

SIXTEENTH  
ANNUAL REPORT  
OF THE  
NATIONAL LABOR  
RELATIONS BOARD

FOR THE FISCAL YEAR  
ENDED JUNE 30

1951

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**1951**

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**UNITED STATES GOVERNMENT PRINTING OFFICE  
WASHINGTON, D. C. • 1952**



# NATIONAL LABOR RELATIONS BOARD

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PAUL L. STYLES

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WILLIAM O. MURDOCK, *Associate General Counsel*

DAVID P. FINDLING, *Associate General Counsel*

ELLISON D. SMITH, JR., *Associate General Counsel*

---

<sup>1</sup> Resigned Dec. 31, 1951. Ivar H. Peterson appointed to complete term ending August 27, 1956.

<sup>2</sup> Appointed Nov. 13, 1951 to succeed Frank M. Kleiler, resigned.



**LETTER OF TRANSMITTAL**

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NATIONAL LABOR RELATIONS BOARD,  
*Washington, D. C., January 3, 1952.*

SIR: As provided in section 3 (c) of the Labor Management Relations Act, 1947, I submit herewith the Sixteenth Annual Report of the National Labor Relations Board for the year ended June 30, 1951, and, under separate cover, lists containing the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board.

PAUL M. HERZOG, *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

## The Act in Operation

**T**HE fiscal year 1951 was marked by the heaviest filing of unfair labor practice and representation cases in the Board's 16-year history. This continued the trend of heavier filings of these two principal types of cases which occurred in the preceding fiscal year.

Cases of these two types filed during the 1951 fiscal year, ended June 30, 1951, totaled 15,508. This was an increase of 420 cases, or 2.7 percent, over the 15,088 such cases filed in fiscal 1950, the previous peak year for such filings.

During fiscal 1951, the five-Member National Labor Relations Board issued formal decisions in a total of 3,534 cases of all types. This was the largest number of decisions issued by the Board in its history.

Of these, 606 were unfair labor practice cases and 2,740 were representation cases. This was the largest number of cases decided by the Board Members in either of these categories in the agency's history. About two-thirds were contested cases.

The largest number of cases decided by the Board while it had only three Members was approximately 2,220, in fiscal 1944.<sup>1</sup> The five-Member Board's 1951 output of decisions exceeded this by more than 58 percent. The 1951 output also represented an increase of 19 percent over the 2,951 cases decided by the Board Members in the preceding fiscal year.

The agency as a whole processed to conclusion a total of 22,637 cases, while receiving a total of 22,298. It thus reduced its backlog of pending cases of all types to 6,375 at the end of the fiscal year, a reduction of slightly more than 5 percent.

Of the cases closed, 5,503 were unfair labor practice cases and 10,291 were representation cases. This was the third largest number of unfair practice cases closed in the Board's history and the second largest number of representation cases. However, combined, this total of 15,794 cases was the largest number of these two major types of cases closed by the agency in any one year during its history. The

<sup>1</sup> This figure varies from the 1,856 "cases" which the Board reported in 1944 that it had decided that year. The figure used here was estimated to allow for the fact that during that year the Board counted some proceedings which involved two or more cases as only one "case."

**NOTE.** Throughout the present report, for the purpose of uniformity and clarity, cases later consolidated for processing or decision are counted as separate cases if they were originally filed separately by the parties. Thus, for example, the 419 contested unfair labor practice cases decided by the Board required only 295 actual opinions.

**Types of Cases Handled by NLRB**

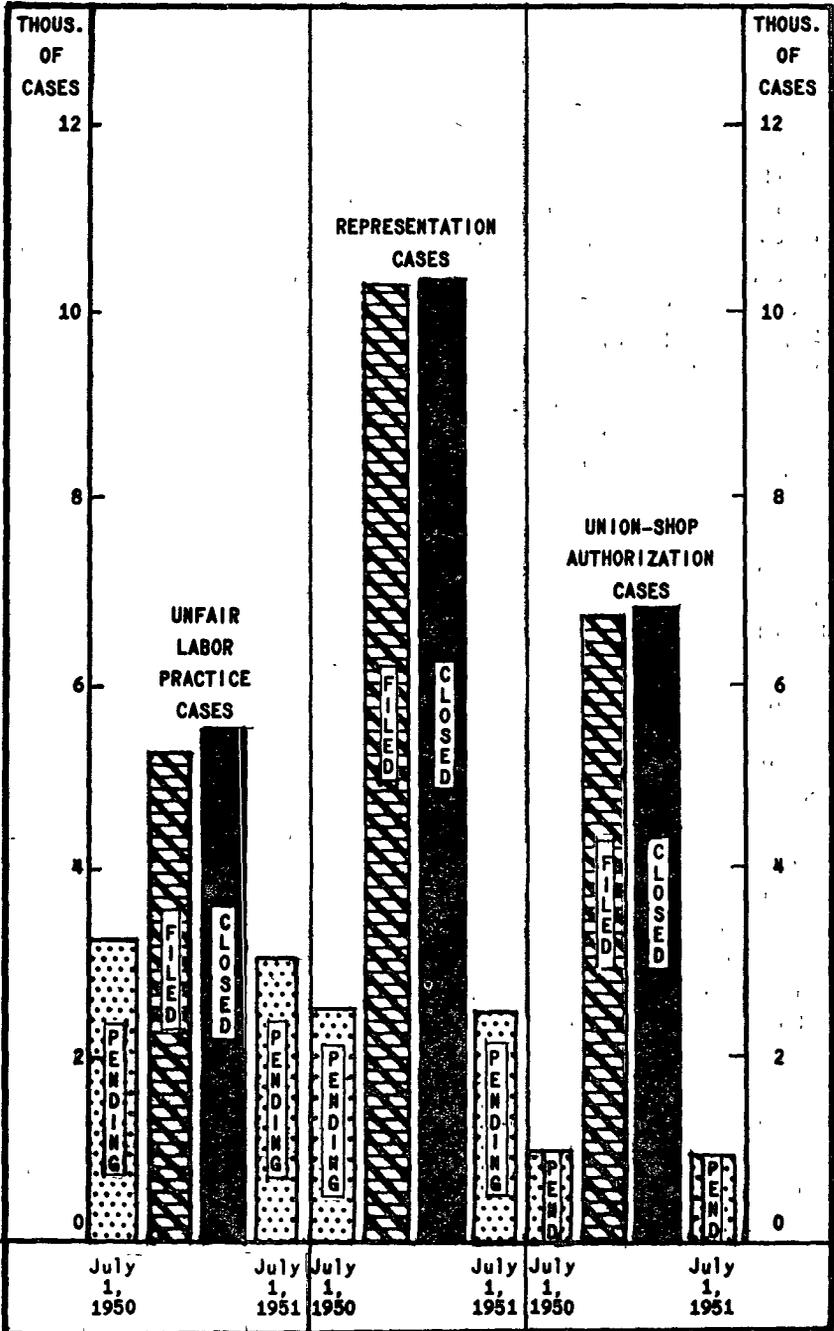


CHART 1.—Types of cases filed and disposed of during fiscal 1951, and pending at beginning and end of period.

prior high was 14,456 in fiscal 1947, when the agency closed 4,014 unfair practice cases and 10,442 representation cases. The 1951 output exceeded this prior peak by 9 percent. The 1951 closings of these two principal types of cases also were 10 percent above the 14,376 cases of these types closed in fiscal 1950, the prior peak for such operations since the amendment of the act in 1947.

By this output of cases, the agency reduced its backlog of unfair labor practice cases by 242, or approximately 7 percent, and its backlog of representation cases by 44. It finished the year with 3,001 unfair practice cases and 2,436 representation cases pending.

Union-shop election cases, during fiscal 1951, continued to play a relatively minor role in the agency's total operations.<sup>2</sup> A total of 6,843 cases of this type was closed during this year. Of these, 6,810 or 99.5 percent were closed without the necessity of any formal action by the agency. In most such cases, the parties agreed to holding a poll, and the agency's only major operation in connection with the case was the actual conduct of the poll. Only 31 contested union-shop cases were carried up to the Board Members for decision. The requirement of union-shop polls was abolished by amendment to the act in October 1951.<sup>3</sup>

In cases of discrimination against employees because of their union activities or because of their failure to participate in such activities, back pay totaling \$2,219,980 was awarded to 7,549 employees.<sup>4</sup> Of this back pay, \$2,177,320 was found owing in cases where employers were charged with having illegally discharged or demoted employees, usually because of their activities on behalf of unions. In cases where unions were charged with having caused an employer to discharge or demote employees illegally, usually because of the employees' lack of union membership, the unions were required to pay a total of \$42,660. The 1951 union liability for back pay represented an increase of 243 percent over the \$12,430 union liability in such cases during fiscal 1950.

Of all back pay in 1951, a total of \$1,911,270, or 86 percent, was collected upon agreement of the parties, without the necessity of formal decision by the Board Members. Awards of back pay in cases where it was ordered by formal decision of the Board Members totaled \$308,710.

<sup>2</sup> See Fifteenth Annual Report, p 1.

<sup>3</sup> See discussion of amendment, section 8 of this chapter, and sec. F of ch IV.

<sup>4</sup> The 1951 awards bring the total of back pay collected for employees who had suffered illegal discrimination since passage of the original act in 1935 to \$16,765,310. This amount was paid to a total of 53,708 employees.

During its 16-year history, the Board also has ordered reinstatement of 311,320 employees in their jobs after finding that they had been illegally discharged. This figure includes most of those receiving back pay.

### Cases Decided by Board Members

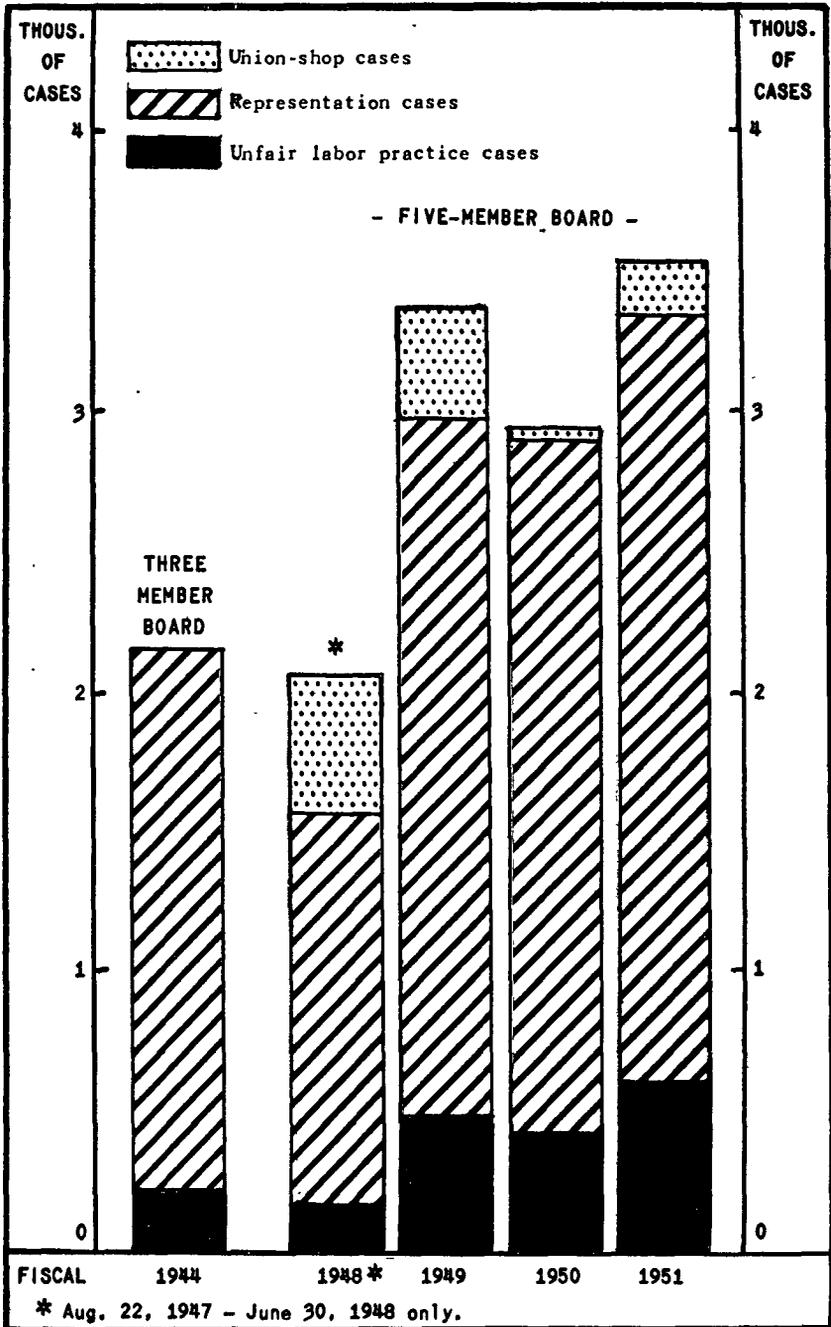


CHART 2.—Formal decisions issued by five-member Board compared with number issued by three-member Board in busiest year.

## 1. Case Activities of Five-Member Board

The five-Member Board, which is the decisional arm of the agency, issued formal decisions and opinions during the 1951 fiscal year in 419 unfair labor practice cases which were brought up to it on contest over either the facts or the application of the law. This was an increase of 51 percent over the 277 such cases decided by the Board Members in fiscal 1950.

Of the 419 contested cases decided, 315 involved charges against employers and 104 involved charges against unions. Violations of one or more sections of the act were found in 265 of the cases against employers, or 84 percent of the employer cases decided. In the remaining 45, the complaint was dismissed in its entirety. Violations were found in 83 of the cases against unions, or 80 percent of the union cases decided. In the other 21, the entire complaint was dismissed.

In addition, the Board issued formal decisions adopting the intermediate reports of trial examiners in 79 cases where no exceptions to the reports were filed by the parties. Of these, 62 cases against employers—48 finding violations and 14 dismissals—and 17 were cases against unions—12 finding violations and 5 dismissals. The Board also issued orders in 108 unfair labor practice cases by consent of the party charged with violation. Of these, 94 were cases against employers and 14 were against unions.

In representation cases, the Board directed 1,689 elections to determine whether or not the employees involved wished to choose a representative for collective bargaining. The Board dismissed petitions in 266 cases. The 1,955 contested representation cases decided represented an increase of 33 over the 1,922 decided in fiscal 1950.

Only 31 contested union-shop election cases came to the Board Members for decision. The Board directed holding of polls in 9 cases and dismissed the petitions in 22 cases.

## 2. Activities of the General Counsel

The statute gives the General Counsel the sole and independent responsibility for investigating charges of unfair labor practices, issuing complaints in cases where his investigators find evidence of violation of the act, and prosecuting such cases before the Board Members.

Also, under an arrangement between the five-Member Board and the General Counsel,<sup>5</sup> the field staff under his supervision acts as

<sup>5</sup> See amended Board Memorandum Describing the Authority and Assigned Responsibilities of the General Counsel of the National Labor Relations Board (effective October 10, 1950), 15 Federal Register 6924 (published October 14, 1950).

The General Counsel also acts on behalf of the Board in seeking injunctions against unfair labor practices, as provided by the statute, and in court litigation to enforce orders of the Board or to protect Board processes. The activities in these fields are reported in chs. VI, VII, VIII, and IX.

### Total Cases Processed By NLRB

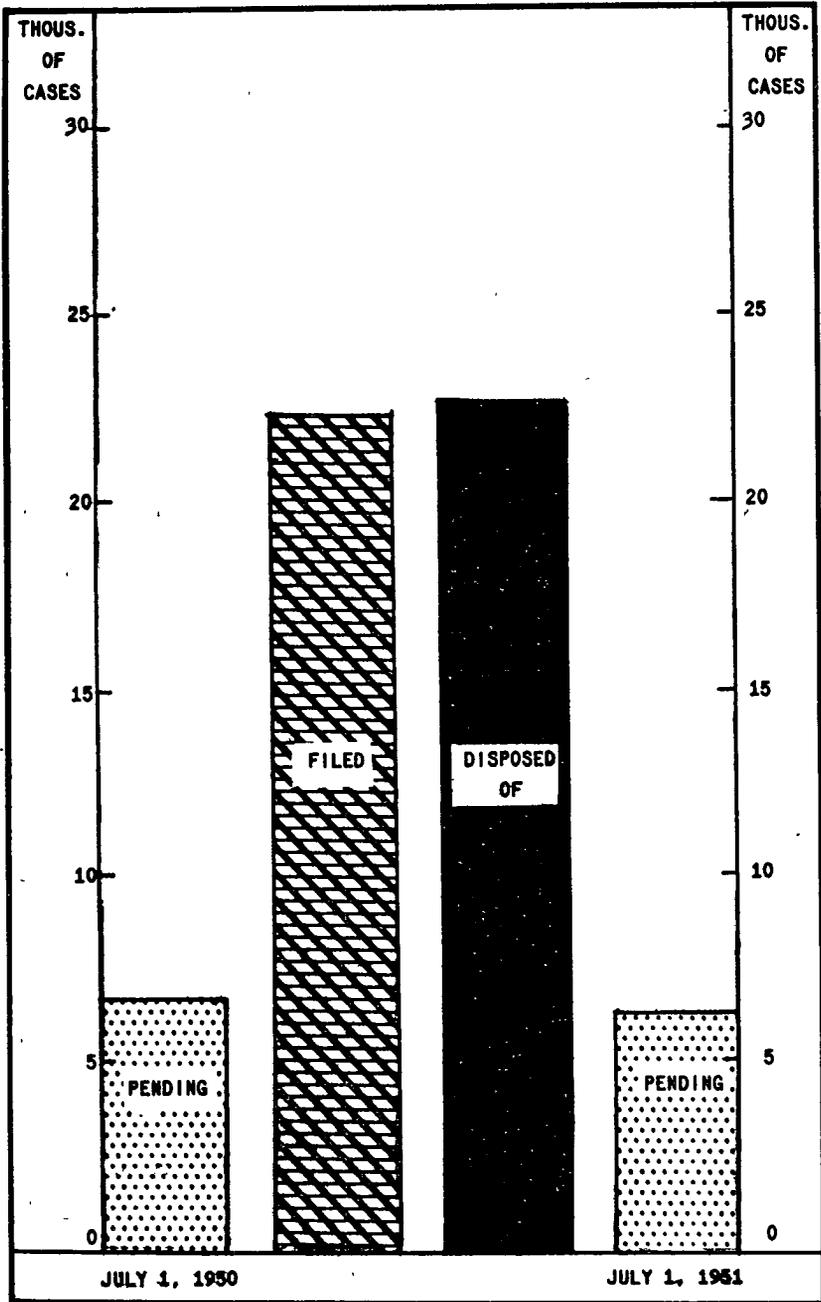


CHART 3.—Cases filed and disposed of during fiscal 1951, and cases pending at beginning and end of period.

agents of the Board in the preliminary investigation of representation and union-shop deauthorization cases.<sup>6</sup> In this latter capacity, the field staff in the regional offices has authority to effect settlements or adjustments in representation and union-shop deauthorization cases and to conduct hearings on the issues involved in contested cases. However, decisions in contested cases of all types are made by the five-Member Board.

Dismissals by regional directors of charges in unfair labor practice cases may be appealed to the General Counsel in Washington. Regional directors' dismissals in representation cases may be appealed to the Board Members.

### **a. Representation and Union-Shop Cases**

The field staff closed 8,350 representation cases and 6,810 union-shop election cases during the 1951 fiscal year. This was 81 percent of the representation cases closed by the agency and 99.5 percent of the union-shop cases.

In representation cases, consent of the parties for holding an election was obtained in 4,989 cases. Petitions were dismissed by the regional directors in 671 cases. Recognition was granted by the employer in 192 cases without the necessity of an election. In 2,466 cases, the petitions were withdrawn by the filing parties.

### **b. Unfair Labor Practice Cases**

In the capacity of prosecutor of unfair labor practice cases, the General Counsel's staff closed 4,800 unfair practice cases of all types during the 1951 fiscal year without the necessity of formal action. This was 87.3 percent of all unfair practice cases closed by the agency.

In addition, the regional directors, acting under the General Counsel's statutory authority, issued formal complaints alleging violations of the act in 792 cases. Of these, 630 were against employers and 162 against unions. Complaints against employers thus constituted 79.5 percent of those issued and those against unions 20.5 percent. This corresponds almost exactly to the ratio of cases filed during the year, of which 79.1 percent was against employers and 20.9 percent against unions.

The 792 complaints issued by the General Counsel in fiscal 1951 compares with 708 issued in fiscal 1950, an increase of 11.8 percent. Thus, formal complaints, which launch the trial of the case before the Board Members, were issued in approximately 14 percent of the 5,592 cases on which the General Counsel acted during the 1951 fiscal year.

<sup>6</sup> The field staff had similar authority in union-shop election cases until the union-shop election requirement of the act was abolished by amendment Public Law 189, approved by the President, October 22, 1951.

## Collective Bargaining Elections

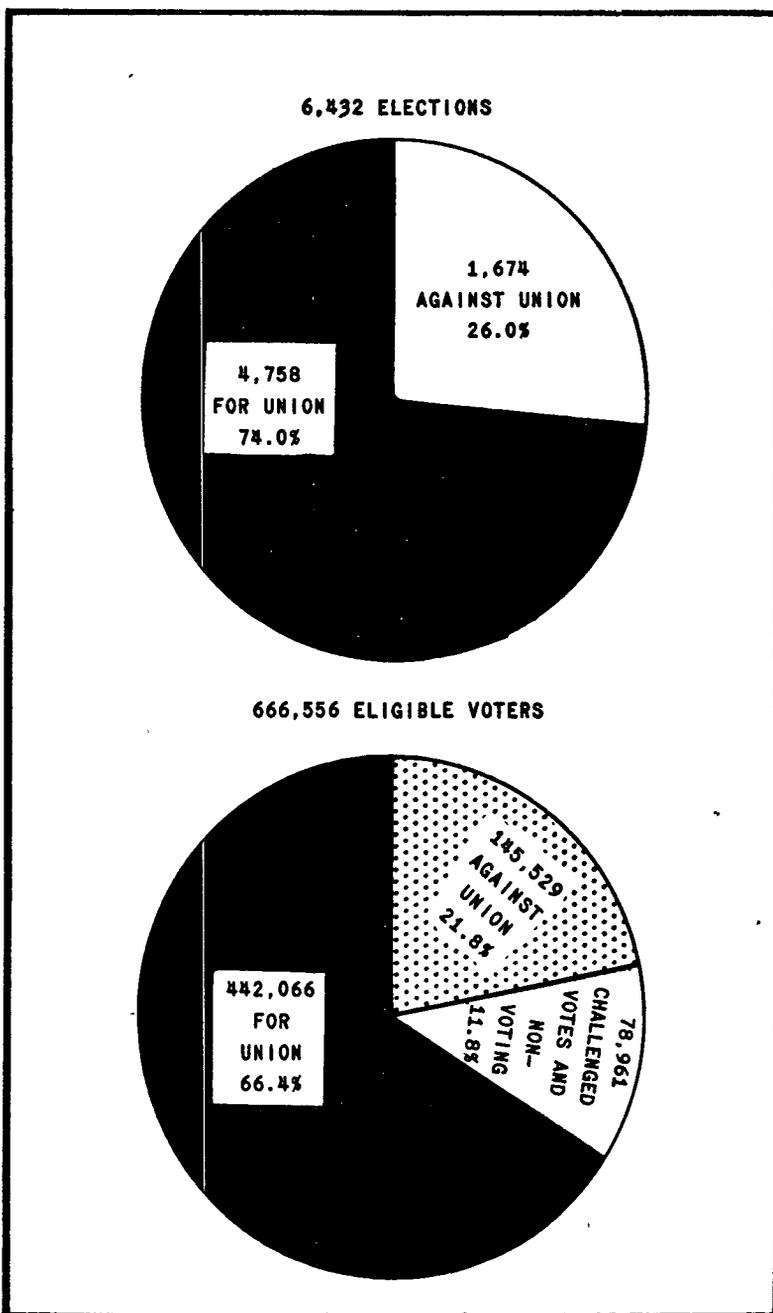


CHART 4.—Collective bargaining elections held during fiscal 1951.

Of the 4,800 cases which the field staff closed without formal action, 969 or 20 percent were adjusted by various types of settlements, and 1,296 or 27 percent were dismissed after investigation. In the remaining 53 percent, the charges were withdrawn; in many cases, such withdrawals actually reflected a settlement of the matter at issue between the parties through the offices of the field staff. Of the charges against employers, 960 or 25 percent were dismissed, 796 or 22 percent were adjusted, and 1,982 or 53 percent were withdrawn. Of charges against unions, 336 or 31.7 percent were dismissed, 169 or 11.9 percent were adjusted, and 550 or 52.4 percent were withdrawn.

### 3. Division of Trial Examiners

Trial examiners for the Board, who usually conduct hearings only in unfair practice cases, conducted hearings on 670 such cases during fiscal 1951 and issued intermediate reports and recommended orders in 624 cases.

This was an increase of more than 41 percent in the number of cases heard and an increase of nearly 80 percent in the number of cases on which intermediate reports were issued.

In 79 cases coming to the five-Member Board during the year, the trial examiners' reports were not contested by the parties. Nineteen of these intermediate reports recommended dismissal of the case in its entirety.

During the year, 76 cases were closed by direct compliance with the trial examiners' recommended orders.

### 4. Results of Representation Elections

The Board conducted a total of 6,525 representation elections of all types during the 1951 fiscal year.<sup>7</sup> This was an increase of 14 percent over the 5,731 elections conducted in fiscal 1950. It probably was also the largest number of representation elections conducted in any one year in the Board's history.<sup>8</sup>

In the 1951 representation elections, collective bargaining agents were selected in 4,785 elections. This was 74 percent of the elections held, compared with selection of bargaining agents in 73 percent of the 1950 elections and 71 percent in 1949.

<sup>7</sup> The term "representation election" embraces both certification elections, where a candidate bargaining agent is seeking certification, and decertification elections, where a group of employees is seeking to decertify a recognized or previously certified bargaining agent. In this report, the term "collective bargaining election" is generally used to describe certification elections.

<sup>8</sup> No accurate figures are available on the number of elections held in the period 1935-47, under the Wagner Act, because elections and cross-checks of union authorization cards against payroll were counted together during this period in order to show accurately the number of employees choosing representation. The cross-check is no longer used by the Board.

In these elections, bargaining agents were chosen to represent units totaling 508,004 employees. This was 76 percent of those eligible to vote.

Of 592,945 employees actually casting valid ballots in Board representation elections during the year, 444,462, or approximately 75 percent, cast ballots in favor of representation. Eighty-eight percent of the 672,667 eligible to vote cast valid ballots.

Unions affiliated with the American Federation of Labor won bargaining rights in 2,650 of the 3,988 elections in which they took part. This was 66.4 percent of the elections in which they participated.

Affiliates of the Congress of Industrial Organizations won 1,375 out of 2,234 elections. This was 61.5 percent.

Unaffiliated unions won 733 out of 1,181 elections. This was 62 percent.

A study of Board elections, conducted this fiscal year for the first time, showed that 60 percent of the collective bargaining elections was held in units of less than 40 employees.<sup>9</sup> Eighty percent was held in units of less than 100 employees.

## 5. Results of Union-Shop Authorization Polls

During the 4 years and 2 months, from 1947 to 1951, in which a union-shop authorization poll was required by the act before a valid union-shop agreement could be made, the Board conducted 46,119 such polls.<sup>10</sup>

Negotiation of union-shop agreements was authorized by vote of the employees in 44,795 of these polls. This was 97 percent of those conducted.

In the polls conducted, 6,542,564 employees were eligible to vote. Of these, 5,547,478 or 84.8 percent cast valid ballots. Of those voting, 5,071,988 or 77.5 percent voted in favor of the union shop.

During the 1951 fiscal year, the Board conducted 5,964 polls and the union shop was authorized in 5,759 or 96.6 percent. Bargaining agents were thus authorized to negotiate union-shop agreements covering 1,585,881 employees out of 1,623,375 eligible to vote in the 1951 polls.

Unions affiliated with the American Federation of Labor won 3,062 out of 3,202 polls in which they participated during fiscal 1951, thus winning the right to negotiate union-shop agreements covering 309,484 employees.

Affiliates of the Congress of Industrial Organizations in 1951 won

<sup>9</sup> See table 11, appendix B.

<sup>10</sup> See table 14A, appendix B.

1,976 polls out of 2,018, winning the right to make union-shop agreements covering 1,162,209 employees.

Unaffiliated unions in 1951 won 721 polls out of 744, winning the right to make union-shop agreements covering 114,188 employees.

## 6. Types of Unfair Labor Practices Charged

The most common type of unfair labor practice charged against either employers or unions continues to be illegal discrimination against employees because of their union activities or because of their lack of union membership.

Employers were charged with having engaged in such discrimination, usually because of employees' union activities, in 2,899 cases filed during the 1951 fiscal year. This was 69.6 percent of the 4,164 cases filed against employers.<sup>11</sup>

The second most common charge against employers was refusal to bargain in good faith with the representative of their employees. This was alleged in 1,235 cases, which was 29.7 percent of the cases filed against employers.

Unions were charged with having caused or attempted to cause employers to discriminate illegally against employees, usually because of the employees' lack of union membership, in 669 cases during fiscal 1951. This was 61 percent of the 1,097 cases filed against unions.

The second most common charge against unions was illegal restraint or coercion of employees in the exercise of their right to engage in union activity or to refrain from it. This was alleged in 609 cases, or 55 percent of cases filed against unions. Other major charges against unions were secondary boycott, made in 143 cases or 13 percent, and refusal to bargain in good faith, made in 123 cases or 11.2 percent. Refusal to bargain charges usually are based upon allegations that the union has insisted upon contract provisions which violate the act, such as a closed shop or an illegal union shop.

## 7. Non-Communist Affidavits

At the close of the 1951 fiscal year, 225 national and international unions were currently qualified to use the processes of the Board, by having filed certain financial data and non-Communist affidavits executed by their officers.

Of these unions, 119 were affiliated with the American Federation of Labor, 34 with the Congress of Industrial Organizations, and 72 were independent. At the time, 24 national unions were out of com-

<sup>11</sup> Percentages may add up to more than 100 because violations of more than one section often are charged in one case. See table 2, appendix B.

## Unfair Labor Practice Cases

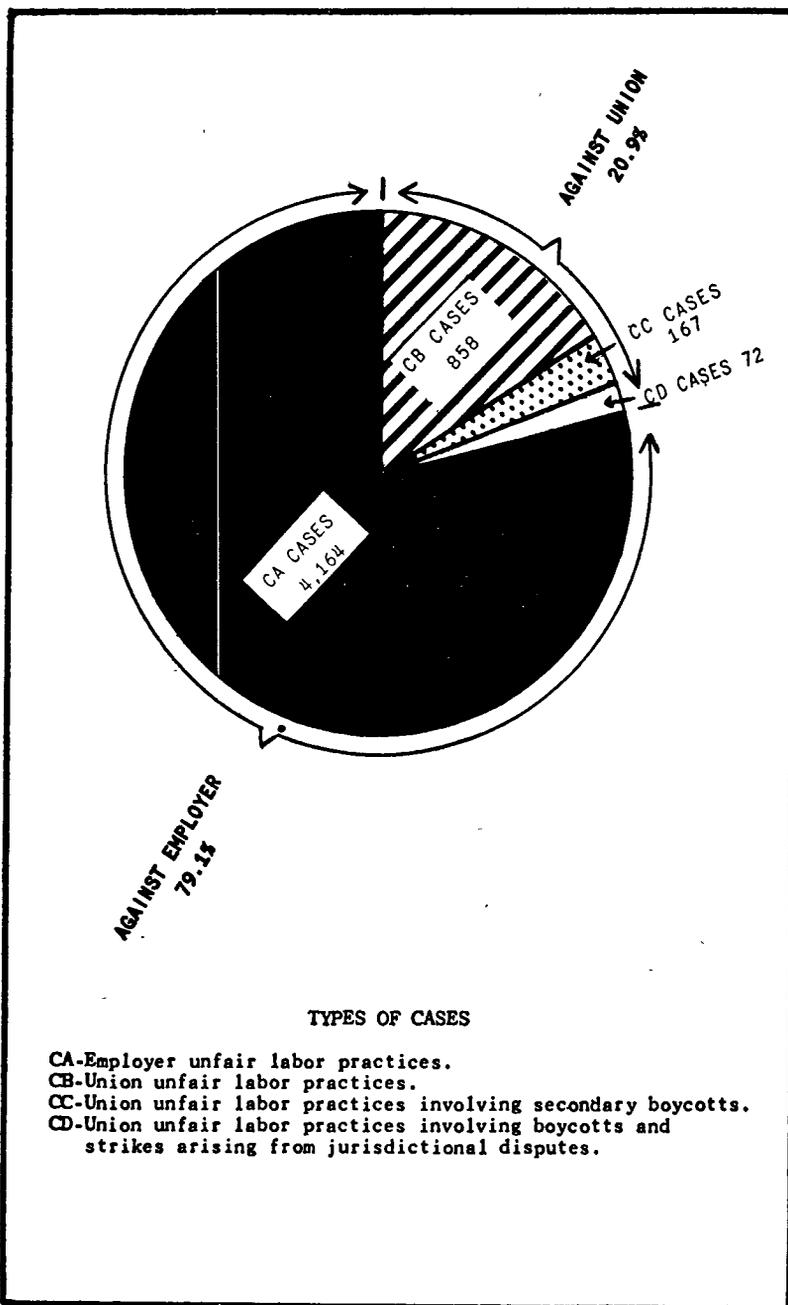


CHART 5.—Unfair labor practice cases filed against employers and unions during fiscal 1951.

pliance because of incomplete filings. Three of these were AFL unions, 1 CIO union, and 20 unaffiliated.

At the same time, a total of 15,678 local unions was in full compliance with the act's filing requirements. Of these, 9,408 were AFL locals, 4,700 were CIO locals, and 1,570 were unaffiliated or affiliated with other national organizations.

Altogether, a total of 139,483 officers of national, international, and local unions had current affidavits on file.

In addition, 9,999 local unions with 92,455 officers had permitted their compliance to lapse. Of these, 5,988 were AFL affiliates, 2,448 were CIO affiliates, and 1,563 were unaffiliated or affiliated with other national organizations.

## 8. Amendment to the Act

After the close of the 1951 fiscal year, the act was amended by Congress to eliminate the requirement of a union-shop authorization poll of employees before a union shop could be established legally.<sup>12</sup> It was the first amendment of the act since 1947.

However, the amendments did not otherwise relax the restrictions placed on union-shop agreements by the 1947 amendments. Unions making such agreements still must comply with the non-Communist affidavit and filing requirements of the act. The 1951 amendments further retained the provision for polls to determine whether employees wish to revoke the authority of a bargaining agent to make a union-shop agreement.

The 1951 amendments also made special provision for preserving certain certifications and union-shop agreements which were jeopardized by the Supreme Court's interpretation of the non-Communist affidavit provisions of the act in the *Highland Park* case.<sup>13</sup>

The legislative chronology of the amendments was as follows:

August 6<sup>14</sup>—S. 1959 introduced by Senator Taft (Ohio) and Senator Humphrey (Minn.); referred to Committee on Labor and Public Welfare. 97 Congressional Record 9678.<sup>15</sup>

August 16—Reported with amendments. Senate Report 646. 97 Congressional Record 10314.

August 21—Debated, amended and passed by Senate. 97 Congressional Record 10673-10675.

August 23—Referred to House Committee on Education and Labor. 97 Congressional Record 10795.

<sup>12</sup> Public Law 189. The amendments, principally revising sections 8 (a) (3) and 9 (e) (1) and adding a new section 17, are indicated in copy of the text of the act contained in appendix C of this report. The union-shop provisions of the amendment are discussed in section F of chapter IV.

<sup>13</sup> *N. L. R. B v Highland Park Mfg Co*, 341 U S 322, discussed in section 3 of chapter VI of this report. This section of the amendments is discussed in sec. 2 of ch. III.

<sup>14</sup> All dates are 1951.

<sup>15</sup> The Congressional Record cited is the daily edition.

October 1—Reported back. House Report 1082. 97 Congressional Record 12705.

October 9—Made special order of business by House Resolution 453. House Report 1107 97 Congressional Record 13119, 13122. Debated and paused by House 97 Congressional Record 13122–13127.

October 10—Signed by Speaker of the House. 97 Congressional Record 13194

October 11—Presented to the President. 97 Congressional Record 13201.

October 22—Signed by the President, became Public Law 189.

## Jurisdiction of the Board

The extent to which the Board should assert its jurisdiction has long been a matter given considerable study by the Board. The courts have held that the Board's authority over representation questions and unfair labor practices "affecting" interstate commerce (except on airlines and railroads and in agriculture) is as broad as the Federal power to regulate labor-management relations.<sup>1</sup> However, the Board has long taken the position that it will better effectuate the purposes of the act "not to exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress, but to limit that exercise to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce."<sup>2</sup>

For many years, the question of where to draw the line necessarily turned upon the facts of each case as it came before the Board for decision. But early in the 1951 fiscal year, after long study of the pattern emerging from past decisions, the Board issued a series of unanimous decisions setting forth more precisely the standards to govern its future exercise of jurisdiction in the 48 States.<sup>3</sup> In doing so, the Board declared: "The time has come, we believe, when experience warrants the establishment and announcement of certain standards which will better clarify and define where the difficult line can best be drawn."<sup>4</sup>

### 1. Standards for Asserting Jurisdiction

In these decisions, the Board announced 9 general standards for determining jurisdiction in the 48 States. It declared that it would

<sup>1</sup> *N. L. R. B. v. Fanblatt*, 306 U. S. 606

<sup>2</sup> *Hollow Tree Lumber Co.*, 91 NLRB 635 (October, 1950). The Supreme Court has noted: "Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case." *N. L. R. B. v. Denver Building and Construction Trades Council*, 341 U. S. 675 (1951). For discussion of court rulings on the Board's jurisdiction, see also section 1 of chapter VIII (courts of appeals) and section 1 of chapter VII (Supreme Court).

<sup>3</sup> Section 2 (6) of the act confers upon the Board plenary jurisdiction over all business enterprises "within the District of Columbia or any Territory." Therefore, general policies on jurisdiction announced by the Board for the 48 States do not apply there. *Roy C. Kelley*, 95 NLRB No. 7.

<sup>4</sup> *Hollow Tree Lumber Co.*, cited above. Since issuance of these decisions, Board members have not recorded dissenting views on the exercise of jurisdiction except in rare cases.

generally take jurisdiction over cases involving enterprises in the following categories:

1. Instrumentalities and channels of commerce, interstate or foreign.<sup>5</sup>
2. Public utility and transit systems.<sup>6</sup>
3. Establishments operating as an integral part of a multistate enterprise.<sup>7</sup>
4. Enterprises producing or handling goods destined for out-of-State shipment, or performing services outside the State in which the firm is located, valued at \$25,000 a year.<sup>8</sup>
5. Enterprises furnishing goods or services of \$50,000 a year or more to concerns in categories 1, 2, or 4.<sup>9</sup>
6. Enterprises with a direct inflow of goods or materials from out-of-State valued at \$500,000 a year.<sup>10</sup>
7. Enterprises with an indirect inflow of goods or materials valued at \$1,000,000 a year.<sup>11</sup>
8. Enterprises having such a combination of inflow or outflow of goods or services, coming within categories 4, 5, 6, or 7, that the percentages of each of these categories, in which there is activity, taken together add up to 100.<sup>12</sup>
9. Establishments substantially affecting the national defense.<sup>13</sup>

## 2. Application of the Standards

One of the first questions to confront the Board after announcement of the new standards was whether or not it should permit the revival of cases in which it had previously declined jurisdiction but which fell within the area of jurisdiction under the new standards. In a series of cases, the Board made it clear that it would reconsider certain representation cases which it had dismissed, but that it would not apply the standards retroactively to unfair labor practice cases. The Board distinguished between the two types of cases on the basis of the fact that a representation case, unlike an unfair labor practice case, has only a future effect.<sup>14</sup>

Thus, in a representation case involving a taxicab company, the Board reconsidered a decision in which it had declined to assert jurisdiction before announcement of the standards, and, in accordance

<sup>5</sup> *W. B. S R, Inc*, 91 NLRB 630

<sup>6</sup> *Local Transit Lines*, 91 NLRB 623

<sup>7</sup> *The Borden Co*, 91 NLRB 628

<sup>8</sup> *Stanislaus Implement and Hardware Co*, 91 NLRB 618

<sup>9</sup> *Hollow Tree Lumber Co*, 91 NLRB 635

<sup>10</sup> *Federal Dairy, Inc*, 91 NLRB 638.

<sup>11</sup> *Dorn's House of Miracles, Inc*, 91 NLRB 632

<sup>12</sup> *The Rulledge Paper Products, Inc*, 91 NLRB 625

<sup>13</sup> *Westport Moving & Storage Co*, 91 NLRB 902

<sup>14</sup> *Skyview Transportation Co*, 92 NLRB 1664

with the standards, asserted jurisdiction.<sup>15</sup> But in an unfair labor practice case involving a similar taxicab operation, the Board announced that it would not reconsider unfair labor practice cases which were disposed of before adoption of the present standards.<sup>16</sup> In the latter decision, the Board said:

In the opinion of the Board, sound policy precludes reconsideration of complaint cases which were disposed of before the adoption of present jurisdictional standards. The original decision in the instant cases was made in accord with practice in effect at that time concerning the exercise of jurisdiction. The Board will not disturb that decision or the dismissal of the complaint. This ruling, however, is not to be taken as a holding that the Board would not assert jurisdiction in proper new complaint or representation proceedings involving the Respondent Yellow Cab or other employers involved in previously decided complaint cases where operations meet present jurisdictional criteria.

In another case, a majority of the Board applied this principle to an unfair labor practice case where the Board had previously declined jurisdiction over a representation case involving the same employer.<sup>17</sup> The Board held that the dismissal of the representation case on jurisdictional grounds was in effect notice to all parties concerned that any complaint based upon unfair labor practices that occurred before the date of the decision in the representation case would be dismissed similarly. Therefore, the majority concluded, fair play and sound policy required dismissal of a complaint based upon unfair labor practices which had occurred before the Board declined jurisdiction in the representation case. The decision added:

This ruling, however, is not to be taken as meaning that the Board would not assert jurisdiction in proper new complaint or representation proceedings involving this Respondent or other employers involved in previously decided cases whose operations meet present jurisdictional criteria. Nor do we here decide that we would dismiss a complaint solely because the alleged unfair labor practices occurred at a time when the Board would not have asserted jurisdiction over the particular employer involved. That question is not before us. What is controlling in the instant case is the fact that the Board issued a decision declining to assert jurisdiction after the commission of the alleged unfair labor practices.

#### a. Lack of Complete Annual Data

In view of the fact that certain of the Board's jurisdictional standards were expressed in terms of *annual* dollar volume of sales or purchases, a question soon arose as to the method of applying the standards in cases where the available figures covered only a portion of a year.

In the first such case, the commerce data available covered only a half year of the employer's operations. Standing alone, these half-

<sup>15</sup> *Shyview Transportation Co.*, cited above.

<sup>16</sup> *Yellow Cab Co. of California*, 93 NLRB 766.

<sup>17</sup> *Screw Machine Products*, 94 NLRB No. 234 (Member Houston dissenting).

year figures were less than the minimum annual amount required for assertion of jurisdiction. However, in view of the fact that the employer expected uninterrupted continuation of its operations, the Board projected the available figures and inferred that the employer's annual operations affecting commerce were large enough to warrant the assertion of jurisdiction.<sup>18</sup> In another case, the Board made a similar projection based upon 4 months' business, and asserted jurisdiction.<sup>19</sup> In this decision, the Board said:

Because the minimum jurisdictional amounts were expressed in terms of annual sales and/or purchases, however, it is not to be understood that the Board intends to refrain from assuming jurisdiction over business concerns for which financial statements, covering a full year, are not available. Where on the basis of available financial information and statements, reflecting the volume of a company's sales and purchases for any period of time, there is a reasonable expectation that the company under consideration will in a period of 12 months attain the minimum jurisdictional requirements, the Board will assume jurisdiction.

Another case involved a company which had not yet engaged in any actual production. The Board took jurisdiction, relying mainly upon the employer's uncontradicted statement that he intended to manufacture products valued at more than \$100,000 and to ship a substantial portion of them outside the State.<sup>20</sup> He had already purchased \$140,000 worth of supplies and machinery in preparation for manufacturing operations.

A related problem arose in an unfair labor practice case where a strike had severely curtailed the employer's operations on a construction project and the company's actual volume of business did not measure up to the minimum standards. The Board found that it was a reasonable conclusion that the minimum standards would have been met if the strike, which was the very subject of the employer's unfair labor practice charges, had not taken place. In view of this, the Board concluded that a dismissal on jurisdiction grounds would be self-defeating. The Board asserted jurisdiction.<sup>21</sup> To do otherwise, the Board stated, "would have the effect of depriving the Board of jurisdiction to correct an alleged unfair labor practice by the very conduct which is the subject of the complaint." The case involved strike action to compel discrimination against employees and an illegal refusal to bargain.

<sup>18</sup> *C & A. Lumber Co.*, 91 NLRB 909.

<sup>19</sup> *General Seat and Back Mfg. Co.*, 93 NLRB 1511. In this case, the Board declined to base its projection upon 3 months' business, despite an assertion by the employer that it was representative, when the fourth month's figures were available and showed an increase in the employer's business activity.

<sup>20</sup> *New London Mills, Inc.*, 91 NLRB 1003.

<sup>21</sup> *Fairmont Construction Co.*, 95 NLRB No. 113 (decided Aug. 6, 1951).

## b. Extent of Operations Considered

In cases where the employer is engaged in more than one operation, the Board generally considers the totality of the employer's operations in determining jurisdiction. This applies even though there is considerable diversity in the types of operation.

One such case involved a company operating a meat packing plant, a retail motor vehicle sales agency, a farm, a filling station, grocery store, cafeteria, and bakery, all located at one city and in the same general area. The case concerned only representation of employees of the grocery store, cafeteria, and bakery, and the employer contended that jurisdiction should be declined because these were separate enterprises essentially local in character. The Board rejected this contention, finding that these enterprises were an integral part of the employer's over-all operations which made out-of-State sales of more than \$7,000,000 a year. The Board said ". . . the totality of these operations, rather than the operations of any component part, is relevant in determining jurisdiction."<sup>22</sup> The Board noted also that "although the separate enterprises possess a certain degree of operational autonomy, employment and labor relations are centrally controlled." Moreover, nearly 50 percent of the employees in the other enterprises purchased their groceries at the grocery store and an equal number ate their meals at the cafeteria, the Board noted.

The same principle was applied in another case involving the representation of employees in the meat departments of a State-wide grocery chain.<sup>23</sup> The Board rejected a contention that it should consider only the commerce data relating to the meat departments and considered the commerce facts on the total operation of the company. The totality of the employer's operations also were considered in a case involving the representation of employees in the dairy division of a company which also operated a chain of ice companies and a chain of grocery stores within the same State.<sup>24</sup>

This principle was applied also in a case involving unfair practice charges of employer domination of a union in one branch plant of a liquor distributor. The domination occurred only in the one plant. In this case, the Board took jurisdiction on the basis of the total business of the company.<sup>25</sup>

The Board also applies this principle of considering total operations in the building and construction industry.<sup>26</sup>

<sup>22</sup> *Morgan Packing Co*, 35-RC-394 (not printed).

<sup>23</sup> *H. E. Butt Grocery Co.*, 39-RC-263 (not printed).

<sup>24</sup> *The Southland Corp., Oak Farms Dairies Division*, 94 NLRB No. 228 See also cases cited therein.

<sup>25</sup> *Jack Smith Beverages, Inc.*, 94 NLRB No. 210.

<sup>26</sup> *Paul W. Speer, Inc.*, 94 NLRB No. 59, expressly overruling on this point *West Virginia Electric Corp.*, 90 NLRB 526 (decided prior to announcement of new standards). See pp. 36-37.

(1) *Associations of Employers*

The jurisdictional standards are applied on the basis of total operations also in cases involving associations or groups of employers joined together for the purposes of collective bargaining.

Thus, in a case decided shortly after announcement of the standards, the Board took jurisdiction of two department stores on the basis of their membership with four other stores in a collective bargaining association.<sup>27</sup> In this case, the Board found that it had jurisdiction over the stores "because of their participation in an association-wide bargaining group of employers, whose total volume of operations substantially affect commerce within the meaning of the Act." The combined out-of-State purchases of association members in this case totaled \$750,000, thus exceeding the Board's minimum standard of \$500,000 on direct inflow. Similarly, the Board took jurisdiction of a bakery which belonged to a city-wide association of 11 bakeries that engaged in collective bargaining.<sup>28</sup> Applying the same rule, the Board asserted jurisdiction in other cases over an automobile dealers' association,<sup>29</sup> a group of plumbing contractors,<sup>30</sup> a dairy company,<sup>31</sup> grocery stores,<sup>32</sup> furniture stores,<sup>33</sup> and a group of breweries.<sup>34</sup>

The rule applies whether or not all participants in the joint bargaining are parties to the Board proceeding. The Board said in one case:

The clear effect of this type of bargaining is the establishment of a relationship whose impact on commerce reaches beyond the confines of any one employer involved in the joint bargaining and is coextensive with the totality of the operations of all the employers so involved. And we have recognized this impact in measuring the facts as to commerce in such cases by considering the operations of all the participants in the multiemployer bargaining, whether or not they were parties to the proceeding. It would therefore be totally unrealistic and contrary to Board precedent to disregard the commerce facts of the other participating employers . . . particularly where, as here, the contracts resulting from such joint bargaining, and the implementation thereof by the parties hereto, form the basis of the unfair labor practice allegations. . . .<sup>35</sup>

However, where the association was formed for purposes other than collective bargaining and did not engage in bargaining, the Board applied its jurisdictional tests to the employers on an individual basis. Thus, in the case of a florists' association formed only to expedite deliveries, the Board took jurisdiction over four member companies

<sup>27</sup> *Federal Stores Division of Speigel, Inc.*, 91 NLRB 647.

<sup>28</sup> *Rainbow Bread Co.*, 92 NLRB 181.

<sup>29</sup> *Port Angeles Automobile Dealers Assn.*, 19-RC-616 (not printed).

<sup>30</sup> *Plumbing Contractors Assn. of Baltimore*, 93 NLRB 1081.

<sup>31</sup> *Arondale Dairy Co., et al.*, 92 NLRB 89.

<sup>32</sup> *Vaughn Bowen, et al.*, 93 NLRB 1147.

<sup>33</sup> *Davis Furniture Co.*, 94 NLRB No. 52.

<sup>34</sup> *Oertel Brewing Co. and Louisville Brewers Association*, 93 NLRB 530.

<sup>35</sup> *Vaughn Bowen, et al.*, 93 NLRB 1147. As precedent, the Board cited *Carpenter & Skaer, Inc., et al.*, 90 NLRB 417 and *Federal Stores Division of Speigel, Inc.*, 91 NLRB 647.

whose business met the standards and declined jurisdiction over a fifth member whose business did not.<sup>36</sup>

Nor is it necessary for the employer group to be a formally organized association for the rule to apply. Thus, in one case, the Board applied its jurisdictional tests to the total operations of a group of 47 dairies which had merely made a mutual contract to negotiate jointly through an informal 9-man committee and to prorate the costs of bargaining.<sup>37</sup> Similarly, the Board took jurisdiction of an association of automobile dealers which had no constitution, bylaws, fixed dues, or regular meeting place or time, nor any formal procedure for electing officers although a president and secretary were chosen periodically.<sup>38</sup>

But where a formal association existed, the Board has declined to determine jurisdiction, on the basis of association operations, over employers who merely adopt the terms of the association contract. Thus, while taking jurisdiction of association members, the Board rejected jurisdiction over another employer who was not a member of the association, even though he had agreed in advance to be bound by whatever contract the association negotiated, wanted to join the association, and would have preferred bargaining through it.<sup>39</sup> In this case, the association would not act as bargaining agent for non-members.

The Board said:

. . . the basic requirement for inclusion in a multiemployer unit, and hence for basing jurisdiction upon the totality of the operations of all the employers in the unit, is "participation in joint bargaining as a group." It is not sufficient that an employer customarily adopts the terms of the agreement negotiated by the multiemployer group, or agrees in advance to be bound thereby. As McCann [the employer involved] has not participated in group bargaining through the Association, we must base our jurisdictional findings as to McCann on McCann's individual operations, rather than on the operations of the Association. . . .

The Board declined to assert jurisdiction over this individual contractor because his own business failed to meet its minimum standards. Similarly, the Board declined jurisdiction over a grocery company which did not meet the tests, although the company adopted association contracts.<sup>40</sup>

In another case where several employers resigned from a bargaining association, the Board applied its standards to the companies individually. On this basis, it took jurisdiction over 31 out of 37 employers involved in the case.<sup>41</sup> In that case, the Board said:

. . . The Board has held that the essential element warranting the establishment of multiple-employer units is clear evidence that the employers unequivocally

<sup>36</sup> *Seattle Wholesale Florists Assn.*, 92 NLRB 1186.

<sup>37</sup> *Avondale Dairy Co.*, cited above.

<sup>38</sup> *Port Angeles Automobile Dealers Association*, cited above.

<sup>39</sup> *Plumbing Contractors Assn. of Baltimore*, cited above.

<sup>40</sup> *Vaughn Bowen*, cited above.

<sup>41</sup> *Pacific Metals Company, Ltd., et al.*, 91 NLRB 696.

cally intend to be bound in collective bargaining by group rather than individual action. The correlative standard for excluding an employer from such a unit is evidence of an intent to pursue an individual course of action with respect to labor relations. The evidence which suffices to establish either intent varies with the circumstances involved. Here, group bargaining has been based on an association. Under circumstances such as are here present, the Board has held that an employer by withdrawing from the association evinces an intention to abandon group action and to pursue an independent course of bargaining. Participation for a substantial period of time in group bargaining does not preclude an employer from abandoning such bargaining. . . .

In the plumbers' case, the objection was raised that this policy permits an individual employer to invoke or defeat the jurisdiction of the Board merely by joining or withdrawing from a bargaining association.<sup>42</sup> Recognizing this fact, the Board pointed out that "such action, to be effective, must however be taken at an appropriate time."<sup>43</sup> The opinion in this case added:

In any event, we do not believe that the possibility that employers may join or quit associations for that reason is sufficient ground to deny the benefits of the Act to labor organizations and employers where, as in the instant case, the employers involved are willing to participate in, and be bound by, group action.

## (2) *Secondary Boycotts*

Soon after announcement of the standards, the Board was confronted with the question of how to apply them in cases involving alleged violations of the act's ban on secondary boycotts.<sup>44</sup> These cases by their nature involved at least two employers—the primary employer with whom the union has its dispute and the secondary employer whose employees the union allegedly is seeking to encourage to engage in a strike or boycott. Because the effect of a secondary boycott therefore extends beyond the operations of the primary employer, the Board decided that in its jurisdictional determinations it should consider not only the primary employer's operations, but also the operations of any secondary employer to the extent that they are affected by the boycott activities.<sup>45</sup>

The Board stated the rule as follows:

. . . in determining whether the Board will assert jurisdiction in cases in which secondary boycotts are alleged, we must consider not only the operations of the primary employer, but also the operations of any secondary employers, to the extent that the latter are affected by the conduct involved. Of course, if the operations of the primary employer alone meet the minimum requirements under the Board's current policy, jurisdiction should be asserted without further inquiry. Where, however, the operations of the primary employer do not satisfy the

<sup>42</sup> *The Plumbing Contractors Association of Baltimore, Md., Inc.* cited above.

<sup>43</sup> Here the Board cited *Purity Stores, Ltd.*, 93 NLRB 199 and *Engineering Metal Products Corp.*, 92 NLRB 823.

<sup>44</sup> The ban is contained in section 8 (b) (4) (A).

<sup>45</sup> *Jamestown Builders Exchange*, 93 NLRB 386, Member Reynolds dissenting. See *United Construction Workers (Kanawha Coal Operators' Assn.)* 94 NLRB No. 236, decided July 3, 1951, where jurisdiction was taken under *Jamestown* formula on the basis of secondary employers' business

Board's jurisdiction standards we must, in addition, consider the operations of the secondary employers, but only insofar as such operations are affected by the alleged unlawful boycott. If, taken together, the business of the primary employer and that portion of the secondary employers' business which is affected by the alleged boycott meet the minimum standards, jurisdiction ought to be asserted.

In this case, the Board declined jurisdiction after finding that the impact on commerce of the business of the primary employer and of the secondary employers' two construction projects which were picketed, all taken together, did not meet the minimum standards. Member Reynolds, in his dissent, agreed with the majority's formulation of the general rule but differed on its application to this case. He took the view that the boycott activities were directed at all employers who belonged to an association to which both the primary employer and the secondary employer in the case belonged. Therefore, he would have considered the total operations of association members in determining jurisdiction. The majority rejected this view, but said on this point:

It may well be that in some cases the record will demonstrate that a secondary boycott, in fact, involved more employers than those at whom the union's conduct is immediately directed, and was part of a general plan to bring *secondary* pressure upon employers other than those actually involved in the specific conduct complained of. But this is not such a case

### c. Application of the Categories

The nine categories which the Board established to determine jurisdiction were each applied in numerous cases during the past fiscal year. Certain categories, however, were subject to considerably more discussion in formal Board decisions than others. Notable among the more discussed categories were those of multistate enterprises and instrumentalities or channels of commerce. In general, the standards based upon specific figures, such as those involving inflow or outflow, required less discussion.

#### (1) *Instrumentalities or Channels of Commerce*

In the category of instrumentalities and channels of commerce, the Board took jurisdiction over such businesses as radio stations,<sup>46</sup> newspapers,<sup>47</sup> banks,<sup>48</sup> and taxicabs.<sup>49</sup>

In announcing this jurisdictional category, the Board took jurisdiction over a radio station.<sup>50</sup> This station was affiliated with a

<sup>46</sup> *WWEZ Radio, Inc.*, 91 NLRB 1518, *Port Arthur College*, 92 NLRB 152 *Radio Station KVEC*, 93 NLRB 618.

<sup>47</sup> *Press, Inc.*, 91 NLRB 1360

<sup>48</sup> *Amalgamated Bank of New York*, 92 NLRB 545

<sup>49</sup> *Red Cab, Inc.*, 92 NLRB 175.

<sup>50</sup> *WBSR, Inc.*, 91 NLRB 630.

national broadcasting network, but the Board thereafter made it clear such affiliation was not necessary to bring a station within the category. Thus, in one case, the Board took jurisdiction of a station which belonged to no network but had listeners in other States, leased national wire news services, and obtained 10 percent of its royalties from out-of-State advertisers.<sup>51</sup> In another case, the Board took jurisdiction over a station operated by a college on an allegedly nonprofit basis.<sup>52</sup> The Board, however, found that the station actually was operated "on a commercial basis for profit," although the profits went to a nonprofit educational institution. On this point, the Board said, "That these profits are used to further the cultural objectives of a nonprofit educational organization with religious affiliations does not in our opinion alter the business character of the station's activities." In this case, the station was a network affiliate, used the interstate services of two communications companies and a national news service and devoted nearly half its time to network shows.

Newspapers which were members of interstate news services were found to come within this category.<sup>53</sup> The so-called news agencies which distribute newspapers and magazines also were found in some cases to be within the jurisdiction of the Board, but under the categories relating to inflow and outflow of goods rather than this category.<sup>54</sup>

Taxicab companies serving the terminals of interstate transportation systems were found to be within the jurisdiction of the Board as essential links in interstate commerce. Two cases involving such cab companies arose during the 1951 fiscal year.<sup>55</sup> In both cases, the companies involved made about 6 percent of their trips to and from interstate bus, railway, and airline terminals. The Board took jurisdiction in both cases. Similarly, the Board asserted jurisdiction over an auto livery service hauling passengers to and from an airport.<sup>56</sup>

In one case, a telephone company which operated 10 local exchanges in one State and 8 in another was held to come within this category.<sup>57</sup> None of the company's lines crossed State boundaries but it acted as an agent for a national telephone system in transmitting messages to and from points outside the 2 States where its exchanges were located.

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<sup>51</sup> *Central Kentucky Broadcasting Co., Inc.*, 93 NLRB 1298. See also *Greater Erie Broadcasting Co.*, 92 NLRB 270.

<sup>52</sup> *Port Arthur College*, 92 NLRB 152.

<sup>53</sup> *Press, Inc.*, 91 NLRB 1360; *Record Publishing Co.*, 6-RC-584 (not printed). See also *Tampa Times Co.*, 93 NLRB 224; *Telegraph Publishing Co.*, 1-RC-1942 (not printed).

<sup>54</sup> *Manson News Agency, Inc.*, 93 NLRB 1112; *Rockaway News Supply Co., Inc.*, 94 NLRB No. 156.

<sup>55</sup> *Red Cab, Inc.*, cited above, *Skyview Transportation Co.*, 92 NLRB 1664.

<sup>56</sup> *Horace F. Wood Auto Livery Co.*, 93 NLRB 997.

<sup>57</sup> *Central Carolina Telephone Co.*, 92 NLRB 1424.

The Board continued to assert jurisdiction over interstate bus and truck lines.<sup>58</sup>

## (2) Public Utilities and Transit Systems

In this category, the Board took jurisdiction of gas companies,<sup>59</sup> electric power companies including cooperatively owned companies,<sup>60</sup> and local street railway or bus systems,<sup>61</sup> where their operations had an impact upon commerce. The Board also took jurisdiction of a water company engaged in distributing water to commercial and residential users in a city.<sup>62</sup>

The leading case in this category involved a local bus line whose traffic of about 1,000 passengers a day included employees of certain atomic energy plants over which the Board had taken jurisdiction in prior cases.<sup>63</sup> On these facts, the Board found that "a stoppage of the Employer's operations as a result of a labor dispute would result in a substantial interruption to, or interference with, the free flow of commerce."<sup>64</sup> In taking jurisdiction, the Board's unanimous opinion said:

. . . Our experience has shown that public utilities, including public transit systems of the type here involved, have such an important impact on commerce as to warrant our taking jurisdiction over all cases involving such enterprises, where they are engaged in commerce or in operations affecting commerce, subject only to the rule of *de minimis*. . . .

In one case involving a local transit line over which the Board had asserted jurisdiction in two prior cases, the Board rejected the contention that the sole test of a transit company's impact on commerce is the effect of a work stoppage on its lines.<sup>65</sup> In this case, the company urged that the Board renounce jurisdiction because during a 2-week strike which had caused the transit company to cease operations, there was only a negligible increase in the absences of employees in various industrial plants of the city. In rejecting this as a showing that the transit line had no substantial effect on commerce, the Board said, "An equally important factor in determining whether the operation of a local transit system has an effect on interstate

<sup>58</sup> Examples. *Deluxe Motor Stages*, 93 NLRB 1425; *Luper Transportation Co., Inc.*, 92 NLRB 1178; *Direct Transit Lines*, 92 NLRB 1715.

<sup>59</sup> *Citizens Gas Co.*, 92 NLRB 1743; *Roanoke Gas Co.*, 94 NLRB No. 226.

<sup>60</sup> *Cherokee County Rural Electric Cooperative Association*, 92 NLRB 1181; *Plymouth Electric Cooperative Assn.*, 92 NLRB 1183. In the *Cherokee* case, the Board said: "We find . . . that a cooperative utility of the type involved herein should, for these purposes [jurisdiction], be treated as a public utility."

<sup>61</sup> *Louisville Railway Co.*, 94 NLRB No. 12; *Neuces Transportation Co.*, 93 NLRB 1193; *Gastonia Transit Co.*, 91 NLRB 894.

<sup>62</sup> *The Wichita Water Co.*, 93 NLRB 895.

<sup>63</sup> *Local Transit Lines*, 91 NLRB 623.

<sup>64</sup> See also *N. L. R. B. v. El Paso-Ysleta Bus Line*, 190 F. 2d 261 (C. A. 5), upholding Board's jurisdiction and citing *N. L. R. B. v. Denver Building and Construction Trades Council, et al.*, 341 U. S. 675.

<sup>65</sup> *Louisville Railway Co.*, cited above.

commerce is the benefit which accrues to the flow of commerce from the uninterrupted operation of such a facility.<sup>66</sup>

In the case of a sightseeing bus service affiliated with a Nation-wide association to promote tours, the Board asserted jurisdiction both "because the employer operates a licensed public transit system, and because the character of its sales made through the Nation-wide association constitutes the Employer a multistate enterprise."<sup>67</sup>

### (3) Multistate Enterprises

During the 1951 fiscal year, the Board asserted jurisdiction over companies in many fields of business and industry as "integral parts of multistate enterprises." These included retail automobile dealers,<sup>68</sup> a retailer of farm and dairy equipment,<sup>69</sup> a coin-operated vending machine company,<sup>70</sup> canning companies,<sup>71</sup> soft drink bottlers and distributors,<sup>72</sup> a radio and television retailer,<sup>73</sup> a restaurant operated under a franchised trade name,<sup>74</sup> an undertaker,<sup>75</sup> motion picture theaters,<sup>76</sup> an apartment project operated by an insurance company,<sup>77</sup> a poultry products company,<sup>78</sup> and a sightseeing bus service,<sup>79</sup> among others. The Board continued to assert jurisdiction over interstate chains of retail stores.<sup>80</sup>

<sup>66</sup> Here the Board cited *N. L. R. B. v. Baltimore Transit Co.*, 140 F. 2d 51 (C. A. 4) cert. denied 321 U. S. 795, where the court said, "If Congress may regulate the labor relations of a clothing manufacturer (*N. L. R. B. v. Fambblatt*), the wages of an elevator operator in a loft building (*Kirschbaum Co. v. Walling*), or the grain acreage of a farmer (*Wickard v. Filburn*), because of the effect these may have on interstate commerce, it would be absurd to say that its power does not extend to the labor relations of a street transportation company, upon whose operation the industrial life of a great city extensively engaged in interstate commerce is so largely dependent."

<sup>67</sup> *Rose City Tours, Inc.*, 92 NLRB 1254.

<sup>68</sup> *Baxter Brothers*, 91 NLRB 1480, *Davis Motor Co.*, 93 NLRB 206, enforced C. A. 10 No. 4281 issued November 5, 1951, *Conover Motor Co.*, 93 NLRB 867, enforced C. A. 10, No. 4286, issued November 5, 1951.

<sup>69</sup> *Holm Tractor & Equipment Co.*, 93 NLRB 222.

<sup>70</sup> *California Cigarette Concessions, Inc.*, 21-RC-1341 (not printed)

<sup>71</sup> *Stokeley Foods, Inc.*, 91 NLRB 1267.

<sup>72</sup> *Squirt Distributing Co.*, 92 NLRB 1667, *Seven Up Bottling Co. of Miami, Inc.*, 92 NLRB 1622 In the *Seven Up* case, the Board found that the local bottler "operates as an essential link and element in a multistate system devoted to the manufacture and distribution of a nationally advertised drink."

<sup>73</sup> *Muntz Television, Inc.*, 92 NLRB 29

<sup>74</sup> *Mil-Bur, d/b/a Howard Johnson*, 94 NLRB 1161. But see *Ben Franklin Stores*, 94 NLRB No. 112 where jurisdiction declined over "franchised" variety store.

<sup>75</sup> *Riverside Memorial Chapel, Inc.*, 92 NLRB 1594

<sup>76</sup> *Gamble Enterprises, Inc.*, 92 NLRB 1528

<sup>77</sup> *Metropolitan Life Insurance Co., Parklabrea Resident Community*, 93 NLRB 381. The Board found that the housing project, one of several owned by the insurance company, constituted an integral part of the company's business because it served as an outlet for the investment of funds which is a necessary incident of the company's insurance business. In this case, it was contended that the Board should decline jurisdiction under *N. L. R. B. v. Shawnee Milling Co., d/b/a Pauls Valley Milling Co.*, 184 F. 2d 57 (C. A. 10) On this point, the Board said, "Whatever the applicability of that decision, the Board, with due respect for the opinion of the Court of Appeals for the Tenth Circuit, is constrained to adhere to its original view until the Supreme Court of the United States has had an opportunity to pass on the question."

<sup>78</sup> *Tennessee Egg Co.*, 93 NLRB 846.

<sup>79</sup> *Rose City Tours, Inc.*, 92 NLRB 1254 The company was also found to be a licensed public transit system coming within category 2.

<sup>80</sup> *Sears Roebuck & Co.*, 91 NLRB 1411, *S. H. Kress & Co.*, 92 NLRB 15, *Safeway Stores, Inc.*, 92 NLRB 275.

In announcing that jurisdiction would be asserted over local units of multistate enterprises, the Board said:

Having recently reexamined Board policy covering the exercise of jurisdiction, we continue to believe that when a plant is owned and operated by a company which is a multistate enterprise, we should exercise our discretion in favor of taking jurisdiction, even though management is entrusted to local officials and the particular plant may sell its entire product within the State where it is located.<sup>81</sup>

However, in a case arising soon after announcement of the standards, the Board made it clear that this policy applies also to companies which are locally owned yet function as an integral part of an interstate enterprise.<sup>82</sup> One case in which this policy was applied involved a locally owned restaurant which operated under the trade name of an interstate concern.<sup>83</sup> The interstate company owned and operated 65 restaurants and licensed 252 other restaurants to use its name under "operator's agreements." In this case, the individually owned restaurant was required to build a building to the interstate company's specifications, promote sale of its products, maintain standards of quality acceptable to the interstate company, carry certain public liability and workmen's compensation insurance in favor of the interstate company, and permit the interstate company's supervisory personnel entry to the premises at any time to check the conduct of the business. The interstate company had the right to terminate the agreement for any default not remedied to its satisfaction, and it had the right to approve an assignee or to buy the operator's business including premises and furnishing if he should wish to sell. In taking jurisdiction, the Board observed, "Although the business of this employer is locally owned and its sales necessarily consummated within the State of Michigan, it is conducted pursuant to an operating agreement as an integral part of a multistate enterprise devoted to the manufacture and distribution of ice cream and other foodstuffs."

But in the case of two locally owned variety stores operating under an interstate trade name through a "franchise" from an interstate wholesaler, the Board declined jurisdiction when it found that the local employer's operations "are not so related to those of [the wholesaler] and the degree of control exercised by [the wholesaler] is not so extensive as to warrant the assertion of jurisdiction over the employer as an integral part of a multistate enterprise."<sup>84</sup> In this case, the franchise entitled the local stores to a discount on purchases, use of the trade name, and expert advice or assistance in merchandising and other details of the stores' operation. The Board found no evidence that the interstate company exercised any control over personnel or

<sup>81</sup> *The Borden Co*, 92 NLRB 628

<sup>82</sup> *Baxter Brothers*, 91 NLRB 1480.

<sup>83</sup> *Mil-Bur, Inc., d/b/a Howard Johnson*, 94 NLRB No 169

<sup>84</sup> *Louise W. Buresh and Edith I Buresh d/b/a Ben Franklin Stores*, 94 NLRB No. 112

labor policies of the local stores and had no financial interest in the stores. The Board noted also, that there was no requirement of a minimum stock inventory; nor did the merchandise sold bear the trade name. Moreover, the two stores bought only about half their merchandise from the interstate company; the remainder was purchased from its competitors.

The existence of an exclusive dealership arrangement, however, is not necessary to establish a retailer as an integral part of a multistate distribution enterprise.<sup>85</sup>

### (a) Automobile and Implement Retailers

A substantial number of the cases in which the Board has found multistate enterprises warranting assertion of jurisdiction have involved retailers of automobiles and farm implements.<sup>86</sup>

The first such case in this category that came to the Board after announcement of the new standards involved a franchised dealer who had the exclusive right to sell a nationally advertised make of new cars in his community.<sup>87</sup> But in later cases, the Board made it clear that its assertion of jurisdiction in the automobile retailing field was not limited to dealers having exclusive dealerships.<sup>88</sup> This policy was in accord with the Board's practice before adoption of the new standards.<sup>89</sup>

In one case, under the new standards, where the dealer did not have an exclusive dealership for the largest selling make he handled, although he bought his cars directly from the factory, the dealer ob-

<sup>85</sup> *Davis Motors, Inc*, 93 NLRB 206, enforced November 5, 1951, by C. A. 10.

<sup>86</sup> *Baxter Brothers*, cited above, *Holm Tractor Equipment Co.*, 93 NLRB 222, *Hauser Nash Sales, Inc*, 92 NLRB 531; *Des Rochers Motor Co*, 92 NLRB 709; *Walker Motor Co*, 92 NLRB 540.

<sup>87</sup> *Baxter Brothers*, cited above. In two prior cases—*Knapp Chevrolet*, 30-RC-225 (not printed) and *Dunlap Chevrolet Co*, 91 NLRB 1115—the question did not arise because the business of the dealers involved met the standard of \$500,000 a year direct inflow.

<sup>88</sup> *Davis Motors, Inc*, 93 NLRB 206, *Conover Motor Co*, 93 NLRB 867, both enforced by the Court of Appeals for the Tenth Circuit, November 5, 1951. In upholding the Board's jurisdiction in *Davis Motors*, the court said:

It is said that a cessation of the respondent's activities because of a work stoppage would not impede, burden or obstruct the free flow of interstate commerce, because unlike the dealers with exclusive franchises, the manufacturer's products would be distributed to the other dealers in the same area without any interstate repercussions or harmful effects. But we do not think this factual distinction makes any jurisdictional difference. It is not difficult to foretell that the unfair labor practices of this dealer, if left unchecked, would spread to all other dealers in this same area with consequent far reaching harmful effects on interstate commerce as in the cases of the exclusive dealers.

In the *Conover* case, the court said:

We think it is apparent that the cessation of any one of the respondent's business due to a strike caused by its unfair labor practices would decrease the flow of new automobiles, trucks, parts and accessories into the State of Colorado. A cessation of the respondent's business would not only affect the movement of automobiles into the State but would also have a direct effect upon the interstate activities of their manufacturers, whose production schedule is geared to the needs of their dealers. A stoppage of respondent's business would necessarily affect the manufacturers' production—a cut back in production would in turn affect the interstate activities of those furnishing materials required for such production. \* \* \* To deny jurisdiction of the Board would allow thousands of retailers of new automobiles to engage in unfair labor practices with impunity. The 'total incidence' of such unfair labor practices if left unchecked would not only substantially interfere with the free flow of commerce, but would conceivably bring to a complete stand still the interstate transactions of one of the Nation's greatest industries.

<sup>89</sup> *Howell Chevrolet*, 89 NLRB 1189, *Wray Brothers*, 89 NLRB 592, *Public Motors Co.*, 39-RC-196 (not printed).

jected to the trial examiner's characterization of this as a "franchise." On this point, the Board said:

We do not consider the characterization of the dealer agreement controlling. What is controlling is the fact that by virtue of its dealer agreement, the Respondent is one of a limited number of dealers functioning as an essential, integral part of a Nation-wide system for the manufacture and distribution of automobiles.<sup>90</sup>

In another case, the Board took jurisdiction over a company retailing farm and dairy equipment, on the basis of dealer agreements with two interstate companies manufacturing tractors and farm implements.<sup>91</sup> Under these agreements, the retailing company was assigned exclusive territories, and the interstate companies were accorded "a substantial degree of control over the operations of the employer," the Board found.

#### (4) Concerns Engaged Directly in Commerce

No questions arose about the application of the \$25,000-a-year standard to major companies engaged in shipping goods or performing services in interstate commerce, but a few pending cases were dismissed when it was found that the interstate business of the employers involved fell short of this minimum.<sup>92</sup>

During the fiscal year, the Board exercised jurisdiction under this standard in cases involving a wide variety of businesses and industries.<sup>93</sup>

In announcing this standard, the Board said:

In future cases we will exercise jurisdiction over employers which annually ship goods valued at \$25,000 or more out of a State.<sup>94</sup>

Applying this rule, a Board panel unanimously took jurisdiction in a case involving an investigating and auditing service "because the employer performs out-of-State services valued in excess of \$25,000 per year."<sup>95</sup>

In two cases, questions arose as to the coverage of employers whose responsibility for goods or services going across State lines allegedly ceased within their own State. In one case, an undertaking company contended that it was not engaged in commerce because its responsibility for its shipments ceased when delivery was made to the local

<sup>90</sup> *Conover Motor Co.*, cited above.

<sup>91</sup> *Holm Tractor & Equipment Co.*, cited above.

<sup>92</sup> *Justin A. Davis Furniture Mfg. Co.*, 91 NLRB 925, *Green Bay Auto Co.*, 91 NLRB 720; *The Stille & Duhtmeier Co.*, 91 NLRB 913.

<sup>93</sup> Examples *The Sunday School Board of Southern Baptist Convention*, 92 NLRB 801; *Seattle Wholesale Florists Assn.*, 92 NLRB 1186, *Rainbo Bread Co.*, 92 NLRB 181; *Peerless Quarries, Inc.*, 92 NLRB 1194; *Round Mountain Gold Dredging Corp.*, 92 NLRB 859; *Pen & Pencil Workers Union (The Parker Pen Co.)*, 91 NLRB 883; *Imperial Garden Growers*, 91 NLRB 1034.

<sup>94</sup> *Stanslaus Implement and Hardware Co., Ltd.*, 91 NLRB 618.

<sup>95</sup> *Sargoy & Stern*, 92 NLRB 1693. The decision cited as an additional ground for asserting jurisdiction the fact that the company also performed services of more than \$50,000 for interstate companies, thus coming under the rule of the *Hollow Tree* case.

railroad station.<sup>96</sup> The Board held it was sufficient that the interstate shipments were initiated by the employer at the request of out-of-State clients.<sup>97</sup> In another case, the Board upheld a trial examiner who rejected as immaterial evidence intended to show that two coal companies were not engaged in interstate commerce because they sold their coal to a brokerage company within the State, which in turn sold it to various out-of-State customers.<sup>98</sup> In this case, the trial examiner cited the Supreme Court's statement that "It was not any the less interstate commerce because the transportation did not begin or end with the transfer of title of the merchandise transported."<sup>99</sup>

### (5) Concerns Serving Interstate Enterprises

In announcing the standard for asserting jurisdiction in cases involving employers who furnish goods or services to interstate enterprises, the Board said:

The Board has determined that it will exercise jurisdiction over those enterprises which affect commerce by virtue of the fact that they furnish goods or services necessary to the operations of other employers engaged in commerce, without regard to other factors, where such goods or services are valued at \$50,000 per annum or more, and are sold to: (a) public utilities or transit systems; (b) companies which function as instrumentalities and channels of interstate and foreign commerce and their essential links; or (c) enterprises engaged in producing or handling goods destined for out-of-State shipment, or performing services outside the State, in the value of \$25,000 per annum or more. This standard reflects, in large measure, the results reached in the Board's past decisions disposing of similar jurisdictional issues.<sup>1</sup>

In this category, the Board has asserted jurisdiction over the following types of business and industry, among others, when their services amounted to \$50,000 a year: A detective agency supplying guard service to steamship lines.<sup>2</sup> An auditing and investigating agency serving Nation-wide distributors of motion pictures.<sup>3</sup> Contractors repairing, constructing, and maintaining such instrumentalities of commerce as public highways and an airport.<sup>4</sup> Distribution agencies serving newspapers and magazines.<sup>5</sup> A tire recapping company serving interstate trucking firms.<sup>6</sup> A company supplying ce-

<sup>96</sup> *Riverside Memorial Chapel*, 92 NLRB 1594.

<sup>97</sup> Here the Board cited *McLeod v. J. E. Dilworth Co.*, 322 U. S. 327.

<sup>98</sup> *United Mine Workers of America, District 51, et al (L. E. Cleghorn and B. H. Swaney, Inc.)*, 95 NLRB No. 73

<sup>99</sup> *N. L. R. B. v. Fainblatt*, 306 U. S. 601 (1939).

<sup>1</sup> *Hollow Tree Lumber Co*, 91 NLRB 635

<sup>2</sup> *Newton Investigation Bureau*, 93 NLRB 1574. See also *Reed Detective Agency*, 91 NLRB 727, where jurisdiction was declined when agency's services to interstate firms did not meet \$50,000 a year minimum.

<sup>3</sup> *Sargoy & Stein*, 92 NLRB 1693.

<sup>4</sup> *Depeu Paving Co.*, 92 NLRB 142; *R. B. Guerin & Co.*, 92 NLRB 1698.

<sup>5</sup> *Manson News Agency*, 93 NLRB 1123; *Rockaway News Supply Co*, 94 NLRB No. 156.

<sup>6</sup> *McCoy Truck Tire Recap Co*, 93 NLRB 667.

ment to an interstate oil company.<sup>7</sup> An electrical and refrigeration repair company performing service under warranties made to customers by a Nation-wide refrigerator manufacturer.<sup>8</sup> A cafeteria in an airplane factory.<sup>9</sup> A processing company selling gum rosin within its own State to an interstate paint company.<sup>10</sup> Companies supplying services to public utilities and a railroad.<sup>11</sup> An office building operator who rented space to an interstate insurance company.<sup>12</sup>

In one case, a question arose as to whether this standard applied to a company supplying services or goods to interstate companies only sporadically.<sup>13</sup> Although the company involved had performed construction valued at \$200,000 for an interstate concern in the most recent annual period, a trial examiner recommended dismissal of the case because the company did not "customarily or regularly" furnish such services to interstate concerns. The Board reversed this ruling and took jurisdiction. In doing so, the Board said that, in view of the fact a contractor's business is generally sporadic, "such a test would tend to confuse application of the rules for asserting jurisdiction."

Another case involved a manufacturer who supplied more than \$50,000 worth of concrete blocks and ready-mix cement to two out-of-State contractors for the construction of a municipal sewer system within the State where the manufacturer was located.<sup>14</sup> All the manufacturer's products were used within the State. Therefore, it was urged that the Board was precluded from asserting jurisdiction. The Board rejected this contention, pointing out that the standard applies to companies which supply materials, goods, or services to enterprises which perform services outside interstate company's home State as well as those which ship goods outside the State.

In the same case, the Board reaffirmed its earlier ruling that, in the case of a concern serving more than one interstate enterprise, the business volumes with the various interstate firms would be added together to determine whether the \$50,000 a year minimum was met. Thus, in a case where a company supplied \$9,700 worth of goods to one interstate firm, \$26,600 to another, and \$19,000 to a

<sup>7</sup> *Halliburton Portland Cement Co*, 91 NLRB 717.

<sup>8</sup> *Dineen Sales & Service Corp*, 91 NLRB 1222

<sup>9</sup> *Fairchild Cafeteria*, 92 NLRB 609

<sup>10</sup> *Jacksonville Processing Corp*, 93 NLRB 943.

<sup>11</sup> *Scott Construction Co, Inc*, 91 NLRB 930, *Rock Asphalt, Inc* 91 NLRB 1515, to utilities, *Blue Rock, Inc*, 92 NLRB 581, to a railroad

<sup>12</sup> *Cormax, Inc., db/a South Building and Annex*, 94 NLRB No. 173, specifically overruling such prior decisions as *Midland Building Co*, 78 NLRB 1243, to the extent that the Board's prior policy of declining jurisdiction over office buildings was reversed by the standards laid down in the *Hollow Tree* decision.

<sup>13</sup> *Paul W. Speer, Inc.*, 94 NLRB No. 59.

<sup>14</sup> *Hart Concrete Products Co*, 94 NLRB No. 225

third, its volume of business coming under this category was figured as \$55,300.<sup>15</sup>

### (6) Direct Inflow of \$500,000

In the decision announcing the Board's yardstick for asserting jurisdiction upon the basis of direct inflow of goods, materials, or services from out-of-State, the Board said:

. . . In the light of more than 3 years' experience under the amended Act and the Board's current budget and case load, we now conclude that, although it would effectuate the policies of the statute to assert jurisdiction in cases of this kind where the direct inflow is substantial, due regard for these factors requires that we continue to decline jurisdiction where the direct inflow is less than \$500,000 in value annually. . . .<sup>16</sup>

Adoption of the \$500,000-a-year minimum resulted in the dismissal of a few pending cases,<sup>17</sup> and the assertion of jurisdiction in a few others involving employers not previously concerned in Board proceedings.<sup>18</sup>

### (7) Indirect Inflow of \$1,000,000

The Board announced the adoption of the minimum of \$1,000,000 year of indirect inflow of goods or services in the following language:

. . . In the past, the Board has in some cases refused to assert jurisdiction over certain retail enterprises where the sole basis for doing so would be inflow. After full reexamination and consideration, we have concluded that a labor dispute at an establishment having an indirect inflow of as much as \$1,000,000 annually would tend to have such a substantial effect upon interstate commerce as to warrant our assertion of jurisdiction on that basis alone in order to effectuate the policies of the Act. Hereafter, in the interest of certainty, regardless of the nature of the enterprise, where the indirect inflow totals at least \$1,000,000 annually, we shall treat that factor alone as a sufficient basis for asserting jurisdiction.<sup>19</sup>

Under this standard, the Board asserted jurisdiction in a number of cases involving chain stores, large super markets, or associations of retail stores, whose annual purchases of goods originating from outside the State totaled more than \$1,000,000.<sup>20</sup> Applying the same standard, it declined jurisdiction in other cases.<sup>21</sup>

<sup>15</sup> *Waterways Engineering Corp.*, 93 NLRB 794.

<sup>16</sup> *Federal Dairy Co.*, 91 NLRB 638.

<sup>17</sup> *Florida Mattress Factory*, 91 NLRB 772; *Green Bay Auto Parts Co.*, 91 NLRB 720. *Snohomish County Building Material Assn.*, 92 NLRB 39.

<sup>18</sup> *Star Beef Co.*, 92 NLRB 1018, *Associated Wholesale Grocers, Inc.*, 92 NLRB 542.

<sup>19</sup> *Dorn's House of Miracles, Inc.*, 91 NLRB 632.

<sup>20</sup> *Minimax Stores*, 91 NLRB 644; *Galyan's Super Market, Inc.*, 92 NLRB 298; *Vaughn Bowman, et al.*, 93 NLRB 1147.

<sup>21</sup> Example: *McMahan's of Santa Ana and Lynwood*, 91 NLRB 1154.

### (8) Combination of Inflow, Outflow, or Other Commerce Activity

The Board, in announcing its jurisdictional standards, also declared that it would take jurisdiction in cases involving enterprises which had any combination of inflow and outflow of goods or services coming within categories 4, 5, 6, or 7, that the percentages of each of these categories, in which there is activity, taken together add up to 100.<sup>22</sup> In the case setting forth this standard, the company had 90 percent of the \$25,000-a-year minimum requirement for direct interstate shipments and 15 percent of the \$500,000-a-year minimum on direct inflow of goods or services—a total of 105. The Board said:

. . . The total of the two percentages is thus in excess of "100 percent." Thus viewed, interference by a labor dispute with this Employer's interstate business would, in our opinion, exert an impact upon commerce as great as would be exerted in the case of companies having interstate shipments of the value of either of the minimum yardstick figures alluded to above. We find not only that the Employer is engaged in commerce within the meaning of the Act, but that this Board should exercise jurisdiction herein.

This standard, however, did not require any considerable discussion in later cases where it was applied, except in cases where jurisdiction was declined because the business involved did not measure up to this, or any other, standard.<sup>23</sup>

### (9) Establishments Affecting National Defense

As a final standard for the assertion of jurisdiction, the Board said:

We find it will effectuate the policies of the Act to assert jurisdiction over enterprises which substantially affect the national defense.<sup>24</sup>

However, most of the major establishments engaged in defense work, or operations affecting the national defense, would come under jurisdiction of the Board on the basis of other standards.<sup>25</sup> Even in three out of four principal cases in which this standard was held to govern, the Board would have asserted jurisdiction over enterprises concerned under other standards. One case involved an interstate moving company which also was engaged in making crates for the Army.<sup>26</sup> Another case involved a cold storage company serving national meat packing concerns and interstate truck lines which also stored food, under contract, for the Quartermaster Corps of the Army.<sup>27</sup> In this case, the Board said, ". . . particularly in view of the

<sup>22</sup> *Rutledge Paper Products, Inc.*, 91 NLRB 625. For an application, see *Oklahoma State Union of the Farmers' Educational and Cooperative Union of America*, 92 NLRB 28.

<sup>23</sup> *Capitol Laundry and Dry Cleaners*, 91 NLRB 923, *J. Weiss Printers*, 92 NLRB 993; *Seattle Wholesale Florist Association*, 92 NLRB 1186, *Green Bay Auto Parts Co.*, 91 NLRB 720.

<sup>24</sup> *Westport Moving and Storage Co., Crate Making Division*, 91 NLRB 902.

<sup>25</sup> See, for example, *Motorola, Inc.*, 94 NLRB No. 181; *American Smelting and Refining Co (Colorado Plateau Uranium Ore Project)*, 92 NLRB 1451.

<sup>26</sup> *Westport Moving and Storage Co.*, cited above.

<sup>27</sup> *Memphis Cold Storage Warehouse Co.*, 91 NLRB 1404.

employer's contract with the Army Quartermaster Corps, which makes its operations a part of the national defense effort, we shall assert jurisdiction." A third case involved an unincorporated joint venture organized to assemble and install five hydroelectric generator-turbines in the powerhouse at an Arizona dam under a contract with the United States Department of Interior.<sup>28</sup>

The fourth case involved a laundry and dry cleaning establishment operating on an atomic energy reservation. In asserting jurisdiction over this concern, the Board said in a unanimous decision:

Our decision that it would best effectuate the purposes of the Act to exercise jurisdiction here is based solely on the Respondent Employer's relationship to the national defense effort, arising from his license to do business on a United States reservation devoted to atomic energy. The Board does not rely on the Trial Examiner's finding of fact that the Respondent Employer's business is an essential element in the life of a community which has been established as part of the national defense program. In the Board's opinion, any employer doing business on such an atomic energy reservation, whether or not his business is absolutely essential to the inhabitants of the community, is nonetheless so identified with the Government's national defense program as to warrant the full exercise of the Board's power to assert the jurisdiction conferred on it by the Act.<sup>29</sup>

#### **d. Application to Certain Industries**

In cases involving certain industries or types of business, the Board was urged to make exceptions in the application of its jurisdictional standards. The building and construction industry and the hotel industry were the principal industries in which the Board was urged to make exceptions. The Board made an exception of the hotel industry in accordance with the congressional endorsement of its historic policy of not taking jurisdiction over hotels, but it declined to make an exception of the building and construction industry in view of the legislative history of the amended act and the industry's impact upon the Nation's commerce. In other cases, it was urged that the Board should not take jurisdiction of cooperatively owned companies or commercial enterprises operated by nonprofit institutions such as colleges and churches. The Board declined to make these exceptions. The cases involving these questions are discussed in the following subsections.

##### **(1) *The Building and Construction Industry***

Between 1947 and the adoption of the new standards in 1950, the Board asserted jurisdiction in a number of cases in the building industry, where jurisdiction probably would not be taken under the

<sup>28</sup> *Donovan, James, Wismer & Becker*, 93 NLRB 1562.

<sup>29</sup> *Harvey Stoller d/b/a Richland Laundry & Dry Cleaners*, 93 NLRB 680.

standards.<sup>30</sup> This was particularly true in secondary boycott cases, where a Board majority said in an early case that it felt called upon to exercise the Board's full power in taking jurisdiction.<sup>31</sup> Thus, the Board took jurisdiction in one secondary boycott case involving, as primary employer, an electrical subcontractor with a \$325 contract on a \$15,200 home<sup>32</sup>. The subcontractor received about \$5,000 worth of goods indirectly from out-of-State and he did \$8,400 worth of business across State lines. Although the Board in applying the new standards to secondary boycott cases also considers the business of the secondary employer to the extent affected, none of the amounts cited in the decision would be sufficient to meet the present standards.<sup>33</sup> However, in a case not involving a secondary boycott, the Board declined jurisdiction over a small plastering contractor whose gross income was only \$33,000 a year, all derived from jobs within his home State.<sup>34</sup>

But soon after adoption of the new standards, the Board made it clear in a series of decisions that it will apply them to the building and construction industry just as to other industries.<sup>35</sup> This policy was followed in representation cases<sup>36</sup> as well as secondary boycott cases.<sup>37</sup>

Asserting jurisdiction in a representation case involving the plumbers employed by a group of plumbing contractors, the Board said:

Although the Board has asserted jurisdiction over the building and construction industry in both unfair labor practice and representation cases, the representation cases have involved either multicraft units of construction employees on large projects of substantial duration,<sup>38</sup> or shop employees.<sup>39</sup> The Board is here for the first time confronted with the question of whether it should direct an election in a proposed single craft unit of employees employed in the actual construction operations.

As the Board has pointed out in earlier cases involving the building and construction industry, the legislative history of the amended Act clearly establishes the intent of Congress in 1947 that the Board should assert jurisdiction in that industry for the purpose of preventing certain unfair labor practices by labor organizations. Consistent with that intent, the Board has asserted jurisdiction in unfair labor

<sup>30</sup> *Ira A. Watson Co.*, 80 NLRB 533 (1948) (Chairman Herzog concurring specially; Member Houston dissenting). *Samuel Langer*, 82 NLRB 1028 (1949) (Members Houston and Murdock dissenting). Chairman Herzog joined the majority in asserting jurisdiction because of Langer's actual interstate operations. However, Langer's \$8,400-a-year out-of-State operations would fall short of the \$25,000 a year required under present standards.

<sup>31</sup> *Ira A. Watson Co.*, cited above.

<sup>32</sup> *Samuel Langer*, cited above.

<sup>33</sup> See discussion of application of standards to secondary boycott cases above.

<sup>34</sup> *Walter J. Mentzer*, 82 NLRB 389 (1949) (Member Reynolds dissenting).

<sup>35</sup> *Jamestown Builders Exchange, Inc.*, 93 NLRB 386, *The Plumbing Contractors Association of Baltimore, Md.*, 93 NLRB 1081; *Paul W. Speer, Inc.*, 94 NLRB No. 59

<sup>36</sup> *The Plumbing Contractors Association of Baltimore*, cited above

<sup>37</sup> *Jamestown Builders Exchange*, cited above. For discussion of application of standards in secondary boycott cases, see subsection b, section 2 of this chapter.

<sup>38</sup> Here the Board cited, as an example, *Ozark Dam Constructors*, 77 NLRB 1136 (1948)

<sup>39</sup> Here the Board cited, as an example, *White Construction and Engineering Co., Inc.*, 92 NLRB 53.

practice cases arising under Section 8 (b) (4) [the secondary boycott ban] of the Act, when such assertion was appropriate on the basis of the commerce facts established therein. In addition, however, to proscribing certain conduct by labor organizations, Section 8 (b) (4) excepts from such proscription, or grants certain benefits to, a labor organization which has been *certified* pursuant to Section 9 (c). Section 8 (b) (2), when read in conjunction with Section 8 (a) (3), grants to a labor organization which has been *certified* pursuant to Section 9 (e) (1) the right to enter into and enforce a union-security contract.

If, as we think it must, the Board is to continue in appropriate cases to process complaints and issue cease and desist orders against labor organizations in the building industry, it would be most inequitable for the Board, at the same time, to deny to labor organizations the benefits which accrue from certification when in appropriate cases, our jurisdiction is invoked. We do not believe that Congress intended that in this industry the Board would wield the sword given it by the Act, but that labor organizations desiring it should be denied the shield of the Act. We believe, rather, that in providing that certain benefits would flow from certification, Congress intended that the shield should go with the sword, and that the Board should to this end assert jurisdiction in representation and union-security authorization cases to the same extent and on the same basis as in unfair labor practice cases. Unless and until Congress, for reasons of policy, provides otherwise by appropriate legislation, we must proceed on that basis. We could not take any other course without flouting the will of Congress as now expressed in the 1947 statute.<sup>40</sup>

On the matter of the Board's jurisdiction, the Supreme Court said in a building industry case:

The activities complained of must affect interstate commerce to bring them within the jurisdiction of the Board. The Board here found that their effect was sufficient to sustain its jurisdiction and the Court of Appeals was satisfied. We see no justification for reversing that conclusion. . . .

The Board also adopted the finding that the activities complained of had a close, intimate and substantial relation to trade, traffic and commerce among the states and that they tended to lead, and had led, to labor disputes burdening and obstructing commerce and the free flow of commerce. The fact that the instant building, after its completion, might be used only for local purposes does not alter the fact that its construction, as distinguished from its later use, affected interstate commerce.<sup>41</sup>

In one building industry case, the Board was urged to decline jurisdiction over a building contractor engaged in construction work valued at \$200,000 for an interstate concern selling more than \$500,000 worth of goods outside the State, on the ground that the alleged unfair labor practices had occurred in connection with a purely local construction job of the contractor, which by itself had no effect on interstate commerce. In asserting jurisdiction in this case, the Board in unanimous decision said, "We find no merit to this contention, as we believe that in the construction industry, as in others, the Board

<sup>40</sup> *The Plumbing Contractors Association of Baltimore*, cited above.

<sup>41</sup> *N. L. R. B. v. Denver Building and Construction Trades Council, et al. (Gould & Preisner)*, 341 U. S. 875, decided June 4, 1951. In this case, in which the Board asserted jurisdiction before adoption of the new standards, the primary employer purchased annually about \$55,000 worth of materials outside the State and shipped about \$5,000 a year outside the State.

should determine jurisdiction based on the over-all operations of the employer.”<sup>42</sup>

In another case, the Board asserted jurisdiction over a manufacturer of concrete blocks and ready-mixed cement who supplied materials valued at more than \$50,000 during a year to two out-of-State contractors who were engaged in constructing a municipal sewer system within the manufacturer’s home state.<sup>43</sup>

## (2) *Nonprofit and Cooperatively Owned Enterprises*

The Board has long followed the policy of asserting jurisdiction over *commercial* enterprises operated by nonprofit organizations, whether the organizations are religious, fraternal, or educational.<sup>44</sup> The 1947 amendments to the act changed this policy only to exclude from the definition of the term “employer,” as used in the act, “any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual.”<sup>45</sup>

After adoption of the new jurisdictional standards, the question of the Board’s assertion of jurisdiction over nonprofit organizations arose again. In a case involving the publishing operations of a church organization which made sales of \$250,000 a year in interstate commerce, a majority of the Board said:

. . . The interstate sale and shipment of the Employer’s publications is clearly commerce. As this Board and the courts have held, it is immaterial that the Employer may be a nonprofit organization, or that its activities may be motivated by considerations other than those applicable to enterprises which are, in the generally accepted sense, commercial.<sup>46</sup>

Similarly, the Board took jurisdiction of a radio station operated by a college,<sup>47</sup> but declined jurisdiction in a case involving employees of a university’s libraries.<sup>48</sup>

The matter of taking jurisdiction over nonprofit fraternal organizations was also raised in a case involving a farmers’ organization which

<sup>42</sup> *Paul W Speer, Inc.*, cited above. This decision specifically overruled *West Virginia Electric Corporation*, 90 NLRB 526 (to which Chairman Herzog and Member Reynolds had separately dissented) on this point.

<sup>43</sup> *Hart Concrete Products Co*, 94 NLRB No. 225. See also *Tampa Sand and Material Co.*, 91 NLRB 868.

<sup>44</sup> *Christian Board of Publications*, 13 NLRB 534 (1939) enforced 113 F. 2d 678 (C A 8); *American Medical Association*, 39 NLRB 385 (1942); *Polish National Alliance*, 42 NLRB 1375 (1942), jurisdiction affirmed by Supreme Court, 322 U. S. 643 (1944)

<sup>45</sup> Section 2 (2).

<sup>46</sup> *Sunday School Board of the Southern Baptist Convention*, 92 NLRB 801, Chairman Herzog and Member Reynolds dissented, on the ground that this was not such a commercial activity as the Board should assert jurisdiction over.

<sup>47</sup> *Port Arthur College*, 92 NLRB 152.

<sup>48</sup> *Trustees of Columbia University*, 97 NLRB No. 72 (decided December 11, 1951). In this case, the Board stated that it would not “assert its jurisdiction over a nonprofit, educational institution where the activities involved are noncommercial in nature and intimately connected with the charitable purposes and educational activities of the institution” See also *Philadelphia Orchestra Association*, 97 NLRB No. 80.

was engaged in writing insurance on members' farm property and crops within one State.<sup>49</sup> The organization had \$93,000,000 insurance in force and did extensive business with interstate and foreign reinsurance companies. In addition, the organization made purchases of \$250,000 a year and sales of \$15,000 a year outside the State through associated organizations. In this case, the Board said:

Contrary to the Employer's contention, this Board has never declined to assert jurisdiction over an employer *because* it is a fraternal organization or a cooperative operated for the benefit of its members. Except for hospitals, the present Act grants no exemption to nonprofit organizations. We have therefore applied the same jurisdictional criteria to fraternal and cooperative organizations as to private businesses operated for profit. We find that the Employer's business operations, whether considered separately or together with those of its satellite organizations, bring it within the coverage of the Act.

The Board likewise has asserted jurisdiction over cooperatively owned public utility companies,<sup>50</sup> and a cooperatively owned auction market.<sup>51</sup>

### (3) *The Hotel Industry*

The Board, throughout its history since 1935, has declined to assert jurisdiction over the hotel industry. The only exception is in the District of Columbia and the Territories, where the statute in effect gives the Board the plenary powers of a local board.<sup>52</sup> There the Board has consistently taken jurisdiction of hotels.<sup>53</sup>

After amendment of the act in 1947, the question arose as to whether the Board should continue to decline jurisdiction over hotels in the 48 States under the amended act. Citing the precedent then 14 years old, a majority of the Board reaffirmed this policy of declining jurisdiction over hotels as a matter of policy, although finding that hotel "operations are not wholly unrelated to commerce."<sup>54</sup>

After announcement of the new jurisdictional standards, this question arose again. Reconsidering the question in the light of the new standards, a majority of the Board again reaffirmed the policy of declining jurisdiction over hotels in the 48 States.<sup>55</sup> In this case,

<sup>49</sup> *Oklahoma State Union of the Farmers' Educational and Cooperative Union of America*, 92 NLRB 248.

<sup>50</sup> *Cherokee County Rural Electric Cooperative Association*, 92 NLRB 1181, *Plymouth Electric Cooperative Association*, 92 NLRB 1183, *Wheatland Electric Cooperative, Inc.*, 94 NLRB No. 21.

<sup>51</sup> *Flemington Auction Market Cooperative Association, Inc.*, 4-RC-820 (not printed)

<sup>52</sup> *Roy C Kelley*, 95 NLRB No. 7.

<sup>53</sup> *Willard, Inc.*, 2 NLRB 1094 (1937), *The Raleigh Hotel Co.*, 7 NLRB 353 (1938); *Westchester Apartments, Inc.*, 17 NLRB 433 (1939); *Rutland Court Owners, Inc.*, 44 NLRB 587 (1942), *Parkside Hotel*, 74 NLRB 809 (1947)

<sup>54</sup> *The White Sulphur Springs Co.*, 85 NLRB 1487 (1949) (Members Reynolds and Murdock dissenting)

<sup>55</sup> *Hotel Association of St. Louis*, 92 NLRB 1388. (Members Reynolds and Murdock dissenting) In their dissent, Members Reynolds and Murdock urged particularly that jurisdiction should be asserted on the basis of the Board's policy of asserting jurisdiction over enterprises which "substantially affect the national defense," in view of the hotels' role of supplying lodging for military and civilian personnel traveling on business essential to the national defense effort.

both the employers and the predominant labor organizations representing hotel employees urged that the Board adhere to its past policy of declining jurisdiction.

Conceding that by literal application of the standards the Board would take jurisdiction in this case, the majority declared that "there are other and weightier considerations present in this case." Among these, the majority cited the positive congressional endorsement of the Board's historic policy of declining jurisdiction over hotels, both on the floor of the Senate and in a congressional survey of Board jurisdiction.<sup>56</sup> The majority opinion added:

. . . Surely this Board did not intend by announcing these standards, and should not now, completely divest itself of power to decline to take jurisdiction upon the basis of other factors, in that rare situation where we are convinced that the Board would otherwise have to sacrifice the evident purposes of Congress in the interest of mere blueprint consistency. . . .

\* \* \* \* \*

. . . We do not believe that a settled policy, endorsed by all those members of Congress who have recorded an opinion on the subject, should be lightly overturned by the action of this administrative Board. And certainly no persuasive reasons have been presented to warrant overturning it in this case. . . .

Pending a showing, therefore, of any new congressional desire that this Board reverse a long-established policy upon which State Boards, the industry, and its predominant labor organizations have come to rely, we shall continue to adhere to that policy. . . .

<sup>56</sup> The majority cited Senator Taft's statement of August 30, 1949, on the floor of the Senate that "In my opinion the Act was never intended to cover the hotel industry . . ." and the Report of the Committee on Expenditures (1948), House Report No. 2050, 80th Congress, 2d Session.

### III

## The Filing Requirements

**T**HE act requires that a labor organization file certain documents and statements, including a non-Communist affidavit from each of its officers, and furnish its members with annual financial reports in order to use the processes of the Board in any type of case.<sup>1</sup>

Absent such compliance, the act forbids action upon different types of cases at different stages. In an unfair labor practice case, it forbids the issuance of a complaint based upon a charge filed by a union which has not complied.<sup>2</sup> In a representation case, it forbids investigation of a question of representation "raised by a labor organization" which has not complied.<sup>3</sup> In a union-shop case—before the 1951 amendment—it forbade that any petition for a union-shop authorization poll from a noncomplying union should be "entertained." The 1951 amendment abolished the requirement of the union-shop authorization poll, but a labor organization still must comply with the filing requirements in order to make a valid union-shop agreement.<sup>4</sup>

### 1. Filing of Charges After Compliance

Except for the impact of the Supreme Court's *Highland Park* decision, which is discussed in the next section, only one major question involving the filing requirements arose during the 1951 fiscal year. This was the question of whether the act relieved an employer of the duty to bargain with a union which is the choice of a majority of employees, but which has not yet met the filing require-

<sup>1</sup> Sec. 9 (f), (g), and (h).

<sup>2</sup> However, this does not prevent a noncomplying labor organization from being a defendant to an unfair labor practice charge or from being decertified as a bargaining representative. *Chicago Newspaper Publishers Association (Chicago Typographical Union No. 16, et al)*, 86 NLRB 1041 (1949), unfair labor practice; *Harris Foundry & Machine Co*, 76 NLRB 118 (1948), decertification. See also *Hercules Powder Co.*, 89 NLRB 52 and *Sterling Tool & Mfg Co*, 89 NLRB 142 (1950).

<sup>3</sup> This applies equally to representation petitions filed by an employer, because the act permits the filing of such a petition only after a labor organization or individuals acting on behalf of employees has made a claim to represent the employees. See *Herman Loewenstein, Inc.*, 75 NLRB 377 (1947).

<sup>4</sup> Public Law No. 189, approved by the President October 22, 1951. See appendix C, Text of Amended Act. The amended act still provides for deauthorization polls to determine whether employees wish to rescind their bargaining agents' authority to make a union-shop agreement.

ments at the time of its request to bargain. Originally, the Board held that, in such a case, the union could not bring a charge of refusal to bargain against the employer after the union had filed.<sup>5</sup>

However, section 8 (a) (5) of the act states:

It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

Section 9 (a) provides:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . [subject only to certain provisos regulating the right of individual employees to present grievances].

In regard to unfair labor practices, section 9 (f), (g), and (h) provide that “. . . no complaint shall be issued pursuant to a charge made by a labor organization . . .” unless that organization has filed its annual reports and other data required and “. . . unless there is on file with the Board an [non-Communist] affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit . . .”

Upon reexamination of this statutory scheme and the intent of Congress in establishing the filing requirements, a majority of the Board reversed the earlier ruling.<sup>6</sup> The majority held that a non-complying majority union whose request for bargaining was refused by an employer might later make its filings and bring a charge of refusal to bargain against the employer, on the basis of his refusal to negotiate at the time when the union had not yet filed. However, one point not ruled upon in this case was whether the Board would find a refusal to bargain if the employer had contemporaneously asserted the union's noncompliance status as grounds for his refusal to bargain. Chairman Herzog proposed that it should not be held a violation in such cases, if the employer notified the union at the time of the request to bargain that its demonstrated noncompliance was the reason for the employer's refusal to negotiate. The two other members of the majority—Board Members Houston and Styles—declined to pass upon this point, saying that it was not presented to the Board by this case. The employer in this case had not asserted noncompliance as the basis of his refusal to bargain until the case

<sup>5</sup> *Andrews Co.*, 87 NLRB 379 (1949).

<sup>6</sup> *New Jersey Carpet Mills*, 92 NLRB 604 (Members Reynolds and Murdock dissenting). This case is discussed briefly in the Fifteenth Annual Report, page 117, footnote 56a.

came before the Board. The majority opinion in this case made the following observations on the nature of the act's filing requirements:

. . . Section 9 (f), (g), and (h) do not wipe out the obligations of employers; they merely impose certain specific limitations upon unions' use of this Board's processes. These sections carefully provide that, unless the moving labor organization is in compliance: (1) The *Board* may not conduct investigations for the determination of exclusive bargaining representatives; (2) the *Board* may not certify a bargaining agent; (3) the *Board* may not entertain petitions for union-security authorization elections; and (4) the *Board*, through the General Counsel, may not issue a complaint based on charges of unfair labor practice, although there is no inhibition upon filing of the charges themselves. Thus the services of a Government agency may not be effectively invoked by a union which has not satisfied the statutory conditions precedent. But the statute nowhere suggests that, once a union *is* in compliance, it may not call upon the Board to right a wrong previously visited upon employees.

These provisions of the statute, and especially Section 9 (h), draw such careful procedural distinctions that we are entitled to assume, even more than in the ordinary situation, that Congress chose each word with care. We therefore do not feel at liberty to import more into the language than Congress put there. When the lines are so clear, there is no occasion to read between them.

The compliance provisions disclose a congressional policy of seeking to eradicate Communist leadership from labor organizations. The method adopted was a procedural one: to encourage compliance with the filing requirements of the Act by creating a system of benefits and detriments.

\* \* \* \* \*

Turning for the moment to policy considerations, we are convinced that the decision we reach will, in the long run, encourage compliance with the provisions of Section 9 far more than would adherence to the *Andrews* decision or to the position taken in the dissenting opinion. The purpose of Congress clearly was to encourage compliance, by offering benefits to those unions which are in a position to comply, after their members have been made aware of the disadvantages of having officers who could not or would not do so. The purpose of Congress was not to make the Board's processes unavailable to employees, but to put a certain reasonable price upon their availability. The labor organization that brought the charges in this case could not have secured the issuance of a complaint at the time when the employer first refused to bargain. What better method could there be to encourage prompt compliance than to say, as we do now, that when—but only when—the labor organization has complied, it may invoke the Board's processes to remedy a prior refusal to bargain not motivated by its earlier non-complying status?

## 2. Effect of Supreme Court Ruling in *Highland Park*

In the *Highland Park* case, the Supreme Court held that the term "national or international labor organization" as used in section 9 (h) encompasses parent labor federations such as the American Federation of Labor and the Congress of Industrial Organizations.<sup>7</sup> Therefore,

<sup>7</sup> *N. L. R. B. v. Highland Park Mfg. Co.*, 341 U. S. 322, decided May 14, 1951.

the Court ruled, these federations must make the filings required of labor organizations before any of their affiliated unions could attain compliance entitling them to bring cases before the Board. This decision reversed the Board's interpretation that the term meant only organizations engaged directly in organizing employees or representing them in collective bargaining, and thus applied to the federations only when they sought to organize or represent employees directly.<sup>8</sup>

The Supreme Court's decision invalidated a number of unfair labor practice cases, certifications of bargaining representative, and union-shop authorization polls in which the Board or General Counsel had acted while the two federations were not in compliance with the act's filing requirements as interpreted by the Supreme Court.

In unfair labor practice cases, the Board acted immediately in accordance with the Supreme Court ruling to vacate decisions it had rendered on complaints based upon charges of unions which were not in compliance under the Court's ruling when the complaint issued.<sup>9</sup> In a number of cases where the Board had petitioned the courts of appeals for enforcement of its orders, the Board withdrew its petitions.<sup>10</sup> In other cases, where argument on the enforcement petition had been completed, the courts denied enforcement of Board orders on the basis of the *Highland Park* decision.<sup>11</sup>

However, in one case where dismissal of a complaint was sought, the Board pointed out again that the act does not require compliance with the filing requirements at the time a labor organization files a charge, but only at the time of issuance of the complaint by the General Counsel.<sup>12</sup>

Another question posed as a result of the *Highland Park* decision was whether a contract containing an otherwise lawful union-security clause made pursuant to a Board-directed union-shop poll by a union not in compliance under this decision should bar a representation petition filed by a rival union. In effect, the Supreme Court's ruling invalidated the union-shop polls on which such contract clauses were based.<sup>13</sup> Therefore, the Board found, these clauses came within the established Board policy that a contract containing a union-

<sup>8</sup> *Northern Virginia Broadcasters, Inc.*, 75 NLRB 11; see Thirteenth Annual Report, p. 23.

<sup>9</sup> Examples: *Cummer-Graham Co.*, 95 NLRB No. 32, and *Tide Water Associated Oil Co.*, 95 NLRB No. 33, both decided July 13, 1951.

<sup>10</sup> Examples: *N. L. R. B. v. Long Lewis Hardware Co.*, 189 F. 2d 611 (C. A. 5); *N. L. R. B. v. Pre-Cast Slab & Tile Co.*, 190 F. 2d 206 (C. A. 8).

<sup>11</sup> Examples: *N. L. R. B. v. Bethlehem Steel Co.*, 191 F. 2d 341 (C. A. D. C.); *Cathey Lumber Co. v. N. L. R. B.* 189 F. 2d 428, (C. A. 5). In the *Cathey Lumber* case, the court, on a petition for rehearing, vacated its prior order of enforcement on the basis of *Highland Park*. This was the only case in which a court took this action.

<sup>12</sup> *Dant & Russell, Ltd.*, 95 NLRB No. 44 (decided July 17, 1951)

<sup>13</sup> It was estimated that 4,700 polls had been conducted under such circumstances. See chapter IV, section C, subsection 2, The Effect of Invalid Union-Security Clauses

security clause put into effect without authorization by a Board-conducted poll of employees should not bar a petition.<sup>14</sup> On first impression, the Board declined to make an exception to this policy. However, upon further consideration of the equities of the situation and of the actions of the courts in comparable situations, a majority of the Board reversed this ruling in the same case, and held such a contract a bar to an election.<sup>15</sup>

Pointing out that in making the contract in 1949 the union had complied with all the procedures of the act including a union-shop poll and the requirement for filing of non-Communist affidavits as then interpreted by the Board, the majority declared that holding the contract invalid as a bar to a rival petition "is not only harsh and inequitable but a result which, the Board after careful consideration now concludes, is not required by the Act or by court decisions interpreting the Act." The majority opinion added:

We are now convinced that our earlier decision did not give enough weight to fundamental equitable principles established by the courts in comparable situations which show a clear disposition to protect and save affirmative action taken in reliance upon erroneous administrative assurance or upon interpretation of a statute later judicially declared to have been incorrect.<sup>16</sup>

We find a similar disposition on the part of the courts to refuse to regard as a nullity all action taken in reliance on a statute later held unconstitutional.<sup>17</sup>

Applying these principles, the majority concluded:

For the Board to say now that the 1949 contract is so tainted by the inclusion of the union-security clause, only recently shown to have been improperly authorized by the Board, that it cannot be effective for contract bar purposes, is not only harsh and inequitable but a result which, the Board after careful consideration now concludes, is not required by the Act or by court decisions interpreting the Act. In the light of these considerations, and as the *Highland Park* decision does not compel a contrary conclusion, we find without merit the contention of the petitioner that the September 28, 1949, contract should not be a bar to the pending petition because of the union-security clause. That a legislative remedy, as suggested by our dissenting colleague, is possible, should not, because of its speculative and delayed character, deter the Board in exercising its full legal authority in deciding pending cases.

<sup>14</sup> *Ford Motor Co. (Canton Forge Division)*, 95 NLRB No. 27 (issued July 11, 1951).

<sup>15</sup> *Ford Motor Co. (Canton Forge Division)*, 95 NLRB No. 121 (Member Reynolds dissenting, Chairman Herzog not participating; issued August 1, 1951). In reaching its second decision, the Board reopened the case and heard reargument from all interested parties.

<sup>16</sup> Here the Board cited *Moser v. United States*, 341 U. S. 41 (1951); *Stockstrom v. Commissioner of Internal Revenue*, 190 F. 2d 283 (C. A. D. C.) (1951).

<sup>17</sup> Here the Board quoted from the decision of the Supreme Court in *Chicot County Drainage District v. Baxter State Bank, et al.*, 308 U. S. 371 (1940) as follows:

. . . The actual existence of a statute, prior to such a determination [of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. *The past cannot always be erased by a new judicial declaration* . . . Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. . . . [Emphasis supplied.]

The opinion emphasized that the ruling dealt only with a representation case, adding, "We are not, of course, in any way deciding any issues which might be presented in an *unfair labor practice* proceeding concerning a union-security agreement executed under the circumstances we have here considered."

Member Reynolds based his dissent on "strong equitable considerations," including the rights of any employees who were not adherents of the contracting union but were compelled to pay dues to it under the union-security clause. He said, "I think it is of paramount importance that the rights of these employees . . . be considered."

His dissent added:

Finally, I do not think the Board's decision today effects a practical solution of the problems created by the *Highland Park* decision. If it did, such practical considerations would undoubtedly be entitled to serious consideration. However, the fact is that the majority decision does not negate the necessity of re-holding union-security elections conducted before the CIO complied with the affidavit provisions of the Act on December 22, 1949. It is my view, and I cannot see any escape from it, that the union-security agreement in this case, and others like it, cannot be relied upon as a defense in an unfair labor practice case. In reality, therefore, unions wanting the benefits of union-security will have to secure new 9 (e) certificates. I see nothing to be gained by giving any semblance of validity to the 1949 contract in this case. On the contrary, it seems to me unwise to lead the contracting parties to believe that they can in any way rely upon union-security agreements executed under the circumstances here present. The remedy they seek lies with Congress and not the Board.

### a. Amendment to Act

To deal with this and certain other problems arising from the *Highland Park* decision, legislative action was initiated in Congress. On August 6, 1951, Senator Taft of Ohio and Senator Humphrey of Minnesota introduced S. 1959 which ultimately became Public Law 189.<sup>18</sup> As adopted, this law added to the act a provision that—

No petition entertained, no investigation made, no election held, and no certification issued by the National Labor Relations Board, under any of the provisions of section 9 of the National Labor Relations Act, as amended, shall be invalid by reason of the failure of the Congress of Industrial Organizations to have complied with the requirements of section 9 (f), (g), or (h) of the aforesaid Act prior to December 22, 1949, or by reason of the failure of the American Federation of Labor to have complied with the provisions of section 9 (f), (g), or (h) of the aforesaid Act prior to November 7, 1947: Provided, That no liability shall be imposed under any provision of this Act upon any person for failure to honor any election or certificate referred to above, prior to the effective date of this amendment: Provided, however, That this proviso shall not have the effect of setting aside or in any way affecting judgments or decrees heretofore entered under section 10 (e) or (f) and which have become final.<sup>19</sup>

<sup>18</sup> For the legislative chronology of the law, see chapter I.

<sup>19</sup> Sec. 18 of the act. At the time of this writing, the Board had not yet had occasion to apply this provision in a case.

The House Committee on Labor and Education, in reporting the bill for adoption, stated that this section was added "for the purpose of resolving problems created by the holding of the Supreme Court in *National Labor Relations Board v. Highland Park Company* (341 U. S. 322)." <sup>20</sup> The Senate Committee's Report contained a similar statement.<sup>21</sup>

The House Report said further on this point:

#### The Purposes of the Bill

The purposes of the bill are (1) to resolve problems arising from a recent Supreme Court decision, *National Labor Relations Board v. Highland Park Manufacturing Company*, and (2) to dispense with the requirement of existing law that an election be held before a labor organization and an employer may make a union-shop agreement.

#### The Highland Park Case

Subsection (a) of the bill amends the National Labor Relations Act, as amended, by adding a new section 18 for the purpose of resolving problems created by the holding of the Supreme Court in *National Labor Relations Board v. Highland Park Company* (341 U. S. 322), decided May 14, 1951. In that case the Supreme Court held that the Congress of Industrial Organizations and the American Federation of Labor are "national or international labor organizations" within the meaning of subsection (h) of section 9 of the National Labor Relations Act (which relates to the filing of non-Communist affidavits by union officials). This decision reversed the position taken by the National Labor Relations Board in *Northern Virginia Broadcasters* (75 N. L. R. B. 11), decided October 7, 1947. The Highland Park decision invalidated representation certificates issued under section 9 (c) of the act, and union-shop authorization certificates issued under section 9 (e), in those cases where the Board had applied its rule that it was unnecessary for the American Federation of Labor and the Congress of Industrial Organizations to comply with subsections (f), (g), and (h) of section 9 in order for unions affiliated with such organizations to invoke the processes of the National Labor Relations Board.

Since the officers of the American Federation of Labor are now in compliance with subsections (f), (g), and (h) of section 9 of the act, and have been in continuous compliance therewith since November 7, 1947, and since the officers of the Congress of Industrial Organizations are now in compliance with such subsections and have been in continuous compliance therewith since December 22, 1949, it seems unnecessary and wasteful to hold the repeat elections which would be required under the Highland Park decision, if this bill were not enacted. At the same time it seems inequitable to subject parties who have acted in reliance upon the Board's certificates to possible unfair-labor-practice charges for having done so.

<sup>20</sup> House Report No. 1082, issued October 1, 1951.

<sup>21</sup> Senate Report No. 646, issued August 16, 1951. The Senate Committee Report said of this section: "The amendment will protect parties who have acted in reliance upon certificates issued by the Board against possible charges of unfair labor practices. It will also stabilize collective bargaining relationships governed by Board certificates and afford to such relationships all the protection of the statute. At the same time the amendment, by a proviso, prohibits the imposition of liability upon any person who, prior to the effective date of the amendment, failed to honor a certificate invalid under the Highland Park decision. The bill does not, however, excuse disobedience to court judgments and decrees which became final prior to the effective date of the amendment."

The bill, therefore, validates those elections and other actions taken by the Board which may be affected by the Highland Park decision, thereby according all the protection of the act to relationships which have resulted from such elections and other actions, and thereby avoiding the waste which would be involved in the needless repetition of elections and other administrative proceedings. While validating certificates and other actions of the Board, the new section 18, in its first proviso, guards against the imposition of liability upon any person who, prior to the date of enactment of this bill, failed to honor any election or certificate which is validated by that new section. A second proviso to the new section 18 makes it clear, however, that the first proviso does not excuse disobedience to court judgments and court decrees which became final prior to the date on which this bill is enacted. It is not intended that this bill, in itself, shall create any authority to reinstitute any unfair labor practice proceeding which has heretofore been dismissed by the courts or by the National Labor Relations Board, on the authority of the Highland Park case.

### 3. Other Rulings On Filing and Compliance

In a number of cases, the Board had occasion to reaffirm or amplify the basic principles it had previously enunciated in the 3 years since the filing requirements were incorporated in the act in 1947.<sup>22</sup>

In a number of cases, the Board reiterated its long-standing rule that the compliance status of a labor organization is a matter exclusively for administrative determination by the Board and therefore is not subject to litigation by the parties in any type of Board proceeding.<sup>23</sup> In one unfair labor practice case, the Board stated:

The Board has consistently held that, under the statutory scheme, whether a labor organization which is required to comply with the filing requirements of Section 9 (f), (g), and (h) of the Act has in fact done so is not litigable. Such determination remains one entrusted to the Board in its administrative capacity.

As part of its investigation of compliance, the Board will, of course, consider any relevant information brought to its attention. All information submitted by Respondent in this case was considered by the Board before it made its determination that the Union was in compliance with Section 9 (h) of the Act.<sup>24</sup>

A question also was raised as to whether the investigative procedure established by the Board during the 1950 fiscal year for its use in determining compliance in certain cases opened the way for litigation of compliance status.<sup>25</sup> The Board ruled that it did not.<sup>26</sup> The pro-

<sup>22</sup> See Fifteenth Annual Report, chapter 2, Fourteenth Annual Report, pp 13-17, Thirteenth Annual Report, pp. 21-25.

<sup>23</sup> *Woodside Mills, Inc*, 10-RC-967 (not printed), *Birmingham Casket Co*, 92 NLRB 573, *Campbell Offset Printing Co*, 92 NLRB 1421, (representation cases), *Intertown Corp*, (Michigan), 90 NLRB 1145, *American Optical Co*, 93 NLRB 1547; *Sunbeam Corp*, 94 NLRB No. 134 (unfair labor practice cases)

<sup>24</sup> *Sunbeam Corp*, cited above

<sup>25</sup> The establishment of this investigative procedure was announced in an amendment of sec 203.13 of the Board's Rules and Regulations. See Fourteenth Annual Report, pp 20-21.

<sup>26</sup> *Metropolitan Life Insurance Co.*, 91 NLRB 473, *Equitable Life Insurance Co*, 8-RC-585, (not printed) In the *Equitable* case, Member Reynolds, in a special concurring opinion, took the view that the Board should disclose that it had made a detailed investigation in accordance with sec 203.13 of the Rules and Regulations and found no subterfuge in the constitutional abolition of the union positions in question. He concurred in finding that the union had met the filing requirements

cedure was established for use of the Board when it might appear that a union had sought to circumvent the filing requirements by failing to file non-Communist affidavits from all its officials who actually hold the status of officer.<sup>27</sup>

The Board said:

The change in question does not disturb the Board's established rule that compliance is an administrative matter not subject to collateral attack.<sup>28</sup>

In another case, the Board set forth its policy governing the access of parties to information on compliance matters as follows:

. . . while no party is entitled as a matter of right to such information, the Board's policy is to have its agents release to interested parties, under proper safeguards, the names of designated union officers and of persons who have filed the required affidavits. Because Respondent failed to obtain this desired information, whatever the reason, its request will be referred to the Regional Director for action in accordance with the Board's policy. If Respondent, after it has received the information which it desires, brings to the Board's administrative attention any pertinent additional information concerning the Union's compliance status, the Board will, of course, consider further the question of compliance in the light of such new matter.<sup>29</sup>

The Board, also during the 1951 fiscal year, had occasion to reaffirm its prior ruling that it will not attempt to investigate the truth or falsity of non-Communist affidavits, because the statute itself vests this function and responsibility solely in the Department of Justice.<sup>30</sup>

### a. "Fronting" for Noncomplying Unions

The Board continued to enforce the policy that it will not permit either individuals (who do not have to file under the act<sup>31</sup>) or complying unions to "front" for noncomplying unions in cases before the Board.<sup>32</sup> However, the doctrine of "fronting" does not apply to cases involving the rights of individual employees—as in cases of discriminatory discharge—even though they are members of a noncomplying union or are active on behalf of such union.<sup>33</sup>

In one area—decertification elections, the Board tightened up its rules against "fronting." In prior years, the Board had declined generally to apply its rule on "fronting" to cases where an individual was seeking to decertify an incumbent union.<sup>34</sup> In such cases, where there is no question of conferring bargaining rights upon a non-complying union, the Board took the view that it was not necessary

<sup>27</sup> See sec 203.13, Rules and Regulations, Series 6.

<sup>28</sup> *Metropolitan Life Insurance Co.*, footnote 2, cited above

<sup>29</sup> *Sunbeam Corp.*, cited above

<sup>30</sup> Example: *American Broadcasting Co.*, 93 NLRB 1410

<sup>31</sup> *Campbell Offset Printing Co.*, 92 NLRB 1421.

<sup>32</sup> For discussion of this policy, see Fifteenth Annual Report, pp 22-23.

<sup>33</sup> *Happ Brothers Co.*, 90 NLRB 1513, footnote 3. See also Fourteenth Annual Report, pp 23-24.

<sup>34</sup> *Whitn Machine Works*, 76 NLRB 998 (1948); *Ellis-Klatscher & Co.*, 79 NLRB 183 (1948), *Auburn Rubber Corp.*, 85 NLRB 545 (1949); *Radix Wire Co.*, 86 NLRB 105 (1949).

to consider the possibility of "fronting." But in two cases during the past fiscal year, the Board declined to make this exception to its rule on "fronting" in decertification cases and specifically overruled two past cases where this exception had been made.<sup>35</sup> In the two cases decided this year, the Board found that the individuals who filed the petitions were actually "fronting" for noncomplying unions which apparently hoped that decertification of the incumbent unions would clear their way to obtaining recognition of the employers as the bargaining representatives of the employees involved. In each case, the noncomplying union took an active part in bringing about the decertification proceeding.

In one case, the petitioning individual had been a member of the noncomplying union for several years.<sup>36</sup> The Board found that, after attending a union meeting at which an official of the noncomplying union urged decertification of the incumbent union, this individual signed a blank-form petition with the intention of thereby helping to establish the noncomplying union as the representative of his fellow employees. The Board found further that: He had no knowledge of how the petition forms were subsequently filled in. On the day of the Board hearing on the case, he was informed by a union organizer that an attorney would represent him, although he had not asked for one, did not know how the attorney would be paid, and did not intend to pay for such services. On two occasions, the petitioner did not appear at the hearing because the organizer had erroneously informed that the hearings had been postponed.

In the second case, the individual employee who filed the petition to decertify the incumbent union had kept an application for membership on file with the rival noncomplying union for several years.<sup>37</sup> In this case, the petitioning individual discussed the matter of filing the petition with a representative of the noncomplying union and the union representative prepared the petition and mailed it. The Board found further that, while the petition was pending, the individual solicited fellow employees to join the noncomplying union and turned the cards of those who signed over to the union. Although not a member of the union, he also attended closed meetings of the union's organizing committee and made suggestions about campaign literature which were adopted.

However, in another decertification case, the Board found that "fronting" was not established when it was shown merely that the petitioning individual had been friendly with and had discussed the

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<sup>35</sup> *Knife River Coal Mining Co.*, 91 NLRB 176, overruling to the extent inconsistent therewith *Radix Wire Co.*, and *Auburn Rubber Corp.*, both cited above; and *Hammond Bag & Paper Co.*, 94 NLRB No. 147.

<sup>36</sup> *Knife River Coal Mining Co.*, cited above.

<sup>37</sup> *Hammond Bag & Paper Co.*, 94 NLRB No. 147.

situation with an official of a noncomplying union which sought to represent his fellow employees.<sup>38</sup> There was no evidence of any other assistance to the petitioner by the noncomplying union.

In one representation case, the petitioning union moved to exclude an intervening international union from the ballot on the ground that it might be fronting for a noncomplying local union.<sup>39</sup> The Board denied the motion when the petitioner failed to make any showing that the intervenor lacked the capacity to bargain or was engaging in subterfuge, or was contemplating evasion of the act in any manner in the future.

### b. Compliance in Board Proceedings

Determinations of compliance in both representation and unfair labor practice cases during the past fiscal year, raised no major questions that could not be resolved under principles previously established.<sup>40</sup> Thus the Board has consistently required that, before a parent national or international organization may be placed on the ballot in an election, any locals which in fact exist and represent the employees involved, or have members among them, must be in compliance.<sup>41</sup> The Board also adhered to its prior rule that branches or "servicing arms" of petitioning or charging local unions, such as an organizing committee, need not file even though they may derive "incidental benefit" from the Board action being sought by their parent locals.<sup>42</sup> And in an unfair labor practice case, the fact that a charging union, itself in compliance, has chartered a local at the employer's plant which was not in compliance when the complaint was issued does not preclude adjudication of the complaint, in the absence of evidence of an intent to circumvent the act's requirements.<sup>43</sup>

A noncomplying union having a contractual interest in a representation proceeding is permitted to intervene for all purposes,<sup>44</sup> but it will

<sup>38</sup> *Consolidated Rendering Co.*, 91 NLRB 1257.

<sup>39</sup> *Standard Steel Spring Co.*, 90 NLRB 1805.

<sup>40</sup> For discussion of established principles, see Fifteenth Annual Report, pp 19-23.

<sup>41</sup> See *Hudson Pulp & Paper Corp.*, 94 NLRB No 142, *American Mfg Co.*, 10-RC-979 (not printed); *Chesapeake & Potomac Telephone Co of Baltimore City*, 5-RC-682 (not printed) See also *Sunbeam Corp.*, 98 NLRB No 98 (1952), where the Board revoked bargaining order and certification of national union because its local active among the employees failed to file affidavits for all officers.

<sup>42</sup> *West Texas Utilities Co.*, 94 NLRB No. 237, *Union Buffalo-Mills, Division of United Merchants and Manufacturers, Inc.*, 10-RC-1094 (not printed) (an organizing committee)

<sup>43</sup> *Slokely Foods, Inc.*, 91 NLRB 1267 In this case, the Board said "The remedy sought . . . is for the protection of individual employee rights and the mere fact that the local . . . may incidentally derive a benefit from an unfair labor practice finding . . . is immaterial "

<sup>44</sup> *Northern Indiana Public Service Co.*, 91 NLRB 172 In this case the petitioning union urged the Board to reverse this well-settled policy on the basis of the Supreme Court's opinions upholding the constitutionality of the act's filing requirements (*American Communications Association v. Douds*, 339 U. S 382, see Fifteenth Annual Report, pp 159-162) The petitioner contended that this opinion held it was the congressional intent to deny noncomplying unions all access to Board facilities. The Board found no merit in this contention

not be placed on the ballot, unless it effects compliance within 2 weeks of the date of the direction of election.<sup>45</sup> As in the past, petitioning and intervening unions whose compliance had lapsed since the hearing without being renewed generally were given 2 weeks from the date of the direction of election to renew their compliance status if they desired to participate in the election.<sup>46</sup>

In decertification proceedings, a noncomplying union will be placed on the ballot subject to the qualification that, if it wins the election, only the arithmetic results of the election will be certified,<sup>47</sup> unless it has come into compliance by that time.<sup>48</sup>

One case involved a union which was only in partial compliance when it filed its representation petition but came into full compliance within the 10-day period after it had made its initial recognition claim and filed its petition. In this situation, the Board held that a contract executed by a rival union after the filing of the petition and before the petitioner achieved complete compliance could not bar the petition. This holding was based on the Board's 10-day rule, which gives a union 10 days after its initial recognition claim to file a "valid petition."<sup>49</sup> In another case, the Board sanctioned the intervention by a newly formed union which had not yet achieved complete compliance at the time of the hearing but did so shortly thereafter.<sup>50</sup>

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<sup>45</sup> *Danner Press of Canton, Inc*, 91 NLRB 237.

<sup>46</sup> *Campbell Offset Printing Co*, 92 NLRB 1421, lapse of petitioner's compliance status, *U S Rubber Co.*, 13-RC-1351 (not printed), lapse of intervenor's compliance status

<sup>47</sup> *The Hoover Co*, 8-RD-13 (not printed). See also *Stamford Wall Paper, Inc*, 92 NLRB 1173.

<sup>48</sup> *Brunswick-Balke Collender Co*, 7-RD-73 (not printed).

<sup>49</sup> *Alpert & Alpert*, 92 NLRB 806

<sup>50</sup> *Marine Optical Mfg Co*, 92 NLRB 571.

## IV

# Representation and Union-Shop Cases

**T**HE ACT requires that an employer bargain with the representative selected by a majority of his employees in a unit appropriate for collective bargaining.<sup>1</sup> But the act does not require that the representative be selected by any particular procedure so 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.<sup>2</sup> However, the Board may conduct such an election only after a petition has been filed by the employees or any individual or labor organization acting on their behalf, or by an employer who has been confronted with a claim of representation from an individual or labor organization.

Once a petition has been properly filed, the Board has full statutory power to determine the employees' choice of collective bargaining representative in any business or industry where a labor dispute might affect interstate commerce, with the major exceptions of agriculture, railroads, and airlines. It does not always exercise that power, however, where small or local enterprises are involved.<sup>3</sup> It also has the power to determine the unit of employees appropriate for collective bargaining.

The Board may formally certify a collective bargaining representative in a representation case only upon the basis of the results of a Board-conducted election by secret ballot.<sup>4</sup> Once certified by the Board, the bargaining agent is the exclusive representative of all employees in the appropriate unit for collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. The right of a bargaining agent to exclusive representative status, however, is limited by a statutory proviso to section 9 (a)

<sup>1</sup> Sec. 9 (a).

<sup>2</sup> Sec. 9 (c) (1).

<sup>3</sup> Ch III, Jurisdiction.

<sup>4</sup> However, in an unfair labor practice case involving refusal to bargain, the Board may use other evidence to determine whether or not individual or labor organization claiming representation rights actually was the choice of a majority of employees at the time of the alleged refusal to bargain.

that any individual employee or group of employees has the right to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of any collective bargaining agreement then in effect. The statute requires, however, that the bargaining representative must be given an opportunity to be present at any such adjustment.

The amended act also empowers the Board to conduct an election to decertify an incumbent bargaining agent which has been previously certified or which is being currently recognized by the employer. Decertification petitions may be filed by employees or individuals other than management representatives, or by labor organizations acting on behalf of employees.

Petitions for Board elections are filed in the regional office in the area in which the plant or business involved is located. The Board provides standard forms for filing petitions in all types of cases.

During the 1951 fiscal year, 10,247 petitions for representation elections were filed in the Board's office. During this period, the Board conducted 6,525 representation elections, in which 672,522 employees were eligible to vote. Bargaining representatives were selected in 4,785 of these elections. Collective bargaining representatives were thereby designated to represent a total of 508,004 employees, or approximately 76 percent of those involved in Board elections. More than 76 percent of the elections were conducted by agreement of the parties, without the necessity for formal decisional action by the Board members. The Board members, however, were called upon to make decisions in 2,740 representation cases during the year. They directed representation elections in 1,689 of these cases.

## 1. Union-Shop Poll Abolished

The act formerly required also that, before a bargaining agent could effectuate a contract with an employer for a union shop, a majority of the eligible employees must authorize it in a Board-conducted referendum. This provision was in effect throughout the 1951 fiscal year, but it was eliminated by amendment to the act contained in Public Law No. 189 approved by the President October 22, 1951.<sup>5</sup> The amendments contained in Public Law No. 189, however, reenacted the provision for Board-conducted polls to revoke a bargaining agent's authority to make a union-shop agreement. Moreover, the new amendments to the act provide specifically that a union must obtain notice from the Board of compliance with the filing requirements of sections 9 (f), (g), and (h) before making a

<sup>5</sup> See appendix C, Text of Amended Act, and sec. F of this chapter, the Union-Shop Referendum.

union-shop agreement. The act still limits union-shop agreements to those in which employees are required to become members not earlier than 30 days after they are employed or after the union-shop clause takes effect, whichever is the later.

During the 1951 fiscal year, the Board conducted 5,964 union-shop authorization polls. In these polls, 1,623,375 employees were eligible to vote. The employees authorized negotiation of union-shop contracts in 5,759 elections, or about 97 percent of those conducted. The bargaining agents were thereby authorized to negotiate union-shop contracts covering a total of 1,585,881 employees.

During the 4 years and 2 months in which the union-shop poll was required,<sup>6</sup> the Board conducted 46,119 such polls, in which a total of 6,542,564 employees were eligible to vote. Negotiation of union-shop agreements was authorized in 44,795 of these polls, or 97.1 percent. A total of 5,547,478 employees, or 84.8 percent of those eligible to vote, cast ballots and 5,071,978, or 91.4 percent of those voting, voted in favor of the union shop. Those voting in favor constituted 77.5 percent of those eligible to vote.

The conditions under which the Board directed union-shop polls and the conditions under which the Board will direct representation elections are discussed in the following sections of this chapter.

## A. The Question of Representation

Proceedings before the Board to determine a group of employees' choice of a collective bargaining representative are technically of two types—proceedings to certify a bargaining agent and proceedings to decertify an incumbent bargaining agent. In both types of cases, the Board must determine whether or not a question of the representation of employees exists, and whether or not there is sufficient interest in the question among the employees to merit the holding of an election. If the Board finds that a question of representation exists, it can make a final determination of the employees' choice only by a secret ballot election.

The Board's proceedings in both types of cases are set in motion by the filing of a petition. The filing of petitions and the proceedings are governed by section 9 (c) of the act. This section provides that a petition either for certification or for decertification may be filed (1) by employees or (2) by an individual or a labor organization on behalf of employees. An employer also may file a petition for a certification proceeding when he is presented with a claim to recognition as bargaining agent by an individual or a labor organization.

<sup>6</sup> From August 22, 1947, the effective date of 1947 amendments to the act, to October 22, 1951, the date on which Public Law 189, abolishing the union-shop referendum, was approved by the President

## 1. Showing of Employee Interest

A petition for a representation election filed by an employee or a group of employees or any individual or labor organization acting in behalf of employees must allege support of "a substantial number of employees."<sup>1</sup> Consequently, the first question to be determined upon the filing of such petition is whether there actually is sufficient employee support to warrant the holding of an election. The Board has consistently required an administrative showing of at least a 30 percent interest.<sup>2</sup> This requirement is based on the Board's experience that, in the absence of such showing of interest, an election seldom would serve any purpose of the statute because there is little likelihood that a majority representative can be chosen.<sup>3</sup> The holding of an election in such circumstances would serve only to deprive employees of their right to participate in another election for a period of 12 months, under the statute.<sup>4</sup> Moreover, in such circumstances, an election would result in the "needless dissipation of the Government's time, effort and funds."<sup>5</sup> The required "showing of interest" may be made by submitting to Board investigators authorization cards signed by employees, or any other appropriate evidence. To determine the adequacy of the showing, Board agents check the evidence against the appropriate payroll for the unit involved.

The Board continues to adhere to the traditional position that the showing of interest is exclusively a matter for administrative determination by the regional director and may not be challenged either directly or collaterally, in the course of proceedings for a determination of representatives.<sup>6</sup> The basic reason is that no rights of the parties are affected, because it is the election that decides which, if any, of the claimants actually represent a majority of the employees involved.<sup>7</sup> Accordingly, the Board declined to dismiss representation petitions on any of the following grounds which were asserted in various cases: That failure to disclose the showing of interest prevented the employer from preparing his case;<sup>8</sup> that authorization cards relied on were alleged to be misleading<sup>9</sup> or invalid because of fraud;<sup>10</sup> that the showing of interest was not made within the time prescribed by the Board's

<sup>1</sup> Sec. 9 (c) (1) (A).

<sup>2</sup> See for instance *B. G. Corporation*, 2-RC-3897 (27 9 percent interest held insufficient), Administrative Decision of the Board No. 621.

<sup>3</sup> Statements of Procedure, effective March 1, 1951, sec. 101.17

<sup>4</sup> See sec. G of this chapter, the 12-month Limitation

<sup>5</sup> *O. D. Jennings & Co.*, 68 NLRB 516.

<sup>6</sup> *The Visking Corp.*, 90 NLRB 1006; *White Construction and Engineering Co.*, 94, NLRB No. 202; *The Liberal Market, Inc.*, 9-RC-739 (not printed); *Akim Products Co.*, 39-RC-207 (not printed).

<sup>7</sup> *O. D. Jennings & Co.*, cited above.

<sup>8</sup> *United States Hoffman Machinery Corp.*, 3-RC-476 (not printed)

<sup>9</sup> *Magma Copper Co.*, 21-RC-1298 (not printed).

<sup>10</sup> *Arrow Mill Co.*, 21-RC-1545 (not printed).

rules and regulations;<sup>11</sup> that other evidence tended to offset the showing submitted to the regional director;<sup>12</sup> or that there had been a change in the unit requested by the claimant.<sup>13</sup>

The showing of interest requirement also involves the question of (1) which parties to representation proceedings must show interest, and (2) the unit in which interest must be shown.

### a. Petitioner's Interest

Under the statute, showing of interest is specifically required of petitioning employees, individuals, or labor organizations.<sup>14</sup> A petitioning employer, however, is not required to make such showing; but, to obtain an election, he must show a bona fide request for recognition by a party claiming to represent a majority of employees in an appropriate unit.<sup>15</sup>

Unless the petitioner shows a 30-percent interest in the unit which it seeks, or which is appropriate, the Board will dismiss the petition. But the Board has held that each of two labor organizations which jointly seek to represent a single group of employees need not each make separate 30-percent showings.<sup>16</sup> However, in a case where a petitioner sought to enlarge a laborers' unit which it was then representing, the Board dismissed the petition because the petitioner failed to demonstrate a 30-percent interest in the group of machine operators it sought to add.<sup>17</sup> But when the intervening union in this case demonstrated a sufficient interest in the existing laborers' unit, the Board treated the intervenor as petitioner and permitted the original petitioner to participate in an election among the laborers.

In some cases, the Board finds a unit of employees different from that claimed in the petition to be appropriate for bargaining. If the petitioner's interest in the unit found appropriate is sufficient, the Board will direct an election. However, in such case, the Board permits the petitioner to withdraw without prejudice, upon notice,<sup>18</sup> unless the petitioner has indicated its willingness to participate in an election in the unit found.<sup>19</sup> On the other hand, if the petitioner's

<sup>11</sup> *Corning Glass Works*, 93 NLRB 775; *Continental Carbon, Inc.*, 94 NLRB No. 148.

<sup>12</sup> *United States Rubber Co.*, 91 NLRB 293 (previous dismissal of petition for inadequate showing); *Standard Steel Spring Co.*, 90 NLRB 1805 (affidavits repudiating petitioner); *Waterways Engineering Corp.*, 98 NLRB 794 (petitioner's previous loss of Board election).

<sup>13</sup> *The Diamond Match Co.*, 20-RC-961 (not printed); *American Locomotive Co.*, 92 NLRB 115.

<sup>14</sup> Sec. 9 (c) (1) (A).

<sup>15</sup> Sec. 9 (c) (1) (B); *Grossman Department Store, Inc.*, 7-RM-51 (not printed); Statements of Procedure, sec. 101 17.

<sup>16</sup> *Sullivan Chevrolet Co.*, 13-RC-1668 (not printed).

<sup>17</sup> *National Oats Co.*, 93 NLRB 939.

<sup>18</sup> *J. C. Penney Co.*, 92 NLRB 1286; *Flora Cabinet Co., Inc.*, 94 NLRB No. 6, *Kraft Foods Co.*, 92 NLRB 193 (10 days' notice); *Coca-Cola Bottling Co.*, 32-RC-221 (not printed) (5 days' notice).

<sup>19</sup> *Reilly Electrotape Co.*, 94 NLRB No. 120.

interest in the unit found appropriate by the Board is inadequate, the petition will be dismissed.<sup>20</sup> Similarly, where the Board found separate units appropriate rather than the multidepartmental or multiplant units claimed by petitioners, elections were directed only in those departments and plants in which the petitioner had made a separate showing of adequate interest.<sup>21</sup>

### (1) Showing in Seasonal Industries

In the case of seasonal industries, where the number of employees fluctuates, it is the Board's policy to require a showing of interest only among those currently employed in the unit at the time the petition is filed.<sup>22</sup> In applying this policy, the Board was confronted with one case in which the petitioner was asking for a future election in a seasonal unit where there actually were no employees on the payroll at the time of hearing.<sup>23</sup> In this case, the petitioning union originally had asked for a unit of "inside" employees at a beet sugar factory but, upon learning that a sister union represented these employees, the petitioner amended its petition to cover only "outside" employees, who were not in the sister union's contract unit. The petitioning union admitted that it had no representation among the "outside" employees. Petitioner asked, however, that the Board follow the procedure adopted in a case under the Wagner Act, in which an election was directed to be held during the processing season on condition that, prior to the election, the petitioner should furnish documentary proof of substantial representation in the proposed unit.<sup>24</sup> The Board declined to do this in view of the specific provision of section 9 (c) (1) (A) of the amended act that a petition must allege that "a substantial number of employees . . . wish to be represented for collective bargaining. . . ." The Board dismissed the petition without prejudice.

#### b. Intervenor's Interest

While the statute specifically requires a showing of interest only from petitioning employees, individuals, and labor organizations, the Board has long recognized that the orderly administration of the representation procedures of the act also calls for limitations upon other parties who claim an interest in the employees involved and seek to

<sup>20</sup> *Edward Hines, Inc.*, 90 NLRB 1140, *Fort Worth Steel & Machinery Co.*, 16-RC-537 (not printed).

<sup>21</sup> *The Salt Lake Tribune Publishing Co and Telegram Publishing Co.*, 92 NLRB 1411, *Mullins Lumber Co.*, 94 NLRB No 8

<sup>22</sup> *Akin Products Co.*, 39-RC-207 (not printed)

<sup>23</sup> *Holly Sugar Corporation*, 94 NLRB No. 196

<sup>24</sup> *Arena-Norton Co.*, 62 NLRB 1070

intervene for the purpose of appearing on the ballot.<sup>25</sup> As a general rule, an intervenor, in order to appear on the ballot, is required to show an adequate interest in the employees involved, such as a current or recent contractual interest,<sup>26</sup> or a representative interest.<sup>27</sup>

In one case, permission to appear on the ballot was granted an intervenor which formerly had been the contractual representative of the employees involved and was currently picketing the employer's plant in the course of a strike.<sup>28</sup>

However, an intervenor which lacks a contractual interest need not show a full 30-percent authorization interest, unless it seeks a unit substantially different from that specified in the petition.<sup>29</sup> Thus, an intervenor was placed on the ballot for a voting group in which it had "some evidence of representation," but no election was directed in the separate unit proposed by the intervenor in which it had less than a 30-percent interest.<sup>30</sup>

As an administrative practice, the Board has long required an intervenor who lacks a contractual interest to present a showing of at least 10 percent employee support in order to contest an election petition to which all other parties agree. However, in consent elections, which are held by agreement of parties with substantial interests, it is Board policy to grant the intervenor a place on the ballot on the basis of a lesser showing of interest, provided the intervenor accepts the terms of the consent election agreement.

The interest on which an intervenor relies in order to participate in the election must have been acquired before the close of the hearing.<sup>31</sup> Consequently, the Board granted intervention subsequent to the hearing where the intervening union made an adequate showing of interest acquired prior to and during the hearing<sup>32</sup> but it denied a motion to intervene in the absence of evidence of any interest acquired before the hearing had closed.<sup>33</sup>

<sup>25</sup> According to sec. 102.57 (b) of the Board's Rules and Regulations (Series 6) not only a person desiring to appear on the ballot may intervene but any person who "claims to have an interest in the proceeding." Thus the Board, in one case during the past year, permitted certain unions, which represented other employees of the particular employers, to intervene because of "the alleged novelty" of certain issues in the proceeding. *The Plumbing Contractors Association of Baltimore, Md., Inc., et al.*, 93 NLRB 1081. In another case, a union, which did not claim representation among the employees sought, was permitted to intervene in order to protest the petitioner's unit request. *Pacific Gas & Electric Co.*, 91 NLRB 615.

<sup>26</sup> *Mitprint, Inc.*, 91 NLRB 561; *Pacific Metals Co., Ltd.*, 91 NLRB 696.

<sup>27</sup> *Cadillac Motor Car Division*, 94 NLRB No. 41.

<sup>28</sup> *Hamilton Foundry & Machine Co.*, 94 NLRB No. 24.

<sup>29</sup> Fifteenth Annual Report, pp. 32-33.

<sup>30</sup> *Cadillac Motor Car Division*, cited above.

<sup>31</sup> *Metropolitan Life Insurance Co.*, 90 NLRB 935.

<sup>32</sup> *Cadillac Motor Car Division*, cited above.

<sup>33</sup> *Arrow Mill Co.*, 21-RC-1545 (not printed).

## 2. Existence of a Question of Representation

Before the Board may direct a representation election, it must find that a question concerning representation exists, upon the basis of the facts disclosed at the hearing.<sup>34</sup> The rules developed by the Board in past years for determining the existence of a question of representation in both certification and decertification cases<sup>35</sup> have been generally followed during the past year.

### a. Certification Proceedings

In certification proceedings, an election will be directed if a specific request for recognition has been made by the petitioning bargaining agent and denied by the employer of the employees involved. Moreover, the Board continues to follow the practice of determining that, though no request for recognition was made, a question of representation exists if it appears at the hearing that the employer declines to recognize the petitioner.<sup>36</sup> Also, the Board adheres to the view that the act does not require the dismissal of a petition where the petitioner is currently recognized by the employer.<sup>37</sup> Thus, where the employer and the union had a contract covering the employees in the proposed unit, the Board again applied the principle that the "assertion by the petitioner of its majority status, and the filing of a petition expressing its desire to secure a certificate, is itself sufficient to raise a question concerning representation."<sup>38</sup> In another case, the Board rejected the employer's contention that a petitioning union which was currently recognized was not entitled to an election because it was the legal successor to the bargaining rights of a previously certified union.<sup>39</sup> Without deciding whether the petitioner actually succeeded to the rights under the certification, the Board held that the petitioner should not be precluded from seeking certification in its own name.<sup>40</sup> In so ruling, the Board observed that the certification of the former union was 6 years old and that, since then, changes in the act itself had occurred.

On the other hand, the Board held, a question of representation cannot be raised by a motion to amend an existing certification for

<sup>34</sup> Sec. 9 (c) (1)

<sup>35</sup> See Fifteenth Annual Report, pp 34-36

<sup>36</sup> *Rooney Optical Co*, 8-RC-767 (not printed); *The Visking Corp.*, 90 NLRB 1006, *Nicholas William Kuris*, 7-RC-862 (not printed); *White Construction and Engineering Co., Inc.*, 94 NLRB No 202 See *Advance Pattern Co*, 80 NLRB 29, Fifteenth Annual Report, p. 35.

<sup>37</sup> See *General Box Co*, 82 NLRB 678

<sup>38</sup> *The Plumbing Contractors Association of Baltimore, Md., Inc., et al*, 93 NLRB 1081 See also *Evening News Publishing Co*, 93 NLRB 1240.

<sup>39</sup> *Acme-Evans Co, Inc*, 90 NLRB 2107.

<sup>40</sup> However, where the petitioner has been certified, a refusal of the employer to recognize it does not raise a question concerning representation within the certification year. See sec. C of this chapter, Impact of Prior Determinations. See *Kay & Burbank Co.*, 92 NLRB 224

the purpose of substituting the name of another union as bargaining agent.<sup>41</sup> In this case, the motion was made by a union claiming to represent the employees after their local union disaffiliated from the certified union and affiliated with the claiming union. The Board held that the normal procedure of filing a proper petition for an election among the employees must be followed. The Board's opinion added that this procedure could not be evaded, even though the claiming union was prevented at the time from filing a petition because less than 12 months had elapsed since the election on which the certification was based.<sup>42</sup>

An employer's filing of a petition for an election, in itself, constitutes a denial of recognition to a representative claiming bargaining rights, but a current claim of majority representation in an appropriate unit is necessary to raise a question of representation.<sup>43</sup> Consequently, the Board will dismiss an employer petition if the unit sought is found inappropriate,<sup>44</sup> or if the representative involved disclaims any representative interest.<sup>45</sup> In several cases, the Board held that the union's "clear and unequivocal disclaimer"<sup>46</sup> of interest in the employees was not offset by picketing or other activities which did not necessarily indicate a current representation claim. In two instances, the picketing or other activities were part of an attempt to organize the employees,<sup>47</sup> and in one instance, they were intended to compel the employer to resume operations in a department which had been shut down.<sup>48</sup>

In one case, a majority of the Board declined to dismiss the petition of an employer who was currently negotiating with an uncertified union which it had recognized for several years.<sup>49</sup> The majority held that it would be contrary to the purposes of the act to require an employer to suspend current bargaining negotiations and expose himself to a charge of refusal to bargain in order to obtain a determination of the union's majority status which the employer has reason to doubt. In the majority's opinion, the reasoning of the *General Box Co.* case<sup>50</sup>—that a currently recognized union is entitled to seek a certification, if it wants one—required that the employer should not be denied "the opportunity to secure the benefits attendant upon dealing with

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<sup>41</sup> *Wagner Electric Corp.*, 91 NLRB 220.

<sup>42</sup> See sec. 9 (c) (3).

<sup>43</sup> *Anville Products Co., Inc.*, 4-RC-60 (not printed); *Librascope, Inc.*, 91 NLRB 178, *Luper Transportation Co., Inc.*, 92 NLRB 1178

<sup>44</sup> *Librascope, Inc.*, and *Luper Transportation Co., Inc.*, both cited above.

<sup>45</sup> *Anville Products Co., Inc.*, cited above

<sup>46</sup> The mere failure of the representative to appear at the hearing on the employer's petition was held not to constitute a disclaimer. *D B Thornton Co.*, 94 NLRB No. 201.

<sup>47</sup> *Smuth's Hardware Co.*, 93 NLRB 1009; *Hamilton's, Ltd.*, 93 NLRB 1076.

<sup>48</sup> *Palace Knitwear Co., Inc.*, 93 NLRB 872.

<sup>49</sup> *J. P. O'Neil Lumber Co.*, 94 NLRB No. 190 (Member Murdock dissenting)

<sup>50</sup> 82 NLRB 678.

a certified union.” However, where the petitioning employer had recognized the incumbent local pursuant to a previous certification of its parent international and had made a current contract with the local without questioning its majority status, the Board dismissed the petition.<sup>51</sup>

### b. Decertification Proceedings

In decertification proceedings, the Board ordinarily will find that a question concerning representation exists if the incumbent bargaining agent, whose majority status the petitioner challenges, has been certified or is currently recognized by the employer. If the alleged bargaining agent has been neither certified nor recognized, the petition must be dismissed.<sup>52</sup> Applying these rules, the Board held in one case that no question of representation existed under the following circumstances: Nine labor organizations which the petitioner sought to decertify had in the past had a contract with a manufacturers’ association covering employees of the employer involved in the case. At the time of the filing of the petition, the employer had withdrawn the association’s authority to bargain on its behalf with the unions and the employer did not recognize the unions as the representative of any of its employees. The unions had never been certified, and they did not claim to represent the employer’s employees apart from the unit of the employees of members of the association. The Board therefore dismissed the petition.<sup>53</sup> In another case, the Board likewise dismissed a decertification petition where the contract between the employer and the union to be decertified had terminated and there was no evidence of subsequent dealings between the parties.<sup>54</sup>

In a decertification proceeding, as with an employer’s petition for a representation election, there must be a current claim of representation by the alleged bargaining agent. When the certified or recognized representative which the petitioner seeks to decertify disclaims any interest in the employees, no question concerning representation exists and the petition must be dismissed.<sup>55</sup> However, the incumbent union’s disclaimer must be unequivocal or an election will be directed.<sup>56</sup>

## 3. Qualification of Representative

While the Board continues to give effect to the principle that the selection of a bargaining agent is primarily a matter for the employees’

<sup>51</sup> *Electrol, Inc.*, 93 NLRB 740.

<sup>52</sup> Sec. 9 (c) (1) (A) (ii); see also *Hackathorn & Myers*, 90 NLRB 785 (union never certified, contract expired, and no evidence of dealing between employer and union thereafter).

<sup>53</sup> *Anderson-Wagner, Inc.*, 94 NLRB No. 48.

<sup>54</sup> *Hackathorn & Myers*, cited above.

<sup>55</sup> *Maus Dry Goods & Grocery Co., Ltd.*, 37-RD-16 (not printed).

<sup>56</sup> See Fifteenth Annual Report, p. 35.

own choice, it adheres also to the policy that it will not direct an election or issue a certification when the proposed bargaining agent lacks the necessary qualifications and therefore is incapable of serving as a bona fide representative of the employees.

### a. Capacity for Representation

During the past year, the Board had occasion to affirm its long-standing policy of not directing an election where the union seeking certification lacks the attributes of a bona fide labor organization.<sup>57</sup> In this case, the Board found that, because the petitioning organization was "predominantly composed of, organized, and controlled" by art directors who were supervisors within the meaning of section 2 (11) of the act, it was incapable of serving as bargaining representative of the nonsupervisory drafting room employees. The Board declined to deviate from the customary disqualification of organizations dominated by supervisors on the basis of an alleged industry custom of supervisors and rank-and-file employees belonging to the same union. In the Board's opinion, the existence of the alleged custom was not proved. On the other hand, the Board did not pass upon the allegation by a petitioning union that the intervenor in the case was not a bona fide labor organization because it was dominated by the employer. The Board pointed out that the contention constituted a charge of unfair labor practice under section 8 (a) (2) of the act which could be heard only in a complaint proceeding.<sup>58</sup>

The mere fact that the candidate bargaining agent is not a single union, or the type of union customarily representing the employees of the category involved, is not grounds for disqualification. For example, the Board continues to permit employees in the same unit to select several unions to act jointly as their bargaining representative. Thus, the Board rejected the employer's contention that the joint petition of two unions should be dismissed.<sup>59</sup> However, the Board's direction of election in this case specifically provided that if the joint petitioners were certified, the employer might insist that they bargain jointly for the employees as a single unit.

The Board during the past year again held that a craft union is not disqualified from representing a unit of production and maintenance employees.<sup>60</sup> Nor is a union of production and maintenance employees precluded from seeking certification as bargaining agent for a separate unit of office workers in the same plant.<sup>61</sup>

<sup>57</sup> *White-Washburne Co., Inc.*, 1-RC-1553 (not printed) See the cases cited in the Board's decision

<sup>58</sup> *Marine Optical Manufacturing Co.*, 92 NLRB 571

<sup>59</sup> *Wilson & Co., Inc.*, 92 NLRB 1793

<sup>60</sup> *Consolidated Western Steel Corp.*, 93 NLRB 1199

<sup>61</sup> *The Ohio Steel Foundry Co.*, 92 NLRB 683

An individual person, as well as an organization, may represent employees in collective bargaining. In such cases, however, the Board requires a specific showing that the individual seeks representative status for the purpose of collective bargaining.<sup>62</sup>

### b. Equal Representation of Employees

It has long been the Board's policy to withhold certification from a labor organization if there is proof that the union will not accord effective representation to all employees in the bargaining unit.<sup>63</sup> Since the willingness of the bargaining agent to represent adequately the employees involved is the controlling factor,<sup>64</sup> the Board will not inquire into the employees' eligibility to membership or the extent of the union's constitutional jurisdiction.<sup>65</sup> Similarly, in the absence of proof that the union seeking certification could not adequately represent the employees, the Board disregarded the fact that the union in one case was limited by its parent international to a geographical area other than the one involved.<sup>66</sup> In another case, the Board rejected the contention that the intervening union was not a labor organization because under its constitution it could arbitrarily exclude employees from membership on the ground of character.<sup>67</sup>

## B. Impact of Contracts

In many cases in which petitions for representation elections are filed, a question arises as to whether or not an election should be denied because the employees in the unit sought are already covered by a current contract between the employer and another bargaining agent.

As stated in a recent case,

almost from the beginning of the Wagner Act, the Board has been faced with the problem of deciding when, if ever, to conduct a representation election in the face of a valid existing collective bargaining contract which is claimed to be a bar. In making its determination in such cases, the Board has had to balance two separate interests, both of which the Act is intended to foster and protect: The interest of employees and society in the stability that is essential to the effective

<sup>62</sup> *Campbell Offset Printing Co., Inc.*, 92 NLRB 1421. (The Board directed an election with the individual's name on the ballot.)

<sup>63</sup> See Fifteenth Annual Report, p. 36, and previous Annual Reports cited there.

<sup>64</sup> *White-Washburne Co., Inc.*, 1-RC-1553 (not printed).

<sup>65</sup> *White-Washburne Co., Inc.*, cited above. Cf. *The Graphic Arts Association*, 91 NLRB 565, where the Board reaffirmed the principle that "the authority of a bargaining agent must be sought in the employees, consent and not in the extent of a union's jurisdiction."

<sup>66</sup> *Johnson Printing Inc.*, 92 NLRB 1426.

<sup>67</sup> *Rock-Ola Mfg. Corp.*, 93 NLRB 1196.

encouragement of the practice of collective bargaining, and the sometimes conflicting interest of employees to select and change their representatives at will.<sup>1</sup>

In the cases in which the effect of an asserted contract had to be determined, the Board has generally followed its established "contract bar" rules but with two major changes. One change was to eliminate the old rule that the reopening of a contract—when not specifically provided for in the contract—opened the contract to a petition for a new determination of the employees' choice of representative.<sup>2</sup> The Board declared this to be outmoded both by modern bargaining practice and by the present sophistication of employees in representation matters. The other change was an adjustment of the premature extension rule to fit the 60-day notice provision of section 8 (d).<sup>3</sup>

The contract bar rules apply equally in both certification and decertification proceedings.<sup>4</sup> The basic rule is that a contract, whether newly executed or renewed under an automatic renewal clause,<sup>5</sup> is a bar to an election among the employees covered until shortly before its termination date. To come within this rule the contract must be a valid written agreement, signed by the parties, (1) recognizing the employees representative as exclusive bargaining agent, (2) containing substantive terms and conditions of employment for all employees in a unit appropriate for collective bargaining, and (3) extending for a definite and reasonable period.<sup>6</sup>

Thus, the Board has consistently held that an oral contract will not bar an election.<sup>7</sup> This applies even if the contract is executed in writing after the filing of a petition and made retroactive.<sup>8</sup> Nor is an unsigned contract effective as a bar;<sup>9</sup> nor a contract which is not signed by the proper parties.<sup>10</sup>

In determining what constitutes a contract of sufficient scope to bar an election, the Board rejected the following as election bars: A "letter of understanding" regarding the reinstatement of a former contract;<sup>11</sup> an agreement limited to wages;<sup>12</sup> contracts covering only

<sup>1</sup> See the dissenting opinion of Chairman Herzog and Board Member Murdock in *Harrisburg Railways Co.*, 94 NLRB No. 151.

<sup>2</sup> See subsec. 5 of this section, Change in Rule on Reopening of Contracts, p. 73.

<sup>3</sup> See subsec. 7 of this section, Change in Rule on Renewals, p. 78.

<sup>4</sup> *Behlehem-Sparrows Point Shipyards, Inc.*, 5-RD-44 (not printed).

<sup>5</sup> Fifteenth Annual Report, p. 61.

<sup>6</sup> In connection with a contract bar question, the Board presumes in a representation proceeding that the contracting union had representative status among the employees covered and does not admit evidence on the question whether at the time of the execution of the contract the union had been designated by a majority of the employees. *Sport Girl Co. et al.*, 2-RC-1743 (not printed); *Columbia River Salmon and Tuna Packers Assn.*, 91 NLRB 1424.

<sup>7</sup> *Weyerhaeuser Timber Co.*, 93 NLRB 842; *Alpert & Alpert*, 92 NLRB 806.

<sup>8</sup> *Engineering Metal Products Corp.*, 92 NLRB 823; *Monark Silver King, Inc.*, 94 NLRB No. 46.

<sup>9</sup> *Safeway Stores, Inc.*, 16-RC-547 (not printed).

<sup>10</sup> *International Shoe Co.*, 93 NLRB 331; *Harrell Owens Co.*, 92 NLRB 160.

<sup>11</sup> *Southern Heater Corp.*, 91 NLRB 1118.

<sup>12</sup> *Associated Transport, Inc.*, 93 NLRB 1564.

pensions and insurance;<sup>13</sup> and one providing only for arbitration services.<sup>14</sup>

However, a properly executed contract still may be destroyed as a bar to an election by other defects. Among such things which the Board has held will render a contract ineffective as a bar are: Provisions which are inconsistent with the policies of the act, such as an unauthorized union shop or a preferential hiring clause; a substantial change in the status of the bargaining agent which made the contract, such as a schism within the union; unreasonable duration, or premature extension, of the contract. These are discussed in the remainder of this section.

### 1. Effect of Invalid Union-Security Clauses

The Board since its inception has consistently held that a contract containing a clause contrary to the basic policies of the act will not bar an immediate election. This rule was developed originally to deal with contracts of unions found to be dominated by employers and contracts covering units based solely on race or sex. However, under the amended act, this long-established rule has come into play most frequently in cases involving contracts that contain invalid union-security clauses. These illegal clauses fall generally into two types: (1) A clause which conforms to the union-security provisions of the act, except that it was not authorized by a referendum of employees as formerly required,<sup>15</sup> or (2) a clause containing provisions that go beyond the limited union security permitted by section 8 (a) (3) of the act. The Board has held that the existence of an invalid provision of either type rendered a contract ineffective as a bar to a representation election, regardless of whether or not the provision has been enforced.<sup>16</sup>

#### a. Failure To Provide 30-Day Grace Period

Unauthorized clauses were less common in cases coming to the Board during the past fiscal year, but clauses going beyond the union-security provisions permitted by the act continued to be quite numerous. In many of these cases the contract fell as an election bar because it did not conform to the statutory limitation that employees may be required to join a union only "on or after the thirtieth day following the beginning of . . . employment or the effective date of [the]

<sup>13</sup> *R-P & C Valve Div., American Chain & Cable Co., Inc*, 94 NLRB No. 149; *J. P. O'Neil Lumber Co*, 94 NLRB No. 190.

<sup>14</sup> *Texas Telephone Co*, 93 NLRB 741.

<sup>15</sup> The union-shop authorization poll was abolished by amendment to the act in Public Law No. 189, approved by the President October 22, 1951. See sec. F of this chapter, The Union-Shop Referendum, and appendix C, Text of the Amended Act. The following cases were all decided before the amendment: *Muntz Television, Inc*, 92 NLRB 29, *Indiana Limestone Co., Inc*, 92 NLRB 1337, *Liberty Music Shops, Inc*, 93 NLRB 178; *Standard Steel Spring Co.*, 90 NLRB 1805.

<sup>16</sup> *Standard Steel Spring Co.*, 90 NLRB 1805 (unauthorized clauses); *McCoy Truck Tire Recap Co.*, 93 NLRB 667 (illegal terms); see also *Chester Glass Co*, 92 NLRB 1016.

agreement, whichever is the later.”<sup>17</sup> This requirement of a 30-day grace period does not apply to employees who are already members of the union, but only to employees (a) who are not members on the effective date of the agreement or (b) who are hired after that date.<sup>17a</sup>

In the interpretation of this 30-day grace requirement, the Board declared that it had “no authority to construe the 30-day provision . . . other than literally.”<sup>18</sup> Consequently it was constrained to hold that a clause requiring employees to join the union on or after the 29th day following the beginning of their employment, rendered the agreement invalid.<sup>19</sup>

### b. Preferential Hiring Clauses

Agreements which give preference in hiring to union members are another type of invalid union-security clause which remove a contract as a bar to an election.<sup>20</sup> Found to be in this category was a requirement that new employees who were not union members had to obtain clearance from the union. The Board held that this arrangement gave improper preference to union members, who did not have to obtain such clearance.<sup>21</sup> The Board also held invalid a provision that new employees must be “satisfactory to both parties.”<sup>22</sup> A majority of the Board found that this provision was intended and utilized as an invalid form of union security.<sup>23</sup> But a contract clause which provided for filling vacancies on a seniority basis and obligated the employer to notify the union of the existence of vacancies was held to be valid.<sup>24</sup> The Board construed this clause as not dealing with union security.

### c. “Membership in Good Standing”

A question also arose as to whether a contract requiring employees to maintain “membership in good standing” is permissible under the act. The Board ruled unanimously that “Congress intended by the word ‘membership’ to permit a requirement of membership in good standing.”<sup>25</sup> Pointing out that this is the established practice in the field of labor relations, the Board noted that, under the Wagner Act,

<sup>17</sup> Sec 8 (a) (3), *Rock-Ola Mfg Corp*, 93 NLRB 1196, *Continental Carbon, Inc*, 94 No 148, *Anaconda Wire and Cable Co*, 94 No. 222, *Wheelco Instrument Co*, 13-RC-1096 (not printed); *National Lock Washer Co*, 13-RC-1223 (not printed); *Aluminum Co. of America*, 93 NLRB 1190; *John Hancock Mfg Co.*, 21-RC-1610 (not printed)

<sup>17a</sup> *Charles A Krause Milling Co*, 97 NLRB No 75 (decided Dec 14, 1951)

<sup>18</sup> *Chesler Glass Co*, 92 NLRB 193

<sup>19</sup> *Chesler Glass Co.*, cited above.

<sup>20</sup> *Muntz Television, Inc*, 92 NLRB 29, *Indiana Limestone Co, Inc*, 92 NLRB 1337.

<sup>21</sup> *McCoy Truck Tire Recap Co*, 93 NLRB 667.

<sup>22</sup> *Newton Investigation Bureau*, 93 NLRB 1574, Chairman Herzog, dissenting, was of the opinion that rather than to hold that the contract was not a bar to a present election, the effect on the validity of the contract of any practice of the parties to require union membership as a condition of employment should be left to be fully litigated in an unfair labor practice proceeding.

<sup>23</sup> Where the terms of an asserted agreement are ambiguous, the Board determines from the evidence whether, and what type of, union security was intended by the parties. See *Snyder Engineering Corp.*, 90 NLRB 783 Cf *O F Shearer & Sons*, 93 NLRB 1228

<sup>24</sup> *Northern Indiana Public Service Co*, 91 NLRB 172

<sup>25</sup> *Firestone Tire and Rubber Co*, 93 NLRB 981

it had followed this interpretation consistently, and Congress, in adopting the 1947 amendments, made no change in the language of the former statute on this point. The Board concluded that the amended act's prohibition against discharge of employees who lose their membership for reasons other than nonpayment of dues or initiation fees does not change the type of membership which a union may require.

Similarly, the Board upheld as a bar a contract which required membership "in good standing in accordance with the Union's Constitution and Bylaws as a condition of employment."<sup>26</sup>

#### d. What Constitutes Periodic Dues

The act limits union-security provisions to those requiring discharge of nonunion employees for one reason only: "Failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."<sup>27</sup>

In the interpretation of this proviso, the Board has ruled that fines, even though termed a "dues increase" and intended to stimulate attendance at union meetings, do not come within the meaning of the statutory term "periodic dues."<sup>28</sup> Nor do "general assessments."<sup>29</sup>

Of a nonattendance charge of 50 cents a month which did not come due until after a member had failed to attend a union meeting, a majority of the Board said:

We cannot consider such a charge, with the conditions attached, as regular monthly dues. In our opinion it is nothing other than a fine. . . .

The statute specifies that the "periodic dues" be uniformly required. This we read essentially to include the requirement that such dues be charged to all members alike and that any distinctions in amount be based upon reasonable general classifications. A charge which distinguishes between individual members who attend particular meetings and those who do not attend particular meetings, in our opinion, is not one "uniformly" applied. We do not doubt that a member's attendance at a union meeting is highly desirable and salutary to carry out the democratic process. But, as we have already held, the Act as written may not be used as a mean of requiring such attendance. The Act's machinery is equally unavailable to enforce the collection of a *fine* to accomplish this union objective.<sup>30</sup>

In another case, the Board was confronted with the question of the legality of a contract clause requiring that employees, to retain their jobs, must maintain "membership in the union to the extent of current monthly dues, general assessments and initiation fees, if any. . . ."<sup>31</sup>

<sup>26</sup> *RCA Service Co., Inc.*, 94 NLRB No 154.

<sup>27</sup> Sec 8 (a) (3), proviso (B)

<sup>28</sup> *Electric Auto-Lite Co.*, 92 NLRB 1073 (Board Member Styles dissenting) This was an unfair labor practice case.

<sup>29</sup> *International Harvester Co., Foundry Division (Joltsville Works)*, 95 NLRB No. 80.

<sup>30</sup> *Electric Auto-Lite*, cited above

<sup>31</sup> *International Harvester Co.*, cited above.

The Board ruled unanimously that the requirement to pay "general assessment" to continue employment went beyond the union security permitted by the act. Noting that assessments involved did not "contain any element of regularity or periodicity," the Board's unanimous opinion said:

This Board has the duty to administer the Act in accord with the letter of the Act and the evident intent of the Congress that passed it. The only possible interpretation of that intent, based upon legislative history, leads us to the conclusion that the assessments involved in this case are not encompassed within the term "periodic dues" as used in Section 8 (a) (3) of the Act. . . .

It appears that Congress intended to eliminate the nonpayment of assessments, as such, as a basis for discharge of employees. It is our duty to follow that intent.

Therefore, the Board ruled, the contract containing this clause could not constitute a bar to an election.

#### e. Deferred or Amended Clauses

The presence of an illegal union-security clause, however, has not prevented a contract from barring an election, if the application of the clause was clearly deferred until the contracting union was duly authorized in a union-shop referendum under section 9 (e) <sup>32</sup> or until its legality is established.<sup>33</sup> If the contracting union later obtained the necessary authority under section 9 (e), the union-security clause became automatically effective, but if it exceeds the limits provided in section 8 (a) (3) the contract of which it is a part ceases then to be a bar to a representation election.<sup>34</sup> The Board has consistently held that the mere insertion of a general severability clause does not properly defer application of an illegal union-security provision and does not preserve the contract as a bar.<sup>35</sup> Nor is there such a deferment where the saving clause permits the illegal union-security provisions of the contract to operate until the proper tribunal declares it invalid.<sup>36</sup> An oral understanding that a union-security clause shall not become operative until it can become legally effective also was held insufficient to save the contract as a bar.<sup>37</sup>

While the proper rescission or correction of an illegal union-security provision will validate the contract as a bar to a representation election, the amendment of the contract is not effective for contract bar purposes if it is not made until after the filing of the petition.<sup>38</sup>

<sup>32</sup> *Asplundh Tree Expert*, 92 NLRB 1013. The requirement of such referendum was abolished by amendment to the act contained in Public Law No. 189, approved by the President October 22, 1951.

<sup>33</sup> *Sa-Mor Quality Brass, Inc., et al.*, 93 NLRB 1225.

<sup>34</sup> *Aluminum Co of America*, 93 NLRB 1190.

<sup>35</sup> *Sonotone Corp.*, 90 NLRB 1236, *Wheelco Instrument Co.*, 13-RC-1096 (not printed); *O. F. Shearer & Sons*, 93 NLRB 1228.

<sup>36</sup> *Muntz Television, Inc.*, 92 NLRB 20, *Indiana Limestone Co., Inc.*, 92 NLRB 1337; *Sa-Mor Quality Brass, Inc., et al.*, 93 NLRB 1225

<sup>37</sup> *Sonotone Corp.*, 90 NLRB 1236

<sup>38</sup> *Snyder Engineering Corp.*, 90 NLRB 783.

## 2. Coverage of Contract

Because an election petition raises a question only as to the representation of employees in the unit sought, a contract naturally is not a bar unless it covers at least a substantial number of the employees in the unit. Thus, an election is not barred by a contract from which the employees sought in the petition are specifically excluded.<sup>39</sup> This is true also where the parties to the contract have substantially departed from the unit previously certified by the Board.<sup>40</sup> Similarly, a contract does not bar an election among the employees in a new plant subsequently acquired by the employer, even though the contract specifically provides for the coverage of companies acquired later.<sup>41</sup>

### a. Master Contracts

Master contracts often present problems of coverage. For example, a master contract was held no bar to an election at one of the employer's plants where by its own terms it was not effective because no local agreement had been completed at the time of the petition.<sup>42</sup> Nor was a master contract held to bar an election at a new plant for which the contracting union had not been certified and the inclusion of the plant in the master agreement had not been negotiated between the parties as required by the agreement.<sup>43</sup>

However, a master contract which provided for execution of local supplemental agreements was held to cover employees of a single plant as a full-scale collective bargaining agreement and therefore a bar to an election, when the master agreement was a 13-page document of 75 clauses setting forth hours of work, holiday and overtime pay provisions, seniority, vacations, grievance procedure, retirement, and various insurance benefits.<sup>44</sup> In this case, the master contract was found to be the basic agreement and the local supplemental agreements merely served to fill out its terms as to certain local conditions.

### b. New, Resumed, or Expanded Operations

A contract is not a bar if executed at a time when actual operations at the plant covered have not begun and the employer has not yet

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<sup>39</sup> *The Baltimore Transit Co., et al.*, 92 NLRB 688; *Reynolds Metals Co.*, 93 NLRB 721.

<sup>40</sup> *Continental Can Co., Inc.*, 91 NLRB 500. Board Member Murdock, dissenting, was of the opinion that the case was not within the principle announced in the *Savannah Electric and Power* case, 48 NLRB 33, relied on by the majority.

<sup>41</sup> *Sinclair Refinery Co.*, 92 NLRB 643.

<sup>42</sup> *U. S. Rubber Co.*, 13-RC-1351 (not printed).

<sup>43</sup> *Cadillac Motor Car Division*, 94 NLRB No 41; cf. *Phelps-Dodge Corp.*, 93 NLRB 990, where similar conditions in a contract had been complied with and the contract was, therefore, held to bar the petition of a rival union.

<sup>44</sup> *Pillsbury Mills, Inc.*, 92 NLRB 172.

recruited a representative complement of employees.<sup>45</sup> And a contract which provided for the transfer of the employees to a new location was held not to bar an election at the new plant, where only a small number of the employees covered by the contract transferred and the employer had to hire a large contingent of new employees. Under these circumstances, the Board was of the opinion that the new plant was equivalent to a completely new operation.<sup>46</sup> Moreover, an automatically renewed contract was held no bar where automatic renewal occurred while the plant was shut down indefinitely and operations were subsequently resumed with new employees because the former employees were no longer available.<sup>47</sup> However, a contract covering a unit which expanded after its execution will be a bar to an election if there has been no material change in the scope and character of the unit and if the original working force is representative of the employees in the unit at the time of the petition.<sup>48</sup>

A contract covering an association-wide multiemployer unit was held no bar to an election among the employees of an employer who had withdrawn from the association.<sup>49</sup>

### 3. Schism and Change in Status of Contracting Agent

In cases in which a contract bar is asserted, the Board is at times confronted with situations in which all or a large part of the employees covered by the contract appear to have repudiated the contracting union by formally transferring their allegiance to another representative. It has been the Board's policy<sup>50</sup> to proceed with the determination of representatives whenever such defections raise a substantial doubt as to the identity of the representative which is the employees' present choice. In the Board's judgment, the resolution of such a doubt is necessary in the interest of the stability in labor relations which the act seeks to promote.

While, in extreme cases, uncertainty as to the contracting union's majority status may clearly result from intraunion dissension,<sup>51</sup> the Board in order to find that the doubt arising from a schism in the contracting union is substantial enough to justify an election, has generally "required as a minimum \* \* \* that the members of the

<sup>45</sup> *Leighton Furniture Corp.*, 94 NLRB No. 58, cf. *H Muehlstein and Co.*, 93 NLRB 1273

<sup>46</sup> *Richard Alan Bulton Co.*, 94 NLRB No. 219.

<sup>47</sup> *Sheets & Mackey*, 92 NLRB 179, see also *Decca Records, Inc.*, 93 NLRB 819.

<sup>48</sup> *H Muehlstein and Co.*, 93 NLRB 1273, *Corning Glass Works*, 93 NLRB 775.

<sup>49</sup> *Economy Shade Co.*, 91 NLRB 1552

<sup>50</sup> *Carson Pirie Scott*, 69 NLRB 935 (1946), but see *Sagmaw Furniture Shops*, 97 NLRB No. 231.

<sup>51</sup> See, for instance, *John Hancock Mutual Life Insurance Co.*, 93 NLRB 778, where "extreme confusion and uncertainty" was shown by the expulsion of the contracting union from its parent organization, the following disaffiliation of a large number of its locals, and the merger of the expelled union into another organization.

contracting union, gathered at a meeting held for such purpose, have expressed through a formal vote their desire to take action affecting the existence or continued functioning of the union concerned.”<sup>52</sup> In one case in which an election was held justified on these grounds, the Board rejected the contention that the above standards were not met when members of the contracting local union at two plants covered by separate contracts convened separately rather than jointly.<sup>53</sup> The Board observed that both meetings were specially convened by the chief officers of the local for disaffiliation purposes. In another case, the Board considered it immaterial that the contracting union had not been formally dissolved and its charter had not been returned to its parent federation.<sup>54</sup>

One case in which a question of schism arose presented the following circumstances: Members of a local union, which had made the contract, voted to disaffiliate from one national union and affiliate with another. The vote was taken at a special meeting called by the local officers for that purpose. The original parent national union declined to recognize the disaffiliation, and another group of members in the plant elected new officers in the name of the old local. The new officers processed a grievance and conferred informally with the employer about reopening the wage provisions of the contract. The Board declined to rule upon the legal validity of the disaffiliation, but it held that these circumstances revealed such a schism in the contracting union's organization as to remove the contract as a bar to an election.<sup>55</sup>

Similarly, a majority of the Board held in another case that, because of the schism within the contracting union, its contract was no bar to a present determination of the employees' representative, notwithstanding that the contracting union continued to process grievances and to hold monthly meetings and that four of its five officers remained loyal.<sup>56</sup>

On the other hand, an election will not be directed if the contracting union, notwithstanding disaffiliation action, has continued to function and to represent the employees as before. Under these circumstances, the contract will be held a bar, particularly where it does not appear

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<sup>52</sup> *Columbia River Salmon and Tuna Packers Association, et al.*, 91 NLRB 1424, see also *Boston Machine Works Co.*, 89 NLRB 59, Fifteenth Annual Report, p. 64, and *Tourek Manufacturing Co.*, 90 NLRB 5.

<sup>53</sup> *American Radiator and Standard Sanitary Corp.*, 93 NLRB 7. For other cases where schism was found, see *Radio Station WBNY*, 92 NLRB 1561; *John Hancock Mutual Life Insurance Co.*, 93 NLRB 778.

<sup>54</sup> *Shawinigan Resins Corp.*, 91 NLRB 354, see also *The Edwin H. Fuller Co.*, 90 NLRB 1880.

<sup>55</sup> *Radionic Products Div., Radionic Controls, Inc.*, 91 NLRB 595

<sup>56</sup> *Harrisburg Railways Co.*, 94 NLRB No 151. Chairman Herzog and Member Muddock, dissenting, believed that the disaffiliation in this case did not create such confusion in the bargaining relationship between the employer and the contracting union that the contract could no longer promote stability in industrial relations. They said that the application of the schism doctrine to the facts of the case might encourage raiding by rival unions during the life of an existing contract.

that the petitioner has acted on behalf of the employees,<sup>57</sup> or where the disaffiliation was not in fact successful.<sup>58</sup> And a Nation-wide contract was held to bar an election where defection from the contracting union was limited to one of 35 locals covered by the contract and the local involved continued to function and to be recognized by the employer.<sup>59</sup>

Since the only question to be determined in schism cases is whether such confusion exists as to the status of the contracting union that the contract no longer serves to stabilize labor relations,<sup>60</sup> the Board will not pass upon the legal validity of the disaffiliation action<sup>61</sup> or the property rights or collective bargaining duties of the parties.<sup>62</sup>

As in the case of a schism within the contracting union, a contract will not be held to bar an election if the bargaining agent has abandoned its contract or has become defunct and has ceased to exist.<sup>63</sup>

#### 4. Duration of Contracts

Originally, in applying the "reasonable period" yardstick, the Board declined to recognize a contract as a bar to an election for more than 1 year except under unusual circumstances, or unless contracts for longer periods were customary in the particular industry.<sup>64</sup> More recently, as collective bargaining relationships began to stabilize, the Board has adopted the 2-year term as its standard for a reasonable period.<sup>65</sup> Adhering to this policy, the Board during the past year again held that "in the absence of custom in the industry, a contract for more than 2 years is presumed to be unreasonable and therefore a bar to a representation petition only during the first 2 years of its existence."<sup>66</sup> The 2-year rule applies to a contract of indefinite duration, which will not be recognized as a bar where 2 years or more have elapsed since the making of the contract.<sup>67</sup>

The Board has also held that when automatic renewal of a contract has been forestalled by proper notice, the contract cannot bar an election during negotiations for new terms. This is true even though the contract provides that, in the event of proposed substantial changes, all other provisions of the contract are to remain in full force and effect and the newly negotiated provisions are to become part

<sup>57</sup> *Diagraph-Bradley Industries, Inc.*, 91 NLRB 605 (Board Members Houston and Reynolds dissenting).

<sup>58</sup> *Columbia River Salmon and Tuna Packers Association, et al.*, 91 NLRB 1424.

<sup>59</sup> *RCA Service Co., Inc.*, 94 NLRB No. 154.

<sup>60</sup> *The Edwin H. Fuller Co.*, 90 NLRB 1880.

<sup>61</sup> *Radionic Products Division, Radionic Controls, Inc.*, cited above; *Shawinigan Resins Corp.*, cited above.

<sup>62</sup> *The Chesapeake & Potomac Telephone Co. of Baltimore City*, 5-RC-682 (not printed); *American Radiator and Standard Sanitary Corp.*, 93 NLRB 7; *Dewey & Almy Chemical Co.*, 94 NLRB No. 178.

<sup>63</sup> *Brown & Williamson Tobacco Co.*, 92 NLRB 1330; *Kerrigan Iron Works, Inc.*, 10-RC-1154 (not printed).

<sup>64</sup> *National Sugar Refining Co. of N. J.*, 10 NLRB 1410 (1939).

<sup>65</sup> *Reed Roller Bit Co.*, 72 NLRB 927 (1947).

<sup>66</sup> *Interstate Brick Co.*, 91 NLRB 1428; *San Francisco Retailers Council*, 90 NLRB 1803.

<sup>67</sup> *Stone & Webster Engineering Corp.*, 94 NLRB No. 39.

of the contract as amendments. Such a provision, the Board stated, "rendered the contract, at best, one of indefinite duration which, under the circumstances, cannot preclude a determination of representatives."<sup>68</sup> Similarly, the Board held that where timely notice had been given of a desire to modify an automatically renewable contract, a subsequent agreement to continue the contract in effect indefinitely until negotiations for a new contract were completed did not reinstate the contract as a bar to a representation petition.<sup>69</sup>

Unlike contracts of indefinite duration, contracts which may be terminated at the will of the parties are not a bar at any time. This rule has been applied generally where the original term of a contract was subject to such termination,<sup>70</sup> but the Board has also held that provisions to continue the contract, after notice of intended modification is given, "until an agreement was reached, or failing agreement, until either party served a termination notice" transformed the contract into one terminable at will, which cannot preclude an election.<sup>71</sup>

As heretofore, the Board has held that a contract which, at the time of the Board's decision is about to expire, does not bar an election.<sup>72</sup>

## 5. Change in Rule on Reopening of Contracts

Under past Board rules, the reopening of a contract would open the way for a new representation election unless the reopening was specifically provided for in the contract.<sup>73</sup> And in reopenings under a contract clause, the reopened negotiations had to be confined strictly to areas provided by the reopening clause in order to maintain the contract as a bar.

This general rule was a corollary of the doctrine that the premature extension of a contract, before its term had run, entitled employees to a new choice of representative if they wanted it.<sup>74</sup> Both rules were designed to forestall any effort to thwart the statutory guarantee to employees of full freedom in choosing their bargaining representative. The Board long held that, in either type of situation, the employees were entitled to an immediate election of representative if a petition were filed before the expiration date of the original contract.

<sup>68</sup> *Inco Co*, 93 NLRB 745.

<sup>69</sup> *Rooney Optical Co.*, 8-RC-767 (not printed).

<sup>70</sup> *Mountain States Telephone and Telegraph Co.*, 30-RC-276 (not printed); *Texas Telephone Co.*, 93 NLRB 741.

<sup>71</sup> *Great Lakes Carbon Co.*, 92 NLRB 507; *Mount Shasta Pine Manufacturing Co*, 92 NLRB 1138.

<sup>72</sup> *Dictaphone Corp*, 90 NLRB 962; *Evening News Publishing Co.*, 93 NLRB 1355.

<sup>73</sup> *Gay Games, Inc.*, 88 NLRB 250 (1950) (reopening beyond scope of clause); *Greenville Finishing Co., Inc.*, 71 NLRB 436 (1946) (reopening within scope and discussion of origin of rule); *U. S. Vanadium Corp.*, 68 NLRB 389 (1946) and *Olin Industries, Inc*, 67 NLRB 1043 (1946); *Great Bear Logging Co.*, 59 NLRB 701; *Chapman Valve Manufacturing Co.*, 40 NLRB 800. These decisions were specifically overruled by *Western Electric Co., Inc*, 94 NLRB No. 9.

<sup>74</sup> See subsec. 9 of this section, *Premature Extension of Contracts*.

In the interest of putting bargaining relationships upon a more stable and predictable basis, the Board since 1949 has permitted prematurely extended agreements to continue as a bar for the term of the original agreement.<sup>75</sup>

During the past year, the Board also reexamined its rule on reopenings in the light of (1) the bargaining scheme of the present statute as set forth in section 8 (d); (2) the realities of bargaining as practiced today; (3) the present sophistication of employees in representation matters; and (4) the need to stabilize labor-management relations as far as possible without depriving employees of their right to an opportunity to change bargaining agents, if they wish, at reasonable and predictable intervals. As a consequence, the Board decided unanimously to discard the old rule. Instead, it adopted the policy that the reopening or modification of a contract by mutual consent, whether or not it contains a reopening clause, does not open it up to an election before the normal time, near the end of the contract's original term.<sup>76</sup>

The Board stated the new rule as follows:

Whether or not an exclusive bargaining contract contains a provision for modification, and regardless of the scope of such a modification provision if provided for in the contract, the parties may renegotiate or modify any of the provisions of the contract during its term, if done by mutual assent, without "opening up" the contract to an otherwise prematurely filed petition. . . . Rival union petitions will of course continue to be timely if appropriately filed in relation to the original contract term.<sup>77</sup> This does not lift the premature extension rule.<sup>78</sup>

In reaching this result, the Board reasoned:

A number of factors impel this determination. Foremost among these is the need for increased stability in industrial relations. By this holding, such stability will be achieved in relatively large measure, at a minimum sacrifice of the sometimes conflicting statutory policy of protecting employees' freedom to change their representatives. As time has gone on, employees have become increasingly familiar with their collective bargaining rights under the Act and have acquired a better knowledge of the unions available and chosen to represent them. This being so, an apposite modification of Board contract bar rules to encourage continuity will not operate seriously to prejudice any party concerned.

Rival union petitioners normally expect, and are expected, to file for change of bargaining representative only at the appropriate time before the contract's automatic renewal date or terminal date, as the case may require. They are not entitled to governmental encouragement of a practice of filing at a time entirely dependent upon the fortuity of the contracting parties' mutual undertaking to modify their contract, while it is still current, although without the benefit or beyond the scope of a modification clause in the contract.

<sup>75</sup> *Republic Steel Corp.*, 84 NLRB 483.

<sup>76</sup> *Western Electric Co., Inc.*, 94 NLRB No. 9 (Board Member Reynolds not participating)

<sup>77</sup> *Western Electric Co., Inc.*, cited above.

<sup>78</sup> See subsec. 9 of this section, *Premature Extension of Contracts*, and subsec. 7, *Change in Rule on Renewals*.

Employees will not be prejudiced, as they stand to gain in the form of benefits becoming immediately available as a result of modified contract provisions freely negotiated, in the light of changed conditions, by their employer and the incumbent union.

## 6. Forestalling Contract Bar

The question of whether an existing contract should be held to bar a present election frequently depends upon the time when the contract was made or renewed. The Board has established certain rules fixing the time when a petition must be filed, or when a competing representation claim must be asserted, in order to forestall a contract between the employer and incumbent union from becoming a bar to a rival petition. In general, the same rules apply to a renewal of a prior contract.

### a. Timeliness of Petition

In view of the Board's change in the rule on contract renewals under the 60-day notice provision of section 8 (d), a petition normally should be filed at least 61 days prior to the expiration of the contract, or earlier in the case of a contract which provides for automatic renewal earlier than 60 days from expiration.<sup>79</sup>

This rule stems from the Board's decision that when the parties to a contract elect to give 60-day notice under section 8 (d) and thereupon make a new contract, the new contract will constitute a bar to an election.<sup>80</sup> However, if the parties do not give such notice, petitions continue to be timely up until the day before automatic renewal date, if the contract has one,<sup>81</sup> or until a new contract is made after expiration of the old one, if there is no provision for automatic renewal.

The general rule still prevails that a contract made or renewed after the filing of a petition does not bar an election. Nor does a contract made or renewed in the face of a rival petition become operative as a bar to a subsequent amendment to the petition if the amendment is insubstantial, such as a minor change in the unit requested.<sup>82</sup>

In determining the timeliness of a petition, the Board's general rule is that the effective date rather than the execution date of the contract is controlling. Accordingly, a petition filed after the execution date of the contract but before the effective date is timely.<sup>83</sup> However, a contract executed after the filing of a petition but effective retroactively does not bar the petition.<sup>84</sup>

<sup>79</sup> See subsec. 7 of this section, Change in Rule on Renewals

<sup>80</sup> *De Soto Creamery and Produce Co.*, 94 NLRB No. 229 (Chairman Herzog and Board Member Reynolds dissenting).

<sup>81</sup> *Miles Laboratories, Inc.*, 92 NLRB 23

<sup>82</sup> *Westinghouse Air Brake Co.*, 6-RC-534 (not printed).

<sup>83</sup> Cf. *De Soto Creamery and Produce Co.*, cited above

<sup>84</sup> *Southern Heater Corp.*, 91 NLRB 1118

Petitions for representation elections may also be filed too early in the term of an existing contract. In general, however, the Board pursues a liberal policy in regard to early filings. Noting that petitions filed 3 months before the automatic renewal date of a contract have been held timely, the Board stated in the *De Soto* case that the original petition "would have been timely although filed almost three months prior to the 60-day termination."<sup>85</sup> The Board in other cases rejected contentions that petitions were premature where they were filed 2 months before the automatic renewal date or 2½ months before the earliest termination of the contract.<sup>86</sup>

### b. Representation Claims—the 10-Day Rule

The assertion of a representation claim or a request for recognition by a candidate bargaining agent also may forestall the operation of a contract as a bar under certain circumstances.

The Board has consistently held that where a rival union presents an employer with a claim for recognition which has a substantial and recognizable basis, the subsequent execution or renewal of a contract with another union does not bar an election.

A bare and unsupported claim to majority representation also will forestall such a contract as a bar, if the claimant files a petition within 10 days from the date of the claim, under the Board's 10-day rule.<sup>87</sup> The Board applied this rule in one case where the representation claim was served on the employer after he had made an oral agreement with another union but 1 day before the oral agreement was reduced to writing.<sup>88</sup> The claiming union in this case proceeded to file its petition within 10 days, and it was held timely. The rule also was applied when the petitioning union served notice of its claim 5 days before the employer executed a contract with another union, and filed its petition within 10 days. The contract was held no bar to an election.<sup>89</sup>

The question of what constitutes such a substantial basis for a claim that it will forestall a subsequent contract's operation as a bar was raised in at least two cases during the past year. In one case, the Board found that a claim for recognition accompanied by notice of a schism within the incumbent union and followed by unfair labor practice charges "was substantial and had a demonstrated founda-

<sup>85</sup> *De Soto Creamery*, cited above.

<sup>86</sup> *International Harvester Co.*, 90 NLRB 1905, *Marine Optical Mfg. Co.*, 92 NLRB 571. In the latter case the Board also noted that the contracting union was dissolved before the filing of the petition.

<sup>87</sup> This rule is known also as the *General Electric X-Ray* doctrine, from the case of that name in which it was announced, 67 NLRB 997 (1946). For a recent application of the rule, see *Gerber Products*, 93 NLRB 1668, which also involves a question of identity of the employer during the transfer of operations of a plant from one company to another.

<sup>88</sup> *Alpert & Alpert*, 92 NLRB 806. The decision noted, "The Board has repeatedly held that an oral contract has no standing as a bar to a representation proceeding."

<sup>89</sup> *Cooper's, Inc.*, 92 NLRB 1900.

tion.”<sup>90</sup> Accordingly, the Board held that a contract between the employer and the incumbent union made after this claim did not bar a petition filed 2 months later. In another case, the Board held that the petitioner’s representation claim was substantial where the petitioner had a contract with the employer and upon its termination sought to negotiate a new contract.<sup>91</sup> Consequently, a contract made by the employer with another union after this claim did not bar a petition filed after execution of the contract.

For the purpose of establishing whether a timely representation claim has been made, the date of the employer’s receipt of notice of the claim is controlling, rather than the date of mailing of the notice.<sup>92</sup> Thus, a claim was held too late when the employer did not receive the letter requesting recognition as majority representative until the day after the execution of the contract.<sup>93</sup> Nor was a claim contained in a letter, addressed to an official no longer with the company, which was returned to the post office unopened held sufficient, because the employer had no actual knowledge of the claim before the execution of the contract.<sup>94</sup> Nor was such a claim sustained where the petitioner stated its claim in a letter sent by ordinary mail and there was no evidence that the employer had ever received the letter.<sup>95</sup>

The filing of a petition under the 10-day rule is governed by section 102.86 of the Board’s Rules and Regulations, Series 6. Therefore, a petition received in the regional office on the 11th day after the demand for recognition is timely where the 10th day falls on Sunday.<sup>96</sup> In one case, in which the petition was filed in the wrong regional office of the Board, but later transferred to the proper regional office, the Board held that in case of a faulty original petition, which is later perfected, the date of the original petition shall govern in applying the 10-day rule.<sup>97</sup>

### c. Automatic Renewal

Because a major share of collective bargaining agreements provide for automatic renewal, the Board in contract bar cases is often confronted with the question of whether automatic renewal of a contract has been forestalled by a rival union’s assertion of a claim, or by the filing of a petition. The basic rule in such cases is that, to prevent an automatically renewed contract from becoming a bar, the rival claim must be made, or the petition must be filed, before the auto-

<sup>90</sup> *Swift & Co*, 94 NLRB No. 137.

<sup>91</sup> *National Chemical & Manufacturing Co.*, 94 NLRB No. 184

<sup>92</sup> *Southern Heater Corp.*, 91 NLRB 1118.

<sup>93</sup> *Keystone Tanning and Glue Co.*, 92 NLRB 201

<sup>94</sup> *Snyder Engineering Corp.*, 90 NLRB 783.

<sup>95</sup> *Miles Laboratories, Inc.*, 92 NLRB 23.

<sup>96</sup> *Standard Nut and Bolt Co.*, 92 NLRB 412.

<sup>97</sup> *International Shoe Co.*, 93 NLRB 331.

matic renewal date of the contract.<sup>98</sup> However, this rule has been modified in cases where the parties elect to give notice under section 8 (d). In these cases, the petition must be filed before such notice is given.<sup>99</sup> Moreover, renewal whether automatic or otherwise does not open the way for an election during the certification year.<sup>1</sup>

In one case this year, the Board was confronted with the question of the timeliness of a petition filed on the very day on which the contract became automatically renewed.<sup>2</sup> The Board held the petition was too late. The Board ruled that, to be timely, a petition must be filed *before* the effective date of the contract's automatic renewal provision.

Calculating the precise date of automatic renewal occasionally presents a problem. In the case of contracts which provide for notice to be given a specified number of days "prior to the expiration date" of the contract, the Board has followed the practice of taking the last day of the contract's original term as the last day of the automatic renewal period. That day is counted in counting back the required number of days.<sup>3</sup> Thus, for example, where a contract for 2 years is made effective on September 15, with provision for automatic renewal "60 days prior to expiration," the Board counted September 14 of the second year as the last effective day of the contract. In computing the automatic renewal date, this last effective day of the contract—September 14, in this case—is counted as the last day of the automatic renewal period, unless there is plain evidence of a contrary intent in the contract.<sup>4</sup> The automatic renewal date in this case was found to be July 17. In explaining the adoption of this method of calculation, the Board observed that automatic renewal provisions are commonly intended "to provide a period *immediately before the end of the contract term* to negotiate outstanding differences and thus avoid interruption of contractual relations."

## 7. Change in Rule on Renewals

The general rule on contracts which contain automatic renewal clauses is that a petition, to be timely, must be filed before the automatic renewal date. As a corollary to this rule, the Board has held that a new contract executed during the term of a prior contract but before its automatic renewal date constituted a "premature extension"

<sup>98</sup> This is known also in Board decisions as the "Mill B" date, from the name of the first decision dealing with such renewals, *Mill B, Inc.*, 40 NLRB 346 (1942). This is the date mentioned in the contract on which the contract will automatically renew itself unless one of the parties gives notice of an intention to terminate or modify the contract. See *Evans Milling Co.*, 94 NLRB No. 164.

<sup>99</sup> See subsec 7 of this section, Change in Rule on Renewals.

<sup>1</sup> See sec C of this chapter, Impact of Prior Determinations

<sup>2</sup> *Miles Laboratories, Inc.*, 92 NLRB 23.

<sup>3</sup> *Little Rock Furniture Manufacturing Co.*, 80 NLRB 65

<sup>4</sup> *Miles Laboratories*, cited above.

of the prior contract. Therefore the new contract is no bar to a petition filed before the automatic renewal date.<sup>5</sup> But a new contract executed between the automatic renewal date and the expiration date of the prior contract has been held a bar to a petition filed after the automatic renewal date. This rule applies even though the new contract does not take effect until the expiration of the old one.<sup>6</sup>

During the past year, however, the Board made a major change in these rules on the timeliness of petitions in such contract renewal situations. The change resulted from a reexamination of the provisions of section 8 (d). This reexamination was made in a case in which a rival union had filed a petition before the automatic renewal date but after the employer and the incumbent union had given the 60-day notice required by section 8 (d) and thereupon made a new contract which they asserted as a bar. The new contract was executed before the contract's automatic renewal date, which fell 30 days before the expiration date. Concluding that section 8 (d) is "patently designed . . . to have the parties negotiate and execute new contracts between the 60th and 30th day prior to expiration of existing contract," a three-member majority of the Board adopted the rule that a contract made during this period would be held to bar a subsequent petition for election.<sup>7</sup>

The majority opinion stated the new rule as follows:

We shall normally hold in future cases, that a new contract which . . . is executed, pursuant to a 60-day notice under Section 8 (d) (1), in the 60-day period prior to expiration of an existing contract, and which is also executed *prior to the filing of a petition*, will bar the petition, even though the petition is filed prior to a 30-day automatic renewal date of the expiring contract, and prior to the effective date of the new contract

Rival unions, the decision pointed out, "therefore will simply be required to file their petitions more than 60, rather than 30, days prior to the expiration of a contract in this situation."

Detailing the functioning of this new rule in two hypothetical situations posed by the dissenting Board Members, the majority opinion said:

In the situation . . . of a 60-day notice under Section 8 (d) (1) given 75 days in advance of the termination date of an existing contract, a new contract executed in the 15 days following such notice would still be subject to the Board's "premature extension" and "effective date" rules, but a new contract executed anytime thereafter *in the 60-day period prior to the termination date of the existing contract* would receive the protection of the rule here enunciated. Similarly, in the case

<sup>5</sup> *Wichita Union Stockyards Company*, 40 NLRB 369, *Republic Steel Corporation*, 84 NLRB 483.

<sup>6</sup> *Northwestern Publishing Co.*, 71 NLRB 167; *Mississippi Lime Co. of Missouri*, 71 NLRB 472

<sup>7</sup> *De Soto Creamery & Produce Co.*, 94 NLRB No. 229 (Chairman Herzog and Board Member Reynolds dissenting) Chairman Herzog and Board Member Reynolds held that no change in the Board's established contract bar rules was required, because the provisions of 8 (d) are intended to establish a cooling-off period before a work stoppage, and there is no legislative history indicating that Congress intended the Board's contract bar rules were to be changed because of the insertion of 8 (d).

of a 60-day notice under Section 8 (d) (1) given 50 days prior to the termination date of an existing contract, a new contract executed anytime in the following 50-day period would be given such protection, because executed in the 60-day period prior to the termination date of the existing contract.

The Board, however, did not apply the new rule in this particular case on equitable grounds, because the petitioning union had filed a petition before the 60-day notice but withdrew it on advice of an NLRB regional director that it was prematurely filed.

## 8. Premature Extension of Contracts

In order to adjust the contract bar rules to the statutory mandate which guarantees employees freedom of choice of bargaining representatives, the Board has long followed the rule that a prematurely extended contract will not bar an election petition "which is timely with respect to the expiration date of the original agreement."<sup>8</sup> But if the original contract contains an automatic renewal clause, this rule requires that the petition be filed, or a representation claim made, prior to the automatic renewal date.<sup>9</sup>

However, in case the parties to the contract elect to give 60-day notices under section 8 (d) and thereupon negotiate a new contract, this does not constitute a premature extension of the old contract, even though the original contract provided an automatic renewal date of less than 60 days.<sup>10</sup> In practice, this means that a petition normally should be filed at least 61 days prior to the expiration of a contract, or earlier in the case of a contract which provides for automatic renewal or notice of termination earlier than 60 days from expiration.

The premature extension rule is designed to provide employees with an opportunity to change bargaining representatives, if they wish, at "predictable and reasonable intervals."<sup>11</sup> However, the premature extension of a contract does "not in and of itself render the extended agreement ineffectual as a bar during the period that the original con-

<sup>8</sup> *Standard Steel Spring Co.*, 90 NLRB 1805

<sup>9</sup> *Miles Laboratories, Inc.*, 92 NLRB 23, *Pillsbury Mills Inc.*, 92 NLRB 172.

<sup>10</sup> *DeSoto Creamery*, 94 NLRB No. 229 (Chairman Herzog and Board Member Reynolds dissenting). See subsection 7 of this section, Change in Rule on Renewals.

<sup>11</sup> *American Steel Foundries*, 85 NLRB 19.

In establishing the rule, the Board in *Wichita Union Stockyards Company*, 40 NLRB 369 (1942), said: "Were we to hold that the parties to a collective bargaining agreement covering a period of several years could forestall a petition for investigation and certification of representatives by entering into a supplemental agreement modifying the contract in advance of the date fixed therein for reopening negotiations, the right of the employees to seek a change of representatives after the lapse of a reasonable time might be defeated. So to hold would require of employees, desiring to change representatives, acceleration of organizational activities so that they would be ready to assert a claim of majority representation at any time the contracting parties might elect to discuss modification of the existing agreement instead of stabilized labor relations." Member Murdoek dissented solely on the question of service of the notice. He based his position upon the fact that the vice president-general superintendent did not actually examine the letter. He said that had he "actually looked at the envelope and seen the Intervenor's name thereon as the return addressee, I would unhesitatingly have found that he should have accepted the letter, for then I would have been satisfied that the evidence disclosed knowledge on his part as to the nature of the letter."

tract would have remained in effect had it not been so extended.”<sup>12</sup> In other words, the extended agreement continues as a bar only for the term of the original contract.

The premature extension rule applies even though the contract has been extended for economic reasons rather than to prevent a redetermination of representatives. The Board has stated that its “concern is not the purpose but the effect of such premature extensions.”<sup>13</sup> The Board likewise rejected the contention that the rule should not be applied because substantial benefits accruing to employees from an extension contract which were obtained for them only by bargaining for a longer contract, outweighed the immediate exercise of their right to change representatives.<sup>14</sup> Nor does it make any difference that a majority of the employees affected ratified the extension agreement.<sup>15</sup>

The Board also declined to make an exception to the rule where the agreement was made upon the insistence of the employer and in response of appeals from public authorities to avert a strike.<sup>16</sup> In this case, the contracting union conceded the validity of the Board’s premature extension rule, but urged that it should not be applied because of “special circumstances.” The circumstances were: (1) The employer, despite a notice of the representation claim of the petitioning union, insisted upon the extension because he was unwilling to negotiate another contract for the ensuing year. (2) The mayor of the city urged making the agreement because a strike in the city’s principal plant at that time would seriously disrupt the community and might cause the city to lose the plant of a new company which was planning to locate there. (3) The employees had ratified the extension agreement by vote of 315 to 20. The contracting union contended further that this vote was tantamount to a designation of it as bargaining representative, and therefore no question of representation existed.

The Board majority, in holding that the premature extension rule should apply, said:

The premature extension rule was necessitated by the mandate of the statute guaranteeing freedom of choice of a bargaining representative to employees. We do not find that the circumstances herein urged as “special” are of such nature as to require us to override this primary purpose of the statute.<sup>17</sup>

<sup>12</sup> *Republic Steel Corp.*, 84 NLRB 483.

<sup>13</sup> *Standard Steel Spring Co.*, 90 NLRB 1805.

<sup>14</sup> *Consolidated Western Steel Corp.*, 93 NLRB 1199.

<sup>15</sup> *The Cornelius Co.*, 93 NLRB 368; *Louisville Railway Co.*, 94 NLRB No. 12

<sup>16</sup> *Albion Malleable Iron Co.*, 90 NLRB 1640 (Board Member Murdock dissenting).

<sup>17</sup> Member Murdock, in his dissent, took the view that an exception to the premature extension rule should be made in this case. He also took the view that no real question of representation existed because the extended agreement, ratified by the employees, specifically provided for recognition of the contracting union as sole representative of the employees.

In rejecting the contention that the ratification of the extended agreement eliminated any question of representation, the majority opinion said:

We have, however, held that even a union-security election is not tantamount to an election of representatives for the purpose of collective bargaining. The fact that the membership here voted to approve the extension of the existing contract is therefore not dispositive of the issue of their choice of bargaining representatives for the future.

## 9. Termination of Contracts

In determining whether or not an asserted contract is a bar to a present election, the Board must frequently pass upon the question whether the contract has in fact been terminated by the parties. The Board has consistently held that a contract is removed as a bar where notice to terminate or modify the contract is given in accordance with the terms of the contract.<sup>18</sup> Thus, the Board rejected a contention that a notice to negotiate did not terminate the contract because of its provisions for arbitration in case a dispute regarding a new contract could not be adjusted. Nor do agreements between the parties to continue the terms of the contract pending negotiation of a new contract preserve the old contract as a bar.<sup>19</sup>

### a. What Constitutes Notice

In most cases, notice of a desire to terminate or to negotiate modifications of a contract is served upon the proper party or parties in clear and unmistakable terms, usually by registered letter, and well in advance of the notice date provided by the contract. The Board imposes no required form for it to take. However, in some cases, the question of whether proper notice was adequately served determines whether or not the contract involved is still effective as a bar.

One case in which a question of proper service was raised involved a contract designating both the local union and its parent international as the "union." The three signers for the union listed themselves on the contract as officials of the international but one of them was also president of the local. In this case, the Board held that the international had proper notice when the employer sent a notice of termination to the local at the office of its president, which was shared by one of the two other signers of the contract.<sup>20</sup>

A more complex problem of both notice and service was raised in the case of a union which sent the employer, shortly before the automatic

<sup>18</sup> See for instance, *The Diamond Match Co.*, 20-RC-961 (not printed); *U. S. Rubber Co.*, 13-RC-1351 (not printed).

<sup>19</sup> *Scripps-Howard Radio Co., Inc.*, 93 NLRB 1095; *Inco Co.*, 93 NLRB 745; *Rooney Optical Co.*, 8-RC-767 (not printed).

<sup>20</sup> *Juhan B. Stevin Co.*, 94 NLRB No. 205.

renewal date of the contract, a letter informing him that its members had voted to dissolve. The letter concluded with the statement: "Our contract with your firm state's (sic) that we must notify you (60) sixty day's (sic) before Nov. 1, 1950." The Board concluded that "this necessarily refers to the notice required by the contract to forestall its automatic renewal, for at no other place in the contract is there provision for the giving of any notice." The Board unanimously construed this as proper notice of termination.<sup>21</sup> Also in this case, the union sent the notice in a registered, insured letter addressed to the president of the company. The envelope bore the name and address of the union for return. When the letter arrived, the company president was out of town. His secretary refused it, on instruction of the company's vice president-general superintendent. However, it was a discussion between this company official and the president of the union several days earlier, regarding the union's dissolution, that had led the union to send the letter. On the basis of these facts, a majority of the Board held that "we do not believe that the refusal of the . . . letter was justified, or that the contract between the employer and the intervenor [union] should bar this proceeding."

### C. Impact of Prior Determinations

Generally, a Board certification of a bargaining representative is an absolute bar to a new determination of representatives for 1 year. This long-standing Board policy is reinforced by section 9 (c) (3) of the amended act which prohibits the holding of a representation election less than 12 months after a prior valid representation election has been held in the same unit.

The purpose of the Board's policy is to enable a newly certified representative to establish bargaining relations by assuring it a year, free of rival claims or decertification proceedings, in which to negotiate a contract. Should litigation of the bargaining rights of the certified agent intervene, the agent is normally permitted to have a year to establish itself after the Board's order affirming those rights or the court decree enforcing the Board's order. Thus, the Board dismissed a decertification petition filed within a year of a court decree enforcing a bargaining order, notwithstanding the lapse of almost 5 years since the union's certification.<sup>1</sup>

Nor is the protection during the certification year lost by the execution or renewal of a contract during that year. Thus, a petition of a rival union which was filed just shortly before the automatic renewal date of such a contract was dismissed because the certification year

<sup>21</sup> *Evans Milling Co.*, 94 NLRB No. 164, Member Murdock dissenting on adequacy of service.

<sup>1</sup> *Aldora Mills*, 10-RD-78 (not printed).

had not run out.<sup>2</sup> Similarly, a petition filed during the certification year was dismissed even though the certified union's short-term contract had expired.<sup>3</sup>

A petition, however, may be filed in the twelfth month of a certification year, but the Board will not process it until the year ends. But if, between filing of the petition and the certification year's end, the employer and the certified union enter into or renew a contract, the Board will dismiss the petition.<sup>4</sup> In a case decided after close of the fiscal year, the Board stated this rule more fully:

. . . the Board has determined that, absent unusual circumstances, a petition filed more than 1 month before the end of the certification year should be dismissed. Where the petition is filed during the twelfth month of the certification year, the Board's administrative policy is to docket that petition, but in order to minimize the effect the petition might otherwise have as an intrusion upon the certified union's right to bargain freely during the remainder of the certification year, the Board has adhered to the administrative policy of having the Regional Director notify the parties that the petition will not be processed until after the certification year has expired. If a valid collective bargaining contract is then executed with the certified union before the expiration of its certification year, that contract operates as a bar in which event the docketed petition will be dismissed.<sup>5</sup>

However, the Board has declined to apply these rules where there is substantial evidence of a schism of the employees from the certified union of such proportions that the bargaining relationship "has become a matter of extreme confusion and uncertainty."<sup>6</sup> To promote stability in industrial relations in such cases, the Board will direct an election before the end of the certification year. Thus, a petition filed 2½ months before the end of the certification year was held timely where 7 months following certification, the union's members voted to disaffiliate from the certified union and to affiliate with the petitioner, and where the employer refused to recognize the petitioner until certified.<sup>7</sup> However, ordinarily, the employer's refusal to recognize a rival petition does not raise a question of representation during the certification year.<sup>8</sup>

While a certified union is generally protected from rival union intrusions, no similar immunity is conferred upon a bargaining agent which has been recognized by an employer on the basis of only the settlement agreement and a card check.<sup>9</sup>

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<sup>2</sup> *Wm. Bros. Boiler & Manufacturing Co.*, 18-RC-1028 (not printed).

<sup>3</sup> *International Harvester Co.*, 9-RC-1023, 1047 (not printed).

<sup>4</sup> See *KMYR Broadcasting Co.*, 91 NLRB 91, following *Central California Ice Co.*, 85 NLRB 1205.

<sup>5</sup> *National Heat Treating Co.*, 95 NLRB No. 144 (August 14, 1951), also following *Central California Ice Co.*, cited above. See also *Zenith Radio Corp.*, 95 NLRB No. 155 (August 17, 1951).

<sup>6</sup> *Swift & Co.*, 94 NLRB No. 137.

<sup>7</sup> *Swift & Co.*, cited above.

<sup>8</sup> *Kay and Burbank Co.*, 92 NLRB 224.

<sup>9</sup> *National Waste Material Corp.*, 93 NLRB 477.

## D. Unit of Employees Appropriate for Bargaining

The act imposes upon the Board the duty to determine, whenever the question arises, whether a proposed or existing bargaining unit is "appropriate" for collective-bargaining purposes. Construing the term "appropriate," the Board said in a recent case:

There is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be "appropriate." It must be appropriate to ensure the employees *in each case* "the fullest freedom in exercising the rights guaranteed by this Act."<sup>1</sup>

However, the discretion of the Board in determining bargaining units is limited insofar as section 9 (b) provides that "the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." The proviso of section 9 (b) further limits the Board's discretion in the following respects:

1. Professional employees may not be included in a unit of non-professional employees, unless a majority of the professional employees vote for the inclusion in such unit.

2. No craft unit may be held inappropriate on the ground that a different unit was established by a prior Board decision.

3. Plant guards, who enforce rules for protection of property or safety on an employer's premises, may not be included with other employees.<sup>2</sup>

The broad standards of section 9 (b) must be applied to individual situations in the large number of cases in which the Board is asked to determine the bargaining rights of a representative under the various provisions of section 9. The standards must be applied also in cases in which it is alleged that an employer has violated section 8 (a) (5) by refusing to bargain with the representative of employees in an appropriate unit, and in cases in which it is charged that a union which represents employees in such a unit has refused to bargain with their employer in violation of section 8 (b) (3). The question is involved also in cases where the Board must determine whether a union-security agreement is valid, in that it covers employees represented by the contracting union in an appropriate unit, as required by section 8 (a) (3).

In any of these cases, certain basic issues present themselves which concern: (1) The type of the unit, i. e., whether an industrial unit,

<sup>1</sup> *Morand Brothers Beverage Co.*, 91 NLRB 409.

<sup>2</sup> Moreover, the Board may not certify as bargaining agent for guards any union that admits other employees as members or that is "affiliated directly or indirectly" with an organization admitting nonguard employees, sec. 9 (b) (3).

embracing a general class such as production and maintenance employees, or a smaller group within the general category is proper; (2) the scope of the unit, i. e., whether it should be a multiemployer, multiplant, plant-wide, or some smaller departmental unit; and (3) the composition of the unit, i. e., whether the unit should include "fringe" groups such as clerks, technical, or professional employees.<sup>3</sup> To some extent, the composition of bargaining units is specifically limited by section 2 (3) of the act, which exempts certain classes of employees from its operation.<sup>4</sup>

In resolving unit issues, the Board's primary concern is to group together only employees who have substantial mutual interests in wages, hours, and other conditions of employment. The Board has consistently refused to establish units based upon race, nationality, or special considerations unrelated to work interests and functions.<sup>5</sup> In order to determine whether sufficient mutual interests exist in a given instance, the Board considers such factors as (1) extent and type of union organization of the employees involved;<sup>6</sup> (2) any pertinent history of collective bargaining among the employees involved; (3) similarity of duties, skills, and working conditions of the employees; and (4) the desires of the employees.

## 1. Collective Bargaining History

A history of collective bargaining among any group of employees, whose representation is the subject of a petition, often plays an important part in determining the unit appropriate for an election. The Board, of course, does not consider itself bound by the applicable bargaining history in deciding whether a unit is appropriate,<sup>7</sup> but it generally will not disturb a well-established bargaining pattern unless there are "compelling circumstances" for doing so.<sup>8</sup> For example, in a case involving a chain grocery, the Board held that on the basis of an existing bargaining history, a residual unit of 8 out of 20 grocery stores in one of the employer's districts was appropriate, although the 8 stores did not comprise a separate administrative group within the

<sup>3</sup> The numerical size of the unit is important only insofar as the Board has consistently held one-man units inappropriate. See Fifteenth Annual Report, p. 39.

<sup>4</sup> Sec. 2 (3) expressly excludes from the term "employee" as used in the act "any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

<sup>5</sup> See *Alaska Salmon Industry, Inc.*, 94 NLRB No. 204.

<sup>6</sup> Sec. 9 (c) provides "In determining whether a unit is appropriate the extent to which the employees have organized shall not be controlling." Compare *Breman Steel Company*, 93 NLRB 720. However, this does not preclude the Board from giving some consideration to the extent of self-organization where other factors are given proper weight. *Silverwood's*, 92 NLRB 1114.

<sup>7</sup> *Kohler Co.*, 93 NLRB 398 and cases cited therein.

<sup>8</sup> *Baltimore Transit Co.*, 92 NLRB 688.

employer's organizational structure.<sup>9</sup> The Board declined to disrupt the bargaining patterns which the employer and 2 unions had established.

However, such bargaining history must be substantial. Thus, the Board rejected a request for a multiemployer unit based on a bargaining history of a single, short-lived contract.<sup>10</sup> In that case, the Board said:

It appears that the only bargaining history upon which the Employers rely for justification of a multiemployer unit is limited to a single instance of a short-lived and aborted contract. We consider such a brief bargaining history to be too insubstantial to be controlling now. Certainly, it cannot be said to have stabilized, or to have contributed to the stabilization of, labor relations between these Employers and their employees. (Footnotes omitted.)

In another case, the Board held that a 1-year bargaining history on a multiemployer basis, "not predicated upon a Board unit finding," did not preclude the appropriateness of a single-employer unit.<sup>11</sup> In still another case, the Board declined to give controlling effect to a history of bargaining in a plant-wide unit, although based on a Board certification, where such bargaining dated only from the certification and the certification was only a year old when the craft unit petition in the case was filed.<sup>12</sup>

Nor will a unit determination be based on a bargaining history which disregards well-established Board principles. Thus, no weight was accorded contractual relations in which office and clerical employees were grouped with technical employees despite the fact that the Board previously had denied such a merger as not in accord with its general policy.<sup>13</sup> Similarly, a bargaining history during which the contract unit was in conflict with a unit determination by the Board was held not controlling.<sup>14</sup> Nor did the fact that bargaining had been conducted for 15 years on a basis conflicting with Board policy serve to establish a unit as appropriate.<sup>15</sup> Moreover, the Board will not base a unit finding on the bargaining experience of a union found to have been illegally assisted by the employer,<sup>16</sup> and it will attach little weight to bargaining relations conducted only on behalf of those employees who are members of the union.<sup>17</sup> A 10-year history of oral contracts, where no election had ever been conducted among the employees covered, was likewise held to be inconclusive for the purpose of a unit determination.<sup>18</sup>

<sup>9</sup> *The Kroger Co.*, 93 NLRB 274.

<sup>10</sup> *Brewster Motors, Inc.*, 93 NLRB 675

<sup>11</sup> *Jerry Fairbanks, Inc.*, 93 NLRB 898.

<sup>12</sup> *Reynolds Metals Co.*, 93 NLRB 721.

<sup>13</sup> *International Harvester Co., West Pullman Works*, 13-RC-1004 (not printed).

<sup>14</sup> *The Budd Co., Red Lion Plant*, 4-RC-753.

<sup>15</sup> *Kohler Co.*, 93 NLRB 398

<sup>16</sup> *Albert's, Inc.*, 91 NLRB 522.

<sup>17</sup> *Laggett & Myers Tobacco Co.*, 91 NLRB 1145.

<sup>18</sup> *Inyo Lumber Co.*, 92 NLRB 1267.

## 2. Units of Craft Employees

The act provides specifically that the Board, in grouping employees for bargaining purposes, may find that a unit composed of craft employees is appropriate.<sup>19</sup> Craft units are requested in many cases, and the Board follows the general policy of granting the craft employees separate self-determination elections, wherever appropriate.<sup>20</sup> This policy is followed even in the face of a history of bargaining on a broader basis.<sup>21</sup> If the craft employees vote for the union seeking the broader unit, they are taken to desire inclusion in it; but if they vote for the union seeking the craft unit, they are taken to desire a separate unit. However, under established Board doctrine, "a request for severance must be coextensive with the existing unit," taking in all such craftsmen in this unit.<sup>22</sup>

In all such cases, the Board must decide whether the employees in the proposed unit are in fact craft employees and whether they form a cohesive group which can appropriately bargain as a unit. In these decisions, the Board has consistently recognized the craft status of employees who are engaged in the work of a traditional craft and who have had to undergo extensive training or apprenticeship in order to qualify in their particular craft.<sup>23</sup> Into this category fall such established crafts as tool and die makers, welders, machinists, printing pressmen, carpenters, and electricians, to name a few.

The Board also will accord craft status to employees doing other work, who exercise skills sufficiently distinct from those of production employees to require a high degree of skill and a substantial period of training or instruction. Thus, the Board in one case accorded craft status to a group of cutting-machine operators in a printing plant, who needed 4 to 4½ years' experience in order to become skilled workmen.<sup>24</sup> The Board found also that a group of sewing machine mechanics in a garment factory possessed and exercised "a high degree of skill which stamps them with craftsman status."<sup>25</sup> Because these mechanics were engaged only in repairing, overhauling, or rebuilding of the sewing machines, the Board distinguished them from loom fixers in the textile industry, whom the Board has on occasion declined to place in separate units because the loom fixer's work is so closely integrated with the repetitive production process. In another case, the

<sup>19</sup> Sec. 9 (b).

<sup>20</sup> *Phillips Oil Co*, 94 NLRB No 208. Exceptions are craftsmen in industries which the Board has found to have such completely integrated operations that severance of craft units is foreclosed. These industries are basic steel, basic aluminum, basic lumbering, and the wet milling industry, such as corn products. See discussion next subsection, units in Integrated Industries.

<sup>21</sup> *Phillips Oil Co*, cited above; *The Atlantic Refining Co*, 92 NLRB 651.

<sup>22</sup> *Interchemical Corp*, 9-RC-843 (not printed); *Pioneer, Inc*, 90 NLRB 1848.

<sup>23</sup> *The Plumbing Contractors Association of Baltimore, Md*, 93 NLRB 1081, *Southwest Tablet Manufacturing Co*, 93 NLRB 2780.

<sup>24</sup> *I. S. Berlin*, 93 NLRB 13.

<sup>25</sup> *Cooper's, Inc.*, 92 NLRB 1900.

Board established a separate craft voting unit for a group of instrumentmen in an oil refinery, who had to have a minimum of 4 years' experience to reach the journeyman level in the installation, maintenance, and repair of pneumatic and electrical instruments.<sup>26</sup> In granting the instrumentmen craft status, the Board noted that they functioned as a cohesive unit in their own shop under separate supervision, received the same rates of pay as other craft groups, and were subject to the same training and experience requirements as pipefitters, boilermakers, electricians, welders, and carpenters in the plant. In the same plant, however, the Board declined to accord craft status to a group of insulators. The Board held that the special knowledge of insulating materials and mortar that these employees needed did not qualify them as craftsmen. Similarly, the Board held in another case that a pipe coverer, who covered pipe with insulating materials, was not a craftsman.<sup>27</sup>

In addition, the Board will grant separate bargaining units to employees in certain types of work which have come to be traditionally regarded as similar to crafts even though not requiring craft skills. Truck drivers,<sup>28</sup> powerhouse operators, foundry workers are among employees generally falling into this category.<sup>29</sup>

As a rule, the Board will permit employees who belong to an identifiable and homogeneous craft group to be represented in separate units. Where such a group has been included in an industrial unit in the past, it may sever from that unit if another union seeks to represent the group separately.<sup>30</sup> In the cases in which the establishment or severance of craft units was sought during the past year, the Board continued to apply previously announced principles. Thus, it was held that craftsmen, such as carpenters on a construction project, who are engaged exclusively in craft work may constitute separate units, even though they work in close association with other employees and are at times assigned to work, away from their own shop, under the supervision of a foreman other than their own.<sup>31</sup> It was also held that a craft group did not lose its identity because members of the group perform some duties which may not be strictly within the limits of their recognized craft,<sup>32</sup> or because they occasionally exercise their skills in connection with production activities.<sup>33</sup> In one case in which some of the machinists in a plant spent about

<sup>26</sup> *Phillips Oil Co.*, cited above.

<sup>27</sup> *Coosa River Newsprint Co.*, 10-RC-811, *et seq* (not printed).

<sup>28</sup> *Coosa River Newsprint Co.*, cited above.

<sup>29</sup> See Fifteenth Annual Report, p. 42, footnote 20

<sup>30</sup> See sec. 9 (b) (2) of the amended act

<sup>31</sup> *Radio Corp. of America*, 4-RC-721 (not printed) *David E. Kennedy, Inc.*, 2-RC-1922 (not printed), *International Harvester Co., Canton Works*, 91 NLRB 487, *W. K. McIllyar Construction Co.*, 16-RC-510 (not printed).

<sup>32</sup> *The Plumbing Contractors Association of Baltimore, Md., Inc.*, 93 NLRB 1081.

<sup>33</sup> *The Cornelius Co.*, 93 NLRB 368.

25 percent of their time in regular production work, or in alleviating excess production workloads, the Board held that the craft status of the machinists was not thereby affected.<sup>34</sup> Nor was a unit of traditional craftsmen in several departments of a shipyard held inappropriate because of an occasional crossing of craft lines, which was due to the exigencies of particular jobs rather than to the employer's disregard of the functions of the various crafts in work assignments.<sup>35</sup>

However, where the work of craft employees is highly integrated with production operations, as in the case of electricians who "regularly and repetitively perform indispensable assembly-line operations,"<sup>36</sup> the Board will deny the craft separate representation.<sup>37</sup>

In dealing with requests for separate craft representation, the Board has repeatedly said that it is not precluded from approving a craft unit because past bargaining for the craft on a broader basis has been successful, or because the Board found a broader unit appropriate in an earlier decision.<sup>38</sup>

The Board continues to follow the policy of declining to accord separate representation to an otherwise appropriate craft group if it fails to include within its scope all members of the craft. Thus, a petition for the decertification of a unit of skilled employees engaged in experimental operations was dismissed because the unit was confined to employees in the employer's experimental department and did not include employees performing similar work in other departments.<sup>39</sup> The Board likewise declined to find appropriate a unit limited to employees in a rotogravure-cylinder department which included engravers, where the employer also employed engravers in its photoengraving department. The Board observed that while the engravers in the two departments were not interchangeable they shared the same basic skills and operated at the same degree of competence.<sup>40</sup>

On the other hand, the fact that a group which is sought to be separately represented includes unskilled workers does not preclude the finding of a craft unit, so long as the group has a substantial nucleus of skilled workers.<sup>41</sup>

Multicraft units composed of all skilled maintenance employees in a plant continued to be recognized during the past year where there was a total absence of a bargaining history on a broader basis,<sup>42</sup> or

<sup>34</sup> *Radio Corp. of America*, cited above.

<sup>35</sup> *Bethlehem Pacific Coast Steel Corp.*, 93 NLRB 588

<sup>36</sup> See *Ford Motor Co.*, 78 NLRB 887

<sup>37</sup> Cf. *The Atlantic Refining Co.*, 92 NLRB 651; *McIlyar Construction Co.*, cited above, *The Plumbing Contractors Association of Baltimore, Md., Inc.*, 93 NLRB 1081; *Oregon Portland Cement Co.*, 92 NLRB 695

<sup>38</sup> See *The Atlantic Refining Co.*, 92 NLRB 651; *Hudson Pulp & Paper Corp.*, 94 NLRB No. 142

<sup>39</sup> *International Harvester Co., McCormick Works*, 92 NLRB 1504.

<sup>40</sup> *Milprint, Inc.*, 91 NLRB 561; see also *Link Bell Co.*, 91 NLRB 1143.

<sup>41</sup> *Oregon Portland Cement Co.* 92 NLRB 695.

<sup>42</sup> *Halliburton Portland Cement Co.*, 91 NLRB 717, see *Armstrong Cork Co.*, 80 NLRB 1328 (1948).

where the bargaining history was of only limited or very recent duration.<sup>43</sup> However, where the bargaining history on a broader basis was substantial, or where the proposed multicraft unit included non-craft employees, separate representation was denied.<sup>44</sup>

### 3. Units in Integrated Industries

In certain industries, the Board has found that integration of all operations is so complete that deviation from the established plant-wide bargaining pattern in such a plant would not only have adverse effects from the standpoint of operations and production, but also would defeat the employees' over-all interests in effective representation. The first instance in which the Board, because of these considerations, made an exception to its practice of permitting separate craft representation elections was in the basic steel industry.<sup>45</sup> Subsequently, the Board found that comparable conditions likewise militated against separate craft units in the lumbering industry,<sup>46</sup> as well as in the basic aluminum industry.<sup>47</sup> A similar result was reached in regard to the wet-milling industry.<sup>48</sup>

During the past year, the Board again had occasion to apply the integration formula in cases involving lumber and wet-milling industries.<sup>49</sup> The formula was applied also in the case of a plant which was largely engaged in the production of alumina and was integrated to the same extent as plants in the basic aluminum industry.<sup>50</sup> However, the Board permitted severance of boiler-room operators in an aluminum plant which was not engaged in the basic production of alumina but in the reclamation of aluminum by a different and novel process.<sup>51</sup> Also, a separate unit of skilled maintenance employees was held appropriate where the employer was engaged in the manufacture of aluminum foil rather than the basic processing of aluminum and where the work of the maintenance personnel was not inseparably integrated with the work of the production group.<sup>52</sup> Similarly, severance of patternmakers was granted in a steel plant not primarily engaged in the basic manufacture of steel.<sup>53</sup>

<sup>43</sup> *Aluminum Foils, Inc.*, 94 NLRB No 125, *Aerotox Corp*, 93 NLRB 1101

<sup>44</sup> *Glass Fibers, Inc.*, 93 NLRB 1289, *Hudson Pulp & Paper Corp.*, 94 NLRB No 142; *Westinghouse Electric Corp*, 94 NLRB No. 126; see also *Bremen Steel Co*, 93 NLRB 720

<sup>45</sup> See *National Tube Co*, 76 NLRB 1199 (1948)

<sup>46</sup> *Weyerhaeuser Timber Co.*, 87 NLRB 1076 (1949)

<sup>47</sup> *The Permanente Metals Corp*, 89 NLRB 804 (1950)

<sup>48</sup> *Corn Products Refining Co*, 87 NLRB 187 (1949)

<sup>49</sup> *Pehastin Lumber and Box Co*, 19-RC-501 (not printed), *Union Starch and Refining Co*, 91 NLRB 3, see also *General Mills, Inc*, 91 NLRB 984, and *International Paper Co*, 94 NLRB No 81.

<sup>50</sup> *Reynolds Metals Co*, 92 NLRB 136

<sup>51</sup> *Reynolds Metals Co*, 93 NLRB 721.

<sup>52</sup> *Aluminum Foils Inc*, 94 NLRB No 125

<sup>53</sup> *Mesta Machine Co*, 94 NLRB No 221

The Board has rejected contentions that because of similarity of conditions, the integration formula was applicable to the rubber, pulp and paper, Portland cement, and aircraft industries.<sup>54</sup>

#### 4. Employees' Wishes in Unit Determinations

The authority to determine the appropriateness of bargaining units under the act is vested exclusively in the Board. However, in exercising this power, it is the Board's policy to give effect to the wishes of the employees concerned in situations where two possible units are equally appropriate. Under these circumstances, the Board ordinarily directs a self-determination election in order to find out the preference of the employees. This type of election is known in Board parlance as a "Globe election."<sup>55</sup> The employees' wishes in such cases are not binding upon the Board as a matter of law, but the Board ordinarily states in advance how it will interpret, and act upon, the various alternative results of the employees' voting.

Self-determination elections are most commonly held in situations where one union is seeking an industrial unit that includes a group of craft employees which another union is seeking to represent separately. In these cases, the ballots of the craft employees are segregated and counted separately. If a majority of them vote for the union seeking the craft unit, they are ordinarily accorded separate representation, but if they vote for the union seeking the industrial unit, they are ordinarily included in that unit. However, the principle of self-determination for craft groups does not apply where there is no union seeking to represent the craft group separately.<sup>56</sup>

Such elections also are conducted on occasion where it is proposed to merge two or more groups of employees who have been represented separately in the past. Thus, as a matter of policy, the Board permitted a group of power-plant firemen and oilers to vote on the petitioning union's proposal to merge them into a single unit with the power-plant's engineers. The Board observed that, in view of the fact that there had been a considerable period of separate bargaining, a self-determination election was proper even though the inherent appropriateness of a single power-plant unit was established by the evidence in the case.<sup>57</sup> In another case, the Board conducted separate self-determination elections among production employees and maintenance employees when they had a substantial history of separate representation.<sup>58</sup> So

<sup>54</sup> *U. S. Rubber Co.*, 13-RC-1351 (not printed); *Hudson Pulp and Paper Corp.*, 94 NLRB No. 142, *Oregon Portland Cement Co.*, 92 NLRB 695; *McDonnell Aircraft Corp.*, 92 NLRB 899

<sup>55</sup> From the name of the case in which the rule was first established, *Globe Machine & Stamping Co.*, 3 NLRB 294.

<sup>56</sup> *Rock-Ola Manufacturing Corp.*, 93 NLRB 1196.

<sup>57</sup> *New Jersey Brewers Association.*, 92 NLRB 1404.

<sup>58</sup> *Steel Castings, Inc.*, 8-RC-676 (not printed)

also, where there was a substantial bargaining history at a newly acquired plant, the Board directed a self-determination election, despite the fact that the new plant had been integrated into the purchasing employer's oil business where bargaining had been on a Nation-wide basis since 1934.<sup>59</sup> In this case, the employees at the newly acquired plant had been represented by a group of craft unions for 9 years.

A self-determination election may also be directed among employees hired for operation of a newly established plant.<sup>60</sup> Also, in one case, a self-determination election was directed among employees of the older of two plants when it was proposed that the two plants should be constituted a single bargaining unit.<sup>61</sup> The employees in the older plant had a 10-year history of continuous separate representation.

#### a. Change in Rule on Self-Determination for Fringe Employees

The problem is often presented as to whether employees who have been excluded from previously established bargaining units should be granted a self-determination election. These employees are often called "fringe" employees.

In this category are sometimes found such employees as plant clericals,<sup>62</sup> testers or nonsupervisory inspectors,<sup>63</sup> janitors or other custodial employees,<sup>64</sup> nonsupervisory hostesses in a restaurant,<sup>65</sup> or almost any group of employees entitled to bargaining which has been excluded from a previously established unit under valid standards of unit composition. The Board, however, distinguishes "fringe" employees from employees who could not properly be excluded from a unit, such as newly hired employees doing work similar to that done by employees in the unit.<sup>66</sup> Sometimes "fringe" employees are left over when a craft unit is established.<sup>67</sup> Most often, though, they are outside any unit because they have been left out in past bargaining and Board rules do not make their inclusion necessary to establish a unit appropriate for bargaining. This is in accord with the Board's established policy of retaining, when possible under general Board standards, the form of bargaining units which have stood the test of time and experi-

<sup>59</sup> *Sinclair Refinery Co.*, 92 NLRB 643.

<sup>60</sup> *Brown Equipment & Manufacturing Co., Inc.*, 93 NLRB 1278.

<sup>61</sup> *Southwest Truck Body Co.*, 93 NLRB 1341.

<sup>62</sup> *Allis-Chalmers Manufacturing Co.*, 84 NLRB 30; *Waterous Co.*, 92 NLRB 76.

<sup>63</sup> *Chase Aircraft Co. Inc.*, 91 NLRB 238

<sup>64</sup> *The Post Printing & Publishing Co.*, 30-RC-306 (not printed).

<sup>65</sup> *Marshall Field & Co.*, 93 NLRB 182.

<sup>66</sup> *Bronx County News Corp.*, 89 NLRB 1567 (1950). In this case, the Board held that a group of employees hired to staff a "return room" of a newspaper, which was established after formation of the original bargaining unit to take care of returns formerly handled by employees in the unit, properly belonged in the unit. See also cases listed in footnote 6 of *Waterous* decision, cited above.

<sup>67</sup> *W. S. Tyler, Co.*, 93 NLRB 523

ence.<sup>68</sup> Nevertheless, unrepresented fringe employees usually may be included in any established noncraft unit.

In the past, if the fringe employees constituted a sufficiently distinct group, it has been the Board's practice to conduct a self-determination election among them whenever it was proposed to include them in an established unit.<sup>69</sup> During the past year, however, the Board reconsidered this policy, and a majority decided that "there is no cogent reason of statutory policy for balloting fringe employees separately in circumstances where . . . the only union (or unions) seeking to represent the fringe employees on any basis is, at the same time, asking for an election and certification in the basic appropriate unit in which the fringe group properly belongs."<sup>70</sup> Accordingly, the Board declined to segregate the ballots of eight plant clericals, whom it found properly belonged in an established production and maintenance unit, when an election was ordered in the whole unit.

In deciding a separate vote was unnecessary in such circumstances, the majority opinion said:

We have chosen this course because, in the circumstances of this case, it seems the most realistic and efficient means of insuring that *all* employees within the same circle of common interests will share equally in the benefits of collective bargaining and in the opportunity to select representatives. This result, in our judgment, is consonant with the statutory policy of fostering the practice and procedure of collective bargaining. We disagree with our dissenting colleagues' position, and we have overruled the line of cases upon which they rely, because the practical net effect of that position is to perpetuate conditions in which fringe employees—typically too few in number and too indistinct to be organized independently—are excluded from participation in a collective bargaining relationship which the "overwhelming" majority of their fellow workers may have found beneficial enough to continue. We of course adhere to the Board's established policy of giving great weight to the form of bargaining unit which has stood the test of time and experience. But we think there is nothing in that sound and practical policy which ought to inhibit this Board from correcting a fringe defect in an historical bargaining unit. That is all we are doing in this case, as our decision perpetuates what is essentially the very same industrial unit which has proved satisfactory in this plant.

The Board applied this new rule also in refusing a self-determination election for hitherto unrepresented employees of two districts of a power company when it found a four-district divisional unit appro-

<sup>68</sup> See *Waterous* decision, cited above.

<sup>69</sup> Such elections have come to be known in Board parlance as "Armour-type Globe elections," taking the name from the case in which the practice was inaugurated *Armour & Co.*, 40 NLRB 1333 (1942). See also *Petersen & Lytle*, 60 NLRB 1070 (1945). In the *Armour* case, employees in three small departments of a meat packing plant, who had been excluded from a plant-wide production and maintenance unit, were permitted to vote in a separate election to determine whether they wished to be included in the unit. In the *Petersen* case, the Board excluded a group of employees from a production and maintenance unit on the basis of bargaining history but suggested that these employees could obtain a separate election later to determine whether they wished to be included in the unit.

<sup>70</sup> *Waterous Company*, 92 NLRB 76 (Chairman Herzog and Member Reynolds dissenting).

priate and the only union involved had asked for an election in the wider unit.<sup>71</sup> In this case, the Board directed a division-wide election.

However, where a union seeks to add a hitherto unrepresented group of employees to its unit and no election is asked in the basic unit, the Board continues generally to direct a self-determination election. Thus, a majority of the Board ordered a separate election among employees on a branch pipeline when the union which represented other employees of the pipeline system sought to add the branch employees to its unit.<sup>72</sup> The union in this case did not ask for a system-wide election, and the Board ordered an election among the branch employees even though it found they could not constitute a unit appropriate for bargaining.<sup>73</sup> Under this precedent, the Board ordered a self-determination election among a group of fringe employees working in a bathhouse attached to an oil refinery when the union representing refinery employees sought to add them to its unit.<sup>74</sup> Similarly, the Board ordered an election only among printers of blueprints and clerks who distributed rivets through an airplane factory, when it found both categories of employees could be properly included in a production unit. In neither case was there any question of representation raised in the basic unit.<sup>75</sup>

But when two or more unions are competing for the right to represent a fringe group, the Board generally declines to order an election in anything less than a unit appropriate for collective bargaining. Thus, a Board majority declined to direct a self-determination election among a group of production and maintenance employees in a foundry who had been left out of a unit of skilled foundry employees.<sup>76</sup> Finding that these less skilled employees properly belonged in a single unit with the skilled employees, the Board directed an election among all foundry employees. Similarly, a majority of the Board declined to direct an election among a previously unrepresented group of five stationary operating engineers in a powerhouse of a factory.<sup>77</sup> In this case, the election was sought by a union other than the one representing the powerhouse unit, in which the majority held the engineers properly belonged.

The majority opinion said:

Although the Board will require a "Globe" type election before adding a previously unrepresented group to an existing unit (where there is no question con-

<sup>71</sup> *California-Pacific Utilities Co.*, 93 NLRB 747

<sup>72</sup> *Great Lakes Pipe Line Co.*, 92 NLRB 583 (Member Murdock dissenting)

<sup>73</sup> Member Murdock, in his dissent in the *Great Lakes Pipe Line* case, took the view that the act precludes the Board from directing an election in an inappropriate unit. However, the majority concluded that, while section 9 (a) of the act limits certification to a representative in an appropriate unit, it does not prohibit the Board from directing an election among employees who do not constitute an appropriate unit.

<sup>74</sup> *Gulf Oil Corp.*, 92 NLRB 700

<sup>75</sup> *Boeing Airplane Co.*, 92 NLRB 716

<sup>76</sup> *W S Tyler Co.*, 93 NLRB 523 (Chairman Herzog and Board Member Reynolds dissenting)

<sup>77</sup> *Packard Motor Car Co.*, 94 NLRB No. 218 (Chairman Herzog and Member Reynolds dissenting).

cerning representation in the existing unit) it does not *follow* . . . that such a group will necessarily be allowed to be represented as a separate unit, as the Petitioner here requests. [Emphasis by the Board.]

The majority rejected the engineers' group as too limited for collective bargaining. Moreover, the majority noted, the union representing other powerhouse employees had clearly expressed a desire to represent the engineers as part of its powerhouse unit.

Nor does the fact that the Board, for its guidance in determining the unit, will grant a group of fringe employees an election to express their wishes about inclusion in a bargaining unit mean that a group already in a unit is entitled to an election to express their desires about remaining in the unit. Thus, a majority of the Board declined to conduct a decertification election among a group of aircraft factory planners who had been absorbed into a production and maintenance unit.<sup>78</sup> The majority found that they did "not constitute an appropriate unit in any sense" and, the majority held further, they would normally have been included in the production unit by the Board in the first instance.

Summarizing Board policy on the holding of self-determination elections, the majority opinion said:

Doctrine of these cases means only that one way of adding a fringe group to an over-all unit is to hold an election in that group to determine whether or not it wishes to join the established unit. This is not equivalent to holding that there is no other way to merge such a group into an over-all unit, or that a majority of the group could thwart the over-all majority will with respect to collective bargaining, or that the group is also entitled to further separate elections once it has been merged into the over-all unit.

In one case, a group of fringe employees was given the choice of being placed in either of two existing units.<sup>79</sup> The employees involved were engaged in cutting and wrapping meat in wholesale cuts at a warehouse of a retail food chain. However, the work had formerly been done by employees in the meat department of the retail stores. Therefore, they were given a choice of being included either in the unit of warehouse employees or in the chain's meat market unit.

## b. Residual Units

In order not to deprive fringe employees of collective bargaining if they want it, the Board also in some cases has directed elections in units composed of employees left out of previously established units.

This probably has occurred most frequently in the lithographic printing industry. After considering the skills and techniques required by the lithographic process in a number of cases, the Board has

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<sup>78</sup> *Douglas Aircraft Co., Inc.*, 92 NLRB 702 (Chairman Herzog and Member Houston dissenting).

<sup>79</sup> *Safeway Stores, Inc.*, 92 NLRB 275

concluded that, absent "unusual circumstances," employees engaged in lithograph work form a cohesive unit appropriate for separate bargaining.<sup>80</sup> Consequently, in order not to deny bargaining to other employees in a lithographic printing plant, the Board has adopted the practice of placing all other production and maintenance employees, such as those in the letterpress, composing room, and bindery departments in a separate residual unit.<sup>81</sup> In such a unit, the Board has also included messengers, janitors, and cutters when no other union seeks to represent them and they would otherwise be left without a bargaining representative.<sup>82</sup>

In another case, the Board found that all employees of an experimental department constituted "a cohesive and well-defined residual departmental group with separate supervision and working space which may properly constitute a separate bargaining unit."<sup>83</sup> The employees had been specifically excluded from a consent representation election. The decision noted that the experimental department was the only division, out of 17 at the plant, in which employees had no representation for collective bargaining. Similarly, the Board approved a unit of 8 stores in a grocery chain as a residual unit when they were the only stores within a 20-store district not included in any unit.<sup>84</sup>

## 5. Multiplant Units

The determination of the proper scope of a bargaining unit when the employer operates more than one plant or establishment often presents certain special problems. The act provides that "the Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . ." <sup>85</sup> However, another section of the statute provides that "in determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling." <sup>86</sup> In cases involving employers with multiplant operations, the latter provision is often invoked in opposition to a single-plant unit or any unit less than company-wide.

After careful study of the legislative history of this provision, the Board concluded that Congress did not intend that the Board should ignore this factor in establishing units to give employees "the fullest

<sup>80</sup> *Johnson Printing, Inc*, 92 NLRB 1426, *Ewing Printing Co.*, 85 NLRB 237 (1949); *Manz Corp*, 79 NLRB 211 (1948). For "unusual circumstances," see *Pacific Press, Inc.*, 66 NLRB 458 (1946).

<sup>81</sup> *Johnson Printing*, cited above; *The Madison Co.*, 7-RC-1183 (not printed).

<sup>82</sup> *The Madison Co.*, cited above.

<sup>83</sup> *Engineering and Research Corp*, 90 NLRB 16

<sup>84</sup> *The Kroger Co.*, 93 NLRB 274.

<sup>85</sup> Sec. 9 (b).

<sup>86</sup> Sec. 9 (c) (5)

freedom" in bargaining.<sup>87</sup> Rather, the Board found, Congress intended, as the statute says, that this factor "shall not be controlling" or, in other words, not solely determinative of a unit. However, that does not mean that the Board may not even consider this factor. Accordingly, the Board has considered extent of organization as a factor in a number of cases involving employers with multiplant operations, but it has consistently based its decisions upon consideration of other additional factors as well.<sup>88</sup> And where the only persuasive basis for the unit proposed was found to be extent of organization, the Board has rejected the unit, as required by the Act.<sup>89</sup>

Principal among the other factors taken into consideration in such cases are: (1) Past bargaining practices of the employer, (2) the extent of interchange of employees between plants or sections of the company, and contacts between the various groups of employees, (3) the extent of functional integration of operations between the plants or sections, (4) differences in the products of the plants or in the skills and types of work required, (5) the centralization, or lack of centralization, of management and supervision, particularly in regard to labor relations and the power to hire and discharge, and (6) the physical or geographical location of the plants in relation to each other.

Rarely, if ever, is a unit determined by any one of these factors standing alone. In most cases, several of these factors are present; some pointing to the appropriateness of a multiplant unit, others pointing to the appropriateness of a narrower unit. In each case, the Board must weigh all the factors present to decide which way the balance falls. Moreover, the Board is not required to find the *only* appropriate unit, but merely *an* appropriate unit.<sup>90</sup> Sometimes more than one unit could be found appropriate.

However, in certain industries, the Board generally favors company-wide or multiplant units. Foremost among such industries are the public utilities, such as power, telephone, and gas companies. It has long been the Board's policy to establish system-wide units in public utilities, wherever feasible.<sup>91</sup> This policy stems from the fact that ordinarily the nature of a public utility and the type of service rendered requires a high degree of coordination and integration among the employees and a high degree of interdependence among its various departments.<sup>92</sup> As the Board observed in a recent case, "these broader

<sup>87</sup> *Waldensian Hosiery Mills, Inc.*, 83 NLRB 742 (1949)

<sup>88</sup> *Union-Buffalo Mills, Division of United Merchants and Manufacturers, Inc.*, 10-RC-1094 (not printed); *The McKay Machine Co.*, 93 NLRB 822

<sup>89</sup> *Montgomery Ward & Co.*, 90 NLRB 609.

<sup>90</sup> *Morand Brothers Beverage Co.*, 91 NLRB 409.

<sup>91</sup> *The LaClede Gas Light Co.*, 77 NLRB 354 (1948); *Public Service Electric & Gas Co., of N. J.*, 81 NLRB 1191 (1949); *Public Service Co. of Indiana*, 91 NLRB 1151; *Elizabethtown Consolidated Gas Co.*, 93 NLRB 1270; *California-Pacific Utilities Co.*, 93 NLRB 747; *Pacific Power & Light*, 94 NLRB No. 98

<sup>92</sup> See *LaClede Gas Light and Public Service Electric & Gas Co.*, both cited above.

unit findings have been predicated upon the highly integrated and interdependent nature of public utility operations, the centralized control of major policies relating to labor relations and the public interest involved.”<sup>93</sup> Even in the face of a substantial history of bargaining on a narrower basis, the Board has held system-wide or multidepartment units appropriate in utilities.<sup>94</sup>

In the field of insurance sales, the Board has similarly stated its long-standing belief that the appropriate unit is that which most nearly approximates a company-wide unit.<sup>95</sup> Similarly, the Board has declared that “where an employer-wide unit exists in the transportation field, we have been reluctant to disturb it.”<sup>96</sup>

But in most other industries, the Board continues to apply its standard tests in measuring the appropriateness of multiplant units.

In line with the general policy of retaining, where possible, bargaining units which have stood the test of time and experience,<sup>97</sup> the Board places considerable emphasis upon past collective bargaining practice in its determinations of unit in multiplant operations, as elsewhere.<sup>98</sup> Thus, in one case, a unit of production and maintenance employees limited to one of a company’s two plants was held inappropriate where there was a 9-year history of multiplant bargaining, despite the fact that the plants were two miles apart, made different products requiring different skills, had separate seniority, and no interchange of employees.<sup>99</sup> Similarly, the Board declined to sever a group of employees in a wholesale distributor’s feed mill from a unit composed of the mill and two warehouses in view of a 10-year history of multiplant bargaining.<sup>1</sup> In another case—in the transportation field—the Board approved a unit of truck maintenance employees at one of four terminals when they had a 5-year history of separate bargaining.<sup>2</sup>

Interchange of employees between plants or operations often figures as a factor in determining the appropriateness of multiplant units. In one case, the Board rejected a proposed unit of two recently established retail stores where one-third of the key personnel had come from other stores in an established bargaining unit of 187 other stores; transfers between stores were frequent, and promotions were on a

<sup>93</sup> *New England Telephone & Telegraph Co*, 90 NLRB 639

<sup>94</sup> *New England Telephone & Telegraph Co*, and *Elizabethtown Consolidated Gas Co*, both cited above

<sup>95</sup> *Home Beneficial Life Insurance Co*, 10-RD-81 (not printed)

<sup>96</sup> *Yellow Transit Co*, cited above, see *Acme Fast Freight, Inc.*, 80 NLRB 979

<sup>97</sup> See *Waterous Co*, 92 NLRB 76.

<sup>98</sup> *Yellow Transit Co*, 92 NLRB 538

<sup>99</sup> *Hanovia Chemical & Mfg Co*, 90 NLRB 650. However, in this case, the plants also had a common labor policy, a single wage scale, and only one personnel office and one maintenance department to serve them both

<sup>1</sup> *Central Cooperative Wholesale*, 93 NLRB 1. In this case, the Board also found complete integration of operations, duplication of many work categories, similarity of skills required, and interchange of employees

<sup>2</sup> *Yellow Transit Co*, cited above. Here, although employees at all terminals had substantially the same rates of pay and working conditions, hiring was on a local basis, interchange of employees was infrequent, and the terminals were widely separated geographically

basis of the whole retail operation.<sup>3</sup> Also, the Board approved a unit composed of employees at a coal tippie and unlicensed personnel on the employer's river boats hauling coal from the tippie when it found there was association between shore and boat employees and some transfers of boat employees to shore jobs.<sup>4</sup>

Lack of interchange of employees, on the other hand, is usually taken as evidence of the appropriateness of separate units.<sup>5</sup> Thus, a unit composed only of employees engaged in crate making for the Army was held appropriate where there was no interchange or contact between these employees and others at the employer's moving and storage business where the crates had formerly been made.<sup>6</sup> These employees were held entitled to separate representation even though crate-making employees were claimed to have been covered by a contract covering moving and storage operations. Similarly, the Board approved a unit of employees at one of two powerhouses serving the employer's three plants in the area when there was no interchange of employees between the powerhouses, seldom a transfer, and no regular face-to-face contact between employees of the two powerhouses.<sup>7</sup> These factors were held to outweigh functional integration of the employer's operations.

Similarly, the Board declined to find appropriate a single unit embracing an employer's sawmill, lumber plant, and furniture plant where there was little employee contact between the sawmill and the other two plants, and the employees were not interchangeable.<sup>8</sup>

The integration of operations between plants or divisions of a company is another factor often considered by the Board in determining the appropriate unit in cases involving employers operating more than one plant. Thus, in one case, the Board held inappropriate a proposed separate unit of employees at two warehouses operated by a mail-order company, because of the close integration of operations between the warehouses and the mail-order house which they served.<sup>9</sup> In this case, there was a steady flow of merchandise between mail-order house and warehouses, and the warehouses often shipped goods direct to customers in the same manner as the mail-order house proper.

<sup>3</sup> *American Stores Co.*, 2-RC-2044 (action on appeal from regional director's dismissal, not printed). Also, working conditions were similar in all of the company's stores.

<sup>4</sup> *Hatfield Campbell Creek Coal Co.*, 93 NLRB 999. In this case, there also was a history of collective bargaining on this basis and operations were integrated.

<sup>5</sup> *Perfection Garment Co.*, 91 NLRB 1421; *Muntz Television, Inc.*, 92 NLRB 29.

<sup>6</sup> *Westport Moving and Storage Co.*, 91 NLRB 902.

<sup>7</sup> *Burroughs Adding Machine Co.*, 90 NLRB 1814. Also, the two powerhouses were 21 miles apart and had separate immediate supervisors who initiated all personnel actions.

<sup>8</sup> *Mullins Lumber Co.*, 94 NLRB No. 8. Also, there was no history of bargaining on the broad unit basis, and employment and supervision were handled locally.

<sup>9</sup> *Montgomery Ward & Co.*, 90 NLRB 609. In these instances, the Board found also some face-to-face contact between employees of the store and mail-order department and their respective warehouses, and some similarity of work. In the mail-order case, there was additionally some interchange of employees and some transfers.

In the same case, the Board rejected a separate unit of employees at another warehouse of the company because of its close integration to the operations of the company's retail store in the same vicinity. But in another case, where a warehouse was operated completely independent of the plant, the warehousemen were held to constitute an appropriate separate unit.<sup>10</sup> Where there was integration of operations in the manufacture of glass fibers, a two-plant unit was found appropriate, although the plants were 50 miles apart.<sup>11</sup> The Board also found that the integration of operations between a steel-tank manufacturing plant and a separately located job shop of the same employer was sufficient to place employees of both plants in the same bargaining unit.<sup>12</sup> This was also the case with a lumberyard, planing mill, and green-chain operation, all operated by one employer.<sup>13</sup> In another case, where two firms had common ownership and facilities and the employees of both were engaged in similar work, the Board dismissed a petition for a unit composed of the mechanics of only one firm.<sup>14</sup> Similarly, the Board held appropriate a unit of employees in both a fruit-packing operation and a cannery when they were located in the same building and had the same supervision, and fruit unsuitable for shipment fresh was used in the cannery to make juices.<sup>15</sup>

Nearness of the plants to each other, however, does not necessarily establish integration of operations. Thus, the Board found appropriate a separate unit at each of two warehouses of the same employer only half a block apart because their operations were unrelated and the skills and duties required were entirely dissimilar.<sup>16</sup> Likewise, the Board held separate units appropriate where the employer fabricated truck bodies in one building and, in an adjoining plant, retinned milk cans.<sup>17</sup> Two units were held appropriate here even though occasionally, during slack periods, retinning plant employees were assigned to the body department.

The extent of centralization of management and supervision, particularly in regard to labor relations and the power to hire and discharge, frequently is a major factor in determining the appropriateness of multiplant units. In one case, a company-wide unit of salesmen for a brewing company operating in three States was held appro-

<sup>10</sup> *Goodyear Tyre & Rubber Co.*, 21-RC-1658 (not printed).

<sup>11</sup> *Glass Fibers, Inc.*, 93 NLRB 1289. Also, in this case, the Board found unified control of management policies and labor relations at the two plants, similar work, and transfers of employees between the plants.

<sup>12</sup> *Modern Welding Co.*, 9-RC-1075 (not printed).

<sup>13</sup> *J. G. Howard Lumber Co.*, 93 NLRB 1230.

<sup>14</sup> *Betram F. Roland, d/b/a Launderrepair Co.*, 90 NLRB 778. Also, several employees did the same work for both firms.

<sup>15</sup> *Holly Hill Fruit Products, Inc.*, 10-RC-887 (not printed).

<sup>16</sup> *Champlin Refining Co.*, 92 NLRB 1377.

<sup>17</sup> *Johnson Welding & Mfg. Co.*, 91 NLRB 1325. Also, the two plants were conducted as separate enterprises with separate supervision.

appropriate because of the company's centralized sales organization, absence of local autonomy in hiring, and centralized supervision, labor relations, and general policies.<sup>18</sup> For the same reasons, in a case involving another brewery, the Board rejected smaller units of salesmen.<sup>19</sup> Highly centralized control of labor relations policy alone, however, seldom dictates a multiplant unit when there is local hiring and firing and little or no interchange or transfer of employees between plants.<sup>20</sup>

Differences in product and the skills and techniques required also militate against multiplant units in some cases.<sup>21</sup>

Geographical separation is another factor that plays a part in determining the unit appropriate in cases involving employers with multiplant operations.<sup>22</sup> Thus, the Board held that a unit limited to a granite plant and quarry operation was appropriate when it was a distance of 135 miles from the employer's two other quarries.<sup>23</sup> In another case, the Board approved a unit composed of five out of six retail stores operated by the employer where the sixth store was 100 miles from the other five.<sup>24</sup> The Board held that this separation, the absence of a history of bargaining on an employer-wide basis, and the fact that no union was seeking to represent the larger unit outweighed the centralized control customary to chain-store operations and the similarity of work of employees in the different stores.

## 6. Multiemployer Units

The question of the appropriateness of a bargaining unit comprising employees of more than one employer arises where employers of an industry conduct collective bargaining negotiations jointly as members of an association or through a joint bargaining agent. Generally, the Board will find that such a unit is appropriate if there is a *controlling* bargaining history on a multiemployer basis.<sup>25</sup> For this purpose, neither the lack of a formal association of employers<sup>26</sup> nor the fact that the results of joint negotiations have been incorporated in separate uniform contracts is determinative.<sup>27</sup>

The inclusion of employees in a multiemployer unit depends primarily on whether the employer intends to be bound, or is in fact

<sup>18</sup> *John F. Trommer, Inc.*, 90 NLRB 1200, see also public utility cases cited above

<sup>19</sup> *Liebmann Brewers, Inc.*, 92 NLRB 1740

<sup>20</sup> *Coca-Cola Bottling Co. of St. Louis*, 94 NLRB No. 30, *Mullins Lumber Co.*, 94 NLRB No. 8, *M. Snower Co.*, 13-RC-1409 (not printed), *Lenoir Chair Co.*, 34-RC-242 (not printed), *Conover Furniture Co.*, 34-RC-244 (not printed)

<sup>21</sup> *Stow and Davis Furniture Co.*, 92 NLRB 80, *Johnson Welding & Mfg. Co.*, cited above

<sup>22</sup> *Southland Mfg. Co.*, 34-RC-196 (not printed), *North Star Granite Corp.*, 18-RC-954 (not printed), *Imperial Garden Growers*, 91 NLRB 1034, *Mid-States Steel & Wire Co.*, 94 NLRB No. 47

<sup>23</sup> *North Star Granite Corp.*, cited above

<sup>24</sup> *Silverwood's*, 92 NLRB 1114

<sup>25</sup> *Rainbo Bread Co.*, 92 NLRB 181

<sup>26</sup> *Schulze Baking Co.*, 92 NLRB 73

<sup>27</sup> *Arena-Norton, Inc.*, 93 NLRB 375

bound, by joint negotiations. Thus, in one case during the past year, the Board said

It is the participation for a substantial period of time in joint bargaining negotiations and the uniform adoption of the agreements resulting from such negotiations that indicates a desire on the part of the participants to be bound by joint, rather than individual, action and warrants the establishment of the multiemployer unit.<sup>28</sup>

Since the employer's participation in joint negotiations is the determining factor,<sup>29</sup> it is not necessary that he agree in advance to be bound by any contract which may be jointly negotiated.<sup>30</sup> Conversely, the mere adoption by an employer of contracts negotiated by an employer group will not be held to require the inclusion of his employees in the multiemployer unit.<sup>31</sup>

However, an employer's intention to be bound by the joint negotiations of an association is not sufficient where the employer is not a member of the association and the association will act as bargaining agent only for its members.<sup>32</sup>

A history of multiemployer bargaining, nevertheless, is not necessarily controlling. Thus, where negotiations with a multiemployer committee resulted in contracts which were applicable only to members of the contracting union,<sup>33</sup> a panel majority of the Board said

Although the Board has sometimes accepted a members only contract as indicative of the feasibility of the scope of the unit, traditionally the Board has refused to give controlling weight to such a bargaining history, for such history does not afford the kind of representation nor establish such a bargaining unit as the Act contemplates. In particular, it has been our policy not to permit such history to preclude the establishment of a unit such as the one involved herein, which is inherently appropriate.<sup>34</sup> [Footnotes omitted.]

Moreover, a multiemployer bargaining history will not be held to require inclusion of employees in the multiemployer unit if their employer has effectively abandoned joint bargaining.<sup>35</sup> Thus, where one member of an employer group in the course of negotiations stated that it would not join in any further group bargaining, and thereafter

<sup>28</sup> *Cleveland Builders Supply Co*, 90 NLRB 923.

<sup>29</sup> See also *Whiz Fish Products Co*, 94 NLRB No. 198, *Schulze Baking Co*, 92 NLRB 73, *The Plumbing Contractors Association of Baltimore, Md., Inc.*, 93 NLRB 1081.

<sup>30</sup> *Whiz Fish Products Co*, 94 NLRB No. 198.

<sup>31</sup> *Coca-Cola Bottling Works Co*, 93 NLRB 1414, *Bedmi Brothers*, 93 NLRB 610; *Stamford Wall Paper, Inc.*, 92 NLRB 1173.

<sup>32</sup> *The Plumbing Contractors Association of Baltimore, Md., Inc.*, 93 NLRB 1081, see also *Coca-Cola Bottling Works Co*, 93 NLRB 1414; *Bedmi Bros.*, 93 NLRB 610.

<sup>33</sup> *Crucible Steel Castings Co.*, 90 NLRB 1843.

<sup>34</sup> Member Murdock, dissenting, was of the opinion that the contracts in question were in fact intended to cover all employees in the unit.

<sup>35</sup> *Pacific Metals Co.*, 91 NLRB 696.

did not enter into any written contracts with the union involved, the Board applied the rule that

if an employer at an appropriate time, manifests an unequivocal intent to pursue an individual course in his labor relations, a unit limited to his employees alone becomes appropriate.<sup>36</sup>

In another case, the Board held that the employer's expressed intention to pursue an individual course of bargaining in the future was not offset by an interim agreement which extended the terms of the last joint contract but which was executed and signed by the employer in its own behalf.<sup>37</sup> On the other hand, unless the expression of an employer's intent to abandon his participation in group action is both unequivocal and timely, the prior multiemployer bargaining history continues to control the type of unit appropriate for his employees. Consequently, where an association member indicated that it did not wish to be bound by future negotiations, but did not withdraw from the association and in fact continued to permit the association to negotiate in its behalf, the Board held that the existing bargaining history was controlling.<sup>38</sup> Furthermore, an employer will not be permitted to change its course from joint to individual action during the term of an existing contract, because this would not make for that stability in bargaining relations which the Act seeks to promote.<sup>39</sup> Similarly, where an employer did not resign from an employer association until after an agreed escape period and after the execution of a new contract, the Board held that the single-employer unit requested on the basis of the employer's resignation was not appropriate.<sup>40</sup>

Nor may an employer partially withdraw from association-wide bargaining, in respect to only one group of employees, at a time when a contract covering a larger unit is still in effect. Thus, the Board in one case declined to permit such a withdrawal which would have had the effect of removing a group of lithographic employees from a pressroom unit.<sup>41</sup> The Board, having previously denied a petition for the severance of this group, held that a new request for such severance was not validated by the employer's attempted withdrawal.

<sup>36</sup> *Milk Dealers of Greater Cincinnati*, 94 NLRB No. 11; see also *Economy Shade Co.*, 91 NLRB 1552.

<sup>37</sup> *Stamford Wall Paper, Inc.*, 92 NLRB 1173.

<sup>38</sup> *Carnation Co.*, 90 NLRB 1808

<sup>39</sup> *W S Ponton of N. J., Inc.*, 93 NLRB 924. Shortly after the close of the fiscal year the Board, upon reopening the case, found that the employer had later effectively withdrawn from the association involved and was no longer bound to bargain on a multiemployer basis. *W. S. Ponton of N. J., Inc.*, 95 NLRB No 77 (July 25, 1951).

<sup>40</sup> *Purity Stores, Ltd.*, 93 NLRB 199.

<sup>41</sup> *Pioneer, Inc.*, 90 NLRB 1848.

The presence of a controlling multiemployer bargaining history defeats the presumption that a single-employer unit is appropriate; and this applies to special classifications of employees which were omitted from joint negotiations. The Board, therefore, held that a single-employer unit of operating and maintenance engineers of a wholesale bakery was too limited and that the uninterrupted and current pattern of multiemployer bargaining for other employees of the employer was controlling.<sup>42</sup> However, where the bargaining pattern for a special classification is contrary to the multiemployer pattern for the employer's other employees, the latter will not be followed.<sup>43</sup>

Where separate corporations are found to constitute a single employer in view of common ownership and control, the Board will include their employees in a single unit if the interest of the employees are sufficiently identical, even though bargaining may have taken place on a single-company basis.<sup>44</sup> On the other hand, a single unit of employees of several commonly controlled corporations will not be held appropriate in the absence of sufficient integration of operations and in the absence of collective bargaining on a multiemployer basis.<sup>45</sup>

## 7. Employees in Separate Units

Employees engaged in three general types of work normally are placed by the Board in separate units. These are plant guards, professional employees, and office clerical employees.

In the case of plant guards, who enforce rules for the protection of property or safety on an employer's premises, the statute not only forbids the Board from placing them in bargaining units with other employees but it forbids the certification of a labor organization as their representative if the organization admits other employees as members, or if it is "affiliated directly or indirectly" with an organization admitting other employees as members.<sup>46</sup>

Professional employees, on the other hand, may be included in bargaining units with other employees, but only if a majority of the professionals vote for such inclusion.<sup>47</sup> The term "professional employee" is defined in the Act in considerable detail.<sup>48</sup>

There is no statutory provision against the inclusion of clerical employees in bargaining units with other employees, but the Board,

<sup>42</sup> *Schulze Baking Co.*, 92 NLRB 73

<sup>43</sup> *Rainbo Bread Co.*, 92 NLRB 181.

<sup>44</sup> *Beaumont City Lines, Inc.*, 90 NLRB 1800, *Sa-Mor Quality Brass, Inc.*, 93 NLRB 1225

<sup>45</sup> *Silverstein Brothers, Inc.*, 93 NLRB 1074.

<sup>46</sup> Sec. 9 (b) (3) This, of course, prevents any organization affiliated with any of the standard national or international labor unions or any of the standard federations from being certified as the representative of guards. See Fifteenth Annual Report, p. 50.

<sup>47</sup> Sec. 9 (b) (2).

<sup>48</sup> Sec. 2 (12)

from its inception, has followed the policy of approving only separate units for these employees, unless they work regularly on the production floor.<sup>49</sup> The principal reason for this, of course, is the fundamental differences between office clericals and production or maintenance employees in interests, working conditions, manner of payment, and supervision.<sup>50</sup> However, this does not prevent a union composed primarily of production and maintenance employees from representing office clerical employees if the clericals wish it.<sup>51</sup> On the other hand, clericals who work regularly on the production floor, commonly known as plant clericals, are customarily included in production units, when sought, because of their community of interest with production and maintenance employees.<sup>52</sup>

### a. Plant Guards

The Board's discretion in determining appropriate bargaining units where the plant-protection employees are involved is limited by section 9 (b) (3) to the extent that the Board may not—

decide that any unit is appropriate . . . if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises.

This section provides further 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.

The question which confronts the Board most frequently in administering this section is whether or not a given employee is a "guard" within the definition and for the purposes of the act. Generally, the Board will find that watchmen are guards in the statutory sense if they perform such duties as checking for fire and other safety hazards, identifying persons entering the plant, stopping and reporting violations of plant regulations, and punching clocks while making their rounds through the plant. The fact that such watchmen may not be armed, deputized, or uniformed is not material.<sup>53</sup> Moreover, an employee's status as a guard is not affected by his payroll classification. Thus, the Board excluded from a unit an employee classified as a maintenance employee who spent his entire time in performing watch-

<sup>49</sup> *Pacific Gas & Electric Co.*, 3 NLRB 835 (1937)

<sup>50</sup> *Nelson-Ricks Creamery Co.*, 19-RC-583 (not printed) See Third Annual Report (1938).

<sup>51</sup> *The Ohio Steel Foundry Co.*, 92 NLRB 683.

<sup>52</sup> *American Hardware Corp.*, 4 NLRB 412 (1937). See Third Annual Report (1938), p 185, and Annual Reports since.

<sup>53</sup> *Fruit Growers Supply Co.*, 94 NLRB No 128, *Thomas A. Edison Co.*, 90 NLRB 154; *Kohler Co.*, 93 NLRB 398.

man duties.<sup>54</sup> The Board during the past year reaffirmed its ruling that employees engaged in guarding property of customers of their employer on a commercial basis are not guards within the definition of section 9 (b) (3).<sup>55</sup>

Employees who are primarily engaged in maintaining fire-extinguishing equipment, or who are employed chiefly for fire-protection purposes without any responsibility for enforcing company rules against employees and other persons, were held not to be guards.<sup>56</sup>

The Board continues to apply the principle that employees will not be considered guards for the purposes of the act unless they spend more than 50 percent of their time in work that conforms to the statutory description.<sup>57</sup> In one case, the Board's more-than-50-percent requirement was held satisfied where a watchman, during about one-fourth of the year, spent over half of this time in production work, but during the remainder of the year devoted his entire time to guard's duties.<sup>58</sup>

In one case, the Board had occasion to dismiss the petitions for a unit of guards on the ground that both unions admitted employees other than guards as members, and were, therefore, precluded from representing plant guards.<sup>59</sup>

## b. Professional Employees

Under section 9 (b) (1), the Board may not "decide that any unit is appropriate \* \* \* if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit." Consequently, if a proposed unit contains both professional and non-professional employees, the Board will direct a self-determination election among the professionals in order to ascertain whether or not they desire to be included in the unit sought.<sup>60</sup> However, if a proposed unit is predominantly professional, it will be held appropriate, although the unit includes a group of nonprofessional employees.<sup>61</sup> Applying this rule, the Board held that a unit of professional engineers and chemists properly included a number of nonprofessional technicians

<sup>54</sup> *Johnson Printing Inc*, 92 NLRB 1426

<sup>55</sup> *American District Telegraph Co*, 17-RC-947 (not printed) See Fifteenth Annual Report, p 51

<sup>56</sup> *Allied Materials Corp*, 7-RC-889 (not printed), *Schenley Distillers Inc*, 92 NLRB 1130.

<sup>57</sup> *Conover Furniture Co*, 94 NLRB No. 36, *Sterling Spinning Co.*, 34-RC-261 (not printed), and *Wiley Manufacturing Inc*, 92 NLRB 40, overruling *Texas Knitting Mills, Inc*, 16-RC-517 (not printed), and *Cornell-Dubilier Electric Corp*, 35-RC-343 (not printed), insofar as inconsistent.

<sup>58</sup> *Fruit Growers Supply Co*, 94 NLRB No 128

<sup>59</sup> *Thomas A. Edison Co*, 2-RC-1953 (not printed)

<sup>60</sup> *International Harvester Co.*, 13-RC-1004 (not printed) *The Budd Co*, *Red Lion Plant*, 4-RC-753 (not printed); *Westinghouse Electric Corp*, 92 NLRB 196, *Sonotone Corp*, 90 NLRB 1236

<sup>61</sup> See *Boeing Airplane Co*, 86 NLRB 368, Fifteenth Annual Report, p 49

who were closely associated with them in the performance of their duties.<sup>62</sup>

In determining whether employees are "professional," the Board applies the tests indicated in section 2 (12) of the act<sup>63</sup> to work performed by the particular employees. In one case, the Board held that while some time-study men, by reason of their specialized duties and scientific training, may meet these standards, the particular time-study employees involved were not "professional" within the terms of the statute.<sup>64</sup> This case specifically overruled earlier cases which might be interpreted to mean that time-study men, by occupation, are necessarily professional employees.<sup>65</sup>

The following types of employees were held to be professional employees under the circumstances of the respective cases: Senior draftsmen,<sup>66</sup> operational planners,<sup>67</sup> a spectograph gang leader with college degree and specialized knowledge in a new field of analytical chemistry,<sup>68</sup> a radio-station employee with first-class engineer's license who spent 90 percent of his time in experimental research.<sup>69</sup>

The Board found that the following employees did not perform professional duties: Blueprint operators,<sup>70</sup> assistant engineers,<sup>71</sup> time-keepers with college training in accounting, quality inspectors,<sup>72</sup> draftsmen,<sup>73</sup> embalmers, and funeral directors.<sup>74</sup>

### c. Clerical Employees

The categories of employees which may appropriately be assembled in a bargaining unit are controlled not only by the statutory limitations discussed above, but also by certain rules established by the Board in the exercise of its discretion on the basis of its evaluation of the interests of particular classes of employees. Within this latter category are office clerical employees, as distinguished from plant clericals. Generally, office employees have been excluded from production and maintenance units because of the fundamental differences in the work and interests of the two groups.<sup>75</sup> The Board applies this rule notwith-

<sup>62</sup> *Federal Telecommunication Laboratories, Inc.*, 92 NLRB 1395.

<sup>63</sup> See appendix C, Text of Amended Act.

<sup>64</sup> *Florence Store Co.*, 94 NLRB No 213

<sup>65</sup> Cases specifically overruled were *Worthington Pump and Machinery Corp.*, 75 NLRB 678; *Detroit Harvester Co.*, 79 NLRB 1316, *The Timken-Detroit Axle Co.*, 80 NLRB 1075, *F. W. Sickles Co.*, 81 NLRB 390; *Westinghouse Electric Corp.*, 89 NLRB 8, and *General Electric Co.*, 89 NLRB 726

<sup>66</sup> *Sonotone Corp.*, 90 NLRB 1236

<sup>67</sup> *American Locomotive Co.*, 92 NLRB 1457.

<sup>68</sup> *United States Metals Refining Co.*, 93 NLRB 795.

<sup>69</sup> *Southwestern Sales Corp.*, 93 NLRB 936.

<sup>70</sup> *General Motors Corp.*, 7-RD-70 (not printed).

<sup>71</sup> *Sonotone Corp.*, 90 NLRB 1236

<sup>72</sup> *Chase Aircraft Co.*, 91 NLRB 288.

<sup>73</sup> *Ohio Steel Foundry Co.*, 92 NLRB 683

<sup>74</sup> *Riverside Memorial Chapel Inc.*, 92 NLRB 1594.

<sup>75</sup> *Nelson-Ricks Creamery Co.*, 19-RC-583 (not printed); *Calavo Growers of California and Calavo, Inc.*, 21-RC-1277, decided July 21, 1950 (not printed).

standing a contrary collective bargaining history.<sup>76</sup> On the other hand, plant clericals will be included in a unit with production and maintenance employees because of the similarity of the interests and working conditions of the two groups.<sup>77</sup>

Clerical employees who work both in the office and in the plant will be included in the production group if they are primarily plant clericals and perform office work only occasionally.<sup>78</sup> Conversely, office clericals whose duties require them to go into the plant for brief periods each day were excluded from a production and maintenance unit.<sup>79</sup> Also excluded was a group of office clericals who worked under the supervision of the office manager, but were located in the plant for convenience.<sup>80</sup> In one case, all "main office clerical employees" were excluded from a plant-wide unit although some of them performed plant clerical functions.<sup>81</sup> The Board's finding in this case took into consideration the fact that there was no clear demarcation between plant clericals and office clericals, and that all of the disputed clerical employees worked in enclosed offices under the same immediate supervision. An office clerk who performed production work during emergencies was likewise excluded from a production unit.<sup>82</sup>

Among employees which the Board has found to fall into the category of plant clericals have been: Stock chasers, tool crib attendants, store tenders, receiving clerks, a general shop clerk, a record clerk, an expediter clerk, and shipping clerks.<sup>83</sup> Where such clericals had their desks or stations in the production area and had no administrative or functional connection with the employer's general office workers, who were located on another floor, the Board held them to be plant clericals who could be included in a production and maintenance unit despite the fact they were salaried.<sup>84</sup> The Board found they were "closely allied in interest" with the production employees in that case.

## 8. Excluded Employees

Persons engaged in certain types of work are excluded from coverage of the act by being specifically excluded from the statute's definition of the term "employee."<sup>85</sup> These include domestic servants

<sup>76</sup> *The Budd Co., Red Lion Plant*, 4-RC-753 (not printed); *Southern Desk Co.*, 34-RC-217 (not printed); *Proctor and Gamble Mfg. Co.*, 2-RC-2385 (not printed), *Hy-Lan Furniture Co.*, 34-RC-277 (not printed), *Stowe Spinning Co.*, 34-RC-262 (not printed).

<sup>77</sup> *The Hilliard Corp.*, 3-RC-449 (not printed), *United States Smelting, Refining and Mining Co.*, 93 NLRB 1280; *The American News Co.*, 93 NLRB 1566; *Kerrigan Iron Works, Inc.*, 93 10-RC-1154 (not printed).

<sup>78</sup> *American Perfit Crystal Corp.*, 2-RC-2146 (not printed); *Telechron, Inc.*, 90 NLRB 931, see also *Fieldcrest Mills Division of Marshall Field & Co.*, 93 NLRB 18

<sup>79</sup> *Gastonia Weaving Co.*, 91 NLRB 899.

<sup>80</sup> *United States Gypsum Co.*, 92 NLRB 18.

<sup>81</sup> *The E. J. Kelly Co.*, 1-RC-1497 (not printed)

<sup>82</sup> *Hy-Lan Furniture Co.*, 34-RC-277 (not printed).

<sup>83</sup> *Allen-Bradley Co.*, 13-RC-1089 (not printed); *Waterous Co.*, 92 NLRB 76.

<sup>84</sup> *Waterous Co.*, cited above.

employed in a home, individuals employed by parent or spouse, individuals employed by an employer under the Railway Labor Act, supervisory employees, independent contractors, and agricultural laborers. However, only the last three categories—supervisors, independent contractors, and agricultural laborers—have presented questions in any substantial number of cases coming before the Board.

In addition, the Board has long followed the policy of excluding from bargaining units employees whose duties are managerial, and employees who stand in a confidential relationship to executive employees handling labor relations of the employer.<sup>86</sup>

### a. Supervisory Employees

Since the amended act excludes supervisors from its protection,<sup>87</sup> the Board must frequently determine whether employees sought to be included in, or excluded from, a proposed unit come within the statutory definition of the term supervisor.<sup>88</sup>

The Board's decision in this type of case turns primarily on the presence of the type of authority specified in section 2 (11).

In determining whether employees actually possess supervisory powers, the Board will not be guided by the employee's job title or classification,<sup>89</sup> but by his actual duties, taking into account all relevant factors, including the type of work done and responsibility exercised.<sup>90</sup>

The Board will reject the contention that an employee is a supervisor if his authority amounts to no more than the supervision usually exercised by experienced employees over those who are less skilled.<sup>91</sup>

Since under the terms of section 2 (11) authority must be exercised over "other employees," the Board has repeatedly held that employees who exert control primarily over equipment, and direct personnel only incidentally, are not supervisors.

Under this rule, the following employees were held not to be supervisors: Radio dispatchers of a transit company who were located in the radio room and transmitted usually standardized directives to mobile

<sup>86</sup> Sec. 2 (2)

<sup>87</sup> *Ford Motor Co.*, 66 NLRB 1317 (1946); *Consolidated Vultee Aircraft Corp.*, 54 NLRB 103 (1943), *Creamery Package Manufacturing Co.*, 34 NLRB 108 (1941)

<sup>88</sup> Sec. 2 (3)

<sup>89</sup> Sec. 2 (11) of the act provides, "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment"

<sup>90</sup> *Silverwood's*, 92 NLRB 1114, *United States Gypsum Co.*, 1-RC-1561 (not printed), *Olympic Petroleum and Equipment Co.*, 3-RC-424 (not printed), *McGough Bakeries Corp.*, 90 NLRB 2004; *Indiana Metal Products Co.*, 13-RC-1270 (not printed); *The Baltimore Transit Co.*, 92 NLRB 688, *I. S. Berlin Press*, 93 NLRB 13, *Bear Brand Hosiery Co.*, 93 NLRB 95; *Coca-Cola Bottling Co. of St. Louis*, 94 NLRB No. 33

<sup>91</sup> *Silverwood's*, cited above.

<sup>92</sup> *United States Gypsum Co.*, 93 NLRB 91; *Geo Knight and Co.*, 93 NLRB 1193.

supervisors in response to trouble calls.<sup>92</sup> Street railway inspectors who were responsible for the observance of schedules and routes, enforced rules relative to the safe operation of vehicles, investigated, corrected, and reported transgressions of safety rules by operators.<sup>93</sup> Employees in charge of one-man departments, and employees who possess authority but have no subordinates.<sup>94</sup> Retail-store department heads who were the sole regularly assigned workers in their departments and had subordinates detailed to them only during short periods of seasonal activity.<sup>95</sup> A shipping clerk who had only a school-boy assisting him part time.<sup>96</sup> However, a warehouse superintendent, who from time to time, was assisted by and exercised authority over as many as eight employees from other departments on a part-time basis, was held to come within the statutory definition of a supervisor.<sup>97</sup>

Route salesmen, or driver-salesmen, who usually have one helper on their trucks, are a class of employees who have presented questions of supervisory powers in some cases. One such case involved driver-salesmen for the alcoholic beverage distributing company.<sup>98</sup> The Board declined to hold them supervisory employees in this case, where they worked under supervision of a sales superintendent and there was no showing that they had been given any general instructions or authorization to hire or fire helpers or that they in fact hired or fired helpers as a general practice. In this instance, drivers on occasion had obtained another helper when one quit while out on the route. On occasions, drivers had also been authorized specifically by the employer to hire a helper when the employer was unable to obtain one. Moreover, drivers had in some instances dismissed helpers while on the route when the helper proved utterly undesirable. These instances were found by the Board to be only deviations from the general practice which did not confer supervisory status upon the drivers.

A question often arises whether an employee has supervisory status because he has authority "responsibly to direct" other employees which "requires the use of independent judgment" rather than being "merely of a routine or clerical nature."<sup>99</sup> This type of supervisory authority was found to have been conferred upon line supervisors of a garment factory who instructed new employees in the use of machines,

<sup>92</sup> *The Baltimore Transit Co.*, 92 NLRB 1260.

<sup>93</sup> *Union Street Railway*, 93 NLRB 782.

In *Great Lakes Sugar Co.*, 92 NLRB 1408, while not necessary for the decision in the case, the Board expressed the view that supervision over workers, such as agricultural laborers, who are not protected by the act, does not bring the person who exercises supervision within the definition of section 2 (11)

<sup>94</sup> *Silverwood's*, 92 NLRB 1114; *The Kroger Co.*, 93 NLRB 274; *WCAU, Inc.*, 93 NLRB 1003.

<sup>95</sup> *Sears Roebuck & Co.*, 91 NLRB 1411.

<sup>96</sup> *Rainbo Bread Co.*, 92 NLRB 181.

<sup>97</sup> *Stokely Foods Inc.*, 8-RC-875 (not printed)

<sup>98</sup> *Dodd Distributing Co.*, 94 NLRB No. 185

<sup>99</sup> Quotations from sec. 2 (11).

assigned work to all production employees, and were responsible for the quality of their work. The Board found that these employees were supervisors although the employer contended that they had authority only as to "minor details."<sup>1</sup> Similarly, in the case of certain television directors, the Board rejected the employer's argument that a director does not "responsibly direct" the performance of actors but that his directions are "suggestions, requests, cues." The Board observed that "what would be a direction in another industry may be termed a 'suggestion' in the field of television, but nevertheless it is the director's concept of the desired result that governs the response of the performer, regardless of the manner of communication."<sup>2</sup>

On the other hand, in the case of a crew leader whose functions in giving instructions to crew men with whom he worked one half of his time were repetitive and routine, the Board found that he did not exercise the independent judgment necessary to qualify as a supervisor.<sup>3</sup> Group leaders who, in addition to performing production work, instructed new employees, assisted in straightening out assembly line tie-ups, and made reports to subforemen, were likewise found not to exercise the necessary independent judgment.<sup>4</sup>

When other factors do not clearly indicate whether a certain category of employees possess supervisory authority, the Board may take into consideration the ratio of supervisors to employees.<sup>5</sup> However, even a high ratio, such as one supervisor to five employees, is not held conclusive if other strong evidence of supervisory status is present.<sup>6</sup>

The Board applies the principle that employees who actually possess supervisory authority do not lose status as supervisors because they have not exercised their authority. Thus, where certain categories of employees clearly had been informed by the employer of their supervisory powers, the failure or refusal of some of these employees to perform supervisory functions was held immaterial.<sup>7</sup> In another instance, the Board credited television broadcast directors with authority effectively to recommend the transfer or discharge of employees under their direction, although an occasion for such a recommendation had never arisen.<sup>8</sup> However, where the alleged authority of employees whose status is disputed does not presently exist, the employees will be included in the unit. The Board, therefore, did not exclude a salesman who was hired with the expectation

<sup>1</sup> *Denton Sleeping Garment Mills, Inc.*, 7-RC-1061 (not printed).

<sup>2</sup> *American Broadcasting Co.*, 93 NLRB 1410.

<sup>3</sup> *Allied Materials Corp.*, 7-RC-889 (not printed).

<sup>4</sup> *Teletchtron Inc.*, 90 NLRB 931.

<sup>5</sup> *Silverwood's*, 92 NLRB 1114, *Geo Knight and Co.*, 93 NLRB 1193 and cases cited therein.

<sup>6</sup> *United States Gypsum Co.*, 93 NLRB 91.

<sup>7</sup> *United States Gypsum Co.*, cited above.

<sup>8</sup> *WCAU, Inc.*, 93 NLRB 1003.

of being appointed assistant store manager but at the time of the hearing had not yet been promoted.<sup>9</sup> Nor did the Board exclude from a bargaining unit an employee who formerly had been in charge of other men, when it was not shown that he was presently employed or classified as a supervisor or would be so employed in the future.<sup>10</sup>

In determining whether an employee has supervisory status, the Board will consider not only the actual existence of authority over other employees, but also the extent to which such authority is exercised. Ordinarily, the number of employees supervised is not controlling, and the Board has stated that "where true supervisory authority exists, the right to supervise a single employee is sufficient to constitute the holder of such right a supervisor within the meaning of the Act."<sup>11</sup>

Where supervisory authority is exercised by an employee only at times, the Board has consistently held the employee to be a supervisor only if he exercises his authority at regular intervals and not just occasionally.<sup>12</sup> Thus, employees who substitute for supervisors only once in a while, as for instance, during the supervisor's illness or absence, are not considered supervisors under the act.<sup>13</sup> Conversely, relief foremen or assistants who regularly have full supervisory authority 1 or 2 days a week will be excluded from bargaining units as supervisors.<sup>14</sup> Similarly, employees in training to assume supervisory positions were excluded from the unit because they actually exercised supervisory duties during as much as 25 percent of their time.<sup>15</sup>

### b. Independent Contractors

Independent contractors, like supervisors, are specifically excluded from the act's definition of "employees," and therefore will not be included in bargaining units. While the act does not define the term "independent contractor," the Board on several occasions<sup>16</sup> has observed that,

The legislative history of the Act shows that Congress intended that the Board recognize as employees those who "work for wages or salaries under direct supervision," and as independent contractors, those who "undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and

<sup>9</sup> *J. C. Penney Co.*, 92 NLRB 1454.

<sup>10</sup> *Armour Fertilizer Works, Division of Armour and Co.*, 92 NLRB 641, *W. R. Wrape Stone Co., Inc.*, 32-RC-225 (not printed)

<sup>11</sup> *United States Gypsum Co., Inc.*, 93 NLRB 91.

<sup>12</sup> *B. F. Goodrich Co.*, 92 NLRB 575.

<sup>13</sup> *Humboldt Full Fashioned Hosiery Mills, Inc.*, 32-RC-211 (not printed), *Colorado Builders Supply Co.*, 90 NLRB 2002, *Phillips Oil Co.*, 91 NLRB 534, *Witco Carbon Co.*, 33-RC-229 (not printed), *Florence Store Co.*, 94 NLRB No. 213

<sup>14</sup> *Witco Carbon Co.*, cited above, *Pure Oil Co.*, 90 NLRB 1661, *Minnesota and Ontario Paper Co.*, 92 NLRB 711; *Kettleman North Dome Association*, 21-RC-1798 (not printed)

<sup>15</sup> *Hunter-Thomas Co.*, 32-RC-241 (not printed); *S. H. Kress & Co.*, 92 NLRB 15.

<sup>16</sup> *The Dispatch Printing Co.*, 93 NLRB 1282; *The Times Herald Printing Co.*, 94 NLRB No. 250.

depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is upon profit "

Applying these tests to persons engaged in newspaper distribution, the Board found that certain "city independent haulers"<sup>17</sup> and "city dealers"<sup>18</sup> were independent contractors. These "haulers" and "dealers" used their own trucks in delivering papers to carriers and other sellers. They were not required to keep records and were not carried on the company's payroll. They were free to engage in other gainful business activities, and they were paid by the job by expense checks<sup>19</sup> or they derived their earnings from the difference between the cost of the newspapers to them and the flat rate they charged the carriers.<sup>20</sup> Suburban route operators also were held to be independent contractors.<sup>21</sup> These operators in delivering single newspapers to customers and bundles of papers to carriers worked under oral agreements which are terminable at will. The difference between the purchase and selling price of the papers delivered constituted their earnings, except for a minimum guaranteed return. They were not carried on the company's payroll but were paid by expense check. On the other hand, "district drivers" who spent 2 hours per day in delivering bundles of newspapers to carriers and sellers were found to be regular part-time employees "rather than independent businessmen."<sup>22</sup> These drivers exercised no independent judgment as to volume and time of delivery. Although they were not carried on the payroll but were paid a flat rate per week by expense check, they were hired after filing regular job application blanks.

The determination of whether persons who perform work for an employer are independent contractors in certain cases may turn on the employer's "right of control"; that is, on whether the employer has the right to exercise control over the methods and manner by which the work is done. On this test, the Board held that truckers, who under a "commission marketer" agreement delivered gasoline and fuel oil in their own trucks to the employer's customers, were independent contractors.<sup>23</sup> In this case, some of the oil company's truckers were corporations with employees of their own; all owned their trucks and equipment; they received no payment other than a fixed gallonage rate. They did not share in benefits granted salaried employees, and they fixed their own hours and manner of delivery. Also, they paid their own taxes and license fees. Conversely, in another case, an

<sup>17</sup> *The Dispatch Printing Co*, cited above

<sup>18</sup> *The Times Herald Printing Co*, cited above

<sup>19</sup> *The Dispatch Printing Co*, cited above.

<sup>20</sup> *The Times Herald Printing Co*, cited above.

<sup>21</sup> *The Dispatch Printing Co*, cited above.

<sup>22</sup> *The Dispatch Printing Co*, cited above.

<sup>23</sup> *Sinclair Refining Co.*, 93 NLRB 1116

employment relationship was held to exist because of the extent of the employer's control over the work of certain truck owners during the time they were on the employer's land.<sup>24</sup> Similarly, a group of drivers for a lumber company who owned their own trucks were held to be employees rather than independent contractors when they worked the same hours and had the same supervision as other truck drivers.<sup>25</sup> Like the other drivers, they were sometimes assigned to other duties. Also, they received the same benefits as other employees, such as accident insurance and workmen's compensation. The Board found that the only difference between them and the other drivers, aside from their ownership of their trucks, was the fact that they were paid on the basis of the number of feet of lumber they hauled rather than by the hour.

While the question of the alleged status of a person may depend in part on the fact that the employer makes withholding tax deductions and pays workmen's compensation and social security taxes on the particular person,<sup>26</sup> the Board will not regard this fact as determinative.<sup>27</sup>

The question of the status of a person who performs work for an employer may also become important for the purpose of determining whether or not certain employees on a job belong in the unit. If it is found that the particular person is an independent contractor, the Board ordinarily excludes his employees from a unit of workers in the employer's plant.<sup>28</sup>

### c. Agricultural Laborers

Agricultural laborers are a category of employees which the act has always specifically excluded from coverage. Until 1946, the act left the definition of the term "agricultural laborer" to the Board. Since then, a rider to the Board's annual appropriation has required the Board to define the term in accordance with the provisions of section 3 (f) of the Fair Labor Standards Act. That section provides that

"Agriculture" includes farming in all its branches and among other things includes . . . the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . and any practice . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or market or to carriers for transportation to market.

Insofar as the interpretation of section 3 (f) is concerned, the Board has announced that, whenever possible, it will follow the interpretation

<sup>24</sup> *Vaughn Brothers*, 94 NLRB No. 64

<sup>25</sup> *Pehastin Lumber & Box Co.*, 19-RC-501 (not printed).

<sup>26</sup> See *Pehastin Lumber & Box Co.*, cited above, *Sinclair Refining Co.*, 93 NLRB 1115, *The Dispatch Printing Co.*, 93 NLRB 1282.

<sup>27</sup> *Ivy Russell Motor Co.*, 30-RC-174 (not printed)

<sup>28</sup> *O Z Hall Motors, Inc.*, 94 NLRB No. 183

adopted by the Department of Labor and its Wage-Hour Division, which has primary responsibility for the administration of the Fair Labor Standards Act.<sup>29</sup>

Since the Department of Labor had specifically ruled on the applicability of the term "agriculture" to practices connected with the packing and processing of agricultural products,<sup>30</sup> the Board re-examined its policy in determining the status of packing-shed workers. Under its old policy, the Board treated such workers as agricultural laborers unless they were engaged in packing produce not grown by their own employer or processing activities which materially changed the product to enhance its market value.<sup>31</sup> Applying the tests suggested by the Department of Labor, rather than the Board's old rule, the Board held that the packing-shed workers with whom it was concerned were not agricultural laborers because they were employed as "a completely separate labor force" to work in the employer's packing shed, a plant which was "operated as a separate commercial enterprise, and not merely 'as an incident to or in conjunction with'" farming operations on a farm.<sup>32</sup>

In a case involving an employer engaged in the production of naval stores (gum resin and turpentine) at a "central still," the Board found that the employees concerned were not agricultural laborers.<sup>33</sup> This ruling likewise was based on the Department of Labor's interpretation of the section 3 (f) of the Fair Labor Standards Act, which in turn refers to the definition of "agricultural commodities" in section 15 (g) of the Agricultural Marketing Act. According to the Wage-Hour Division's interpretation, which the Board adopted, the tree farmer who produces the crude gum, and not the central still, is the producer of the agricultural commodity. Hence, the employees of the central still, whether they work on crude gum processed for the tree farmer, or on gum purchased from a tree farmer, are not engaged in the production of agricultural commodities. In another case, the Board also held the work of naval-store workers was predominantly nonagricultural because they worked only 35 percent of their time on crude gum taken from the employer's own trees.<sup>34</sup>

The Board held in one case that the agricultural exemption of the act was not applicable to employees engaged in extracting sugar from beets purchased by the employer from farmers. The Board observed that, while the employees worked on an agricultural commodity, they

<sup>29</sup> *Imperial Garden Growers*, 91 NLRB 1034.

<sup>30</sup> The Department's interpretation is set out in detail in the Board's decision.

<sup>31</sup> See *Salinas Valley Vegetable Exchange*, 82 NLRB 96 (1949); *Burnett & Burnett*, 82 NLRB 720 (1949); *Di Giorgio Fruit Corp.*, 80 NLRB 853 (1948).

<sup>32</sup> See also *Arena-Norton, Inc.*, 93 NLRB 56 and *D'Arrigo Bros of California*, 93 NLRB 827

<sup>33</sup> *Jacksonville Processing Corp.*, 93 NLRB 943.

<sup>34</sup> *The Langdale Co.*, 93 NLRB 946

did so in a separate industrial operation which materially changed the commodity to enhance its value.<sup>35</sup> The Board also rejected the contention that the employees<sup>36</sup> of a marketing cooperative who handled eggs, poultry, and livestock at its auction grounds were agricultural laborers.<sup>36</sup> This ruling was based on the fact that the cooperative was an entity separate from its members and that its operations did not take place on a farm.

#### d. Confidential and Managerial Employees

The Board is often confronted with a request that certain employees be excluded from a collective bargaining unit either because they are managerial employees, although not qualifying as supervisors, or because they stand in an allegedly confidential relationship to management. In such cases, the Board of course must balance the statutory right of an employee to engage in collective bargaining against the traditional right of management to be secure in its secret or confidential data. As a consequence, the Board has long endeavored to limit its exclusions to (1) employees exercising bona fide managerial functions, and (2) employees whose confidential relationship directly involves matters of labor relations policy, such as negotiations with a union or the handling of grievances at a high level.<sup>37</sup> The Board will not deprive an employee of the use of its services to effectuate his right to collective bargaining because he handles financial, technical, or other business data that is secret or confidential only as a matter of business competition, such as costs of products, sales, or specifications.<sup>38</sup>

The Board has defined "managerial" employees as "executive employees who are in a position to formulate, determine, and effectuate management policies."<sup>39</sup> "Confidential employees," it has defined as "those who assist and act in a confidential capacity to persons who exercise 'managerial' functions in the field of labor relations."<sup>40</sup> The Board has consistently excluded employees doing either type of work from collective bargaining units.

Under this definition of managerial employees, buyers who have authority to pledge the company's credit have been held managerial.<sup>41</sup> So also have the credit manager and assistant credit manager of a

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<sup>35</sup> *Franklin County Sugar Co.*, 92 NLRB 1341.

<sup>36</sup> *Flemington Auction Market Cooperative Association, Inc.*, 4-RC-320 (not printed).

<sup>37</sup> *Brooklyn Daily Eagle*, 13 NLRB 974 (1939).

<sup>38</sup> *Phillips Oil Co.*, 91 NLRB 534; *The Ohio Steel Foundry Co.*, 92 NLRB 683; *Republic Steel Corp.*, 91 NLRB 904.

<sup>39</sup> *Ford Motor Co.*, 66 NLRB 1317 (1946), specifically reaffirmed in *Palace Laundry Dry Cleaning Corp.*, 85 NLRB 320, after the 1947 amendment of the act.

<sup>40</sup> *Ford Motor Co.*, cited above.

<sup>41</sup> *Federal Telecommunication Laboratories, Inc.*, 92 NLRB 1395; *American Locomotive Co.*, 92 NLRB 115; *Westinghouse Electric Corp.*, 89 NLRB 8.

department store.<sup>42</sup> However, the Board had occasion in one case during the past year, to reaffirm its ruling that a cashier is not a managerial employee "simply because he has custody of company money."<sup>43</sup> Although the cashier in this case handled the employer's local banking business, the Board included him in a unit of office and clerical employees when it found that he did not deal with labor relations or take any part in formulating labor relations policy. The Board in another case rejected contentions that managerial functions were exercised by a cost estimator or by a group of cost accountants.<sup>44</sup> However, the Board has excluded from bargaining units employees who, while not exercising actual managerial or supervisory authority, were closely identified with management. In this group have been found an assistant display manager in a department store,<sup>45</sup> the editor of a daily newspaper's editorial page even though he did not direct the work of other editorial writers or employees, know their salaries or control their hours,<sup>46</sup> and "learners" in training for managerial positions.<sup>47</sup> The Board also continues to exclude from bargaining units persons who are closely related to the employer or to managerial employees.<sup>48</sup>

The question of whether an employee stands in confidential relationship to management within the Board's definition was raised in a number of cases. It occurred usually in connection with proposed units of office and clerical employees. In such cases, the Board has consistently excluded from the unit the secretaries to the heads of companies,<sup>49</sup> and secretaries or stenographers to the employer's chief collective bargaining negotiators and labor-relations policymakers, such as a plant superintendent<sup>50</sup> or a general manager.<sup>51</sup> Moreover, a personnel clerk who spent 25 to 50 percent of her time daily acting as the personnel manager's senior stenographer and who maintained his confidential files was held to be a confidential employee.<sup>52</sup> But in a number of cases, the Board has declined to deprive clerical employees of collective bargaining rights when they act as stenographers or secretaries to department heads, where it is not shown that "the department heads have any duties or responsibilities with respect to the formulation or effectuation of the employer's general labor poli-

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<sup>42</sup> *Charles Livingston & Sons, Inc*, 86 NLRB 30.

<sup>43</sup> *American Locomotive Co.*, cited above.

<sup>44</sup> *Federal Telecommunication Laboratories*, cited above.

<sup>45</sup> *Cherry & Webb Co*, 93 NLRB 9.

<sup>46</sup> *The Salt Lake Tribune Publishing Co.*, 92 NLRB 1411.

<sup>47</sup> *S. H. Kress & Co.*, 10-RC-1264 (not printed).

<sup>48</sup> *E. J. Kelley Co*, 1-RC-1497 (not printed); *Barber Buick Co*, 10-RC-889 (not printed); *Hy-Lan Furniture Co.*, 34-RC-277 (not printed); *Wiley Manufacturing, Inc.*, 92 NLRB 40.

<sup>49</sup> *Sargoy & Stein*, 92 NLRB 1693.

<sup>50</sup> *Phillips Oil Co.*, 91 NLRB 534.

<sup>51</sup> *Record Publishing Co.*, 6-RC-584 (not printed).

<sup>52</sup> *E. F. Goodrich Co.*, 92 NLRB 575.

cies.”<sup>53</sup> This rule was applied in the case of the stenographer to a chief clerk who supervised the general office department, and the stenographer was included in the clerical unit.<sup>54</sup> Similarly, clerks to superintendents of departments in a steel plant were included in bargaining units, where there was no showing that the clerks handled general labor relations policy data.<sup>55</sup> The Board also declined to deny participation in a collective bargaining election to two secretaries to a company attorney who was consulted occasionally on labor relations matters, mainly to develop facts or proposals for the benefit of management negotiators.<sup>56</sup> In this case, the Board concluded that “whatever labor relations work [the attorney] may do is not managerial in character.”

The Board has also rejected contentions that employees in the following categories were engaged in work of such confidential nature as to deprive them of participation in collective bargaining: Production records clerk,<sup>57</sup> accounting employees such as general billing clerk, bookkeeper, and assistant to the chief cost accountant,<sup>58</sup> and a payroll clerk.<sup>59</sup> Telephone and teletype operators are another group of employees whose exclusion from bargaining has often been sought on grounds of confidential relationship. In an early case, the Board said of telephone operators, “the fact that telephone operators may . . . occasionally obtain information on labor relations does not constitute a substantial reason to deny them the exercise of the rights of collective bargaining.”<sup>60</sup> Similarly, in two cases during the past year, the Board declined to exclude telephone and teletype operators because they handled messages or calls relating to labor relations or collective bargaining negotiations.<sup>61</sup>

Time-study men, the Board has ruled in a number of cases, are neither managerial or confidential employees, but they may in certain instances be professionals.<sup>62</sup>

## 9. Seasonal, Part-Time, and Probationary Employees

The Board is sometimes confronted with contentions that employees other than regular full-time employees should be excluded from a proposed bargaining unit. In two recent cases, in which the exclusion of certain probationary employees was requested, the Board made it

<sup>53</sup> *Phillips Oil Co*, cited above, *B. F. Goodrich Co*, cited above.

<sup>54</sup> *Phillips Oil Co*, cited above.

<sup>55</sup> *Republic Steel Corp*, 91 NLRB 904.

<sup>56</sup> *Sargoy & Sten*, cited above.

<sup>57</sup> *B. F. Goodrich Co*, cited above.

<sup>58</sup> *The Ohio Steel Foundry Co*, 92 NLRB 683

<sup>59</sup> *Federal Telecommunication Laboratories, Inc*, cited above

<sup>60</sup> *Chrysler Corp.*, 58 NLRB 239 (1944).

<sup>61</sup> *Phillips Oil Co.*, cited above; *American Locomotive Co*, cited above.

<sup>62</sup> *Ford Motor Co.*, cited above, *The Ohio Steel Foundry Co*, cited above (held not professionals); *American Locomotive Co*, cited above (held professionals). See subsection, Professional Employees.

clear that the nature of the tenure of employment is not to be considered in connection with the proper composition of the unit.<sup>63</sup> The Board said:

our unit finding is based upon functionally related occupational categories, and all employees working at jobs within the unit are necessarily included and entitled to representation, irrespective of the tenure of their employment.

Consequently, as in the case of other groups of employees, the factor which will determine whether seasonal, part-time, or probationary employees shall be included in a given unit is the similarity of their interests and working conditions to those of other employees in the proposed unit.<sup>64</sup> However, the employees' tenure is important insofar as their eligibility to vote in the election is concerned.<sup>65</sup>

## 10. Units in Decertification Proceedings

In determining the appropriate unit in decertification proceedings under section 9 (c) of the act, the Board applies the same criteria as in certification cases. Consequently, the unit found appropriate for the purpose of a decertification election ordinarily will be identical with the unit for which the incumbent union has previously been certified or is currently recognized as representative.<sup>66</sup> Applying these rules, the Board during the past year denied consolidated petitions for the decertification of two groups of employees each of which constituted only a segment of a larger group engaged in similar work throughout the employer's plants.<sup>67</sup> The Board held that because the groups involved were inappropriate for collective bargaining purposes and had had a long bargaining history on a multi-plant production and maintenance basis, they were not proper subjects for decertification. In another case, the Board on similar grounds denied a decertification election among a group of timekeepers, who constituted only a part of a larger factory clerical group with whom they had common interests and with whom they had been represented for a number of years.<sup>68</sup> In the same case, a majority of the Board also denied the petition for the decertification of a group of technical employees who had common interests with a larger number of other, but unrepresented, technical employees in the plant. The majority did not decide whether the omission of the large unrepresented

<sup>63</sup> *The Sheffield Corp.*, 94 NLRB No. 240; also *Gerber Products*, 93 NLRB 1668.

<sup>64</sup> Compare *Comico Products Corp.*, 5-RC-618 (not printed); *Milwaukee Branch, LaSalle Coca-Cola Bottling Co.*, 13-RC-1335 (not printed), *Block and Kuhl Co.*, 13-RC-1126 (not printed); *Franklin County Sugar Co.*, 92 NLRB 1341.

<sup>65</sup> *Gerber Products*, cited above, where seasonal employees who lacked a sufficiently regular and substantial tenure of employment were held ineligible to vote. See subsection, Eligibility to Vote, p. 122.

<sup>66</sup> See Fifteenth Annual Report, p. 59.

<sup>67</sup> *Buick Motor Division, General Motors Corporation*, 7-RD-70 (not printed).

<sup>68</sup> *General Motors Corp., A. C. Spark Plug Division*, and *General Motors Corp., Buick Motor Division*, 92 NLRB 1889.

sented group alone was sufficient to require the dismissal of the petition. It based its decision on the ground that the incumbent union's success in a decertification election would result in its certification as representative of a group of technical employees which was too limited to constitute an appropriate bargaining unit.<sup>69</sup>

## E. Conduct of Representation Elections

A question of representation raised by a petition filed under section 9 (c) of the act can be resolved only through an election by secret ballot.<sup>1</sup> In general, however, the act leaves to the Board's discretion the determination of the eligibility of employees to vote, the mechanics of conducting elections, and the certification of election results. Two principal exceptions to this general discretion limit the frequency with which elections may be directed and prohibit voting by strikers who are not entitled to reinstatement.<sup>2</sup>

The Board's published rules and regulations govern many phases of election and certification procedure,<sup>3</sup> but the Board often is called upon to decide the proper application of its rules, or to rule in situations not covered by the rules and regulations.

### 1. Eligibility To Vote

In general, eligibility to vote in a Board-directed election is limited to employees who were employed in the appropriate unit during the payroll period immediately preceding the date of issuance of the direction of election. This includes employees who did not work during such period because they were ill, on vacation, or temporarily laid off. Not eligible to vote are employees who quit or were discharged for cause and who had not been reinstated prior to the date of the election. "Employees on strike who are not entitled to reinstatement" also are barred from voting by section 9 (c) (3) of the amended act.

If there is a question about the voting eligibility of an employee which cannot be resolved by the evidence produced at the election hearing, the Board follows the general practice of permitting him to vote subject to challenge. Should the challenged ballots be sufficient to affect the election result, the Board will then determine the eligibility of the challenged voters. In determining eligibility, the Board must frequently determine whether employees, according to their status or tenure, fall within an included or an excluded category.

<sup>69</sup> Chairman Herzog and Member Reynolds, dissenting in this respect, expressed the opinion that the unit for which decertification was sought was not sufficiently defective to require the denial of the petition, or thereby to deprive the employees involved of an opportunity to express their desire as to whether the incumbent union should continue to represent them

<sup>1</sup> See sec. 9 (c) (1) of amended act.

<sup>2</sup> See sec. 9 (c) (3).

<sup>3</sup> See sec. 102.61, Rules and Regulations, Series 6, as amended.

### a. Part-Time, Seasonal, and Probationary Employees

Part-time and extra employees ordinarily are eligible to vote if they have sufficient interest in the conditions of employment. This requires that they work regularly and perform work similar to that of the full-time employees under the same general conditions.<sup>4</sup> However, if a part-time employee has other employment elsewhere, he will be eligible to vote only if his part-time employment is regular and for a substantial portion of his time.<sup>5</sup> Similarly, regular extras in a retail clothing store who worked a substantial number of hours at regularly assigned times each week were permitted to vote, but additional extras called in only for special sales, or during seasonal peaks, were held ineligible.<sup>6</sup>

Employees who work part time in the voting unit and part time elsewhere for the same employer also have presented a problem in determining their eligibility to vote. In the past, the Board has required that to be eligible to vote, they spend 50 percent of their time or more in work within the unit.<sup>7</sup> But in a case decided after close of the fiscal year, the Board unanimously modified this rule and held that these employees should come under the same rule as part-time employees who remain idle or work for a different employer when not working in the voting unit.<sup>7a</sup> Thus, the Board held that an employee who worked 25 hours a week in the pressroom and 35 hours a week in other departments of the same company was eligible to vote in the pressroom unit because he had "sufficient interest in the terms and conditions of employment within the unit to entitle him to take part in the determination of a collective bargaining representative."

Temporary employees who are hired for a specific task or a peak period, usually are not permitted to vote, unless they have a reasonable expectation of permanent employment after the completion of the particular work or at the end of the season.<sup>8</sup> However, this rule does not apply to employees in a seasonal industry.<sup>9</sup>

Probationary and student employees ordinarily are held eligible to vote if they have sufficient interests in common with regular employees

<sup>4</sup> *R L Polk & Co*, 91 NLRB 443; *H. E. Butt Grocery Co*, 93 39-RC-263 (not printed); *Evening News Publishing Co*, 93 NLRB 1355.

<sup>5</sup> *Montgomery Steel Products Corp*, 94 NLRB No. 42, *Southern Desk Co.*, 92 NLRB 137.

<sup>6</sup> *Silverwood's*, 92 NLRB 1114.

<sup>7</sup> *Coca-Cola Bottling Co*, 94 NLRB No. 33; *Dispatch Printing Co Inc*, *Ohio State Journal Division*, 93 NLRB 1282, *WWEZ Radio, Inc*, 91 NLRB 1518, *Port Arthur College*, 92 NLRB 152, *WCAU, Inc*, 93 NLRB 1003, see also *Florida Broadcasting Co*, 93 NLRB 1568

<sup>7a</sup> *The Ocala Star Banner*, 97 NLRB No. 57 (decided Dec 10, 1951) This decision specifically overruled cases cited in footnote 7.

<sup>8</sup> *The Winter Brothers Stamping Co*, 7-RC-885 (not printed); *The Sunday School Board of the Southern Baptist Convention*, 92 NLRB 801; see also *Cherry Webb Co*, *Providence*, 93 NLRB 9

<sup>9</sup> See subsection 3 of the section, Timing of Elections, p. 125.

in the same classification and a prospect of eventually achieving permanent employee status.<sup>10</sup>

### b. Laid-Off Employees and Strikers

In determining the eligibility of employees separated from their jobs for legitimate business reasons, the Board must ascertain whether the termination of employment is of a permanent nature or constitutes merely a temporary layoff. If the terminated employee has "a reasonable expectation of reemployment in the near future," he is eligible to vote in an election occurring during the layoff. But, where the probability of future employment is remote, the separated employee is not permitted to vote, even though he has contractual seniority rights<sup>11</sup> or even though he is still carried on the employer's payroll or a preferential hiring list.<sup>12</sup>

Employees in the Armed Forces at the time of the election may vote if they appear in person at the polls. However, this does not foreclose the right of the present incumbent of the position also to vote in the election.<sup>13</sup>

Under the amended act, strikers who have ceased work to achieve economic or contractual objectives, such as improved wages or working conditions, and who have been permanently replaced are not eligible to vote; however, employees who strike because of the employer's unfair labor practices ordinarily may not be replaced. But for such strikers to be permitted to vote, it is not sufficient merely to allege in a representation case that the strike has been caused by unfair labor practices. Thus, where no charges of unfair labor practice had been filed or no complaint had issued, the Board held itself required to find that the strike is an economic one and that permanently replaced strikers are ineligible to vote.<sup>14</sup>

### c. Employees Whose Status Is in Doubt

Where an employee's status is in doubt, he usually will be permitted to vote subject to challenge. This occurs where it cannot immediately be determined on the evidence at the Board's preelection hearing whether the employee is a supervisor, or an indefinitely laid-off employee, or whether he is in a classification within the unit.<sup>15</sup> Simi-

<sup>10</sup> *H. E. Butt Grocery Co.*, 39-RC-263 (not printed); *National Torch Twp Co.*, 6-RC-696 (not printed), *R. L. Polk & Co.*, 91 NLRB 443, *Wilson Athletic Goods Mfg Co., Inc.*, 9-RC-1058 (not printed)

<sup>11</sup> *General Motors Corp. (Frigidare Div., Newark Zone Shop)*, 92 NLRB 1752, *Standard Oil Co., of Calif.*, 21-RC-674 (not printed).

<sup>12</sup> *Peace Dale Mills M. T. Stevens & Sons Co.*, 93 NLRB 994; *Big Run Coal & Clay Co.*, 93 NLRB 1351.

<sup>13</sup> *Lynch Carrier Systems, Inc.*, 92 NLRB 867

<sup>14</sup> *Tech-Masters Products Co.*, 94 NLRB No. 110, citing *Times Square Corp.*, 79 NLRB 361

<sup>15</sup> *Northern Indiana Public Service Co.*, 13-RC-1851 (not printed), *The E. J. Kelley Co.*, 90 NLRB 239, *W. R. Wrape Slave Co., Inc.*, 32-RC-225 (not printed), *Young Manufacturing Co.*, 92 NLRB 410, *Greater Erie Broadcasting Co.*, 92 NLRB 270.

larly, where it is not possible to determine at the time that the election is directed whether strikers have been validly replaced, or are entitled to reinstatement, both strikers and replacements are presumed eligible to vote, subject to challenge.<sup>16</sup> Likewise eligible to vote, subject to challenge, is an employee as to whose discharge an unfair labor practice charge has been filed.<sup>17</sup>

## 2. Selection of Payroll for Eligibility

Whenever an election is directed, the Board must select the payroll or payrolls, which most accurately list the employees whose interests are involved, to serve as the basis for determining eligibility to vote. The payroll normally chosen is the one which covers the period immediately preceding the date of the Board's direction of election.

However, special circumstances or the nature of a particular business may make another payroll period more appropriate. Thus, where employment fluctuates materially from week to week, as in the case of a fruit and vegetable packing shed, the Board departed from its usual eligibility rule and directed that eligibility be based on payrolls of a 30-day period immediately preceding the issuance of the notice of election.<sup>18</sup> Similarly, where the operations of a manufacturer of chemicals for agricultural use were seasonal, eligibility in the election was extended to employees who had worked 15 days in the period immediately preceding the date of the issuance of the notice of election.<sup>19</sup> Also, in the case of motion picture carpenters and set directors who had relatively brief periods of employment and who were frequently interchanged among different members of an employer's association, the Board also departed from its usual eligibility rule and directed that employees who had worked for one or more of the employer-members for two or more days during the 6-month period immediately preceding the direction of election should be permitted to vote.<sup>20</sup> However, in a case of alleged mass layoffs and dismissals subsequent to the petition, the Board declined to depart from its usual practice and determine eligibility as of the time of the petition, in view of the fact that no charge of unfair labor practice had been filed alleging that the dismissals were discriminatory.<sup>21</sup>

<sup>16</sup> *Frank Foundries Corp.*, 92 NLRB 1754; *Pipe Machinery Co.*, 76 NLRB 247 (1948).

<sup>17</sup> *The Rutledge Paper Products Inc.*, 91 NLRB 115.

<sup>18</sup> *D'Arrigo Bros. Co. of California*, 93 NLRB 827.

<sup>19</sup> *California Spray-Chemical Corp.*, 91 NLRB 897.

<sup>20</sup> *Society of Independent Motion Picture Producers*, 94 NLRB No. 35.

<sup>21</sup> *Sa-Mor Quality Brass, Inc., et al.*, 93 NLRB 1225.

### 3. Timing of Elections

In directing an election, the Board usually orders that it be held within the 30-day period following the date on which it issues the direction of election. However, for reasons of efficient administration, the fixing of the precise date usually is left to the NLRB regional director in whose region the plant is located.

But in some cases, circumstances are present which make it necessary for the Board to determine whether a present election would effectuate the statutory purposes, or whether an election held at a later time would serve better to insure the employees in the unit adequate representation. For example, an immediate election may not be appropriate because of the seasonal nature of the industry involved, or because of the temporary cessation of operations, or because of an impending change in operations. Under such circumstances, the Board frequently leaves the choice of the election date to the discretion of the regional director.

Thus, in the case of seasonal industries, the Board will direct that the election be held "at or about the approximate seasonal peak, on a date to be determined by the regional director."<sup>22</sup> This is particularly important where the peak of the current season has passed and an election before the next seasonal peak would deprive the majority of employees of a vote.<sup>23</sup> In fixing the time for the election, the regional director has broad discretion and, unless he acts arbitrarily, the Board will abide by his judgment. Thus the Board overruled an objection to an election based on the fact that a regional director had advanced the election date in a canning plant when it appeared that, because of weather conditions, the peak of the tomato harvesting season had arrived earlier than anticipated.<sup>24</sup> In the case of industries with two or more peak seasons, the Board normally directs that the election shall be held at the time, to be determined by the regional director, when the maximum number of employees are at work.<sup>25</sup>

Where the employer's plant has been temporarily shut down for such purposes as construction and expansion, the Board will likewise instruct the regional director to hold the election at a time when he has determined that operations have been resumed and that a representative and substantial number of the working force has been employed.<sup>26</sup> However, where a seasonal plant was destroyed by fire and manufacturing operations were not expected to resume for a year, the

<sup>22</sup> See *Arena-Norton, Inc.*, 93 NLRB 375.

<sup>23</sup> *Wright Manufacturing Co.*, 94 NLRB 21-RC-1882 (not printed). See also *California Spray-Chemical Corp.*, 91 NLRB 897; *Franklin County Sugar Co.*, 92 NLRB 1341; *Atkin Products Co.*, 39-RC-207 (not printed).

<sup>24</sup> *Wade & Paxton*, 90 NLRB 1227.

<sup>25</sup> *Employer Members of Imperial Valley Shippers Labor Committee*, 92 NLRB 533.

<sup>26</sup> *Gerber Products Co.*, 93 NLRB 1668.

Board ordered an immediate election among the working force engaged in clean-up and reconstruction when it found that they appeared to be representative of those who would be employed in the plant during the next year.<sup>27</sup>

The question of whether an election should be held immediately or whether it should be postponed also arises where an expansion or reduction in the employer's operations is contemplated, or is in progress. In case of an expansion, the determining factor is whether the present force constitutes a substantial and representative proportion of the contemplated working force. Applying this test, the Board directed an immediate election in one case, even though the number of the working force in the unit was expected to increase from 80 to 200 employees.<sup>28</sup> In another case, the Board directed an immediate election where the completion of a new structure was expected to result in a similar expansion of classifications already in existence.<sup>29</sup> Also, where an increase in the working force is purely speculative, an immediate election will be directed.<sup>30</sup>

The Board has consistently held that a mere reduction in the number of employees in the unit is not sufficient reason for postponing an election.<sup>31</sup> Thus, the Board ordered an election within the customary 30 days where a substantial part of the working force was discharged because of material shortages but the Board found that a representative number of employees was left in the unit.<sup>32</sup>

However, where the Board found that the appropriate unit for a lumber operation should include both present logging employees and future mill employees, the election was postponed for about 1 month, at which time the sawmill was to be completed and ready for operation.<sup>33</sup> But where the present employees were not representative of the future force and where most of the new employees were to be in a classification which was scarcely represented among present employees, no election was directed and the petition was dismissed without prejudice to the filing of a new petition at a more appropriate time.<sup>34</sup>

A related question is whether an election should be directed where the operations in which the employees concerned are engaged are to be abandoned. If the complete cessation of operations is definitely scheduled and if they will terminate shortly, no election will be

<sup>27</sup> *Armour Fertilizer Works, Division of Armour & Co.*, 92 NLRB 641.

<sup>28</sup> *Metropolitan Life Insurance Co., Parklambra Resident Community*, 93 NLRB 381

<sup>29</sup> *Flora Cabinet Co, Inc*, 94 NLRB No 6, see also *United States Smelting, Refining and Mining Co.*, 93 NLRB 1280.

<sup>30</sup> *Frank Foundries Corp*, 92 NLRB 1754; *Electrical Reactance Corp*, 92 NLRB 1256.

<sup>31</sup> See *Knorr-Maynard, Inc*, 90 NLRB 17

<sup>32</sup> *Owen Steel Co., Inc*, 92 NLRB 1334.

<sup>33</sup> *Weyerhaeuser Timber Co.*, 93 NLRB 887.

<sup>34</sup> *Eversharp, Inc*, 91 NLRB 1538.

directed. Accordingly, the Board dismissed the petition where a logging operation was to be shut down within 30 days because the employer's timber supply in the vicinity had been exhausted and there was no certainty that the employees would be transferred to a new operation.<sup>35</sup> Also, where employees installing generators and turbines at a dam either had been discharged, or were about to be, and there was no reasonable prospect of their early reemployment by the employer, the Board declined to hold an election among them.<sup>36</sup> But, an election was directed where the employer was still operating his business and where, notwithstanding anticipated lack of raw materials, the cessation of operations was indefinite and unpredictable.<sup>37</sup>

In determining the appropriateness of directing an election in such industries as that of plumbing and heating contractors, the Board took into consideration whether employment in the proposed bargaining unit was sufficiently stable.<sup>38</sup> However, in another case, the Board reaffirmed its past ruling that a considerable turnover in a unit does not necessarily impair the representative nature of the balloting and that the benefits of the act may not be denied to employees in industries having a high turnover.<sup>39</sup>

Pending unfair labor practice charges affecting the bargaining unit involved ordinarily will bar an immediate election. But an election may be held if the charging party files a waiver to the effect that the alleged unfair practices will not later be used for the purpose of objecting to the election.<sup>40</sup> Moreover, the Board may make an exception to this general rule when appropriate.<sup>41</sup> Such an exception was made where the petitioner's charges against the employer and intervening union were not filed until the last day before the election.<sup>42</sup> The Board held the exception was justified by the "eleventh hour" filing of charges and the fact that a strike called by the intervenor had been in progress at the plant for 6 weeks.

However, even in the absence of a waiver, the employees were not deprived of the benefit of an immediate election where the employees alleged in the charge to be aggrieved were not among those in the proposed bargaining unit.<sup>43</sup> Nor is an election barred by charges which have been dismissed or which are based on the same conduct contained in previous charges which were dismissed or withdrawn.<sup>44</sup>

<sup>35</sup> *G. H. Smalley Logging Co.*, 91 NLRB 921.

<sup>36</sup> *Donovan, James, Wismer, & Becker*, 93 NLRB 1562.

<sup>37</sup> *Lone Star Boat Mfg. Co.*, 94 NLRB No. 13.

<sup>38</sup> See *Plumbing Contractors Association of Baltimore, Md., Inc.*, 93 NLRB 1081, *Plumbing and Heating Contractors Association of Olean, New York*, 93 NLRB 1099

<sup>39</sup> *Young Manufacturing Co.*, 92 NLRB 410.

<sup>40</sup> *Stone and Davis Furniture Co.*, 92 NLRB 80, *Southwest Michigan Broadcasting Co.*, 94 NLRB No. 17.

<sup>41</sup> *Columbia Pictures Corp.*, 81 NLRB 1313

<sup>42</sup> *West-Gate Sun Harbor Co.*, 93 NLRB 830. (The charges were later dismissed by the General Counsel.)

<sup>43</sup> *Pollatch Forest, Inc.*, 94 NLRB No. 216.

<sup>44</sup> *United States Smelting, Refining and Mining Co.*, 93 NLRB 1280.

An election will likewise be directed where an appeal from a regional director's dismissal of the charges is pending before the General Counsel or where the General Counsel has refused to issue a complaint.<sup>45</sup>

#### 4. Standards of Election Conduct

Board elections are conducted in accordance with strict standards designed to assure that the participating employees have an opportunity to register a free and untrammelled choice in selecting a bargaining representative.

If either employer or union engage in conduct or make statements that create an atmosphere which makes it improbable that the eligible employees will be able to exercise such a free choice, the Board will set the election aside and conduct a new one when such choice is possible.<sup>46</sup> The Board also will conduct the election over again if a Board agent fails to maintain proper standards in the conduct of the election.<sup>47</sup>

Objections directed against "the conduct of the election or conduct affecting the results of the election" will be investigated, if the objections are filed within 5 days after the parties received the tally of ballots.<sup>48</sup> Where the conduct of an election is challenged, the Board will determine whether or not the election was "conducted under conditions conducive to a fair and orderly election."<sup>49</sup> But, in such investigation, the Board will not pass upon questions which were fully litigated in the proceeding which led to direction of the election, such as the appropriateness of the bargaining unit.<sup>50</sup> Nor will it pass again upon matters which were administratively determined, such as a participating union's compliance with the affidavit requirements of the act.<sup>51</sup> Moreover, the objecting party has an obligation to take reasonable steps to furnish any evidence or information it may have to support its objections. Thus, the Board rejected a general allegation of violations of the Board's rules and regulations, stating that "it can attach no validity to objections based on alleged interference with elections where, absent manifest interference, the objecting party takes no steps to substantiate its allegations or otherwise assist the Board in its investigation of the objections."<sup>52</sup>

<sup>45</sup> *Biltmore Mfg. Co.*, 34-RD-25 (not printed); *Pacific Pearl of Alaska, Inc.*, 19-RM-52 (not printed).

<sup>46</sup> *Atlas Imperial Diesel Engine Co. and Hunt Foods, Inc.*, 91 NLRB 530; *William R. Whittaker, Ltd.*, 94 NLRB No 171.

<sup>47</sup> See Fifteenth Annual Report, pp. 83-84.

<sup>48</sup> Sec. 102 61; Rules and Regulations, Series 6, see *R & R News Co.*, 92 NLRB 1134, where exceptions to regional director's report on objections to election were dismissed because of failure to serve exceptions on other party in the case as required by Board's rules and regulations. Board held this was failure to "follow fundamental procedures, essential to fairness"

<sup>49</sup> *William R. Whittaker Co., Ltd.*, cited above.

<sup>50</sup> *William R. Whittaker Co., Ltd.*, cited above.

<sup>51</sup> *Metropolitan Life Insurance Co.*, 90 NLRB 935 (Chairman Herzog dissenting on another point).

<sup>52</sup> *Wiley Manufacturing, Inc.*, 93 NLRB 1600.

### a. Mechanics of the Election

Delaying tactics or interference with the mechanics of conducting an election may be grounds for setting the election aside. Thus the Board held that the conditions necessary to a fair and orderly election were lacking when the employer refused to furnish the Board and the union a list of the eligible voters at a reasonable time prior to the election.<sup>53</sup> In this case, the employer, after repeated delays over several weeks, furnished a list only one-half hour before opening of the polls. Even then, the list contained not only the names of employees at the plant covered by the election but the names of employees at another plant, intermixed without distinction. A correct list was not furnished to Board agents until 3 days after the election, and the union was not supplied with a list at all. Because the union thus had no reasonable opportunity to exercise its right to challenge voters, the Board set the election aside.

The use of mail ballots in the conduct of a Board election is a customary and usual procedure when appropriate,<sup>54</sup> but this procedure has on occasion been the subject of objections. In one case, the Board rejected a contention that the casting of a ballot by mail in itself violated the employee's secrecy of ballot.<sup>55</sup> In another case, it was contended that a regional director of the Board had abused his authority by permitting certain employees to vote by mail.<sup>56</sup> The Board held that a regional director has broad discretion in arranging the details of an election, including the determination as to whether to conduct the election in whole or in part by mail in appropriate instances.<sup>57</sup> Accordingly, the Board held that the regional director had not abused his discretion when he conducted an election by mail among employees who worked on different shifts at different work locations.

### b. Electioneering and Campaign Tactics

It is sometimes alleged that either the employer or a union has prevented the employees from making a free choice by engaging in campaign tactics or electioneering that went beyond permissible bounds. Board precedent is well established that "isolated impropriety, or electioneering conduct that is more ebullient than polite, will not suffice to impeach an election where the balloting is secret," but the Board will set aside an election when it finds conduct that goes "beyond the limits of legitimate electioneering."<sup>58</sup> Moreover, the

<sup>53</sup> *William R. Whitaker Co., Ltd.*, cited above.

<sup>54</sup> *Atlas Imperial Diesel Engine Co., et al.*, cited above.

<sup>55</sup> *Cooper's, Inc.*, 94 NLRB No. 223.

<sup>56</sup> *Southwestern Michigan Broadcasting Co.*, 7-RC-1096 (not printed).

<sup>57</sup> *Citing North American Aviation, Inc.*, 81 NLRB 1046.

<sup>58</sup> *Stern Bros.*, 87 NLRB 16 (1949).

Board has long had a rule against electioneering "at or near the polling place."<sup>59</sup>

The rule against electioneering near the polling place was applied in one case during the past fiscal year where a sound truck was involved.<sup>60</sup> In this case, the union which won the election persisted in operating a sound truck broadcasting electioneering material during most of the time the polls were open. Although located on a public highway across the street from the plant parking lot and about 300 feet from an employees' entrance to the plant, the broadcast could be heard clearly by employees all the way to the entrance, which was only 30 feet from the polling place. A substantial number of employees who voted came through this entrance. The Board held that this violated the rule against electioneering near the polls and voided the election. The Board's opinion said:

The determining factor is not the linear distance from the sound truck to the employees' entrance or the polling place, but the immediacy of the voice of the electioneering broadcaster to the eligible voters as they approached the polling place through the parking lot and areaway. We are therefore of the opinion and find that the Petitioner engaged in electioneering near the polling place during election hours, and that its conduct was a violation of a material and salutary election rule and constituted interference with the conduct of the election.

However, isolated remarks such as "Let's go," or "All you boys know how to vote," made or audible at the polling place, were held by the Board not to be electioneering "of such character as to have affected a free choice in the election."<sup>61</sup> Nor was it held to be improper electioneering when a union representative, while near the polling place, suggested to two employees that they "go and vote."<sup>62</sup> The Board found in this conduct "nothing which savors of coercion or of an interference with the free choice by the employees." However, the Board observed that if the union representative stationed himself within 50 feet of the polls, as asserted by the employer, his conduct would "merit criticism." The opinion added that "in such circumstances, if a request had been made—as it was not—to the election officials that he [the union representative] be directed to leave the area, it would properly have been acted upon."

In another case, the Board found that the picketing of the employer's plant in connection with an economic strike called by one of the unions participating in the election did not interfere with the election, when the pickets were some 200 feet away from the polling place on another

<sup>59</sup> *Kilgore Manufacturing Co.*, 45 NLRB 468 (1942); *Detroit Creamer Co.*, 60 NLRB 178 (1945); *Continental Can Co.*, 80 NLRB 785 (1948).

<sup>60</sup> *Alliance Ware, Inc.*, 92 NLRB 55.

<sup>61</sup> *United States Gypsum Co.*, 92 NLRB 1661

<sup>62</sup> *Southwestern Electric Service Co.*, 90 NLRB 457.

side of the plant and the picketing was peaceful.<sup>63</sup> In this case, the Board said:

As the existence of an economic strike is not sufficient, *per se*, to prevent the holding of an election, we believe that, absent violence or any other gross misconduct, the presence of the usual activity accompanying strikes away from the restricted polling area . . . likewise should not, *per se*, invalidate an election. . . .

Another electioneering practice which came under examination during the past fiscal year was that of distributing marked sample ballots to suggest how employees should vote. One case involved sample ballots bearing the name and title of a Board regional director. A majority of the Board held that the presence of the regional director's name on the ballot, which was marked in favor of the union which won the election, was "misleading on its face and therefore improper."<sup>64</sup> Consequently, the Board set aside the election. The majority opinion said:

No participant in a Board election should be permitted to suggest to the voters that this Government agency, or any of its officials, endorses a particular choice. That was the plain implication of including the Director's name and title directly under a recommendation as to how the voters should vote. The implication was in no wise cured by the inclusion of the word "sample" on the ballot, and cannot be lightly disregarded, . . . on the ground that voters are so sophisticated that the Government can afford to tolerate such misrepresentation. As we are primarily concerned with the complete protection of the Board's procedures to ensure employees fair and impartial elections, we shall affirm the Regional Director's findings, set the election aside, and order a new election.

However, the circulation of marked sample ballots which did not contain any misleading matter was held not to constitute improper interference.<sup>65</sup> In this same case, a circular, bearing the name of a high clergyman of the same faith as most of the employees were reputed to be, which advocated the right of employees to organize was held to be within "the legitimate bounds of campaign propaganda." The circular was attached to the sample ballot.

Preelection conduct or campaign tactics other than improper electioneering also may be held to interfere with the employees' free choice in a Board election. Thus, the Board held that the taking of photographs of employees and union organizers during the distribution of union literature on the employer's premises made a free election impossible.<sup>66</sup> In this case, the employer's personnel director stationed himself near union organizers distributing literature outside the plant and took numerous photographs of employees and others distributing

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<sup>63</sup> *West-Gate Sun Harbor Co*, 93 NLRB 830.

<sup>64</sup> *The Am-O-Krome Co*, 92 NLRB 893 (Board Members Reynolds and Murdock, dissenting, expressed the view that, because of the extensive use of similar sample ballots in political elections, employees are not likely to be misled by this technique).

<sup>65</sup> *Marinette Knitting Mills*, 93 NLRB 365

<sup>66</sup> *Calmes Engineering Co*, 90 NLRB 771 (Board Member Reynolds dissenting).

and receiving literature. The Board declared that "regardless of the employer's motives in openly taking the photographs, the clear effect of its action was to intimidate the employees and thus to make a free election impossible."

However, the Board found no interference where an employer furnished transportation to the polls for all employees without discrimination and had its supervisors repeatedly urge employees to go to vote.<sup>67</sup> Nor was it held interference where the employer had a rule against the bringing of union literature into the plant and enforced it impartially.<sup>68</sup> The Board held that such a rule was a permissible limitation on campaign activities.

Another case involved a statement allegedly made by a union representative that it was not necessary to vote at the election and that a failure to vote would be counted as a vote against the union. It was contended that the election should be set aside because certain employees, whose votes would have affected the outcome of the election, did not vote allegedly because of this statement. A majority of the Board held that such a statement, if actually made, did not exceed the limits of permissible preelection conduct.<sup>69</sup>

Improper and unlawful interference was found, however, when an employer operating a seasonal can manufacturing plant where an election was scheduled sent returning seasonal employees to one of the two unions participating in the election "for clearance" before being assigned to work.<sup>70</sup> The Board set aside the election, holding that this was "unlawful preferential treatment" of one of the two contesting unions. The Board added, "Such practices are not calculated to create the kind of atmosphere in which Board elections should be conducted."

### c. Coercive Statements

Statements to employees, particularly by employers, are one type of preelection or campaign activity often alleged to have improperly affected the results of an election.

The Board has held that, under the amended act, an employer may make openly antiunion statements to employees, if he wishes, but such statements must be kept free of either promises of benefit or threats of reprisal, either express or implied.<sup>71</sup> Otherwise, they may constitute evidence of an unfair labor practice. This limitation on such statements is fixed by section 8 (c) of the act, the

<sup>67</sup> *John S. Barnes Corp.*, 90 NLRB 1358.

<sup>68</sup> *Westinghouse Electric Corp.*, 91 NLRB 955.

<sup>69</sup> *Round Mountain Gold Dredging Corp.*, 92 NLRB 859. Chairman Herzog, dissenting, expressed the opinion that the union's inducement of employees by such misrepresentations *not* to vote was little different from accomplishing the same result by fraud or threats and was sufficient to set aside the election.

<sup>70</sup> *Atlas Imperial Diesel Engine Co. and Hunt Foods, Inc.*, 91 NLRB 530.

<sup>71</sup> *Cherry & Webb Co., Providence*, 93 NLRB 9.

so-called "free speech" provision. But, in a representation proceeding, the Board is not limited by the provisions of 8 (c) in determining whether or not a statement is of such nature as to make the free selection of a bargaining representative improbable. On this point, the Board stated in one case decided during the past fiscal year:

Section 8 (c) prevents the Board from treating as evidence of *unfair labor practices* any expression of views, argument, or opinion which contains no threat of reprisal or force or promise of benefit. Section 8 (c) does not, however, prevent the Board from finding in a *representation* case that an expression of views, whether or not protected by Section 8 (c), has, in fact, interfered with the employees' freedom of choice in an election, so as to require that such election be set aside. [Emphasis by the Board.]

The majority opinion added:

In determining whether there has been such interference, the Board's test is not, \* \* \* whether the Employer was acting in good faith or whether the challenged utterances or related conduct of the Employer was "shocking," but only whether they created an atmosphere incompatible with freedom of choice by his employees.

In this case,<sup>72</sup> the employer sent to each eligible employee a letter asserting that the Board erred in allowing one of the two unions in the election to participate, and announcing that, if that union was certified, "it is our intention to contest through the courts the issue of its failure to comply with the law."<sup>73</sup> This letter was called to the attention of employees again by telegrams just before the election. The majority held that this announcement was calculated to impress upon the employees the futility of voting for that union. In the majority's opinion, the prospect of having no collective bargaining relations for several years, if that union won, tended to deter the employees from exercising their choice of a bargaining agent freely.

Another case involved a speech in which the president of the company told the employees the day before the election that "a union is not needed and would impose a serious barrier tending to injure, if not destroy, the human values which have existed here." He then went on to add that the plant "is now obsolete" and that it would be "doomed" if the "human values" were not retained or "if anything should happen to prevent our continuing to work together in this plant in that spirit which we have had in the past." He concluded with a disclaimer that his remarks were a threat. Rejecting this

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<sup>72</sup> *Metropolitan Life Insurance Co*, 90 NLRB 935, Chairman Herzog dissented. He held the employer's statements to be no more than a bona fide reiteration of a plan to test the Board's decision on one union's compliance status in the courts by the only method permitted by the statute. He would have held the employer's statements unrelated to the election itself. This case is also discussed briefly in the Fifteenth Annual Report, pp. 82-83.

<sup>73</sup> The employer had contended in the proceeding which led to direction of the election that this union was not properly in compliance with the non-Communist affidavit requirements of the act. The Board determined administratively that it was in compliance and held further that this determination was an administrative matter not subject to litigation.

disclaimer and holding that the speech plainly implied that the plant would be closed if a union were chosen, the Board held that the speech was "by its very nature, coercive in character" and that it restrained the employees in their freedom of choice.<sup>74</sup> The Board, therefore, set aside the election.

The Board also voided an election where it found that an employer's supervisors had told employees that election of a bargaining representative would result in the loss of their incentive bonus payments.<sup>75</sup>

In another case, a majority of the Board set aside an election because the employer intimated, in a preelection letter, that wage increases, insurance, and other benefits were held up by the election contest.<sup>76</sup> The majority held that external circumstances, to which the employer did not expressly refer in the letter, could not be held to have offset the employer's statements.

#### d. Wage Increases Before Elections

Wage increases, or promises of wage increases, made shortly before a representation election also have been held to constitute undue interference with the employees' freedom of choice. However, the granting of a wage increase or other benefits preceding an election will not be held to justify voiding the election in all cases. The Board has described its general policy on this point as follows:

Where we have set aside elections on such grounds, we have found that the relationship between the granting of benefits and the election was more than mere temporal coincidence. We have found, under the circumstances of the case, that the granting of the benefits was intended, or was reasonably calculated to interfere with the employees' free choice. This has been found where, for example, (1) the announcement of benefits follows no request by the employees and at a time wholly unexpected by them, or (2) the benefits, while decided upon somewhat earlier, are not announced to the employees until just before the election, and no credible explanation is offered for the delay, or (3) the announcement comes at a time substantially different from that which had been the employer's customary time to grant employee benefits.<sup>77</sup>

In this case, during the period when the election petition was pending, the company announced that it would absorb an increase in premiums on hospital insurance carried by its employees and granted an increase in wages and insurance benefits. Both increases occurred before the Board issued its direction of election and the wage increase occurred nearly 45 days before the election. The Board found that, for a number of years, the employer had followed the practice of attempting to maintain substantial equality of wages and other bene-

<sup>74</sup> *Onondaga Pottery Co*, 94 NLRB No. 25

<sup>75</sup> *Farm Tools, Inc*, 8-RC-602 (not printed).

<sup>76</sup> *Telechron, Inc*, 93 NLRB 474 (Chairman Herzog and Member Reynolds dissenting).

<sup>77</sup> *United Screw & Bolt Corp.*, 91 NLRB 916.

fits between its two plants; making changes at both plants at about the same time. One located at Cleveland had collective bargaining and the other at Chicago did not. The Board ruled that the increases were not intended, or reasonably calculated, to interfere with the employees' freedom of choice in the election held at the Chicago plant because "the announcement of the wage increases and insurance benefits to the Chicago employees followed almost immediately after the formal conclusion of collective-bargaining negotiations at the Cleveland plant, at a time when it had been customary to grant such benefits, and when the Chicago employees could, on the basis of past practice, have reasonably expected that adjustments in the terms and conditions of their employment would be made." In this case, the Board explicitly declined to hold that the granting of increases in wages or other benefits while an election petition is pending constitutes grounds *per se* for setting an election aside.

Similarly, in another case, the Board found no undue interference where an employer granted a general wage increase at approximately the same time that it had been giving such increases for 5 years, even though the increase came less than 2 weeks before the election.<sup>78</sup>

However, where an employer's prior practice had been to grant only individual merit increases, the Board set aside the election because of the announcement of a general wage increase immediately before the election.<sup>79</sup>

In certain cases, however, it has been held that the union had waived its right to protest an election on the basis of an increase made shortly before an election. The Board found such waiver where a wage increase was granted more than 2 months prior to the election and the union neither protested the holding of the election nor filed unfair labor practice charges.<sup>80</sup> In another case in which the waiver theory was applied, the Board said

The wage increase was announced 2 weeks before the Board's decision issued, and more than a month before the election. It is clear that the Petitioner was aware of the increase; it characterized it as illegal, and, as part of the election campaign, contended that the increase was not enough to meet the rising cost of living. Although it accused the Employer of impropriety, it did not throughout this period protest that the wage increase made a fair election impossible. Nor did it file any unfair labor practice charges based upon the announcement. Instead, it took its chances, preferring to await the result of the election. Without passing upon the question as to whether the Employer's activity here objected to might, in other circumstances, be deemed to have constituted interference with the election, we conclude on all the facts here, and more particularly because of the

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<sup>78</sup> *Exner Grocery Co.*, 93 NLRB 1614

<sup>79</sup> *Direct Laboratories, Inc.*, 94 NLRB No. 75.

<sup>80</sup> *Cherry and Webb Co., Providence*, 94 NLRB No. 105.

Petitioner's past acquiescence, that there is no warrant in this case for setting aside the election.<sup>81</sup> (Citing cases.)

## F. The Union-Shop Referendum

Before the amendment of 1951, a referendum by secret ballot under section 9 (e) of the act was necessary for employees to authorize their bargaining agent to enter into the type of union-security agreement permissible under the proviso to section 8 (a) (3). This type of referendum was abolished by the 1951 amendment after the close of the fiscal year.

However, section 9 (e) still provides for a referendum among employees who have indicated a desire to revoke their bargaining agent's authority to make a union-shop agreement.<sup>1</sup> This type of referendum, which is known as a deauthorization poll, may be obtained at appropriate times upon a showing that 30 percent of the employees have indicated a desire to revoke the authorization.<sup>2</sup>

The following discussion of cases arising under section 9 (e) during the 1951 fiscal year is based upon the provisions of the section before amendment.

Before amendment, section 9 (e) of the Act required that a union seeking a union-security referendum first had to make a showing that at least 30 percent of the employees involved had indicated a desire to grant it such an authorization. In addition, the section precluded the Board from conducting a union-security referendum if a question of representation existed. These were the only statutory prerequisites for the holding of a union-shop authorization poll.<sup>3</sup>

To bar a union-shop poll, the question concerning representation had to be validly raised. In a complaint proceeding, the Board dealt with the problem of "good faith" on the part of the employer in raising a question concerning representation.<sup>4</sup> The employer failed to avail itself fully of Board processes to contest the validity of the union-shop authorization proceeding. The Board said that it "has entertained and administratively sustained objections to a union authoriza-

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<sup>81</sup> *Denton Sleeping Garment Mills, Inc.*, 93 NLRB 329 (Board Member Murdock dissenting). Subsequently, in a refusal-to-bargain case, a majority of the Board had occasion to point out that the "waiver" principle applies only where a bona fide question concerning representation exists; if no representation question was in fact present, an election will be set aside, regardless of the fact that the petitioning union participated in the election with knowledge of improper preelection conduct of the employer. *M. H. Davidson Co.*, 94 NLRB No. 34.

<sup>1</sup> Public Law No. 189, approved by the President October 22, 1951. Under this amendment, a union must first obtain from the Board a notice of compliance with the non-Communist affidavit and filing requirements of the act [sec. 9 (f), (g), and (h)] in order to make a valid union-security agreement. Moreover, the agreement still must conform to the provisions of 8 (a) (3).

<sup>2</sup> See sec. 9 (e), Text of Amended Act, appendix C.

<sup>3</sup> Sec. 9 (e) of the act before amendment; *Kay and Burbank Co.*, 92 NLRB 224.

<sup>4</sup> *United States Gypsum Co.*, 90 NLRB 964.

tion election, filed by an employer, which alleged that a question of representation existed at the time the union authorization election was conducted.”<sup>5</sup> However, in the instant case, the employer did not file such objections, or request a revocation of the certification of results of the election, or move to dismiss the proceedings. Further, the employer did not participate in the proceeding even for the limited purpose of challenging the ballots of employees who, the employer asserted, were not properly included in the unit. This failure of the employer to contest the validity of the union-authorization election by the available processes contributed to the Board’s conclusion that the employer did not, in good faith, raise a question concerning representation.

In addition, a union-shop referendum proceeding was generally governed by the rules which the Board applies to certification and decertification election proceedings under section 9 (c), insofar as identical or related matters are concerned.<sup>6</sup> Thus, the Board held that, in the absence of extraordinary circumstances, a unit appropriate for a representation election is also appropriate for a union-shop referendum.<sup>7</sup>

In another case, the Board set aside a union-shop authorization poll where the employer, through notice to its employees, rendered “improbable a free and untrammelled choice” on the part of the employees in making their decision as to whether they wished membership in a union to be a condition of continued employment.<sup>8</sup> In this case, the employer published a notice stating categorically that employer “will not sign or enter into any agreement, oral or written, with a Union requiring [my employees] to join the Union.” The Board said that the notice “could very well have been the cause of the small number of votes cast.”

## G. The 12-Month Limitation

The Board’s administrative judgment that a certification should not be disturbed for at least a year is paralleled by section 9 (c) (3) which specifically provides that—

No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

<sup>5</sup> Board cited *American Products Co.*, 18 UA-1104, January 31, 1949 (not printed).

<sup>6</sup> In *General Motors Corp.*, 92 NLRB 1752, for instance, the Board followed an earlier case (*Lima Hamilton Corp.*, 87 NLRB 65; Fifteenth Annual Report, p. 86) and determined that the mere possession of contractual seniority rights does not entitle a laid-off employee to vote in a union-security poll. The voting eligibility of such employees depends rather on whether they have a reasonable expectation of reemployment in the near future.

<sup>7</sup> See *Grant Food Shopping Center, Inc.*, 77 NLRB 791, and *Kingsley Stamping Machine Co.*, 93 NLRB 1266, for such extraordinary circumstances.

<sup>8</sup> *F. W. Woolworth Co.*, 93 NLRB 992.

In construing this section, the Board has held that either a certification or decertification will bar another representation election during the next 12 months, but the section does not preclude the holding of both a representation election and union-shop referendum<sup>1</sup> in the same unit during the same period.<sup>2</sup> However, the Board has ruled that this section does not limit the Board's discretion as to when a direction of election may be issued, so long as the election itself is not to be held sooner than the statute allows. The 12-month period is computed from the date of the conclusion of the balloting in the last valid representation election.<sup>3</sup>

Since the statute provides that any *valid* election bars a second election during the same 12-month period, the outcome of the election is immaterial and a decertification election resulting in a tie vote is a bar.<sup>4</sup>

The question of whether an election is barred arises at times where a craft union seeks to represent a craft group which during the preceding 12 months participated in an election either as a separate group or as part of a larger group. In one such case, it was held that a union which had petitioned for, and had lost, an election in a craft unit could not intervene less than 12 months later in a representation proceeding involving a different unit for the purpose of getting a new election in the same craft unit.<sup>5</sup> In another case,<sup>6</sup> however, an election in a craft unit was held not to be barred by an election held 5 months earlier in a plant-wide unit including the craft, because of the following circumstances: The craft petition was filed after the plant-wide election was directed but before it was held; the ballots of the craft group in that election were impounded and did not affect the results of the election which the union lost; and certification of the results of the plant-wide election was to be withheld until after the separate election in the craft group.

In one case, during the past year, the Board had occasion to hold that section 9 (c) (3) limited only the number of elections which may be held, but not the number of petitions which may be filed as to the same bargaining unit within a 12-month period.<sup>7</sup> In the same case, the Board rejected the contention that repeated petitions during a short period impose an undue burden on the employer.

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<sup>1</sup> The union-shop referendum, except to revoke a bargaining agent's authority to make a union-shop agreement, was abolished by Public Law No 189, signed by the President October 22, 1951. See sec. 9 (e), Text of Amended Act, appendix C.

<sup>2</sup> *C. K. Williams & Co.*, 20-RC-1102 (not printed).

<sup>3</sup> Fifteenth Annual Report, pp. 75-76.

<sup>4</sup> *C. K. Williams & Co.*, cited above.

<sup>5</sup> *Westinghouse Air Brake Co.*, 6-RC-534 (not printed)

<sup>6</sup> *Colorado Builders Supply Co.*, 90 NLRB 2002.

<sup>7</sup> *Thalhimer Bros., Inc.*, 93 NLRB 726.

The Board also was confronted again with the contention that a present election was barred by a previous election conducted by a State board less than 12 months earlier.<sup>8</sup> The Board pointed out that the prohibition of section 9 (c) (3) against more than one representation election per year in the same unit is directed only against elections conducted by the National Labor Relations Board; it is not concerned with elections conducted by other agencies or persons.

<sup>8</sup> *Waterways Engineering Corp.*, 93 NLRB 794.

## Unfair Labor Practices

**T**HE Board is empowered by the Act "to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce."<sup>a</sup> In general, section 8 forbids an employer or a union or their agents from engaging in certain specified types of activity which Congress has designated as unfair practices that interfere with the free flow of commerce, stability of industrial relations, free collective bargaining or the rights of employees to engage in, or refrain from, concerted activities directed toward group bargaining or other mutual aid or protection.

The Board, however, may not act to prevent such activities until a charge of unfair labor practice has been filed with it. Even then, the Board may issue an order to prevent future unfair labor practices only after it has received proof that the union or employer involved has engaged in past unfair practices.

Unfair practice charges may be filed by an employer, an employee, a labor organization, or other private party. Such charges are filed with the regional office of the Board in the area where the unfair practice allegedly was committed.

Formal proceedings before the Board itself, however, are initiated only upon issuance of a formal complaint after investigation of the charges filed by the private parties. Final authority over the investigation of charges and the issuance of formal complaints, on behalf of the Board, is conferred by the act upon the General Counsel. Once a formal complaint is issued, the act provides for hearing of testimony and evidence in the case by the Board or by a Board Member or by a trial examiner designated by the Board. In practice, all hearings on unfair practice complaints are conducted by trial examiners.

After completion of the hearing, the trial examiner issues a report and recommended order, which becomes an order of the Board unless exceptions to it are filed by the parties within 20 days after it has been served on them. If exceptions are filed, the Board Members make a decision after considering the entire record of the case, the trial examiner's findings, and any further arguments the parties may

<sup>a</sup> Sec. 10 (a).

make. The Board's orders are designed to remedy past unfair practices and prevent future ones.

To enforce its orders, the Board is empowered to petition any United States court of appeals for an order of enforcement. Any person aggrieved by a final order of the Board, including charging parties whose charges have not been sustained by the Board, also may petition the courts of appeals for review of a Board order.

The act provides, however, that "no objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." The act also provides further that "the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."<sup>b</sup>

## A. Unfair Labor Practices of Employers

In general, the act requires an employer to bargain in good faith with the representative chosen by a majority of a group of employees which is appropriate for collective bargaining.<sup>1</sup> To assure the freedom of employees in bargaining, the act forbids an employer to interfere with the right of employees to engage in concerted activities directed toward collective bargaining.<sup>2</sup> Similarly, the act forbids an employer to assist or dominate an organization of employees which is formed, or is being formed, for the purpose of bargaining.<sup>3</sup> The act also specifically forbids an employer from discriminating in the terms or conditions of employment against employees either because of their participation in the concerted activities protected by the act, or because of their refusal to participate in such activities except under a valid union shop.<sup>4</sup> The specific sections of the act which lay down these rules and the Board's rulings based upon them are discussed in the following subsections of this chapter.

### 1. Interference with Employees' Rights

Section 8 (a) (1) of the act forbids an employer "to interfere with, restrain, or coerce" employees in the exercise of their rights to engage in, or refrain from, collective bargaining and self-organizational activities as guaranteed by section 7. Although conduct which violates other subsections of 8 (a) may also violate subsection (1), this section

<sup>b</sup> Quotations in this sentence and the preceding one are from sec. 10 (e).

<sup>1</sup> Secs. 8 (a) (5) and 9 (a).

<sup>2</sup> Sec. 8 (a) (1).

<sup>3</sup> Sec. 8 (a) (2).

<sup>4</sup> Sec. 8 (a) (3).

of this chapter will deal with conduct which violates only section 8 (a) (1), which is commonly known as an "independent 8 (a) (1) violation."

The forms of unlawful employer interference, restraint, or coercion, of employees in the cases decided by the Board during fiscal year 1951 were varied, but in general paralleled those noted in prior annual reports.<sup>5</sup> Conduct of employers which the Board found to violate this subsection included: Interrogation of employees or applicants for employment,<sup>6</sup> concerning their own or other employees' union membership, sympathies, or activities.<sup>7</sup> Surveillance of union activities,<sup>8</sup> or creating the impression of surveillance.<sup>9</sup> Threats that union membership or activity would result in economic detriment, such as the closing<sup>10</sup> or removal<sup>11</sup> of the plant, or the loss of employment,<sup>12</sup> pay,<sup>13</sup> promotion or seniority,<sup>14</sup> or the loss of other benefits or

<sup>5</sup> See Fifteenth Annual Report, pp 92-100 and Fourteenth Annual Report, pp 50-56.

<sup>6</sup> *Atlanta Broadcasting Co*, 90 NLRB 808, *S. B. Whistler & Sons, Inc*, 92 NLRB 1. See also *Jackson Daily News*, 90 NLRB 565, *The Warren Co, Inc*, 90 NLRB 689, *Yale Filing Supply Co*, 91 NLRB 1490, *The M. H. Davidson Co*, 94 NLRB No 34, *Morehead City Garment Co, Inc*, 94 NLRB No. 45

<sup>7</sup> *Happ Bros Co, Inc*, 90 NLRB 1513, *Standard Dry Wall Products, Inc*, 91 NLRB 544, *Carolina Mills, Inc*, 92 NLRB 1141, *McKesson & Robbins, Inc*, 92 NLRB 1432, *Kanmak Mills, Inc*, 93 NLRB 490; *Victor Chemical Works*, 93 NLRB 1012, *Brophy Engraving Co*, 94 NLRB No 104, *Otis L. Broyhill Furniture Co*, 94 NLRB No 232. See also *Paterson Fire Brick Co*, 90 NLRB 660; *Tampa Sand & Material Co*, 91 NLRB 868, *Rogue Valley Broadcasting Co, Inc (KWIV)*, 93 NLRB 949

<sup>8</sup> *Thermod Co*, 90 NLRB 614, *Cummer-Graham Co*, 90 NLRB 722; *Pure Oil Co (Illinois Producing Co.)*, 90 NLRB 1661; *W. T. Carter and Bro.*, 90 NLRB 2020, *Atlanta Metallic Casket Co.*, 91 NLRB 1225; *Salant & Salant, Inc*, 92 NLRB 343 and 417, *Carolina Mills, Inc.*, 92 NLRB 1141, *Majestic Metal Specialties, Inc*, 92 NLRB 1854, *Hilltop Baking Co*, 93 NLRB 694, *Victor Chemical Works*, 93 NLRB 1012, *Williams Lumber Co.*, 93 NLRB 1672; *Morehead City Garment Co, Inc*, 94 NLRB No 45; *Southland Mfg Co.*, 94 NLRB No 123, *The Stille Plywood Co, Inc*, 94 NLRB No 138; *Puerto Rico Cereal Extracts, Inc.*, 94 NLRB No 157; *Otis L. Broyhill Furniture Co*, 94 NLRB No 232, *West Texas Utilities Co, Inc*, 94 NLRB No 237.

<sup>9</sup> *Montgomery Ward & Co, Inc*, 90 NLRB 609, *Trumansburg Home Telephone Co*, 90 NLRB 1386, *John S. Barnes Corp*, 92 NLRB 589

<sup>10</sup> *Jackson Daily News*, 90 NLRB 565, *Cummer-Graham Co*, 90 NLRB 722, *Somerset Classics, Inc*, 90 NLRB 1676, *Newport News Children's Dress Co, Inc*, 91 NLRB 1521, *Salant & Salant, Inc.*, 92 NLRB 343 and 417, *Wentworth Bus Lines, Inc*, 92 NLRB 1356, *Majestic Metal Specialties, Inc*, 92 NLRB 1854, *Kenmak Mills, Inc*, 93 NLRB 490, *Queen City Valves, Inc*, 93 NLRB 1576; *Somerville Buick, Inc*, 93 NLRB 1603; *Williams Lumber Co*, 93 NLRB 1672, *Pennwoven, Inc*, 94 NLRB 842, *Bill Heath*, 94 NLRB No 124, *The Stille Plywood Co, Inc*, 94 NLRB No 138, *Palmer Mfg. Co*, 94 NLRB No. 230.

<sup>11</sup> *Morehead City Garment Co, Inc*, 94 NLRB No. 45; *Bryan Mfg Co*, 94 NLRB No. 187

<sup>12</sup> *Thermod Company*, 90 NLRB 614 (threat to give employee undesirable jobs to the point where he would quit), *Trumansburg Home Telephone Co*, 90 NLRB 1386, *Tampa Sand & Material Co.*, 91 NLRB 868, *Atlanta Metallic Casket Co*, 91 NLRB 1225, *Ozark Hardwood Co.*, 91 NLRB 1443; *Royal Palm Ice Co*, 92 NLRB 1295, *Augusta Bedding Co.*, 93 NLRB 211 ("veiled" threat—panel majority), *Cathy Lumber Co*, 93 NLRB 510, *Montgomery Ward & Co., Inc.*, 93 NLRB 640; *Hilltop Baking Co*, 93 NLRB 694, *Williams Lumber Co*, 93 NLRB 1672; *Machine Products Co, Inc*, 94 NLRB No. 106; *Palmer Mfg Co.*, 94 NLRB No. 230; *Otis L. Broyhill Furniture Co.*, 94 NLRB No. 232. See also *Rogue Valley Broadcasting Co., Inc (KWIV)*, 93 NLRB 949 (statement, following interrogation concerning union sentiments, that dissatisfied employees "can quit").

*Cf. Pure Oil Co*, 90 NLRB 1661 (insisting, as condition of continued employment as acting supervisor, that employee relinquish union membership held not violative of sec. 8 (a) (1))

<sup>13</sup> *Jackson Daily News, et al*, 90 NLRB 565 (discontinuing paid sick leave), *Cummer-Graham Co*, 90 NLRB 722 (discontinuing paid rest periods), *Consolidated Frame Co*, 91 NLRB 1295 (eliminating overtime), *Baxter Bros*, 91 NLRB 1480 (reducing working hours), *New Jersey Carpet Mills, Inc.*, 92 NLRB 604, *Roure-DuPont Mfg. Co*, 93 NLRB 1240 (withholding bonus), *Crow-Burlingame Co*, 94 NLRB No 146 (loss of paid vacations).

*Cf. Kansas-Nebraska Natural Gas Co, Inc*, 90 NLRB 1423 (withholding merit increases until after Board's dismissal of representation petition held not interference).

<sup>14</sup> *West Texas Utilities Co, Inc*, 94 NLRB No. 237.

privileges,<sup>15</sup> or threats of blacklisting.<sup>16</sup> Promising or granting wage increases or other benefits to discourage union membership or activities.<sup>17</sup> Attempting to influence employees to vote against union representation<sup>18</sup> or against a particular union.<sup>19</sup> Inducing or assisting employees to withdraw from a union.<sup>20</sup> Privately polling employees to determine their union views.<sup>21</sup> Penalizing employees for engaging in strikes,<sup>22</sup> or for participating in Board proceedings.<sup>23</sup> Threatening or attempting to instigate physical violence to discourage union membership or activity.<sup>24</sup>

Dealing individually with striking employees in disregard of their bargaining agent was also held to be unlawful interference in a number

<sup>15</sup> Financial assistance *Jackson Daily News*, 90 NLRB 565, *Cummer-Graham Co*, 90 NLRB 722, *English Mica Co.*, 92 NLRB 766, *Williams Lumber Co*, 93 NLRB 1672, *Rouch's Sawmill, Ltd*, 94 NLRB No 57  
Making up lost time *Consolidated Frame Co*, 91 NLRB 1295.

Privilege of leaving early *Consolidated Frame Co*, *supra*

Use of company-owned dwellings. *United States Gypsum Co*, 90 NLRB 964; *Pacific Mills*, 91 NLRB 60.  
Other benefits. *Harbon-Hubbard Mfg Co*, 94 NLRB No. 133 (vacation and holiday pay, and Christmas bonuses).

<sup>16</sup> *The M H. Davidson Co*, 94 NLRB No 34

<sup>17</sup> Wage increases *Paterson Fire Brick Co*, 90 NLRB 660, *Long-Lewis Hardware Co.*, 90 NLRB 1403; *Continental Nut Co, Inc*, 91 NLRB 1058, *Salant & Salant, Inc*, 92 NLRB 343 and 417, *Deena Products Co.*, 93 NLRB 549, *Tennessee Egg Co*, 93 NLRB 846, *Motorola, Inc* 94 NLRB No 181, *Bryan Mfg Co.*, 94 NLRB No 187, *Sam Zall Milling Co.*, 94 NLRB No 235 See also *Atlanta Metallic Casket Co*, 91 NLRB 1225.  
Cf. *Lerner Shops of Alabama, Inc*, 91 NLRB 151 (wage increase granted not only to store involved but to almost all of employer's other stores held not violative of act)

Other benefits: *Atlantic Metallic Casket Co*, 91 NLRB 1225 (paid holidays), *Majestic Metal Specialties, Inc*, 92 NLRB 1584 (good jobs and other benefits); *Jamestown Veneer and Plywood Corp*, 93 NLRB 101 (paid holiday and wage increases), *Queen City Valves, Inc*, 93 NLRB 1576 (improved working conditions, increased wages, holiday and vacation pay), *The M H Davidson Co*, 94 NLRB No 34 (implied promise); *Arthur Winer, Inc*, 94 NLRB No 97, *Brophy Engraving Co.*, 94 NLRB No 104; *Crow-Burlingame Co*, 94 NLRB No. 146, *West Texas Utilities Co, Inc*, 94 NLRB No 237.

<sup>18</sup> *Greenville Cotton Oil Co*, 92 NLRB 1033, *Wentworth Bus Lines, Inc*, 92 NLRB 1356, *McKesson & Robbin, Inc.*, 92 NLRB 1432, *Editorial "El Imparcial," Inc*, 92 NLRB 1795, *Majestic Metal Specialties, Inc*, 92 NLRB 1854, *Kanmak Mills, Inc*, 93 NLRB 490, *Rogue Valley Broadcasting Co, Inc (KWIV)*, 93 NLRB 949, *Victor Chemical Works*, 93 NLRB 1012, *American Optical Co*, 93 NLRB 1547, *Williams Lumber Co*, 93 NLRB 1672.

<sup>19</sup> *Pennwoven, Inc*, 94 NLRB No. 43

<sup>20</sup> *Southern Block and Pipe Corp.*, 90 NLRB 590 (assisting in preparation and filing of decertification petition), *Paterson Fire Brick Co*, 90 NLRB 660; *Atlanta Broadcasting Co*, 90 NLRB 808, *Long-Lewis Hardware Co*, 90 NLRB 1403, *Pure Oil Co*, 90 NLRB 1661, *Somerset Classics, Inc*, 90 NLRB 1676 ("loyalty" document—antiunion petition), *Yale Filing Supply Co*, 91 NLRB 1490, *English Mica Co*, 92 NLRB 766; *Royal Palm Ice Co*, 92 NLRB 1295, *A S Beck Shoe*, 92 NLRB 1457, *Editorial "El Imparcial," Inc*, 92 NLRB 1795, *Radio Station KVEC*, 93 NLRB 618, *Cathy Lumber Co*, 93 NLRB 510 (abandonment of union as a condition of reemployment), *Cherokee Hosiery Mills*, 93 NLRB 590, *Tennessee Egg Co.*, 93 NLRB 846 (soliciting withdrawal of nonstrikers from union held violative of sec. 8 (a) (1), under circumstances of case, although contract permitted their withdrawal); *Victor Chemical Works*, 93 NLRB 1012, *Roure-DuPont Mfg. Co.*, 93 NLRB No. 230, *Morehead City Garment Co, Inc*, 94 NLRB No 45, *Crow-Burlingame Co.*, 94 NLRB No 146. See also *Williams Lumber Co*, 93 NLRB 1672 (inducing employees not to participate on union's negotiating committee)

Cf. *Superior Co, Inc*, 94 NLRB No 90 (permitting circulation antiunion petition during working hours held not violative of sec. 8 (a) (1), under circumstances of case)

<sup>21</sup> *Paterson Fire Brick Co*, 90 NLRB 660, *The F. C. Russell Co*, 92 NLRB 206, *Queen City Valves, Inc*, 93 NLRB 1576; *Somerville Busck, Inc*, 93 NLRB 1603, *William S Frazier*, 94 NLRB No 68

<sup>22</sup> *Collins Baking Co*, 90 NLRB 895 (threat not to rehire); *West Fork Cut Glass Co*, 90 NLRB 944 (threat not to rehire); *Greenville Cotton Oil Co*, 92 NLRB 1033 (basing reinstatement on condition that strikers "humble" themselves and "forget" union); *American Shuffleboard Co*, 92 NLRB 1272 (threat to discharge).

<sup>23</sup> *Superior Co, Inc*, 94 NLRB No 90

<sup>24</sup> *Editorial "El Imparcial," Inc.*, 92 NLRB 1795, *Morehead City Garment Co, Inc*, 94 NLRB No 45, *The American Thread Co*, 94 NLRB No 246.

of cases.<sup>25</sup> However, in one case, the Board held the solicitation of economic strikers to return to work did not violate the act under the circumstances of that case.<sup>26</sup> The Board said:

Absent a threat or promise of benefit designed to coerce the strikers into returning by the deadline date, the legality of the Respondent's individual solicitation of the strikers must be determined against the background in which such solicitation was done. For, although the Board has, in the past, found individual solicitation of strikers violative of the Act, in all such cases one or both of the following two factors has been present: (1) The solicitation has constituted an integral part of a pattern of illegal opposition to the purposes of the Act as evidenced by the Respondent's entire cause of conduct, or (2) the solicitation has been conducted under circumstances, and in a manner, reasonably calculated to undermine the strikers' collective bargaining representative and to demonstrate that the Respondent sought individual rather than collective bargaining. Neither factor is present here. [Footnotes omitted.]

### a. Questioning of Employees

Consistent with past rulings,<sup>27</sup> the Board has continued to hold that the questioning of employees by their employer *per se* violates section 8 (a) (1) when it concerns the following subjects: Employees' union membership<sup>28</sup> or activities.<sup>29</sup> Their attitude toward the union,<sup>30</sup> or their desire for union representation.<sup>31</sup> Their voting intentions in a scheduled Board election,<sup>32</sup> or their views concerning the outcome of a scheduled Board election.<sup>33</sup> Whether they had received solicitation letters from a union.<sup>34</sup>

In one case, a company official questioned employees about their union buttons, which he termed their "pass to heaven."<sup>35</sup> The Board declined to accept the explanation that these statements were only "kidding remarks," and held them unlawful. The Board said:

. . . The wearing of union buttons by employees is a form of union activity. It has an important function during a union campaign. It prompts solidarity among union members and signifies their membership and determination to accomplish the unionization of the plant. The employer's interrogation of an employee concerning his union button is as objectionable as the employer's direct questioning of an employee concerning his membership in a union, reasons for joining a union, his voting interests or attendance at union meetings, or any other

<sup>25</sup> *Happ Brothers Co., Inc.*, 90 NLRB 1513; *The W. T. Rawleigh Co.*, 90 NLRB 1924; *Old Town Shoe Co.*, 91 NLRB 240, *Ohio Associated Telephone Co.*, 91 NLRB 932; *Waterman Industries, Inc.*, 91 NLRB 1041.

<sup>26</sup> *The Texas Co.*, 93 NLRB 1358.

<sup>27</sup> See *Standard-Coosa-Thatcher*, 85 NLRB 1358, discussed in Fifteenth Annual Report (1950), pp. 94-95.

<sup>28</sup> *Atlanta Broadcasting Co.*, 90 NLRB 808.

<sup>29</sup> *Waterman Industries, Inc.*, 91 NLRB 1041.

<sup>30</sup> *The F C Russell Co.*, 92 NLRB 206; *Supreme Bedding and Furniture Mfg Co.*, 93 NLRB 1616; *Waterman Industries*, cited above.

<sup>31</sup> *Bill Heath, Inc.*, 94 NLRB No. 124.

<sup>32</sup> *Bill Heath, Inc.*, cited above.

<sup>33</sup> *The F. C. Russell Co.*, cited above.

<sup>34</sup> *Montgomery Ward & Co., Inc.*, 93 NLRB 640.

<sup>35</sup> *Salant & Salant, Inc.*, 92 NLRB 417.

aspect of union activities. There is no essential difference between asking an employee why he belongs to the union and why he is wearing a union button.

Besides invading the area guaranteed to be exclusively the business and concern of his employees, an employer by questioning employees concerning their union buttons, their union organizer, or other union activities or affairs, also interferes with the employees' free exercise of the rights guaranteed under the Act. Underlying such inquiries is a veiled expression of hostility toward the Union tending to interfere with the free exercise of the employees' rights under the Act. They are reasonably led to believe that their employer not only wants information concerning the union button or union organizer but also contemplates some form of reprisal once the information is obtained. . . .

However, in another case, the Board held that questioning an employee as to why he and other employees were wearing buttons of a union other than the present representative did not violate section 8 (a) (1), because of the special circumstances of the case.<sup>36</sup> The question in this instance was addressed to an employee who had been the incumbent union's spokesman and it was asked by an official who had been the employer's spokesman in recent bargaining negotiations which had resulted in execution of a contract with the incumbent union. Upon being told that the employees had not abandoned their earlier idea of affiliating with the organization whose button they were wearing, the questioner replied: "If that's the way you want it, O. K." In view of this reply and the fact that both men had recently participated in matters which presumably stabilized labor relations, the Board treated the inquiry as "an understandable impulsive reaction which did not tend to interfere with, restrain, or coerce employees within the meaning of Section 8 (a) (1) of the Act."

Direct questions held illegal have included inquiries as to: Whether an employee had been "contacted . . . about the union."<sup>37</sup> His reasons for joining the union<sup>38</sup> or for not signing an antiunion petition.<sup>39</sup> The employee's attitude toward the union.<sup>40</sup> How he voted<sup>41</sup> or intended to vote<sup>42</sup> in a representation election. The identity of those who had signed union-authorization cards.<sup>43</sup> How many authorization cards had been signed.<sup>44</sup> Why the employees wanted a union.<sup>45</sup> Whether another employee might change her mind about the union.<sup>46</sup>

The Board has also held unlawful statements from which it may be inferred that the speaker expects an answer relating to union member-

<sup>36</sup> *United States Gypsum Co.*, 93 NLRB 966.

<sup>37</sup> *S. B. Whistler & Son, Inc.*, 92 NLRB 1.

<sup>38</sup> *The Warren Co., Inc.*, 90 NLRB 689.

<sup>39</sup> *Somerset Classics, Inc.*, 90 NLRB 1676.

<sup>40</sup> *United States Gypsum Co.*, 94 NLRB No. 27.

<sup>41</sup> *English Mica Co.*, 92 NLRB 766.

<sup>42</sup> *Hilltop Baking Co.*, 93 NLRB 694.

<sup>43</sup> *Continental Nut Co., Inc.*, 91 NLRB 1058, *Salant & Salant, Inc.*, 92 NLRB 417; *A. S. Beck Shoe Corp.*, 92 NLRB 1457. See also *Root-Carlin, Inc.*, 92 NLRB 1313.

<sup>44</sup> *Machine Products Co., Inc.*, 94 NLRB No. 106.

<sup>45</sup> *A. S. Beck Shoe Corp.*, *supra*; *Somerville Buick, Inc.*, 93 NLRB 1603.

<sup>46</sup> *Majestic Metal Specialties, Inc.*, 92 NLRB 1854.

ship, sympathies, or activities. Example: "I heard you joined the union."<sup>47</sup>

It is no defense that such inquiries may be "isolated and innocuous,"<sup>48</sup> or prompted by no ulterior motive.<sup>49</sup> Nor are such inquiries excused because they were made to prepare a defense to pending unfair practice charges, when "the interrogation could not have constituted part of such defense."<sup>50</sup> However, as a matter of policy, the Board declined to issue a cease and desist order in one case where only a single isolated instance of illegal interrogation by a minor supervisor was involved.<sup>51</sup>

### b. Rules Restricting Union Activities

The act guarantees employees the right to engage in union organization and other concerted activities directed toward collective bargaining, but the Board has held this does not prevent an employer from making rules to prohibit or limit solicitation of members or similar activities on company premises during the actual working time of the employees involved.<sup>52</sup> The Board has held that, in the interest of efficiency and plant discipline, an employer may make such rules, provided they do not extend to the employees' nonworking time and are not discriminatorily applied so as to impede union activity while antiunion activity or activity on behalf of a favored organization is tolerated or encouraged.<sup>53</sup>

In retail stores, the Board has held, the nature of the business requires that the employer have greater leeway in banning such activities on the selling floor. Consequently, the Board has permitted employers operating retail stores to prohibit union activities on the selling floor even during the employees' off-duty time, because such activities in the presence of customers would tend to disrupt the employer's business.<sup>54</sup> But rules which are so broad as to prohibit such activities during the employees' free time away from the selling floor have been held to violate section 8 (a) (1).<sup>55</sup> However, collective bargaining contracts which prohibited such activities on the employer's

<sup>47</sup> *Jamestown Veneer and Plywood Corp.*, 93 NLRB 101.

<sup>48</sup> *Montgomery Ward & Co, Inc.*, 93 NLRB 640

<sup>49</sup> *The R. C. Russell Co.*, 92 NLRB 206, *New Jersey Carpet Mills, Inc.*, 92 NLRB 604

<sup>50</sup> *Cummer-Graham Co*, 90 NLRB 722

<sup>51</sup> *U. S. Gypsum Co.*, 93 NLRB 966.

<sup>52</sup> Editorial "El Imparcial," *Inc.*, 92 NLRB 1795; *Ohio Associated Telephone Co*, 91 NLRB 932; Fifteenth Annual Report (1950) pp. 96-97 See also *Le Tourneau Company of Georgia*, 54 NLRB 1253 (1944), enforced 324 U. S. 793.

<sup>53</sup> See Fifteenth Annual Report, p 96, *Deena Products Co* 93 NLRB 549. In this case, dormant working rules relative to visiting rest rooms and talking during working hours were more rigidly enforced during a union organizational campaign, but no violation was found when it was shown that such enforcement coincided also with employees' abuse of privileges.

<sup>54</sup> *Meier & Frank Co.*, 89 NLRB 1016 (1950).

<sup>55</sup> *A. S. Beck Shoe Corp*, 92 NLRB 1457 See also *Marshall Field & Co*, 98 NLRB No. 11.

premises even during nonworking hours have been sanctioned by the Board when enforced without discrimination.<sup>56</sup>

Distribution of union literature within a plant comes under a different rule.<sup>57</sup> In general, the Board has followed the rule that an employer may ban the distribution of literature in the plant if it can be distributed in areas where employees pass or congregate near the plant.

In one case decided during the past fiscal year, the Board unanimously stated the rule as follows:

. . . an employer can lawfully prevent the distribution of literature in the plant proper, even during the employees' nonworking time, in the interest of keeping the plant clean and orderly, at least where it is not evident that such activity cannot readily be conducted somewhere off the employer's premises.<sup>58</sup>

Accordingly, the Board found unanimously in this case that a nondiscriminatory ban on the distribution of literature in the plant proper did not infringe the employees' right to self-organization, when they were permitted to distribute literature in company parking lots and at entrances to the plant. Similarly, no violation was found in such a ban in the plant where literature could be distributed easily outside the plant, because the employees' only exit opened on a public street and the busses which transported employees loaded across the street.<sup>59</sup> But where distribution off the employer's premises was both ineffective and dangerous because of traffic, the Board held that the employer interfered with the employees' statutory rights by denying the union the privilege of distributing literature on company premises.<sup>60</sup> The Board also found a violation when an employer permitted rank-and-file employees, carrying guns and clubs, to leave their jobs to interfere with, and intimidate, other employees who were distributing union literature off the employer's premises but in the vicinity of the plant.<sup>61</sup>

In company-owned towns, an employer's denial of the use of company property for union activities such as meetings also violates section 8 (a) (1) where no other suitable facilities are available.<sup>62</sup> Thus, in a company town where no large assembly of employees could take place except on company property, an employer who refused to permit the holding of an outdoor union meeting on company property,

<sup>56</sup> *Fruitvale Canning Co.*, 90 NLRB 884.

<sup>57</sup> *Monolith Portland Cement Co.*, 94 NLRB No. 211, *Newport News Children's Dress Co., Inc.*, 91 NLRB 1521.

<sup>58</sup> *Monolith Portland Cement Co.*, cited above. On this point, this decision specifically overruled *American-Book Stratford Press, Inc.*, 80 NLRB 914, and *Chicopee Mfg. Corp. of Georgia*, 85 NLRB 1439.

<sup>59</sup> *Newport News Children's Dress Co., Inc.*, cited above.

<sup>60</sup> *Carolina Mills, Inc.*, 92 NLRB 1141.

<sup>61</sup> *The American Thread Co.*, 94 NLRB No. 246.

<sup>62</sup> *W. T. Carter and Brother*, 90 NLRB 2020; see also *N L R. B. v. Stowe Spinning Co.*, 336 U. S. 226.

enlisted the aid of peace officers to prevent the meeting, and obtained a court order against it, was held in violation of section 8 (a) (1).<sup>63</sup>

In a similar case, a Board majority held it a violation of section 8 (a) (1) when an employer refused to rent a company-owned community hall for union meetings, where the hall had been used for other community gatherings and it was the only available meeting place in an isolated company town.<sup>64</sup> The Board rejected the contention that granting such permission would be unlawful support of the union. The majority pointed out that in the cases where the use of company buildings or facilities was held unlawful assistance there was other strong evidence of employer assistance and the use of a company meeting hall was not the sole criterion of its unlawfulness.

### c. Employer Surveillance of Union Activities

Surveillance of union activities by an employer, a management representative, or anyone acting on behalf of the employer, constitutes unlawful interference.<sup>65</sup> Even though a union meeting is open to the general public, management representatives may not attend without an express invitation.<sup>66</sup> Nor may an employer send a reporter to take notes at the meeting, even if the employer himself were privileged to attend.<sup>67</sup> An employer's conduct in following union organizers through the streets of a company town, while the organizers were broadcasting through a loudspeaker, was held to go beyond any privilege management might have had to attend an open union meeting.<sup>68</sup>

### d. Contracts and Unilateral Action

Section 8 (a) (1) is violated also where an employer enters into and gives effect to a bargaining contract which, although recognizing the union as the exclusive bargaining agent of all employees, limits certain benefits to union members.<sup>69</sup>

<sup>63</sup> *W. T. Carter*, cited above. Chairman Herzog dissented only from the holding that the securing of a State court order to prevent the meeting constituted a violation of section 8 (a) (1). Board Members Houston and Reynolds did not participate in the decision.

<sup>64</sup> *Phillips Petroleum Co.*, 92 NLRB 1344. Board Member Reynolds dissented because of extenuating circumstances in this particular case.

<sup>65</sup> *Thermold Co.*, 90 NLRB 614; *Cummer-Graham Co.*, 90 NLRB 722, *Pure Oil Co. (Illinois Producing Co.)*, 90 NLRB 1661; *W. T. Carter and Bro.*, 90 NLRB 2020; *Atlanta Metallic Casket Co.*, 91 NLRB 1225; *Salant & Salant, Inc.*, 92 NLRB 343 and 417; *Carolina Mills, Inc.*, 92 NLRB 1141, *Majestic Metal Specialties, Inc.*, 92 NLRB 1854; *Hilltop Baking Co.*, 93 NLRB 694, *Victor Chemical Works*, 93 NLRB 1012; *Williams Lumber Co.*, 93 NLRB 1672, *Morehead City Garment Co., Inc.*, 94 NLRB No. 45, *Southland Mfg. Co.*, 94 NLRB No. 123; *The Stillely Plywood Co., Inc.*, 94 NLRB No. 138; *Puerto Rico Cereal Extracts, Inc.*, 94 NLRB No. 157; *Otis L. Broyhill Furniture Co.*, 94 NLRB No. 232; *West Texas Utilities Co., Inc.*, 94 NLRB No. 237; *Montgomery Ward & Co., Inc.*, 90 NLRB 609; *Trumansburg Home Telephone Co.*, 90 NLRB 1386; *John S. Barnes Corp.*, 92 NLRB 589.

<sup>66</sup> *W. T. Carter and Brother*, 90 NLRB 2020.

<sup>67</sup> *W. T. Carter and Brother*, cited above.

<sup>68</sup> *W. T. Carter*, cited above.

<sup>69</sup> *Rockaway News Supply Co., Inc.*, 94 NLRB No. 156.

The execution, maintenance, or enforcement, of a contract containing a union-security provision which exceeds the limits set by section 8 (a) (3) also violates this section. In a recent case, an employer association member that did not sign an association contract which contained an unlawful union-security provision was held to have violated section 8 (a) (1) by maintaining and enforcing the contract.<sup>70</sup>

Under the doctrine of the *Midwest Piping Co.* case, the execution by an employer of an agreement granting exclusive recognition to a union at a time when a valid question concerning representation is pending before the Board interferes with the employees' freedom to choose their bargaining representative, usurps the Board's exclusive function to determine questions of representation, and therefore violates section 8 (a) (1).<sup>71</sup> While there were no findings of independent 8 (a) (1) violations under this doctrine during the past fiscal year, the doctrine was considered in cases involving other sections of the act.<sup>72</sup>

Unilateral action by an employer when the employees have a bargaining representative is another form of unlawful interference with employees' collective bargaining activities which violates this section of the act. Thus, the Board held, in various cases, that employers violated section 8 (a) (1) by suggesting that the employees negotiate a contract directly with the employer,<sup>73</sup> by discussing a proposed wage incentive plan with employers without first consulting the union,<sup>74</sup> and by instituting a wage increase without notifying or consulting the union.<sup>75</sup>

### e. Threatened Refusal to Bargain

An employer's declaration in the presence of employees that he would not recognize "this or any other union" was held to violate section 8 (a) (1).<sup>76</sup> A Board majority held in this case that "it is clear that a threat [by an employer] to its employees involving an anticipatory refusal to bargain is tantamount to a threat to its employees to refrain from assisting or becoming members of any union."

Unlawful interference was found also where an employer declared that he would not operate with a union in the plant and would move the machines out rather than do so.<sup>77</sup>

<sup>70</sup> *Carpet Workers Local No. 1255 and Sterling Furniture Co.*, 94 NLRB No. 20.

<sup>71</sup> *Midwest Piping and Supply Co., Inc.*, 63 NLRB 1060.

<sup>72</sup> *The Hoover Co.*, 90 NLRB 201 and *Electronics Equipment Co.*, 94 NLRB No. 19, discussed in section of report dealing with section 8 (a) (3) of the act; *William Penn Broadcasting Co.*, 93 NLRB 1104, discussed in section 2 of this report, subsection b (1), dealing with section 8 (a) (2) of the act, pp. 159-161.

<sup>73</sup> *Radio Station KVEC*, 93 NLRB 618.

<sup>74</sup> *Crow-Burlingame Co.*, 94 NLRB No. 146.

<sup>75</sup> *Motorola, Inc.*, 94 NLRB No. 181.

<sup>76</sup> *Augusta Bedding Co.*, 93 NLRB 211, Board Member Reynolds dissented on a technical aspect of this point in the case, but agreed that this type of statement violates 8 (a) (1).

<sup>77</sup> *Cherokee Hosiery Mills*, 93 NLRB 590.

But in another case, no violation was found where a certified union stated at a bargaining session that it was considering affiliation with the AFL because it might then have "a stronger weapon in bargaining," and the employer replied that what he would give the incumbent union "would be just as good as [the incumbent] could get with the AFL."<sup>78</sup> The Board held that the employer's reply was merely an assurance that he would bargain as well with one representative as with another.

### f. Interference With Employee Discussion or Reports

Employee discussions or reports on self-organization or matters involved in bargaining or organization also are concerted activities protected by the statute. Interference with such activities therefore constitutes a violation of section 8 (a) (1).

A Board panel found such a violation where an employee, who had attended a Board conference as the union representative of plant employees and reported to a shop committee what occurred at the conference, was discharged allegedly for spreading a false report that the employer had made "fantastic earnings."<sup>79</sup> The Board found that the employee in this case had reported, only to the shop committee, the figures on the employer's gross interstate business which had been presented at the conference. But the Board held further that, even assuming that the employee had reported falsely but not deliberately or maliciously, his activity in making the report was protected by the act. The Board said:

Employees do not forfeit the protection of the Act if, in discussing matters of such vital common concern as their employer's financial status, they give currency to inaccurate information.

In another case, unlawful interference was found where an employee was discharged because of his discussions with fellow employees about the need for union organization.<sup>80</sup> In this case, the Board said:

Manifestly, the guarantees of Section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization.

### g. Discriminatory Treatment as Interference

Forms of discriminatory treatment other than discharge for statements or reports also were found to violate section 8 (a) (1) in some cases during the fiscal year. These included: Giving a union leader an "unsatisfactory" performance rating based upon factors not re-

<sup>78</sup> *U. S. Gypsum Co.*, 93 NLRB 966

<sup>79</sup> *American Shuffleboard Co.*, 92 NLRB 1272, enforced 190 F. 2d 898 (C.A. 3).

<sup>80</sup> *Root-Carlén, Inc.*, 92 NLRB 1313.

quired to be considered, while overlooking similar faults in rating other employees.<sup>81</sup> Making retroactive wage and vacation payments only to employees who were union members under a contract covering only union employees.<sup>82</sup> Entering into and giving effect to a contract that limited its benefits to union-member employees.<sup>83</sup>

While the act does not extend protection to the organizational activities of supervisors, the layoff or discharge of a supervisor because he declines to participate in illegal interference with employees' rights under the act may constitute a violation of section 8 (a) (1). Under such circumstances, the Board has held, discharge or discrimination against the supervisor "constitutes an invasion of the rights guaranteed to nonsupervisory employees."<sup>84</sup> Accordingly, in one case decided during the past fiscal year, the Board held an employer violated 8 (a) (1) by discharging a foreman who declined to "line up" his subordinates for a union which the employer was illegally assisting in a contest with another union.<sup>85</sup>

#### h. Questions of Employers' Freedom of Speech

In determining whether an employer has violated section 8 (a) (1) by statements to employees on matters pertaining to their organizational activities, the Board frequently must pass upon the question of whether the utterances are within the free speech guarantees of the Constitution or of section 8 (c) of the act. Section 8 (c) specifically permits the expression of "any views, argument, or opinion," so long as such expressions are not accompanied by any "threat of reprisal or force or promise of benefit." The Board, in its interpretation of section 8 (c), has continued to apply the principles which it announced shortly after amendment of the act in 1947.<sup>86</sup>

Statements lacking coercive content in the statutory sense have been held privileged. Examples: A general manager's statement that he did not believe there should be a union in the plant.<sup>87</sup> A supervisor's statement to an employee that "the best thing to do if you have [signed with the union] is to tear up your slip and tell them you don't want any part of the union."<sup>88</sup> An employer's letter to employees who signed an antiunion petition (not prepared, sponsored, or circulated by employer), expressing gratification at their "cooperation, and con-

<sup>81</sup> *Jefferson Standard Broadcasting Co*, 94 NLRB No. 227.

<sup>82</sup> *Gaynor News Co, Inc*, 93 NLRB 299.

<sup>83</sup> *Rockaway News Supply Co, Inc*, 94 NLRB No. 156.

<sup>84</sup> *Inter-City Advertising Co*, 89 NLRB 1103 (1950), enforced *as modified* 190 F. 2d 420 (C. A. 4). Court held evidence did not establish supervisor in this case was discharged for this reason.

<sup>85</sup> *Salant & Salant, Inc*, 92 NLRB 343.

<sup>86</sup> See Fourteenth Annual Report (1949), pp 54-55; Fifteenth Annual Report (1950), pp. 98-99

<sup>87</sup> *Accurate Threaded Products Co*, 90 NLRB 1364.

<sup>88</sup> *Carolina Mills, Inc.*, 92 NLRB 1141.

sideration" and assuring them of readiness to do anything "which regards our business relationship or even in the personal matters."<sup>89</sup>

But acts of interrogation, threats of reprisal, promises of benefit, and circulation of antiunion petitions are not protected as an exercise of free speech.<sup>90</sup> Neither do a supervisor's coercive statements become privileged because qualified as her "personal opinion," when made while on duty as a supervisor during working hours and in conformity with a pattern of unlawful interference by other supervisors.<sup>91</sup>

One case involved remarks by supervisors about union buttons which employees were wearing.<sup>92</sup> Pointing out in the decision that the wearing of union buttons is a form of union activity that serves an important function during the organizational period, the Board held that a request by a supervisor that an employee stop wearing her button so that others would follow her example constituted illegal interference.

Although abusive name calling of a union, without more, has been held within the orbit of free speech,<sup>93</sup> such conduct violates Section 8 (a) (1) when accompanied by threats of economic or other reprisal.<sup>94</sup> In one case during the past fiscal year, a panel majority held that a supervisor's criticism of a union adherent for mixing with a "group of Communists" was an attempt to induce the employees to abandon the union and therefore violated section 8 (a) (1).<sup>95</sup>

In another case, the Board held that an employer engaged in illegal interference with employees' statutory rights by giving newspaper reporters statements for publication threatening its employees who were on strike with eviction from company houses if they did not return to work.<sup>96</sup> Stories quoting the employer's threatening remarks were twice published in local papers, and the Board found that the stories were given to the press in order to intimidate and coerce the employees into abandoning their strike.

### i. Employer's Responsibility for Acts of Subordinates and Others

The question of whether section 8 (a) (1) has been violated also requires at times determination of whether acts committed by the employer's subordinates or other persons may be imputed to the employer.

<sup>89</sup> *Superior Co., Inc.*, 94 NLRB No. 90, panel majority—Chairman Herzog dissenting—held letter not a promise of benefit for having taken antiunion action.

<sup>90</sup> *Rubin Brothers Footwear, Inc.*, 91 NLRB 10; *Rouch's Sawmill, Ltd.*, 94 NLRB No. 57.

<sup>91</sup> *Salant & Salant, Inc.*, 92 NLRB 417.

<sup>92</sup> *Salant & Salant, Inc.*, cited above. See subsection a of this section for further discussion of this aspect of this case, pp 144-145.

<sup>93</sup> Fifteenth Annual Report (1950), p. 98.

<sup>94</sup> *Wentworth Bus Lines, Inc.*, 92 NLRB 1356 (calling union "a bunch of racketeers, communists and grafters," and "gun-carrying gangsters"). See also *E. B. Law and Son*, 92 NLRB 826.

<sup>95</sup> Editorial "*El Imparcial*," *Inc.*, 92 NLRB 1795, Board Member Reynolds dissenting.

<sup>96</sup> *Hart Cotton Mills*, 91 NLRB 728.

Ordinarily, the employer is responsible for the conduct of supervisors because of their position as management representatives.<sup>97</sup> Thus an employer has been held responsible for remarks made by an acting plant manager regardless of whether such remarks were authorized or not.<sup>98</sup> He has also been held responsible for the conduct of a rank-and-file employee (1) where the latter was substituting for a regular supervisor,<sup>99</sup> (2) where the employer knew of the unlawful conduct but failed to disavow it or disassociate himself therefrom,<sup>1</sup> or (3) where the attitude or acts of management appeared to endorse such conduct.<sup>2</sup>

Acts of a close relative of management were attributed to the employer where the relative, although allegedly nonsupervisory, had at least authority to direct employees' work, enjoyed the confidence of management, and made unlawful remarks so similar to those uttered by responsible management representatives as to give employees reason to regard him as speaking for management.<sup>3</sup>

The Board has consistently held that an employer may not avoid liability for acts of subordinates by instructing them not to interfere with a union's organizational activities, unless such instructions are also communicated to rank-and-file employees.<sup>4</sup> Nor is an employer relieved of liability by a declaration of neutrality in general terms, where no measures are taken to make the declaration effective or to dissipate the coercive effect of supervisors' acts.<sup>5</sup>

The acts of outsiders likewise have occasionally been attributed to the employer under certain circumstances. In the cases decided during the past fiscal year, the employer's liability was based upon his business or other relations with the outsiders or his ratification of, or acquiescence in, the acts in question. Thus, a respondent employer was held responsible for coercive statements made to his employees by the owner of an independent business, where the latter employer, prior to engaging in independent business, had been employed by the former.<sup>6</sup> In this case, the second employer was a personal friend of management, was frequently consulted on operating methods and policies, and had free access to respondent's plant and continued on its payroll.

<sup>97</sup> *Somerset Classics Inc., et al.*, 90 NLRB 1676, *Chautauqua Hardware Corp.*, 92 NLRB 1518 (employer held in violation of sec. 8 (a) (1) for threat of reprisal made only to supervisor, where supervisor repeated substance of remark to rank-and-file employee); *Radio Station KVEC*, 93 NLRB 618; *Morehead City Garment Co.*, 94 NLRB No. 45.

<sup>98</sup> *Somerset Classics, Inc.*, *supra*.

<sup>99</sup> *Kansas-Nebraska Natural Gas Co.*, 90 NLRB 1423.

<sup>1</sup> *E. B. Law and Son*, 92 NLRB 826.

<sup>2</sup> *Yale Filing Supply Co.*, 91 NLRB 1490.

<sup>3</sup> *Waldoroth Label Corp.*, 91 NLRB No. 673.

<sup>4</sup> *Otis L. Broyhill Furniture Co.*, 94 NLRB No. 232.

<sup>5</sup> *Happ Bros. Co., Inc.*, 90 NLRB 1513; *Salant and Salant*, 92 NLRB 417.

<sup>6</sup> *Jackson Daily News*, 90 NLRB 565.

Similarly, an employer was charged with the antiunion conduct of an outsider who had represented him at a bargaining conference and discussed with him plans to induce the employees to repudiate the union.<sup>7</sup> Coercive statements made by the town mayor and the cashier of the local bank, at an employee meeting away from company premises, were attributed to the employer where the employer had actively participated in organizing the meeting, manifested to employees foreknowledge and approval of its purpose, and failed to disavow statements made at the meeting which were similar to statements recently made to employees by a management representative.<sup>8</sup>

In a case in which a company employee was also a nonsalaried deputy sheriff in the company town, the conduct of such individual in interfering with employees' efforts to hold a union meeting on company property was imputed to the employer, where it was impossible to separate his activities as an employee from his activities as deputy sheriff.<sup>9</sup> While an employer was held responsible for antiunion statements and threats made by managerial and supervisory personnel to employees, with instructions to pass them on to their union friends in the plant, the employer was not responsible, however, for town gossip with respect thereto nor for antiunion activities of inhabitants of the community.<sup>10</sup> Contrary to the trial examiner, the Board concluded that the employer had not made the "community" his "agent" for dissemination of coercive statements.

#### j. Coercion That Fails to Achieve Aim

In determining whether an employer's conduct falls within the proscription of section 8 (a) (1), it is immaterial that employees were not actually restrained or coerced thereby, or that despite such conduct the union's organizational efforts were successful.<sup>11</sup> In the *Somerset Classics* case, the Board said:

It is now established, beyond question, that an employer's conduct calculated or tending to interfere with, restrain, or coerce its employees in rights guaranteed by Section 7 of the Act is no less violative of Section 8 (a) (1) because such conduct may not have achieved its purpose.

## 2. Employer Domination or Support of Employee Organizations

Section 8 (a) (2) of the act forbids an employer to dominate or interfere with the formation or administration of any labor organization. This section also forbids an employer from contributing financial or other support to such an organization.

<sup>7</sup> *Cherokee Hosiery Mills*, 93 NLRB 590.

<sup>8</sup> *Southland Mfg. Co.*, 94 NLRB 123.

<sup>9</sup> *W. T. Carter and Brothers*, 90 NLRB 2020.

<sup>10</sup> *Morehead City Garment Co., Inc.*, 94 NLRB No. 45.

<sup>11</sup> *Rubin Brothers Footwear, Inc.*, 91 NLRB 10, *Somerset Classics, Inc.*, 90 NLRB 1676.

The act defines a labor organization as "any organization of any kind, . . . in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers" on grievances, labor disputes, or other matters on which the act requires bargaining.<sup>12</sup>

Since the 1947 amendments to the act, the Board has distinguished in the remedy it applies between (a) cases of domination and (b) cases involving no more than unlawful assistance or support of a labor organization by an employer.<sup>13</sup> In cases where employer interference in a labor organization amounts to domination, the Board orders it completely disestablished as the bargaining representative of employees. In cases where the interference and support does not reach the point of domination, the Board orders only that the employer withhold recognition of the organization until it has been certified by the Board as a bona fide bargaining representative of a majority of employees. The Board continued this policy during the past fiscal year.

#### a. Domination of a Labor Organization

The Board customarily finds a labor organization to be dominated by the employer when its organization is directly instigated and encouraged, or directly participated in, by supervisors or other managerial employees and the employer provides financial or other direct support to the organization.

Thus, the Board found illegal domination in a case where the employer's manager directed employees to participate in an "Employee Management Policy Committee," under threat of closing the plant if a committee was not formed.<sup>14</sup> The plant manager then personally solicited and ordered employees to "elect" representatives from lists prepared by the employer, and acted as chairman of the first meetings of the committee. The Board cited as additional factors indicating domination the fact that the meetings were held on company time and property and were attended by supervisors and other representatives of the employer. In another such case, the vice president of the employer and most of its managerial and supervisory employees were members of the association found dominated.<sup>15</sup> Also, the employer extended substantial assistance to the organization including loans totaling \$1,000 and the profits of plant vending machines. In addition, the employer granted the dominated organization free rent and utilities, free use of plant space for candy concessions and two cafete-

<sup>12</sup> Section 2 (5).

<sup>13</sup> *Carpenter Steel Co.*, 76 NLRB 670. See Thirteenth and subsequent Annual Reports.

<sup>14</sup> *Bryan Manufacturing Co.*, 94 NLRB No 187.

<sup>15</sup> *Farrington Manufacturing Co.*, 93 NLRB 1416.

rias, besides permitting the organization to hold meetings, elections and organizing campaigns on company time and premises.

Similarly, the Board found that the employer dominated a "shop council" made up of nine employees and eight supervisors, of which the assistant to the employer's president was permanent chairman and the company purchasing agent was vice chairman.<sup>16</sup> The employer also gave the council the profits of plant vending machines and provided free luncheons at council meetings. The council in this case was started by an employee, but only after obtaining permission of management. All the original meetings, to explain the council to employees, and other organizational steps took place in the plant. The Board also found that a "workers' league," which replaced the council, inherited this illegal domination.

An attempt to revive a defunct employer-dominated organization, when an outside union started to organize the employees, also was found a violation of 8 (a) (2) in another case.<sup>17</sup> In this instance, supervisors circulated a petition for revival of an "independent union" organized originally by supervisors. At the same time, three top management officials—vice president-general manager, assistant treasurer, and plant superintendent—called an employee to the office and spent more than an hour attempting to coerce him into renouncing the union and signing up with the employer-dominated organization. In this case, the supervisors also participated actively in meetings of employees called to revive the dominated organization.

A local of the AFL Teamsters' Union was found in one case to be dominated by an employer at one branch plant, and it was ordered completely disestablished as bargaining representative of employees at all three of the company's plants.<sup>18</sup> In this case, the company president and the manager of the branch plant helped a representative of the Teamsters' local locate most of the company's drivers, one by one, then remained present while the union official induced them to sign membership applications and authorizations for the company to withhold their dues. Two drivers who were missed by the union official were signed up by the branch manager himself. Immediately thereafter, without bargaining, the company granted the local's request for a checkoff of dues, then paid the local the fees and dues of its employees without making any deductions from their wages. At the same time, the company recognized the local as bargaining agent even though it knew that another union had petitioned the Board for a representation election among the employees. The local thereafter made

<sup>16</sup> *Majestic Metal Specialties, Inc.*, 92 NLRB 1854.

<sup>17</sup> *Stedfast Rubber Co.*, 91 NLRB 300.

<sup>18</sup> *Jack Smith Beverages, Inc.*, 94 NLRB No. 210. See subchapter D, Remedial Orders. For other cases of domination, see *Happ Brothers Co.*, 90 NLRB 1513; *General Shoe Corp.*, 90 NLRB 1331; *Galyan's Super Market*, 92 NLRB 298.

no effort to obtain from the company a collective bargaining agreement on wages, hours, or conditions of work covering these employees, and it held no meetings of these employees in nearly a year.

### (1) *Successors to Dominated Organizations*

The taint of employer domination also carries over into successor organizations, if there is no absolute and public cleavage or "clear line of fracture" between them.<sup>19</sup> Such a cleavage ordinarily requires also that the employer disavow to the employees its illegal conduct with respect to the prior organization.<sup>20</sup> On this point, the Board said:

. . . where a labor organization appears to be the successor to an earlier, company-dominated union, the Board and the courts have consistently held that the later organization inherits the illegality of the earlier one and that the effect of company domination and support continues unless the employer, *before* the formation of the new organization, has unequivocally and publicly disavowed and disestablished the earlier illegal union and has assured the employees of their freedom from further employer interference. . . .<sup>21</sup>

### b. *Illegal Assistance by an Employer to a Union*

Employer interference with the formation and administration of a labor organization or the contribution of financial or other support which violates 8 (a) (2), but falls short of actual domination, is held to be illegal assistance.

In one case, the Board adopted a trial examiner's finding of "flagrant interference" falling short of domination where the employer successively invited two outside unions into the plant and gave them "the run of it" to organize the employees.<sup>22</sup> The employer's president told the employees that they had to join a union, and contributed \$1,500 of company funds to one union for employees' initiation fees. The employer also permitted supervisors to use coercive tactics in helping the second union obtain employees' signatures to cards authorizing the checkoff of dues. A third union had previously lost a representation election in the plant, and the employer was seeking to unionize its employees in order to get a union boycott of its products lifted.

In another case, the employer's president, in a speech made soon after a union started organizing its employees, suggested that the employees organize an "inside union" and that, if they did, certain "adjustments" would be made.<sup>23</sup> When an "Employees Committee" was organized thereafter, the employer (1) promptly recognized it without proof of majority; (2) offered, negotiated, and granted a 25 percent

<sup>19</sup> *Farrington Mfg. Co.*, 93 NLRB 1416; *Bryan Mfg. Co.*, 94 NLRB No. 187.

<sup>20</sup> *Majestic Metal Specialties, Inc.*, 92 NLRB 1854.

<sup>21</sup> *Majestic Metal Specialties, Inc.*, cited above.

<sup>22</sup> *Meyer & Welch, Inc.*, 91 NLRB 1102.

<sup>23</sup> *Long-Lewis Hardware Co.*, 90 NLRB 1403.

wage increase, freely permitting the committee to use company time and property in the process; (3) had the committee, in return for the wage increase, circulate petitions among employees to withdraw from the union; and (4) contributed company time and property as well as money and management assistance in the drafting and circulation of the petitions. The Board held this to be illegal assistance falling short of domination, and ordered the employer to withhold recognition from the committee until it should be certified by the Board as a bona fide representative of a majority of employees.

Illegal assistance more often takes less flagrant forms. Thus, the Board found illegal assistance in a number of cases where an employer agreed to, or enforced, an unauthorized or illegal union-security clause, thereby assisting the union in recruiting or maintaining membership.<sup>24</sup> The Board also held in another case that the employer violated 8 (a) (2) by including, through error, an illegal discriminatory contract clause and then delaying publication of a correction until 5 months after the error was discovered.<sup>25</sup>

Various types of favoritism by the employer toward one union, or other encouragement of membership in one union in preference to another, were also held to be illegal assistance in a number of cases.<sup>26</sup>

But in one case, the Board rejected an employer's contention that it would have been illegal assistance for the employer merely to rent an employer's building to a union for a meeting, when it was the sole community building in a company-owned town.<sup>27</sup> The refusal to permit such use was the sole violation charged in an 8 (a) (1) complaint and the Board found the refusal unlawful. In its opinion, the Board reaffirmed its ruling in the *Stowe Spinning* case.<sup>28</sup> The Board distinguished this ruling from those of two prior cases involving the same employer where the employer's acts of allowing use of company halls were cited as one item of evidence of assistance and domination of a company-sponsored "Plan for Employee Representation."<sup>29</sup> The Board pointed out that in these cases there was "overwhelming evidence" of the employer's domination of the organizations involved,

<sup>24</sup> *Meat Cutters Local 421 (Von's Grocery Co)*, 91 NLRB 504, *Federal Stores Div. of Spiegel, Inc*, 91 NLRB 647, *Operating Engineers Local 15C and United Hoisting Co.*, 92 NLRB 1642, *Teamsters Local 249 and Squart Distributing Co*, 92 NLRB 1667; *Gaynor News Co*, 93 NLRB 299, *Retail Clerks Local 770 (Vaughn Bowen)*, 93 NLRB 1147; *L. Ronney Sons & Furniture Mfg Co*, 93 NLRB 1049; *Carpet Workers Local 1255 (Sterling Furniture Co)*, 94 NLRB No. 20, *Retail and Wholesale Employees Local 850 (Strauss Stores Corp.)*, 94 NLRB No. 80, *Newspaper and Mail Deliverers' Union (Rockaway News Supply Co)*, 94 NLRB No. 156; *Newark Newsdealers Supply Co*, 94 NLRB No. 239.

<sup>25</sup> *Cement Workers Local 291 (Monolith Portland Cement Co)*, 94 NLRB No. 211

<sup>26</sup> *Gulf Shippide Storage Corp.*, 91 NLRB 181, *Salant & Salant*, 92 NLRB 343, 417, *Operating Engineers Local 101 (Peerless Quarries)*, 92 NLRB 1194, *Gaynor News Co*, 93 NLRB 299, *L. Ronney & Sons Furniture Mfg Co*, 93 NLRB 1049, *Harrison Sheet Steel Co.*, 94 NLRB No. 23 (panel majority, Member Reynolds dissenting in part); *Stewart-Warner Corp*, 94 NLRB No. 85 (Member Reynolds dissenting), *Horton Hubbard Mfg Co*, 94 NLRB No. 133; *Cement Workers Local 291 (Monolith Portland Cement Co.)*, 94 NLRB No. 211.

<sup>27</sup> *Phillips Petroleum Co.*, 92 NLRB 1344, Member Reynolds dissenting.

<sup>28</sup> *Stowe Spinning Co*, 70 NLRB 614, enforced 336 U. S. 226 See Fourteenth Annual Report, pp 111-113.

<sup>29</sup> *Phillips Petroleum Co.*, 23 NLRB 741 and 24 NLRB 325.

but, "in no case was the use of a company meeting hall under the circumstances here present the sole criterion of unlawful assistance."

Nor does the fact that the employer undertook to assist one union against another for patriotic reasons excuse a violation of 8 (a) (2), the Board held in one case.<sup>30</sup> In this case, the employer contended that it had supported one union to rid its plant of a rival union alleged to be Communist-dominated. The Board rejected the contention that this exonerated the employer's illegal assistance, stating that "Congress has not authorized this Board to engraft an exception upon the statute whenever a respondent's violations may be motivated in part by patriotic objectives." The charges in the case were filed by another union which had displaced the one alleged to be Communist-dominated and against which no such charges were made.

The conduct of the employer which the Board found to be illegal assistance in this case included: A threat to one employee of disciplinary action if she did sign a petition for the favored union; a threat to another employee of loss of job security if she did not vote for the favored union; denial to the other union's adherents of the right, previously granted the favored union, to circulate petitions in the plant; recall of a laid-off employee for the purpose of assisting the favored union, and the granting of recognition to the favored union despite the Board's refusal to certify it while unfair labor practice charges were pending.

### (1) *Bargaining With One of Competing Unions*

The Board has held that an employer engages in illegal assistance by recognizing and executing a contract with one of two or more rival unions when a question exists as to whether the union recognized actually represents a majority of employees.<sup>31</sup>

<sup>30</sup> *Stewart-Warner Corp*, 94 NLRB No. 85, Member Reynolds dissenting on the sufficiency of the evidence of assistance within 6 months prior to filing of charges, Member Houston dissenting from the dismissal of charges that the employer had illegally discharged the president of the local, which the employer was seeking to displace.

Activity on behalf of the Communist Party, however, is not protected by the Act. Thus, the General Counsel of the Board refused to issue a complaint in a case where an employer suspended two employees who had been named in a libel suit as being members of the Communist Party. The two employees had filed charges alleging that they were suspended illegally for union activities. Investigation failed to produce sufficient evidence to establish that union activities motivated the suspensions, and the General Counsel dismissed the charges on the ground that the company had acted upon a good faith belief that the employees were Communists.

In the letters of suspension, the company stated that (1) if the charges in reference to the employees' communist affiliations were proved correct, it was deemed in the best interest of the company that they be suspended, and (2) if the charges were proved false to the satisfaction of the company within 1 year, the two would be reinstated. The company declared further, during investigation of the charges, that the suspensions were predicated not only upon the charges in the libel suit but upon a good faith belief that the employees were Communists because of their past public association with, and participation in, a number of alleged communist-front organizations. General Counsel's Administrative Decision No. 63, made public March 7, 1951 (not printed).

<sup>31</sup> *Horton-Hubbard Mfg. Co.*, 94 NLRB No. 133; *Harrison Sheet Steel Co*, 94 NLRB No. 24.

The Board also holds as a general rule that the execution of a contract with one of two or more competing unions while a petition for a representation election is pending with the Board constitutes illegal assistance.<sup>32</sup> However, in one case during fiscal 1951, the Board modified this rule somewhat as it applies to *incumbent* unions.<sup>33</sup> A majority of the Board held that an employer may continue bargaining with a union which has been the established majority representative, even in the face of a rival union's petition, if the petition raises no *valid* question of representation, either because it proposes an inappropriate unit or for other reasons. However, the Board made it clear that an employer and a union do so at their own risk, subject to unfair labor practices charges if the Board later finds that the petition did raise a valid question of representation.

The Board declared that this modification of the *Midwest Piping* rule would help to assure employees "the benefits of an uninterrupted bargaining relationship whenever a clearly unsupportable or specious rival union claim is made upon an employer." The opinion said further:

. . . the pendency of a petition for certification imposes no duty upon an employer to refrain from continuing exclusively to recognize and deal with an *incumbent* bargaining representative . . . unless the petition has a character and timeliness which create a real question concerning representation.

The existence of such a question concerning representation is determinable by applying the same criteria, contemplated in Section 9 of the Act, that are uniformly applied by the Board in finding a "question of representation" before proceeding to an election. One of the essential elements for a determination that such a "question" exists is that the petitioning union, seeking to displace an incumbent, assert its claim as to an *appropriate unit of employees*.

\* \* \* \* \*

The "determination" which an employer may make for himself, and at his peril, under the rule in this case is in no way different from the interpretations of law, derived from existing statutes and authoritative legal opinions, an employer is regularly called upon to make to guide himself in his other business activities.

In this case, the employer and the incumbent union signed a renewal contract granting a wage increase while another union had on file with the Board a petition for an election among only part of the employees in the established unit. The Board reversed a trial examiner's ruling that this was illegal assistance to the incumbent union, on the ground that it had not been established that the unit sought in the petition was appropriate. The Board held that, in such an unfair practice case, the burden of proving that the unit sought in the petition was appropriate,

<sup>32</sup> This is known as the *Midwest Piping* doctrine, taking its name from the case in which this principle was first laid down, *Midwest Piping and Supply Co.*, 63 NLRB 1660 (1945). See Tenth Annual Report, pp. 38-39.

<sup>33</sup> *William Penn Broadcasting Co.*, 93 NLRB 1104, Member Houston dissenting. Members Reynolds and Murdock, in a special concurrence, urged remand of the case to take evidence on the unit question. This was later done; see next footnote.

rested upon the General Counsel. Later the Board reopened the record in the case to take evidence on the appropriateness of the unit "so that the case may be decided upon the merits rather than upon a technical failure of the evidence."<sup>34</sup>

### 3. Illegal Discrimination Against Employees

Section 8 (a) (3) forbids an employer to discriminate against employees to encourage or discourage membership in any labor organization. This section outlaws discrimination for this purpose "in regard to their hire or tenure of employment or any term or condition of employment."

However, a proviso to 8 (a) (3) permits an employer to discharge or otherwise discriminate in employment against an employee who fails to pay the initiation fees and dues necessary to join or maintain membership in a union having a valid union-shop contract.

Section 8 (b) (2) forbids a labor organization or its agents to "cause or attempt to cause" an employer to engage in the types of discrimination forbidden by 8 (a) (3).<sup>35</sup>

Because the protection of employees' right to organize is fundamental to the statutory policy of promoting industrial peace through collective bargaining, the Board continues to be vigilant in the enforcement of this section. To remedy discrimination against an employee and to safeguard the rights of other employees, the Board customarily orders restoration of the employee to his former job or job rights and reimbursement for the wages he lost as a result of the discriminatory action. The Board also usually orders the employer to refrain from any other such conduct in the future.

The protection of employees under this section is not limited merely to the formal activities of union membership, but extends as well to other concerted activities, such as urging other employees to form a union,<sup>36</sup> or a concerted quitting of plant premises in protest over the short notice given in a layoff,<sup>37</sup> or an employee's acting as spokesman for an informal group of workers seeking a wage increase.<sup>38</sup> Circulating a petition urging a change in the method of choosing union stewards also was held to be concerted activity protected by this section.<sup>39</sup>

Discrimination against employees because of their concerted activi-

<sup>34</sup> *William Penn Broadcasting Co.*, 94 NLRB No. 188.

<sup>35</sup> Violations of section 8 (b) (2) are discussed in section B, subsection 2, of this chapter.

<sup>36</sup> *Root-Carlén, Inc.*, 92 NLRB 1313.

<sup>37</sup> *Jamestown Veneer and Plywood Corp.*, 93 NLRB 101.

<sup>38</sup> *Smith Victory Corp.*, 90 NLRB 2089, enforced 199 F. 2d 56 (C. A. 2).

<sup>39</sup> *Air Products, Inc. (Merchandise Drivers Local 641 International Brotherhood of Teamsters)*, 91 NLRB 1381.

ties or their union membership or lack of it continues to be the most common form of employer unfair labor practice.

However, the Act does not circumscribe an employer's right to hire, discipline, or discharge an employee for reasons not forbidden by the Act, even though the employee may be an active union advocate or adherent. Thus, the Board found no violation where it was not proved that the employer had an illegal discriminatory motive in discharging a known union member who had a long history of absenteeism and of bad relations with his supervisor<sup>40</sup> or in discharging a union steward who objected to performing a different type of work in emergencies.<sup>41</sup> The Board said in one case:

The employer is at all times free to discharge an employee, for any reason or for no reason, provided only that the discharge is not for the purpose of encouraging or discouraging union membership, or does not have the effect of otherwise interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.<sup>42</sup>

Upon scrutiny of all the facts in a particular case, the Board must determine whether or not the employer's treatment of the employee was motivated by a desire to encourage or discourage union membership or other activities protected by the statute. The Board requires that a preponderance of the evidence show an employer's illegal motive in order to establish a violation of 8 (a) (3), except in cases of *per se* violations such as the discharge of an employee admittedly because of activities protected by the statute. The burden of proving unlawful motivation rests with the General Counsel.<sup>43</sup> However, once the General Counsel has established a *prima facie* case, the burden of going forward with defense evidence falls upon the respondent.<sup>44</sup> Moreover, proof of an affirmative defense, such as a contention that the employee's discharge was for cause or for serious misconduct in the course of concerted activities, rests with the employer.<sup>45</sup>

However, the fact that a valid cause for discharge or discipline of an employee exists does not excuse a violation of the act, if the evidence shows that an employer's real reason was to discourage or encourage union activities of employees. Thus, in one case, the Board found that the employer violated this section by discharging employees active in union organization when they failed to make production quotas, while other employees who also failed to make their quotas were neither discharged nor threatened with discharge, although some

<sup>40</sup> *Happ Brothers Co., Inc.*, 90 NLRB 1513. See also *Farber Brothers, Inc.*, 94 NLRB No. 111.

<sup>41</sup> *Montgomery Ward & Co.*, 90 NLRB 1244.

<sup>42</sup> *Fairchild Cafeteria*, 92 NLRB 809

<sup>43</sup> See *W. C. Nabors Co.*, 89 NLRB 538.

<sup>44</sup> *Supreme Bedding and Furniture Mfg. Co., Inc.*, 93 NLRB 1616, *Pacific Mills*, 91 NLRB 60, *Somerset Classics, Inc.*, 90 NLRB 1675, enforced January 14, 1952 (C. A. 2).

<sup>45</sup> *Standard Oil Co. of California*, 91 NLRB 783, *Jefferson Standard Broadcasting Co.*, 94 NLRB No. 227. These legal principles apply also to labor organizations and other respondents in unfair labor practice cases

of the others fell further below their quotas than the union adherents.<sup>46</sup> Similarly, in another case, where a plant was closed to the accompaniment of management statements that the employees had "asked for the place to close" by joining the union, the Board found a violation even though there may have been coexisting economic grounds for the shutdown.<sup>47</sup>

### a. Knowledge of Union or Concerted Activities

In order for the Board to find that a discharge or other action against an employee was motivated by discriminatory purposes, it must be shown that the employer knew or believed that the employee had participated in union or concerted activities. Supervisory personnel's knowledge of such activities normally is imputed to the employer.<sup>48</sup>

The fact that the employer was mistaken in believing that the employee had engaged in concerted activities, however, does not excuse an illegal discharge made on the basis of such mistaken belief.<sup>49</sup> The Board has held that a discharge based upon an employer's mere suspicion of union activity is equally discriminatory.<sup>50</sup> The Board said in an earlier case:

We have always held that when an employee is discharged because his employer believes him to be engaged in concerted activity, the discharge is violative of the Act, whether or not such belief is well founded.<sup>51</sup>

Direct evidence, or admissions, of such knowledge is rare in cases of this type, so the Board often must determine from the circumstances of the case whether or not the employer had such knowledge. In one case where the company denied knowledge of the union activities of discharged employees, the Board inferred such knowledge from the following facts:<sup>52</sup> (1) Small size of the plant, which made it likely that word of any union activities would reach the management; (2) admissions by supervisory personnel that they knew of certain discharged employees' union activities prior to their discharge; and (3) statements by a foreman to various employees, prior to the discharge, that the company had compiled a list of union members and that "there will be lots of new faces in the mill."

Similarly, the Board imputed knowledge of union activities to an employer in another case involving a small plant, through which the supervisors were constantly circulating and where a union organizer

<sup>46</sup> *Happ Brothers Co., Inc.*, 90 NLRB 1513. See also *Royal Palm Ice Co.*, 92 NLRB 1295, enforced January 11, 1952, No. 13735 (C. A. 5).

<sup>47</sup> *Somerset Classics, Inc.*, 90 NLRB 1676, enforced January 14, 1952, No. 22081 (C. A. 2).

<sup>48</sup> *Ozark Hardwood Co.*, 91 NLRB 1443.

<sup>49</sup> *Thermoid Co.*, 90 NLRB 614.

<sup>50</sup> *Southern Furniture Manufacturing Co.*, 91 NLRB 1159, footnote 3, p. 1160. For further statement of this policy, see Editorial "*El Imparcial*," *Inc.*, 92 NLRB 1795, p. 1797.

<sup>51</sup> *New York Telephone Co.*, 89 NLRB 383 (1950).

<sup>52</sup> *Ozark Hardwood Co.*, 91 NLRB 1443.

visited employees on two occasions shortly before their discharge.<sup>53</sup> In this case, three employees who were the most active union proponents in the plant were abruptly discharged on the day before the company president assembled the employees and threatened to close the plant rather than deal with the union.

An employer was also inferred to have had knowledge of the union activities of discharged employees in a case where a number of employees signed union application cards on a bus going home, after the driver had stopped the bus in order to permit a union organizer to speak to them.<sup>54</sup> The next morning a foreman questioned an employee as to whether she had signed a card on the bus. After the employee admitted signing one, nearly all those who regularly rode home on the bus were discharged during the same day.

The Board also agreed with a trial examiner who rejected an employer's denial that he knew of discharged employees' union activities, in a case where the union's letter announcing its organization in the plant was not received until after the discharges.<sup>55</sup> In this case, however, a few minutes before the discharges, the employer's chief operating official had other employees brought to his office for questioning about union activities in the plant and received an answer that all employees in the machine shop, where the discharged employees were then working, had signed union application cards. A foreman who was present at the questioning thereupon distributed previously prepared final pay checks to the employees discharged.

However, in another case, the Board dismissed an allegation of unlawful discharge in the case of an employee who was fired 2 days after the holding of a union meeting at her home.<sup>56</sup> While finding that the employer later discharged a number of other employees because of their union activities, the Board held that there was not sufficient evidence to establish that the company knew of the union organization in its plant until it was informed by the employee first discharged, 2 days after her discharge.

The Board noted in another case that awareness of union activity is not necessarily tantamount to a hostility to unions.<sup>57</sup> Remark- ing that in this case "the record is singularly lacking in evidence that the Respondent was hostile to the Union or to the organizational efforts of its employees," the Board concluded that the preponderance of evidence failed to establish that the employees were discharged because of their union activities, although the Board found that the

<sup>53</sup> *Somerville Buick, Inc.*, 93 NLRB 1603.

<sup>54</sup> *Southern Furniture Mfg Co*, 91 NLRB 1159.

<sup>55</sup> *The Warren Co., Inc.*, 90 NLRB 689.

<sup>56</sup> *Carolina Mills, Inc.*, 92 NLRB 1141, enforced 190 F. 2d 675 (C. A. 4).

<sup>57</sup> *Farber Brothers, Inc.*, 94 NLRB No. 111.

reasons advanced by the employer for discharge of two of the employees were rather dubious.

### b. Forms of Discrimination

Discrimination in violation of section 8 (a) (3) most frequently takes the form of a discharge or layoff of an employee known or suspected to have engaged in union or concerted activities.<sup>58</sup> However, demotion of an employee, or transferring him to a less desirable job of the same type of work, because of union activities, is equally a violation.<sup>59</sup>

Refusal to hire an employee because of his union activities, or his failure to participate in such activities, also constitutes illegal discrimination.<sup>60</sup> Refusal to reinstate a laid-off or discharged employee because of his union activities similarly violates this section.<sup>61</sup>

Illegal discrimination also took many other forms in cases decided during the 1951 fiscal year. Among them were: Offering a day-shift striker who was entitled to reinstatement only a night-shift job and rehiring him at 5 cents an hour less than his prestrike rate.<sup>62</sup> The closing down of a plant to defeat union organization, and discrimination against union members in calling employees back when operations were resumed with a reduced force.<sup>63</sup> Reducing all employees' wages the day after a Board election in which they had designated a union as their bargaining representative.<sup>64</sup> Discontinuing weekly payments made to an employee for transporting other employees to and from work, because of his "shortcomings as a labor spy," in that he failed to give the employer accurate reports of union activities in the plant.<sup>65</sup> Discharging an employee because he was the working partner of an employee who was discharged for union activities.<sup>66</sup> Reducing a union adherent's earnings by transferring his overtime work to

<sup>58</sup> For examples, see *Somerset Classics, Inc., Southern Furniture Mfg. Co., or Somerville Buick, Inc.*, all cited in the preceding subsection.

Discrimination against an employee because he is *not* a member of a union, or "cleared" by a union, also may violate this section of the act. Cases of this type are discussed in subsection F of this section of this report, dealing with Discrimination Under Union-Security Agreements.

<sup>59</sup> *The Post Printing and Publishing Co.*, 90 NLRB 1820 (demotion); *South Jersey Coach Lines*, 92 NLRB 791 (transfer to less desirable job). *Peerless Quarries, Inc. (International Union of Operating Engineers, Local 101, and Common Laborers' Union, Local 663)*, 92 NLRB 1194, enforced December 3, 1951 (C. A. 10).

<sup>60</sup> *The Warren Co.*, 90 NLRB 689 (refusal to hire because of union membership); *General Electric Co. (United Brotherhood of Carpenters and its Local 743)*, 94 NLRB No. 193 (refusal to hire because of lack of membership in a particular union). However, an employee may be discharged for failure or refusal to tender his union initiation fees or dues under a legal union-shop agreement. See subsection F of this section.

<sup>61</sup> *Somerset Classics*, cited above.

<sup>62</sup> *The Stillely Plywood Co., Inc.*, 94 NLRB No. 138.

<sup>63</sup> *Somerset Classics*, cited above.

<sup>64</sup> *Standard Generator Service Co. of Missouri*, 90 NLRB 790, enforced 186 F. 2d 606 (C. A. 8).

<sup>65</sup> *J. L. Williams Lumber Co.*, 93 NLRB 1672.

<sup>66</sup> *J. L. Williams Lumber Co.*, cited above.

employees believed to be nonunion.<sup>67</sup> Causing a union sympathizer to lose outside work.<sup>68</sup> Discharging an employee, who was being laid off for economic reasons, sooner than planned because of his union activities.<sup>69</sup> Evicting employees from company-owned houses because of their union activities.<sup>70</sup> Denying employees time off to permit them to engage in legitimate organizational activities; in this instance, attendance at a conference with a Board representative.<sup>71</sup>

An unusual form of discrimination occurred in two cases where employers were found to have attempted to use supervisory job titles as an instrument for curtailing employees' union activities. In one case, an employer was found to have violated the act by discharging an active union adherent who declined to accept the employer's offer of the title of "foreman" without actual supervisory authority and without any change in his duties.<sup>72</sup> The Board found that the alleged reclassification was merely "a pretext to eliminate an especially active union leader." In another case, a union leader was promoted to "assistant foreman," a position without actual supervisory authority, and then discharged because he declined to abandon his union activities.<sup>73</sup>

Discrimination in favor of union members also may violate this section. Thus, the Board found that an employer engaged in illegal discrimination by the granting of retroactive wage payments and vacation benefits only to union members, thereby encouraging membership in the union.<sup>74</sup> Discriminating against nonunion employees in the matter of route assignments and extra pay for unannounced changes in shifts also were held illegal discrimination.<sup>75</sup>

Nor is an employer excused from a violation of the act because he acted only under pressure from a union or an antiunion group, or because he permitted either a pronoun or antiunion group "to arrogate to itself the company's control over employment, and to use such control to accomplish discharges which were clearly discriminatory."<sup>76</sup> Thus, an employer was held in violation when he acquiesced in the discharges of several employees for activities characterized by union

<sup>67</sup> Editorial "El Imparcial," Inc, 92 NLRB 1795.

<sup>68</sup> *El Mundo, Inc*, 92 NLRB 724.

<sup>69</sup> *William A. Mosow*, 92 NLRB 1727.

<sup>70</sup> *W. T. Carter and Brother*, 90 NLRB 2020, *Sellers Mfg Co*, 92 NLRB 279, *J. L. Williams Lumber Co*, cited above.

<sup>71</sup> *Superior Co*, 94 NLRB No. 90.

<sup>72</sup> *West Texas Utilities Co, Inc.*, 94 NLRB No 237.

<sup>73</sup> *Jackson Daily News*, 90 NLRB 565. In this case the Board found it unnecessary to rule on the trial examiner's holding that the promotion itself, which he found was intended to end the employees' union activities, was discrimination in violation of the act.

<sup>74</sup> *Gaynor News Co.*, 93 NLRB 229, *Rockaway News Supply Co. (Newspaper and Mail Deliverers' Union)*, 94 NLRB No. 156, *Newark Newsdealers Supply Co*, 94 NLRB No. 239.

<sup>75</sup> *Rockaway News Supply Co.*, cited above

<sup>76</sup> *Air Products, Inc*, (*Merchandise Drivers Local 641, International Brotherhood of Teamsters*), 91 NLRB 1381.

officials as "against," or "harmful" to, the union.<sup>77</sup> In this case, four employees were told by a union official in a union meeting that they were fired. The employer's district manager, who was present, assented. The four employees had circulated a petition urging a change in the method of choosing union-shop stewards. In another case an employer was found in violation when he complied with a union demand for the discharge of a union member who had refused to cooperate in a union-sponsored effort of employees to limit their production to a certain level.<sup>78</sup>

The Board has held that this section of the act applies equally to situations involving discrimination *between* union members, based upon their union activities or relationships, except under a valid union shop. Thus, in one case, an employer was found to have engaged in illegal discrimination by discharging a union member who had obtained a job without first getting a "work order" from his union.<sup>79</sup> The Board rejected a trial examiner's finding in this case that the discharge was legal because, as the employee was already a union member, his discharge would neither encourage nor discourage union membership, but would only encourage acceptance of the membership obligation of hiring through the union hall. The Board majority pointed out that, by yielding to the union's demand for the employee's removal even though he was a union member, "the Employer perforce strengthened the position of the Local and forcibly demonstrated to the employees that membership in, as well as adherence to the rules of, that organization was extremely desirable." The Board reaffirmed the well-established rule that "an employer's acceptance of the determination of a labor organization as to who shall be permitted to work for it is violative of Section (a) (3) of the Act, where . . . no lawful contractual obligation for such action exists." Similarly, in another case, the Board held that an employer engaged in illegal discrimination when it complied with a local union's request to lay off members of the local union's subordinate local before laying off any members of the parent local.<sup>80</sup>

As a corollary to the act's requirement that an employer not permit a union or antiunion group to take control over company employment for discriminatory purpose, the Board has held that an employer has an affirmative duty "to take effective action to assure [an employee] that he would be protected in his right to remain at work" even in the

<sup>77</sup> *Air Products, Inc.*, cited above, see also *American Pipe and Steel Co.*, 93 NLRB 54.

<sup>78</sup> *Printz Leather Co. (Local 90, International Fur and Leather Workers' Union)*, 94 NLRB No. 209.

<sup>79</sup> *American Pipe and Steel Corp. (International Brotherhood of Boilermakers and its Local 92)*, 93 NLRB 54, Member Murdock dissenting.

<sup>80</sup> *Sub-Grade Engineering Co. (International Union of Operating Engineers, Local 101)*, 93 NLRB 406, Member Murdock dissenting.

face of a threat of disruption of the employer's operations.<sup>81</sup> The Board stated the rule in one case as follows:

It is well established that an employer is under a duty to insure that its right to hire, discharge, or transfer is not delegated to any antiunion or prounion group of employees. And this duty exists even where the failure to yield to employee pressure might cause disruption to the employer's operations.<sup>82</sup>

In this case, the employer was held to have engaged in discrimination against two employees because other employees refused to work with them on account of their active advocacy of union organization. The employer sought to transfer both employees to another department, where they would have more arduous and less agreeable work and would have been deprived of an opportunity to earn a bonus. One employee had been physically evicted from the plant, by four fellow employees carrying him out, the day after the union lost a Board election. He accepted the transfer, but the Board held that this voluntary acceptance of the demotion did not exonerate the employer from violation of the act. In the case of the other employee, who worked in the same department, his fellow employees engaged in a sitdown strike when he returned to work a few days after the election. He declined to accept the transfer and, when the employer insisted upon it, he left the plant. The Board rejected a trial examiner's finding that this employee had voluntarily quit and held that his termination "was tantamount to a discharge."<sup>83</sup>

Similarly, in another case, the Board found that an employer had engaged in illegal discrimination when he failed to protect the right of an employee to remain at work, when fellow union employees engaged in work stoppages because the discharged employee was delinquent in his union dues and refused to pay up the delinquency.<sup>84</sup> In this case, the Board reiterated that, even assuming the employee "quit his job because it had been made untenable by the Respondent Union, we would nevertheless find that the Respondent Company violated Section 8 (a) (3) and (1) of the Act." The opinion added, "The Board has frequently held with judicial approval that an employer violates Section 8 (a) (3) of the Act when he knowingly permits the exclusion of an employee from the plant by any union or antiunion group."<sup>85</sup>

In other cases, employers were found to have engaged in illegal discrimination between members of different unions. Thus, in one case, the employer was found to have yielded unlawfully to the demand

<sup>81</sup> *Pappas and Co. (Food, Tobacco and Agricultural Workers' Union and its Local 76)*, 94 NLRB No. 189.

<sup>82</sup> *Majestic Metal Specialties, Inc.*, 92 NLRB 1854.

<sup>83</sup> For other cases of "constructive discharge," see *Missouri Bag Co.*, 91 NLRB 385; *Stokely Foods, Inc.*, 91 NLRB 1267; *Cummer-Graham Co.*, 90 NLRB 722; *Victor Chemical Co.*, 93 NLRB 1012.

<sup>84</sup> *Pappas and Co.*, cited above.

<sup>85</sup> Here the Board cited *Fred P. Weissman Co.*, 69 NLRB 1062, enforced 170 F. 2d 952 (C. A. 6), and *N. L. R. B. v. Hudson Motor Car Co.*, 128 F. 2d 528 (C. A. 6).

of one union, enforced by a picket line, that he discharge all the company's installation employees, who were members of another union and assign the work to members of the picketing union.<sup>86</sup> In another case, the employer, after an economic shutdown, failed to recall its employees who were members of one union because it had negotiated a more favorable contract with a rival union which the employer enlisted to assist in recruiting new employees.<sup>87</sup> The Board held this to be illegal discrimination. Another employer, who sought to improve relations with a contracting union by voluntarily discharging a member of that organization who had been active on behalf of another union, also was found in violation.<sup>88</sup>

However, in one case, the Board dismissed charges of discrimination when it found that "hiring" and "firing" of members of one union actually were arranged merely as an ingenious device intended to defeat another union in a jurisdictional dispute.<sup>89</sup> In this case, the Board found, a local of one union arranged for certain employers who had illegal union-security agreements with another union to hire members of the former union, on the understanding that the employers would discharge the former union's members when the latter union requested it. When this happened the "discharged" members of the former union filed charges with the Board seeking an order of reinstatement on grounds of discrimination. Finding that the former union's members were on the job only briefly (one only 30 minutes), and that they had full knowledge of the scheme, the Board held that a bona fide employer-employee relationship was never established by the token "hirings" and "firings." Dismissing the charges of discrimination, although holding the union-security contract and another discharge to be violations, the Board said, "This attempt to use the Board's processes to further the cause of the Teamsters in its jurisdictional conflict with the Respondent Union constitutes, in our opinion, a palpable abuse of the Board's machinery."

### c. Protected and Unprotected Employee Activities

Cases involving section 8 (a) (3) often require that the Board determine whether or not the activities of the employees allegedly suffering discrimination are the type of union activities or "concerted activities for the purpose of collective bargaining or other mutual aid or protection" which the act protects.

Activities are "concerted" within the meaning of the act when two or more employees participate in them. Thus, when one employee

<sup>86</sup> *Oertel Brewing Co. (Louisville Building Trades Council)*, 93 NLRB 536.

<sup>87</sup> *L. Ronney & Sons Furniture Mfg. Co.*, 93 NLRB 1049.

<sup>88</sup> *New York State Employers Assn., Inc. (Local 182, International Brotherhood of Teamsters)*, 93 NLRB 127.

<sup>89</sup> *Vaughn Bowen, et al. (Retail Clerks Union Local 770)*, 93 NLRB 1147.

discusses with another the need for union organization, their action is "concerted" even though one may be only a listener.<sup>90</sup> In this case, the Board said:

Manifestly, the guarantees of Section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization.

During the 1951 fiscal year, the Board found many varied forms of concerted employee activities to be protected by the act. Among these were: The formation of a group of workers near their plant during the lunch period for the purpose of calling on their supervisor for an explanation of the discharge of two fellow union members.<sup>91</sup> Preparation and circulation of a petition signifying disapproval by union members of an existing contractual method for selecting shop stewards.<sup>92</sup> A concerted quitting of the plant premises in protest against the shortness of an employer's notice of an economic layoff.<sup>93</sup> A union member's failure and refusal, during the course of his regular duties, to cross his own union's primary picket line at another establishment.<sup>94</sup> A union's adoption and observance of a limited hourly workload, and also an employee's refusal to participate in this activity.<sup>95</sup> Presentation and prosecution of grievances.<sup>96</sup> Refusal by employee-members of a union bargaining committee to sign an agreement committing them to a bonus plan previously rejected by the union.<sup>97</sup> An employee's acting as spokesman for a group of workers seeking to bargain concerning a wage increase.<sup>98</sup> All of these activities were held to be protected by the act, and discharges or other discrimination against employees because of them was therefore found to be illegal.

However, the Board has ruled, with court approval, that

. . . not every form of concerted activity which falls within the literal language of Section 7 is given protection, so as to immunize those who participate in it against discharge or other discipline. Picketing accompanied by violence, sit-down strikes, strikes against Board certifications, or in breach of a no-strike clause in a contract, are examples of concerted activity, which, though designed to achieve "collective bargaining" or for "mutual aid or protection" of employees, are not accorded the protection of the Act by this Board or by the courts. Nonetheless, it is clear that in engrafting these exceptions upon the broad language of Section

<sup>90</sup> *Root-Carlin, Inc.*, 92 NLRB 1313.

<sup>91</sup> *Ozark Hardwood Co.*, 91 NLRB 1443.

<sup>92</sup> *Air Products, Inc. (Teamsters Local 641)*, 91 NLRB 1381.

<sup>93</sup> *Jamestown Veneer and Plywood Corp.*, 93 NLRB 101

<sup>94</sup> *Cyril de Cordova & Bro.*, 91 NLRB 1121. See also *Cinch Mfg. Corp.*, 91 NLRB 371 (supervisors who, at time of their refusal to cross picket line, were "employees" under original act).

<sup>95</sup> *Printz Leather Co. (Fur Workers Local 50)*, 94 NLRB No 209

<sup>96</sup> *Salant & Salant, Inc.*, 92 NLRB 417, *Dant & Russell, Ltd.*, 92 NLRB 307; *The Ohio Oil Co.*, 92 NLRB 1597.

<sup>97</sup> *Central Metallic Casket Co.*, 91 NLRB 572

<sup>98</sup> *Smith Victory Corp.*, 90 NLRB 2089, enforced by the Second Circuit in *N L R B. v. Smith Victory Corp.*, 190 F. 2d 56.

7, the Board and the courts have been particularly careful to limit such exceptions to those instances in which the means employed involved violence or similar conduct, or where the objectives sought were inconsistent with the terms or the clearly enunciated policy of this Act or other Federal statutes.<sup>99</sup>

In another case, the Board stated:

The test . . . is whether the particular activity involved is so indefensible as to warrant the employer in discharging the participating employees. Either an unlawful objective or the adoption of improper means of achieving it may deprive employees engaged in concerted activities of the protection of the Act.<sup>1</sup>

In this case, the Board held that the employees' concerted slow-down of production was not protected. The Board ruled that the employer lawfully discharged employees for engaging in such a slow-down. In another case, a majority of the Board held that employees were not protected in circulating a handbill attacking the quality of the employer's product.<sup>2</sup> The handbill, which was circulated in public places of the city, did not bear the name of the union involved or any other statement identifying it with the labor dispute. The handbill accused the employer, a television station, of providing inferior and technically inadequate programs. The Board declared "these tactics, in the circumstances of this case, were hardly less 'indefensible' than acts of physical sabotage."

The majority opinion added:

The Board has held, and we reaffirm, that the Act protects employees against employer reprisal when they speak freely "on organizational matters" . . . and in one way or another denounce their employer for his conduct of labor relations or affairs germane to the employment relationship. Moreover, employees acting in concert may exhort consumers to refrain from purchasing their employer's product unless and until he alters his labor policy or practices. But this is a different case. Here, the subject matter of the employees' verbal attack upon the Employer was not related to their interests *as employees*. And the gist of their appeal to the public was that the Employer ought to be boycotted because he offered a shoddy product to the consuming public—not because he was "unfair" to the employees who worked on that product.

The protection accorded employees instigating or encouraging a consumers' boycott of their employer's products to support a labor dispute was involved in one case.<sup>3</sup> Here, during the course of an economic strike, a union had instituted a consumers' boycott of the employer's product. The strike was abandoned and the employees returned to work, but no action was taken to halt the boycott which the union had encouraged in several States. When members of the union's executive board returned to work in the plant, the employer first suspended them for failing to call off the boycott, and then,

<sup>99</sup> *The Hoover Co.*, 90 NLRB 1614. See further discussion of this case later in the section.

<sup>1</sup> *Elk Lumber Co.*, 91 NLRB 333.

<sup>2</sup> *Jefferson Standard Broadcasting Co.*, 94 NLRB No. 227, Member Murdock dissenting.

<sup>3</sup> *The Hoover Co.*, cited above.

after some negotiations over their reinstatement, discharged them. Meanwhile, before the strike ended, another labor organization seeking to represent the employees had filed a petition for a representation election with the Board, and before the actual discharge of the union executive board members, the second union had won a Board certification.

The employer contended that the discharges were lawful, on the ground that the boycott activities were not protected because the boycott had an unlawful objective. The objective alleged as unlawful was: To compel the employer to recognize one union at a time when another union had a representation petition pending with the Board. Granting recognition at such a time, the employer contended, would violate section 8 (a) (1) under the Board's *Midwest Piping* doctrine.<sup>4</sup> Citing the fact that, at the time of the boycott, the likelihood of the boycott causing the employer to violate this doctrine was speculative because other events might have removed the possibility of violation, the Board rejected the employer's theory and held the boycott activities protected and the discharges illegal.<sup>5</sup>

In the same case, the Board ruled that, on the basis of its holding the boycott to be lawful protected activity, the employer could not legally suspend employees for engaging in such activity, even though it may be "unjust and disloyal" for an employee to continue work and receive wages from a boycotted employer.<sup>6</sup>

Four cases decided by the Board during the fiscal year involved questions as to the protection afforded employees in making statements or comment on their employer's business or labor policies.

In one case, an employee was discharged for allegedly spreading a story that the employer had made "fantastic earnings" by quoting the employer's gross sales as profits.<sup>7</sup> While finding that the employee had reported the figure only to a shop committee and apparently with accuracy, the Board held that the employee's reporting would have been protected and the discharge illegal even if he "had made a false (but not deliberately or maliciously false) report to the shop committee." The Board declared that employees do not forfeit the

<sup>4</sup> This doctrine was enunciated in *Midwest Piping & Supply Co.*, 63 NLRB 1060. Later, during the 1951 fiscal year, the Board restricted somewhat its application of the doctrine in certain cases where incumbent unions are seeking *continued* recognition while a representation petition of another union is pending. The modification, however, would not appear to affect a situation such as developed in the *Hoover* case. See discussion of the new rule in section 2, subsection b (1), above, pp. 159-161.

<sup>5</sup> After close of the fiscal year, this ruling was reversed by the Court of Appeals for the Sixth Circuit in reviewing the case, 191 F. 2d 380 (July 9, 1951). The court found that the purpose of the boycott became unlawful after the filing of the competing union's representation petition.

<sup>6</sup> The court of appeals also reversed the Board's ruling on this point, on the ground that "it is a wrong done the company for employees, while being employed and paid wages by a company, to engage in a boycott to prevent others from purchasing what their employer is engaged in selling and which is the very thing their employer is paying them to produce." However, the court ordered reinstatement of two executive board members who had completely disassociated themselves from the boycott or its continuance.

<sup>7</sup> *American Shuffleboard Co.*, 92 NLRB 1272, enforced August 16, 1951, 190 F. 2d 898.

protection of the act because, in discussing matters of such vital common concern as their employer's financial status, they happen to give currency to inaccurate information.

In another case, a shop steward for a union was discharged for helping send customers of the employer two letters, which it was contended were libelous and accused the company of unfair labor practices.<sup>8</sup> The letters also requested the customers to withhold patronage from the employer to compel recognition of the union, although a petition of another union was pending with the Board. Finding that the letters contained no deliberate untruths and were not published for the malicious purpose of injuring the employer's business, a majority of the Board held the writing and sending of them was protected and the discharge illegal. The Board characterized the letters as "a somewhat unrestrained variety of what is usually accepted as campaign propaganda." However, the Board did not rule on the effect of a legal showing of malice in such a case. The Board found it also unnecessary to consider whether the letters were libelous under State law because "State law is not determinative of the right or obligations under the Act except where the latter expressly provides otherwise."

As to the alleged accusation of unfair labor practices, the Board declared that even a reader's conclusion from the letters that the employer had committed an unfair labor practice would not be sufficient to remove the normal protection of the act from their publication. The Board said, "A contrary conclusion would necessarily result in denying the right to publicize the facts in a labor dispute at any time when those facts might add up to a possible conclusion that an unfair labor practice had been committed." However, the Board found no such accusation in the letters.

Another case involved a shop steward who frequently referred to the employer's management and policies in profane and abusive language, not only in private discussions of grievances but in public places on the employer's premises.<sup>9</sup> Discharge of the steward because of this language was held lawful. However, the Board did not rule on the legality of such a discharge if the offensive language had been used only in grievance discussions or other concerted activities.

### (1) *Discrimination in Strike Situations*

Discrimination against strikers was alleged in a number of cases coming to the Board for decision during the 1951 fiscal year.

In general, strikes are protected concerted activities, for which

<sup>8</sup> *Electronics Equipment Co.*, 94 NLRB No 19, Member Reynolds dissenting. See also *Jefferson Standard Broadcasting Co.*, cited and discussed above.

<sup>9</sup> *Midland Broadcasting Co.*, 93 NLRB 455.

employees may not be penalized. An exception, however, is a strike in violation of Federal law or contrary to basic policies of the act. An example of the latter is a strike in violation of a valid no-strike contract. Also, an individual striker may lose the protection of the act by serious misconduct in concerted activities, such as physical assaults on nonstrikers or threats of violence.<sup>10</sup> This applies to employees striking to protest unfair practices as well as economic strikers.<sup>11</sup>

In cases involving alleged discrimination against strikers, the Board continues to distinguish between two types of strikes: Economic strikes, where the employees strike to obtain economic benefits such as wage increases or improved working conditions,<sup>12</sup> and unfair labor practice strikes, where employees strike to compel an employer to remedy or cease an unfair labor practice, such as an illegal discharge of an employee or an illegal refusal to recognize the union chosen by a majority of employees.<sup>13</sup>

An economic strike, however, may be converted into an unfair labor practice strike by an employer's unfair practices during its course.<sup>14</sup>

Economic strikers may be legally replaced with bona fide permanent employees by an employer seeking to keep his plant in operation or to resume operations.<sup>15</sup> But they may not be denied reinstatement when their jobs are filled only on a temporary basis.<sup>16</sup> Nor may they be discharged, before replacements are hired, for striking or for other legitimate concerted activity.<sup>17</sup>

Unfair labor practice strikers, however, may not be replaced, and employees hired to replace them during such a strike will be ordered discharged, if necessary, to reinstate such strikers.<sup>18</sup> An example of unfair labor practice strikers are those who strike to compel an employer to reinstate employees who have been discharged illegally because of union activities. However, a strike in protest against a legal discharge is an economic strike, but still a protected activity.<sup>19</sup> The fact that a strike against unfair labor practices may also have an economic objective does not deprive the striking employees of

<sup>10</sup> *Intertown Corp (Michigan)*, 90 NLRB 1145, *Standard Oil Co. of California (El Segundo Refinery)*, 91 NLRB 1540

<sup>11</sup> *Intertown Corp. (Michigan)*, cited above; *National Electric Products Corp*, 80 NLRB 995 (1948).

<sup>12</sup> *The Texas Co*, 93 NLRB 1358, Member Reynolds dissenting on another point

<sup>13</sup> *Happ Brothers Co*, 90 NLRB 1513, *Seven-Up Bottling Co. of Miami*, 92 NLRB 1622.

<sup>14</sup> *The Texas Co.*, cited above, *Augusta Bedding Co*, 93 NLRB 211

<sup>15</sup> *Roure-Dupont Mfg. Co.*, 93 NLRB 1240.

<sup>16</sup> *Morand Brothers Beverage Co*, 91 NLRB 409, Member Reynolds dissenting on ground that strike not protected because of objective; majority decision enforced on this point, 190 F. 2d 573, July 23, 1951 (C. A. 7)

<sup>17</sup> *The W T Rawleigh Co.*, 90 NLRB 1924, enforcement denied in part on other grounds, 190 F. 2d 832, (C. A. 7) The court denied reinstatement to all strikers because of character of picketing activities.

<sup>18</sup> *Happ Brothers Co*, cited above In this case, where work had become slack in the meantime, the Board ordered the unfair practice strikers placed on a preferential list for reinstatement

<sup>19</sup> *Happ Brothers Co*, cited above, see footnote 9, p. 1515.

their rights as unfair labor practice strikers.<sup>20</sup> Thus, the Board held that employees striking to obtain reinstatement of two employees who had been illegally discharged did not lose their status as unfair practice strikers because they also sought reinstatement of an employee whose discharge was not alleged to be illegal.<sup>21</sup>

A slowdown, however, was held to be unprotected activity, for which an employee may be legally discharged.<sup>22</sup>

## (2) *Discrimination in Lockouts*

An employer's closing of a plant in order to defeat or discourage union organization or the protected concerted activities of employees is illegal discrimination.<sup>23</sup>

However, the Board held in one case that an employer was justified on economic grounds in shutting down an entire plant when employees of one department engaged in intermittent work stoppages.<sup>24</sup> In this case, the Board found that, in view of the interdependent functioning of the different departments and the need for round-the-clock operation of the department where the strikes occurred, "there was economic justification for the Respondent's conduct in shutting down the plant . . . until it had adequate assurance that the employees in all departments and all shifts were ready to work." The Board added, "Nothing in the Act, in our opinion, requires that an employer continue to operate his plant despite the prospect of recurrent work stoppage which would make further operations uneconomical." A Board majority<sup>25</sup> further held that, in the special circumstances of this case, the employer was justified in refusing to reopen the plant until the union had actually signed a contract containing a no-strike clause and an "escape" provision which would permit employees who joined the union, after the intermittent strikes, to resign from the union.<sup>26</sup> But in this case, the principal opinion stated that it did not pass upon whether or not an employer has the right in ordinary circumstances to lay off employees pending negotiation of a complete contract.<sup>27</sup>

<sup>20</sup> *Happ Brothers Co*, cited above, footnote 9.

<sup>21</sup> *Happ Brothers Co.*, cited above.

<sup>22</sup> *Elk Lumber Co*, 91 NLRB 333; see p. 171

<sup>23</sup> *Somerset Classics, Inc.*, 90 NLRB 1676, enforced January 14, 1952, No 22081 (C A 2)

<sup>24</sup> *International Shoe Co*, 93 NLRB 907. The Board was unanimous on this point.

<sup>25</sup> Board Members Houston and Styles dissenting on this point.

<sup>26</sup> The strikes had been called to compel nonmembers of the union to join before the effective date of a maintenance-of-membership contract, which required that all employees who belonged to the union on that date must maintain their membership.

<sup>27</sup> Member Murdock, in his special concurrence with the dismissal of the charges against the employer, also emphasized that he was not passing upon this broad question. The principal opinion was signed by Chairman Herzog and Member Reynolds.

**(a) Lockouts and Strikes in Multiemployer Bargaining Units**

In view of the fact that the Board has long treated a group of employers that bargain together as being a single employer, strikes or lockouts involving a union and employers who have been dealing on such a multiemployer basis present more complex problems as to the rights and status of the employees.

One such problem is posed when a union that has been dealing with a group of employers as a unit calls a strike at the plant of only one or two employers, and the other employers then proceed to lock out their employees. This situation was presented in three cases coming to the Board for decision during the 1951 fiscal year and shortly afterward.<sup>28</sup>

In each case, the Board found the strike to be lawful protected activity, noting that the unions had bargained in good faith to a genuine deadlock over contract terms and had not sought to force the employers to repudiate their group bargaining agent.<sup>29</sup>

As to the lockout, in the first case, the Board found that the employers had actually discharged their employees because of the strike.<sup>30</sup> Accordingly, the Board held the discharges to be illegal discrimination. The Board therefore ordered back pay for the employees for the time from their discharges until they were rehired. The employers contended that the discharges were justified because of the peculiar effectiveness of the piecemeal strike strategy of picking off one employer at a time. Pointing out that 700 employees, who had remained at work, were discharged by 34 employers simply because 60 employees of another employer went on strike, the Board said:

The logical corollary of the Respondents' position is . . . that a union seeking to negotiate a contract with a group of employers, however large, must strike all or none. If it strikes less than all, its members will be deprived of the protection of the Act; if it strikes all, they will be protected. We cannot give such an incongruous construction to an Act designed to minimize industrial strife.

The Board said further:

Strike activity, actual or threatened, is concerted activity, and concerted activity does not cease to be protected because it is, or may be, effective, or because it subjects the employer to economic hardship.

In the second case, the Board found that the employers had laid off their employees illegally as reprisal for the strike action against one of the employers of the bargaining group.<sup>31</sup> However, the Board found

<sup>28</sup> *Morand Brothers Beverage Co.*, 91 NLRB 409, Member Reynolds dissenting; *Davis Furniture Co.*, 94 NLRB No. 52, *Betts Cadillac Olds, Inc.*, 96 NLRB No. 46.

<sup>29</sup> See discussion of this point in *Morand Brothers* case, cited above.

<sup>30</sup> *Morand Brothers Beverage Co.*, cited above. The Court of Appeals for the Seventh Circuit held that a temporary *layoff* of the employees in this case would not violate the act, and remanded this portion of the case to the Board to determine whether or not there was additional evidence to support the Board's findings of discharge. 190 F. 2d 573, July 23, 1951.

*Davis Furniture Co.*, cited above.

that the cause of the strike in this case was somewhat different. In the *Morand* case, the Board had found that the union called the strike as part of its effort to obtain an agreement by bargaining with the employers individually, apparently choosing the employer to be struck more or less by chance. However, in the *Davis* case, the Board found that the union selected the employer to be struck on the ground that this employer was blocking an association-wide agreement because it was paying lower wages than the other employers in the association. Moreover, in the *Davis* case, the union did not threaten to strike any of the other employers. Nor did it even attempt to bargain with the employers individually. Also, before the strike, the employers had agreed that if less than all of them were struck, the others would close to protect the competitive position of all. Nevertheless, only 11 of the 19 employer-members of the association locked out their employees. On the day of the strike, the 11 notified their employees that their stores were closed until further notice, because of the union's strike action against the one other store. The Board held these lockouts to be illegal discrimination against the nonstriking employees.

In the third case, however, the Board held that a group of automobile dealers were justified in locking out the employees in their repair departments when the union struck 2 employer-members out of 21 in the bargaining association, after declining to tell an association representative when, where, or against how many dealers the strike would be called.<sup>32</sup> In this case, the union had authorization from its parent organization to strike all the dealers and had so informed the dealers' association. The Board adopted the trial examiner's recommendation that the charges of discrimination be dismissed. The trial examiner had held that the dealers were justified in shutting down their repair shops because of fears that the union would call a strike in their shops at a time when customers' cars were partially torn down and the cars, consequently, would be tied up in the shop for several days or even the duration of the strike. The trial examiner found that the union's strategy in this case was to keep the employers off balance with a threat of momentary strike hanging over their heads.

Reviewing earlier Board decisions on the legality of lockouts and layoffs of employees in the face of proposed strike actions, the trial examiner had summarized the general rule as follows:

An employer is not prohibited from taking reasonable measures, including closing down his plant, where such measures are, under the circumstances, necessary for the avoidance of economic loss or business disruption attendant upon a strike. This right may, under some circumstances, embrace the curtailment of operations before the precise moment the strike has occurred. The pedestrian need not wait to be struck before leaping to the curb.

<sup>32</sup> *Betts Cadillac Olds, Inc.*, cited above (decided September 23, 1951).

The nature of the measures taken, the objective, the timing, the reality of the strike threat, the nature and extent of the anticipated disruption, and the degree of resultant restriction on the effectiveness of the concerted activity, are all matters to be weighed in determining the reasonableness under the circumstances, and ultimate legality, of the employer's action.

Manifestly, where there is no real threat, or when the union has given reasonable assurances against a strike, or assurances of notice sufficient to avoid disruption, there is no objective need for protective measures.

#### d. Discharge of Strikers for Misconduct

The Board will not order reinstatement of striking employees who are proved to have engaged in serious misconduct, such as physical violence or threats of violence, even though their discharges may technically violate section 8 (a) (3).<sup>33</sup> Employees striking to protest an employer's unfair labor practices as well as those striking for economic objectives are subject to this rule.<sup>34</sup>

Under this policy, an employer may legally discharge an employee who commits such misconduct, but the Board requires that the employer prove that the employee concerned actually engaged in misconduct. Mere belief, even in good faith, that the employee engaged in misconduct does not suffice to justify discharge or other discipline in such cases. The Board stated the general rule in one case as follows:

. . . assuming arguendo that the Respondent entertained such a good-faith belief at the time of the discharges, we hold that this defense is invalid as a matter of law. In the *Mid-Continent Petroleum Corp.*, case (54 NLRB 912), the Board enunciated the rule that an employer who refused to reinstate strikers, as such, even upon an honestly mistaken belief that they had engaged in forbidden conduct, has no valid defense, if, in fact, the employees were not guilty of the forbidden conduct. Under this doctrine, the discharges may be viewed, as we view them here, as having been made because of lawful strike activity, unless the employer affirmatively proves employee misconduct. To hold otherwise would be to place employees who engage in lawful strike activities with the hope of returning to their jobs at the end of the economic struggle at the mercy of an employer who may sincerely regard their conduct as unlawful. The function of determining whether the strikers' conduct is lawful or unlawful has been entrusted by the Congress to the Board, subject to judicial review, and not to any private agency. Thus an employer, who discharges a striker on the ground that he has engaged in unlawful strike activities, does so at the peril of deciding wrongly. . . .<sup>35</sup>

Nor does the mere identification of a striker as being in a large crowd at the plant entrance justify his discharge, when the strikers did not gather pursuant to a plan to obstruct entry to and from the

<sup>33</sup> *Old Town Shoe Co*, 91 NLRB 240. Violence or threats of violence against employees who declined to participate in strikes or other concerted activities also violate section 8 (b) (1) (A). See section 1a of subchapter B, this chapter.

<sup>34</sup> *Intertown Corp. (Michigan)*, 90 NLRB 1145.

<sup>35</sup> *Standard Oil Co. of California*, 91 NLRB 783, Member Reynolds dissenting on another point.

plant or to commit other illegal acts.<sup>36</sup> In this case, the Board found the discharges of 43 strikers were illegal, and upheld the discharges of 13 others. Conduct on the part of strikers which the Board found to have justified discharges in one case<sup>37</sup> included: Forcible attempts to prevent nonstrikers from entering a struck plant. Use of an automobile, zigzagging back and forth in traffic, as a means of "dangerous harassment on the highway" of a nonstriker driving home. Deliberately bumping or jostling a nonstriker and then striking him as he sought to pass through a picket line at an entrance of the plant.

In another case, the Board found that an employer was justified in discharging a striker who was arrested while he had his hand raised to throw a rock at three police officers who were escorting a strike sympathizer to a squad car.<sup>38</sup> Similarly, the Board declined to order reinstatement of a striker who was convicted of breaking windows in the house of a nonstriker and was sentenced to serve 6 months in jail.<sup>39</sup> The Board also upheld the discharges of two strikers who attempted, while intoxicated, to provoke an altercation on a bus while going to the plant for service on the picket line.<sup>40</sup>

Picketing which attempts to block entrance to a plant physically has been held by the Board to violate section 8 (b) (1) (A) and therefore constitutes unprotected activity, for which an employer may discharge or otherwise discipline a striker.<sup>41</sup> However, the Board declined to hold in one case this year that picketing back and forth across a railroad track when a locomotive was some distance away came within this rule, even though the picket said, "in the heat of the controversy," that he would lie down on the tracks rather than permit trains to pass.<sup>42</sup> The majority held that this was not sufficient "to constitute an attempt to block entry," and therefore "did not constitute illegal activity or exceed the bounds of picketing protected by the Act." The Board made the same finding as to another striker's picketing of the entrance to a parking lot at a struck plant. This picket continued to walk back and forth across the entranceway even though he was bumped by cars seeking to enter and police officers had pulled him out of the way twice. In the same case, the Board majority ruled that the employer was not justified in discharging a striking employee with a "crooked" right arm who par-

<sup>36</sup> *Standard Oil Co*, cited above. Cf. *Socony Vacuum Oil Co*, 78 NLRB 1185, where the Board found the strikers had gathered pursuant to such an illegal plan.

<sup>37</sup> *Standard Oil Co. of California (El Segundo Refinery)*, 91 NLRB 1540, Members Houston and Styles dissenting.

<sup>38</sup> *Standard Oil of California*, 91 NLRB 783.

<sup>39</sup> *Old Town Shoe Co.*, cited above.

<sup>40</sup> *Nashville Corp.*, 94 NLRB No. 233.

<sup>41</sup> *Socony Vacuum Oil Co, Inc.*, cited above. See also *Local No. 1150, Unstet Electrical Workers (Cory Corporation)*, 84 NLRB 972.

<sup>42</sup> *Standard Oil Co. of California*, 91 NLRB 783, Member Reynolds dissenting, Chairman Herzog not participating.

ticipated in a missile-throwing incident between strikers and non-strikers, to the extent of throwing two small stones which did not travel far and fell harmlessly. The Board found the two picketing incidents to be protected activity and held that the stone throwing "was not of such a serious nature as to pass the limits of protected activity."

Questions as to the weight to be given certain evidence in connection with discharges for alleged misconduct arose in some cases. In one case, the Board dismissed as "speculative" a trial examiner's finding that a photograph showed the striker "about to go to the aid of the person with whom police officers are struggling," when the Board found that the photograph did not actually show the striker engaged in any improper activity.<sup>43</sup>

In another case, the Board upheld a trial examiner's admission into evidence of the records of a State court proceeding, in which the court held that a number of strikers had violated the court's injunction prohibiting certain forms of picketing.<sup>44</sup> However, the Board rejected the employer's contention that the State court's findings constituted conclusive proof of misconduct. The Board said:

We have held, and have been uniformly sustained by the courts, that the seriousness of the conduct alleged as the ground for refusal to reinstate strikers is initially for the Board to determine, and that a State court conviction, or a finding that a State court injunction has been violated is not dispositive of whether an employer is obliged to reinstate such strikers. The Board affirms the Trial Examiner's finding that the violation, nonviolent in character, of the State court injunction against picketing within 100 yards of the plant gates was not so serious as to warrant the Respondents' discrimination against them.

The Board also declined to find that striking employees had engaged in misconduct justifying discharge merely upon testimony of management representatives that they had received reports from other employees of such misconduct on the part of the strikers.<sup>45</sup> The Board rejected this testimony as "nothing more than hearsay," on which the Board could not base a finding that the strikers had, as a fact, engaged in the misconduct alleged. The Board also rejected the reports, which were unsworn statements, made outside the Board hearing in the case, by persons who did not testify.

### e. Discrimination Under Union-Security Agreements

A proviso to section 8 (a) (3) contains the statutory authorization for the making of limited union-shop agreements after certain statutory requirements have been met.

<sup>43</sup> *Standard Oil Co. of California*, cited above.

<sup>44</sup> *Nashville Corp. and Avco Mfg. Co.*, 94 NLRB No. 233.

<sup>45</sup> *Ohio Associated Telephone Co.*, 91 NLRB 932, set aside 192 F. 2d 664 (C. A. 6).

For such an agreement to be lawful, the proviso requires that the contracting union must be (1) the lawful representative of the employees in an appropriate bargaining unit,<sup>46</sup> and (2) free from employer domination or assistance within the meaning of section 8 (a) (2). This proviso also *formerly* required that a majority of the eligible employees authorize the making of a union-shop agreement in a referendum conducted by the Board, but this requirement was abolished by amendment to the act in 1951.<sup>47</sup> However, the new amendments still require that a union must comply with the filing and non-Communist affidavit provisions of the act before making a union-shop agreement.<sup>48</sup>

In applying these provisions, the Board has held in a number of cases that the making and enforcing of an illegal union-security agreement, such as a closed-shop or preferential hiring clause, or the making of an otherwise lawful union-shop agreement without authorization in a Board referendum of employees, constituted illegal discrimination.<sup>49</sup>

### (1) Execution of Illegal Agreement as Violation

By executing and enforcing a union-shop contract with a union which had failed to obtain the authorization required by statute, an employer engages in illegal discrimination violating section 8 (a) (3), the Board ruled in one case where no discharges or other actual discrimination against specific individual employees was found.<sup>50</sup> Similarly, the Board held an employer had engaged in illegal discrimination by continuing in effect, and later renewing, a contract containing an illegal union-security clause, in a case where the original execution of the contract could not be held a violation because it had occurred more than 6 months before the filing of charges.<sup>51</sup>

Moreover, in another case, the mere execution of an unauthorized union-security clause was held a violation.<sup>52</sup> In this case, the Board ruled that nonenforcement of such an illegal clause was no defense. The Board said in this case:

As the mere execution of a union-security contract, however, constitutes a

<sup>46</sup> *Richland Laundry & Dry Cleaners*, 93 NLRB 680. Making the union-security contract in this case with a nonrepresentative union also was held illegal assistance.

<sup>47</sup> Public Law 189, approved by the President, October 22, 1951.

The union-shop referendum requirement was in effect throughout the 1951 fiscal year.

<sup>48</sup> See sections 8 (a) (3) and 9 of the amended act, appendix C.

<sup>49</sup> Examples: *Federal Stores Division of Spiegel, Inc.*, 91 NLRB 647, *New York State Employers Association*, 93 NLRB 127; *Carpenter & Skaer*, 93 NLRB 188, *Sterling Furniture Co.*, 94 NLRB No. 20.

<sup>50</sup> *Vaughn Bowen*, 93 NLRB 1147 (see findings on respondent Serbet). Execution of a union-security contract under such circumstances also has been held by the Board to violate section 8 (a) (1) and (2), on the part of the employer and section 8 (b) (1) (A) and (2), on the part of the union.

<sup>51</sup> *Childs Co.*, 93 NLRB 281.

<sup>52</sup> *Rockaway News Supply Co.*, 94 NLRB No. 156. Here the Board cited *Julius Resnick, Inc.*, 86 NLRB 38 (1949) and *Childs Co.*, cited above.

violation of Section 8 (a) (1), (2), and (3) of the Act, the fact that the union-security clause was not enforced does not preclude a finding that the Company violated these sections of the Act.

However, a majority of the Board declined to hold that the inclusion of an unauthorized union-security clause by mistake in the published version of a contract constituted illegal discrimination, even though there was a delay of more than 5 months before the contracting parties published a supplemental agreement correcting the mistake.<sup>53</sup> But this was held unanimously to be illegal interference with employees' rights in violation of 8 (a) (1) and unlawful assistance to the union in violation of 8 (a) (2). The majority held that, in this case, no discriminatory conditions of employment had actually been created. But the mistaken publication of the illegal clause was held unanimously to be illegal interference with the employees' rights in violation of 8 (a) (1) and unlawful assistance to the union in violation of 8 (a) (2).

The inclusion of a union-shop clause in an agreement before the holding of a Board referendum was not held to be unlawful, when it was not put into effect and its operation was clearly deferred.<sup>54</sup> But, in the same case, when the clause was put into operation after the employees had voted in favor of a union shop in a Board referendum, but before the Board had issued a certificate authorizing it, the employer and the union were held to have engaged in illegal discrimination. The Board held that the act, before the 1951 amendments, accorded validity to a union-shop agreement only if the labor organization making it had been *certified* by the Board as authorized to make such an agreement.

However, in another case, the Board held that an illegal union-security clause was not clearly deferred by a general saving clause which stated that "all clauses that are affected by the law shall be considered null and void . . . (until) declared legal."<sup>55</sup> A Board majority held that the saving clause "lacks the required specificity" in identifying the clauses suspended, particularly in view of the fact that this general language was chosen because the parties could not agree on which clauses were affected.

An oral union-security contract also was held to violate the act in another case, where it was found that illegal discrimination had been committed by the employer and union pursuant to the terms of such an oral agreement.<sup>56</sup>

<sup>53</sup> *Monolith Portland Cement Co.*, 94 NLRB No. 211, Members Reynolds and Murdock dissenting.

<sup>54</sup> *Kingston Cake Co., Inc.*, 91 NLRB 447. See also discussion of the standing of contracts containing deferred union-shop clauses in representation proceedings, p. 68.

<sup>55</sup> *New York State Employers Association*, 93 NLRB 127, Member Houston dissenting on this point.

<sup>56</sup> *Von's Grocery Co.*, 91 NLRB 504. No violation of 8 (a) (3) was alleged in connection with the execution of this contract, but violations of 8 (a) (1) and (2), which were alleged, were found by the Board.

## (2) Terms of Union-Security Agreements<sup>57</sup>

The statute prohibits the granting of preference in hiring or terms of employment to an employee because of his union membership or lack of membership, except that he may be discharged for failure to tender his initiation fees or periodic dues under a valid union-shop agreement.

However, the Board has held that this does not prohibit an employer from calling upon a union to supply employees, provided that "clearance" or "referral" from the union, or union membership, is not made a condition of hiring. Thus, in one case, the Board dismissed a charge of illegal discrimination made against a contractor who had no agreement with the union, but followed a practice of asking union job stewards on construction projects to refer qualified employees.<sup>58</sup> The Board held that this did not amount to a "policy" of illegal discrimination in favor of job applicants referred by the union. In this case, a union member who had been denied a referral card by the union was refused employment, but the Board found that the evidence indicated that the job was given to another employee on grounds that had nothing to do with union membership. In this case, the Board said:

That . . . the Respondent company made use of the Respondent Union's "employment agency" facilities, and actually hired, on most occasions, such applicants as were referred to it by the Respondent Union, is not sufficient proof of the existence of the alleged "policy." Nor is such use by an employer of union employment facilities *per se* indicative of hiring practices restraining or interfering with rights guaranteed employees under the Act.

In an earlier case, a majority of the Board upheld the legality of a contract clause which required the employer to notify the union of vacancies and required the union, *when requested*, to supply personnel within 2 or 3 days.<sup>59</sup> However, in the same case, the Board found that the employer and union had engaged in illegal discrimination by discharging a union member who had been unable to obtain a referral card from the union. Likewise, in another case, where the employer and union had an identical contract clause, the Board found a violation of 8 (a) (3) because the employer actually followed the discriminatory practice of requiring job applicants to obtain clearance from the union.<sup>60</sup> In another case, involving charges only against a union, the Board upheld the legality of a contract proposal which would have required the employers to secure all employees from a union hiring hall which was to operate without discrimination between union members

<sup>57</sup> See also discussion of invalid union-security clauses in representation cases, subchapter B, section 1, of chapter IV

<sup>58</sup> *Missouri Boiler and Sheet Iron Works*, 93 NLRB 319

<sup>59</sup> *American Pipe and Steel Corp.*, 93 NLRB 54. Members Houston and Reynolds dissented on the grounds that the terms of the contract were ambiguous and that evidence on actual practice indicated that the employer and union actually interpreted and applied the contract provision in a discriminatory manner. Member Murdock dissented from finding of illegal discrimination in the discharge of the union member.

<sup>60</sup> *Consolidated Western Steel Corp.*, 94 NLRB No. 212.

and nonmembers.<sup>61</sup> Preference was to be given to persons then employed by the employers and to those having seniority through employment during the preceding 2 years, but the employers were to retain the ultimate right to accept or reject any employee.

In a representation case,<sup>62</sup> the Board held unlawful a contract clause which provided:

It is understood that in hiring to fill all vacancies or new positions, the Employer will, under this Agreement, choose his own source of new employees, providing, however, such persons employed are satisfactory to both parties of this Agreement.

The majority held that, in view of the past practices of the employer and union in requiring new employees to join the union, it could be expected that this clause would permit the union to veto nonmembers as "unsatisfactory."

Union-security clauses were declared illegal in a number of unfair practice cases because they exceeded the extent to which union membership may be required under section 8 (a) (3).<sup>63</sup> In two cases,<sup>64</sup> the Board held illegal clauses which provided:

The employer shall have the optional right to hire men, either direct or through the representative of the union, provided such men are members of the union.

The Board also continued to hold the application of a discriminatory hiring policy to be a violation, regardless of whether it was established that there was any oral or written agreement between the employer and the union.<sup>65</sup> Moreover, the Board held that the discrimination under such a policy is continuing, and the mere fact that no jobs are available at the time of an illegal refusal to hire does not preclude a finding of actual discrimination.<sup>66</sup> In this case, the Board issued an order for back pay dating from the time that jobs became available, even though the employees who were refused employment did not reapply. The Board said:

By imposing such an unlawful condition, the complainants [employees who were members of another union] were discriminatorily denied an opportunity to be considered for employment by the Respondents. This method of discrimination is of a continuing nature and quite obviously precluded their actual employment when jobs became available shortly thereafter. In these circumstances, where further applications for employment would have been futile, it is settled that the complainants were not required to continue making the useless gesture of reapplying in order to establish that they were victims of the Respondents' discriminatory hiring policy.

<sup>61</sup> *National Union of Marine Cooks and Stewards (Pacific American Shipowners Association)*, 90 NLRB 1099, Member Reynolds dissenting on the ground that the provisions of the contract proposal were inherently discriminatory despite "window dressing" language to the contrary.

<sup>62</sup> *Newton Investigation Bureau*, 93 NLRB 1574, Chairman Herzog dissenting.

<sup>63</sup> *Examples. Carpenter & Skaer, Inc.*, 93 NLRB 188; *New York State Employers Association*, cited above; *Sterling Furniture Co.*, 94 NLRB No. 20

<sup>64</sup> *William W. Kimmins & Sons*, 92 NLRB 98; *Carpenter & Skaer, Inc.*, cited above.

<sup>65</sup> *R. B. Guerin & Co.*, 92 NLRB 1698.

<sup>66</sup> *Swinerton and Walberg Co.*, 94 NLRB No. 152.

Under lawful union-security agreements, employers were found in violation by discharging employees at the behest of unions, where the employer had reasonable grounds for believing that union membership had not been made available to the discharged employees on the same terms and conditions generally applicable to other members, or that the employees had been denied membership, or their memberships terminated, for reasons other than the failure to tender the uniformly required dues or initiation fees.<sup>67</sup> Thus, in one case, the Board held that an employer could not justify its discharge of an employee for failure to pay his dues, under a valid union shop, when the company regularly checked off from the employee's earnings and paid over to the union sums sufficient to pay all the employee's periodic dues.<sup>68</sup>

However, an employer was exonerated of illegal discrimination in the discharge of an employee who failed to pay his dues on time under a valid union-shop contract.<sup>69</sup> Nor did the fact that the employee offered to pay up his delinquent dues before he was actually expelled from union membership protect him from discharge, the Board majority ruled.

Also, in one case, when an employee failed to pay his union dues under a valid union-shop agreement, the employer and union reduced his seniority ranking rather than discharge him, as they could have legally done.<sup>70</sup> Thereafter, the employee paid up his back dues. But, as a result of his reduction in seniority, he was later laid off in a plant-wide reduction in force. The Board unanimously held that there was no violation. Pointing out that at the time of the employee's delinquency in dues he could have been discharged, but he was assessed the lesser penalty of loss of seniority, the Board said, "this leniency on the part of the union cannot reasonably be said to have detracted from the otherwise meritable position of either the union or the employer."

The Board, in the same case, unanimously upheld the legality of a union-shop agreement which required that employees must maintain membership "in good standing."<sup>71</sup> On this point, the Board declared that "the substantial alterations made by the amendments [of 1947] limit the *grounds* on which good-standing membership must be lost in order to legalize discrimination, but do not change the *kind* of membership that must be lost."

<sup>67</sup> *Electric Auto Lite Co.*, 92 NLRB 1073; *Ferro Stamping and Mfg. Co.*, 93 NLRB 1459.

<sup>68</sup> *The Electric Auto Lite Co.*, cited above, Member Styles dissenting from majority holding that extra charge to members who did not attend meetings was a fine rather than an increase in dues.

<sup>69</sup> *Chisholm Ryder Co.*, 94 NLRB No. 76, Member Murdock dissenting.

<sup>70</sup> *Firestone Tire & Rubber Co.*, 93 NLRB 981.

<sup>71</sup> *Firestone Tire & Rubber Co.*, cited above.

## f. Rights of Supervisors Under Amended Act

The Board had occasion in two cases during the 1951 fiscal year to pass on the rights of supervisors under the amended act, which excludes them from the definition of the term "employees" whose activities are protected by the act.

In one case, the Board ruled that the discharge of a supervisory setup man because of his activities as a member of a union of rank-and-file employees did not violate the act.<sup>72</sup>

The other case involved an employee who had been promoted recently to supervisor after working 20 years for the company as a nonsupervisory employee.<sup>73</sup> Shortly after his promotion, the rank-and-file employees struck. The supervisor refused to perform rank-and-file production work because of his past participation in the union, and he was discharged. He then reinstated his union membership and actively participated in the strike and picketing. When the strike ended, he sought reemployment as a supervisor. Upon being refused a supervisory job because of his union activities, he applied for *any* job with the employer. His application for nonsupervisory work also was refused.

The Board ruled unanimously that his discharge for refusing to perform production work during the strike was lawful. But a majority of the Board held that the employer's refusal to hire him as a nonsupervisory employee was illegal discrimination in violation of section 8 (a) (3). The majority ruled that, when he applied for work after the strike, he was no longer a supervisor but an employee entitled to full protection of the act, and therefore refusal to hire him because of his past union activities was illegal. Moreover, the majority held, membership of employees in the rank-and-file union was "palpably discouraged when Cody [the former supervisor], entitled to the protection of the act, was refused employment solely because he had, in the past, made common cause, in a manner which was not unlawful, with protected concerted activity by the rank-and-file union."

Discussing the status of supervisors under the amended act, the majority pointed that, while the act as amended in 1947 removed the affirmative protection of the act from the concerted activities of supervisors, it did not make such activities illegal.

<sup>72</sup> *Accurate Threaded Products Co.*, 90 NLRB 1364

<sup>73</sup> *The Texas Co.*, 93 NLRB 1358, Members Reynolds and Murdock dissenting. The majority distinguished this case from *Pandera Sucionon Alonso*, 87 NLRB 877 (Chairman Herzog and Member Houston dissenting), where the Board held that the discharge of a supervisor for activities on behalf of a union of agricultural employees, who also are not protected, did not violate the act because there were no protected activities involved.

See also fifth paragraph of subsection b, above, *Forms of Discrimination*, and subsection g of section 1, above, pp. 150 and 165

#### 4. Discrimination for Filing Charges or Testifying

Section 8 (a) (4) makes it an unfair labor practice for an employer to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under the act. During the past year, the Board decided 10 cases involving this section, compared with only 3 in the previous year, and found violations in 6 of these 10 cases.

In one case, the Board declared:

. . . We have consistently held that a refusal to reinstate or reemploy a laid-off employee because he has filed charges with the Board constitutes a violation of Section 8 (a) (4) and 8 (a) (1) of the Act. We have also held that such a refusal is violative of the Act even though the employer believes that the charges are false or the ultimate proof does not sustain their validity. . . .<sup>74</sup>

In one 8 (a) (4) case, the employer was found to have clearly advised a laid-off employee that she would not be reemployed unless, among other things, charges previously filed with the Board in connection with her layoff were withdrawn.<sup>75</sup> Since "she was thus placed in a class apart from the other applicants for reemployment . . . subject to more onerous conditions," the employer's conduct was unlawful under section 8 (a) (4).<sup>76</sup> In other cases in which violations of this section were found, the employers' discriminatory conduct included: The transfer of a worker to a less desirable position.<sup>77</sup> Selection of a union member for discharge in an alleged reduction in force and the eviction of this same employee from his company-owned house several days after his discharge.<sup>78</sup> Refusal to rehire in a nonsupervisory capacity a union adherent who had testified in a Board proceeding prior to his discharge from a supervisory position.<sup>79</sup>

On the other hand, no violation was found in the discharge of an employee 2 weeks after his testimony in a Board proceeding, where he was not otherwise active on his union's behalf and he had in fact been guilty of misconduct on the job.<sup>80</sup> In this case, the employer did not engage in any antiunion conduct after the events giving rise to the Board case in which the employee had testified, and two other employee witnesses were not discharged.

<sup>74</sup> *Waterman Industries, Inc.*, 91 NLRB 1041. (This was a section 8 (a) (3) proceeding.)

<sup>75</sup> *Kanamak Mills, Inc.*, 93 NLRB 490.

<sup>76</sup> See also *Consolidated Frame Co.*, 91 NLRB 1295, *Majestic Metal Specialties, Inc.*, 92 NLRB 1854 (refusal to reinstate until Board proceeding was terminated)

<sup>77</sup> *South Jersey Coach Lines*, 92 NLRB 791.

<sup>78</sup> *W. T. Carter and Brother*, 90 NLRB 2020.

<sup>79</sup> *John Hancock Mutual Life Insurance Co.*, 92 NLRB 122, Member Reynolds dissenting on the facts

<sup>80</sup> *Mission Oil Co.*, 93 NLRB 1215. Other cases in which no 8 (a) (4) violation was found included *U. S. Gypsum Co.*, 90 NLRB 964, *El Mundo, Inc.*, 92 NLRB 724, *Augusta Bedding Co.*, 93 NLRB 211.

## 5. Refusal to Bargain in Good Faith

The act requires that an employer bargain in good faith with the representative selected by a majority of employees in a unit appropriate for collective bargaining. Section 8 (a) (5) makes it an unfair labor practice for an employer to refuse to do so.

### a. Majority Status

To prove a violation of Section 8 (a) (5) of the act, it must be established first that the charging union represented an uncoerced majority of the employees in an appropriate unit.<sup>81</sup>

Usually a union's majority status and the appropriateness of the unit is established in a representation proceeding, culminating in a certification by the Board or its regional director.<sup>82</sup>

When such a certification is relied upon to show majority status and appropriateness of unit in a case of alleged refusal to bargain, the Board does not permit relitigation of the issues decided in the prior representation proceeding.<sup>83</sup>

Except under extraordinary circumstances, a union's representative status once established by Board certification, is conclusively presumed to continue for a reasonable period of time. Customarily, this is a period of 1 year after certification and indefinitely thereafter until such status is shown to have ceased.<sup>84</sup>

An employer's duty to bargain with such certified representative prevails during this period despite a loss, alleged or real, of the union's majority status.<sup>85</sup> Nor, during this period, does an employer's good-faith doubt justify questioning the union's majority status.<sup>86</sup> This rule stems from the policy of the act to reduce industrial strife "by encouraging the practice and procedure of collective bargaining."<sup>87</sup> From experience, the Board has found, that a period of at least a year

<sup>81</sup> See *Lerner Shops of Alabama, Inc.*, 91 NLRB 151, where the employer's refusal to bargain was held not unlawful, since some of the authorization cards on which the union based its claim of majority status had been secured by threats, and the union therefore did not represent an uncoerced majority of the employees in the unit. See also section D of chapter IV for a discussion of what constitutes an appropriate unit.

<sup>82</sup> In making majority determinations, the Board does not rely on the results of union-authorization elections; *United States Gypsum Co.*, 90 NLRB 964.

<sup>83</sup> *American Finishing Co.*, 90 NLRB 1786.

<sup>84</sup> *United States Gypsum Co.*, 90 NLRB 964; *Jersey City Welding & Machine Works, Inc.*, 92 NLRB 510. Thus, the presumption of a certified union's continuing majority status was not rebutted by the following circumstances: High labor turnover; poor attendance at union meetings; changes in union offices and committees; decrease in payment of union dues, small number of grievances, *United States Gypsum Co.*, cited above. See also *West Fork Cut Glass*, 90 NLRB 944; *Southern Block and Pipe Corp.*, 90 NLRB 590. In *West Fork Cut Glass*, the Board reiterated that "the Board and the courts have consistently held that a certification is binding despite a clear attempt by the employees to repudiate the union."

<sup>85</sup> *West Fork Cut Glass.*, cited above.

<sup>86</sup> *Jersey City Welding & Machine Works, Inc.*, cited above. In *West Fork Cut Glass Co.*, cited above, the Board stated, "Indeed, the Board has held that the mere raising of the question of a union's majority status as a condition precedent to bargaining within the certification year amounts to a violation of Section 8 (a) (5) of the Act."

<sup>87</sup> Section 1, see appendix C.

is needed to assure employees, through their newly certified representative, an opportunity to establish a functioning collective bargaining relationship.<sup>88</sup>

The Board also continues to hold that, under no circumstances, may an employer question the properly established majority status where any defection in membership is attributable to the employer's own unfair labor practices.<sup>89</sup> Thus, the Board held that certain resignations from a union were inoperative with respect to the union's continuing majority status, notwithstanding that the withdrawals involved were not directly solicited by the employer.<sup>90</sup> In this case, the Board held that while the particular withdrawals were not solicited directly by the employer, the employer's preceding interrogation and solicitation of other employees could not be so localized as to affect only the employees immediately involved. In another case, where the Board rejected the respondent employers' contention that no bargaining order should issue because of alleged schism within the union, the Board said:<sup>91</sup>

. . . the Board, with judicial approval, has held that the policies of the Act will best be effectuated by directing an employer to bargain with the representative of the employees, upon request, even though that representative, for whatever reason, may have lost its majority status *after* the employer's refusal to bargain. [Citations omitted.]

However, where the complaining union lost its majority status due to legitimate discharges, the employer's refusal to bargain was held not to violate the act.<sup>92</sup>

When a complaining union's majority status has not been certified in a prior Board representation proceeding or the continuation of its majority status is in doubt, the union's majority status at the time of the employer's alleged refusal to bargain is determined on the basis of the evidence presented in the complaint proceeding.<sup>93</sup> In making such determination, the Board does not rely solely on union membership, but may base its finding on various factors which indicate a union's majority or lack of it. Thus, the Board ruled in one case that suspended or delinquent members of a union may properly be counted in determining majority status, because the designation of a union as the bargaining representative is not dependent upon membership in that union, and the mere suspension of union members, or their failure to pay union dues, does not necessarily establish that

<sup>88</sup> See section C of chapter IV; Fifteenth Annual Report, p 74

<sup>89</sup> *Montgomery Ward & Co*, 90 NLRB 1244; *Southwestern Wholesale Grocery Co.*, 92 NLRB 1485, *Cherokee Hosiery Mills*, 93 NLRB 590, *Long Lewis Hardware Co*, 90 NLRB 1403, *Stedfast Rubber Co*, 91 NLRB 300

<sup>90</sup> *Tennessee Egg Co.*, 93 NLRB 846.

<sup>91</sup> *Metropolitan Life Insurance Co*, 91 NLRB 473. See also *Kelly A Scott*, 93 NLRB 654.

<sup>92</sup> *Jefferson Standard Broadcasting Co*, 94 NLRB No 227. The employees were held to have been lawfully discharged because they distributed handbills impugning the technical quality of their employer's product.

<sup>93</sup> *Editorial "El Imparcial," Inc*, 92 NLRB 1795.

such individuals no longer want the union to represent them in collective bargaining.<sup>94</sup> Similarly, the Board has held that signed union membership application blanks are sufficient to designate a union as bargaining representative.<sup>95</sup>

In another case, the Board based its majority finding on the fact that all but two of the employer's employees participated in a recognition strike and picketed the employer's properties in support of their strike.<sup>96</sup>

While an employer is under a statutory duty to bargain with the majority representative of employees, he may nevertheless, if acting in good faith, challenge the union's majority and demand that the union establish its majority status in a Board election. The Board, during the past fiscal year, restated the rule in the following terms:

An employer who, in good faith, doubts the majority status of the union which demands recognition as the bargaining representative of his employees, may lawfully insist that the union prove its majority in a Board-conducted election. But, if in insisting upon an election the employer is motivated, not by a bona-fide doubt as to the union's majority standing, but by a rejection of the collective bargaining principle or a desire to gain time in which to undermine the union, the demand for an election is no defense to a refusal to bargain charge, if the union did in fact represent a majority of employees in an appropriate unit at the time of the refusal to bargain. . . .<sup>97</sup>

Whether, in questioning the union's majority status, the respondent employer was in fact acting in good faith must be determined in each individual case and must be judged in the light of the employer's other conduct.<sup>98</sup> Thus, the Board has held that an employer's questioning of a union's majority status was not in good faith when the employer, despite the alleged doubt, failed to file its own petition for a Board election, although fully aware of the availability of such procedure.<sup>99</sup> Similarly an employer was held not to have entertained a good-faith doubt of the union's representative status, where the employer, in a letter to a State commission, showed knowledge that all his employees had joined the union and had gone out on strike.<sup>1</sup> In one case, where an employer in the midst of negotiations on renewal of a contract with a representative of long standing abruptly, and without explanation, questioned the union's majority status, the Board held that "the employer's good faith becomes suspect."<sup>2</sup>

In cases where an employer's alleged doubt of the union's majority

<sup>94</sup> *United States Gypsum Co.*, 90 NLRB 964; see also *New Jersey Carpet Mills, Inc.*, 92 NLRB 604.

<sup>95</sup> *Long-Lewis Hardware Co.*, 90 NLRB 1403, *New Jersey Carpet Mills, Inc.*, cited above.

<sup>96</sup> *Seven Up Bottling Company of Miami, Inc.*, 92 NLRB 1622.

<sup>97</sup> *New Jersey Carpet Mills, Inc.*, cited above.

<sup>98</sup> *New Jersey Carpet Mills, Inc.*, cited above.

<sup>99</sup> *Toolcraft Corp.*, 92 NLRB 655, *Heider Manufacturing Co.*, 91 NLRB 1185, *Southwestern Wholesale Grocery Co.*, 92 NLRB 1485.

<sup>1</sup> *New Jersey Carpet Mills, Inc.*, 92 NLRB 604

<sup>2</sup> *Heider Manufacturing Co.*, cited above.

status is accompanied, or immediately preceded, by other unfair labor practices on the part of the employer, the Board has invariably held that the challenge was not motivated by a good-faith doubt, but rather by a desire to avoid the statutory duty to bargain.<sup>3</sup> The Board applied this rule in a case where the Board, in a prior representation proceeding involving the same parties, had determined that a question of representation existed, and the union, despite its knowledge of the employer's unfair labor practices, proceeded to a Board election, which it lost.<sup>4</sup> The majority opinion found that the employer's alleged doubt of the union's majority status was not made in good faith, because it was accompanied by various unfair labor practices and the employer's refusal to bargain consequently violated section 8 (a) (5). The Board expressly rejected the contention that the union, by proceeding in the representation case, thereby waived its right to complain of the employer's prior unlawful conduct. The majority distinguished this case from those in which the Board applied the "waiver" principle,<sup>5</sup> by the fact that in those cases a bona fide question of representation existed and no question of the employer's prior good faith in challenging the union's majority status had been raised or litigated. In this case, on the other hand, the Board ruled that the employer's *original* challenge of the union's majority status had been made in bad faith. Hence no *genuine* question of representation was raised in the representation proceeding, and the election, therefore, must be regarded as a nullity from the beginning. The majority opinion said:

. . . to apply the waiver doctrine here, would require complete disregard of the Board's obligation to enforce the public policy against those refusals to bargain which are successful in inducing a union to file a petition—and in inducing the Board, in the representation proceeding, to find a question of representation—in the mistaken belief that a question of representation had in fact arisen. Here, the unfair labor practice which vitiated the election did not occur after a genuine question of representation had arisen, but was the very refusal to bargain which induced both the Union and the Board to conclude, albeit erroneously, that such a question had arisen, and which induced the filing of the petition. In such a situation the Board's statutory obligation to prevent refusals to bargain and to enforce the public policy enunciated by the Act is paramount. The Board cannot permit a possible waiver by a private party to overrule this policy. [Footnotes omitted.]

<sup>3</sup> *The Warren Co., Inc.*, 90 NLRB 689, *Cummer-Graham Co.*, 90 NLRB 722, *New Jersey Carpet Mills, Inc.*, cited above, *Southwestern Wholesale Grocery Co.*, cited above, *William A. Mosow*, 92 NLRB 1727; *Ken Rose Motors, Inc.*, 94 NLRB No. 141; *Sam Zall Milling Co.*, 94 NLRB No. 235, *Dismuke Tire and Rubber Co., Inc.*, 93 NLRB 479, *Radio Station KVEC*, 93 NLRB 618.

<sup>4</sup> *M. H. Davdson*, 94 NLRB No. 34, Member Murdock dissenting.

<sup>5</sup> See *Denton Sleeping Garment Mills, Inc.*, 93 NLRB 329 and cases cited there.

## b. The Request to Bargain

Although a union may enjoy majority status, the employer's obligation to bargain normally does not become operative until a specific request to bargain is made of him by the majority representative.<sup>6</sup>

The request to bargain need not be formal, nor does it have to be made in any particular manner. It is sufficient that the employer is clearly aware of the employee's desire to enter into bargaining negotiations through their designated bargaining agent. Thus, the Board has held that a union's letter accusing an employer of unfair labor practices, and threatening a recognition strike unless the employer agreed to a consent election or met with the union by a certain date to negotiate a contract, was an unequivocal request for bargaining. The employer's failure to reply was found a violation of section 8 (a) (5).<sup>7</sup> In another case, following an impasse in bargaining, the union notified the employer that it was temporarily suspending its strike action in favor of exploring the possibility of settling the labor dispute by arbitration.<sup>8</sup> The Board held this to be a renewed request to reopen negotiations, thus ending the privileges the employer might otherwise have possessed in an impasse situation. The Board also found in another case that the union's representation of its recognition demand to a foreman, who was the only company representative then located at the plant, was properly addressed and hence a valid bargaining request.<sup>9</sup> But the Board has held no bargaining request was implied by a union representative's remarks, made during a chance meeting with the employer's attorney on the street near the plant, to the effect that it was too bad that the union and the employer had been unable to get together, but that they should be able to do so under the auspices of the State Conciliation Service.<sup>10</sup>

However, a request of a union for a meeting to deal with a matter outside the scope of bargaining required by the act does not constitute a request to bargain. Thus, the Board found no refusal to bargain in an employer's failure to meet with the union within a reasonable time after the union requested a meeting, when the union's only purpose in making this request was to negotiate some kind of settlement of certain unfair labor practice charges that had been filed against the employer.<sup>11</sup> Finding that such request did not constitute an adequate bargaining request, the Board said:

This is not to imply that the Board discourages voluntary settlement of unfair

<sup>6</sup> *Long-Lewis Hardware Co.*, 90 NLRB 1403. See also *West Fork Cut Glass Co.*, 90 NLRB 944, where the Board held that the employer's original refusal to bargain occurred on the day he replied to the union's bargaining demand and not on the day the union made its demand.

<sup>7</sup> *Intertown Corp. (Michigan)*, 90 NLRB 1145.

<sup>8</sup> *Central Metallic Casket Co.*, 91 NLRB 572.

<sup>9</sup> *Somerset Classics, Inc.*, 90 NLRB 1676.

<sup>10</sup> *Old Town Shoe Co.*, 91 NLRB 240.

<sup>11</sup> *Jefferson Standard Broadcasting Co.*, 94 NLRB No. 227.

labor practice charges. . . . But Section 8 (a) (5) does not require an employer to enter into negotiations with a union for the sole purpose of settling unfair practice charges if the employer prefers to test the legality of his conduct by a Board decision.

Although normally a prior request to bargain is a condition precedent to finding an 8 (a) (5) violation, a union's failure to make a bargaining request may, under certain circumstances, not constitute a defense to an employer's refusal to bargain. Thus, in one case, a union's failure to request resumption of negotiations after a strike began was held no defense for the employer to a charge of refusal to bargain.<sup>12</sup> In this case, the employer publicly stated it would not bargain on anything during the strike, and the Board held that a request by the union thereafter would have been only a futile gesture.

### c. Extent of the Duty to Bargain

Outright refusals to meet with the representative of a majority of employees for negotiations continue to occur,<sup>13</sup> but alleged violations of section 8 (a) (5) more often take the form of a refusal to discuss or negotiate a particular matter.

Consequently, the Board often has to determine in such cases whether or not the subjects on which the employees' representative seeks to deal actually come within the area of bargaining required by the act. In other cases, the Board must determine whether or not a bargainable matter was raised at an appropriate time.

The filing of unfair labor practice charges does not relieve an employer of the continuing duty to bargain.<sup>14</sup> Neither does a union's resort to a lawful strike.<sup>15</sup> On this point, the Board said in one case:

. . . the duty to bargain is not suspended during a lawful strike; indeed, the fulfilment of the obligation to bargain becomes doubly important during a strike.<sup>16</sup>

A strike in violation of a valid no-strike agreement suspends the employer's duty to bargain only during continuation of the strike.<sup>17</sup> Upon voluntary termination of the strike and the strikers' return to work, the duty to bargain revives. However, the Board held that an oral statement of a union official to an employer representative that the union "contemplated no action" for a week did not consti-

<sup>12</sup> *Old Town Shoe Co*, cited above.

<sup>13</sup> *Somerville Buick, Inc*, 93 NLRB 1603, *Station KDRO*, 93 NLRB 1440, *Consolidated Frame Co*, 91 NLRB 1295, *Atlanta Broadcasting Co*, 90 NLRB 808, *Long-Lewis Hardware Co*, 90 NLRB 1403, *Star Beef Co*, 92 NLRB 1018, *Atlas Life Insurance Co*, 94 NLRB No 103

Section 8 (d) of the act requires an employer and the representative of a majority of employees in appropriate unit "to meet at reasonable times and confer in good faith" regarding the subjects on which bargaining is required, and to put any agreement reached into a written and signed contract.

<sup>14</sup> *Atlanta Broadcasting Co*, 90 NLRB 137; *Old Town Shoe Co.*, 91 NLRB 240

<sup>15</sup> *Atlanta Broadcasting Co*, cited above, *West Fork Cut Glass Co*, 90 NLRB 944.

<sup>16</sup> *Old Town Shoe Co*, cited above

<sup>17</sup> *Higgins, Inc.*, 90 NLRB 184; see Fifteenth Annual Report, p 122.

tute a no-strike agreement.<sup>18</sup> Before the week was out, the union struck to compel recognition and to protest the employer's discrimination against union members. The Board said in this case:

Self-denial of the right to strike guaranteed by the Act cannot be lightly presumed. Moreover, it is the very essence of a no-strike agreement that it substitute, completely and unreservedly, collective bargaining in place of strike and lockout. Here, the Union's reply . . . was, by its very language, far short of a definite promise to refrain from strike action.

However, in a case where the employer's operations were of a highly integrated nature, and the union conducted intermittent work stoppages to force employees to join the union before a maintenance-of-membership clause in a newly negotiated contract took effect, a majority of the Board held that the employer did not illegally refuse to bargain by shutting down the plant, revoking its agreement to the proposed contract, and insisting that the union sign a no-strike contract containing an escape clause which would permit employees who joined during the strikes to resign from the union.<sup>19</sup> On the employer's insistence on the escape provision, the majority said:

We are . . . unwilling to treat the inclusion of this demand by the Employer as not justified under the circumstances, or as a violation of the Act. There is nothing to show that this was demanded in a spirit of retaliation; there is much to show considerable foundation for the Employer's belief that such a clause was necessary to nullify coercive conduct engaged in by the Union in its membership drive. The record reveals that in the course of its membership drive, which the union president himself testified was "kinda warm" union agents engaged in conduct which at the least may be said to have bordered upon a violation of Section 8 (b) of the Act. Apart from the instances of such conduct detailed in the record, it appears that the General Counsel issued a complaint on charges of violations of Section 8 (b) (1) (A) by the Union. Although the Union filed an answer denying such violations, it signed a settlement stipulation wherein it agreed to cease and desist from restraining and coercing employees, on which a Board Order issued April 6, 1950. If the Employer was to join the Union in compelling membership by a maintenance of membership provision, we believe that the course of events after agreement was reached on a contract on June 10 warranted the Employer's insistence on an escape clause to ensure that the membership thus to be maintained was actually a free and not a coerced membership.

We hold, therefore, that under the special circumstances of this case, the Employer was justified in instituting and continuing a temporary lockout of its employees until the Union signed the contract, and that it did not violate Section 8 (a) (3) or 8 (a) (5) of the Act in so doing.

\* \* \* \* \*

. . . we are not here confronted with and need not pass upon the right of an employer in ordinary circumstances to lay off employees pending negotiation of a complete contract.

<sup>18</sup> *Consolidated Frame Co.*, cited above

<sup>19</sup> *International Shoe Co.*, 93 NLRB 907, Member Murdock concurring separately, Members Houston and Styles dissenting.

(1) *Subject Matter of Bargaining*

The act requires that an employer must meet with the representative designated by a majority of employees to negotiate "with respect to wages, hours, and other terms and conditions of employment."<sup>20</sup> In a number of cases each year, the Board is called upon to determine whether or not a particular subject falls within this area of mandatory bargaining.

In one case during the past fiscal year, the Board reaffirmed its prior ruling that group insurance plans and amendments to such plans are subjects on which bargaining is required.<sup>21</sup>

In another case, where low-rental houses were furnished by the employer admittedly to attract and maintain a full work force, the Board held that the employer was required to bargain on this subject, and found his refusal a violation of 8 (a) (5).<sup>22</sup> Similarly, in another case, the Board held that an employer was under a duty to bargain about the leasing of company-owned houses in which a number of employees lived.<sup>23</sup> In this case, the employer cited the low rentals of the houses as among benefits granted employees, without union representation, in a letter circulated by management just before a representation election. In the letter, the employer told employees who occupied the houses, "your saving in house rent alone makes your actual wages thirty to forty dollars per month *more* than the total of your two semimonthly pay checks."

The question of whether merit pay raises for individual employees are a subject on which bargaining is required arose again in one case during the 1951 fiscal year.<sup>24</sup> Reaffirming its long-established rule that "merit increases are as much a part of the wage structure as basic rates of pay,"<sup>25</sup> the Board ordered the employer to bargain on such increases. The employer had contended that, while some merit increases were bargainable, those for editorial personnel receiving more than the top minimum salary provided by the collective bargaining contract were not, because they could not be determined by

<sup>20</sup> Section 8 (d).

<sup>21</sup> *The Standard Oil Co*, 92 NLRB 227.

<sup>22</sup> *Hart Cotton Mills*, 91 NLRB 728, enforcement denied on the ground that the issue of housing had "disappeared from the bargaining field as a practical matter" in the controversy over other points, which the court found was conducted in good faith. No. 6262, decided July 31, 1951. (C. A. 4). But the court said: ". . . the Company's contention that company houses are not a proper subject of negotiation with a union representing the employees cannot be sustained as a general proposition. In many mills such houses are a necessary part of the enterprise and in this instance they were maintained by the employer and rented at such rates to the employees as to represent a substantial part of their remuneration. It follows that the subject is one in which the employees have so great an interest in connection with their work that it should be a subject of bargaining between the employer and the representatives of the men."

<sup>23</sup> *Elgin Standard Brick Mfg. Co*, 90 NLRB 1467.

<sup>24</sup> *E. W. Scripps Co.*, 94 NLRB No 55.

<sup>25</sup> See *J. H. Allison & Co*, 70 NLRB 377 (1946), enforced (1948) 165 F. 2d 766 (C. A. 6), certiorari denied 335 U. S. 814, rehearing denied 335 U. S. 905.

objective standards but only upon the basis of "opinion formed by management." The Board rejected this distinction, saying:

That, in the opinion of the Respondent [employer], acceptable objective standards for awarding merit increases to its editorial employees may be difficult or perhaps impossible to achieve, does not relieve it of its statutory duty to bargain on the subject. Perhaps the problem may not be as impossible of solution by negotiation as the Respondent now seems to think. In any event, it is under a statutory duty to seek such a solution.

In another case, the Board held that a wage incentive payment plan and the addition of such an incentive plan to the wage structure are subjects on which bargaining is required.<sup>26</sup>

## (2) *Bargaining During Contract Term and Waiver*

With the growth of collective bargaining, the question of the extent of the continuing duty to bargain during the term of a contract has come into greater prominence, along with the twin question of whether or not the parties to a particular contract have waived the right to bargain on particular matter during the contract's term.

In one 1951 case, the Board—by a divided vote—expressed the following views on the statutory duty to bargain during the life of an existing contract:<sup>27</sup>

1. The contract parties are *required* to bargain on any mandatory subject of bargaining, whenever raised, if the issue is in no way treated in the existing contract and was never negotiated during discussion leading up to the contract.<sup>28</sup>

2. The parties are *not required* to bargain on any revived mandatory subject, even though it is in no way treated in the written contract, if it was advanced and fully discussed as part of the negotiations leading up to the existing contract.<sup>29</sup>

In this case, the Board held (1) that the employer was required to bargain about a pension plan, which had neither been discussed in negotiations nor mentioned in the existing contract, but (2) that the employer was not required to bargain about group insurance, which had been explored in negotiations before the execution of the agreement.<sup>30</sup>

But the fact that the parties are not required to bargain upon an issue during the contract term, does not give one of the parties the right to establish a proposed modification of the contract unilaterally.

<sup>26</sup> *John W. Bolton & Sons, Inc.*, 91 NLRB 989.

<sup>27</sup> *The Jacobs Manufacturing Co.*, 94 NLRB No. 175. See Fifteenth Annual Report, pp 122-124

<sup>28</sup> Member Reynolds dissenting on this point, Member Murdock dissenting on a ground limited to the facts in this case.

<sup>29</sup> Members Houston and Styles dissenting on this point, which was specifically maintained in the opinion of Chairman Herzog.

<sup>30</sup> Majorities composed of different Board Members reached these two results by differing rationales.

Thus, the Board found that an employer violated section 8 (a) (5) by establishing a wage incentive plan after the employees' representative lawfully declined to negotiate on such a plan during the contract term.<sup>31</sup>

On the question of whether the employee representative in a current contract has waived the right to negotiate on a particular subject, the Board has long taken the position that:

We are reluctant to deprive employees of any of the rights guaranteed them by the Act in the absence of a clear and unmistakable showing of a waiver of such rights.<sup>32</sup>

Applying this principle, the Board declined to limit its investigation to the terms of the contract, in determining whether or not bargaining on merit raises had been waived by the carry-over of an identical clause from contracts under which the union admittedly gave the employer the right to make such increases unilaterally.<sup>33</sup> In this case, the Board held that the Trial Examiner properly admitted parole evidence to determine whether or not the union intended to waive bargaining on such increases. The Board adopted the trial examiner's finding that there had been no waiver. In this case, the Board said:

We are dealing with a right that derives from statute and not from contract. Although the Board has held that a union may waive certain statutory rights by genuine collective bargaining, it has also said that such a waiver will not readily be inferred. . . . There is no "clear and unmistakable" showing in this case that the Union intended to waive its right to bargain about merit increases. On the contrary, as found by the Trial Examiner, both the Union and the Respondent [employer] understood that the signing of the 1950 contract was without prejudice to the litigation of the merit increase issue before this Board. The parole evidence rule does not require nullification of this understanding.

Similarly, in another case, the Board declined to hold that a union's failure to use the grievance procedure of an existing contract in connection with the employer's refusal to bargain on amendments to a group insurance plan deprived it of the right to seek a remedy before the Board.<sup>34</sup>

### (3) *The 60-Day Notice Period*

Section 8 (d) of the amended act provides certain procedures to be followed by a party to a collective bargaining agreement who desires to terminate or modify the contract. Among these procedures is a requirement that the party desiring modification or termination give 60 days' notice to the other party, during which time there is to be no strike or lockout or unilateral modification of the contract terms.

<sup>31</sup> *John W. Bolton & Sons, Inc.*, 91 NLRB 989. In this case, the Board ordered the employer to revoke the new incentive plan and return to the prior method of paying employees.

<sup>32</sup> *Tide Water Associated Oil Co.*, 85 NLRB 1096 (1949).

<sup>33</sup> *E. W. Scripps Co.*, 94 NLRB No. 55.

<sup>34</sup> *The Standard Oil Co.*, 92 NLRB 227.

The Board has held that this 60-day period is computed from the receipt of actual notice by the party to be notified, counting the day of receipt as the first day.<sup>35</sup> Thus, the Board held that a strike called on the sixty-first day after the employer had received the notice was protected by the act. In another case, the Board held that a strike occurring upon the completion of a work shift ending at midnight of the sixtieth day also was protected.<sup>36</sup>

In another case, where notice of termination was given by the union, the Board declined to hold that an employer who failed also to give notice under 8 (d) had violated 8 (a) (5), by failing thereafter, to continue an agreement with the union in effect after its expiration date.<sup>37</sup> The Board said:

. . . Section 8 (d) was designed to provide a cooling-off period during which a labor organization is forbidden to strike to enforce its demands to modify or terminate a contract. As there was no strike in this case, Section 8 (d) is inapplicable.

#### (4) Effect of Impasse in Bargaining

The amended act provides that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession." Consequently, an employer and the representative of employees may bargain sincerely in good faith to a deadlock or impasse on one or more major issues, thereby making final agreement at least momentarily impossible.

The Board has said:<sup>38</sup>

. . . ordinarily a good-faith bargaining impasse connotes the futility of further negotiations and, in the case of the employer-party of the collective relation leaves that employer free to take certain economic steps not dependent upon the mutual consent of the union.<sup>39</sup>

The existence of a bargaining impasse does not destroy either the authority of the representative to act within the sphere of its representation nor the right of the employees to seek by collective action (which may take the form of either further negotiation or concerted application of economic pressures) to persuade the employer to accept the collective position of the group as to the particular terms which shall govern the employment relation. Accordingly, as we have frequently held, a bargaining impasse does not relieve an employer from the continuing duty to take no action which the employees may interpret as a "disparagement of the collective bargaining process"<sup>40</sup> or which amounts in fact to a withdrawal of recognition of the union's representative status or to an undermining of its authority.

<sup>35</sup> *Ohio Oil Co.*, 91 NLRB 759.

<sup>36</sup> *Standard Oil Co. of California*, 91 NLRB 783

<sup>37</sup> *U. S. Gypsum Co.*, 90 NLRB 964, footnote, 11 at p. 968.

<sup>38</sup> *Central Metallic Casket Co.*, 91 NLRB 572.

<sup>39</sup> Here the Board cited *J. I. Case Co. v. N. L. R. B.*, 321 U. S. 332 and *W. W. Cross, Inc.*, 77 NLRB 1162 and cases cited therein.

<sup>40</sup> Here the Board cited *N. L. R. B. v. Crompton-Highland Mills, Inc.*, 337 U. S. 217, where an employer was found in violation solely by instituting, after allegedly reaching an impasse, a wage increase larger than he had offered the union in bargaining.

The Board found that such good-faith impasses were reached in three cases. In one such case, a majority held that an impasse was reached on the issue of union security, and the parties "did not bargain further because each realized that neither would surrender nor be able to persuade the other to abandon its position."<sup>41</sup> In another case, the Board found that a genuine impasse was reached, after 2 months' bargaining, on the issue of a wage increase.<sup>42</sup> The union in this case did not seek to bargain on other issues. But here, the Board held, the employer illegally refused to bargain after the union called a strike over the wage issue. The Board said:

It is well settled that, although an impasse in negotiations has once been reached, a strike effects a sufficient change of circumstances to break the impasse. This is so even where, as here, the union broke off negotiations and did not affirmatively indicate, when it sought to reopen negotiations, that it would recede from any of its previous demands.

In another case, the Board stated that, even assuming that the employer and union had reached an impasse, such impasse was broken when the union indicated that it had new arguments to offer.<sup>43</sup>

The third case where a bona fide impasse was found involved a union bargaining with two associations.<sup>44</sup> The Board held that existence of an impasse in bargaining with the associations justified the union in seeking to bargain with the employers individually, when it did not seek to cause the individual employers to repudiate the association as their bargaining representative.

#### d. Unilateral Action

When an employer is aware of the existence of a properly designated bargaining representative, he may not deal directly or indirectly with his employees,<sup>45</sup> nor unilaterally make changes in the employees' terms or conditions of employment, without first giving the representative an opportunity to bargain collectively. Thus the Board has held that an employer's unilateral announcement of a wage cut the day after an election demonstrated bad faith.<sup>46</sup> Similarly, a reduction in piece rates without prior consultation with the collective bargaining representative of the employees was held *per se* violative of section 8 (a) (5).<sup>47</sup> In another case, an employer's attempt to advise employees individually to come to the office if they wanted wage increases was held to constitute a refusal to bargain.<sup>48</sup> Other

<sup>41</sup> *Collins Baking Co*, 90 NLRB 895, Member Styles dissenting.

<sup>42</sup> *West Fork Cut Glass Co*, 90 NLRB 944.

<sup>43</sup> *The Jacobs Manufacturing Co*, 94 NLRB No. 175.

<sup>44</sup> *Morand Brothers Beverage Co*, 91 NLRB 409.

<sup>45</sup> *General Metallic Casket Co*, 91 NLRB 572.

<sup>46</sup> *Standard Generator Company of Missouri, Inc*, 90 NLRB 790, *The Stillely Co*, 94 NLRB No. 138.

<sup>47</sup> *Atlanta Metallic Co*, 91 NLRB 1225.

<sup>48</sup> *Star Beef Co.*, 92 NLRB 1018.

unilateral actions on part of an employer which were found to be violative of section 8 (a) (5) involved such conduct as making gifts and promises to individual employees,<sup>49</sup> granting wage increases while negotiations with the union were still pending,<sup>50</sup> and the announcement of a wage increase and institution of a new job evaluation plan approximately 5 days after the complex proposal, which had required many months of preparation by the employer, had been submitted to the union.<sup>51</sup>

Under certain circumstances, however, an employer's unilateral action may be justified. Thus, the Board stated in one case that ordinarily a good-faith bargaining impasse leaves the employer "free to take certain economic steps not dependent upon the mutual consent of the union," but it does not relieve him from "the continuing duty to take no action which the employees may interpret as a 'disparagement of the collective bargaining process' or which amounts in fact to a withdrawal of the union's representative status or to an undermining of its authority."<sup>52</sup> However, in this case, the Board found that, even assuming an impasse in negotiations with the union had been reached, the employer nevertheless violated section 8 (a) (5) by such actions as: (1) Holding *individual* conferences with three employee-members of the bargaining committee; (2) denying the request that a union agent be present during such conferences; (3) attempting to obtain one employee's active support and promulgation of a bonus plan rejected by the union; and (4) discharging all three employees when they refused to sign individual commitments to the bonus plan without being afforded a prior opportunity to discuss the matter with their union.

In the *Montgomery Ward* case, although finding that the employer's other conduct constituted a refusal to bargain, the Board did not adopt the trial examiner's finding that the employer violated the act by unilaterally putting into effect, after the union's strike action, certain wage rates previously offered to the union where the union had been given advance notice.<sup>53</sup>

<sup>49</sup> *Intertown Corporation*, 90 NLRB 1145.

<sup>50</sup> *Montgomery Ward & Co.*, 90 NLRB 1244; *Intertown Corporation*, cited above; *Grant Co.*, 94 NLRB No. 145.

<sup>51</sup> *Montgomery Ward & Co.*, 90 NLRB 1244.

<sup>52</sup> *Central Metallic Casket Co.*, cited above.

<sup>53</sup> *Montgomery Ward & Co.*, cited above.

### e. Demands for Illegal Contract Provisions

An employer may not insist, as a condition of signing a collective bargaining agreement, that the union surrender any rights guaranteed by the act.<sup>54</sup>

While reaffirming this principle in one case, the Board also pointed out that a union may waive such a right through genuine collective bargaining.<sup>55</sup> The facts giving rise to the controversy in this case were as follows: An existing contract between the union and the employer provided for "workmen's committees" consisting of five employees each, which were to handle all grievances after such grievances had been processed by the complaining employee with his foreman. The parties were in agreement that such a contract provision, as a matter of construction in language, meant that the union was entitled to bargain as to grievances only through members of the respective workmen's committees. As a matter of practice, the employer had on occasion permitted persons other than members of the workmen's committees to attend grievance meetings, but always with the express reservation that such permission was granted as a matter of courtesy and not as of right. The complaint in this case alleged that the employer refused to bargain collectively by objecting to the presence of certain union officials, who were not members of a workmen's committee, during three separate grievance meetings. The Board rejected a trial examiner's findings that the contract provision was in derogation of the union's statutory right to be present at the adjustment of grievances and thus did not justify the employer's action. The Board said:

While a union may not be compelled to bargain as to giving up its right to negotiate grievances through any class it desires, we see no reason why a union may not waive that right through genuine collective bargaining, if it so chooses. . . .

Finding that such a situation prevailed in the instant case, the Board ruled that the employer was justified in its refusal to proceed with the grievance negotiations while nonmembers of the workmen's committee remained on the scene. The Board observed further:

Such a holding does not derogate from the principles of collective bargaining. For, in the first instance, the union is not required to bargain with respect to waiving or restricting its right to be represented by any specific class, regardless of an employer's insistence. But here the union, either voluntarily or because it yielded to the normal persuasion attendant upon good-faith collective bargaining

<sup>54</sup> *Gay Paret Undergarment Co.*, 91 NLRB 1363, in which the Board found that an employer's insistence upon having a contractual right to discharge strikers "whether for union activity or not" constituted *per se* a violation of section 8 (a) (5).

Similarly the Board holds a union's insistence upon an illegal contract provision to be an unlawful refusal to bargain, in violation of 8 (b) (3).

<sup>55</sup> *Shell Oil Co.*, 93 NLRB 161.

. . . willingly bargained with respect to the subject matter in question, and agreed to the restriction pursuant to the ordinary give and take of good-faith bargaining. For us to hold that an employer under these circumstances violates the Act by insisting that the union honor its contractual obligations would make a mockery of the collective bargaining in which the parties in good faith engaged.

The Board distinguished this situation from that in the *Bethlehem Steel* case.<sup>56</sup> In this case, it was a question only of the legality of an agreement as to the composition of the union group authorized to be present at the adjustment of a grievance, while in the *Bethlehem* case, the employer sought to bar the union from being present at the adjustment of grievances of individual employees. In that case, the Board held that the act guaranteed the union the right to be present.

### f. Refusal to Furnish Information

An employer's duty to bargain also includes the obligation to furnish the bargaining representative with sufficient information to enable the union to bargain intelligently and to understand and discuss the issues raised by the employer in opposition to the union's demands.<sup>57</sup> The extent and nature of such information depends upon the bargaining which takes place in any particular case. Thus, in the *Southern Saddlery* case, an employer who maintained the intransigent position that he was financially unable to raise wages, but at the same time, refused to furnish the union with sufficient information which would support or justify his position, was held to have "erected an insurmountable barrier to successful conclusion of the bargaining" and thereby violated section 8 (a) (5).

In another case, the Board applied this principle to a situation where the union took the position that it could not accept the employer's "mere statement" that he was in no position to pay a wage increase, and requested information on "incoming and outgoing orders" as well as for a general look at the company's books to find out its general financial position.<sup>58</sup> While holding that the employer's refusal to disclose *any* information amounted to a refusal to bargain, the Board did not rule upon the union's request for a look at the employer's books. The Board stated:

. . . we are not called upon to determine whether the union was entitled to all of the information it requested. It suffices that the Respondent [employer] adamantly insisted that it need go no further in bargaining over a wage increase than to express its inability to grant the wage increase the Union had sought, and that it refused to disclose any record information whatever to substantiate its position.

<sup>56</sup> *Bethlehem Steel Co.*, 89 NLRB 341.

<sup>57</sup> *E. W. Scripps Co.*, 94 NLRB No. 55; *Southern Saddlery Co.*, 90 NLRB 1205; see also *Yawman & Erbe Mfg. Co.*, 89 NLRB 881 (1950), enforced 187 F. 2d 947, discussed p. 264.

<sup>58</sup> *Jacobs Manufacturing Co.*, 94 NLRB No. 175.

The Board, in another case,<sup>59</sup> based a finding of a refusal to bargain, among other factors, on the following incidents: (1) The employer's denial on numerous occasions of the union's request for the names and merit ratings of employees, despite the union's justifiable assertion that such information was essential to enable it to bargain and to handle grievances intelligently; (2) the delay in furnishing the union a comprehensive written description of the employer's complicated wage plan, although such information was available at the time of the union's original request; and (3) the withholding of production standards utilized in the determination of merit ratings, which were requested by the union.

### g. Good Faith in Bargaining

The act requires that employer and union alike bargain in good faith, with a sincere intent to reach agreement.<sup>60</sup> The Board has stated:

Mere participation in meetings with the Union and protestations of willingness to bargain do not alone fulfill the requirements of Section 8 (a) (5) and 8 (d) of the Act, for these are only the surface indicia of bargaining. Bargaining in good faith is a duty on both sides to enter into discussions with an open and fair mind and a sincere purpose to find a basis for agreement touching wages and hours and conditions of labor.<sup>61</sup>

This, however, does not require either party to make any concessions.<sup>62</sup>

In determining whether an employer has bargained in good faith, the Board will examine the employer's conduct "as a whole" for a clear indication of bad faith, and usually will not rely upon any one factor as conclusive evidence that the employer did not genuinely try to reach an agreement.<sup>63</sup> Applying this test, the Board found in several cases that the required good faith was lacking.

The Board held in one case that the employer's conduct of (1) a sudden and unexplained shift in its bargaining position; (2) demanding a "much shorter contract" after several months of negotiations; (3) announcing its unwillingness to sign a contract with the union; (4) demanding radical changes at the eleventh hour in the negotiations, evidenced by the absence of a sincere intention on the part of the employer to reach an agreement.<sup>64</sup> In another case, the Board based its findings of bad faith on the employer's (1) failure to invest sufficient authority in the employer's negotiator; (2) insistence that the union's

<sup>59</sup> *Montgomery Ward & Co.*, 90 NLRB 1244.

<sup>60</sup> *Atlanta Broadcasting Co.*, 90 NLRB 808, *Gay Paret Undergarment Co.*, 91 NLRB 1363, *Montgomery Ward & Co.*, 90 NLRB 1244. For discussion of refusal to bargain on the part of a union, see section B 4 of this chapter.

<sup>61</sup> *Southern Saddlery Co.*, 90 NLRB 1205.

<sup>62</sup> *Montgomery Ward & Co.*, cited above.

<sup>63</sup> *Southern Saddlery Co.*, cited above; *Standard Generator Service Co of Missouri, Inc.*, 90 NLRB 790.

<sup>64</sup> *Atlanta Broadcasting Co.*, cited above.

parent federation be made a signatory to the contract; (3) conditioning a proposed wage increase upon the union's withdrawal of unfair practice charges; and (4) insistence on the inclusion in the contract of a provision for a performance bond by the union.<sup>65</sup>

A majority held in one case that the employer's insistence on a "settlement" clause, purporting to settle all differences between the parties, as a condition precedent to the execution of a contract was evidence of the absence of good faith.<sup>66</sup> Although a preceding contract contained a similar clause, the majority reasoned that the employer's insistence on such a clause evidenced his bad faith because the employer was aware of the fact that the union intended to file certain unfair labor practice charges. The employer's insistence on the settlement clause, therefore, became in effect an insistence that the union abandon its unfair labor practice charges in order to obtain an agreement. In the same case, the majority found a lack of good faith was shown by the employer's insistence that certain seniority and other provisions, which had been included in the prior contract, be omitted in a renewal in order to permit discharge of a number of union adherents.<sup>67</sup> After the discharges, the employer was willing to agree that these provisions be retained.

In another case, the Board affirmed a trial examiner's ruling that an employer had not made a good faith effort to reach agreement on a new contract, where (1) its chief negotiator showed considerable personal pique as the result of a prior dispute with the union; (2) the employer completely reversed its position on certain issues several times during the negotiations; (3) at the final meetings, just before the expiration of the old contract, the employer introduced new issues despite the parties' agreement on these matters in past contracts, and raised certain objections for the first time; and (4) after the inception of a strike, the employer publicly offered individual strikers better employment conditions than those offered to the union.<sup>68</sup>

Under some circumstances, an employer's failure to offer any counterproposal during negotiations may be indicative of a lack of good faith in bargaining.<sup>69</sup> Thus, the Board held that where the union is willing to consider any counterproposal the employer might make, even one which would do no more than embody current wages and working conditions, and the employer fails to make any proposal, such conduct is "indicative of complete unwillingness to provide any basis for discussion leading to possible agreement."<sup>70</sup> Similarly, the making of a

<sup>65</sup> *Standard Generator Service Co of Missouri, Inc*, cited above.

<sup>66</sup> *Heider Manufacturing Co.*, 91 NLRB 1185, Chairman Herzog dissenting.

<sup>67</sup> Here the Board cited *Register Publishing Co.*, 44 NLRB 834.

<sup>68</sup> *Hart Cotton Mills*, 91 NLRB 728.

<sup>69</sup> *Gay Parez Undergarment Co.*, cited above.

<sup>70</sup> *Crow-Burlingame Co*, 94 NLRB No. 146.

patently unacceptable counteroffer may be indicative of a lack of good faith.<sup>71</sup> However, a counterproposal is not indispensable to good faith bargaining when, from the discussions, it is apparent that what one party would offer is wholly unacceptable to the other and that a counterproposal would be an obviously futile gesture.<sup>72</sup>

#### **h. Bargaining With Noncomplying Union**

During the 1951 fiscal year, the Board had occasion to reconsider the question of whether an employer is required to bargain with an incumbent union which has not yet qualified to bring cases before the Board by filing non-Communist affidavits for each of its officers. A Board majority overruled an earlier decision<sup>73</sup> and held that the employer's refusal to bargain with an incumbent union which was not yet in compliance at the time of the bargaining request, but which complied long before issuance of the complaint, violated section 8 (a) (5),<sup>74</sup> when the employer's refusal was not based upon the union's noncompliance but upon other, and unlawful, grounds.<sup>75</sup>

## **B. Unfair Labor Practices of Unions**

The types of conduct by labor organizations which the amended act forbids as unfair labor practices are listed in subsection (b) of section 8. This section also prohibits agents of labor organizations from engaging in such practices. It does not place any prohibitions upon individual employees except when they act as agents of a labor organization. However, an individual loses his status as an employee if he engages in a strike before the expiration of the 60-day waiting period required by section 8 (d).

In general, a labor organization like an employer is required to bargain in good faith whenever it is the representative of a majority of employees in a group appropriate for bargaining.<sup>1</sup> Also, the act

<sup>71</sup> *Elgin Standard Brick Mfg Co*, 90 NLRB 1467.

<sup>72</sup> *Southern Saddlery Co*, cited above.

<sup>73</sup> *The Andrews Co*, 87 NLRB 379. In this case, a Board majority laid down the rule that an employer was not legally obligated to bargain with a union while it was not in compliance with the provisions of section (f), (g), and (h), and that the union's subsequent compliance did not cure the effect of its noncompliance at the time of the request to bargain so as to permit a subsequent 8 (a) (5) finding from the Board.

<sup>74</sup> *New Jersey Carpet Mills*, 92 NLRB 604, Members Reynolds and Murdock dissenting.

<sup>75</sup> Chairman Herzog, in the *New Jersey Carpet* case, proposed further that a refusal to bargain with a non-complying union should not be considered a violation, if the employer notifies the union at the time of the refusal to bargain that its demonstrated noncompliance is the reason for the employer's refusal to negotiate. This principle would effectuate the congressional policy of encouraging compliance with the affidavit requirements of section 9 (h), he declared. The other members of the majority (Members Houston and Styles) declined to pass on this matter, on the ground that it was not before the Board in this case.

<sup>1</sup> Sec. 8 (b) (3).

forbids a labor organization from restraining or coercing employees in the exercise of their right to engage in concerted activities directed toward self-organization or collective bargaining, or their right to refrain from such activities except under a valid union shop.<sup>2</sup> In section 8 (a), the act outlaws the closed shop and employment practices which give preference on the basis of union membership or lack of it, except under a valid union shop. In section 8 (b), a labor organization is forbidden "to cause or attempt to cause" an employer to engage in such discriminatory employment practices.<sup>3</sup>

Another major provision of this section forbids a union from inducing or encouraging employees of a neutral employer to engage in a secondary strike or boycott where an object is to compel the neutral employer to cease doing business with another employer.<sup>4</sup> The act also forbids a union from encouraging such a secondary strike or boycott for the purpose of compelling an employer to recognize a union which has not been certified by the Board as bargaining representative.<sup>5</sup> Another provision of section 8 (b) (4) prohibits a union from inducing employees to strike to compel their employer to recognize one union as their bargaining agent when the Board has certified another union.<sup>6</sup> Jurisdictional strikes in connection with disputes between unions over the assignment of work also are forbidden by this subsection.<sup>7</sup>

The Board's rulings on these and other unfair labor practice provisions applicable to labor organizations or their agents are discussed in the following sections of this chapter.

## 1. Restraint or Coercion of Employees

Section 8 (b) (1) (A) makes it an unfair labor practice for a labor organization or its agents "to restrain or coerce employees in the exercise of the rights guaranteed in section 7." Section 7 guarantees employees the right to engage in concerted activities directed toward self-organization or collective bargaining and also the right to refrain from such activities except under a lawful union shop.

In construing these provisions during the past year, the Board held that they prohibit only conduct directed against "employees" and do not reach coercion of self-employed persons.<sup>8</sup> Moreover, the Board held in the same case, any pressure exerted against employees in order to be in conflict with section 8 (b) (1) (A) must be direct. The

<sup>2</sup> Sec. 8 (b) (1) (A).

<sup>3</sup> Sec. 8 (b) (2).

<sup>4</sup> Sec. 8 (b) (4) (A).

<sup>5</sup> Sec. 8 (b) (4) (B).

<sup>6</sup> Sec. 8 (b) (4) (C).

<sup>7</sup> Sec. 8 (b) (4) (D).

<sup>8</sup> *United Construction Workers et al. (Kanawha Coal Operators' Ass'n)*, 94 NLRB No. 236 (self-employed truck drivers).

Board, therefore, disagreed with the conclusions of a trial examiner that an unsuccessful attempt to force an employer to join the respondent union violated section 8 (b) (1) (A) because, had the employer joined the union, his employees also might have been compelled to join to retain their jobs. In the Board's view, any pressure which may have resulted from this possibility was not sufficiently direct to justify a finding that section 8 (b) (1) (A) was violated.

In another case, the Board reaffirmed its prior interpretation of the meaning of the terms "restrain or coerce," stating that:

Section 8 (b) (1) (A) was intended to eliminate physical violence, intimidation, and threats of economic action against employees. Where the union's conduct involved violence, threats thereof, or related conduct, or where the union had obtained or was attempting to obtain economic discrimination against particular employees,<sup>9</sup> we have found such conduct proscribed by Section 8 (b) (1) (A).

The Board held that none of these elements was present where a minority union exerted economic pressure in order to force the employer to adjust grievances in the absence of the certified representative.

#### a. Violence and Threats of Reprisals

Coercion and restraint of employees which violate this subsection occur at times in connection with picket-line activities intended to compel employees to support a current strike.

While peaceful picketing in substantial numbers has been held not to be coercive,<sup>9a</sup> violence and acts of intimidation in connection with picketing are unlawful. The Board so held in a case in which a district organization of the United Mine Workers Union sought to enforce a 3-day workweek for a period.<sup>10</sup> In this case, 400 to 500 members of the district appeared in automobiles at a mine employing only 12 or 14 workers. The union men parked their cars so as to block the road to the mine completely, and then proceeded *en masse* to the middle of the property, where a district representative stated the union's demand that the mine operate only 3 days a week. Upon the closing of the mine, the representative threatened to return with twice as many men if the 3-day week was not observed. During the discussions, a mine employee was chased off the premises and a rock was thrown through the window of a truck operated by another employee.

Under similar circumstances, in another case, the Board adopted a trial examiner's conclusion that section 8 (b) (1) (A) was violated in the mass invasion and seizure of mines by some 2,000 union men for

<sup>9</sup> *Smelter Workers Local 586 and Miami Copper Co.*, 92 NLRB 322

<sup>9a</sup> See Fifteenth Annual Report, p. 127, Fourteenth Annual Report, p. 82.

<sup>10</sup> *UMW District 81 (Butner Fuel Co.)*, 92 NLRB 953.

the purpose of enforcing a 3-day week.<sup>11</sup> Actual physical violence, threats of "violence and property damage," and the "rounding up" and taking into custody of employees occurred in this case.

A violation of section 8 (b) (1) (A) was found also where an employee was deprived of his right to refrain from joining a labor organization by the refusal of pickets to permit him to unload his truck because it did not have a sticker indicating union membership.<sup>12</sup>

### b. Threat of Loss of Employment

In one case decided during this fiscal year, a majority of the Board held for the first time that the mere execution of an illegal union-security agreement, such as a closed-shop contract, coerces and restrains employees in violation of section 8 (b) (1) (A).<sup>13</sup> The Board held that the making of such a contract carries an actual and immediate threat of loss of employment to employees who desire to refrain from joining the union. The making of such an agreement on the part of a union was held to have the same effect as a campaign threat that in the event of the union's success, employees would lose their jobs, or that such loss would result if the employees did not join the union.<sup>14</sup> The majority distinguished the situation from the one with which it was confronted in the *National Maritime Union* case,<sup>15</sup> where the union's strike action was intended to, but did not, result in the execution of a closed-shop contract by the employer so that there the right of the employees to refrain from union membership was not impaired.

Later, the Board applied the doctrine to a situation involving the publication of a contract containing an illegal discriminatory clause, as well as protracted delay in publicizing a change in the contract in which the clause had been included by the mutual mistake of the parties.<sup>16</sup> In finding that the union had violated section 8 (b) (1) (A), the Board said in this case:

Just as publication of the July 19 contract in its discriminatory form carried an apparent threat of economic action by the Respondent Company against non-members of the AFL, it carried a similar threat by the Respondent Union, the other party to the contract. And in like fashion, the Respondent Union, as the

<sup>11</sup> *UMW District 23 (West Kentucky Coal Co)*, 92 NLRB 916. Member Reynolds dissented from the majority's dismissal of charge leveled specifically at the district president, he also would have broadened the remedial order to reimburse employees for earnings lost during observance of 3-day week.

<sup>12</sup> *United Construction Workers*, 94 NLRB No. 236.

<sup>13</sup> *New York State Employers Ass'n, Inc*, 93 NLRB 42 (Member Reynolds dissented on the grounds stated in *Clara-Val Packing Co*, 87 NLRB 703, decided during the preceding year) Accord *Restaurant Employees Local 43 and Childs Co*, 93 NLRB 156, *Retail Clerks Local 770 and Vaughn Bowen*, 93 NLRB 1033, *Rockaway News Supply Co*, 94 NLRB No. 156, *Fur Workers Local 50 and Prntz Leather Co*, 94 NLRB No. 209

<sup>14</sup> See *Smith Cabinet Manufacturing Co, Inc.*, 81 NLRB 886, *Seamprufe, Inc*, 82 NLRB 892, enforced 186 F. 2d 671 (C. A. 10, January 2, 1951).

<sup>15</sup> 78 NLRB 971.

<sup>16</sup> *Monolith Portland Cement Co.*, 94 NLRB No. 211 Members Reynolds and Murdock dissenting on other points.

other party to the contract, inexcusably permitted this threat to continue for 6 months after it knew that it had made such a threat. In our opinion, an apparent threat of economic action by a union, which is contained, as here, in a negligently promulgated and perpetuated misrepresentation as to the terms of a contract, is no less coercive than an actual threat of economic action that is contained in a true contract.

It is correct, as pointed out by the Trial Examiner, that the Respondent Company alone handled the publication of the contract, but the Respondent Union, as the other contracting party, was equally responsible for the inclusion of the discriminatory clause in the contract; it knew of, and apparently raised no objection to, the publication of the contract; and it should, therefore, be held equally responsible for any unlawful consequences that flowed from the publication. And clearly, of course, the Respondent Union is responsible for any unlawful consequences which flowed from *its* delay in publicizing the correction of the discriminatory clause.

### c. Discrimination

Violations of section 8 (b) (1) (A) frequently take the form of union conduct which is intended to bring about the discriminatory treatment of an employee by the employer. While "to cause or attempt to cause" such discrimination is specifically proscribed by section 8 (b) (2) of the act, the Board generally finds that such conduct also constitutes unlawful coercion and restraint when it is calculated to force employees to acquire or maintain union membership, or to participate in concerted action when they may not be required legally to do so.

The cases in which the Board during the past year found such violations of section 8 (b) (1) (A) often involved situations in which unions sought to enforce membership requirements in the absence of union-security agreements or under illegal union-security provisions. Thus, where no union-security agreement was in existence, a union was held to have engaged in unlawful coercion by calling a work stoppage in protest against the continued employment of a dues-delinquent member, thereby causing the employer to discharge him and to refuse his later request for reinstatement.<sup>17</sup> Similarly, the discharge of a ship's purser, who was not covered by the union's contract with the employer, was held to have been unlawfully caused by the union, which had advised the employer that its members would not sign articles and would refuse to sail on any ship employing the purser who was not in good standing with the union.<sup>18</sup> In another case, a union was held to have violated section 8 (b) (1) (A) by causing the employer to discharge a dissident union member as a condition to the termination of a pending strike and to the execution of a contract.<sup>19</sup>

<sup>17</sup> *Vegetable Workers Local 78 and Pappas and Co.*, 94 NLRB No 189

<sup>18</sup> *Marine Cooks and Stewards (Burns Steamship Co.)*, 92 NLRB 877. Member Murdock dissenting in other respects.

<sup>19</sup> *Textile Workers Local 169 and Acme Mattress Co.*, 91 NLRB 1010.

Nor was a union which unlawfully caused a reduction in seniority of a dues-delinquent member in another case exculpated by the employer's failure actively to oppose the reduction in his seniority.<sup>20</sup>

The Board, during the past year, had occasion to point out that discrimination caused by a union for the purpose of compelling obedience to union rules, no less than discrimination designed to combat dual unionism, falls within the prohibitions of section 8 (b) (2) and 8 (b) (1) (A) of the act. Thus, violations of these sections were found where the discrimination was intended to prevent an employee from circumventing the union's job rotation principle;<sup>21</sup> and where unions caused the discharge of employees who refused to cooperate in a concerted effort to limit production,<sup>22</sup> or employees who circulated a petition in protest against the union's method of selecting a shop steward.<sup>23</sup>

One type of unlawful discrimination against employees which has often confronted the Board is the enforcement of illegal preferential hiring practices. Thus, section 8 (b) (2) and 8 (b) (1) (A) both were held violated where a union forced employers to engage in discriminatory hiring practices by actual and threatened strike action and slowdowns, and by threatening a "hiring foreman" with disciplinary action and causing the employer to fire him for refusing to discriminate in favor of union members.<sup>24</sup> The fact that the employer voluntarily cooperated in the application of discriminatory hiring practices did not excuse the union causing it. Thus, the Board found an 8 (b) (1) (A) violation when a hiring hall arrangement between a maritime association and a longshoremen's union resulted in the refusal of an association employer-member to give employment to longshoremen whom the hiring hall did not "dispatch" because of their expulsion from the union.<sup>25</sup> The arrangement in this case obligated the employer to obtain all longshore personnel from the "hall," so that the employees concerned could not have secured work directly from the employer.

Similarly, when a union successfully demanded that an employer discharge or suspend employees who had not been cleared through the union's hiring hall, where clearance could be obtained only by members of the union, the Board found that employees were unlawfully coerced and restrained.<sup>26</sup> In another case, where the union had successfully requested hiring foremen to give preference to union

<sup>20</sup> *Teamsters Local 41 (Byers Transportation Co)*, 94 NLRB No 214

<sup>21</sup> *Radio Officers Union (Bull Steamship Co)*, 93 NLRB 1523

<sup>22</sup> *Fur Workers Local 50 and Printz Leather Co*, 94 NLRB No 209

<sup>23</sup> *Air Products, Inc*, 91 NLRB 1381

<sup>24</sup> *Newspaper and Mail Deliverers' Union*, 93 NLRB 237

<sup>25</sup> *Longshoremen's Local 10 (Pacific Maritime Ass'n)*, 94 NLRB No 159.

<sup>26</sup> *Boilermakers Local 92 and American Pipe and Steel Corp*, 93 NLRB 54. Member Murdock, dissenting, was of the opinion that under the circumstances the union's conduct did not violate section 8 (b) (2)

See also *Hod Carriers Local 36 and George W Reed*, 94 NLRB No. 109, *Boilermakers Local 6 and Consolidated Western Steel Corp.*, 94 NLRB No. 212.

members, the Board rejected a contention that the union's conduct could not restrain and coerce employees, because the conduct was directed to the employer and no employees had been threatened with violence or economic reprisals or otherwise induced to join the union.<sup>27</sup> The Board said:

By causing the employers to pursue preferential hiring practices, the Respondent Union obtained actual economic reprisal against nonmembers and members who had lapsed from good standing, effectively restraining such employees in their guaranteed right, under Section 7, to refrain from joining or assisting labor organizations in the absence of an agreement validly conditioning employment upon membership in the Union, and thereby violated Section 8 (b) (1) (A).

The Board continued to hold that the application of illegal union-security provisions coerces and restrains employees in the exercise of their right to join or refrain from joining unions. Some such cases decided during the 1951 fiscal year involved the discharge of employees who had failed to acquire or maintain membership in good standing and had been suspended or expelled from the union.<sup>28</sup> In other cases, the employees to whom the union had denied membership were refused employment or were transferred to less remunerative jobs.<sup>29</sup>

In one case, the Board was confronted for the first time with the question whether a union's unsuccessful attempt to cause the discharge of an employee constitutes restraint and coercion within the meaning of section 8 (b) (1) (A).<sup>30</sup> A majority of the Board held that conduct which is primarily designed to bring about discrimination against specific employees is prohibited by that section, even though it does not succeed.

#### d. Union Rules on Membership

A proviso to section 8 (b) (1) (A) preserves "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

Application of this proviso was involved in two cases. In one case, the question was whether a union could properly increase its initiation fees in advance of the effective date of a union-shop agreement, and could warn employees to join the union within a certain time before that date in order to avoid the proposed increase.<sup>31</sup> The Board

<sup>27</sup> *Longshoremen's Local 1291 and Jarca Corp.*, 94 NLRB No 54

See also *Radio Officers Union (Bull Steamship Co.)*, 93 NLRB 1523

<sup>28</sup> *Hardware Union Local 1146 and Carlyle Rubber Co., Inc.*, 92 NLRB 385, *UAW, Local 12 and Electric Auto-Lite Co.*, 92 NLRB 1073, *UAW Local 1291 (Wisconsin Axle Div.)*, 92 NLRB 968, *Restaurant Employees Local 42 and Childs Co.*, 93 NLRB 281; *Kingston Cake Co and Kingston Mutual Assn.*, 91 NLRB 447

<sup>29</sup> *Asbestos Workers Local 7 (Brower & Co.)*, 92 NLRB 755, *Operating Engineers Local 101 and Peerless Quarries*, 92 NLRB 1194.

<sup>30</sup> *UAW Local 291 (Wisconsin Axle Div.)*, 92 NLRB 968 Member Reynolds dissented on the grounds stated in the *Clara-Val Packing Co.*, 87 NLRB 703

<sup>31</sup> *UAW Local 753 and Ferro Stamping and Mfg Co.*, 93 NLRB 1459

concluded that, because the union was privileged by section 8 (b) (1) (A) to increase its initiation fee, it was likewise privileged to warn employees of the impending increase. But, in the second case, the Board pointed out that the proviso does not protect union rules which result in discriminatory hiring practices.<sup>32</sup>

## 2. Restraint or Coercion of Employer in Choice of Bargaining Agent

Section 8 (b) (1) (B) of the act makes it an unfair practice for a labor organization or its agents "to restrain or coerce \* \* \* an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."

The question of whether union conduct violated the prohibitions of section 8 (b) (1) (B) arose in only one case.<sup>33</sup> The violation was alleged not as an unfair labor practice charge under that section, but as an employer's defense to charges of illegal discrimination in the discharges of certain employees whose union called a strike against only one employer in a multiemployer bargaining unit. The employer contended that the discharges were privileged because of the employees' alleged participation in conduct which violated section 8 (b) (1) (B).

In this case, collective bargaining negotiations with the union had been conducted through the representatives of an association of which the employer was a member. After collapse of negotiations with the association representatives, the union called a strike at only one employer's plant, and the next day invited the employer to negotiate a separate contract. The employer contended that the union's conduct was intended to compel it to bargain directly with the union rather than through its designated representative, and therefore coerced the employer in the selection of its bargaining representative in violation of section 8 (b) (1) (B).<sup>34</sup>

A majority of the Board held that section 8 (b) (1) (B) would have been violated if any of the association members involved had been coerced "to designate as its agent to deal with the Local for a particular purpose, a representative other than the one already selected." Applying this test, the Board found no violation of 8 (b) (1) (B) by the union, because it was not shown either that the employer had designated the association as his representative for separate bargain-

<sup>32</sup> *Boilermakers Local 6 and Consolidated Western Steel Corp*, 94 NLRB No. 212

<sup>33</sup> *Morand Brothers Beverage Co*, 91 NLRB 409, Member Reynolds dissenting, enforced in this respect and remanded in other respects, July 23, 1951, 190 F 2d 576 (C A. 7).

<sup>34</sup> The employer also contended that the union's conduct constituted an unlawful refusal to bargain within the meaning of Section 8 (b) (3). This contention also was rejected.

ing or that the association negotiators were unacceptable to the union.<sup>35</sup> The Board found that the union resorted to the strike and issued the invitation for separate bargaining only to obtain a satisfactory contract. "Such an invitation does not *per se* constitute restraint or coercion," the majority declared.

The majority also rejected the contention that the union violated section 8 (b) (1) (B) merely by seeking separate bargaining rather than joint bargaining. The Board held that this was "an appropriate attempt to engage in collective bargaining" which was not inconsistent with the individual employers retaining membership in the association nor with the resumption of association-wide bargaining at an appropriate time. The Board found that the construction of 8 (b) (1) (B) sought by the employer would preclude a union from seeking to enter into separate negotiations, in lieu of joint negotiations, even after joint negotiations had collapsed. The Board said:

. . . Such a view is inconsistent with the basic policy of the Act to encourage the practice and procedure of collective bargaining, as it would prevent the parties to a labor dispute from exhausting the possibilities of settling their dispute *by collective bargaining rather than economic attrition*. . . .

### 3. Causing or Attempting to Cause Illegal Discrimination

Section 8 (b) (2) forbids a union or its agents "to cause or attempt to cause" an employer to discriminate against employees in terms or conditions of employment, to encourage or discourage membership in a labor organization. However, this section permits a union to obtain the discharge of an employee who fails to tender the union initiation fees and dues uniformly required under a legal union-shop agreement.

The types of discrimination which a union is forbidden to cause are not limited to discharges for nonmembership in the union, but may include all types of discrimination in which an employer is forbidden to engage. Thus, in one case, a union was found to have violated section 8 (b) (2) when it caused an employer, as completion of a project neared, to discharge members of a subordinate local before discharging members of the parent local.<sup>36</sup> The Board also found an 8 (b) (2) violation when an employee was caused to resign his job involuntarily after the union had called a work stoppage to compel him to make up a delinquency in his dues.<sup>37</sup>

<sup>35</sup> Chairman Herzog did not join in this portion of the majority's rationale.

<sup>36</sup> *Sub Grade Engineering Co.*, 93 NLRB 406, Member Murdock dissenting on another point.

<sup>37</sup> *Pappas & Co.*, 94 NLRB No. 189.

### a. What Constitutes "Causing"

Where actual discrimination against an employee has occurred and a violation of 8 (b) (2) is alleged, the Board must determine whether or not it was in fact caused by the respondent union. However, it is not necessary that the union resort to economic force or threats to be held responsible for causing illegal discrimination. A majority of the Board held in one case that a union's request for the illegal discharge of employees violated this section, where the union was in a position to back up its request with economic action and where the request resulted in actual discrimination.<sup>38</sup> In this case, the union was the source of the employer's labor supply and possessed "potential power to deprive the employer of its labor market." The majority rejected the contention that this request, which was not accompanied by any threat of strike or economic action, was merely "persuasion" protected by section 8 (c), the "free speech" provision. Under these circumstances, the Board held, the union's request was the cause of the illegal discharges. The Board distinguished this case from two prior cases where mere requests for illegal discrimination were held protected by 8 (c), because no actual discrimination resulted in those cases.<sup>39</sup>

An illegal union-security agreement also may be the basis for a finding that a union caused illegal discrimination. When a union makes such an agreement with the intent that it shall be enforced, the Board has ruled, the union must be deemed to have caused any discrimination against specific employees that results from application of the contract.<sup>40</sup> Discrimination was found also to have been caused by the union in a case where the union arranged with the employer for discharge of a dissident union member as a condition to the execution of a contract and termination of a current strike.<sup>41</sup>

A union also was found to have caused the discharge of a ship's purser when the discharge followed the employer's discovery that stewards who were members of the union had been instructed not to sign ship's articles until the purser was dismissed.<sup>42</sup> In another case, where an employee was refused clearance for employment by the union, although he was in fact a member in good standing as required by the union's preferential hiring agreement, a majority of the Board ruled that the union's refusal to issue the clearance illegally caused the

<sup>38</sup> *Sub Grade Engineering Co.*, 93 NLRB 406, Member Murdock dissenting on this point. See also *W. Hawley & Co.*, 93 NLRB 1126.

<sup>39</sup> The two prior cases are: *Denver Building and Construction Trades Council (Henry Shore)*, 90 NLRB 1768, and *International Longshoremen's and Warehousemen's Union (Juneau Spruce)*, 90 NLRB 1753.

<sup>40</sup> *Childs Co.*, 93 NLRB 281.

<sup>41</sup> *Acme Mattress Co.*, 91 NLRB 1010, enforced 192 F. 2d 524 (C. A. 7).

<sup>42</sup> *Burns Steamship Co.*, 92 NLRB 877, Member Murdock dissenting in part.

employee's failure to obtain employment.<sup>43</sup> In one case during the past year, the Board applied the doctrine that a union, whose last request for the illegal discharge of an employee was made before the effective date of the amended Act, will be held to have caused the subsequent discharge of the employee if the union's conduct after that date shows it intended the original request to remain operative.<sup>44</sup>

In several other cases, the Board held that the evidence did not establish that the respondent unions had caused the illegal discrimination.<sup>45</sup> In one case, the Board declined to infer, from the union's admitted hostility to an employee because of his activity on behalf of a rival union, that the union had caused his discharge when there was no evidence establishing a direct connection between the union and the discharge.<sup>46</sup> The Board also rejected a trial examiner's inference in another case that a union had caused an employer to give preference to union members by supplying the employer with a copy of the union's trade rules, which provided for such preference.<sup>47</sup> In another case, a majority of the Board concluded that a hiring proposal made in connection with other strike demands, which explicitly was to be administered without discrimination, did not violate section 8 (b) (2). However, the Board found that the hiring hall provisions ultimately adopted by the parties were discriminatory both inherently and in their enforcement.<sup>48</sup>

### b. "Attempts" to Cause Discrimination

Section 8 (b) (2) prohibits a union not only from actually causing employers to discriminate against employees, but also from attempting to do so.

In two cases in which it was found that unions attempted to cause employers to discriminate unlawfully in favor of their members by actual and threatened picketing, the Board was confronted with the question whether the picketing activities, which were peaceful, came within the protection of section 8 (c).<sup>49</sup> Concluding that picketing for

<sup>43</sup> *Bull Steamship Co*, 93 NLRB 1523, Member Murdock dissenting

<sup>44</sup> *Wisconsin Axle Division*, 92 NLRB 968 For statement of doctrine, see *Combustion Engineering Co*, Inc., 86 NLRB 1264.

<sup>45</sup> See *J. K. Paterson*, 90 NLRB 1851; *Queens-Premier-Dressing Corp*, 92 NLRB 42.

<sup>46</sup> *New York State Employers Association*, 93 NLRB 127.

<sup>47</sup> *The Kellogg Co*, 94 NLRB No 74.

<sup>48</sup> *Pacific American Shipowners Association*, 90 NLRB 1099 Member Reynolds dissented on the ground that the union's proposal, notwithstanding the provision for its nondiscriminatory application, was illegal and constituted an unlawful attempt to cause the employer to violate section 8 (a) (3)

<sup>49</sup> *Denver Building & Construction Trades Council (Henry Shore)*, 90 NLRB 1768, enforced 192 F. 2d. 577 (C. A. 10) and *International Longshoremen's and Warehousemen's Union, Local No 16 (Juneau Spruce)*, 90 NLRB 1753 Section 8 (c) provides that "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

purposes prohibited by section 8 (b) (2) is unlawful, the Board said:

. . . we are now satisfied that our position in the *Wadsworth* case, stated as broadly as we stated it there, was not correct, with respect to the status of picketing under Section 8 (c) of the amended Act. In that case, decided February 18, 1949, both the majority and the dissenting members of the Board assumed that peaceful picketing was necessarily an expression of "views, argument, or opinion" within the meaning of Section 8 (c). That assumption was based upon the Supreme Court's earlier decisions in *Thornhill v. Alabama* and related cases, in which peaceful picketing in a labor dispute was apparently assimilated to "free speech" for the purposes of the first and fourteenth amendments to the Constitution. More recently, however, in *Giboney v. Empire Storage and Ice Company*, decided April 4, 1949, and in three cases decided on May 8, 1950, the Supreme Court made it clear that the *Thornhill* doctrine is not so broad as we and others had supposed. In one of these recent decisions the Court held that a State may restrict picketing engaged in for the purpose of compelling an employer to agree to discriminate against nonmembers of the picketing union, contrary to the State's public policy. And the Court pointed out that picketing—even peaceful picketing—has aspects which are more than speech, and that it may therefore be restricted, at least where it is undertaken for an unlawful objective.

Of course, we are here determining the scope of statutory provisions, not of the constitutional guaranty of free speech. But in interpreting Section 8 (c), the "free speech" guaranty of the amended Act, it is our duty to follow the Supreme Court's present views on the status of picketing under the first amendment. For there is nothing in the Act or in its legislative history to indicate that Congress intended to go beyond the protective scope of the Constitution in exempting the picketing activities of labor organizations from the various prohibitions contained in Section 8 (b). It follows that the Respondents' picketing in this case and their threats to picket were unfair labor practices, for Congress outlawed the Respondents' objective by Section 8 (a) (3) of the Act, and interdicted, in Section 8 (b) (2), all means other than mere persuasion, or "views, argument, or opinion" which a union might employ to achieve that unlawful objective.<sup>50</sup> [Footnotes omitted.]

Another important question raised during the past year was whether the adoption of illegal union-security provisions constitutes an illegal attempt to cause discrimination. The Board held that the execution of such an agreement by a union, with the intention that the illegal provisions be enforced, is an unlawful attempt to cause the contracting employer to violate section 8 (a) (3), because it creates conditions which may result in future discrimination.<sup>51</sup> The same reasoning was applied in the case of the renewal of illegal union-security agreements.<sup>52</sup> Moreover, the Board held that the rule of the *Acme Mattress* case applies with equal force in the case of an oral understanding between a union and an employer for the hiring of employees in a discriminatory manner.<sup>53</sup> Conversely, a majority of

<sup>50</sup> *Denver Building & Construction Trades Council (Henry Shore)*, cited above, at pp 1769-1770.

<sup>51</sup> *Acme Mattress Co*, 91 NLRB 1010

<sup>52</sup> *New York State Employers Assn*, 93 NLRB 127, see also *Strauss Stores Corp*, 94 NLRB No. 80, *Printz Leather Co.*, 94 NLRB No. 209

<sup>53</sup> *Consolidated Western Steel Corp.*, 94 NLRB No. 211.

the Board held that inclusion of an illegal union-security clause in a contract by mutual mistake did not constitute an attempt to cause illegal discrimination, because the union did not intend to obtain or enforce the clause and no discriminatory conditions were in fact created.<sup>54</sup> However, the Board indicated in the *Acme Mattress* case that the mere request of a union that the employer discriminate unlawfully in favor of its members, standing alone, was not considered an "attempt to cause" such discrimination. Rather, such a request was held at the most an "attempt to persuade" the employer to take such action and, in view of the legislative history of section 8 (b) (2), is not prohibited.<sup>55</sup>

### c. Finding of Employer Violation Not Necessary Under 8 (b) (2)

In several of the cases in which unions were charged with having caused employers to violate section 8 (a) (3), it was asserted that the Board could not make an 8 (b) (2) finding except in connection with a complaint and a finding that the employer involved had violated section 8 (a) (3). Rejecting this construction of the reference to section 8 (a) (3) in section 8 (b) (2), a majority of the Board in the *Marine Cooks*<sup>56</sup> case, said:

We believe, and find, that the emphasized language was intended by Congress to be *descriptive* of the kind of discharge it is unlawful for a union to cause or attempt to cause. We note that an *attempt* by a labor organization to cause a discriminatory discharge is a violation of Section 8 (b) (2), even though it would never be possible to find a violation of 8 (a) (3) by the employer where he resisted the attempt and refused to discriminate. Necessarily, therefore, the statutory words "in violation of subsection (a) (3)" are merely descriptive with reference to an attempt. These same quoted words do not take on a new and different meaning when the attempt succeeds—they again merely describe the kind of discharge it is unlawful for the union to demand.

However, in another case, the Board pointed out that, while the employer need not be a party to an 8 (b) (2) proceeding, the General Counsel must show, where actual discrimination is alleged, that the respondent union caused the employer "to engage in conduct which—if the employer were before the Board—would be found to violate section 8 (a) (3)."<sup>57</sup>

In several cases, the Board found that the respective unions, notwithstanding the absence of any union-security agreements, had succeeded in securing the application of discriminatory hiring prac-

<sup>54</sup> *Monolith Portland Cement Co.*, 94 NLRB No. 211, Member Reynolds dissented on this point, Member Murdock dissented on another point.

<sup>55</sup> *Denver Building & Construction Trades Council (Henry Shore)*, 90 NLRB 1768, and *International Longshoremen's and Warehousemen's Union, Local No. 16 (Juneau Spruce)*, 90 NLRB 1753

<sup>56</sup> *Burns Steamship Co.*, 92 NLRB 877, Member Murdock dissenting.

<sup>57</sup> *Herald Tribune*, 93 NLRB 419, see also *Wisconsin Azle Div., The Trmken-Detroit Azle Co.*, 92 NLRB 988.

tices<sup>58</sup> and in obtaining the discharge of employees who had failed to observe union rules and policies.<sup>59</sup> In other cases, the discriminatory treatment of employees was the result of the application of invalid union-security agreements between the respective unions and employers.<sup>60</sup>

In one case, the Board dismissed certain charges under section 8 (b) (2) in order to prevent an abuse of its processes.<sup>61</sup> In this case, a union which had a jurisdictional dispute with another union arranged with the employer to "hire" its members and to discharge them upon the anticipated request of the second union. The employees involved were parties to the token hiring and firing and, upon their discharge, filed charges with the Board as instructed by their union. Under these circumstances, the Board found that the hiring-firing scheme in which the employers participated did not result in a bona fide employer-employee relationship, and that the participating employees did not invoke the Board's processes order to remedy an unfair labor practice but for the sole purpose of getting the Board to assist their union in forcing the employer to assign the disputed work to its members.

#### d. Discrimination Under Valid Union-Shop Agreements<sup>62</sup>

The Act permits a limited form of union-shop agreement, but section 8 (b) (2) authorizes discharge or other disciplinary action against an employee under such an agreement only for "his failure to tender the periodic dues and the initiation fees uniformly required" to maintain union membership. In administering this provision, the Board was confronted in two cases with questions on what constitutes "periodic dues," and in two other cases with questions on what constitutes a "tender" of dues or fees as required by the statute.

One such case presented the question of whether amounts charged union members as a fine for nonattendance at membership meetings constitute "periodic dues" within the meaning of the statute.<sup>63</sup> A majority of the Board held that such fines were not "periodic dues" within section 8 (b) (2) and their nonpayment could not be made the

<sup>58</sup> *Pacific American Shipowners Ass'n*, 90 NLRB 1099, *Brower & Co*, 92 NLRB 1099, *American Pipe and Steel Corp*, 93 NLRB 54, *George W. Reed*, 94 NLRB No. 109, *General Electric Co*, 94 NLRB No. 193.

<sup>59</sup> *Printz Leather Co*, 94 NLRB No. 209; *American Pipe and Steel Corp*, 93 NLRB 54, *Air Products, Inc.* 91 NLRB 1381.

<sup>60</sup> *Kingston Cake Co and Kingston Mutual Ass'n.*, 91 NLRB 447, *Carlyle Rubber Co, Inc*, 92 NLRB 385, *United Hoisting Co*, 92 NLRB 1642, *Squirt Distributing Co*, 92 NLRB 1667, *Waterfront Employers Ass'n of the Pacific Coast*, 90 NLRB 1021, *Pacific-American Shipowners Ass'n*, 90 NLRB 1099, *Vaughn Bowen*, 93 NLRB 1147, *Sterling Furniture Co*, 94 NLRB No. 20

<sup>61</sup> *Vaughn Bowen* 93 NLRB 1147.

<sup>62</sup> See also discussion cases involving employers in section 3 e of subchapter A, above

<sup>63</sup> *Electric Auto-Lite Co.*, 92 NLRB 1073, Member Styles dissenting.

basis of a request for the discharge of the delinquent member. The majority held that the statutory terms are intended—

. . . to include the requirement that such dues be charged to all members alike or that any distinctions in amount be based upon reasonable general classifications. A charge which distinguishes between individual members who attend particular meetings and those who do not attend particular meetings, in our opinion, is not one “uniformly” applied. Moreover, we do not doubt that a member’s attendance at a union meeting is highly desirable and salutary to carry out the democratic process. But, as we have already held,<sup>64</sup> the Act as written may not be used as a means of requiring such attendance. The Act’s machinery is equally unavailable to enforce the collection of a *fine* to accomplish this union objective.

Nor could the fact that the union’s constitution defined such a fine as a “due” alter the meaning of the statutory term, the Board held. The international union, the majority said, “could not by the simple expedient of altering a definition, bring within the statute’s limiting words ‘periodic dues and initiation fees,’ all of the various fines and assessments theretofore applied against its membership.” In an earlier case, the Board had similarly held that fines imposed for violation of union rules were not “periodic dues” or “initiation fees” which a union could require employees under a valid union-security agreement to pay in order to retain their jobs.<sup>65</sup>

### (1) Checkoff and Tender of Dues

The *Electric Auto-Lite* case also presented a question on the operation of a blanket checkoff authorization under a valid union-security agreement. The authorization in this case simply directed the employer to deduct for the union a specified amount that equalled the union’s monthly dues, but it did not specify the purpose to which this sum was to be applied. The union applied it to delinquent charges other than dues, and then caused the employer to discharge the employee for failure to pay his dues. A majority of the Board held the discharge a violation. The Board declined to infer that this diversion of dues monies was authorized by either the blanket checkoff authorization or a provision of the union’s constitution which provided for such diversions. The Board declared that, in a discrimination case, it could not recognize or give effect to any such procedure unless it was “evidenced by a clear and specific authorization” for each diversion.

Construing the statutory phrase “failure to tender,” the Board held in one case that an employee’s statutory obligation to “tender” such payments is satisfied by the delivery of a written checkoff author-

<sup>64</sup> Here the Board cited *Union Starch & Refining Company*, 87 NLRB 779; Fifteenth Annual Report, pp. 112-113.

<sup>65</sup> *Parker Pen Co.*, 91 NLRB 883;

ization to the contracting union.<sup>66</sup> In another case, the Board held that a union violated section 8 (b) (2) by causing the discharge of an employee whose tender of dues and initiation fees it had rejected because of the employee's refusal to pay fines previously assessed against her.<sup>67</sup> Likewise, a violation was found where a union caused the discharge of an employee who had shown himself willing to pay his back dues but had refused to pay his fine.<sup>68</sup> When the employee on successive occasions called at the union hall offering to pay his dues and reinstatement fees, he was referred to but not permitted to see the executive board. The Board observed that on these occasions the employee was not required to go through the useless gesture of actually handing the money to the cashier, and that its holding in the *Union Starch*<sup>69</sup> case was not intended to require a "tender" in a strictly legal sense. Moreover, an employee in order to be protected against discrimination under a valid union-security agreement need not tender initiation fees and dues where membership in the contracting union is available to him only upon compliance with a term or condition that is discriminatory under the statute.<sup>70</sup>

#### 4. Refusal to Bargain

Section 8 (b) (3) makes it an unfair labor practice for a labor organization or its agents to refuse to bargain collectively with an employer when it is the representative of a majority of a group of his employees which is appropriate for bargaining.

Section 8 (d) defines collective bargaining as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ."

Because labor organizations are formed primarily when employees desire to negotiate with their employer, the cases in which unions are charged with unlawful refusal to bargain rarely involve any allegation of an outright refusal by the union to meet or negotiate with the employer. Ordinarily, cases in which a union is alleged to have refused to bargain involve the legality of some proposal insisted on

<sup>66</sup> *Ferro Stamping and Mfg Co*, 93 NLRB 1459.

<sup>67</sup> *Parker Pen Co*, 91 NLRB 883. See also *Von's Grocery Co*, 91 NLRB 504, where the Board adopted the trial examiner's conclusion that the union involved violated section 8 (b) (2) by bringing about the discharge of an employee after refusing to accept his tender of a sum of money in payment of an initiation fee and dues.

<sup>68</sup> *Baltimore Transfer Co*, 94 NLRB No. 220.

<sup>69</sup> *Union Starch and Refining Co*, 87 NLRB 779, 784.

<sup>70</sup> *Kaiser Aluminum & Chemical Corp*, 93 NLRB 1203.

by the union or upon a technical point of bargaining such as the question of the legality of a union dealing individually with an employer who has been represented in bargaining by an association. This pattern prevailed in cases decided by the Board during the 1951 fiscal year as during past years.<sup>71</sup>

### a. Bargaining With an Employer Association

The question of a union's right to bargain with an individual employer in a situation where association bargaining had hitherto prevailed was presented to the Board during the past fiscal year. It was raised in one case where the allegation of union refusal to bargain was not formally charged, but instead was urged by a group of employers as a defense to charges of having illegally discharged their employees because the union called a strike against one employer of the group.<sup>72</sup>

In this case, after extensive bargaining with the associations representing the group of employers involved in the case, the union called a strike at the plant of one employer and the next day invited him to negotiate a separate contract. The employers contended that the union violated Section 8 (b) (3) by seeking to bargain separately with this employer, when the association was his authorized bargaining agent and when an association-wide unit of employees was the appropriate unit for bargaining.

The Board agreed that the union was required to bargain with the associations, as the agent of the employers, until an impasse was reached. A majority of the Board found that the union had bargained with association representatives until negotiations collapsed and, even in proposing negotiations with individual employers, did not seek to exclude association representatives. The majority opinion said:

The duty of the Local under the Act to bargain with the Associations could be no broader than the authority vested in the Associations to bargain with the Local. The authority of the Associations was, so far as appears from the record, limited to *association-wide* bargaining, and did not extend to the *separate* bargaining proposed by the Local . . .

Nor would such proposals for separate negotiations, even if they were to preclude participation by association representatives, violate the requirement of Section 8 (b) (3) that the Local bargain with *an* employer. For each Respondent continued to be *an* employer under the Act, with whom the Local was free to bargain after an impasse had been reached in association-wide bargaining. . . .

The Board also rejected the employers' contention that the union had refused to bargain by seeking to establish individual employer

<sup>71</sup> See Fourteenth Annual Report, pp. 86-87, Fifteenth Annual Report, pp. 133-137.

<sup>72</sup> *Morand Brothers Beverage Co*, 91 NLRB 409, Member Reynolds dissenting

units when an association-wide unit was appropriate. The Board rejected the theory underlying this contention that past bargaining had established the association unit as the only one appropriate. The majority pointed out that "the Act requires only that the unit be 'appropriate' . . . to ensure to employees, in each case, 'the fullest freedom in exercising the rights guaranteed by this Act.'" Moreover, the Board noted that it has long been Board policy to permit employers great freedom in the fashioning of multiemployer units by permitting them to withdraw from such units when they wish. Therefore, permitting a union to resort to single-employer bargaining after an impasse had been reached in association bargaining serves only to equalize the bargaining obligations of unions with those of employers, the Board concluded. On these points, the majority opinion said further:

. . . Balancing the instability resulting from the collapse of negotiations on a multiemployer basis against the benefits derived from further collective bargaining on a single-employer basis, we conclude that, in this case, to ensure the fullest freedom in exercising the collective bargaining rights guaranteed to employees single-employer units could be found appropriate.

While such a conclusion might give to unions a limited alternative choice as to bargaining units, it would reduce to that extent the existing disparity between the treatment accorded employers and unions. . . .

But the Board held that, even assuming that the association unit were the only appropriate one, it still would not follow that the union's conduct violated the act. On this point, the majority opinion said:

. . . While it is true that under this view any bargaining on a single-employer basis with a particular respondent [employer] would be limited to a segment of the appropriate, multiemployer unit, Section 8 (b) (3) does not, in our opinion, require that all the employees in an appropriate unit, particularly in a multi-employer unit, be bargained for simultaneously, or that they be covered by the same contract. It is sufficient that the party seeking to bargain for a portion of the statutory unit intends, as did the Local in this case, to negotiate at an appropriate time for the rest of the employees in such unit.

In two other cases, unions were charged with having refused to bargain by insisting upon illegal hiring provisions in proposed contracts. In one case, the Board found that the evidence did not establish that the union had insisted upon the discriminatory provisions.<sup>73</sup> In the other case, the Board concluded that the hiring provisions which the union advanced were not discriminatory.<sup>74</sup> Other violations of the act were found in both cases.

<sup>73</sup> *International Longshoremen's and Warehousemen's Union (Waterfront Employers Association of the Pacific Coast)*, 90 NLRB 1021. However, in this case, the Board found that the union by agreeing to the employers' proposal to continue a discriminatory hiring arrangement violated section 8 (b) (2) and 8 (b) (1) (A).

<sup>74</sup> *National Union of Marine Cooks and Stewards (Pacific American Shipowners Association)*, 90 NLRB 1090, Board Member Reynolds dissenting. In this case also, the Board found that the union violated section 8 (b) (2) and 8 (b) (1) (A) by agreeing to continuation of a discriminatory hiring arrangement.

In another case, a union was charged with unlawfully refusing to reduce an agreement with the employer to writing as required by section 8 (d), but the Board found that no agreement had actually been reached.<sup>75</sup>

## 5. Illegal Secondary Strikes and Boycotts

The act's prohibitions against secondary strikes and boycotts are contained in subsections (A) and (B) of section 8 (b) (4). Subsection (A) contains the general prohibitions against such strikes and boycotts. Subsection (B) forbids a strike or boycott action at the plant of one employer for the purpose of forcing another employer to recognize or bargain with a union which has not been certified by the Board as a bargaining representative for the latter employer's employees. The recognition type of secondary strike or boycott is discussed in subsection 6 of this chapter.

Specifically, in both subsections of the act, a union or its agents is forbidden to engage in such strikes or boycotts or "to induce or encourage employees" to engage in them. For the purpose of clarity, the Board has adopted the practice of designating the employer with which the union has its primary dispute, or from which recognition is sought, as the primary employer. The employer whose employees the union is alleged to have induced or encouraged to engage in secondary action is generally termed the secondary or neutral employer.

### a. Scope of the General Prohibition

In one case, the Board was confronted with a question of whether a temporary withholding of services on union instruction comes within the prohibition of section 8 (b) (4) (A). In this case, the union instructed an employee of a secondary employer not to handle a trailer received from a trucker with whom the union had a dispute.<sup>76</sup> The union contended its only object was to have an opportunity to determine whether the secondary employer's use of the trailer conflicted with a clause in the union's contract with him, which reserved to the union the right to refuse to accept freight from, or make deliveries to, struck establishments. The Board found that an object of its conduct necessarily was to force the secondary employer to cease doing business with the struck employer until the applicability of the contract clause was determined. Finding that the secondary employer was not violating the contract clause, the Board concluded that this section could not be construed to permit even a temporary boycott where there was no applicable contract provision.

<sup>75</sup> *International Molders and Foundry Workers Union (The Hamilton Foundry and Machine Co)*, 91 NLRB 139

<sup>76</sup> *Local 294, International Brotherhood of Teamsters (Western Express Co)*, 91 NLRB 340.

In another case, the Board held that none of the prohibitions of section 8 (b) (4) was violated when a union sought to strengthen its bargaining position by instituting a *consumer* boycott and by instructing teams of strikers to visit sister locals and induce them to support the consumer boycott.<sup>77</sup> These teams were instructed not to request either a boycott or the picketing of the employer's dealers or suppliers. The illegality of the boycott was alleged in this case by the employer as a defense to charges of illegal discharge of employees.

### b. Inducement or Encouragement of Employees

In several cases, questions arose as to whether a union's conduct was addressed to *employees* in order to "induce or encourage" them to take action of the kind and for the purposes forbidden by section 8 (b) (4) (A).<sup>78</sup>

The Board reaffirmed in two cases its prior rulings<sup>79</sup> that section 8 (b) (4) (A) does not prohibit a union from inducing *employers* to cease doing business with one another.<sup>80</sup> In one case, the Board dismissed charges of secondary boycott when it found that the union had limited its activities solely to the inducement of secondary employers and their management personnel, and there was no evidence, either direct or circumstantial, of any attempt to induce employees.<sup>81</sup> As to supervisory employees whom the union had approached in this case, the Board found it irrelevant that they were union members and handled union messages for subordinates. The Board said, "Neither the definition of the word 'supervisor' as used in the Act, nor the exclusion of supervisors from the term 'employee' as used in the Act, provides for special treatment of union adherents." In the other case, an employer urged as a defense to charges of illegal discrimination that the union had engaged in an illegal secondary boycott by prevailing upon certain customers to abstain from purchasing employer's products. The Board rejected this defense on the ground that the customers were employers.<sup>82</sup>

Another question which arose in a number of cases was whether union conduct alleged to violate this section actually constituted "inducement or encouragement" of employees. In one case, the Board held it was inducement and encouragement within the meaning

<sup>77</sup> *The Hoover Co.*, 90 NLRB 1614, enforced as modified in other respects, 191 F. 2d 380 (C. A. 6), July 9, 1951.

<sup>78</sup> The tests and principles applied in the cases involving 8 (b) (4) (A) also apply to cases in which unions are alleged to have "induced or encouraged" employees to engage in prohibited conduct for the objects specified in subsections (B), (C), and (D) of section 8 (b) (4).

<sup>79</sup> *Local 894, International Brotherhood of Teamsters (Conway's Express)*, 87 NLRB 972; *Sealright, Pacific, Ltd.*, 82 NLRB 271.

<sup>80</sup> *Consolidated Frame Co.*, 91 NLRB 1295; *Local 878, International Brotherhood of Teamsters (Arkansas Express, Inc.)*, 92 NLRB 255.

<sup>81</sup> *Local 878*, cited above.

<sup>82</sup> *Consolidated Frame Co.*, cited above.

of the section when a union agent had his secretary call union members employed at various meat markets to inform them that a meat wholesaler had been placed on the union's unfair list.<sup>83</sup> But in the same case, the Board, reversing a trial examiner's finding, held unanimously that the union's internal operations in connection with the listing of this employer as unfair were primary and therefore lawful. On this point, the Board's unanimous opinion said:

There is valid support in practical human experience, although perhaps not in abstract logic, for prohibiting a union, as we have done, from telling a specific employee at his place of work about an unfair list, and yet holding the promulgation of that unfair list at a union meeting to be lawful. In effectuating the evident purpose of Congress to permit primary action while prohibiting secondary inducement, we cannot escape drawing a line somewhere so as to preserve a proper area in which both congressional objectives can best be fulfilled. As we indicated in the *Grauman* case,<sup>84</sup> it is traditional primary action for a union, within its own councils, to classify a primary employer as unfair, whereas conveying the same information to a secondary employer's employee at his place of work assumes the aspect of unlawful secondary inducement tantamount to a specific direction to cease work.

In the *Local 878* case, the Board rejected the contention that a strike threat addressed to the manager of a secondary employer "in hearing distance" of two employees constituted unlawful inducement.<sup>85</sup> Because the union's agents lawfully could have discussed at union meetings its plan to bring pressure directly on the secondary employers, the Board found it was immaterial that the strike threat might have been overhead by rank-and-file employees. In the same case, the Board likewise held that a threat to picket, made in a secondary employer's office, was not unlawful because it was made in the presence of a young woman office employee who was not required to do any of the work which the union sought to interrupt. The Board held also that a contract between the secondary truckers and the union in this case, which provided that employees might refuse to cross primary picket lines, did not unlawfully induce secondary employee action.

However, the Board found illegal inducement of secondary employees where the employees of one of the primary employer's customers were suspended from the union, without explanation, after disregarding a remark by a union agent that he wished to have delivery of the primary employer's products stopped.<sup>86</sup>

<sup>83</sup> *Amalgamated Meat Cutters Union No 503 (Western, Inc)*, 93 NLRB 336.

<sup>84</sup> *The Grauman Co*, 87 NLRB 755 (1949).

<sup>85</sup> *Local 878*, cited above.

<sup>86</sup> *Construction and General Laborers Union, Local No 320, International Hod Carriers (Armco Drainage and Metal Products, Inc.)*, 93 NLRB 751.

### c. Situs of the Primary Dispute

In determining whether a union has engaged in, or has induced employees to engage in, activities prohibited by section 8 (b) (4) (A), the Board also considers the place where the conduct occurred in relation to the site of the primary dispute. Ordinarily, a union's conduct is held to be secondary and prohibited if it occurs at the premises of a secondary employer and calls for action of employees of the secondary employer away from the primary dispute's actual site.

The situs of a primary dispute is particularly important where the lawfulness of picketing activities is in issue. In this regard, the Board reiterated in one case that "picketing at the premises of a primary employer is traditionally recognized as primary action even though it is 'necessarily designed to induce and encourage third persons to cease doing business with the picketed employer.'" <sup>87</sup>

However, the Board is confronted at times with disputes which do not have a fixed situs but are movable, particularly in the transportation industries. In one such case, the respondent union had a dispute with the owner of a ship of foreign registry which was docked at an American shipyard for the purpose of converting it to carry a different type of cargo.<sup>88</sup> In order to enforce certain demands for the establishment of American wage scales and working conditions for the seamen who were to man the ship, the union sought to picket the ship. It first requested permission of the shipyard to picket the ship at the dockside in the shipyard. When this was denied, the union stationed pickets at the entrance to the shipyard. The picketing began only after the conversion was about 90 percent complete and the ship's crew was nearly all on board preparing for the forthcoming voyage. Signs carried by the pickets named only the *ship* as unfair to the respondent union and the Board found that the union and its pickets were "scrupulously careful to indicate that its dispute was solely with the primary employer [the owners of the ship]." Under these circumstances, a majority of the Board ruled that this was lawful primary picketing.

The majority opinion said:

. . . In the kind of situation that exists in this case, we believe that picketing of the premises of a secondary employer is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises;<sup>89</sup> (b) at the time of the picketing

<sup>87</sup> *Sailors' Union of the Pacific (Moore Dry Dock Co)*, 92 NLRB 547, citing *Oil Workers International Union (The Pure Oil Co.)*, 84 NLRB 315.

<sup>88</sup> *Sailors' Union of the Pacific (Moore Dry Dock Co)*, cited above, Members Reynolds and Murdock dissenting. The dissent took the view that the rule laid down for cases of ambulatory situs was too broad

<sup>89</sup> Here the Board cited *Sterling Beverages, Inc*, 90 NLRB 401.

the primary employer is engaged in its normal business at the *situs*;<sup>90</sup> (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer. All these conditions were met in the present case.

On the matter of movable sites of primary disputes, the Board said:

When the *situs* is ambulatory, it may come to rest temporarily at the premises of another employer. The perplexing question is: Does the right to picket follow the *situs* while it is stationed at the premises of a secondary employer, when the only way to picket that *situs* is in front of the secondary employer's premises? Admittedly, no easy answer is possible. Essentially the problem is one of balancing the right of a union to picket at the site of its dispute as against the right of a secondary employer to be free from picketing in a controversy in which it is not directly involved.

When a secondary employer is harboring the *situs* of a dispute between a union and a primary employer, the right of neither the union to picket nor of the secondary employer to be free from picketing can be absolute. The enmeshing of premises and *situs* qualifies both rights. . . .

The majority further made it clear that this ruling applied only where the primary employer was actually engaged in normal operations on the secondary employer's premises. On this point, the Board said:

. . . We are only holding that, if a shipyard permits the owner of a vessel to use its dock for the purpose of readying the ship for its regular voyage by hiring and training a crew and putting stores aboard ship, a union representing seamen may then, within the careful limitations laid down in this decision, lawfully picket in front of the shipyard premises to advertise its dispute with the shipowner.

In two cases during the past year, questions arose as to whether picketing of trucking operations constituted primary activity within the principle of the *Schulz* case or forbidden secondary activity under the rule of the *Sterling Beverages* case.<sup>91</sup> In both cases, the Board ruled the picketing illegal. In one case, the Board found that the picketing was unlawful because the trucks were not the situs of the union's primary dispute and the primary employer's premises could readily have been picketed.<sup>92</sup> In the second case, the Board found that the situs of the union's dispute with certain timbermen, who produced timbers for mines, was at their sawmills rather than at their trucks and that picketing at the mine of a secondary employer where trucks took the timbers was unlawful secondary activity.<sup>93</sup> Moreover, while the signs in this case advertised that the dispute was between the unions and the timbermen, picketing was not confined to the time the timbermen's trucks were on the mine premises but occurred both before arrival of the trucks and after their departure.

<sup>90</sup> Here the Board cited *Schulz Refrigerated Service, Inc.*, 87 NLRB 502 (1949).

<sup>91</sup> See *Schulz Refrigerated, Inc.*, and *Sterling Beverages, Inc.*, both cited above, Fifteenth Annual Report, pp 139-141.

<sup>92</sup> *Amalgamated Meat Cutters, Local 308 (Western Inc.)*, 93 NLRB 336.

<sup>93</sup> *United Construction Workers (Kanawha Coal Operators Association)*, 94 NLRB No. 236.

Also, during the past fiscal year, the Board reaffirmed its earlier ruling that letters and other appeals by a union requesting employees of other employers and their unions to cooperate with it are lawful when they invite action only at the situs of the primary dispute.<sup>94</sup>

#### **d. Efforts to Compel Employer or Self-Employed Person to Join Union or Employer's Association**

Section 8 (b) (4) (A) also forbids a union from seeking to force an employer or self-employed person to join either a labor organization or an organization of employers.

In one case decided during the past fiscal year, the Board found that this section was violated by the secondary efforts of a union to force a group of timbermen, who were both employers and self-employed truck drivers, to join both the union and an employers' association.<sup>95</sup> The Board found in this case that the union had induced and encouraged employees of the secondary employer's mine to engage in a strike and a concerted refusal to use mine timbers supplied by the timbermen, for this object. The union's pickets also engaged in certain primary activities against the timbermen, but the Board limited its cease-and-desist order to the union's secondary activities, saying, "However, we do not intend to indicate thereby that primary as well as secondary action is not proscribed by Section 8 (b) (4) (A) where an object thereof is to force or require any employer or self-employed person to join any labor or employer organization. This is an issue not presented to us for determination in the instant case and therefore we do not pass upon it at this time."

### **6. Secondary Strikes and Boycotts for Recognition**

Section 8 (b) (4) (B) prohibits secondary strikes and boycott activities to force an employer to recognize or bargain with a labor organization which has not been certified by the Board as the representative of his employees.

Section 8 (b) (4) (C) further prohibits unions from engaging in primary strikes or boycott activities to force an employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified by the Board as the representative of such employees.

Violations of section 8 (b) (4) (B) were found by the Board in three cases during the 1951 fiscal year. In one such case, the respondent union sought by secondary pressure to compel certain independent

<sup>94</sup> *Sailor's Union of the Pacific*, cited above, and *Newspaper and Mail Deliverers' Union (Interborough News Co.)*, 90 NLRB 2135, both citing *Oil Workers International Union (The Pure Oil Co.)*, 84 NLRB 315

<sup>95</sup> *United Construction Workers (Kanawha Coal Operators Association)*, 94 NLRB No. 236.

timber dealers to join an employer association with which the union had an association-wide, closed-shop agreement.<sup>96</sup> The Board concluded that, had the union succeeded in its attempt, the lumber dealers would have become subject to the union's contract and would have been required to recognize and bargain with the union as the representative of their employees although it had not been certified. The two other cases presented no problem as to whether or not the uncertified unions had in fact sought to force the respective employers to recognize and bargain with them.<sup>97</sup> In the *Construction Laborers* case, the Board noted that the union commenced to bring pressure on the employer almost 2 years after it had disclaimed its right to represent the employees concerned in response to a petition for decertification of the union.

The prohibition of section 8 (b) (4) (C) was held by the Board to have been violated in one case.<sup>98</sup> In this case, where the Board adopted the trial examiner's conclusions without comment, the respondent union continued picketing of a plant where it had called strike after another union had been certified as the representative of the employees. The respondent union had struck the employer and picketed its premises as a result of a dispute arising in the course of bargaining negotiations. While these activities continued, another union petitioned for an election and, on the basis of the election results, was certified as bargaining agent of the employees involved. Nevertheless, the respondent union continued its strike and picketing activities. This conduct, the trial examiner concluded, violated section 8 (b) (4) (C) because its apparent purpose was to force the employer to resume bargaining negotiations in disregard of the certified bargaining rights of another union.

## 7. Jurisdictional Disputes Under 8 (b) (4) (D)

Section 8 (b) (4) (D) forbids a union to engage in a so-called "jurisdictional dispute" over the assignment of work tasks. More precisely, the section forbids a labor organization to induce or encourage employees to engage in a strike or "concerted refusal in the course of their employment" to handle goods or perform services with an object of forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular 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.

<sup>96</sup> *United Construction Workers (Kanawha Coal Operators Association)*, 94 NLRB No 236

<sup>97</sup> *Amalgamated Meat Cutters Local 908 (Western, Inc)*, 93 NLRB 336 and *Construction Laborers Local 320 (Armco Dramage and Metal Products, Inc)*, 93 NLRB 751

<sup>98</sup> *Retail Clerks Local 1179 (Western Auto Supply Co)*, 93 NLRB 1638.

An unfair labor practice charge under this section, however, must be handled differently than a charge alleging any other type of unfair labor practice. Section 10 (k) requires that the parties to such a "jurisdictional dispute" be given a period of 10 days, after notice of the filing of charges with the Board, to adjust their dispute. If, at the end of this 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 then is empowered to make a determination of the dispute in the case.<sup>99</sup> Section 10 (k) further provides that "upon compliance by the parties to the dispute with the decision of the Board, or upon such voluntary adjustment of the dispute, such charge shall be dismissed." A complaint alleging violation of 8 (b) (4) (D) may issue only when there is a failure to comply with the Board's determination of dispute.

Where a charge under section 8 (b) (4) (D) has been filed and the statutory 10-day period has expired without adjustment, the Board will determine whether the alleged dispute is properly before it. The Board has administratively adopted the rule that a dispute will be determined under section 10 (k) only upon a showing that there is "reasonable cause to believe" that section 8 (b) (4) (D) has been violated; that is, that the respondent union induced and encouraged employees to engage in a concerted refusal to perform work for purposes prohibited by section 8 (b) (4) (D).<sup>1</sup> Unless it appears clearly that the object of the union's alleged conduct was one which is described in that section, the proceeding will be dismissed.<sup>2</sup>

#### a. Disputes Within Section 8 (b) (4) (D)

In a number of section 10 (k) proceedings during the past year, the Board had to construe section 8 (b) (4) (D) in order to determine whether the alleged disputes related to the assignment of work within the meaning of this section. In two cases, it was contended that only disputes between rival unions come within this section and that, therefore, the Board had no jurisdiction to determine the dispute before it, which involved the union's members, on one hand, and unorganized employees of the employer, on the other.<sup>3</sup> The Board rejected this contention, finding on the basis of the legislative history of the section that it was clearly not limited to disputes over

<sup>99</sup> For discussion of Board's discretion in such cases, see discussion of *Parsons v Herzog*, pp 214-215, Fifteenth Annual Report

<sup>1</sup> *Local 26, International Fur and Leather Workers (Winslow Bros & Smith Co)*, 90 NLRB 1379, *Truck Drivers and Chauffeurs Union, Local 705 (Direct Transit Lines)*, 92 NLRB 1715, *International Hod Carriers Local 281 (Middle States Tel Co of Ill)*, 91 NLRB 598; *Longshoremen's Locals 15 and 48 and Sailors Union of the Pacific (W R Chamberlin and Co)*, 94 NLRB No. 67.

<sup>2</sup> *Building and Construction Trades Council (Lumber Dealers, Inc)*, 92 NLRB 632.

<sup>3</sup> *Carpenters Local 50 (New London Mills)*, 91 NLRB 1003 and *Truck Drivers and Chauffeurs Union Local 705 (Direct Transit Lines)*, cited above, Member Murdock dissenting

assignment of work to one particular union rather than to another, but applied also to such disputes between a union and *another group of employees*. The Board in these cases also held that the word "class" in section 8 (b) (4) (D) must be given the same meaning as the word "group," and that the Board is not precluded from determining a dispute between two groups of employees who are within the same occupational classification. In the *Teamsters* case, a majority of the Board declined to construe section 8 (b) (4) (D) as being applicable only if there is a clash of interests between two conflicting groups and if the replacement of one group by another would be economically prejudicial to the group replaced.

In one case, a question as to whether the Board had jurisdiction to determine the dispute arose from the following facts: The respondent union by calling its members off a job engaged in a strike which was solely the result of a disagreement with the employer over working conditions. The company then replaced the strikers with employees who eventually became members of another union. The respondent union then sought to obtain the reinstatement of its striking members, and failing that, it established a picket line. Under these circumstances, the Board rejected the contention that the respondent union had engaged in an unlawful jurisdictional strike.<sup>4</sup> The Board said:

. . . If this contention could be made, then every economic strike would perforce be converted into an unlawful jurisdictional strike after the replacement of strikers, because an objective of the continued strike is clearly to secure the reinstatement of strikers to their old jobs. Section 8 (b) (4) (D) was not intended so to limit the right to strike for legitimate economic objectives. . . . No doubt the original strike objectives had been complicated by the fact that the Company had succeeded in replacing the strikers with men who had become members of the Grain Millers, but as we have pointed out above this circumstance is not sufficient to convert a strike for lawful economic objectives into an unlawful jurisdictional strike.

In another case, section 8 (b) (4) (D) was held to cover a dispute which the Board viewed as essentially a disagreement between two unions over the question as to which of two existing bargaining units appropriately includes a certain job.<sup>5</sup> The Board made a determination that the job properly belonged in one of the units.

### b. Violations of Section 8 (b) (4) (D)

In concluding that the jurisdictional dispute provisions of the act had been violated in one case, the Board pointed out that the following factors are essential to such a finding: <sup>6</sup> (1) the respondent union,

<sup>4</sup> *Sheet Metal Workers Local 99 (Albers Milling Co)*, 90 NLRB 1015

<sup>5</sup> *Local 26, International Fur and Leather Workers (Winslow Bros. & Smith Co)*, cited above.

<sup>6</sup> *International Longshoremen's and Warehousemen's Union Local 16 (Juneau Spruce Corp)*, 90 NLRB 1753.

by picketing the employer's premises, induced and encouraged employees to refuse concertedly to perform services in the course of their employment; (2) the union's object was to force the employer to assign certain operations to its members or to workers dispatched by it, instead of assigning the work to another group of employees; (3) the employer had not disregarded the certification by the Board of a representative of the employees who performed the disputed work, no such certification being in existence; and (4) the respondent union had failed to comply with the Board's determination of the dispute which had given rise to the charges against the union.

One case was concerned solely with the requirement that the respondent union's noncompliance with the Board's determination of the underlying jurisdictional dispute must be shown before a violation of section 8 (b) (4) (D) may be found.<sup>7</sup> The Board held that the General Counsel had failed to sustain his burden of proof in this respect, because there was no substantial evidence that the union engaged in compulsive conduct after the Board's determination of the dispute. Moreover, the Board held the determination of the dispute imposed no affirmative obligations on the union, and therefore the latter's failure to notify the Regional Director of what was done, or not done, following the determination could not alone establish noncompliance.

## 8. Excessive or Discriminatory Fees for Union Membership

Section 8 (b) (5) makes it an unfair labor practice for a union, under a valid union shop, to charge a fee for membership "in an amount which the Board finds excessive or discriminatory under all the circumstances." The section states further that, "in making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected."

One case involving this section came to the Board for decision during the 1951 fiscal year. In this case, the Board unanimously held that an illegal discriminatory fee had been imposed in violation of this section when the respondent union required "old" employees to pay a larger initiation fee than "new" employees.<sup>8</sup> The Board agreed with the trial examiner's conclusion that this distinction in fees was unlawful, because it was based upon the "old" employees' prior refusal to join the union at a time when they were not legally bound to do so. The Board said, "Such a distinction which is based

<sup>7</sup> *Los Angeles Building and Construction Trades Council (Westinghouse Electric Corp)*, 94 NLRB No. 63. See the same case, 88 NLRB 1101, where the Board so construed the act, Chairman Herzog and Member Reynolds dissenting. Fifteenth Annual Report, p. 149.

<sup>8</sup> *Ferro Stamping and Manufacturing Co. (UAW Local 768, CIO)*, 93 NLRB 1343.

on a prior exercise by an employee of his statutory right to refrain from joining a labor organization is plainly 'discriminatory under all the circumstances' within the meaning of Section 8 (b) (5).<sup>9</sup> The Board ordered reinstatement of an "old" employee who was discharged for refusing to pay the fee and ordered the union to refund the difference between the fees to old employees who had paid it.

In the same case, however, the Board held that the union was privileged to raise its initiation fees shortly before its union-shop agreement took effect, and to notify employees of the forthcoming increase. Speaking of the increase in fees, the Board said, "The only limitation placed on the Union's right to do so is contained in Section 8 (b) (5), which prohibits 'excessive or discriminatory' fees as a condition of becoming a member only where a valid union-shop contract covering the employees is in effect."

### 9. "Featherbedding" Exactions

Section 8 (b) (6) forbids a labor organization or its agents "to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed."

One case involving an alleged violation of this section came to the Board for decision during the 1951 fiscal year.<sup>9</sup> In this case, the respondent union, a musicians' local, had had an arrangement with a movie theater before the effective date of the amended act which provided that, whenever the theater engaged a traveling band, minimum union wages would be paid to a band composed of musicians who were members of the local. Under this arrangement, the local musicians were paid but seldom played. After enactment of the amended act, the theater presented a number of traveling bands but the local did not seek payments for local musicians. However, after a time, the union requested the theater, which was one of an interstate chain, to resume its payments to local musicians. The theater declined to do so, and thereafter a traveling band which the theater had engaged did not fill its engagement. These events all occurred 6 months before the filing of charges by the theater management so, under the Act, the Board could not base a finding of unfair labor practice upon them but could consider them only for the purposes of background to explain subsequent events.

However, within the statutory 6 months, the theater again sought the local's consent for the appearance of traveling bands, in view of

<sup>9</sup> *American Federation of Musicians, Local 24 (Gamble Enterprises, Inc.)*, 92 NLRB 1528, Member Reynolds dissenting, Chairman Herzog not participating. See also court decision upholding Board's interpretation of 8 (b) (6), *American Newspaper Publishers Assn. v. N. L. R. B.* (I. T. U. cases) Nos. 10329, 10331, 10332, 10356, decided December 27, 1951 (C. A. 7.).

the provisions of the constitution and bylaws of the American Federation of Musicians forbidding its members in traveling bands to appear within the jurisdiction of a local without the local's consent "unless a local house orchestra is employed." But the local insisted that a local orchestra must be employed at some time if traveling bands were to appear. The local sought an agreement which would guarantee employment of a local orchestra in some proportion to the number of engagements of traveling bands at the theater, but no agreement was reached. Thereafter, the theater contracted for appearance of another traveling band, but when the local union informed the manager of the band that no local agreement had been reached, the engagement was not filled. After this, the theater manager reached a tentative agreement with the local that the theater would employ a local orchestra for one engagement to perform with a traveling vaudeville act and the theater would be permitted to engage a traveling band within 60 days without having to hire local musicians for the traveling band's engagement. However, this agreement was rejected by the home office of the theater chain.

On these facts, a majority of the Board ruled that the union had not violated section 8 (b) (6). Pointing to the language of the section and the statements of sponsors of the amended act that this provision was intended to forbid a union "to force an employer to pay for work which is not performed," the Board said:

In our opinion, Section 8 (b) (6) was not intended to reach cases where a labor organization seeks actual employment for its members, even in situations where the employer does not want, does not need, and is not willing to accept such services. Whether it is desirable that such objective should be made the subject of an unfair labor practice is a matter for further congressional action, but we believe that such objective is not proscribed by the limited provisions of Section 8 (b) (6).

Finding that the union in this case was seeking actual employment for its members, the Board dismissed the complaint.

## 10. Union Responsibility for Unfair Practices

In determining the responsibility of labor organizations for unfair labor practices under section 8 (b), the Board continues to apply the controlling rules of agency first outlined in the *Sunset Line and Twine* case.<sup>10</sup>

The Board has pointed out in a number of cases that, in order to be liable for violations of the provisions of section 8 (b), the union need not have authorized specifically the acts committed. Thus, where the union supervised and controlled the mass invasion of a plant, the Board held that individual acts of violence and coercion

<sup>10</sup> 79 NLRB 1487; see Fourteenth Annual Report, pp. 104-106, and Fifteenth Annual Report, pp. 152-154.

against employees were foreseeable consequences of the union's seizure of the plant for which the union was responsible.<sup>11</sup> A union in another case was held accountable for oral appeals by pickets that an employee participate in a secondary boycott.<sup>12</sup> The Board pointed out that the picketing itself was an appeal to employees and that the oral appeal was therefore within the authorized sphere of action.

Conduct of union representatives who act within the scope of their authority will likewise be attributed to the union. Thus, threats made by a business representative for the purpose of forcing an employer to discriminate against an employee were held to constitute an unfair labor practice on the part of the union.<sup>13</sup> Another union was held responsible for the discriminatory discharge of an employee which had been procured by the union's negotiating committee as a condition to the execution of a contract.<sup>14</sup> The Board found that while the committee, which acquiesced in the conduct of its spokesman, was not specifically authorized to procure the discharge, it was acting within the scope of its apparent authority to set the terms and conditions upon which the respondent union would execute a contract. In the same case, the Board further held that the respondent international also was liable for the discharge since the person procuring it was known to the employer as the only representative who executed contracts on behalf of the international. The fact that the representative actually had only limited authority was held immaterial because the limitations were not communicated to the employer and the representative apparently was acting within the scope of his authority.

A union was held responsible for the discriminatory discharge of an employee, even though no union agent contacted the employer to obtain the discharge.<sup>15</sup> In this case, the employee was dismissed only after the employer learned that other employees had been instructed by a union agent not to sign up unless the particular employee was dismissed. On the other hand, in another case, a union was not held accountable for the conduct of persons who were not shown to be union agents, who had not been authorized to take the particular action and did not act according to any pattern of unlawful conduct established by the union.<sup>16</sup>

In one case during the past year, two unions were held jointly liable for the unfair labor practices involved where it appeared that they had become affiliated, maintained the same office, and had the same officers,

<sup>11</sup> *UMW District 51 (Bitner Fuel Co)*, 92 NLRB 953.

<sup>12</sup> *Meat Cutters Local 305 (Western, Inc.)*, 93 NLRB 336.

<sup>13</sup> *Operating Engineers Local 101 and Peerless Quarries*, 92 NLRB 1194.

<sup>14</sup> *Textile Workers Local 169 and Acme Mattress Co*, 91 NLRB 1010, 192 F 2d 524.

<sup>15</sup> *Marine Cooks and Stewards, CIO (Burns Steamship Co)*, 92 NLRB 877.

<sup>16</sup> *Meat Cutters Local 305 (Western, Inc.)*, 93 NLRB 336.

and that the campaign during which the unfair labor practices occurred was jointly organized.<sup>17</sup> However, the Board declined to hold a building trades council responsible for certain violations of section 8 (b) by a local affiliate where it was not conclusively shown that the local's business representative, who also was president of the council, acted on behalf of the council rather than the local in bringing about the discriminatory discharge of an employee.<sup>18</sup> Nor was a parent union held jointly liable with an offending affiliate, in the absence of evidence that the parent organization or its agents participated in the prohibited conduct.<sup>19</sup>

## C. The 6-Month Limitation on Charges

Section 10 (b) of the amended act, which deals with the filing and disposition of unfair labor practice charges, 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.

The Board has consistently held, with court approval, that this proviso is a statute of limitations intended to fix the time within which unfair labor practice charges must be filed and served, and to extinguish liability for unfair practices committed more than 6 months before filing of charges.<sup>1</sup>

However, this does not prevent the Board from finding a violation in a continuing unfair labor practice which may have begun before the 6 months. Thus, in one case, the Board affirmed a trial examiner's holding that, under this rule, no unfair practice finding could be based upon the *execution* of an illegal union-security agreement which occurred more than 6 months before the filing of charges, but this did not preclude a finding that the *enforcement* of the contract during the 6 months before the charges were filed was a violation.<sup>2</sup>

But in another case, the Board held that section 10 (b) precluded a finding that an employer had illegally refused to reinstate certain strikers, during the statutory 6 months, when the strikers' right to reinstatement depended upon a finding that the strike, which occurred before the 6-month period, was caused by the employer's unfair labor practices.<sup>3</sup> The Board held that section 10 (b) precluded such a finding as to the strike because it would have to be "based upon" un-

<sup>17</sup> *United Construction Workers et al. Kanawha Coal Operators' Ass'n*, 94 NLRB 236.

<sup>18</sup> *Louisville Building & Construction Trades Council and Oertel Brewing Co*, 93 NLRB 530.

<sup>19</sup> *Carpenters Local 743 and General Electric Co*, 94 NLRB No 193.

<sup>1</sup> See Fifteenth Annual Report, pp. 90-91, and section 11 of chapter VII of this report.

<sup>2</sup> *Federal Stores Division of Spiegel, Inc*, 91 NLRB 647.

<sup>3</sup> *Greenville Cotton Oil Co*, 92 NLRB 1033.

fair practices occurring more than 6 months before filing of the charge. Moreover, in this case, the Board also dismissed charges that the employer unlawfully refused to bargain during the 6-month period, because it could not be shown that the union was the representative of a majority of employees without a finding that the strike was caused by unfair labor practices. This was due to the fact that the union did not prove a majority among the employees hired as permanent replacements for the strikers. Therefore, while it was established that the union represented a majority if the strikers were still employees, the strikers would be employees at the time only if it were established that they were illegally replaced. This finding would have depended, in turn, upon the possibility of finding that the strike was caused by unfair labor practices occurring more than 6 months before the filing of charges.

Nor does section 10 (b) preclude the Board from considering events that occurred more than 6 months before the filing of charges, for the purpose of evaluating the character of conduct within the 6 months.<sup>4</sup> The Board reaffirmed this rule in a case where, more than 6 months before the filing of charges, a high ranking supervisor had told employees that "if the union was successful, the effects would immediately be felt," and then refused to explain what his statement meant.<sup>5</sup> The Board held that the trial examiner properly admitted evidence as to this statement "for the purpose of throwing light upon events which happened within the 6-month period." The Board ruled that the statement and the refusal to explain it were "relevant as background material for evaluating the character of his later conduct." However, the Board specifically refrained from determining whether or not the statement might have been a violation of the act had charges based upon it been timely filed.

## 1. Amendment of Charges

The date of the filing and service of the original charge, not that of later amended charges, governs in determining the 6-month period under 10 (b), the Board has held consistently.<sup>6</sup>

This rule was applied in one case where the original charge, filed within 6 months, alleged only that the discharge of an employee was for union activities and violated section 8 (a) (1), but an amended charge, filed more than 6 months after the discharge, alleged that the discharge was not only for union activities but for other concerted activities as well and violated section 8 (a) (3) as well as 8 (a) (1).<sup>7</sup>

<sup>4</sup> For court rulings upon this point, see section 11 of chapter VII of this report.

<sup>5</sup> *El Mundo, Inc*, 92 NLRB 724.

<sup>6</sup> *Royal Palm Ice Co*, 92 NLRB 1295, footnote 2, reaffirming this rule. See also *Stokely Foods, Inc*, 91 NLRB 1267, and *Cathey Lumber Co*, 86 NLRB 157.

<sup>7</sup> *American Shuffteboard Co.*, 92 NLRB 1272, enforced 190 F. 2d 898 (C. A. 3).

The Board held that the 6 months should be calculated from the date of the original charge, because "it tolled the statute of limitations with respect to that discharge, irrespective of the theory upon which the case was ultimately tried."

The function of a charge is to set in motion the investigative machinery of the act.<sup>8</sup> Therefore the Board has held that a formal complaint issued by the General Counsel properly may allege as an unfair labor practice conduct not specifically set forth in the charge. Thus, in one case, the Board upheld inclusion in the complaint of an allegation of an independent violation of section 8 (a) (1) not specified in either the original or amended charges.<sup>9</sup> The Board said:

For the reasons stated in our decision in *Cathey Lumber Company*, 86 NLRB 157, we conclude that we may base an unfair labor practice finding upon any conduct which occurred within a 6-month period before the filing of a charge asserting that the Act has been violated although the charge does not specifically set forth such conduct, provided the complaint which issues pursuant to the charge alleges the conduct as an unfair labor practice.

In another case, the Board held that unfair practices committed by the same respondent after the filing of a charge, and uncovered during investigation of the original charge, also may be included in the complaint without filing of an additional charge.<sup>10</sup> In this case, while the General Counsel was investigating charges that one employee had been illegally discharged, the union which was a joint respondent in the case caused the illegal discharge of another employee. Again citing the reasoning of the *Cathey Lumber* case, the Board said:

. . . once the Board's jurisdiction is properly invoked by the timely filing and service of a charge, any unfair labor practices thereafter committed by a respondent and uncovered while the charge is being investigated becomes cognizable by the Board and may be included in the complaint.

In the present case, Whitehead was discriminatorily discharged while Miranda's charges were being investigated. In these circumstances, we find that Section 10 (b) did not preclude the inclusion in the complaints of the allegations respecting the unlawful discrimination against Whitehead. The fact that this discharge was mentioned in Miranda's second amended charges filed 7½ months later is immaterial as the complaints could properly have alleged this discharge without further amending Miranda's charges.

## 2. Service of the Charge

Under the Board's Rules and Regulations, the charging party is responsible for the timely and proper service of the charge upon the party charged.<sup>11</sup>

<sup>8</sup> *Cathey Lumber Co.*, 86 NLRB 157 (1949), 185 F. 2d, 1021 (C. A. 5.), set aside later under Supreme Court's *Highland Park* decision on 9 (h), 189 F. 2d 428.

<sup>9</sup> *Stokely Foods, Inc.*, 91 NLRB 1267, enforced 193 F. 2d 736 (C. A. 5.). See also *Star Beef Co.*, 92 NLRB 1018, *U S Gypsum Co.*, 94 NLRB No. 27.

<sup>10</sup> *Ferro Stamping and Mfg. Co.*, 93 NLRB 1459

<sup>11</sup> Section 102.14, Rules and Regulations, Series 6, amended.

In one case, a question arose as to whether it was proper under the act for the charging party to serve the charge on the same day that it was filed.<sup>12</sup> The Board held that such filing and service on the same day met the requirements of 10 (b). In another case, the Board ruled that a charge which named the respondent only by the trade name under which he did business was proper, where the respondent made no showing that he was misled or prejudiced in any way by it.<sup>13</sup>

### 3. Computing the 6-month Period

A question arose in one case on how the 6-month limitation period should be counted.

The Board held that, in computing this period, the day on which the unfair labor practice occurred should not be counted, and fractions of a day should be ignored.<sup>14</sup> Thus, counting should start from midnight of the day on which the unfair practice occurred, the Board ruled. In this case, where an employee was discharged on March 26, the Board held that a charge filed on September 26 was timely.

## D. Remedial Orders

When the Board finds that any person charged in a complaint has engaged in unfair labor practices, the Board is empowered by section 10 (c) to issue an order requiring such person to "cease and desist from such unfair labor practices, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." This applies to both employers and labor organizations or the agents of either.

The purpose of the Board's orders therefore is remedial—to undo the effect of the unfair labor practices and "to direct such action as will dissipate the unwholesome effect of violations of the Act."<sup>1</sup> During the fiscal year, the remedial orders issued by the Board have followed established policies.<sup>2</sup> However, a number of cases involved the application of these policies to unusual situations.

In accordance with the mandate of the statute, the Board fashions its orders to best remedy the unfair practice committed and to prevent future violations according to the requirements of the particular case.

<sup>12</sup> *Baltimore Transfer Co.*, 94 NLRB No 220.

<sup>13</sup> *Deluxe Motor Stages*, 83 NLRB 1425

<sup>14</sup> *Baltimore Transfer Co.*, 94 NLRB No 220

<sup>1</sup> *Metropolitan Life Insurance Co.*, 91 NLRB 472 The phrase quoted in this sentence is from the Supreme Court's decision in *N. L. R. B. v. Franks Bros. Co., Inc.*, 321 U S. 702.

<sup>2</sup> See prior annual reports, Fifteenth Annual Report, pp. 154-158, Fourteenth Annual Report, pp. 79-80 and 107-109.

For statistical summary of Board orders in cases closed during the fiscal year 1951, see table 3, appendix B.

Thus, where an employer's unfair labor practices reveal an attitude of hostility to the general purposes of the act and the danger of his committing other unfair labor practices in the future, the Board issues a broad order enjoining him from infringing "in any manner," on his employees' rights as guaranteed in section 7 of the act.<sup>3</sup> Similar broad orders are issued against unions where the Board finds that the commission of future unlawful acts can be anticipated from a union's past conduct.<sup>4</sup>

Conversely, the Board did not issue a broad cease-and-desist order where an employer, although found to have violated section 8 (a) (1) and (5) of the act, was not "disposed generally to deprive" his employees of their rights under the act.<sup>5</sup> In one case, where it was found that a direct consequence of the employer's unfair labor practices was the issuance, at the employer's request, of a court injunction prohibiting any union meetings on the employer's property, a majority of a Board panel ordered the employer to request the court to vacate the injunction, or to modify it appropriately in conformance with the Board's decision.<sup>6</sup>

## 1. Posting of Notices

The Board also continues to require that employers and unions found in violation post notices announcing to the employees that they will cease such violations and refrain from future violations. The notices also usually state what affirmative action the party found in violation has taken to remedy its unfair labor practices, ordinarily listing the names of employees receiving back pay or reinstatement. The Board commonly requires that such notices be kept in plain

<sup>3</sup> Examples: *Southern Block and Pipe Corp.*, 90 NLRB 590, *Atlanta Broadcasting Co.*, 90 NLRB 808; *United States Gypsum Co.*, 90 NLRB 964. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, *McKesson & Robbins, Inc.*, 92 NLRB 1432, *Vaughn Bowen*, 93 NLRB 1147; *Central Kentucky Broadcasting Co.*, 93 NLRB 1298.

<sup>4</sup> Examples: *Jarka Corporation of Philadelphia*, 94 NLRB No. 54; *National Union of Marine Cooks and Stewards (Burns Steamship Co.)*, 92 NLRB 877, where the respondent national union was ordered to cease and desist from directing, instigating, recommending, or encouraging its members to refrain from working not only for the employer of the charging individual but also for any other employer, for the purpose of causing any employer to discriminate against employees because of lack of membership in the union.

<sup>5</sup> *West Fork Cut Glass Co.*, 90 NLRB 944. For other orders limited to the specific violations found, see. *Paterson Fire Brick Co.*, 90 NLRB 660, *UMW District 31 (Bitner Fuel Co.)*, 92 NLRB 953, where the Board limited the scope of its order to apply only to the employees of the charging employer because there was no showing that the respondent union was engaged in a planned program to apply certain unlawful techniques to other employers. *Hardware Union Local 1146 and Carlyle Rubber Co.*, 92 NLRB 385, where the Board limited its cease-and-desist order to unfair practices found and any like or related conduct because there was no suggestion that future unfair labor practices would be committed by respondents employer and union. *UAW Local 13 (Electric Auto-Lite Co.)* 92 NLRB 1073, where the Board issued a narrow order because the union's section 8 (b) (2) violation consisted only of a misapprehension as to the applicability of a union-security agreement. *Denver Building and Construction Trades Council (Henry Shore)*, 90 NLRB 1768, where the respondent union's sole unfair labor practices were picketing threats and actual picketing of the charging employer's premises, to compel him to discriminate in favor of its members. In this case, the Board limited its order to prohibiting picketing or like activity for such purpose, and specifically stated that "neither picketing for other purposes nor mere persuasion or speech for any purpose is enjoined."

<sup>6</sup> *W. T. Carter and Brother, et al.*, 90 NLRB 2020, Chairman Herzog dissenting.

view for 60 days. Employers customarily are required to post notices in their offices, factory, or other business establishment in places where notices to employees are ordinarily put. A union is usually required to post notices in its meeting hall or offices, where notices to members are ordinarily posted.

But in order to reach employees where special circumstances prevail, the Board may vary these requirements. Thus, in one case, although the unfair labor practices occurred at only one store, the Board ordered the employer to post compliance notices at all its stores because of the employer's practice of interchanging employees between various stores.<sup>7</sup> In another case, involving a construction company, the Board took notice of the intermittent nature of the employer's operations, and required it to post notices at any project it started in the locality where the unfair practices occurred within 1 year after the beginning of compliance with the Board's order.<sup>8</sup>

In addition, unions usually are required to furnish signed copies of its notices to the Board's regional director to be posted in the employer's plant or office, if the employer is willing.<sup>9</sup> Similarly, in a case where a national seamen's union was found to have caused illegal discrimination against a steward who sailed on ships touching both coasts of the United States, the Board ordered it to post compliance notices at its branches and business offices "wherever located."<sup>10</sup>

## 2. Disestablishment of Affiliated Union Dominated by Employer

Shortly after the 1947 amendments to the act took effect, the Board announced that in accordance with the policies set forth in the amendments the Board would thereafter order any union found to be under domination of an employer disestablished as the bargaining representative of employees, regardless of whether or not the dominated union was affiliated with one of the national labor federations.<sup>11</sup>

During the 1951 fiscal year, the Board had occasion to apply this policy to an affiliated union for the first time.<sup>12</sup> In this case, the employer's president and a branch plant manager personally helped a union official solicit and sign up all drivers at one branch plant as members of a local of the A. F. L. Teamsters' Union. Another union was seeking to organize these employees at the time. The employer thereupon immediately granted the Teamsters local recognition and

<sup>7</sup> *Amalgamated Meat Cutters' Union, Local 421 (Von's Grocery Co)*, 91 NLRB 504; *Newspaper and Mail Deliverers' Union of N Y (Joseph Rizzo)*, 93 NLRB 419.

<sup>8</sup> *Swinerton and Walberg Co*, 94 NLRB No 152.

<sup>9</sup> *Amalgamated Meat Cutters' Union (Von's Grocery Co)*, cited above. See also *Pure Oil Co.*, 90 NLRB 1661; *E. B. Law and Son*, 92 NLRB 826; *Paterson Fire Brick Co*, 90 NLRB 660

<sup>10</sup> *National Union of Marine Cooks and Stewards (Burns Steamship Co)*, 92 NLRB 877, cited above.

<sup>11</sup> *Carpenter Steel Co*, 76 NLRB 670 (1948)

<sup>12</sup> *Jack Smith Beverages, Inc*, 94 NLRB No. 210.

a checkoff of dues. In addition, the employer paid the dues and fees of all employees without making any deductions from their wages. Thereafter, the union never sought to obtain any kind of agreement from the employer on the matter of wages, hours, or conditions of work, and it did not hold any meeting in nearly a year. The Board unanimously found the Teamsters' local to be dominated by the employer, and ordered the company to withdraw all recognition from it and to "completely disestablish" it as the representative of employees not only at this branch plant but at all of the company's plants.

In this decision, the Board unanimously reaffirmed its 1948 opinion that:

. . . disestablishment . . . is necessary as a remedy, in order effectively to remove the consequences of the employer's unfair labor practices and to make possible a free choice of representatives in those cases, perhaps few in number, in which an employer's control of *any* labor organization has extended to the point of actual domination.

Unions charged with being under the domination of an employer most commonly are unaffiliated, and the Board ordered the disestablishment of such organizations in a number of cases during fiscal 1951.<sup>13</sup>

### 3. Computation of Back Pay

In cases of illegal discrimination against an employee, the Board endeavors to restore the employee to the financial and employee status he would have enjoyed if he had not suffered the illegal discrimination.

To that end, in cases where an employer is found to have caused the discrimination, the Board orders the employer to make the employee whole for any loss of earnings he has suffered as a result of the discrimination.<sup>14</sup> Also, the Board usually requires that the employer make the payments for State and Federal social security and similar benefits that normally would have been made during the period of the employee's discrimination. In addition, the Board ordinarily orders the employer to reinstate the employee in his former job or an equivalent one if his old job has been abolished.

These same remedies are applied when a union and an employer are found to have been jointly responsible for the discrimination, except that the union and the employer are ordered "jointly and severally" to make up the employee's financial loss.<sup>15</sup> The Board does not

<sup>13</sup> *Majestic Metal Specialties, Inc*, 92 NLRB 1854, *Stedfast Rubber Co., Inc*, 91 NLRB 300, *Happ Brothers Co., Inc*, 90 NLRB 1513

<sup>14</sup> *F. W. Woolworth Co.*, 90 NLRB 289, *Harvest Queen Mill & Elevator Co.*, 90 NLRB 320, see Fifteenth Annual Report pp 155-157. See also p. 252, this report.

<sup>15</sup> *Acme Mattress Co.*, 91 NLRB 1010

attempt to determine the amount which each should pay and reserves the right to hold either liable for the full amount, although it does not collect twice in any case.<sup>16</sup> Also, because the union has no control over the reinstatement of the employee, the Board ordinarily permits the union to terminate its back-pay liability by giving notice to the employer and to the employee that it withdraws any objections to the employee's full reinstatement.<sup>17</sup> The union's joint liability ordinarily ceases 5 days after it has given such notice in writing.

### a. Back-Pay Orders in Cases Involving Only a Union

In one case during the 1951 fiscal year, the Board was confronted for the first time with the problem of framing an order in a discrimination case which was brought only against a union.<sup>18</sup> The Board noted that in such a case "we are to a certain degree limited in the direct remedial action which we can order." The Board could not order the union to reinstate the employee in her job, because that was beyond the union's power and lay only with the employer, who was not a respondent in the case. However, the Board did apply the remedy that it had employed in cases involving both employer and union, by requiring that the union notify the employer and the employee in writing that it had withdrawn its objections to her reinstatement without prejudice to her seniority or other rights or privileges. The Board also ordered the union to make the employee whole for the loss of earnings she had suffered.

On the matter of social security and similar benefits, the Board ordered the union to deposit with the appropriate State and Federal agencies the amount of money that would have been deposited by the employer if there had been no illegal discrimination against the employee. In these deposits, the Board specifically required that the union pay over to the agencies not only the amount that would have been deducted from the employee's wages but also the amount of any taxes which the employer would have paid to these accounts for the employee's benefit. However, the union, like an employer in a similar situation, was permitted to deduct from its payments to the employee the amount of any of these deposits which normally would have been deducted from the employee's earnings.

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<sup>16</sup> *Acme Mattress Co.*, cited above. Majority reaffirmed this principle, Chairman Herzog and Member Reynolds dissenting from its universal—and, to them, indiscriminate—application in all cases regardless of fault. See also *Air Products*, 91 NLRB 1381, *American Pipe and Steel Corp.*, 93 NLRB 54, *Ferro Stamping and Mfg. Co.*, 93 NLRB 252.

<sup>17</sup> *Kingston Cake Co.*, 91 NLRB 447, *Von's Grocery Co.*, 91 NLRB 504, *UAW Local 12 (Electric Auto-Inte Co.)*, 92 NLRB 1073. See *Ferro Stamping and Mfg. Co.*, 93 NLRB 1459, where union was required to request reinstatement of employees suffering discrimination.

<sup>18</sup> *Pen and Pencil Workers Union, Local 19593 (Parker Pen Co.)*, 91 NLRB 883. No charges were filed against the company; only section 8 (b) (2) was involved.

In a later case, the Board reaffirmed the ruling of this case that the act does not limit the ordering of back pay to cases in which the Board can or does order reinstatement of the employee.<sup>19</sup>

#### 4. Refund of Illegal Fees and Dues

In cases where the Board found that employees were required illegally to pay dues or fees, the Board ordered refund of the amounts illegally charged. In one case, a union was ordered to refund to 26 employees the \$10 difference between the initiation fee charged "old" and the fee charged "new" employees.<sup>20</sup> In another case, where the employer lent coercive assistance to a union in obtaining employees' authorizations for a checkoff of initiation fees and dues, the employer was ordered to reimburse the employees for all amounts thus deducted from their wages.<sup>21</sup>

<sup>19</sup> *National Union of Marine Cooks and Stewards (Burns Steamship Co)*, 92 NLRB 877, Member Murdock dissenting.

<sup>20</sup> *Ferro Stamping and Mfg. Co*, 93 NLRB 1459

<sup>21</sup> *Meyer & Welch, Inc.*, 91 NLRB 1102. The charges in this case were filed only against the employer.

## VI

# Supreme Court Rulings

The Supreme Court during the past year reviewed eight cases in which the Board sought enforcement of its orders. Two cases dealt with the scope of judicial review of Board findings under the Administrative Procedure Act and the National Labor Relations Act, as amended.<sup>1</sup> Four cases were concerned with the interpretation of the secondary boycott provisions.<sup>2</sup> One case called for an interpretation of the non-Communist affidavit requirement of section 9 (h) of the amended act;<sup>3</sup> and another case dealt with the Board's policy of not deducting funds paid as unemployment compensation in determining the amount of back pay due discriminatorily discharged employees.<sup>4</sup>

One other case in the Supreme Court, in which the Board participated as *amicus curiae*, was concerned with the question whether a State public utility antistrike law conflicted with the provisions of the National Labor Relations Act, as amended.<sup>5</sup>

### 1. Scope of Judicial Review

The issue presented in the *Universal Camera* and *Pittsburgh Steamship* cases<sup>6</sup> arose from the diverging views of the Courts of Appeals for the Second and Sixth Circuits regarding the standards to be applied by the courts in reviewing Board orders under section 10 (e) of the Administrative Procedure Act<sup>7</sup> and the corresponding provisions of the National Labor Relations Act, as amended.<sup>8</sup>

The original National Labor Relations Act had provided that, upon review, the Board's findings shall be conclusive if supported by "evidence," i. e., as judicially construed, by "substantial evidence." The Administrative Procedure Act, enacted in 1946, provides that the courts in passing upon the validity of orders of administrative agencies "shall review the whole record." In the following year, the judicial

<sup>1</sup> *Universal Camera Corporation v. N. L. R. B.*, 340 U. S. 474, *N. L. R. B. v. Pittsburgh Steamship Co.*, 340 U. S. 498.

<sup>2</sup> *N. L. R. B. v. Denver Building and Construction Trades Council*, 341 U. S. 675; *International Brotherhood of Electrical Workers, Local 501, AFL, v. N. L. R. B.*, 341 U. S. 694; *Local 74, United Brotherhood of Carpenters and Joiners of America, AFL, v. N. L. R. B.*, 341 U. S. 707, *N. L. R. B. v. International Rice Milling Co., Inc.* 341 U. S. 665.

<sup>3</sup> *N. L. R. B. v. Highland Park Manufacturing Co.*, 341 U. S. 322.

<sup>4</sup> *N. L. R. B. v. Gullett Gun Co., Inc.*, 340 U. S. 361.

<sup>5</sup> *Amalgamated Association of Street Railway Employees v. Wisconsin Employment Relations Board*, 340 U. S. 383.

<sup>6</sup> Cited above.

<sup>7</sup> 60 Stat. 237, 5 U. S. C. 1001, *et seq*

<sup>8</sup> Sec 10 (e).

review provision of the National Labor Relations Act was amended to provide that the Board's findings of fact shall be conclusive "if supported by substantial evidence on the record considered as a whole." In the opinion of the Court of Appeals for the Second Circuit, neither the quoted language of the Administrative Procedure Act nor that in the Taft-Hartley Act had the effect of materially changing the "substantial evidence" test previously applied by the courts in reviewing Board orders.<sup>9</sup> On the other hand, the Sixth Circuit had concluded that the effect of the review provisions of the two acts was to broaden the scope of judicial review of administrative findings.

In sustaining the position taken by the Sixth Circuit, the Supreme Court held that, in view of the legislative background of the two enactments, the standard of review under the general provisions of the Administrative Procedure Act and under the specific provisions of the Taft-Hartley Act was intended to be the same, and that the new standard required the courts to take into account "the whole record." In other words, the reviewing court in ascertaining the substantiality of evidence "must take into account whatever in the record fairly detracts from its weight." In the course of its decision, however, the Court made it clear that the new requirement "for" canvassing "the whole record" was not intended to negative the function of the Board as an expert body or to deny its findings the respect to which they are entitled because of the Board's expertness in a specialized field. The Court continued:

Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*. Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.<sup>10</sup>

The *Universal Camera* case involved the further question of whether, in reviewing a decision of the Board, the court is bound by the Board's rejection of findings of the trial examiner who heard the case. Agreeing with the Second Circuit that the examiner's findings are not "as unassailable as a master's," the Supreme Court observed that the Board's primary responsibility for unfair labor practice findings is inconsistent with a limitation which would permit the Board to overturn the examiner's findings only when they are "clearly erroneous." However, a majority of the Court held that the examiner's

<sup>9</sup> See Fifteenth Annual Report, pp 184-185; see also the like opinions of other circuits in *Eastern Coal Corp v Labor Board*, 176 F. 2d 131, 134-136 (C. A. 4); *Labor Board v Booker*, 180 F. 2d 727, 729 (C. A. 5); *Labor Board v LaSalle Steel Co*, 178 F. 2d 829, 833-834 (C. A. 7); *Labor Board v Minnesota Mining & Mfg Co*, 179 F. 2d 323, 325-326 (C. A. 8); *Labor Board v. Continental Oil Co*, 179 F. 2d 552, 555 (C. A. 10)

<sup>10</sup> *Universal Camera Corp v N. L. R. B.*, 340 U. S. 474, at p. 488

report, under both the Administrative Procedure Act and the Taft-Hartley Act, must be considered a part of the record on which the reviewing court must determine the substantiality of the evidence on which the Board's decision rests.<sup>11</sup> The Court concluded:

We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. The "substantial evidence" standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case. To give it this significance does not seem to us materially more difficult than to heed the other factors which in sum determine whether evidence is "substantial."<sup>12</sup>

## 2. Secondary Boycotts

In an important group of cases, the Court had before it for the first time the so-called secondary boycott provisions of section 8 (b) (4) of the act.<sup>13</sup> These cases called for decision on a number of questions affecting the administration of this section. Foremost among them were the scope of the basic prohibitions of section 8 (b) (4), their relation to the free-speech guarantees, the Board's jurisdiction in secondary boycott cases, and the form of the relief to be granted by the Board. A majority of the Court sustained the Board on each of the issues presented, saying in one case:

Not only are the findings of the Board conclusive with respect to questions of fact in this field when supported by substantial evidence on the record as a whole, but the Board's interpretation of the Act and the Board's application of it in doubtful situations are entitled to weight. In the views of the Board, as applied to this case, we find conformity with the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own.<sup>14</sup>

### a. Scope of Secondary Boycott Provisions

In three of the four cases before the Court, the boycott situation to which the Board's order related occurred in the construction industry and involved disputes between unions and contractors on con-

<sup>11</sup> Justices Black and Douglas dissenting.

<sup>12</sup> *Universal Camera* case, cited above, at pp 496-497. The case was remanded to the Second Circuit for the purpose of reconsidering its enforcement decree in the light of the Supreme Court's conclusions. Subsequently the lower court set aside the Board's order.

<sup>13</sup> *N L R B v Denver Bldg & Construction Trades Council*, 341 U S 675, *Intl Bro of Electrical Wkrs, Local 501, AFL v N L R B*, 341 U S 694, *Local 74, United Bro of Carpenters & Joiners of America, AFL v N L R B*, 341 U S 707; *N L R B v Intl Rice Milling Co, Inc*, 341 U S 665.

<sup>14</sup> *N. L. R. B v Denver Bldg & Construction Trades Council*, 341 U. S. 675.

struction projects.<sup>15</sup> In each of these cases, union men engaged in a strike against the contractor who employed them, in protest against the employment on the same project of nonunion men by other contractors. In agreement with the Board, a majority of the Supreme Court<sup>16</sup> found in each case that the union's conduct constituted a secondary boycott in violation of section 8 (b) (4) (A). The Court's holding rests on the following conclusions: While the union's ultimate objective was to force the general contractor to make the project an all-union job, this could be achieved only by forcing the general contractor to terminate its contract with the nonunion subcontractor. Thus, one object of the union's conduct, though not the *sole* one, fell within the purview of section 8 (b) (4) (A), and the Board could therefore properly find that the prohibitions of that section had been violated. The majority of the Court also agreed with the Board's conclusion that the contractor-subcontractor relationship of two employers on a construction project does not destroy the independent status of the two employers and does not preclude a finding that they were "doing business" with each other within the meaning of section 8 (b) (4) (A). The Court approved the Board's holding that that section applies "to normal business dealings between a contractor and subcontractor, both engaged in the same general business," where boycott pressure is applied against either in aid of a dispute with the other.<sup>17</sup>

In the *Rice Milling* case, the Board held that the acts alleged in the complaint, unlike those in the *Denver, I. B. E. W.*, and *Local 74* cases, did not come within the purview of the secondary boycott provisions of the act. The Board's conclusions, which were upheld by the Supreme Court, were based on the following facts: The union, whose conduct was involved, sought recognition as bargaining representative of the rice-mill employees. In order to give force to its demand, pickets were placed near the mill, some of whom carried signs saying "This job is unfair to" the union. When a truck of a neutral customer, occupied by two employees, approached the mill to pick up grain, the pickets stopped them and persuaded them to turn back because of the pending strike. Subsequently, a mill representative succeeded in having the driver bring the truck to the mill. While the truck was entering the mill, the pickets threw stones at it.

The Board found that the union's activities were not prohibited by section 8 (b) (4) since they arose out of the primary picketing of the

<sup>15</sup> *N. L. R. B. v. Denver Bldg. & Construction Tr. Council*, 341 U. S. 675, *I B E. W v N L. R. B.*, 341 U. S. 694; *Local 74, United Brothd of Carp. & Joiners v. N. L. R. B.*, 341 U. S. 707.

<sup>16</sup> Justices Reed, Douglas, and Jackson dissenting.

<sup>17</sup> See *Metal Polishers Union*, 86 NLRB 1243, 1252, quoted with approval in footnote 19 of the *Denver Building Trades* decision.

rice mill and were carried on in the immediate vicinity of the mill. Reversing the Court of Appeals for the Fifth Circuit, which had held that this conduct violated section 8 (b) (4), the Supreme Court sustained the Board's conclusion. The Court approved the Board's view that section 8 (b) (4) was not designed to inhibit primary as distinguished from secondary strike pressure,<sup>18</sup> and stated:

A union's inducements or encouragements reaching individual employees of neutral employers only as they happen to approach the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct by such employees. Generally, therefore, such actions do not come within the proscription of § 8 (b) (4), and they do not here.

The Court also agreed that the violence which occurred in connection with the picketing did not bring the union's action into conflict with section 8 (b) (4), since it is "the object of the union's action which is prohibited by that Section, rather than the means adopted to make it felt."

#### b. The Free Speech Provision in Secondary Boycotts

In two of the three construction cases, the union involved had asserted that the conduct which brought about the cessation of work by their members was protected by the provisions of section 8 (c), which contains the so-called "free speech" provision of the act. This section precludes the Board from finding an unfair labor practice based merely on "The expressing of any views, argument, or opinion, or the dissemination thereof. . . ." Insofar as protection was claimed for picket placards advertising a job as "unfair," the Court held in the *Denver* case that the placard was a signal or instruction to union employees to strike. The Court adopted the Board's conclusion that the "protection afforded by Section 8 (c) \* \* \* does not pertain where \* \* \* the issues raised under Section 8 (b) (4) (A) turn on official instructions to a union's members."<sup>19</sup> In the *I. B. E. W.* case, where the unlawful boycott was induced or encouraged not "by prearranged signal" but by peaceful picketing which appealed to non-members of the picketing union, the Court upheld the Board's rejection of section 8 (c) as a defense. On this point, the Court said:

To exempt peaceful picketing from the condemnation of § 8 (b) (4) (A) as a means of bringing about a secondary boycott is contrary to the language and purpose of that section. The words "induce and encourage" are broad enough to include in them every form of influence and persuasion. There is no legislative history to justify an interpretation that Congress by those terms has limited its proscription of secondary boycotting to cases where the means of inducement or encouragement amount to a "thread of reprisal or force or promise of benefit."

<sup>18</sup> See the Court's reference to the *Rice Milling* case in paragraph III, A, of this decision in the *Denver* case.

<sup>19</sup> See 82 NLRB 1195 at p. 1213.

Such an interpretation would give more significance to the means used than to the end sought. If such were the case there would have been little need for § 8 (b) (4) defining the proscribed objectives, because the use of "restraint and coercion" for any purpose was prohibited in this whole field by § 8 (b) (1) (A).

The Court adopted the Board's view that "To find that peaceful picketing was not \* \* \* proscribed [by section 8 (b) (4) (A)] would be to impute to Congress an incongruous intent to permit, through indirection, the accomplishment of an objective which it forbade to be accomplished directly," and that "it was the *objective* of the union's secondary activities \* \* \* and not the quality of the *means* employed to accomplish that objective, which was the dominant factor motivating Congress in enacting [section 8 (b) (4) (A)]." The Court held that the purpose of section 8 (c) was to protect noncoercive speech by employers and labor organizations only when used in furtherance of a lawful objective. That purpose, said the Court, precludes extension of its protection to speech or picketing in furtherance of unfair labor practices such as are prohibited in section 8 (b) (4). The Court in the *I. B. E. W.* case also rejected the contention that as so construed section 8 (b) (4) (A) violated the free-speech guarantee of the first amendment of the Constitution.

### c. Jurisdiction of the Board <sup>20</sup>

In each of the three cases in which violations of section 8 (b) (4) (A) were found, the respondents had contended that since the activities involved affected local construction the Board could not constitutionally exercise jurisdiction over them. The Court rejected this contention, holding that the Board may assert jurisdiction over local enterprises in the construction industry whose operations viewed alone or in the context of the industry as a whole affect commerce. The Court found that in each of these cases the effect on interstate commerce was sufficient as a matter of law to support the Board's exercise of jurisdiction; it also noted with approval the Board's policy of declining jurisdiction in cases where the Board deemed the effect on commerce insufficient to warrant assertion of jurisdiction.

The Court in the *Denver* case also rejected the contention that the decision of the United States District Court for the District of Colorado in the injunction proceeding under section 10 (1),<sup>21</sup> which preceded the Board's adjudication of the unfair labor practice charges, was *res judicata*. The Supreme Court held that the scheme of the act requires that a decision in an ancillary preliminary injunction proceeding shall not foreclose a subsequent adjudication of the merits of the case.

<sup>20</sup> See discussion of Board's jurisdictional standards, chapter II, and discussion of court of appeals rulings, section I, chapter VIII.

<sup>21</sup> *Sperry v Denver Building Trades Council*, 77 F. Supp. 321; Thirteenth Annual Report, p. 93.

### d. Scope of Board Order

In the *I. B. E. W.* case, the union complained that the order of the Board was too broad in that it enjoined not only the unlawful inducement of employees of the particular subcontractor against whom its conduct had been directed, but enjoined also the inducement of any other employer's employees to strike for the purpose of forcing the general contractor to cease doing business with the subcontractor with whom the union had a primary dispute. The Court, in upholding the Board's order, stated that to confine the order to secondary pressure brought through the immediate secondary employer's employees would make the relief inadequate since it would leave the primary employer and others who do business with him exposed to similar pressure through other channels.

### 3. Non-Communist Affidavits

The primary question involved in the *Highland Park* case was the meaning of the term "labor organization" for the purpose of the affidavit requirement of section 9 (h) of the amended act.<sup>22</sup> The Board had taken the position that such federations as the Congress of Industrial Organizations and the American Federation of Labor do not usually function as labor organizations in the statutory sense.<sup>23</sup> Therefore, the Board had held that it could entertain a proceeding instituted by a union affiliated with one of these federations even though the federation officers had not themselves filed affidavits. However, a majority of the Court<sup>24</sup> believed that the commonly accepted meaning of the term "national or international labor organization" included the parent federations, and that their inclusion under section 9 (h) would effectuate the legislative intent, as expressed in that section, of striking at communist leadership at every level of the labor movement.<sup>25</sup>

The Court also held that where a union has admittedly not complied with the qualifying requirements of section 9, the question whether compliance is required of it is subject to judicial review. The Court indicated, however, that, while the admitted noncompliance in the case before it was a matter for its cognizance, a different question would be presented in a case where the Board had determined that a union had in fact complied with the statutory provisions.

<sup>22</sup> See chapter III, The Filing Requirements. *N L R B. v Highland Park Manufacturing Co*, 341 U. S. 322.

<sup>23</sup> The Board recognized, however, that these federations became subject to the requirements of section 9 (h) whenever they assumed the role of a national or international labor organization. See *American Optical Co*, 81 NLRB 453, referred to in the dissenting opinion of Justice Douglas in the *Highland Park* case.

<sup>24</sup> Justices Frankfurter and Douglas dissenting. Justice Black did not participate.

<sup>25</sup> The effect of the Supreme Court's holding was to invalidate numerous union-shop elections and representation proceedings in which affiliates of the CIO and AFL participated prior to the parent federations' compliance with the affidavit and filing requirements of section 9 of the amended act. As a consequence, Congress enacted Public Law 189 (82nd Congress) for the purpose of preserving the effectiveness of such proceedings and certifications based thereon. See chapter II, The Filing Requirements.

#### 4. Calculation of Back Pay

In the *Gullett Gin* case, the only issue presented was whether the Board must deduct from back-pay awards to discriminatorily discharged employees sums paid to them as unemployment compensation by a State agency.<sup>26</sup> The Court held that the Board's action in declining to deduct unemployment compensation was clearly within its discretionary power and could "reasonably be considered to effectuate the policies of the Act." The Court observed that since collateral losses an employee may have sustained are not taken into account in awarding back pay, collateral benefits likewise need not be given consideration. Rejecting the employer's contention that unemployment compensation is in the nature of a direct benefit, the Court pointed out that compensation is not paid by the employer to discharge an outstanding liability but is made by the State in furtherance of a public policy designed to benefit the entire State. Thus, the Court concluded, the Board's practice does not result in making employees who have suffered discrimination more than "whole." The Court also noted that Congress, when amending the Wagner Act in 1947, was fully aware of the Board's practice of treating unemployment compensation as a nondeductible collateral benefit, and that since the back-pay provisions were reenacted without pertinent modification, Congress intended that practice to continue.

#### 5. State Statutes Conflicting with the Act

The State statute involved in the *Wisconsin Employment Relations Board* case in effect outlawed the right to strike in the case of an impasse in bargaining negotiations where the employer involved furnished "essential public utility service."<sup>27</sup> A majority of the Court<sup>28</sup> agreed with the position taken by the Board as *amicus curiae* that the Wisconsin statute was in conflict with Federal law in that it prohibited the exercise of rights guaranteed by section 7 of the National Labor Relations Act.<sup>29</sup> The Court declined to uphold the Wisconsin law on the ground that it related to local public utilities instead of national manufacturing concerns such as were affected by the Michigan law which was invalidated in the *O'Brien* case,<sup>30</sup> pointing out that the operations of intrastate public utilities had, on similar commerce facts, been held subject to the National Labor Relations Act.

<sup>26</sup> *N. L. R. B. v. Gullett Gin Co., Inc.*, 340 U. S. 361.

<sup>27</sup> *Amalgamated Association of Street Railway Employees, Division 998, et al. v. Wisconsin Employment Relations Board*, 340 U. S. 383, 340 U. S. 416. The statute involved was Wisconsin Stat. 1947, Secs. 111.50, et seq.

<sup>28</sup> Justices Frankfurter, Burton, and Minton, dissenting.

<sup>29</sup> See the following cases cited by the Court. *United Automobile Workers v. O'Brien*, 339 U. S. 454, *Plankinton Packing Co. v. Wisconsin Employment Relations Board*, 338 U. S. 953, Fifteenth Annual Report, pp. 165-167; *La Crosse Telephone Corp. v. Wisconsin Employment Relations Board*, 336 U. S. 18, Fourteenth Annual Report, p. 115, *Bethlehem Steel Co. v. New York Labor Relations Board*, 330 U. S. 767, Twelfth Annual Report, p. 43; and *Hill v. Florida*, 325 U. S. 538.

<sup>30</sup> Cited in preceding footnote.

## VII

# Enforcement Litigation

IN the course of the Board's enforcement litigation during the past year, orders of the Board were reviewed by the courts of appeals in 87 cases and by the Supreme Court in 8 cases.<sup>1</sup> The results of this litigation during the past year, and during the Board's entire existence, are summarized in the following table:

**Results of Litigation for Enforcement or Review of Board Orders, July 1, 1950, to June 30 1951, and July 5, 1935, to June 30, 1951**

Results	July 1, 1950, to June 30, 1951		July 5, 1935, to June 30, 1951	
	Number	Percent	Number	Percent
Cases decided by U. S. courts of appeals...	87	100. 0	960	100. 0
Board orders enforced in full.....	2 56	64. 4	581	60. 5
Board orders enforced with modifica- tion.....	14	16. 1	225	23. 4
Remanded to board.....	1	1. 2	18	2. 0
Board orders set aside.....	11	12. 6	131	13. 6
Board orders set aside because of non- compliance with sec. 9(h) by com- plaining union's parent federation...	5	5. 7	5	. 5
Cases decided by U. S. Supreme Court...	8	100. 0	74	100. 0
Board orders enforced in full.....	5	62. 5	53	71. 6
Board orders enforced with modifica- tion.....			11	14. 8
Board orders set aside.....	2	25. 0	5	6. 7
Remanded to Board.....			1	1. 4
Remanded to court of appeals.....	1	12. 5	3	4. 1
Board's request for remand or modi- fication of enforcement order denied.....			1	1. 4

<sup>1</sup> One of these cases was remanded on motion of the Board after the close of the fiscal year.

In addition to the customary cases dealing with conventional legal issues or questions of evidence, a number of cases litigated in the courts of appeals during the 1951 fiscal year presented novel issues or questions concerning the application of established principles to unusual

<sup>1</sup> Supreme Court decisions are discussed in the preceding chapter.

situations. The latter cases are discussed in the following sections. Other cases are merely listed under appropriate headings at the end of this chapter.

## 1. Jurisdiction of the Board

In one group of cases during the past year, the Board's jurisdiction was challenged on the ground that the business operations involved were local in character or did not sufficiently affect commerce within the meaning of the act. In several other cases, the Board's discretion to refuse to exercise its jurisdiction on policy grounds was put in issue.

### a. Enterprises Subject to the Act

In a case involving an insurance company, the contention was made that the Board had no jurisdiction (1) because the impact of the employer's business on commerce was so inconsequential that the doctrine *de minimis* was applicable, and (2) because the building maintenance activities which alone were involved were purely local.<sup>3</sup> The court rejected both contentions. The court noted that the phrase "affecting commerce," used in both the original and amended acts, indicated the intent of Congress to protect interstate commerce from the effects of industrial strife to the fullest extent. The court further stated that in order to establish the Board's jurisdiction it was not necessary to show that the building maintenance operations themselves were "in commerce" or practically a part of it. The controlling factor is the potential effect of the immediate activities on commerce, the court said. In this case, the court pointed out, a stoppage of the elevators in the employer's office building and of maintenance of the offices occupied by the employer would substantially affect the conduct of the employer's interstate business. The court distinguished this situation from that in the *Shawnee Milling* case, also decided by the court during the past year.<sup>4</sup> In that case, the court held that the Board was without jurisdiction over an intrastate subsidiary of an interstate concern. Unlike the Board, the court there found that the operations of parent and subsidiary were not integrated parts of a general operation and that the discontinuance of the subsidiary's intrastate operations would not affect the interstate operations of the parent.

The assertion that the local nature of the employer's business precluded the Board from taking jurisdiction was also rejected in a case where the employer's sole source of raw material and only customer was a nearby plant of the Ford Motor Co.<sup>5</sup> Holding that it

<sup>3</sup> *N. L. R. B. v. Tri-State Casualty Insurance Co.*, 188 F. 2d 50 (C. A. 10).

<sup>4</sup> *N. L. R. B. v. Shawnee Milling Co.*, 184 F. 2d 57 (C. A. 10)

In *Mavis Lane v. N. L. R. B.*, 186 F. 2d 671 (C. A. 10), the court, affirming the Board's jurisdiction, also held that its decision in the *Shawnee* case was not applicable since the employer in the *Lane* case itself was engaged in commerce within the meaning of the act

<sup>5</sup> *N. L. R. B. v. Vulcan Forging Co.*, 188 F. 2d 927 (C. A. 6). Enforcement denied on other grounds.

was proper to take official or judicial notice of the interstate operations of Ford, the court found that the employer's operations affected commerce within the meaning of the act even though the employer was not itself engaged in interstate commerce. The court also concluded that the effect of the employer's operations on commerce was substantial and that the *de minimis* doctrine did not apply to deprive the Board of jurisdiction.<sup>6</sup>

In another case, a court upheld the Board's jurisdiction over an employer which was one of a number of small suppliers of gas to a large distributor who, in turn, supplied gas to interstate businesses, such as a communications company, railroads, and industrial companies.<sup>7</sup> The employer here involved supplied only 5 percent of the total needs of the distributor. The court agreed with the Board's view that, while the amounts of gas furnished by each local supplier were relatively small, the aggregate amount they supplied to the distributor, was needed to fill the requirements of interstate customers; hence, to protect the interstate operations of these customers of the distributor, the distributor's local suppliers must be considered as if they constituted a single enterprise, thereby bringing the employees of any one of them within the Board's jurisdiction.

In two cases involving intrastate bus companies, the Board's jurisdiction was upheld on similar grounds.<sup>8</sup> In these cases, the court noted that bus transportation was provided to interstate railroads, airlines, bus lines, communication, and express companies; that the companies transported employees of concerns engaged in interstate commerce to and from their work, and that the operations of interstate businesses would be seriously affected by any interruption of the bus service furnished.

The Board's jurisdiction was challenged in another case by a local automobile dealer who was engaged in retailing new cars that were manufactured outside the State and brought into the State by an intermediary "sales corporation."<sup>9</sup> The court's decision in this case again pointed out that, although a business viewed in isolation may appear to be merely local, it may nevertheless be subject to the act because of its effect on business across State lines. Here, the court observed, the cessation of the automobile dealer's business would inevitably reduce the number of automobiles brought into the State

<sup>6</sup> See also *N. L. R. B. v. Wiltse*, 188 F. 2d 917 (C. A. 6), cert. denied Oct. 22, 1951, and *N. L. R. B. v. Dixon*, 184 F. 2d 521, (C. A. 8), where the Board's jurisdiction was sustained on the conventional ground that the importation of materials and exportation of finished products across State lines sufficiently affected commerce within the meaning of the act. In the *Wiltse* case, the court noted that it had previously found the employer to be subject to the Board's jurisdiction and that since that time his operations had been considerably expanded.

<sup>7</sup> *N. L. R. B. v. Mid-Co Gasoline Co.*, 183 F. 2d 451 (C. A. 5).

<sup>8</sup> *N. L. R. B. v. Fort Worth Transit Co.*, 187 F. 2d 792 (C. A. 5), enforcement denied on evidentiary grounds, *N. L. R. B. v. El Paso-Ysleta Bus Line, Inc.*, 190 F. 2d 261 (C. A. 5).

<sup>9</sup> *N. L. R. B. v. M. L. Townsend*, 185 F. 2d 378 (C. A. 9), cert. denied, 341 U. S. 909.

by the sales corporation and, while the decrease was relatively small, it was not so insignificant as to come within the maxim *de minimis*.<sup>10</sup> Whether commerce is affected sufficiently within the meaning of the act, the court continued, is not to be judged by the quantitative effect of the immediate activities before the Board, but, as held by the Supreme Court, depends on the total effect of similar situations existing throughout the country, of which the immediate situation is representative. The court said:

For us to hold that respondent is beyond the Board's jurisdiction would allow countless like retailers of new automobiles to engage in unfair labor practices with impunity. The results might well be drastic.

In accordance with well-established principles, the court also held that it was immaterial that, in case of the cessation of the employer's business, similar automobiles might be readily obtained elsewhere;<sup>11</sup> or that title to the automobiles retailed by the employer was acquired from the out-of-State manufacturer by the local sales corporation and not by the dealer;<sup>12</sup> or that the cars were brought into the State by an intermediary rather than by the dealer himself.<sup>13</sup>

### b. Discretion of the Board

In several instances, courts of appeals were confronted with the question of whether the Board has discretion to decline jurisdiction in cases in which the business involved is found to affect commerce within the meaning of the act but where, in the Board's opinion, the exercise of jurisdiction would not effectuate the policies of the act. In two separate cases,<sup>14</sup> the Seventh and Ninth Circuits each agreed that section 10 of the Wagner Act, by "empowering" rather than "directing" the Board to remedy unfair labor practices, clearly conferred discretion on the Board to dismiss a proceeding on grounds of policy. Each court found that this discretionary authority had been exercised by the Board under the Wagner Act with the approval of the courts.<sup>15</sup> Both courts held that under the amended act the Board's discretion in the matter of jurisdiction was the same since Congress, though fully aware of the Board's practice, reenacted section 10 unchanged when amending the act in 1947.

In the *Haleston* case, the court further held that the Board's power to dismiss a complaint on policy grounds was unaffected by section 3 (d) of the amended act which vests in the Board's General Counsel

<sup>10</sup> The dealer's 1947 sales amounted to \$70,770.

<sup>11</sup> See *N. L. R. B. v. Bradford Dyeing Association*, 310 U. S. 318, 326.

<sup>12</sup> See *Williams Motor Car Co. v. N. L. R. B.*, 128 F. 2d 962, 963 (C. A. 8), *N. L. R. B. v. Farnblatt*, 306 U. S. 601, 607.

<sup>13</sup> See *N. L. R. B. v. Sunshine Mining Co.*, 110 F. 2d 780, 784 (C. A. 9).

<sup>14</sup> *Local Union No. 12, Progressive Mine Workers v. N. L. R. B.*, 189 F. 2d 1 (C. A. 7). *Haleston Drug Stores Inc. v. N. L. R. B.*, 187 F. 2d 418 (C. A. 9), cert. denied 342 U. S. 815.

<sup>15</sup> See *e. g. N. L. R. B. v. Indiana & Michigan Electric Co.*, 318 U. S. 9, 18.

the exclusive power to determine whether to issue a complaint. The court held that while section 3 (d) confers upon the General Counsel a discretion as to whether to issue a complaint at all, section 3 (d) is not intended to preclude the Board from thereafter exercising its discretion as to whether, as a matter of policy, the Board will accept jurisdiction when a case is before it for decision.

In the *Progressive Mine Workers* case, it was also contended that it was improper for the Board to decline jurisdiction on the basis of its newly announced jurisdictional standards.<sup>16</sup> These standards, in the court's opinion, were not applied "retroactively" since they were inaugurated before the employer had filed its exception to the trial examiner's report, and therefore prior to the Board's decision. Moreover, the court held that the employer had no legally cognizable right in the Board's jurisdictional policies.<sup>17</sup>

The Board's power to determine for itself whether or not to exercise its jurisdiction was likewise recognized by the Ninth Circuit in the *Townsend* case.<sup>18</sup>

## 2. Persons Entitled to Benefits of the Act

The question presented in one case was whether drivers of trailer trucks, used by the company in transporting new automobiles from factory to dealers under an "owner-operator" arrangement whose concerted activities are protected by the act, were employees or independent contractors, who are excluded from the act's protection.<sup>19</sup> The court held that, by applying the conventional common law right-of-control test, the Board had properly concluded that the degree of control retained by the company over the drivers' work made them employees. This, the court held, was apparent from the "sale" and "lease" agreements under which company and drivers operated. The drivers did not come to the company with equipment of their own, but on being hired "purchased" it from the company on credit, and simultaneously "leased" it to the company for exclusive use in the latter's car delivery business. Title to the trailers remained in the company, and the company optionally could repurchase the trailers upon the termination of the agreement. The lease agreement provided that the operation of the leased equipment was "under exclusive and direct supervision and control of the Company" and that the company could terminate the relationship if the drivers failed to

<sup>16</sup> *Hollow Tree Lumber Co.*, 91 NLRB 635, see chapter II.

<sup>17</sup> In this respect, compare *N. L. R. B. v. The Red Rock Co.*, 187 F. 2d 76 (C. A. 5), cert. denied, 341 U. S. 950, where the court held that an employer could not require that the Board's order be set aside on the basis of the "self-denying rule" in which the Board, subsequent to the issuance of the order, indicated the extent to which it will exercise its statutory jurisdiction.

<sup>18</sup> *N. L. R. B. v. Townsend*, 185 F. 2d 378 (C. A. 9), cert. denied, 341 U. S. 909

<sup>19</sup> *N. L. R. B. v. Nu-Car Carriers, Inc.*, 189 F. 2d 756 (C. A. 3).

operate the trailers to the satisfaction of the company. The court also noted that, while the number of working days or hours was not fixed, regularity and availability were insured by provisions requiring drivers to work exclusively for the company and to be subject to call at all times. The court rejected the contention that the ownership of the trucks or the method of compensation of the drivers was controlling in this case. Ownership, the court pointed out, is significant only so long as it spells out control over working equipment but not where, as here, control over the equipment and the manner in which it is to be used has been completely surrendered by the "owner." Nor, the court held, could an independent contractor relationship be inferred from the compensation of the drivers in the form of a gross "rental" based on mileage, from which operating expenses, insurance, and social security taxes were deducted. The court also noted that the company kept a close check on the drivers' operations by the use of "safety patrol cars," disciplined drivers for rule violations, and otherwise exercised supervision over the work performed by the drivers. The court concluded that the decisions of the Supreme Court in the *Greyvan Lines* case<sup>20</sup> and of the Sixth Circuit in the *Mutual Trucking* case<sup>21</sup> were not applicable because the owner-operators in those cases retained almost complete control over the equipment and its use, and they hired, paid, and directed subordinate personnel.

### 3. Persons Subject to Board Orders

In one case, the court enforced an order directed against a company and a successor organization which, the Board found, was not a separate enterprise but the *alter ego* of the company.<sup>22</sup> In holding both corporations liable for the unfair labor practices, the Board had found that the company's sole purpose in bringing the second corporation into existence was to defeat the union which sought to represent the company's employees and to avoid its obligation to bargain with the union on behalf of the employees. Holding that the Board's conclusions were amply supported, the court noted that, after demonstrating its hostility to the union and shutting down its factory, the company organized the new corporation to carry on the same business in the same factory, with the same supervisory and clerical personnel. The court further noted that the original company retained all profits made by the new company, continued to use its own credit, and to sell goods manufactured under its own name, and that the new company when commencing operations did not reemploy any of the former workmen who were known to have been union adherents.

<sup>20</sup> *Harrison v Greyvan Lines, Inc.*, 331 U. S. 704 (1947).

<sup>21</sup> *U. S. v Mutual Trucking Co.*, 141 F. 2d 655 (1944).

<sup>22</sup> *N. L. R. B. v E. C. Brown Co.*, 184 F. 2d 827 (C. A. 2)

A question was presented in another case as to whether the anti-union activities of a local chief of police, a police officer, and another individual were not only imputable to the employer, with whose unfair labor practices they coincided, but rendered those individuals separately liable as "employers" under section 2 (2), which includes in that term "any person acting as an agent of an employer, directly or indirectly."<sup>23</sup> The court declined to enforce the Board's order against the individual respondents because it did not think that the necessary agency relationship was established by the record. In the court's opinion, the evidence did not sufficiently establish that these individuals were employed by the respondent corporations or that the corporate respondents had authorized, or had knowledge of, the acts committed by the individuals, or that the corporations had any control or authority over these individuals.

In another case, the same court sustained the Board's order remedying unfair labor practices committed by the immediate employer, Red Rock Co., but declined to grant enforcement as to the employer's affiliate, Red Rock Cola Co.<sup>24</sup> The court rejected the finding that, while only employees of Red Rock were involved, Red Rock Cola was also an "employer" and an indispensable party to the proceeding because of the integration of the operations of the two companies and because Red Rock Cola's affairs were inseparably interrelated with those of Red Rock.<sup>25</sup>

#### 4. Agricultural Laborers and Their Organizations

The status of agricultural laborers and their organizations under the act was involved in one major case during the past fiscal year.<sup>26</sup> In this case, the court upheld the Board's conclusion that a union composed entirely of agricultural laborers was not a labor organization within the meaning of the act including the secondary boycott provisions of section 8 (b) (4). Pointing out that the definition of "employees" in section 2 (3) specifically excludes agricultural laborers while section 2 (5) defines a "labor organization" as an organization in which "employees" participate, the court concluded that a union of farm laborers does not come within the term "labor organization" as used in the act. The Board had reached the same conclusion.

In regard to section 8 (b) (4), the court rejected a contention that, because it was the express purpose of Congress to protect farmers against secondary boycotts, the term "employee" as used in the secondary boycott provisions of 8 (b) (4) should be construed more

<sup>23</sup> *N. L. R. B. v. Russell Manufacturing Co.*, 191 F. 2d 358 (C. A. 5).

<sup>24</sup> *N. L. R. B. v. The Red Rock Co.*, 187 F. 2d 76 (C. A. 5), cert. denied, 341 U. S. 950.

<sup>25</sup> In the Board's view, the situation was squarely within the principle applied by the Sixth Circuit in *N. L. R. B. v. Federal Engineering Co., Inc.*, 153 F. 2d 233, and the Second Circuit in *N. L. R. B. v. Don Juan, Inc.*, 178 F. 2d 625, enforcing 79 NLRB 154.

<sup>26</sup> *Di Giorgio Fruit Corp. v. N. L. R. B.*, 191 F. 2d 642 (C. A., D. C.), cert. denied, 342 U. S. 869.

broadly than the general definition of section 2 (3). As to the intent of Congress, the court held that Congress had in mind secondary action against farmers by such organizations as the teamsters' and longshoremen's unions, but it was not concerned with organizations of agricultural laborers. The court held further that construing the term "labor organization" for the purposes of section 8 (b) to include farm laborers' organizations would result in subjecting farm laborers to the restrictions of section 8 (b) while denying them the protection of section 8 (a). Because those two sections must be construed in harmony, the court concluded, Congress clearly did not intend to extend either the benefits or the restrictions of the act to organizations composed exclusively of agricultural laborers.

## 5. Protected Employee Activities

In several cases, courts of appeals were called upon to review the Board's conclusions as to whether or not certain activities engaged in by employees came within the protection of section 7 of the act

One case involved certain drivers who were dissatisfied with the owner-operator work arrangement to which they were subject under the terms of a collective agreement made by their union.<sup>27</sup> The drivers frequently discussed the employer-favored system and attempted to influence their bargaining representative to bring about its abandonment and the substitution of a straight wage system. These activities, the court held, were protected because attempts by some members of a union to persuade the union to change its attitude about existing contractual terms clearly constitute "concerted activity" within the meaning of section 7. The court rejected the employer's contention that the concerted efforts of the drivers involved were not protected because they were not addressed directly to the employer but were directed against the position taken by their union.

The issue before the court in another case was the propriety of the Board's finding that certain employees who refused to cross a picket line at their employer's plant established by a union other than their own in connection with a dispute in which they were not involved had exercised rights guaranteed by section 7.<sup>28</sup> The Board had held that the demotion of the employees because of this conduct constituted unlawful discrimination on the part of the employer.<sup>29</sup>

The court set aside the Board's order on two grounds: (1) The employees, the court thought, were not engaged in "concerted activities" such as are contemplated by section 7 of the act, because they

<sup>27</sup> *N. L. R. B. v. Nu-Carriers, Inc.*, 189 F. 2d 756 (C. A. 3).

<sup>28</sup> *N. L. R. B. v. Illinois Bell Telephone Co.*, 189 F. 2d 124 (C. A. 7), certiorari denied November 26, 1951.

<sup>29</sup> They were demoted from supervisors to rank-and-file employees. The activities and the demotion took place before the enactment of the Taft-Hartley law, at a time when supervisors enjoyed the same protections under the act as regular employees.

acted individually in honoring a picket line in a dispute in which they were not involved rather than acting jointly with fellow employees for their own mutual aid and protection; and (2) the union to which these employees belonged, which was the lawful bargaining representative in the unit of which these employees were a part, enjoyed contractual relations with the employer and had itself refused to honor the picket line of the striking union. The court therefore deemed the conduct of the demoted employees as being in the nature of a wild-cat activity by a dissident group, which was calculated to disrupt the existing bargaining relationship between the employer and the employees' lawful bargaining representative.

In another case, the court declined to enforce an order in which the Board directed the respondent employer to refrain from prohibiting the distribution of union literature during the employees' nonworking time in the immediate vicinity of the employer's premises.<sup>30</sup> The order was based on a finding that following the distribution of successive issues of the union's paper criticizing the employer, the latter issued an order to the union in terms which indicated the employer's intention to prohibit distribution of any union literature on its property. The reversal of the Board rests entirely on the court's contrary conclusion to the effect that the employer's directive was intended solely to prohibit the distribution of two issues of the union's paper which contained scurrilous and defamatory remarks. Having arrived at this conclusion, the court held that the employer had a right to prevent the distribution of printed matter which had a tendency to disrupt discipline in the plant and that the Board's order was not appropriate under these circumstances.

## 6. Employers' Freedom of Speech

In three cases in which employers sought to resist the Board's order by invoking the free speech guarantees of the Constitution and of section 8 (c) of the act, the court upheld the Board's finding that the utterances and expressions involved contained threats of reprisals and promises of benefits and therefore interfered with the exercise of rights under the act by the employees to whom they were addressed. Thus, in one case, the court agreed that a preelection antiunion speech, in which the employer indicated in various ways that the employees could obtain greater benefits without a union, was not protected free speech.<sup>31</sup> Similarly, in another case, the first amendment was held not to protect statements made by the employer for the purpose of

<sup>30</sup> *Maryland Drydock Co. v. N. L. R. B.*, 183 F. 2d 538 (C. A. 4).

<sup>31</sup> *N. L. R. B. v. Beatrice Foods Co.*, 183 F. 2d 726 (C. A. 10).

inducing employees to accept benefits embodied in individual agreements as a condition to their abandonment of the union which sought to represent them.<sup>32</sup> The court in the third case likewise held that the employer during an organizational campaign was not privileged to propose benefits to its employees as an inducement not to join the union.<sup>33</sup>

In a fourth case involving the question of free speech, a majority of the court, contrary to the Board's conclusion, held that the company's "policy" statement was not coercive and, in view of section 8 (c), could not be made the basis of a finding that the employer induced employees to resign from the union in violation of section 8 (a) (1) of the act.<sup>34</sup>

## 7. Unfair Labor Practices of Employers

For the most part, the unfair labor practices involved in the cases in which the Board sought enforcement of orders against employers during the past year followed conventional patterns of violations of the various prohibitions of section 8 (a) against interference with employee rights. However, a number of cases called for decision on novel and important issues arising under the prohibition of section 8 (a) (3) against unlawful discriminations and under the bargaining provisions of section 8 (a) (5). These cases are discussed below.

### a. Discrimination Under Union Shop

The validity of the Board's finding that the employer unlawfully discharged certain employees at the request of their bargaining representative depended upon the proper construction of the union-security provisos to section 8 (a) (3) of the amended act.<sup>35</sup> The union, resorting to an existing union-security agreement, caused the discharge of the complaining employees who had tendered their initiation fees and dues but had refused to comply with other membership requirements, namely, the filing of application cards, attendance at an admission meeting, and the taking of an oath of loyalty to the union. The court agreed that proviso (B) of section 8 (a) (3), which protects only discharges for nonpayment of initiation fees and dues, was applicable

<sup>32</sup> *N L R. B. v Valley Broadcasting Co*, 189 F. 2d 582 (C. A. 6). Enforcement in this case was denied on evidentiary grounds insofar as the Board's order was based on the finding that the employer unlawfully refused to bargain with the complaining union.

<sup>33</sup> *Joy Silk Mills v N L R. B.*, 185 F. 2d 732 (C. A., D. C.), employer's petition for certiorari denied 341 U. S. 914. The broadly worded cease and desist provisions of the Board's order in this case were modified by the court, one judge dissenting.

<sup>34</sup> *N L R. B. v Goodyear Footwear Corp.*, 186 F. 2d 913 (C. A. 7).

<sup>35</sup> *Union Starch and Refining Co, v. N L R. B.*, 186 F. 2d 1008 (C. A. 7), cert. denied October 8, 1951.

and that the discharges complained of were therefore illegal.<sup>36</sup> The respondents in the case contended that since the union uniformly required all applicants for membership to file application cards, to attend an admission meeting, and to take a loyalty oath, proviso (A) protected the discharge of employees who were denied membership in the union because of their noncompliance with these requirements. Rejecting the contention, the court adopted the Board's view that, while proviso (A) has reference to the denial of union membership on a discriminatory basis, proviso (B) protects employees to whom membership is denied for reasons other than nonpayment of dues and initiation fees even though that reason be nondiscriminatory. The court agreed that if a union "imposes any other qualifications and conditions for membership with which he is unwilling to comply, such an employee may not be entitled to membership, but he is entitled to keep his job." This construction of the union-security provisions of section 8 (a) (3), in the court's opinion, was a reasonable one and gave effect to the congressional purpose to prevent utilization of union-security agreements except to compel payment of dues and initiation fees.

#### b. Other Types of Discrimination

Two cases, in which enforcement was denied, involved certain types of discrimination not previously presented in cases litigated in the courts.

In one such case, the Board had found that the employer engaged in prohibited discrimination by adopting a "strike seniority policy" whereby, in case of a reduction in force, strikers who returned after the settlement of an economic strike, regardless of their previous seniority status, would be laid off ahead of strikers who returned before that date or employees hired as replacements during the strike.<sup>37</sup> The court, on the other hand, took the view that the company's failure to maintain previous seniority rights of returning strikers was motivated by legitimate business reasons and did not violate section 8 (a) (3) even though the company's policy discriminated against strikers and thereby tended to discourage union activities.

In the other case, the court held that an employer who had a "members only" contract with a union representing a minority of his employees could grant the union members a retroactive wage increase

<sup>36</sup> Section 8 (a) (3), while validating so-called union-shop agreements, provides further

That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

<sup>37</sup> *N. L. R. B. v. Pollatch Forests, Inc.*, 189 F. 2d 82 (C. A. 9).

as provided by the contract without violating section 8 (a) (3) even though such wage increase was not granted the nonmembers.<sup>38</sup> The court observed that the employer did not "discriminate" in favor of union members since the nonmembers were fully compensated in accordance with *their* individual contracts and "were not deprived of anything that was rightfully theirs." The court further concluded that, even if the employer's action were held to be discriminatory, it was not intended to encourage the nonmember employees to become members of the contracting union and could not have had that effect, because these employees knew that the union admitted to membership only sons of members.

### c. The Duty to Bargain

An employer's duty to furnish wage data to the bargaining representative of employees when negotiations are in progress was affirmed by the court in one case during the fiscal year.<sup>39</sup> The Board found that the employer violated section 8 (a) (5) by refusing to submit a list of employees indicating their salaries for the current and preceding year. This information had been requested by the union upon the employer's refusal to grant wage increases and other concessions. Sustaining the Board, the court rejected the employer's contention that it was under no duty to furnish the data since the union did not show its relevance. In the court's words,

Since the employer has an affirmative statutory duty to supply relevant wage data, his refusal to do so is not justified by the Union's failure initially to show the relevance of the requested information. The rule governing disclosure of data of this kind is not unlike that prevailing in discovery procedures under modern codes. There the information must be disclosed unless it plainly appears irrelevant. Any less lenient rule in labor disputes would greatly hamper the bargaining process, for it is virtually impossible to tell in advance whether the requested data will be relevant except in those infrequent instances in which the inquiry is patently outside the bargaining issue. (Footnote omitted.)

In another case, the court sustained the Board's view that an employer violates his duty to bargain under the act if he refuses to consummate a collective bargain except upon the union's compliance with a condition unrelated to the subject matter of the contract itself, and as to which bargaining, although possible, was not mandatory.<sup>40</sup> Thus, the court held, the employer here could not, as a condition to executing a contract embodying terms already agreed upon, insist upon a provision that would have required the contracting union to register according to Georgia State law so as to become subject to suit in that State on its contract. The court agreed with

<sup>38</sup> *N. L. R. B. v. Reliable Newspaper Delivery, Inc.*, 187 F. 2d 547 (C. A. 3)

<sup>39</sup> *N. L. R. B. v. Yawman & Erbe Manufacturing Co.*, 187 F. 2d 947 (C. A. 2).

<sup>40</sup> *N. L. R. B. v. Dalton Telephone Co.*, 187 F. 2d 811 (C. A. 5), cert. denied.

the Board that to permit the employer to insist upon such a condition would conflict with the holding of the Supreme Court in *Hill v. Florida*<sup>41</sup> to the effect that the exercise of the bargaining rights created by the act may not be conditioned on compliance with State registration laws.

A parallel question was presented in another case which raised the issue of whether an employer had illegally conditioned agreement with the bargaining agent of its employees by insistence that the latter surrender statutory bargaining rights.<sup>42</sup> In this case, the Board had found that the company violated its bargaining duty, not only by actually taking unilateral action while negotiations were pending, but also by insisting on a "prerogative clause" reserving to the company the right to determine unilaterally certain employment conditions, i. e., subjects of compulsory bargaining. While agreeing that the company violated section 8 (a) (5) by changing terms of employment while bargaining negotiations were pending, the court reached the conclusion that the employer had a right to insist upon the inclusion of the disputed prerogative clause in the contract. The Supreme Court has granted the writ of *certiorari*<sup>43</sup> for which the Board applied because of the importance of the question in the future administration of section 8 (a) (5).

Another case was concerned with an employer's defense that its refusal to bargain with the complaining union was not unlawful because the union at the time of the refusal had not fully complied with the affidavit requirements inasmuch as the officers of its parent, the A. F. L., had not filed affidavits.<sup>44</sup> The court upheld the Board's order on two alternative and independent grounds: (1) It agreed with the Board's view, subsequently rejected by the Supreme Court in the *Highland Park* case,<sup>45</sup> that such federations as the A. F. L. are not "labor organizations" within the meaning of section 9 (h) and therefore need not comply with that section; and (2) it adopted the contention of the charging union, contrary to the view then held by the Board,<sup>46</sup> that the employer's defense could not be sustained even if the union was not in compliance with the statutory affidavit requirements at the time of the illegal refusal to bargain so long as it later effected compliance before issuance of the complaint. In the court's view, noncompliance with section 9 (h) "does not in any way relieve an em-

<sup>41</sup> 325 U. S. 538.

<sup>42</sup> *American National Insurance Co. v. N L R B*, 187 F. 2d 307 (C. A. 5).

<sup>43</sup> 342 U. S. 809

<sup>44</sup> *West Texas Utility Co., Inc v N L R. B*, 184 F. 2d 233 (C. A., D C); cert denied 341 U. S. 939.

<sup>45</sup> *N. L. R. B v. Highland Park Mfg. Co.*, 341 U. S. 322.

<sup>46</sup> *Andrews* case (87 NLRB 379). The *Andrews* doctrine to which the court referred with disapproval insofar as inconsistent with the court's view was subsequently qualified by the Board in *New Jersey Carpet Mills, Inc*, 92 NLRB 604, in which it was held that an employer who did not raise the question of the union's compliance with section 9 (h) at the time of negotiations could not later rely upon such noncompliance as a defense to an otherwise illegal refusal to bargain.

ployer of the paramount obligation to bargain in good faith. The act's only sanction for noncompliance is denial of Board facilities." The court further observed that it is left to the Board to refuse its processes to a noncomplying union and it is not for the employer to take the matter into his own hands by refusing to bargain.<sup>47</sup>

## 8. Unfair Labor Practices of Unions

Unfair labor practices charged against labor unions were involved in four principal cases decided by the courts of appeals during the 1951 fiscal year.<sup>48</sup> One case involved interpretation of the act's limitation on the union shop. The three others involved the ban on secondary boycotts.

### a. Causing or Attempting to Cause Discrimination

In the *Union Starch* case, the court sustained the Board's conclusion that the union violated section 8 (b) (2) by causing the discharge of two employees who were subject to a union-security agreement and had failed to comply with the union's membership requirements other than the payment of dues and initiation fees.<sup>49</sup> The union had taken the position that because it had a right to require uniformly that applicants for membership file an application card, attend a meeting, and take an oath of loyalty, it also had the right to demand the discharge of employees who did not comply with the conditions which applied equally to all employees. However, the Board, construing the union-security proviso of section 8 (a) (3), had held that regardless of any nondiscriminatory membership conditions a union may impose, the discharge of an employee may be lawfully requested only for nonpayment of initiation fees and dues.

In another case, the court concurred in the Board's holding that the United Mine Workers Union violated section 8 (b) (2) by its strike-supported and successful insistence that the operators of certain coal

<sup>47</sup> Other cases involving section 8 (a) (5) which were decided by the courts during the fiscal year included *N. L. R. B. v. Grace Co.*, 189 F. 2d 258 (C. A. 8), *N. L. R. B. v. Vulcan Forging Co.*, 188 F. 2d 927 (C. A. 6), and *Pacific Gamble Robinson Co. v. N. L. R. B.*, 186 F. 2d 106 (C. A. 6). The *Grace case* is discussed in section 9 a of this chapter and *Vulcan Forging* is discussed in section 11. In the *Pacific Gamble case*, enforcement was denied when the court disagreed with the Board's conclusion that the employer had violated section 8 (a) (5) during an economic strike by offering individual replacements and strikers a starting wage larger than that offered the union during negotiations. The court took the view that the evidence did not permit a finding that the employer offered replacements a higher wage or terms more favorable than those offered the union even though it was a different offer. Moreover, in the court's opinion, the employer did not seek replacements among the strikers but among workmen generally. Thus, the court concluded, the employer in making its unilateral offer to replacements did not unlawfully bypass the union within the Supreme Court's ruling in the *Crompton Highland case* (337 U. S. 217), on which the Board relied.

<sup>48</sup> Among other cases, the courts upheld the Board's findings that the unions involved unlawfully restrained or coerced employees within the meaning of section 8 (b) (1) (A), in *Mavis Lane v. N. L. R. B.*, 186 F. 2d 671 (C. A. 10), and *Progressive Mine Workers v. N. L. R. B.* 187 F. 2d 298 (C. A. 7). See also *N. L. R. B. v. United Mine Workers*, 190 F. 2d 251, one of the four principal cases discussed in this section, where the Board found that the illegal application of a union-security agreement violated both 8 (b) (2) and 8 (b) (1) (A)

<sup>49</sup> *Union Starch and Refining Co. v. N. L. R. B.*, 186 F. 2d 298 (C. A. 7), cert. denied, October 8, 1951

mines execute a union-shop agreement, although the union had not been authorized to make such an agreement.<sup>50</sup> The court thus adopted the Board's view that the adoption of an illegal union-security agreement creates discriminatory conditions of employment in violation of section 8 (a) (3) and that a union in causing the execution of such an agreement necessarily violates section 8 (b) (2). The court agreed with the Board that section 8 (b) (2) is not limited so as to prohibit only actual discrimination against specific employees, but prohibits potential discrimination against employees generally.<sup>51</sup>

### c. Secondary Boycotts

The Board's interpretation of the secondary boycott provisions were upheld in two principal cases in the courts of appeals during the year. In one, the court upheld the Board's findings that picketing and blacklisting of an employer by a union and also ordering one of his employees off the job, all for the purpose of forcing the employer to cease doing business with another employer involved in a dispute with the union, was violative of section 8 (b) (4) (A) of the act.<sup>52</sup> The court rejected the union's contention that section 8 (b) (4) (A), if applicable to its conduct, was violative of the first, fifth, and thirteenth amendments to the Constitution and the further claim that section 8 (c) immunized the union's conduct from the proscription of section 8 (b) (4) (A).<sup>53</sup> The court also concluded that, absent common ownership or management, the mere doing of business between the two employers did not make the secondary employer an ally of the primary employer so as to remove it from the protection which the act extends to neutral employers against involvement in labor disputes of other employers with whom they are doing business. The court, on the basis of the well-established principle that discontinuance of unfair labor practices does not render a Board order moot, also rejected the contention that the resolution of the basic labor dispute or the discontinuance of business operations by the secondary employer rendered the Board's order moot and therefore not entitled to enforcement.

In the *Di Giorgio* case, the court sustained the Board's dismissal of a complaint alleging that the respondent Teamsters' Union by picketing the property of Di Giorgio, with whom it had a primary dispute, had engaged in a secondary boycott because of the pickets' attempt to

<sup>50</sup> *United Mine Workers v. N. L. R. B.*, 190 F. 2d 251 (C. A. 4)

<sup>51</sup> See also *N. L. R. B. v. National Maritime Union*, 175 F. 2d 686 (C. A. 2), Fifteenth Annual Report, pp. 176, 179.

In *Progressive Mine Workers v. N. L. R. B.*, 187 F. 2d 298 (C. A. 7), the court was of the opinion that there was insufficient evidence to support the Board's finding that certain employees were illegally discharged at the request of the respondent union

<sup>52</sup> *N. L. R. B. v. United Brotherhood of Carpenters*, 184 F. 2d 60 (C. A. 10), cert. denied, 341 U. S. 947

<sup>53</sup> The Supreme Court in *N. L. R. B. v. Denver Building and Construction Trades Council*, 341 U. S. 675, and *I. B. E. W. v. N. L. R. B.*, 341 U. S. 694, cited with approval the court's holding that neither the Constitution nor section 8 (c) protected picketing from the prohibition of section 8 (b) (4) (A)

dissuade truck drivers of other concerns from delivering goods to Di Giorgio despite the fact that the union disciplined member drivers who crossed the picket line.<sup>54</sup> The court agreed that the union's picketing activities at the place of employment of their members, in support of a strike against their employer, were primary rather than secondary and were therefore not prohibited by section 8 (b) (4) (A) under the rule announced by the Supreme Court in the *International Rice Milling* case.<sup>55</sup>

The court also agreed with the Board in the *Di Giorgio* case that the Farm Union could not be held liable for the alleged violations of section 8 (b) (4) (A) because it acted as an agent of its parent, the National Farm Labor Union, a labor organization within the definition of section 2 (5). In the court's opinion, the National Union's constitution indicated separate responsibility on the part of its locals rather than an agency relationship. This situation, according to the court, was not changed merely because the national organization, in accordance with its constitution, furnished assistance to the local union during a dispute with an employer.

## 9. Remedial Orders

The primary responsibility of the Board and its broad discretion in devising appropriate remedies for the redress of unfair labor practices was again emphasized by the courts in several instances.

Thus, in one case where a charging employer filed with the court a petition to review and set aside an order of the Board dismissing certain allegations of misconduct against a union and its officers, the court on motion of the Board struck from the petition the portions in which petitioner requested that the court issue a remedial decree against the union.<sup>56</sup> The court pointed out that even if, contrary to the Board, it should find as a matter of law that an unfair labor practice was present, it would nevertheless be necessary to remand the case to the Board for the purpose of determining the proper remedy. Moreover, the court made the observation that, while a customary cease and desist order might be held appropriate, it was the function of the Board and not the court, to make the initial determination concerning the scope of the order and the nature of the notice, if any, to be posted. In addition, the court agreed with the Board that, in a proceeding to review a Board order, the Board

<sup>54</sup> *Di Giorgio Fruit Corp. v. N. L. R. B.*, 191 F. 2d 642 (C. A., D. C.), cert. denied 342 U. S. 869.

<sup>55</sup> *N. L. R. B. v. International Rice Milling Co.*, 341 U. S. 665. The Supreme Court also overruled *Denver Building Trades Council v. N. L. R. B.*, 186 F. 2d 326, in which the Court of Appeals for the District of Columbia reversed the Board's finding that the picketing of a construction job for the purpose of forcing the general contractor not to use the services of a nonunion subcontractor was secondary and accordingly prohibited.

<sup>56</sup> *American Newspaper Publishers Ass'n v. N. L. R. B.*, 190 F. 2d 45 (C. A. 7).

was the only proper respondent. Accordingly, the court struck the names of the union and its officers from the caption of the petition in which the latter had been named as respondents along with the Board.

In another case, the same court held that it was within the Board's remedial discretion to require the respondent employer and union "jointly and severally" to reimburse employees whose discriminatory discharge they had brought about jointly.<sup>57</sup> The court held that section 10 (c), which provides, in case of discrimination, for back pay by an offending "employer or labor organization," was not intended to require the Board to choose one or the other. On the contrary, the court concluded, the legislative history of the pertinent part of section 10 (c) indicates a congressional intent not only to preserve the existing scope of the Board's discretion but, as found by the Board,<sup>58</sup> to extend its discretion so as to permit back-pay orders against employer *and* union, where both are responsible for the discrimination.

In the matter of back pay, the Board was also upheld in ordering the reimbursement of employees discharged by an employer under what the employer in good faith, though erroneously, believed to be valid union-security provisions.<sup>59</sup> The court noted the Board's conclusion that the "risk of mistake in construing ambiguous provisions of a supposed union security contract should reside with the party who misinterprets the contract, rather than with the employees against whose interest the contract has erroneously been thought to run." In the same case, the court held that it was within the Board's power to require the employer to make whole employees who had been refused reemployment after a strike, although the union which represented the employees had waived back pay for its members in connection with the settlement of the strike.

The Second Circuit held in another case that as long as the positions formerly occupied by striking employees were still in existence, the Board could properly rule that the reinstatement obligation was not fulfilled by the employer's alternative offers.<sup>60</sup> The employer offered either to reinstate the strikers at the plant at which they formerly had worked, upon condition that the nonstriking employees assented to their reinstatement, or, if such assent were not forthcoming, to reinstate them at a new and distant plant. Such a ruling, in the view of the court, was within the discretionary power of the Board to evaluate the conflicting considerations presented in connection with determining the appropriate remedy.

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<sup>57</sup> *Union Starch and Refining Co. v. N. L. R. B.*, 186 F. 2d 1008 (C. A. 7) cert. denied 342 U. S. 815.

<sup>58</sup> See *H. M. Newman*, 85 NLRB 725, at p. 732.

<sup>59</sup> *N. L. R. B. v. Don Juan Co., Inc.*, 185 F. 2d 393 (C. A. 2).

<sup>60</sup> *N. L. R. B. v. Quest-Shon Mark Brassiere Co., Inc.*, 185 F. 2d 285 (C. A. 2), cert. denied 342 U. S. 812.

## 10. Determinations of Bargaining Representatives

In two cases, employers charged with refusal to bargain questioned the legality of certain procedures of the Board in representation cases. In one case, the employer raised a question regarding the application of the Board's contract bar rules. In the other, the employer objected to the manner in which an election had been conducted and to the time limit on objections. In both cases, the employer questioned the propriety of the Board determination of the unit of employees appropriate for bargaining. The Board's rulings on each of these points were upheld by the courts.

### a. Contract Bar Rules

One of the grounds on which an employer sought to justify its refusal to bargain in one case was that the employer had a contract with another union covering the bargaining unit involved at the time of the representation proceeding in which the union was certified by the Board.<sup>61</sup> In fact, on the day on which the complaining union filed its petition for certification, the employer and the incumbent bargaining agent had orally agreed on contract terms. However, a written agreement was not executed by the parties until the following day. These facts brought the situation within the Board's rule that a properly supported petition of a rival union will be entertained unless there is in existence a valid written exclusive bargaining agreement between the employer and the incumbent union, signed by the parties and containing substantive terms and conditions of employment for employees in an appropriate unit.<sup>62</sup> No such contract having been in existence at the crucial time, the Board entertained the complaining union's petition, directed an election, and issued a certification based on the results thereof. Rejecting the employer's challenge, the court not only acknowledged generally the Board's power to adopt rules which it deems necessary to carry out the policies of the act, but also recognized the beneficial effect of the Board's policy of holding a present representation petition barred by an asserted collective agreement only where the agreement has been validly incorporated in a written and signed contract. Moreover, the court pointed out that the contract bar rules adopted by the Board are procedural and that their application under the circumstances of the case was a matter within the Board's discretion.

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<sup>61</sup> *N. L. R. B. v. Grace Co*, 184 F. 2d 126 (C. A. 8). The court denied enforcement of the Board's bargaining order following the Board's determination on remand (184 F. 2d 126) that the employer had permanently closed the plant.

<sup>62</sup> For a full discussion of the Board's contract bar rule, see chapter IV above.

### b. Election Procedures

In one case, the employer contended that the Board's bargaining order should not be enforced because the election on the basis of which the complaining union was certified had not been properly conducted by the Board.<sup>63</sup> Asserting that the employees concerned did not have sufficient notice of the election, the employer relied on the fact that on the day set for the election the Board's agent did not appear at the scheduled hour; that he informed the parties that the election would be held the following day since some part-time workers who were eligible to vote had already left the plant; and that on the next day two of the eligible employees did not vote in the election. The court sustained the validity of the election on several grounds: (1) No written or formal notice of the postponed election was necessary, since, in view of the smallness of the plant, it could reasonably be assumed from all of the circumstances that all of its 44 employees knew of the election; (2) lack of knowledge on the part of the 2 employees who did not vote was a fact within the peculiar knowledge of the employer and the latter's failure to ascertain and disclose that fact entitled the Board to act on the assumption that all employees were given the requisite opportunity to vote; and (3) the employer could not consistently claim lack of notice to its employees after its representative joined in executing a certificate attesting the proper conduct of the election and the opportunity of all eligible voters to cast their ballots in secret.

The court also rejected the employer's contention on the further ground that the employer had failed to file objections to the challenged election within the 5-day period allowed by the Board's rules and regulations. The court held that such a time limitation was necessary and proper, because of the importance of expedition in certification proceedings.

### c. Unit Determinations

In both the *Grace* and *Conlon* cases, the court reaffirmed the rule that the Board's unit determinations may not be disturbed unless they are clearly arbitrary or unreasonable.<sup>64</sup> No such grounds for reversal were found by the court in either case. In the *Grace* case, the Board, over the objections of the employer, held that one of the employer's two plants constituted an appropriate unit. In this case, one union had petitioned for certification as bargaining agent of both plants, whereas another union sought representation rights for the employees of only one plant. While conceding that the circumstances indicated the appropriateness of a company-wide unit, the Board found that the

<sup>63</sup> *N. L. R. B. v. Conlon Bros. Mfg. Co.*, 187 F. 2d 329 (C A 7).

<sup>64</sup> Both cases are cited in the preceding subsections.

one-plant unit sought was equally appropriate, particularly in view of the fact that the two plants were located 53 miles apart. In accordance with its practice in similar situations, the Board made its ultimate unit determination dependent upon the outcome of a self-determination election in the proposed one-plant unit. A majority of the employees in that unit having voted in favor of separate representation, the Board certified the unit accordingly. This method of ascertaining the proper bargaining unit, in the court's opinion, was neither unreasonable nor arbitrary.

In the *Conlon* case, the court held that the Board did not abuse its discretion by including the employer's production employees, shop employees, and part-time workers in a single, plant-wide unit, rather than in three separate units as requested by the employer. In the court's opinion, the appropriateness of a single unit was indicated by the interchange of the members of the three groups in the employer's operations, the similarity of their working conditions and rate of pay, as well as the fact that all employees were subject to the same management policies and the same supervision.

### 11. The 6-Month Limitation on Charges

Enforcement of Board orders was resisted in several cases on the ground of noncompliance with the provisions of section 10 (b), which precludes the Board from issuing a complaint unless the charge upon which it is based was filed and served on the respondent not more than 6 months after the occurrence of the alleged unfair labor practices.

In one case, the original charge was filed within the statutory period, but the employer challenged as untimely the subsequent amended charge on which the Board's complaint was based.<sup>65</sup> The amended charge specified particular unfair labor practices whereas the original charge merely alleged violations in the general language of the act. In the court's view, the amended charge was in the nature of a bill of particulars, making more definite the allegations of the original charge. Although filed more than 6 months after the alleged conduct occurred, it was valid because it related to unfair labor practices "inherent in or connected with the original charge," the court held. The well-known doctrine of "relation back" in pleading, according to the court, should not be narrowly applied in the case of charges before the Board because the only purpose of the charge is to set in motion the Board's investigatory machinery.

In another case, the court similarly rejected a contention that the Board's complaint improperly alleged unfair labor practices which

<sup>65</sup> *Kansas Milling Co. v. N. L. R. B.*, 185 F. 2d 413 (C. A. 10), modified and remanded in other respects.

occurred more than 6 months earlier and which had not been covered by the charge.<sup>66</sup> The court pointed out that allegations of the complaint were not barred by the 6-month limitation of section 10 (b), because they merely restated the allegations of a timely charge in a more formal, definite, and detailed manner.<sup>67</sup>

The further question was presented in another case as to whether section 10 (b) forecloses the Board from receiving evidence of events happening more than 6 months before the filing of the charge for the purpose of appraising the character of acts alleged to have been committed within the statutory 6-month period.<sup>68</sup> The court agreed with the Board that section 10 (b) enacts "a statute of limitations and not a rule of evidence."<sup>69</sup> Therefore, the court held, it is proper for the Board in determining whether unfair labor practices have occurred to take into consideration "background evidence" of antecedent circumstances which occurred more than 6 months before the filing of the original charge and which, of themselves, would afford no basis for a finding of illegal conduct because barred from such consideration by section 10 (b).

## 12. Filing and Affidavit Requirements

During the past year, the Fifth and Sixth Circuits upheld the Board's position that whether the union on whose charge the complaint was based has complied with the filing requirements of section 9 (f), (g), and (h) is not a matter to be pleaded, or affirmatively established upon the record, the Board being permitted to rely upon its own administrative determination that the required documents have been filed, at least where the contrary does not affirmatively appear.<sup>70</sup>

While in each of these cases, the courts relied on the reasoning in the *Greensboro Coca Cola* case, decided by the Fourth Circuit the previous year,<sup>71</sup> the Sixth Circuit in the *Wiltse* case also reached the same result

<sup>66</sup> *Progressive Mine Workers v. N. L. R. B.*, 187 F. 298 (C. A. 7), modified on other grounds.

<sup>67</sup> See also *Cathey Lumber Co. v. N. L. R. B.*, 185 F. 2d 1021 (C. A. 5), subsequently vacated in view of the intervening Supreme Court decision in the *Highland Park* case. In this case the court, without opinion, accepted the Board's argument that the complaint properly alleged discrimination against certain employees in addition to those named in the charge. While the Board, in the first place, contended that the conditions of section 10 (b) did not apply since the charge on which the complaint was based was filed before the effective date of the amended act, the Board further argued that, even if held applicable, the 6-month limitation of the filing of charges did not preclude the allegation in the complaint of additional instances of discrimination occurring not more than 6 months before the filing of the original charge.

<sup>68</sup> *N. L. R. B. v. Clausen*, 188 F. 2d 439 (C. A. 3).

<sup>69</sup> See *Azelson Mfg. Co.*, 88 NLRB 761.

<sup>70</sup> *N. L. R. B. v. Red Rock Company*, 188 F. 2d 917 (C. A. 6); *N. L. R. B. v. Wiltse*, 187 F. 2d 76 (C. A. 5), *N. L. R. B. v. Vulcan Forging Co.*, 188 F. 2d 927 (C. A. 6). In the *Vulcan Forging* case, enforcement was denied because, in the court's opinion, the employer was relieved of its duty to bargain with the union which was repudiated by the employees within 2 weeks after its certification. The court's holding is in direct conflict with the judicially recognized principle that, in the interest of stability in bargaining relations, a Board certificate must be held binding on both employer and employees for at least a "reasonable period." However, the Board is not in a position to seek certiorari in this case because of the applicability of the intervening decision of the Supreme Court in the *Highland Park* case, which is discussed in chapter VI, above.

<sup>71</sup> *N. L. R. B. v. Greensboro Coca Cola Bottling Co.*, 180 F. 2d 840.

upon an independent and extensive examination of the purpose and legislative history of section 9 (f), (g), and (h).

In two cases, enforcement of the Board's order was resisted on the ground that the individuals who had filed discrimination charges were fronting for unions which sought access to the Board's processes without complying with the filing and affidavit requirements.<sup>72</sup> In enforcing the Board's orders, the respective courts agreed with the Board's conclusion that the employees who had suffered discrimination were not precluded from seeking the relief to which they were individually entitled under the act although they were officers in an unqualified union, or had been assisted in preparing their charges by such officers.<sup>73</sup>

### 13. Procedural Problems

In one case, the employer attacked the validity of the Board's order on the ground that the same Board attorney who prosecuted the case against it had also prosecuted a consolidated case against a union agent who sought to organize Seamprufe employees.<sup>74</sup> The employer contended that it was denied due process of law in that the Board's attorney at the consolidated hearing represented two clients with conflicting interests. Rejecting the employer's position, the court pointed out that the Board attorney in presenting the consolidated cases did not represent, nor was he acting in the interest of, any private party but that he acted for, and represented, only the public interest in presenting evidence bearing upon alleged violations of the statute, whether by the union or the employer. The court further observed that the attorney clearly would not have been disqualified from trying the two cases separately and that the fact of their consolidation did not change the situation. In the court's words, "due process concerns itself with substance and not with form."

<sup>72</sup> *N. L. R. B. v. Augusta Chemical Co.*, 187 F. 2d 63 (C. A. 5), *N. L. R. B. v. Clausen*, 188 F. 2d 439 (C. A. 3).

<sup>73</sup> In *N. L. R. B. v. Highland Park Mfg Co*, 184 F. 2d 98 (C. A. 4), enforcement was denied because in the court's view the CIO, with which the complaining union was affiliated, had not complied with the affidavit requirements of section 9 (h). Following affirmance of the holding of the Fourth Circuit by the Supreme Court (341 U. S. 322, see chapter VI) enforcement was similarly denied in *N. L. R. B. v. Clark Shoe Co*, 189 F. 2d 731 (C. A. 1), *N. L. R. B. v. J. I. Case Co.*, 189 F. 2d 599 (C. A. 8), *Bethlehem Steel Co. v. N. L. R. B.*, 191 F. 2d 341 (C. A., D. C.), and *Cathey v. N. L. R. B.*, 189 F. 2d 428 (C. A. 5), originally enforced 185 F. 2d 1021 (C. A. 5). Compare *West Texas Utilities Co v N. L. R. B.*, 184 F. 2d 233 (C. A., D. C.) cert denied, 341 U. S. 939

In the following cases in which enforcement litigation was pending at the time of the Supreme Court's decision in the *Highland Park* case, the respective courts of appeals granted the Board's motion for the remand of the case for the purpose of dismissal *N. L. R. B. v. Long Lewis Hardware Co.*, 189 F. 2d 611 (C. A. 5), *N. L. R. B. v. J. H. Rutter-Rex Mfg Co, Inc.*, 189 F. 2d 611 (C. A. 5), *N. L. R. B. v. Quarles Mfg. Co*, 190 F. 2d 82 (C. A. 5); *N. L. R. B. v. Atlanta Brick & Tile Co.*, 190 F. 2d 83 (C. A. 5); *N. L. R. B. v. Precast Slab & Tile Co.*, 190 F. 2d 206 (C. A. 8), and *Post Printing & Publishing Co. v. N. L. R. B.*, 190 F. 2d 559 (C. A. 10).

<sup>74</sup> *N. L. R. B. v. Seamprufe, Inc.*, 186 F. 2d 671 (C. A. 10), No. 4075. See also *Mavis Lane v. N. L. R. B.*, 186 F. 2d 761 (C. A. 10), No. 3928 (Mavis Lane was the agent involved)

The court in another case upheld the propriety of the Board basing its order on the report of a trial examiner other than the examiner who presided at the hearing, when the latter died prior to the preparation of his report.<sup>75</sup> The court held that, under applicable judicial precedent,<sup>76</sup> the Board's action was not a denial of due process because due process does not require that testimony adduced at an administrative hearing be evaluated by an officer who heard and observed the witnesses. The court also concluded that the procedure was consistent with the pertinent provisions of the National Labor Relations Act, as well as section 5 of the Administrative Procedure Act which provides specifically that hearing officers "who preside at the reception of evidence \* \* \* shall make the recommended decision \* \* \* except where \* \* \* unavailable." The court observed that under section 12 of the Administrative Procedure Act, these provisions were applicable since they had not been expressly modified by the National Labor Relations Act.

In the *Clausen* case, the court held unfounded the employer's contention that the Board's refusal to allow oral argument on exceptions to the trial examiner's report was a denial of due process.<sup>77</sup> As stated by the court, the granting of oral argument is a matter within the Board's discretion, where, as here, the employer had ample opportunity to present its case by exceptions and supporting brief. The court concluded that, under the standards outlined in the *Morgan* cases,<sup>78</sup> argument may be either oral or written and that *Clausen* therefore had a full, fair, and adequate hearing.

The Second Circuit expressed its view that the Supreme Court's recent appraisal of the reviewing powers of the courts under the Administrative Procedure Act and the amended National Labor Relations Act did not mean that the scope of review had been expanded to require a *de novo* review of the Board's findings or to make such findings as vulnerable as those of a [trial] judge.<sup>79</sup>

## 14. Other Cases in Courts of Appeals

Cases, other than those discussed above, in which the Board's order was sustained included:

Second Circuit—*N. L. R. B. v. Everett Van Kleeck and Co., Inc.*, 189 F. 2d 516; *N. L. R. B. v. H. Milton Newman*, 187 F. 2d 488.

<sup>75</sup> *N. L. R. B. v. Stocker Mfg. Co.*, 185 F. 2d 451 (C. A. 3).

<sup>76</sup> *N. L. R. B. v. Mackay Radio & Tele. Co.*, 304 U. S. 333, *Morgan v. U. S.*, 298 U. S. 468.

<sup>77</sup> *N. L. R. B. v. Clausen*, 188 F. 2d 439 (C. A. 3).

<sup>78</sup> *Morgan v. U. S.*, 298 U. S. 468, 481; 304 U. S. 1, 23, 26.

<sup>79</sup> *N. L. R. B. v. Smith Victory Corp.*, 190 F. 2d 56 (C. A. 2). See *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474, discussed in chapter VI. Compare *N. L. R. B. v. Tri-State Casualty Insurance Co.*, 188 F. 2d 50 (C. A. 10); *Standard Dry Wall Products, Inc. v. N. L. R. B.*, 188 F. 2d 362 (C. A. 3), *N. L. R. B. v. Valley Broadcasting Co.*, 189 F. 2d 582 (C. A. 6).

Third Circuit—*N. L. R. B. v. L. B. Hosiery Co.*, 187 F. 2d 335; *Standard Dry Wall Products, Inc. v. N. L. R. B.*, 188 F. 2d 362; *N. L. R. B. v. Magee Carpet Co.*, 189 F. 2d 259.

Fourth Circuit—*N. L. R. B. v. United Distillers of America, Ltd.* 188 F. 2d 353; *N. L. R. B. v. A. J. Sars Products Corp. of Virginia*, 186 F. 2d 502.

Fifth Circuit—*N. L. R. B. v. Westex Boot & Shoe Co.*, 190 F. 2d 12; *N. L. R. B. v. Daniel Hamm Drayage Co.*, 185 F. 2d 1020; *N. L. R. B. v. Alabama Marble Co.*, 185 F. 2d 1022, *N. L. R. B. v. Atlanta Journal Co d/b/a WSB*, 187 F. 2d 13.

Sixth Circuit—*N. L. R. B. v. Taylor Mfg. Co.*, — F. 2d —; *N. L. R. B. v. Empire Pencil Co.* 187 F. 2d 334; *N. L. R. B. v. J. B. Cook Auto Machine Co.*, 184 F. 2d 845.

Eighth Circuit—*Standard Generator Service Co., v. N. L. R. B.*, 186 F. 2d 606.

Ninth Circuit—*N. L. R. B. v. Red Spot Electric Co.*, 191 F. 2d 697.

Tenth Circuit—*N. L. R. B. v. Beatrice Foods Co.*, 183 F. 2d 726.

Summary enforcement was granted in the following cases in which no exceptions to the trial examiner's intermediate report were filed in accordance with section 10 (c):

First Circuit—*N. L. R. B. v. Adams Motors, Inc.*, September 23, 1950.

Second Circuit—*N. L. R. B. v. Bergnes*, June 4, 1951; *Truck Drivers Local Union No. 275 (Seneca Transportation Lines, Inc.)*, March 5, 1951; and *N. L. R. B. v. Vosburgh Moving Co.*, January 8, 1951.

Third Circuit—*N. L. R. B. v. New York Shipbuilding Corp. & IUMSWA, Local 1, CIO*, April 3, 1951.

Fifth Circuit—*N. L. R. B. v. The American Thread Co.*, 188 F. 2d 161.

Seventh Circuit—*N. L. R. B. v. Hasselberg Co*, March 20, 1951.

Ninth Circuit—*N. L. R. B. v. Carter*, October 30, 1950.

Tenth Circuit—*N. L. R. B. v. International Union of Mine, Mill & Smelter Workers*, October 13, 1950.

For cases other than those discussed above, in which the order was modified because of the court's disagreement with some of Board's evidentiary findings or the Board's conclusions see:

Third Circuit—*N. L. R. B. v. National Biscuit Co.*, 185 F. 2d 123.

Fourth Circuit—*N. L. R. B. v. Borchert, d/b/a West Fork Cut Glass Co.*, 188 F. 2d 474.

Fifth Circuit—*N. L. R. B. v. Bibb Mfg. Co.*, 188 F. 2d 825; *N. L. R. B. v. Crosby Chemicals, Inc.*, 188 F. 2d 91, and *N. L. R. B. v. John Deere Plow Co.*, 187 F. 2d 26.

Seventh Circuit—*John S. Barnes Corp. v. N. L. R. B.*, 190 F. 2d 127.

## 15. Contempt Proceedings

The Board's petitions for the adjudication in contempt of parties believed to have violated outstanding enforcement decree resulted during the past year in the adjudication of one employer in both civil and criminal contempt<sup>80</sup> and of two employers in civil contempt.<sup>81</sup> A fourth case, involving a contempt petition against a union, was remanded by the court.<sup>82</sup>

<sup>80</sup> *N. L. R. B. v. Star Metal Mfg. Co.*, 187 F. 2d 856 (C. A. 3).

<sup>81</sup> *N. L. R. B. v. Berkley Machine Works*, 189 F. 2d 904 (C. A. 4), *N. L. R. B. v. Weirton Steel Co.*, 183 F. 2d 584 (C. A. 3).

<sup>82</sup> *N. L. R. B. v. Retail Clerks International Association (Safeway Stores)*, 186 F. 2d 371 (C. A. 9).

In the *Star Metal* case, the company and its officers admitted, and the court found, that the court's bargaining decree had been wilfully and deliberately disobeyed and that the company and the individual defendants were guilty of civil and criminal contempt. In assessing fines of \$1,000 and \$100, respectively, against the two individual defendants and omitting terms of imprisonment, the court took into consideration that subsequent to the institution of contempt proceedings the defendants bargained and executed a contract with the representative of their employees. The company was directed to reimburse the Board for expenses in the amount of \$757.86 incurred in connection with the prosecution of the contempt proceeding. The Board's request to include in the decree a direction that the company and its officers bargain with the union was denied. In the court's opinion, such a direction was unnecessary since the original bargaining decree, entered upon the enforcement of the Board's order, continued in force as a permanent mandatory injunction which, if further violated, could later again serve as basis for contempt proceedings.

In the *Berkley Machine* case, the contemptuous conduct likewise consisted in the employer's refusal to bargain as required under a consent decree embodying the Board's order. While agreeing that the company had not wilfully disobeyed the bargaining decree, the court rejected the special master's finding that the company had bargained in good faith with the complaining union. The court rested its finding of violation on the fact that the employer "was unwilling to bind itself to pay any specific [wage] rate for any specified length of time and was unwilling to bargain at all with respect to [individual] merit pay [increases] but insisted on its right without consulting the union to vary the rates of pay for individual employees."

The court directed the company to purge itself of its contempt within 90 days by bargaining in good faith, and by executing a written agreement with the union "as to all matters upon which agreement can be had." The court also taxed the company with the costs of the court in the proceeding. In view of its finding that the company and its officers did not wilfully disobey the court's decree, the court refrained from imposing fines and imprisonment and from directing the institution of proceedings in criminal contempt.

The contempt adjudication in the *Weirton Steel* case soon after the close of the last fiscal year is referred to in the last annual report.<sup>83</sup> In this case, the company was ordered to pay a total of \$49,459.85 in costs of the contempt litigation and to take certain steps to purge itself, including the reinstatement of certain employees with back pay

<sup>83</sup> Cited above; see Fifteenth Annual Report, p. 195, for brief discussion of this case.

and the disestablishment of a union the company had assisted in organizing.

In the *Retail Clerks* case, the Board's petition for a contempt adjudication was based on its view that the respondent union, by insisting that the employer, Safeway Stores, bargain in regard to its location managers, violated the court's decree enjoining the union from requiring that Safeway bargain for its supervisory employees.<sup>84</sup> The court remanded the case to the Board for the purpose of supplementing the record in the case, which did not disclose the supervisory status of Safeway's location managers.

<sup>84</sup> Cited above.

## VIII

# Injunction Litigation

**S**ECTION 10 (j) and (l) of the amended act provides for injunctive relief in the United States district courts at the request of the Board to halt conduct alleged to constitute an unfair labor practice.

Section 10 (j) confers discretion on the Board to petition for an injunction against any type of conduct, by either an employer or a union, which is alleged to constitute an unfair practice forbidden by the act. Such injunctive relief may be sought upon issuance of a formal complaint in the case by the General Counsel. On the Board's petition, the court may then grant "such temporary relief or restraining order as it deems just and proper."

Section 10 (l) requires that an injunction be sought in a United States district court against a labor organization charged with a violation of section 8 (b) (4) (A), (B), or (C),<sup>1</sup> whenever the General Counsel's investigation reveals "reasonable cause to believe that such charge is true and that a complaint should issue." The court is given discretion to grant "such injunctive relief or temporary restraining order as it deems just and proper." Section 10 (l) also provides for the issuance of a temporary restraining order without prior notice to the respondent party upon an allegation that "substantial and irreparable injury to the charging party will be unavoidable" unless immediate relief is granted. Such an *ex parte* restraining order may not be effective for more than 5 days. In addition, section 10 (l) provides that its procedures shall be used in seeking an injunction against a labor organization charged with engaging in a jurisdictional strike under section 8 (b) (4) (D), "in situations where such relief is appropriate."

During the past year the Board exercised its discretion to petition for section 10 (j) injunctions on three occasions, twice against labor organizations and once against an employer and a labor organization. In two of these cases the court granted injunctive relief. In the third case, in which a temporary restraining order pending the hearing on the petition for injunction was denied, the Board withdrew the petition in view of the discontinuance of the alleged violations of the act.

Under the mandatory provisions of section 10 (l), injunctions were requested in twenty-one cases. Fourteen of these cases involved

<sup>1</sup> These sections contain the act's prohibitions against secondary strikes and boycotts, certain types of sympathy strikes, and strikes or boycotts against a Board certification of representative.

secondary action believed to violate the provisions of section 8 (b) (4) (A) or (B). Three cases involved primary action allegedly initiated in disregard of a Board certification in violation of section 8 (b) (4) (C). In four cases the charges alleged jurisdictional strikes forbidden by section 8 (b) (4) (D). In eight of the cases in which applications for injunctions were filed, relief was granted by the court. Four cases were settled, and one was withdrawn. The eight remaining cases were retained on the court's docket, the alleged unfair labor practices having been discontinued.

The following table summarizes the proceedings instituted and the action taken by the courts in cases under these sections:

Summary of Injunction Litigation Under Section 10(j) and (l)<sup>2</sup>  
July 1, 1950, to June 30, 1951

	Number of cases instituted	Number of applications granted	Number of applications denied	Cases settled, inactive, pending, etc.
Proceedings under sec. 10 (j):				
(a) Against unions.....	2	1	3	1
(b) Against employers.....	0			
(c) Against unions and employers	1	1		0
Proceedings under sec. 10 (l) ..	21	8	0	4 settled. 1 withdrawn. 8 inactive. <sup>4</sup>
Totals.....	24	10	1	13

<sup>2</sup> Injunctive actions during the fiscal year are listed in table 21, appendix B.

<sup>3</sup> In this case a temporary restraining order was denied; the application for an injunction was subsequently withdrawn.

<sup>4</sup> Retained on court's docket, the alleged unfair labor practices having been discontinued.

## A. Injunctions under Section 10(j)

During the past year, injunctive relief under section 10 (j) was granted in the *Newspaper and Mail Deliverers'* case<sup>5</sup> in the form of a temporary injunction, and in the *Anheuser-Busch* case in the form of a preliminary restraining order.<sup>6</sup> On August 17, 1951, soon after the close of the fiscal year, the court in the latter case also granted the Board's application for an order enjoining the respondents from certain conduct pending final adjudication of the complaint by the Board.<sup>7</sup>

In the *Newspaper and Mail Deliverers'* case, where the Board's complaint alleged that the union by certain conduct violated section

<sup>5</sup> *Jaffee v. Newspaper and Mail Deliverers' Union*, 97 F Supp 443 (D. C., S. N. Y.).

<sup>6</sup> *Douds v. Anheuser-Busch, Inc*, June 13, 1951, 28 LRRM, 2277.

<sup>7</sup> *Douds v. Anheuser-Busch, Inc*, 99 F Supp 474 (D. C., N. J.).

8 (b) (2) of the act,<sup>8</sup> relief was granted by the court on the basis of the following findings and considerations.

### 1. Nature of Conduct Involved

Prior to the enactment of the provisions of the amended act banning the closed shop and limiting the types of permissible union-security clauses in bargaining contracts, the union had closed-shop agreements with certain newspaper publishers in New York City. Under its former closed-shop agreements, the union furnished the publishers what were called "regular situation holders" and "regular substitutes." When additional men were required, particularly for the delivery of Sunday editions, it was the practice to line up union and nonunion "extras" in a "shapeup" from which union members were again given preference.

When, following the amendment of the act, the union's closed-shop contracts expired and could not validly be renewed, the union threatened the publishers with strikes and work stoppages in order to maintain the preferential treatment of its members. The situation was aggravated in 1949 and 1950 when several newspaper publishing and delivery companies went out of business and when the union forced other companies to discriminate against nonunion men and to give job and seniority preference to its unemployed members. Nonunion employees thus discriminated against filed charges which led to the issuance of the Board's complaint against the union and five separate companies which had submitted to the union's demands.<sup>9</sup> Several of the companies involved consented to the issuance of an order by the Board and the entry of an enforcement decree by the Court of Appeals for the Second Circuit.<sup>10</sup>

In three of the five cases in which the Board had not yet issued orders against the union, the court enjoined the union's practices which, in its opinion, constituted a regular course of conduct designed to circumvent the union-security provisions of the amended act. In issuing its injunction, the court observed that the union acted in disregard of the orders, and possibly the enforcement decrees, in those cases in which the Board had already held that the union's conduct violated the act. Moreover, the court took into consideration that the union persisted in its conduct notwithstanding the advice of other

<sup>8</sup> Section 8 (b) (2) provides that it shall be an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

<sup>9</sup> The New York Times Company, New York Mirror, New York Daily News, New York Herald-Tribune, and New York Journal-American

<sup>10</sup> The New York Times Company, New York Mirror, and New York Herald-Tribune.

unions and the decisions of an adjustment board set up to adjust differences between publishers and the union. In the court's opinion, the union was clearly responsible for the conduct of its members since its officers and agents, contrary to their assertions, had knowledge of and approved the acts in question.

## 2. Need for and Scope of Injunction

The court held that the need for and the proper scope of the relief to be granted the Board in the three pending cases necessarily had to be determined on the basis of the union's entire conduct including that covered by the Board's orders in the two cases already decided. As to the need for relief in light of all the evidence, the court said:

A free press is essential to the perpetuation<sup>10</sup> of our form of government. To permit a comparatively few men to halt the publication of our city newspapers, in order to accomplish a clearly illegal purpose, is too great a threat to our freedom to let it go unchallenged. We should learn from the experiences of peoples in other lands. Although I am opposed to the issuing of injunctions against labor unions, there are at times situations of great public interest where the reckless and law-defiant conduct of a few cannot otherwise be controlled. This is such a case.

In determining the scope of its injunction, the court was guided by the rule that practices found to be prohibited must be enjoined specifically,<sup>11</sup> and that the "breadth of the injunction 'must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts' found to have been committed in the past."<sup>12</sup> Accordingly, the court enjoined the union from causing or attempting to cause the three publishers (Times, News, and Mirror) to discriminate against nonunion delivery employees; from engaging in or threatening any concerted refusal to work in order to obtain preferential treatment of union men; and from issuing or continuing in effect any directions to, or threatening any of the publishers' employees for the purpose of compelling them to hire union members in their employers' delivery departments. The court further restrained the union from similarly interfering with the hiring of additional and extra delivery employees in accordance with existing contractual arrangements.

In declining to grant like relief in those cases in which Board orders against the union had issued, the court was of the opinion that the Board should seek enforcement and restraining orders as provided in section 10 (e) of the act rather than request relief under section 10 (j).

<sup>11</sup> *Schine Theatres v. United States*, 334 U. S. 110 at p. 126; *May Dept Stores v. Labor Board*, 326 U. S. 376 at p. 392; *Allen Bradley Co. v. Union*, 325 U. S. 797 at p. 811-812, *Labor Board v. Express Pub. Co.*, 312 U. S. 426 at p. 436.

<sup>12</sup> *N. L. R. B. v. Express Publishing Co.*, 312 U. S. 426, 436.

The court also expressed the view that its injunction in the three cases would prove sufficient to deter the union from committing similar acts at the plants of any other newspaper.

### 3. Injunctive Relief to Safeguard Employee Rights

In the *Anheuser-Busch* case, injunctive relief in connection with a complaint was requested by the Board and granted by the court under the following circumstances.

While the Anheuser-Busch Co. was constructing a brewery at Newark, N. J., certain CIO and AFL unions sought bargaining rights for various groups of employees. After the brewery department of the Newark plant had been put in operation, the CIO, on the basis of a consent election, was certified as representative of the brewery employees. Two AFL locals then requested recognition as exclusive bargaining agents for employees to be hired in certain other departments which had not yet been staffed with employees. These demands for recognition were accompanied by threats of strike action and resulted in agreements being signed by Anheuser-Busch granting the AFL locals recognition as the exclusive representatives in the departments for which the employees were still to be hired. Thereafter, Anheuser-Busch, pursuant to the agreements with the AFL locals, hired a number of employees referred by the AFL locals while ignoring some 10,000 applications received for about 1,000 available jobs. The Board sought to enjoin Anheuser-Busch from recognizing the AFL locals, and to enjoin both Anheuser-Busch and the AFL locals from giving effect to the contracts and from continuing their discriminatory hiring agreements and practices, pending final determination by the Board as to whether, as alleged in the complaint, the conduct of the company violated section 8 (a) (1), (2), and (3) and the conduct of the locals violated section 8 (b) (1) (A) and 8 (b) (2).

The court granted the Board's request for immediate relief in the form of a temporary order restraining respondents from the conduct specified in the complaint until after the hearing on the Board's application for ultimate relief pursuant to section 10 (j). Following the hearing, the court issued its injunction on the basis of the evidence which showed that there was reasonable cause to believe that the unfair practices charged had occurred. In accordance with well-established principles<sup>13</sup> the court pointed out that the ultimate determination of the existence of violations charged is reserved exclusively to the Board.

The court rejected the contention of the respondent locals that because they represented the employees in the brewing industry in the State of New Jersey in an industry-wide unit the contracts exe-

<sup>13</sup> See Thirteenth Annual Report, pp. 84, 86-87, Fourteenth Annual Report, pp. 138-139, Fifteenth Annual Report, p. 202.

cuted with Anheuser-Busch were valid. As to this contention, the court held that the employees of Anheuser-Busch had not yet voted for inclusion in the industry-wide unit and that the effect of the conduct charged in the complaint was to impose upon them a bargaining agent in whose selection they had no voice contrary to the express policies of the act. The court also rejected the contention of one of the respondent locals that it was protected by a contract with the company at another plant which allegedly had merely been extended so as to cover employees engaged in similar work at the new plant. In the court's view, the previous designation of the local by the employees of the old plant, even in case of their transfer to the new plant, did not entitle the local to represent the entire prospective complement of almost twice as many employees at the new plant. The court made it clear, however, that its injunction was not intended to prevent the company from transferring employees from the old to the new plant or from recognizing the particular local as the representative of employees so transferred.

Procedurally, the court was called upon to construe the requirement of section 10 (j) to the effect that in case of an application for an injunction "the court shall cause notice thereof to be served upon [the respondent]." Contrary to the respondents' assertion, the court concluded that it was not required to instruct the marshal to serve summons on the parties named in the Board's petition. Rather, the court held, the language of section 10 (j) was intended to require the court to see that notice be given to the respondents by the moving party, in accordance with general rules. In view of the appearances and participation of the parties in the case, the court took judicial notice of the fact that notice of the Board's application had been duly given.

## B. Injunctions under Section 10 (1)

In the eight cases in which injunctions were issued pursuant to section 10 (1), no opinions were filed by the respective courts.<sup>1</sup> The types of conduct enjoined in these cases are indicated below.<sup>2</sup>

In four cases,<sup>3</sup> conventional strike and picketing activities alleged to violate the secondary boycott provisions of section 8 (b) (4) (A) were enjoined. In one of these cases, *Kanawha Coal Operators Association*,

<sup>1</sup> For applicable principles see Thirteenth Annual Report, pp. 84, 86-87, Fourteenth Annual Report, pp. 138-139, Fifteenth Annual Report, p. 202.

<sup>2</sup> For typical findings of fact and conclusions of law in such cases see *Brown v. Int'l. Longshoremen's Union (Pacific Maritime Ass'n.)*, Jan. 30, 1951, (D. C., No. Calif.), 27 LRRM 2410.

<sup>3</sup> *Evans v. United Construction Workers (Kanawha Coal Operators Ass'n.)*, July 27, 1950 (D. C., W. Va., No. 1097); *Vincent v. Truck Drivers Local 375 (Seneca Transportation Lines)*, Sept. 18, 1950 (D. C., No. N. Y., Civ. No. 4690); *Sperry v. Amalgamated Meat Cutters, Local 178 (Producers Produce Co.)*, Sept. 19, 1950 (D. C., W. Mo., Civ. No. 973), and *LeBaron v. New Furniture Drivers Local 198 (Bigelow Sanford Carpet Co.)*, June 12, 1951 (D. C., So. Calif., No. 13161-Y).

the picketing of certain coal mines also appeared to have had for its object forcing the mine operators to join an employer association in violation of section 8 (b) (4) (B).<sup>4</sup>

In two cases,<sup>5</sup> the picketing activities which the court enjoined were shown to have had for their probable purpose to force certain employers to recognize unions other than the certified bargaining representatives of their employees, a purpose specifically prohibited by section 8 (b) (4) (C) of the act.

In the remaining two cases,<sup>6</sup> the respondent unions were restrained from continuing strikes and related activities which appeared to violate the "jurisdictional dispute" provisions of section 8 (b) (4) (D) in that the union's probable object was to force certain shipowners to assign loading and unloading operations to its members rather than to members of a rival union. The union's conduct in these cases was shown to have tied up a number of ships in their respective west coast harbors and to have impeded the movement of lumber shipments.<sup>7</sup>

<sup>4</sup> 94 NLRB 1731. Subsequently the Board found that the union in this case in fact violated section 8 (b) (4) (A) and (B) of the act. In the *Seneca Transportation* case, the Trial Examiner held that section 8 (b) (4) (A) was violated. No exceptions having been filed by the union, the Board, on January 22, 1951, issued an order against the union on the basis of the examiner's report (3-CC-21).

<sup>5</sup> *Brown v. Retail Clerks Local 1179 (Western Auto Supply Co)*, Jan. 8, 1951 (D. C., No. Calif., Civ. No. 30196); *Sperry v. Teamsters Local 41 (Union Chevrolet Co)*, June 25, 1951 (D. C., W. Mo., Civ. No. 6972). In the *Western Auto* case, 93 NLRB 1638, the union was subsequently adjudicated in violation of section 8 (b) (4) (C). For the Board's finding that the union in the *Union Chevrolet* case violated section 8 (b) (4) (C), see 96 NLRB No. 145 (October 19, 1951).

<sup>6</sup> *Brown v. Int'l. Longshoremen's Union (Pacific Maritime Ass'n)*, Jan. 30, 1951 (D. C., No. Calif., Civ. No. 30279), 27 LRRM 2410, and *Graham v. Longshoremen's Local 13 (Pacific Maritime Ass'n)*, March 15, 1951 (D. C., Ore. Civ. No. 5885).

<sup>7</sup> Temporary restraining orders were issued in four of the above cases: *Vincent v. Truck Drivers Local 375 (Seneca Transportation Lines)*, Sept. 18, 1950 (D. C., No. N. Y., Civ. No. 4690), *Sperry v. Amalgamated Meat Cutters Local 172 (Producers Produce Co)*, Sept. 19, 1950 (D. C., W. Mo., Civ. No. 973), *Brown v. Int'l. Longshoremen's Union (Pacific Maritime Ass'n)*, Jan. 5, 1951 (D. C., No. Calif., Civ. No. 30279), and *Graham v. Longshoremen's Local 13 (Pacific Maritime Ass'n)*, Jan. 6, 1951 (D. C., Ore., Civ. No. 5885).

## IX

# Miscellaneous Litigation

During the 1951 fiscal year, besides the customary litigation of cases to enforce Board orders and proceedings for injunctions under section 10 (j) and (1), the Board also was engaged in litigation of five other legal actions in which it sought to protect its processes. Three of these were suits in which private parties attempted to compel or enjoin Board action. In all of these, the courts denied the orders requested.

### 1. Suits to Enjoin or Compel Board Action

In one case, a union sought to compel the Board to certify the results of a representation election in which the plaintiff received a majority of the votes.<sup>1</sup> The Board had withheld certification because, subsequent to the election, unfair labor practice charges involving the status of the complaining union were filed and awaited disposition.<sup>2</sup> Dismissing the union's petition, the court sustained the validity of the Board's practice of thus withholding certification pending adjudication of unfair labor practice charges involving the parties in the representation proceeding. The court observed that the Board's action in the circumstances was equivalent to a consolidation of the two proceedings and that such consolidation had been held permissible by the courts under both the Wagner Act<sup>3</sup> and the Taft-Hartley Act.<sup>4</sup> In so holding, the court rejected the union's contention that section 9 (c) (1) imposed a mandatory duty upon the Board to certify the results of the election.

In another case, the court denied an employer's application for a preliminary injunction restraining the Board's regional director from certifying a union as bargaining representative for a group of employees who had designated the union in an election under section 9

<sup>1</sup> *Local 1081, International Brotherhood of Electrical Workers v Herzog*, 98 F Supp. 613 (D. C., D. C.).

<sup>2</sup> In the ensuing unfair labor practice proceeding, the union was found to have been illegally supported by the respondent employer in violation of section 8 (a) (2). The Board therefore directed the employer to withhold recognition from the union until such time as the latter should be certified by the Board. See *Stewart-Warner Corp.*, 94 NLRB No. 85.

<sup>3</sup> *Warehousemen's Union v. N L R. B.*, 121 F 2d 84 (C A , D. C.) (1941).

<sup>4</sup> *N. L. R. B. v. Minnesota Mining & Mfg. Co.*, 179 F. 2d 323 (C A. 8.) (1950).

(c) of the act.<sup>5</sup> The company sought the injunction in connection with a declaratory judgment action instituted for the purpose of establishing the validity of a collective bargaining agreement between the company and another union. The Board had found that this contract contained an illegal union-security clause and, therefore, was not, as contended by the company, a bar to the determination of the representative of the employees involved. In denying the injunction, the court held that the company failed to show that the union's certification would result in such irreparable injury as would warrant the relief sought. In the court's opinion, the mere possibility that the company might be subjected to economic pressure by a rival union was too remote and speculative an injury to justify injunctive action against the Board. However, the court rejected the Board's contention that the company's motion for injunctive relief should have been dismissed on jurisdictional grounds. In the court's opinion, jurisdiction to entertain the company's motion for injunctive relief existed under the rule announced in *Fay v. Douds*,<sup>6</sup> since the company's allegation that it was not accorded a sufficient opportunity to submit evidence bearing on the validity of the union-security clause held illegal by the Board raised a substantial constitutional question of due process. Also, in the court's opinion, the threat of injury, though not warranting a preliminary injunction, was sufficient to withstand a motion to dismiss.

The Court of Appeals for the District of Columbia, in another case, affirmed the district court's refusal to enjoin the Board from proceeding with a determination of whether an attorney, who allegedly assaulted a Board representative in the course of a hearing, should be barred from further practice before the Board or should otherwise be disciplined.<sup>7</sup> In the court's opinion, the plaintiff was not entitled to judicial relief without having first exhausted his administrative remedies. The court pointed out (1) that it was for the Board in the first instance to determine its disciplinary powers, and (2) that upon considering the merits of the case the Board might decide against taking disciplinary action.<sup>8</sup>

## 2. Other Litigation

In one case, the Court of Appeals for the Fifth Circuit affirmed the lower court's enforcement of a subpoena duces tecum issued by the Board.<sup>9</sup> On the basis of established precedent, the court rejected the

<sup>5</sup> *Worthington Pump and Machinery Corp v. Douds*, 97 F. Supp. 656 (D. C., So. N. Y.).

<sup>6</sup> 172 F. 2d 720 (C. A. 2).

<sup>7</sup> *Camp v. Herzog*, 190 F. 2d 605 (C. A., D. C.). See Fifteenth Annual Report, p. 213.

<sup>8</sup> The Board subsequently suspended the complaining attorney from the privilege of practicing before it for a period of 2 years. 96 NLRB No. 7 (September 10, 1951)

<sup>9</sup> *Edwards v. N. L. R. B.*, 189 F. 2d 950.

appellant's contention that the Board had improperly delegated to its regional director the power to grant a subpoena in an unfair labor practice proceeding.

In another case, in which the Board had instituted proceedings for the enforcement of a back-pay order, the court denied the Board's application for an order temporarily restraining the sale of the property of the respondent employer under the foreclosure decree of a State court.<sup>10</sup> The Board's application was based on its belief that the foreclosure action was instituted by the company's stockholders and officers for the purpose of defeating the court's jurisdiction in the enforcement proceeding. However, the court held that it was without power to review the final decree of the State court.

<sup>10</sup> *N L R B v Ozark Hardwood Co*, 188 F. 2d 354 (C A 8).

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## Fiscal Statement

**T**HE expenditures and obligations of the Board for fiscal year ended June 30, 1951, are as follows:

Salaries .....	\$6, 634, 670
Travel .....	674, 395
Transportation of things .....	13, 544
Communication services .....	214, 182
Rents and utility services .....	397, 914
Printing and reproduction .....	243, 253
Other contractual services .....	85, 543
Services performed by other agencies .....	4, 521
Supplies and materials .....	99, 450
Equipment .....	41, 799
Refunds, awards, and indemnities .....	420
Taxes and assessments .....	3, 970
<hr/>	
Grand total, obligations and expenditures for salaries and expenses .....	8, 413, 661

## **APPENDIX A**

### **Definitions Of Types Of Cases Used In Tables**

The following designations, used by the Board in numbering cases, will be used in the tables in appendix B to designate the various types of cases:

#### **CA Cases**

A charge of unfair labor practices against an employer under section 8 (a).

#### **CB Cases**

A charge of unfair labor practices against a union under section 8 (b) (1), (2), (3), (5), (6).

#### **CC Cases**

A charge of unfair labor practices against a union under section 8 (b) (4) (A) (B), (C).

#### **CD Cases**

A charge of unfair labor practices against a union under section 8 (b) (4) (D).

#### **RC Cases**

A petition by a labor organization or employees for certification of a representative for purposes of collective bargaining under section 9 (c) (1) (A) (i).

#### **RM Cases**

A petition by employer for certification of a representative for purposes of collective bargaining under section 9 (c) (1) (B).

#### **RD Cases**

A petition by employees under section 9 (c) (1) (A) (ii) asserting that the union previously certified or currently recognized by their employer as the bargaining representative, no longer represents a majority of the employees in the appropriate unit.

#### **UA Cases**

A petition by a labor organization under section 9 (e) (1) for a referendum to authorize it to make a contract requiring membership in such union as a condition of employment.

#### **UD Cases**

A petition by employees under section 9 (e) (2) asking for a referendum to rescind a bargaining agent's authority to make a union-shop contract under section 9 (e) (1).

#### **C Cases**

A charge of unfair labor practices against an employer under section 8 of the National Labor Relations Act, prior to amendment.

#### **R Cases**

A petition for certification of a representative for purposes of collective bargaining with an employer under section 9 of the National Labor Relations Act, prior to amendment.

**APPENDIX B**

**Statistical Tables for Fiscal Year 1951**

The following tables present a detailed statistical record of the cases received and handled by the National Labor Relations Board during the fiscal year 1951.

**Table 1.—Number of cases received, closed, and pending by identification of complainant or petitioner, fiscal year 1951**

	Number of cases					
	Identification of complainant or petitioner					
	A. F of L affiliates	C. I. O. affiliates	Unaffiliated unions	Individuals	Employers	
<b>Total</b>						
<b>All cases</b>						
Cases pending July 1, 1950.....	6,714	2,749	1,425	909	1,212	419
Cases received July 1, 1950-June 30, 1951...	22,298	11,184	5,850	2,394	2,013	857
Cases on docket July 1, 1950-June 30, 1951...	29,012	13,933	7,275	3,303	3,225	1,276
Cases closed July 1, 1950-June 30, 1951.....	22,637	11,152	5,681	2,720	2,100	984
Cases pending June 30, 1951.....	6,375	2,781	1,594	583	1,125	292
<b>Unfair labor practice cases</b>						
Cases pending July 1, 1950.....	3,243	956	645	272	1,113	257
Cases received July 1, 1950-June 30, 1951...	5,261	1,640	1,035	497	1,681	408
Cases on docket July 1, 1950-June 30, 1951...	8,504	2,596	1,680	769	2,794	665
Cases closed July 1, 1950-June 30, 1951.....	5,503	1,713	993	558	1,748	491
Cases pending June 30, 1951.....	3,001	883	687	211	1,046	174
<b>Representation cases</b>						
Cases pending July 1, 1950.....	2,480	1,213	536	470	99	162
Cases received July 1, 1950-June 30, 1951...	10,247	5,751	2,633	1,090	324	449
Cases on docket July 1, 1950-June 30, 1951...	12,727	6,964	3,169	1,560	423	611
Cases closed July 1, 1950-June 30, 1951.....	10,291	5,614	2,528	1,311	345	493
Cases pending June 30, 1951.....	2,436	1,350	641	249	78	118
<b>Union-shop authorization cases <sup>1</sup></b>						
Cases pending July 1, 1950.....	991	580	244	167	0	-----
Cases received July 1, 1950-June 30, 1951...	<sup>2</sup> 6,790	3,793	2,182	807	8	-----
Cases on docket July 1, 1950-June 30, 1951...	<sup>2</sup> 7,781	4,373	2,426	974	8	-----
Cases closed July 1, 1950-June 30, 1951.....	<sup>3</sup> 6,843	3,825	2,160	851	7	-----
Cases pending June 30, 1951.....	<sup>4</sup> 938	548	266	123	1	-----

<sup>1</sup> The union-shop authorization poll was abolished by Public Law 189, approved by the President Oct 22, 1951. However, the law still provides for deauthorization polls when appropriate.

<sup>2</sup> Includes 8 UD cases.

<sup>3</sup> Includes 7 UD cases.

<sup>4</sup> Includes 1 UD case.

Table 1A.—Number of unfair labor practice cases received, closed, and pending by identification of complainant, fiscal year 1951

	Total <sup>1</sup>	Number of cases				
		Identification of complainant				
		A. F. of L. affiliates	C. I. O. affiliates	Unaffiliated unions	Individuals	Employers
NLRA—C cases						
Cases pending July 1, 1950.....	231	56	93	70	12	-----
Cases received July 1, 1950—June 30, 1951.....						-----
Cases on docket July 1, 1950—June 30, 1951.....	231	56	93	70	12	-----
Cases closed July 1, 1950—June 30, 1951.....	137	23	49	63	2	-----
Cases pending June 30, 1951.....	94	33	44	7	10	-----
CA cases <sup>2</sup>						
Cases pending July 1, 1950.....	2,374	872	540	184	778	-----
Cases received July 1, 1950—June 30, 1951.....	4,164	1,592	1,005	471	1,096	-----
Cases on docket July 1, 1950—June 30, 1951.....	6,538	2,464	1,545	655	1,874	-----
Cases closed July 1, 1950—June 30, 1951.....	4,168	1,639	915	464	1,150	-----
Cases pending June 30, 1951.....	2,370	825	630	191	724	-----
CB cases <sup>2</sup>						
Cases pending July 1, 1950.....	535	25	11	16	319	164
Cases received July 1, 1950—June 30, 1951.....	858	42	30	25	566	195
Cases on docket July 1, 1950—June 30, 1951.....	1,393	67	41	41	885	359
Cases closed July 1, 1950—June 30, 1951.....	926	45	28	28	575	250
Cases pending June 30, 1951.....	467	22	13	13	310	109
CC cases <sup>2</sup>						
Cases pending July 1, 1950.....	83	2	1	1	4	75
Cases received July 1, 1950—June 30, 1951.....	167	4	0	0	10	153
Cases on docket July 1, 1950—June 30, 1951.....	250	6	1	1	14	228
Cases closed July 1, 1950—June 30, 1951.....	195	5	1	1	13	175
Cases pending June 30, 1951.....	55	1	0	0	1	53
CD cases <sup>2</sup>						
Cases pending July 1, 1950.....	20	1	0	1	0	18
Cases received July 1, 1950—June 30, 1951.....	72	2	0	1	9	60
Cases on docket July 1, 1950—June 30, 1951.....	92	3	0	2	9	78
Cases closed July 1, 1950—June 30, 1951.....	77	1	0	2	8	66
Cases pending June 30, 1951.....	15	2	0	0	1	12

<sup>1</sup> Cases filed jointly by 2 or more affiliates are shown only under one of the affiliates.

<sup>2</sup> See p. 290 for definition of type of cases

Table 1B.—Number of representation cases and union-shop authorization cases received, closed, and pending by identification of petitioner, fiscal year 1951

	Number of cases					
	Identification of petitioner					
	A. F. of L. affiliates	C. I. O. affiliates	Unaffiliated unions	Individuals	Employers	
Total <sup>1</sup>						
NLRB—R cases						
Cases pending July 1, 1950.....	5	2	3	0	0	0
Cases received July 1, 1950-June 30, 1951.....	5	2	3	0	0	0
Cases on docket July 1, 1950-June 30, 1951.....	5	2	3	0	0	0
Cases closed July 1, 1950-June 30, 1951.....	0	0	0	0	0	0
Cases pending June 30, 1951.....	0	0	0	0	0	0
RC cases <sup>2</sup>						
Cases pending July 1, 1950.....	2,214	1,211	533	468	2	-----
Cases received July 1, 1950-June 30, 1951.....	9,460	5,751	2,630	1,076	3	-----
Cases on docket July 1, 1950-June 30, 1951.....	11,674	6,962	3,163	1,544	5	-----
Cases closed July 1, 1950-June 30, 1951.....	9,434	5,612	2,523	1,295	4	-----
Cases pending June 30, 1951.....	2,240	1,350	640	249	1	-----
RM cases <sup>3</sup>						
Cases pending July 1, 1950.....	162	-----	-----	-----	-----	162
Cases received July 1, 1950-June 30, 1951.....	448	-----	-----	-----	-----	448
Cases on docket July 1, 1950-June 30, 1951.....	610	-----	-----	-----	-----	610
Cases closed July 1, 1950-June 30, 1951.....	492	-----	-----	-----	-----	492
Cases pending June 30, 1951.....	118	-----	-----	-----	-----	118
RD cases <sup>3</sup>						
Cases pending July 1, 1950.....	99	0	0	2	97	0
Cases received July 1, 1950-June 30, 1951.....	339	0	3	14	321	1
Cases on docket July 1, 1950-June 30, 1951.....	438	0	3	16	418	1
Cases closed July 1, 1950-June 30, 1951.....	360	0	2	16	341	1
Cases pending June 30, 1951.....	78	0	1	0	77	0
UA cases <sup>3</sup>						
Cases pending July 1, 1950.....	991	580	244	167	0	-----
Cases received July 1, 1950-June 30, 1951.....	<sup>4</sup> 6,790	3,793	2,182	807	<sup>4</sup> 8	-----
Cases on docket July 1, 1950-June 30, 1951.....	<sup>4</sup> 7,781	4,373	2,426	974	<sup>4</sup> 8	-----
Cases closed July 1, 1950-June 30, 1951.....	<sup>5</sup> 6,843	3,825	2,160	851	<sup>5</sup> 7	-----
Cases pending June 30, 1951.....	<sup>6</sup> 938	548	266	123	<sup>6</sup> 1	-----

<sup>1</sup> Cases filed jointly by 2 or more affiliates are shown only under 1 of the affiliates.

<sup>2</sup> See appendix A for definition of types of cases.

<sup>3</sup> The union-shop authorization poll was abolished by Public Law 189, approved by the President Oct 22, 1951. However, the law still provides for deauthorization polls when appropriate.

<sup>4</sup> 8 UD cases.

<sup>5</sup> 7 UD cases.

<sup>6</sup> 1 UD case.

Table 2.—Types of unfair labor practices alleged in charges filed during fiscal year 1951

## A. CHARGES FILED AGAINST EMPLOYERS UNDER SEC. 8 (a)

	Number of cases showing specific allegations	Percent of total		Number of cases showing specific allegations	Percent of total
Total cases.....	1 2 4, 164	1 2 100. 0			
8 (a) (1).....	2 4, 164	2 100 0	8 (a) (3).....	2, 899	69 6
8 (a) (2).....	489	11 7	8 (a) (4).....	68	1 6
			8 (a) (5).....	1, 235	29 7

## B. CHARGES FILED AGAINST UNIONS UNDER SEC. 8 (b)

	Number of cases showing specific allegations	Percent of total		Number of cases showing specific allegations	Percent of total
Total cases.....	1 1, 097	1 100 0			
8 (b) (1).....	625	57. 0	8 (b) (4).....	239	21 8
8 (b) (2).....	669	61. 0	8 (b) (5).....	18	1 6
8 (b) (3).....	123	11 2	8 (b) (6).....	21	1 9

## C. ANALYSIS OF 8 (b) (1) AND 8 (b) (4)

Total cases 8 (b) (1)...	Number of cases showing specific allegations	Percent of total	Total cases 8 (b) (4) ..	Number of cases showing specific allegations	Percent of total
Total cases 8 (b) (1)...	1 625	1 100. 0	Total cases 8 (b) (4) ..	1 239	1 100. 0
8 (b) (1) (A).....	609	97. 4	8 (b) (4) (A).....	143	59. 8
8 (b) (1) (B).....	25	4 0	8 (b) (4) (B).....	60	25. 1
			8 (b) (4) (C).....	22	9 2
			8 (b) (4) (D).....	72	30 1

<sup>1</sup> A single case may include allegations of violations of more than 1 section of the act. Therefore the total of the various allegations is more than the figure for total cases.

<sup>2</sup> An 8 (a) (1) is a general provision forbidding any type of employer interference with the rights of employees, guaranteed by the act, and therefore is included in all charges of employer unfair labor practices.

NOTE.—This table corresponds to the "recapitulation" of charges used in prior annual reports.

Table 3.—Remedial action taken in unfair labor practice cases closed during fiscal year 1951

A. BY EMPLOYERS<sup>1</sup>

Types of remedy	Total	Cases	
		By agree- ment of all parties	By Board or court order
Notices posted.....	1,021	818	203
Recognition or other assistance withheld from employer assisted union.....	126	115	11
Employer-dominated union disestablished.....	30	19	11
Worked placed on preferential hiring list.....	45	45	0
Collective bargaining begun.....	261	195	66
Workers			
Workers offered reinstatement to job.....	3,864	3,528	336
Workers receiving back pay.....	4,429	4,078	351
Back-pay awards.....	\$2,177,320	\$1,874,390	\$302,930

<sup>1</sup> In addition to the remedial actions shown, other forms of remedy were taken in 18 cases<sup>2</sup> Includes 65 workers who received back pay from both an employer and a union.<sup>3</sup> Includes 16 workers who received back pay from both an employer and a union.B. BY UNIONS<sup>1</sup>

	Cases		
Notices posted.....	183	142	41
Union to cease requiring employer to give effect to contract or union security clause, until certified or authorized.....	25	16	9
Notice of no objection to reinstatement of discharged employees.....	10	8	2
Collective bargaining begun.....	19	16	3
Workers			
Union membership made available by agreement.....	18	18	0
Workers receiving back pay.....	3,201	3,184	17
Back-pay awards.....	\$42,660	\$36,880	\$5,780
Amount of dues refunded to employees.....	780	780	0

<sup>1</sup> In addition to the remedial actions shown, other forms of remedy were taken in 12 cases.<sup>2</sup> Includes 65 workers who received back pay from both an employer and a union.<sup>3</sup> Includes 16 workers who received back pay from both an employer and a union.

Table 4.—Geographic distribution of unfair labor practice, representation, and union-shop authorization cases received during fiscal year 1951

Division and State <sup>1</sup>	All cases	Unfair labor practice cases				Representation cases			Union-shop authorization cases <sup>2, 3</sup>
		CA <sup>2</sup>	CB <sup>2</sup>	CC <sup>2</sup>	CD <sup>2</sup>	RC <sup>2</sup>	RM <sup>2</sup>	RD <sup>2</sup>	
New England.....	1,612	260	33	11	10	726	35	28	509
Maine.....	83	14	0	4	0	42	0	4	19
New Hampshire.....	107	12	0	0	0	51	0	5	38
Vermont.....	37	5	0	0	0	18	0	2	12
Massachusetts.....	876	158	23	4	7	387	25	4	268
Rhode Island.....	180	26	5	0	0	79	1	4	65
Connecticut.....	329	45	5	2	3	149	9	9	107
Middle Atlantic.....	5,407	923	271	54	20	2,197	121	66	1,755
New York.....	2,703	551	189	33	8	1,065	76	22	4,759
New Jersey.....	1,180	155	32	9	7	594	12	12	4,359
Pennsylvania.....	1,524	217	50	12	5	538	33	32	637
East North Central.....	4,971	782	135	19	19	2,058	62	64	1,832
Ohio.....	1,413	215	35	6	1	583	12	21	540
Indiana.....	614	132	25	2	2	242	7	11	193
Illinois.....	1,276	213	47	5	11	514	16	17	453
Michigan.....	1,046	154	21	2	5	450	24	13	377
Wisconsin.....	622	68	7	4	0	269	3	2	269
West North Central.....	1,932	313	45	10	4	828	62	35	635
Iowa.....	91	20	0	0	0	66	2	3	0
Minnesota.....	491	43	3	1	1	206	21	7	209
Missouri.....	989	195	31	8	2	343	30	18	362
North Dakota.....	32	8	1	0	0	17	5	1	0
South Dakota.....	26	4	0	0	0	22	0	0	0
Nebraska.....	68	16	3	0	0	47	0	2	0
Kansas.....	235	27	7	1	1	127	4	4	64
South Atlantic.....	1,454	417	43	12	5	729	30	30	188
Delaware.....	30	11	0	0	0	9	1	3	6
Maryland.....	218	38	9	0	1	88	2	5	75
District of Columbia.....	104	18	5	2	1	42	0	1	35
Virginia.....	161	60	4	0	0	84	9	4	0
West Virginia.....	185	29	14	5	2	69	1	5	60
North Carolina.....	250	119	3	1	0	121	3	3	0
South Carolina.....	73	20	0	0	0	40	0	1	12
Georgia.....	215	72	3	3	1	121	9	6	0
Florida.....	218	50	5	1	0	155	5	2	0
East South Central.....	836	187	42	3	3	410	18	23	150
Kentucky.....	278	49	18	2	2	126	1	6	74
Tennessee.....	249	77	17	1	0	134	9	11	0
Alabama.....	235	43	4	0	1	120	7	3	57
Mississippi.....	74	18	3	0	0	30	1	3	19
West South Central.....	998	299	32	4	2	506	27	27	101
Arkansas.....	121	45	2	0	0	64	6	4	0
Louisiana.....	198	45	13	2	1	82	5	4	44
Oklahoma.....	188	40	1	2	1	80	6	3	55
Texas.....	491	169	16	0	0	280	10	16	0
Mountain.....	1,085	205	24	6	0	586	22	15	227
Montana.....	100	7	4	1	0	47	5	1	35
Idaho.....	124	32	1	1	0	56	3	0	31
Wyoming.....	36	5	1	0	0	17	0	1	12
Colorado.....	425	66	4	1	0	274	2	7	71
New Mexico.....	135	46	9	0	0	40	1	4	35
Arizona.....	143	33	3	1	0	97	7	1	1
Utah.....	105	15	2	2	0	49	4	1	32
Nevada.....	17	1	0	0	0	6	0	0	10
Pacific.....	3,488	621	207	39	9	1,207	64	45	1,296
Washington.....	592	149	44	6	1	160	11	2	219
Oregon.....	426	61	22	6	0	163	11	12	151
California.....	2,470	411	141	27	8	884	42	31	4,926
Outlying areas.....	515	157	26	9	0	213	7	6	97
Alaska.....	20	4	8	3	0	3	0	1	1
Hawaii.....	101	13	0	0	0	51	1	0	36
Puerto Rico.....	394	140	18	6	0	159	6	5	560
Nation-wide.....	0	0	0	0	0	0	0	0	0

<sup>1</sup> The States are grouped according to the method used by the Bureau of the Census, U. S. Department of Commerce. <sup>2</sup> See p. 290 for definitions of types of cases.

<sup>3</sup> The union-shop authorization poll was abolished by Public Law 189, approved by the President Oct. 22, 1951. However, the law still provides for deauthorization polls when appropriate.

<sup>4</sup> Includes 1 UD case. <sup>5</sup> Includes 3 UD cases.

Table 5.—Industrial distribution of unfair labor practice, representation, and union-shop authorization cases received during fiscal year 1951

Industrial group <sup>1</sup>	All cases	Unfair labor practice cases				Representation cases			Union shop authorization cases <sup>2</sup>
		CA <sup>3</sup>	CB <sup>3</sup>	CC <sup>3</sup>	CD <sup>3</sup>	RC <sup>3</sup>	RM <sup>3</sup>	RD <sup>3</sup>	
Total.....	22,298	4,164	858	167	72	9,460	448	339	4,790
Manufacturing.....	14,708	2,604	411	71	10	6,306	287	216	4,803
Ordnance and accessories.....	17	2	0	0	0	9	0	0	6
Food and kindred products.....	2,165	362	75	23	0	959	69	38	639
Tobacco manufactures.....	51	8	2	0	0	19	4	1	15
Textile-mill products.....	641	184	17	1	1	250	26	12	150
Apparel and other finished products made from fabrics and similar materials.....	851	188	37	5	0	405	21	6	189
Lumber and wood products.....	855	156	17	2	0	343	23	11	303
Furniture and fixtures.....	617	189	24	2	0	230	6	8	158
Paper and allied products.....	382	56	6	1	0	205	4	7	103
Printing, publishing, and allied industries.....	632	103	19	3	0	278	7	7	215
Chemicals and allied products.....	687	96	14	7	1	366	10	19	174
Products of petroleum and coal.....	250	52	6	1	1	137	3	6	44
Rubber products.....	168	24	5	1	0	67	5	3	63
Leather and leather products.....	256	58	8	0	0	92	11	1	86
Stone, clay, and glass products.....	547	102	13	5	1	217	12	7	190
Primary metal industries.....	987	106	17	4	1	371	8	16	464
Fabricated metal products (except machinery and transportation equipment).....	1,509	245	31	5	3	609	15	15	586
Machinery (except electrical).....	1,503	219	29	1	0	656	13	26	559
Electrical machinery, equipment, and supplies.....	852	170	34	3	1	348	9	7	280
Transportation equipment.....	763	111	26	2	1	334	11	14	264
Aircraft and parts.....	156	34	4	0	0	84	3	2	29
Ship and boat building and repairing.....	116	16	6	2	1	43	4	1	43
Automotive and other transportation equipment.....	491	61	16	0	0	207	4	11	192
Professional, scientific, and controlling instruments.....	268	41	14	1	0	126	6	4	76
Miscellaneous manufacturing.....	707	132	17	2	0	285	24	8	239
Agriculture, forestry, and fisheries.....	0	0	0	0	0	0	0	0	0
Mining.....	302	70	24	10	1	80	13	6	98
Metal mining.....	131	32	0	0	0	29	0	0	70
Coal mining.....	59	17	18	9	1	2	5	2	5
Crude petroleum and natural gas production.....	25	6	0	0	0	17	0	0	2
Nonmetallic mining and quarrying.....	87	15	6	1	0	32	8	4	21
Construction.....	703	164	184	26	42	231	6	0	50
Wholesale trade.....	1,597	252	42	17	0	757	49	28	452
Retail trade.....	1,999	366	44	9	1	951	43	38	547
Finance, insurance, and real estate.....	156	33	4	0	1	60	4	9	45
Transportation, communication, and other public utilities.....	2,158	534	110	32	16	767	31	28	640
Highway passenger transportation.....	219	73	10	0	0	78	5	6	47
Highway freight transportation.....	551	101	27	19	9	213	8	3	171
Water transportation.....	243	103	50	7	4	47	2	0	30
Warehousing and storage.....	301	22	2	1	1	81	6	1	187
Order transportation.....	47	7	4	4	0	17	0	4	11
Communication.....	524	175	12	1	0	200	6	8	122
Heat, light, power, water, and sanitary services.....	273	53	5	0	2	131	4	6	72
Services.....	675	141	39	2	1	308	15	14	155

<sup>1</sup> Source: Standard Industrial Classification, Division of Statistical Standards, U. S. Bureau of the Budget, Washington 1945.<sup>2</sup> See p 290 for definitions of types of cases.<sup>3</sup> The union-shop authorization poll was abolished by Public Law 189, approved by the President Oct 22, 1951. However, the law still provides for deauthorization polls when appropriate.<sup>4</sup> Includes 8 UD cases. <sup>5</sup> Includes 1 UD case. <sup>6</sup> Includes 3 UD cases.

Table 6.—Number of cases in which formal action was taken during fiscal year 1951

Formal actions taken	All cases	Unfair labor practice cases				Representation cases	Union-shop authorization cases <sup>2</sup>
		All C cases	NLRA—C cases <sup>1</sup>	CA cases <sup>1</sup>	Other C cases <sup>1</sup>		
Complaints issued .....	792	792	0	630	162		
Notices of hearing issued .....	2,658	15			15	2,610	33
Cases heard .....	2,833	670	1	520	149	2,131	32
Intermediate reports issued .....	624	624	2	476	146		
Decisions issued, total .....	3,534	606	10	461	135	2,740	188
Decisions and orders .....	498	498	8	<sup>3</sup> 369	<sup>4</sup> 121		
Decisions and consent orders .....	108	108	2	92	14		
Elections directed .....	1,698					<sup>5</sup> 1,689	9
Certifications and dismissals after stipulated elections .....	942					793	149
Dismissals on record .....	280					258	22
Certifications after regional director directed elections .....	8						8

<sup>1</sup> See p. 290 for definitions of types of cases.

<sup>2</sup> The union-shop authorization poll was abolished by Public Law 189, approved by the President Oct. 22, 1951. However, the law still provides for deauthorization polls when appropriate.

<sup>3</sup> Includes 62 cases decided by adoption of intermediate report in absence of exceptions.

<sup>4</sup> Includes 17 cases decided by adoption of intermediate report in absence of exceptions.

<sup>5</sup> Includes 1 Wagner R directed election.

NOTE.—This table is comparable to the "number of cases" columns used in the formal actions table of previous years. In order to simplify this table and to bring it into conformity with other tables included herein, which are stated in terms of "cases," the columns on "formal actions" appearing in prior reports are omitted.

Table 7.—Disposition of unfair labor practice cases closed, by stage and method, during fiscal year 1951

Stage and method	All C cases		N. L. R. A. C cases <sup>1</sup>		CA cases <sup>1</sup>		Other C cases <sup>1</sup>	
	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.....	5,503	100 0	137	100 0	4,168	100 0	1,198	100 0
Before formal action, total.....	4,800	87 3	0	0 0	3,742	89 8	1,058	88 3
Adjusted.....	965		0		796		169	
Withdrawn.....	2,532		0		1,982		550	
Dismissed.....	1,296		0		960		336	
Closed otherwise.....	7		0		4		3	
After 10 (k) <sup>2</sup> notice of hearing, total.....	18	3					18	1 5
Before 10 (k) hearing.....	6						6	
Adjusted.....	3						3	
Withdrawn.....	3						3	
After 10 (k) hearing.....	3						3	
Adjusted.....	1						1	
Withdrawn.....	1						1	
Otherwise.....	1						1	
After 10 (k) hearing and decision and determination of dispute.....	7						7	
Compliance.....	6						6	
Withdrawn.....	1						1	
After 10 (k) hearing and decision and order quashing the notice of hearing.....	2						2	
After complaint, total.....	685	12 4	137	100 0	426	10 2	122	10 2
Before hearing.....	111	2 0	0		90	2 2	21	1 8
Adjusted.....	78		0		63		15	
Withdrawn.....	21		0		18		3	
Dismissed.....	12		0		9		3	
After hearing.....	89	1 6	0	0	68	1 6	21	1 8
Adjusted.....	<sup>3</sup> 27		0		19		8	
Compliance with intermediate report.....	42		0		32		10	
Withdrawn.....	<sup>4</sup> 10		0		9		1	
Dismissed.....	<sup>5</sup> 10		0		8		<sup>5</sup> 2	
After board decision.....	253	4 6	19	13 9	176	4 2	58	4 8
Compliance, total.....	164		17		115		32	
Stipulated decision.....	12		2		8		2	
Contested decision.....	118		15		85		18	
Order adopting intermediate report in absence of exceptions.....	34		0		22		12	
Dismissed, total.....	85		2		57		26	
Contested decision.....	66		2		43		21	
Order adopting intermediate report in absence of exceptions.....	19		0		14		5	
Closed otherwise.....	4		0		4		0	
After court action.....	232	4 2	118	86 1	92	2 2	22	1 8
Compliance with consent decree.....	<sup>6</sup> 160		68		73		19	
Compliance with court order.....	54		38		14		2	
Dismissed.....	13		10		2		1	
Closed otherwise.....	5		2		3		0	

<sup>1</sup> See p. 290 for definitions of types of cases<sup>2</sup> Applies to CD cases only<sup>3</sup> Includes 2 cases adjusted after issuance of intermediate report (1 CA case and 1 other C case).<sup>4</sup> Includes 5 CA cases withdrawn after issuance of intermediate report<sup>5</sup> Includes 1 other C case dismissed after issuance of intermediate report.<sup>6</sup> Includes 6 cases in which the Board order adopted the intermediate report in the absence of exceptions (1 NLRA—C case, 2 CA cases, and 3 other C cases).

Table 8.—Disposition of representation cases closed, by stage and method, during fiscal year 1951

Stage and method	All R cases		RC cases <sup>1</sup>		RM cases <sup>1</sup>		RD cases <sup>1</sup>	
	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.....	10,291	100 0	9,439	100 0	492	100 0	360	100 0
Before formal action, total.....	7,653	74 4	7,012	74 3	380	77 2	261	72 5
Adjusted.....	4,780	-----	4,571	-----	162	-----	47	-----
Consent election.....	3,902	-----	3,746	-----	118	-----	38	-----
Stipulated election.....	695	-----	665	-----	21	-----	9	-----
Recognition.....	183	-----	160	-----	23	-----	0	-----
Withdrawn.....	<sup>2</sup> 2,191	-----	<sup>2</sup> 1,931	-----	118	-----	142	-----
Dismissed.....	650	-----	502	-----	76	-----	72	-----
Closed otherwise.....	32	-----	8	-----	24	-----	0	-----
After formal action, total.....	2,638	25 6	2,427	25 7	112	22 8	99	27 5
Before hearing.....	401	3 9	358	3 8	18	3 7	25	7 0
Adjusted.....	220	-----	203	-----	10	-----	7	-----
Consent election.....	156	-----	144	-----	6	-----	6	-----
Stipulated election.....	57	-----	53	-----	3	-----	1	-----
Recognition.....	7	-----	6	-----	1	-----	0	-----
Withdrawn.....	168	-----	147	-----	7	-----	14	-----
Dismissed.....	13	-----	8	-----	1	-----	4	-----
After hearing.....	296	2 9	266	2 8	18	3 7	12	3 3
Adjusted.....	181	-----	170	-----	7	-----	4	-----
Consent election.....	147	-----	138	-----	7	-----	2	-----
Stipulated election.....	32	-----	30	-----	0	-----	2	-----
Recognition.....	2	-----	2	-----	0	-----	0	-----
Withdrawn.....	107	-----	92	-----	8	-----	7	-----
Dismissed.....	8	-----	4	-----	3	-----	1	-----
After Board decision.....	1,941	18 8	1,803	19 1	76	15 4	62	17 2
Board ordered election.....	<sup>3</sup> 1,549	-----	<sup>3</sup> 1,458	-----	53	-----	38	-----
Dismissed without election.....	266	-----	228	-----	17	-----	21	-----
Withdrawn.....	<sup>4</sup> <sup>5</sup> 116	-----	<sup>4</sup> <sup>5</sup> 109	-----	4	-----	3	-----
Stipulated election and post-election hearing and decision.....	10	-----	8	-----	2	-----	0	-----

<sup>1</sup> See p. 290 for definition of types of cases.

<sup>2</sup> Includes 3 RC cases withdrawn after stipulated election.

<sup>3</sup> Includes 2 NLRA—R cases.

<sup>4</sup> Includes 3 NLRA—R cases.

<sup>5</sup> Includes 14 cases (2 NLRA—R cases and 12 RC cases) withdrawn after voided Board ordered election

Table 9.—Disposition of union-shop authorization <sup>1</sup> cases closed, by stage and method, during fiscal year 1951

Stage and method	Number of cases	Percent of cases closed
Total number of cases closed.....	<sup>1</sup> 6,843	100 0
Before formal action, total.....	<sup>1</sup> 6,810	99 5
Adjusted.....	5,918	86 5
Consent election—authorized.....	5,059	
Consent election—not authorized.....	151	
Stipulated election—authorized.....	144	
Stipulated election—not authorized.....	4	
Regional director directed election—authorized.....	521	
Regional director directed election—not authorized.....	39	
Withdrawn.....	<sup>3</sup> 4 727	10 6
Dismissed.....	<sup>3</sup> 161	2 3
Otherwise.....	4	1
After formal action, total.....	33	5
After notice of hearing.....	2	
Consent election—authorized.....	1	
Withdrawn.....	1	
After hearing held—withdrawn.....	1	
After Board decision—dismissed.....	22	
After Board ordered election—authorized.....	7	
After regional director directed election and Board decision—not authorized.....	1	

<sup>1</sup> Includes 7 UD cases<sup>2</sup> The union-shop authorization poll was abolished by Public Law 189, approved by the President Oct. 22, 1951. However, the law still provides for deauthorization polls when appropriate<sup>3</sup> Includes 6 UD cases<sup>4</sup> Includes 1 case withdrawn after regional director directed election voided.<sup>5</sup> Includes 1 UD case.Table 9A.—Results of union-shop authorization polls conducted Aug. 22, 1947–Oct. 22, 1951 <sup>1</sup>

Fiscal year	Total number of polls	Union-shop authorized		Employees eligible to vote	Percent casting valid votes	Total valid votes cast	Valid votes cast for union-shop	Percent of eligible
		Number	Percent					
Aug. 22, 1947–Oct. 22, 1951.....	46,119	44,795	97 1	6,542,564	84 8	5,547,478	5,071,988	77 5
1948 (Aug. 22, 1947–June 30, 1948).....	17,958	17,601	98 0	1,852,333	88 0	1,629,330	1,534,980	82 9
1949.....	15,074	14,581	96 7	1,733,922	84 8	1,471,092	1,381,829	79 7
1950.....	5,591	5,377	96 2	1,072,917	84 0	900,866	805,189	75 0
1951.....	5,964	5,759	96 6	1,623,375	82 3	1,335,683	1,164,143	71 7
1952 (July 1, 1951–Oct. 22, 1951).....	1,532	1,477	96 4	260,017	81 0	210,507	185,847	71 5

<sup>1</sup> The requirement of union-shop authorization polls was abolished by Public Law 189, approved by the President Oct. 22, 1951. However, the law still provides for deauthorization polls when appropriate.

Table 10.—Types of elections conducted during fiscal year 1951

Type of case	Total elections	Type of election			
		Consent <sup>1</sup>	Stipulated <sup>2</sup>	Regional director directed	Board ordered
All elections, total.....	12, 489	9, 384	965	578	1, 562
Eligible voters, total.....	2, 296, 042	1, 167, 235	442, 820	454, 484	231, 503
Valid votes, total.....	1, 928, 628	1, 001, 778	367, 131	360, 145	199, 574
NLRA, R cases, <sup>3</sup> total.....	1	0	0	-----	1
Eligible voters.....	145	0	0	-----	145
Valid votes.....	135	0	0	-----	135
RC cases, <sup>3</sup> total.....	6, 271	4, 010	775	-----	1, 486
Eligible voters.....	651, 651	305, 146	122, 250	-----	224, 255
Valid votes.....	574, 401	270, 633	110, 508	-----	193, 260
RM cases, <sup>3</sup> total.....	160	113	21	-----	26
Eligible voters.....	14, 760	9, 607	2, 685	-----	2, 468
Valid votes.....	13, 059	8, 594	2, 440	-----	2, 025
RD cases, <sup>3</sup> total.....	93	44	10	-----	39
Eligible voters.....	6, 111	2, 640	1, 351	-----	2, 120
Valid votes.....	5, 350	2, 243	1, 281	-----	1, 826
UA cases, <sup>3</sup> <sup>4</sup> total.....	5, 964	5, 217	159	578	10
Eligible voters.....	1, 623, 375	849, 842	316, 534	454, 484	2, 515
Valid votes.....	1, 335, 683	720, 308	252, 902	360, 145	2, 328

<sup>1</sup> Consent elections are held upon the agreement of all parties concerned and are certified by the regional director.

<sup>2</sup> Stipulated elections are held upon the agreement of all parties concerned, but provide for certification by the Board.

<sup>3</sup> See p. 290 for types of case.

<sup>4</sup> The union-shop authorization poll was abolished by Public Law 189, approved by the President Oct. 22, 1951. However, the law still provides for deauthorization polls when appropriate.

Table 11.—Size of unit in collective bargaining and decertification elections and union-shop polls, conducted during fiscal year 1951

## A. COLLECTIVE BARGAINING ELECTIONS

Size of unit (number of employees)	Number of cases	Percent	Size of unit (number of employees)	Number of cases	Percent
1 to 9.....	1,394	21.7	400 to 599.....	117	1.8
10 to 19.....	1,193	18.6	600 to 799.....	48	.7
20 to 39.....	1,270	19.7	800 to 999.....	37	.6
40 to 59.....	625	9.7	1,000 to 1,999.....	75	1.2
60 to 79.....	432	6.7	2,000 to 2,999.....	13	.2
80 to 99.....	277	4.3	3,000 to 3,999.....	7	.1
100 to 199.....	575	8.9	4,000 to 4,999.....	1	(1)
200 to 299.....	235	3.7	5,000 and over.....	5	.1
300 to 399.....	128	2.0			
			Total.....	6,432	100.0

## B. DECERTIFICATION ELECTIONS

1 to 9.....	17	18.3	200 to 299.....	2	2.1
10 to 19.....	14	15.0	300 to 399.....	1	1.1
20 to 39.....	28	30.1	400 to 499.....	1	1.1
40 to 59.....	5	5.4	500 to 599.....	1	1.1
60 to 79.....	8	8.6	600 to 699.....	1	1.1
80 to 99.....	3	3.2			
100 to 199.....	12	12.9	Total.....	93	100.0

C. UNION-SHOP POLLS<sup>2</sup>

1 to 9.....	1,140	19.1	400 to 699.....	210	3.5
10 to 19.....	967	16.2	700 to 999.....	107	1.8
20 to 39.....	1,088	18.3	1,000 to 1,999.....	106	1.8
40 to 59.....	553	9.3	2,000 to 3,999.....	49	.8
60 to 79.....	368	6.2	4,000 to 6,999.....	25	.4
80 to 99.....	252	4.2	7,000 to 9,999.....	8	.1
100 to 199.....	643	10.8	10,000 and over.....	14	.2
200 to 399.....	434	7.3			
			Total.....	5,964	100.0

<sup>1</sup> Less than 0.1 percent.<sup>2</sup> The union-shop authorization poll was abolished by Public Law 189, approved by the President Oct. 22, 1951. However, the law still provides for deauthorization polls when appropriate.

Table 12.—Number of collective bargaining elections and number of votes cast for participating unions

## A ELECTIONS

Participating unions	Number of elections	Elections won by—			
		A F of L affiliates	C I O affiliates	Unaffiliated unions	No union
Total.....	6,432	2,650	1,375	733	1,674
A. F. of L. affiliates only.....	3,284	2,325			959
C. I. O. affiliates only.....	1,547		1,088		459
Unaffiliated unions only.....	659			482	177
A. F. of L. affiliates—C. I. O. affiliates.....	420	195	166		59
A. F. of L. affiliates—Unaffiliated unions.....	255	117		122	16
C. I. O. affiliates—Unaffiliated unions.....	238		115	119	4
A. F. of L.—C. I. O.—Unaffiliated unions.....	29	13	6	10	0

## B ELIGIBLE VOTERS AND VALID VOTES CAST

Participating unions	Employees eligible to vote	Percent casting valid votes	Total valid votes cast	Valid votes cast for								Employees in units choosing representation
				A F. of L. affiliates		C I O affiliates		Unaffiliated unions		No union		
				Number	Percent	Number	Percent	Number	Percent	Number	Percent	
Total.....	666,556	88 2	587,595	148,532	25 3	184,056	31 3	109,478	18 6	145,529	24 8	505,322
A. F. of L. affiliates only.....	169,710	88 5	150,155	92,722	61 8					57,433	38 2	105,968
C. I. O. affiliates only.....	162,348	89 8	145,801			85,259	58 5			60,542	41 5	95,021
Unaffiliated unions only.....	43,609	85 0	37,062					25,291	68 2	11,771	31 8	32,102
A. F. of L. affiliates—C. I. O. affiliates.....	107,387	87 0	93,424	36,839	39 4	44,411	47 5			12,174	13 1	90,491
A. F. of L. affiliates—unaffiliated unions.....	36,815	88 2	32,474	14,261	43 9			17,051	52 5	1,162	3 6	35,860
C. I. O. affiliates—unaffiliated unions.....	128,359	88 2	113,257			49,243	43 5	61,710	54 5	2,304	2 0	127,552
A. F. of L.—C. I. O.—unaffiliated unions.....	18,328	84 1	15,422	4,710	30 5	5,143	33 4	5,426	35 2	143	.9	18,328

Table 13.—Number of decertification elections and number of votes cast for participating unions during fiscal year 1951

A. ELECTIONS

Participating unions	Number of elections	Elections won by—			
		A. F. of L. affiliates	C. I. O. affiliates	Unaffiliated unions	No union
Total.....	93	15	8	4	66
A. F. of L. affiliates.....	50	15	—	—	35
C. I. O. affiliates.....	23	—	8	—	15
Unaffiliated unions.....	19	—	—	4	15
A. F. of L. affiliates—C. I. O. affiliates.....	1	0	0	—	1

B. ELIGIBLE VOTERS AND VALID VOTES CAST

Participating unions	Employees eligible to vote	Percent casting valid votes	Total valid votes cast	Valid votes cast for—								Employees in units choosing representation
				A. F. of L. affiliates		C. I. O. affiliates		Unaffiliated unions		No union		
				Number	Percent	Number	Percent	Number	Percent	Number	Percent	
Total.....	6,111	87.5	5,350	1,090	20.4	940	17.6	366	6.8	2,954	55.2	2,632
A. F. of L. affiliates.....	2,831	87.3	2,472	1,078	43.6	—	—	—	—	1,394	56.4	1,225
C. I. O. affiliates.....	1,725	84.6	1,460	—	—	938	64.2	—	—	522	35.8	1,187
Unaffiliated unions.....	1,420	92.9	1,319	—	—	—	—	366	27.7	953	72.3	270
A. F. of L. affiliates—C. I. O. affiliates.....	135	73.3	99	12	12.1	2	2.0	—	—	85	85.9	0

Table 14.—Number of union-shop authorization polls <sup>1</sup> and number of votes cast for participating unions during fiscal year 1951

## A. POLLS

Participating unions	Number of polls	Number of polls			
		A. F. of L. authorized	C. I. O. authorized	Unaffiliated unions authorized	No union shop authorized
Total.....	5,964	3,062	1,976	721	205
A. F. of L. affiliates.....	3,202	3,062	-----	-----	140
C. I. O. affiliates.....	2,018	-----	1,976	-----	42
Unaffiliated unions.....	744	-----	-----	721	23

## B. ELIGIBLE VOTERS AND VALID VOTES CAST

Participating unions	Employees eligible to vote	Percent casting valid votes	Total valid votes cast	Valid votes cast for union shop by affiliation of petitioner						Valid votes cast against union shop		Employees in units authorizing union shop
				A. F. of L. affiliates		C. I. O. affiliates		Unaffiliated unions		Number	Percent	
				Number	Percent	Number	Percent	Number	Percent			
Total.....	1,623,375	82.3	1,335,683	253,637	19.0	826,269	61.9	84,237	6.3	171,540	12.8	1,585,881
A. F. of L. affiliates.....	323,382	86.3	279,002	253,637	90.9	-----	-----	-----	-----	25,365	9.1	309,484
C. I. O. affiliates.....	1,181,731	81.0	957,772	-----	-----	826,269	86.3	-----	-----	131,503	13.7	1,162,209
Unaffiliated unions.....	118,262	83.6	98,909	-----	-----	-----	-----	84,237	85.2	14,672	14.8	114,188

<sup>1</sup> The union-shop authorization poll was abolished by Public Law 189, approved by the President Oct. 22, 1951. However, the law still provides for deauthorization polls when appropriate.

Table 15.—Industrial distribution of collective bargaining elections, winner, eligible voters, and valid votes cast, during fiscal year 1951

Industrial group <sup>1</sup>	Number of elections	Winner				Eligible voters	Valid votes cast
		A. F. of L. affiliates	C. I. O. affiliates	Unaffiliated unions	No union		
Total.....	6, 432	2, 650	1, 375	733	1, 674	666, 556	587, 595
Manufacturing.....	4, 479	1, 696	1, 160	516	1, 107	549, 858	487, 384
Ordnance and accessories.....	7	5	2	0	0	1, 963	1, 695
Food and kindred products.....	633	335	86	55	157	49, 882	41, 710
Tobacco manufacturers.....	24	9	5	4	6	7, 837	6, 401
Textile-mill products.....	171	24	54	23	70	43, 636	39, 827
Apparel and other finished products made from fabrics and similar materials.....	132	45	32	6	49	17, 168	15, 896
Lumber and wood products.....	229	94	73	4	58	19, 210	16, 570
Furniture and fixtures.....	180	69	48	10	53	19, 110	17, 492
Paper and allied products.....	158	85	27	5	41	20, 471	18, 324
Printing, publishing, and allied industries.....	205	96	55	15	39	7, 210	6, 284
Chemicals and allied products.....	263	123	63	19	58	32, 134	28, 796
Products of petroleum and coal.....	119	40	39	17	23	9, 635	8, 252
Rubber products.....	69	18	30	8	13	10, 846	9, 482
Leather and leather products.....	70	22	15	9	24	9, 921	8, 907
Stone, clay, and glass products.....	170	71	35	23	41	13, 790	12, 160
Primary metal industries.....	285	86	88	46	65	50, 245	45, 542
Fabricated metal products (except machinery and transportation equipment).....	454	162	114	53	125	49, 206	43, 823
Machinery (except electrical).....	528	137	172	111	108	69, 974	63, 159
Electrical machinery, equipment and supplies.....	274	101	72	57	44	54, 864	47, 204
Transportation equipment.....	237	76	71	30	60	36, 259	32, 315
Aircraft and parts.....	44	15	6	6	17	14, 134	12, 419
Ship and boat building and repairing.....	28	17	2	3	6	4, 379	3, 739
Automotive and other transportation equipment.....	165	44	63	21	37	17, 746	16, 157
Professional, scientific, and controlling instruments.....	91	27	34	6	24	11, 197	10, 000
Miscellaneous manufacturing.....	180	71	45	15	49	15, 300	13, 545
Agricultural, forestry, and fisheries.....	0	0	0	0	0	0	0
Mining.....	57	17	18	6	16	5, 460	4, 911
Metal mining.....	15	3	6	1	5	2, 989	2, 649
Coal mining.....	3	0	0	1	2	114	98
Crude petroleum and natural gas production.....	8	2	3	1	2	371	350
Nonmetallic mining and quarrying.....	31	12	9	3	7	1, 986	1, 814
Construction.....	42	19	5	3	15	3, 675	2, 858
Wholesale trade.....	540	302	66	28	144	19, 672	16, 532
Retail trade.....	626	262	60	63	271	27, 064	23, 902
Finance, insurance, and real estate.....	37	16	8	4	9	11, 233	10, 052
Transportation, communication, and other public utilities.....	509	273	41	86	109	44, 561	37, 615
Highway passenger transportation.....	66	30	2	20	14	3, 812	3, 549
Highway freight transportation.....	124	79	2	15	28	2, 138	1, 922
Water transportation.....	19	5	6	4	4	1, 830	1, 453
Warehousing and storage.....	53	35	5	5	8	1, 407	1, 195
Order transportation.....	15	6	3	1	5	2, 889	2, 539
Communication.....	144	67	14	36	27	27, 232	22, 375
Heat, light, power, water, and sanitary services.....	88	51	9	5	23	5, 253	4, 582
Services.....	142	65	17	27	33	5, 033	4, 341

<sup>1</sup> Source: Standard Industrial Classification, Division of Statistical Standards, U. S. Bureau of the Budget, Washington, 1945.

Table 16.—Industrial distribution of decertification elections, winner, eligible voters, and valid votes cast, during fiscal year 1951

Industrial group <sup>1</sup>	Number of elections	Winner				Eligible voters	Valid votes cast
		A F of L affiliates	C I O affiliates	Unaffiliated unions	No union		
Total.....	93	15	8	4	66	6, 111	5, 350
Manufacturing.....	65	12	7	3	43	4, 853	4, 227
Food and kindred products.....	12	5	0	0	7	327	290
Textile-mill products.....	1	0	1	0	0	298	279
Apparel and other finished products made from fabric and similar materials.....	2	1	0	0	1	231	208
Lumber and wood products.....	5	1	2	0	2	966	760
Furniture and fixtures.....	1	0	1	0	0	13	13
Paper and allied products.....	2	0	0	0	2	25	24
Chemicals and allied products.....	3	0	1	0	2	77	66
Products of petroleum and coal.....	3	0	1	0	2	84	76
Rubber products.....	1	0	0	1	0	62	60
Leather and leather products.....	1	0	0	0	1	6	6
Stone, clay, and glass products.....	7	2	0	0	5	569	508
Primary metal industries.....	4	0	1	0	3	136	127
Fabricated metal products (except machinery and transportation equipment).....	5	1	0	0	4	172	157
Machinery (except electrical).....	2	0	0	0	2	46	40
Electrical machinery, equipment, and supplies.....	5	0	0	2	3	1, 188	1, 052
Transportation equipment.....	6	1	0	0	5	364	309
Aircraft and parts.....	1	1	0	0	0	76	70
Ship and boat building and repairing.....	1	0	0	0	1	114	75
Automotive and other transportation equipment.....	4	0	0	0	4	174	164
Professional, scientific, and controlling instruments.....	1	0	0	0	1	25	25
Miscellaneous manufacturing.....	4	1	0	0	3	264	227
Mining.....	2	0	0	0	2	30	25
Coal mining.....	1	0	0	0	1	21	16
Nonmetal mining and quarrying.....	1	0	0	0	1	9	9
Wholesale trade.....	10	0	0	0	10	197	184
Retail trade.....	4	0	1	0	3	242	194
Transportation, communication, and other public utilities.....	9	2	0	1	6	582	524
Highway passenger transportation.....	4	1	0	0	3	449	419
Other transportation.....	1	0	0	0	1	11	11
Communication.....	2	1	0	1	0	28	27
Heat, light, power, water, and sanitary services.....	2	0	0	0	2	94	67
Services.....	3	1	0	0	2	207	196

<sup>1</sup> Source Standard Industrial Classification, Division of Statistical Standards, U. S. Bureau of the Budget, Washington, 1945.

Table 17.—Industrial distribution of union-shop authorization polls,<sup>1</sup> outcome, eligible voters, and valid votes cast, during fiscal year 1951

Industrial group <sup>2</sup>	Number of polls	Winner				Eligible voters	Valid votes cast
		A. F. of L. affiliates	C. I. O. affiliates	Unaffiliated unions	No union		
Total.....	5,964	3,062	1,976	721	205	1,623,375	1,335,683
Manufacturing.....	4,264	1,906	1,730	519	109	1,502,050	1,234,135
Ordnance and accessories.....	4	3	1	0	0	285	265
Food and kindred products.....	537	398	99	19	21	39,502	32,943
Tobacco manufacturers.....	13	7	3	3	0	3,034	2,614
Textile-mill products.....	139	27	79	32	1	19,543	16,001
Apparel and other finished products made from fabrics and similar material.....	162	102	55	3	2	95,735	89,830
Lumber and wood products.....	227	139	76	3	9	16,251	12,911
Furniture and fixtures.....	137	75	38	21	3	14,676	12,505
Paper and allied products.....	82	62	13	6	1	6,808	5,653
Printing, publishing, and allied industries.....	190	119	58	10	3	9,617	7,943
Chemical and allied products.....	170	102	42	20	6	16,896	13,605
Products of petroleum and coal.....	38	17	15	3	3	3,956	3,355
Rubber products.....	55	8	44	3	0	56,326	42,117
Leather and leather products.....	81	41	22	16	2	11,487	9,999
Stone, clay, and glass products.....	152	93	34	21	4	11,563	9,769
Primary metal industries.....	430	98	287	34	11	565,851	454,376
Fabricated metal products (except machinery and transportation equipment).....	530	187	267	68	8	117,292	97,567
Machinery (except electrical).....	545	140	284	110	11	138,568	116,547
Electrical machinery, equipment, and supplies.....	255	97	92	58	8	114,029	95,398
Transportation equipment.....	251	64	132	47	8	228,616	182,382
Aircraft and parts.....	28	12	8	7	1	25,355	20,415
Ship and boat building and repairing.....	31	11	15	3	2	25,429	20,142
Automotive and other transportation equipment.....	192	41	109	37	5	177,832	141,825
Professional, scientific, and controlling instruments.....	77	23	34	16	4	14,531	12,766
Miscellaneous manufacturing.....	189	104	55	26	4	17,484	14,989
Mining.....	89	12	69	5	3	25,738	21,596
Metal mining.....	70	3	60	4	3	24,215	20,312
Crude petroleum and natural gas production.....	2	0	2	0	0	55	54
Nonmetallic mining and quarrying.....	17	9	7	1	0	1,468	1,230
Construction.....	42	36	2	4	0	2,658	2,248
Wholesale trade.....	397	298	55	25	19	14,271	12,357
Retail trades.....	448	297	64	44	43	28,449	24,209
Finance, insurance, and real estate.....	38	27	5	6	0	3,062	2,580
Transportation, communication, and other public utilities.....	547	393	40	88	26	37,413	30,240
Highway passenger transportation.....	37	24	1	10	2	1,620	1,405
Highway freight transportation.....	147	132	1	5	9	6,720	5,461
Water transportation.....	24	7	11	5	1	1,375	1,183
Warehousing and storage.....	146	101	13	27	5	3,742	3,267
Other transportation.....	12	5	3	4	0	4,681	3,486
Communication.....	114	76	3	31	4	6,197	5,090
Heat, light, power, water, and sanitary services.....	67	48	8	6	5	13,078	10,348
Services.....	139	93	11	30	5	9,734	8,318

<sup>1</sup> The union-shop authorization poll was abolished by Public Law 189, approved by the President, Oct. 22, 1951. However, the law still provides for deauthorization polls when appropriate.

<sup>2</sup> Source Standard Industrial Classification, Division of Statistical Standards, U. S. Bureau of the Budget, Washington, 1945.

Table 18.—Geographic distribution of collective bargaining elections, eligible voters, and number of votes cast for participating unions, during fiscal year 1951

Division and State 1	Number of elections	Elections won by—				Em- ployees eligible to vote	Total valid votes cast	Valid votes cast for—				Em- ployees in units choosing representa- tion
		A F of L affili- ates	C I O affili- ates	Unaffili- ated unions	No union			A F of L affili- ates	C I O affili- ates	Unaffili- ated unions	No union	
New England.....	535	225	122	48	140	97,935	87,032	18,418	31,711	21,226	15,677	81,610
Maine.....	33	17	6	0	10	5,297	4,820	1,741	1,411	715	953	4,435
New Hampshire.....	39	23	11	1	4	4,724	4,338	900	1,981	188	1,269	3,754
Vermont.....	15	5	1	2	7	1,557	1,434	119	498	589	228	1,163
Massachusetts.....	265	114	53	26	73	57,867	50,971	7,998	18,489	17,930	6,554	51,005
Rhode Island.....	64	18	18	10	18	8,154	7,365	1,362	3,365	272	2,366	5,112
Connecticut.....	118	48	33	9	28	20,336	18,104	6,298	5,967	1,532	4,307	16,141
Middle Atlantic.....	1,332	477	371	199	285	151,339	134,411	28,676	46,559	30,781	28,495	123,250
New York.....	651	247	178	94	132	61,402	54,083	10,859	17,308	12,425	13,491	49,287
New Jersey.....	279	102	76	50	51	41,953	37,009	6,710	16,003	9,104	5,192	36,305
Pennsylvania.....	402	128	117	55	102	47,984	43,319	11,007	13,248	9,252	9,812	37,658
East North Central.....	1,564	601	404	174	385	148,147	132,308	35,034	43,803	19,199	34,272	110,461
Ohio.....	487	196	116	53	122	50,492	45,149	11,950	14,905	4,999	13,295	34,562
Indiana.....	176	65	38	22	51	25,304	22,368	6,916	9,025	1,024	5,403	19,875
Illinois.....	369	153	60	63	93	34,129	30,859	7,758	7,242	6,988	8,871	23,232
Michigan.....	337	95	154	19	69	21,255	18,558	4,223	8,165	2,161	4,009	18,036
Wisconsin.....	195	92	36	17	50	16,967	15,374	4,187	4,466	4,027	2,694	14,756
West North Central.....	605	326	80	49	150	34,367	29,771	10,487	7,815	3,552	7,917	25,133
Iowa.....	58	21	14	8	15	7,958	6,816	1,547	3,190	1,490	589	7,518
Minnesota.....	169	89	34	20	26	6,936	5,871	2,077	1,664	709	1,421	5,447
Missouri.....	245	145	19	17	64	12,659	11,020	4,572	1,935	1,244	3,269	8,662
North Dakota.....	13	5	0	0	8	140	137	71	0	0	66	72
South Dakota.....	4	3	0	0	1	1,768	1,629	115	587	0	927	147
Nebraska.....	32	17	0	1	14	1,471	1,313	622	59	37	595	695
Kansas.....	84	46	13	3	22	3,435	2,985	1,483	380	72	1,050	2,592
South Atlantic.....	516	185	114	27	190	73,853	65,380	10,770	18,816	12,657	23,137	44,767
Delaware.....	8	2	3	2	1	1,033	836	290	244	210	92	1,001
Maryland.....	78	31	16	5	26	10,238	7,676	1,700	1,974	2,303	1,699	8,819
District of Columbia.....	19	11	2	0	6	840	745	327	176	28	214	707
Virginia.....	74	26	20	6	22	10,056	9,245	1,479	2,900	1,298	3,568	6,269

West Virginia.....	58	24	3	4	27	19,801	18,450	1,221	5,844	7,327	4,058	12,591
North Carolina.....	91	14	33	4	40	12,686	11,500	1,541	3,680	413	5,866	5,040
South Carolina.....	29	18	3	2	6	6,816	6,045	1,277	1,273	686	2,809	3,620
Georgia.....	74	19	24	0	31	6,351	5,675	982	1,919	24	2,750	2,740
Florida.....	85	40	10	4	31	6,032	5,208	1,953	806	368	2,081	3,990
<b>East South Central.....</b>	<b>281</b>	<b>124</b>	<b>53</b>	<b>18</b>	<b>86</b>	<b>31,009</b>	<b>28,219</b>	<b>9,589</b>	<b>7,262</b>	<b>2,810</b>	<b>8,558</b>	<b>21,130</b>
Kentucky.....	70	44	7	4	15	8,208	7,416	3,171	1,281	1,674	1,290	6,538
Tennessee.....	103	46	15	11	31	13,871	12,610	4,305	3,158	1,028	4,119	9,069
Alabama.....	80	20	28	2	30	4,466	4,050	923	1,565	103	1,459	3,165
Mississippi.....	28	14	3	1	10	4,464	4,143	1,190	1,258	5	1,690	2,358
<b>West South Central.....</b>	<b>388</b>	<b>158</b>	<b>79</b>	<b>23</b>	<b>128</b>	<b>35,675</b>	<b>31,320</b>	<b>9,809</b>	<b>9,166</b>	<b>1,303</b>	<b>11,042</b>	<b>23,431</b>
Arkansas.....	59	19	10	4	26	5,226	4,723	1,258	1,399	104	1,962	3,176
Louisiana.....	63	26	7	3	27	7,402	6,558	1,366	1,365	205	3,622	2,416
Oklahoma.....	61	34	7	2	18	3,806	3,381	1,229	363	57	1,732	1,955
Texas.....	205	79	55	14	57	19,241	16,658	5,956	6,039	937	3,726	15,884
<b>Mountain.....</b>	<b>265</b>	<b>120</b>	<b>32</b>	<b>36</b>	<b>77</b>	<b>20,089</b>	<b>17,145</b>	<b>3,752</b>	<b>4,023</b>	<b>4,723</b>	<b>4,647</b>	<b>14,016</b>
Montana.....	24	8	1	6	9	2,335	2,117	475	490	973	179	2,125
Idaho.....	27	18	1	2	6	1,003	900	297	23	153	427	439
Wyoming.....	14	8	1	1	4	363	333	81	87	13	152	120
Colorado.....	83	42	8	8	25	2,234	2,025	1,039	190	208	588	1,638
New Mexico.....	32	19	1	4	8	2,197	1,864	920	23	493	428	1,846
Arizona.....	45	12	14	7	12	7,482	5,847	277	2,032	1,062	2,476	3,696
Utah.....	34	8	6	8	12	4,341	3,934	571	1,178	1,819	366	4,022
Nevada.....	6	5	0	0	1	134	125	92	0	2	31	130
<b>Pacific.....</b>	<b>812</b>	<b>412</b>	<b>99</b>	<b>98</b>	<b>203</b>	<b>60,899</b>	<b>51,522</b>	<b>19,750</b>	<b>12,928</b>	<b>8,598</b>	<b>10,246</b>	<b>49,761</b>
Washington.....	100	55	12	8	25	6,915	5,412	1,646	833	2,108	825	6,446
Oregon.....	111	46	18	13	34	8,552	6,556	2,266	2,188	446	1,656	7,147
California.....	601	311	69	77	144	45,432	39,554	15,838	9,907	6,044	7,765	36,168
<b>Outlying areas.....</b>	<b>134</b>	<b>22</b>	<b>21</b>	<b>61</b>	<b>30</b>	<b>13,243</b>	<b>10,487</b>	<b>2,347</b>	<b>1,973</b>	<b>4,629</b>	<b>1,538</b>	<b>11,763</b>
Alaska.....	2	1	0	1	0	59	55	22	0	31	2	59
Hawaii.....	17	3	1	5	8	979	828	215	47	325	241	614
Puerto Rico.....	115	18	20	55	22	12,205	9,604	2,110	1,926	4,273	1,295	11,090

<sup>1</sup> The States are grouped according to the method used by the Bureau of the Census, U. S. Department of Commerce.

Table 19.—Geographic distribution of decertification elections, eligible voters, and number of votes cast for participating unions, during fiscal year 1951

Division and State <sup>1</sup>	Number of elections	Elections won by				Employees eligible to vote	Total valid votes	Valid votes cast for				Employees in units choosing representation
		A F of L affiliates	C I O affiliates	Unaffiliated unions	No union			A F. of L. affiliates	C I O affiliates	Unaffiliated unions	No union	
New England.....	7	3	0	0	4	123	115	57	0	0	58	75
Maine.....	0	0	0	0	0	0	0	0	0	0	0	0
New Hampshire.....	2	2	0	0	0	50	46	36	0	0	10	50
Vermont.....	0	0	0	0	0	0	0	0	0	0	0	0
Massachusetts.....	1	1	0	0	0	25	24	16	0	0	8	25
Rhode Island.....	1	0	0	0	1	5	5	1	0	0	4	0
Connecticut.....	3	0	0	0	3	43	40	4	0	0	36	0
Middle Atlantic.....	12	2	0	2	8	1,151	1,075	86	9	190	790	309
New York.....	4	2	0	0	2	192	174	86	0	7	81	164
New Jersey.....	3	0	0	0	3	110	100	0	0	44	56	0
Pennsylvania.....	5	0	0	2	3	849	801	0	9	139	653	145
East North Central.....	30	6	2	2	20	1,725	1,511	448	93	142	828	855
Ohio.....	10	1	0	1	8	945	797	278	18	43	458	488
Indiana.....	5	3	0	0	2	235	215	125	0	1	89	178
Illinois.....	6	0	0	1	5	151	146	6	13	45	82	62
Michigan.....	9	2	2	0	5	394	353	39	62	53	199	127
Wisconsin.....	0	0	0	0	0	0	0	0	0	0	0	0
West North Central.....	9	1	0	0	8	569	507	225	0	2	280	101
Iowa.....	0	0	0	0	0	0	0	0	0	0	0	0
Minnesota.....	2	1	0	0	1	118	104	58	0	0	46	101
Missouri.....	6	0	0	0	6	432	385	167	0	2	216	0
North Dakota.....	0	0	0	0	0	0	0	0	0	0	0	0
South Dakota.....	0	0	0	0	0	0	0	0	0	0	0	0
Nebraska.....	0	0	0	0	0	0	0	0	0	0	0	0
Kansas.....	1	0	0	0	1	19	18	0	0	0	18	0
South Atlantic.....	8	1	2	0	5	807	662	126	247	0	289	472
Delaware.....	1	0	0	0	1	67	59	19	0	0	40	0
Maryland.....	2	0	0	0	2	120	81	0	31	0	50	0
District of Columbia.....	0	0	0	0	0	0	0	0	0	0	0	0
Virginia.....	0	0	0	0	0	0	0	0	0	0	0	0
West Virginia.....	1	1	0	0	0	135	78	45	0	0	33	135
North Carolina.....	2	0	0	0	2	148	134	62	0	0	72	0

South Carolina.....	0	0	0	0	0	0	0	0	0	0	0	0	0
Georgia.....	1	0	1	0	0	298	279	0	186	0	93	298	
Florida.....	1	0	1	0	0	39	31	0	30	0	1	39	
East South Central.....	7	0	0	0	7	230	200	11	3	32	154	0	
Kentucky.....	1	0	0	0	1	53	50	6	0	0	44	0	
Tennessee.....	1	0	0	0	1	13	11	0	0	2	9	0	
Alabama.....	3	0	0	0	3	132	112	0	3	30	79	0	
Mississippi.....	2	0	0	0	2	32	27	5	0	0	22	0	
West South Central.....	5	1	2	0	2	360	324	33	96	0	195	146	
Arkansas.....	1	0	1	0	0	89	82	0	73	0	9	89	
Louisiana.....	0	0	0	0	0	0	0	0	0	0	0	0	
Oklahoma.....	1	0	0	0	1	145	140	6	0	0	134	0	
Texas.....	3	1	1	0	1	126	102	27	23	0	52	57	
Mountain.....	3	1	0	0	2	83	76	34	7	0	35	58	
Montana.....	0	0	0	0	0	0	0	0	0	0	0	0	
Idaho.....	0	0	0	0	0	0	0	0	0	0	0	0	
Wyoming.....	1	0	0	0	1	21	21	0	7	0	14	0	
Colorado.....	1	1	0	0	1	4	4	0	0	0	4	0	
New Mexico.....	1	1	0	0	0	58	51	34	0	0	17	58	
Arizona.....	0	0	0	0	0	0	0	0	0	0	0	0	
Utah.....	0	0	0	0	0	0	0	0	0	0	0	0	
Nevada.....	0	0	0	0	0	0	0	0	0	0	0	0	
Pacific.....	10	0	2	0	8	902	760	56	483	0	221	666	
Washington.....	0	0	0	0	0	0	0	0	0	0	0	0	
Oregon.....	3	0	1	0	2	696	569	8	472	0	89	653	
California.....	7	0	1	0	6	206	191	48	11	0	132	13	
Outlying areas.....	2	0	0	0	2	161	120	14	2	0	104	-----	
Alaska.....	1	0	0	0	1	26	21	2	0	0	19	0	
Hawaii.....	0	0	0	0	0	0	0	0	0	0	0	0	
Puerto Rico.....	1	0	0	0	1	135	99	12	2	0	85	0	

<sup>1</sup> The States are grouped according to the method used by the Bureau of the Census, U. S. Department of Commerce



West Virginia.....	52	24	28	0	0	23,259	19,536	600	17,413	0	1,523	23,259
North Carolina.....	0	0	0	0	0	0	0	0	0	0	0	0
South Carolina.....	13	11	1	0	1	1,740	1,267	820	360	0	87	1,727
Georgia.....	0	0	0	0	0	0	0	0	0	0	0	0
Florida.....	0	0	0	0	0	0	0	0	0	0	0	0
East South Central.....	117	76	28	7	6	32,422	27,277	3,622	19,118	1,289	3,248	32,261
Kentucky.....	68	44	12	7	5	8,783	7,620	1,518	3,758	1,289	1,055	8,633
Tennessee.....	0	0	0	0	0	0	0	0	0	0	0	0
Alabama.....	41	27	14	0	0	22,151	18,377	1,308	14,951	0	2,118	22,151
Mississippi.....	8	5	2	0	1	1,488	1,280	796	409	0	75	1,477
West South Central.....	103	71	17	7	8	6,331	5,308	2,380	1,705	692	531	5,915
Arkansas.....	0	0	0	0	0	0	0	0	0	0	0	0
Louisiana.....	47	27	12	4	4	3,499	2,899	1,246	1,268	161	224	3,270
Oklahoma.....	56	44	5	3	4	2,832	2,409	1,134	437	531	307	2,645
Texas.....	0	0	0	0	0	0	0	0	0	0	0	0
Mountain.....	201	146	30	16	9	35,160	27,825	4,865	12,325	6,835	3,800	28,042
Montana.....	32	22	3	6	1	9,271	7,655	525	129	6,449	552	9,261
Idaho.....	23	16	3	2	2	4,381	2,871	248	1,827	192	604	1,181
Wyoming.....	13	12	0	0	1	355	276	246	0	6	24	338
Colorado.....	67	57	7	2	1	12,978	10,694	2,034	7,273	76	1,311	12,966
New Mexico.....	33	29	1	1	2	1,908	1,560	1,343	26	9	182	1,835
Arizona.....	0	0	0	0	0	0	0	0	0	0	0	0
Utah.....	25	8	14	2	1	5,803	4,412	349	2,915	76	1,072	2,025
Nevada.....	8	2	2	3	1	464	357	120	155	27	55	436
Pacific.....	948	609	154	145	40	112,429	92,915	48,679	27,706	5,568	10,962	103,802
Washington.....	138	96	30	5	7	26,447	20,515	14,978	1,812	256	3,469	23,178
Oregon.....	113	78	25	4	6	4,551	3,700	2,531	651	100	418	4,371
California.....	697	435	99	136	27	81,431	68,700	31,170	25,243	5,212	7,075	76,253
Outlying areas.....	52	17	8	25	2	6,873	5,294	1,282	967	2,382	663	5,868
Alaska.....	2	0	0	1	1	70	43	11	0	15	17	27
Hawaii.....	3	3	0	0	0	274	221	146	0	0	75	274
Puerto Rico.....	47	14	8	24	1	6,529	5,030	1,125	967	2,367	571	5,567

<sup>1</sup> The union-shop authorization poll was abolished by Public Law 189, signed by the President Oct 22, 1951. However, the law still provides for deauthorization polls when appropriate

<sup>2</sup> The States are grouped according to the method used by the Bureau of the Census, U. S. Department of Commerce

Table 21.—Record of injunctions petitioned for under sec. 10 (j) and 10 (l) during the fiscal year 1951 and those having some action in fiscal year 1951, although petitioned for in prior years

Case No	Union and company	Date petition for injunction filed	Type of petition	Temporary restraining order		Date temporary injunction granted	Date injunction denied	Date injunction proceedings withdrawn or dismissed	Date of Board decision and / or order
				Date issued	Date lifted				
21-CD-19.....	AFL-Los Angeles Building and Construction Trades Council, et al (Westinghouse Electric Co.).	May 3, 1949	10 (l).....			June 10, 1949			May 11, 1951
19-CD-4, 5.....	CIO-Longshoremen, Local 16 (Juneau-Spruce Corp).	May 12, 1949	10 (l).....			May 14, 1949		Aug. 24, 1950	Aug. 7, 1950
2-CC-103.....	Newspaper & Mail Deliverers Union of New York and vicinity (Interborough News Co).	Aug 23, 1949	10 (l).....			(1)		Oct. 17, 1950	Aug. 24, 1950
2-CC-119.....	AFL-Teamsters, Local 297 (Western Express Co., Inc)	Nov. 18, 1949	10 (l).....				2Jan. 13, 1950	Jan. 31, 1951	Sept. 20, 1950
6-CC-41.....	AFL-Teamsters, Locals 249 and 635 (Swift & Co).	Mar. 7, 1950	10 (l).....			Mar. 22, 1950		Feb. 26, 1951	(3)
32-CC-3.....	AFL-Teamsters, Local 878 (Arkansas Express, Inc)	Apr. 19, 1950	10 (l).....			(1)		Dec. 15, 1950	Nov. 28, 1950
20-CC-55.....	AFL-Sailors Union of the Pacific (Moore Dry Dock Co.)	Mar. 3, 1950	10 (l).....			Mar. 14, 1950		Jan. 4, 1951	Dec. 8, 1950
20-CB-128, 129.....	AFL-Teamsters, Local 85 (Distributors Association of Northern California).	May 17, 1950	10 (j).....					4July 17, 1950	5June 22, 1950
19-CC-27, 29.....	CIO-Longshoremen & Warehousemen, Local 7-C and Local 19 (Alaska Salmon Industry Inc.).	May 22, 1950	10 (l).....	May 27, 1950	June 1, 1950	June 1, 1950			Aug. 14, 1950
20-CC-60.....	CIO-Longshoremen, Local 6 (Purity Stores, Ltd)	May 2, 1950	10 (l).....					4July 17, 1950	5June 22, 1950
16-CC-14.....	AFL-Meat Cutters, Local 303 (Western, Inc)	May 17, 1950	10 (l).....				4July 25, 1950		Feb. 19, 1951
9-CC-31.....	United Construction Workers, UMW (Kanawha Coal Operators Association)	July 5, 1950	10 (l).....			July 27, 1950			June 29, 1951
2-CB-141, 254.....	Newspaper & Mail Deliverers Union of New York and vicinity (New York Herald Tribune).	Aug 2, 1950	10 (j).....					Oct. 6, 1950	Feb 27, 1951
36-CC-12.....	Construction & General Laborers Union, Local 320 (Armco Drainage & Metal Products).	Aug 19, 1950	10 (l).....					Apr. 4, 1951	Mar 12, 1951
13-CC-27.....	AFL-Photo Engravers Union, Local 5 (Drake Process, Inc.).	Aug. 22, 1950	10 (l).....					4Sept. 26, 1950	(4)
17-CC-10.....	AFL-Meatcutters & Butchers, Local 172 (Producers Produce Co)	Aug 17, 1950	10 (l).....	Sept 15, 1950	Sept. 19, 1950	Sept 19, 1950			(4)
2-CC-165.....	AFL-Teamsters, Local 808 (Airport Package Service, Inc)	Aug 25, 1950	10 (l).....					4Nov. 20, 1950	5Sept. 25, 1950
3-CC-19.....	AFL-Teamsters, Local 649 (Jamestown Builders Exchange, Inc).	Aug 24, 1950	10 (l).....			(1)			Feb. 23, 1951

3-CC-21-----	AFL-Teamster, Locals 182 and 375 (Seneca Transportation Lines)	Sept 11, 1950	10 (l).....	<sup>3</sup> Sept 18, 1950	Apr. 12, 1951			Jan. 22, 1951
20-CC-74-----	Milk Drivers & Dairy Employees Union, Local 302, etc., et al (Sonoma-Marín Dairymen's Association, Inc)	Oct 26, 1950	10 (l).....					<sup>4</sup> Nov 9, 1950 (t)
16-CC-15-----	AFL-General Drivers, Chauffeurs, Warehousemen & Helpers of America, Local 886 (Peaslee-Gaubert Corp)	Oct 10, 1950	10 (l).....			(t)		Jan. 8, 1951 Nov. 23, 1950
20-CC-77-----	AFL-Retail Clerks, Local 1179 (Gamble-Skogmo, Inc.)	Nov 22, 1950	10 (l).....			Jan 8, 1951		May 31, 1951 Apr 23, 1951
20-CD-17, 18, 19	Longshoremen & Warehousemen & Sailors Union of the Pacific (Pacific Maritime Association) (3 petitions)	Jan. 5, 1951	10 (l).....	Jan 5, 1951	Jan 9, 1951	Jan 30, 1951		
2-CB-135, 145, 330, 370, 373, 381	Longshoremen & Warehousemen, Local 48.	Jan. 6, 1951	10 (l).....	Jan 8, 1951	Mar 15, 1951	Mar 15, 1951		
	Longshoremen & Warehousemen, Local 13.	Mar 28, 1951	10 (l).....			(t)		
	Newspaper & Mail Deliverers Union of New York (New York Times, Inc., et al)	Mar 1, 1951	10 (j).....			Apr 10, 1951		
21-CC-108, 109	AFL-Machinists, Local 389 (San Diego Employers Association, Inc.)	Mar 16, 1951	10 (l).....					<sup>4</sup> Mar. 30, 1951 (t)
14-CC-24-----	AFL-Electrical Workers, Local 1 (Carondelet Neon Sign Co)	Apr 16, 1951	10 (l).....			(t)		
21-CC-112-----	AFL-Painters, Local 1232 (General Paint Corp.)	Apr 23, 1951	10 (l).....					<sup>4</sup> May 3, 1951 (t)
2-CD-40-----	National Association of Broadcast Engineers & Technicians (Teleprompter Service Corp.)	Apr 24, 1951	10 (l).....			(t)		
10-CC-24, 25-----	AFL-Lathers, Local 234 (Acousti Engineering Co)	June 8, 1951	10 (l).....			(t)		
2-CA-1925, 1934, 2-CB-628	CIO-Brewery Workers and Anheuser-Busch, Inc.	June 12, 1951	10 (j).....	June 13, 1951				
21-CC-115-----	AFL-New Furniture & Appliance Drivers, Warehousemen & Helpers Union, Local 196 (Bigelow Sanford Carpet Co)	June 1, 1951	10 (l).....			June 12, 1951		
21-CC-114-----	AFL-Teamsters, Local 942 (Royden Ice Co.)	June 18, 1951	10 (l).....			(t)		
17-CC-15-----	AFL-Teamsters, Local 41 (Union Chevrolet Co.).	June 14, 1951	10 (l).....			June 25, 1951		

<sup>1</sup> Because of suspension of unfair labor practice, case carried on inactive court docket only      <sup>2</sup> Case retained on court docket for further proceedings if appropriate.

<sup>3</sup> Case closed on compliance with intermediate report.

<sup>4</sup> Dispute settled and proceeding discontinued.

<sup>5</sup> By consent

NOTE—Discretionary injunction indicated by 10 (j); mandatory injunction indicated by 10 (l).

## APPENDIX C

# Text of Labor Management Relations Act, 1947, as Amended by Public Law 189, 1951

### Key to Comparison

Portions of Title I which have been eliminated by Public Law 189 are enclosed by black brackets; provisions which have been added to Title I are in italics, and unchanged portions are shown in roman type

[PUBLIC LAW 101—80TH CONGRESS]

[CHAPTER 120—1ST SESSION]

[H. R. 3020]

### AN ACT

To amend the National Labor Relations Act, to provide additional facilities for the mediation of labor disputes affecting commerce, to equalize legal responsibilities of labor organizations and employers, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

#### SHORT TITLE AND DECLARATION OF POLICY

SECTION 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947."

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all, recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

#### TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

Sec. 101. The National Labor Relations Act is hereby amended to read as follows:

##### "FINDINGS AND POLICIES

"SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a)

mpairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

“The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

“Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

“Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

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

#### “DEFINITIONS

“SEC. 2 When used in this Act—

“(1) The term ‘person’ includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

“(2) The term ‘employer’ includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

“(3) The term ‘employee’ shall include any employee, and shall not be limited

to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

“(4) The term ‘representatives’ includes any individual or labor organization.

“(5) The term ‘labor organization’ means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

“(6) The term ‘commerce’ means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

“(7) The term ‘affecting commerce’ means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

“(8) The term ‘unfair labor practice’ means any unfair labor practice listed in section 8.

“(9) The term ‘labor dispute’ includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

“(10) The term ‘National Labor Relations Board’ means the National Labor Relations Board provided for in section 3 of this Act.

“(11) The term ‘supervisor’ means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

“(12) The term ‘professional employee’ means—

“(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education

or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

“(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

“(13) In determining whether any person is acting as an ‘agent’ of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

#### “NATIONAL LABOR RELATIONS BOARD

“SEC. 3. (a) The National Labor Relations Board (hereinafter called the ‘Board’) created by this Act prior to its amendment by the Labor Management Relations Act, 1947, is hereby continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

“(b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

“(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed.

“(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

“SEC. 4. (a) Each member of the Board and the General Counsel of the Board shall receive a salary of \$12,000 a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary

for the proper performance of its duties. The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.

"(b) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Board or by any individual it designates for that purpose.

"SEC. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

"SEC. 6. The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act

#### "RIGHTS OF EMPLOYEES

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

#### "UNFAIR LABOR PRACTICES

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

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

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

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

any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h), and (i) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

“(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

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

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

“(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

“(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

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

“(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer,

or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring 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: *Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

“(5) to require of employees covered by an agreement authorized under subsection (a) (3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected; and

“(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.

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

“(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

“(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

“(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

“(3) notifies the Federal Mediation and Conciliation Service within thirty days such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate

disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

“(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose 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, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

#### “REPRESENTATIVES AND ELECTIONS

“Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

“(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but 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.

“(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

“(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

“(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

“(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10 (c).

“(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

“(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

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

“(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

“(e) [(1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9 (a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate

showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

“(2) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3) (i), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify the results thereof to such labor organization and to the employer.】

“(1) *Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.*

【“(3)】 (2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

“(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (e) of this section, 【no petition under section 9 (e) (1) shall be entertained,】 and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

“(1) the name of such labor organization and the address of its principal place of business;

“(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded \$5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

“(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

“(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

“(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

“(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

“(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last

fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

"(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

"(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, [no petition under section 9 (e) (1) shall be entertained,] and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

"(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, [no petition under section 9 (e) (1) shall be entertained,] and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

#### "PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, 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, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

“(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

“(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

“(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of

Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347)

“(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact it supported by sub-

stantial evidence on the record considered as a whole shall in like manner be conclusive.

“(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board’s order.

“(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order on the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled ‘An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes’, approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101–115).

“(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

“(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

“(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, 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, or agreed upon methods for the voluntary adjustment of the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

“(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon

any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8 (b) (4) (D).

#### "INVESTIGATORY POWERS

"SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

"(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

"(2) In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

"(3) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpoena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled,

after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

“(4) Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

“(5) All process of any court to which application may be made under this Act may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

“(6) The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

“SEC. 12. Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than one year, or both.

#### “LIMITATIONS

“SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

“SEC. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

“(b) 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.

“SEC. 15. Wherever the application of the provisions of section 272 of chapter 10 of the Act entitled ‘An Act to establish a uniform system of bankruptcy throughout the United States’, approved July 1, 1898, and Acts amendatory thereof and supplementary thereto (U. S. C., title 11, sec. 672), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided*, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

“SEC. 16. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

“SEC. 17. This Act may be cited as the ‘National Labor Relations Act’.”

“SEC. 18. *No petition entertained, no investigation made, no election held, and*

*no certification issued by the National Labor Relations Board, under any of the provisions of section 9 of the National Labor Relations Act, as amended, shall be invalid by reason of the failure of the Congress of Industrial Organizations to have complied with the requirements of section 9 (f), (g), or (h) of the aforesaid Act prior to December 22, 1949, or by reason of the failure of the American Federation of Labor to have complied with the provisions of section 9 (f), (g), or (h) of the aforesaid Act prior to November 7, 1947: Provided, That no liability shall be imposed under any provision of this Act upon any person for failure to honor any election or certificate referred to above, prior to the effective date of this amendment: Provided, however, That this proviso shall not have the effect of setting aside or in any way affecting judgments or decrees heretofore entered under section 10 (e) or (f) and which have become final."*

#### EFFECTIVE DATE OF CERTAIN CHANGES

SEC. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8 (a) (3) and section 8 (b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

SEC. 103. No provisions of this title shall affect any certification of representatives or any determination as to the appropriate collective-bargaining unit, which was made under section 9 of the National Labor Relations Act prior to the effective date of this title until one year after the date of such certification or if, in respect of any such certification, a collective-bargaining contract was entered into prior to the effective date of this title, until the end of the contract period or until one year after such date, whichever first occurs.

SEC. 104. The amendments made by this title shall take effect sixty days after the date of the enactment of this Act, except that the authority of the President to appoint certain officers conferred upon him by section 3 of the National Labor Relations Act as amended by this title may be exercised forthwith.

### TITLE II—CONCILIATION OF LABOR DISPUTES IN INDUSTRIES AFFECTING COMMERCE; NATIONAL EMERGENCIES

SEC. 201. That it is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working

conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; and

(c) certain controversies which arise between parties to collective-bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.

SEC. 202. (a) There is hereby created an independent agency to be known as the Federal Mediation and Conciliation Service (herein referred to as the "Service," except that for sixty days after the date of the enactment of this Act such term shall refer to the Conciliation Service of the Department of Labor). The Service shall be under the direction of a Federal Mediation and Conciliation Director (hereinafter referred to as the "Director"), who shall be appointed by the President by and with the advice and consent of the Senate. The Director shall receive compensation at the rate of \$12,000 per annum. The Director shall not engage in any other business, vocation, or employment.

(b) The Director is authorized, subject to the civil-service laws, to appoint such clerical and other personnel as may be necessary for the execution of the functions of the Service, and shall fix their compensation in accordance with the Classification Act of 1923, as amended, and may, without regard to the provisions of the civil-service laws and the Classification Act of 1923, as amended, appoint and fix the compensation of such conciliators and mediators as may be necessary to carry out the functions of the Service. The Director is authorized to make such expenditures for supplies, facilities, and services as he deems necessary. Such expenditures shall be allowed and paid upon presentation of itemized vouchers therefor approved by the Director or by any employee designated by him for that purpose.

(c) The principal office of the Service shall be in the District of Columbia, but the Director may establish regional offices convenient to localities in which labor controversies are likely to arise. The Director may by order, subject to revocation at any time, delegate any authority and discretion conferred upon him by this Act to any regional director, or other officer or employee of the Service. The Director may establish suitable procedures for cooperation with State and local mediation agencies. The Director shall make an annual report in writing to Congress at the end of the fiscal year.

(d) All mediation and conciliation functions of the Secretary of Labor or the United States Conciliation Service under section 8 of the Act entitled "An Act to create a Department of Labor," approved March 4, 1913 (U. S. C., title 29, sec. 51), and all functions of the United States Conciliation Service under any other law are hereby transferred to the Federal Mediation and Conciliation Service, together with the personnel and records of the United States Conciliation Service. Such transfer shall take effect upon the sixtieth day after the date of enactment of this Act. Such transfer shall not affect any proceedings pending before the United States Conciliation Service or any certification, order, rule, or regulation theretofore made by it or by the Secretary of Labor. The Director and the Service shall not be subject in any way to the jurisdiction or authority of the Secretary of Labor or any official or division of the Department of Labor.

## FUNCTIONS OF THE SERVICE

SEC. 203. (a) It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

(b) The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(c) If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act.

(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

SEC. 204. (a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall—

(1) exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provision for adequate notice of any proposed change in the terms of such agreements;

(2) whenever a dispute arises over the terms or application of a collective-bargaining agreement and a conference is requested by a party or prospective party thereto, arrange promptly for such a conference to be held and endeavor in such conference to settle such dispute expeditiously; and

(3) in case such dispute is not settled by conference, participate fully and promptly in such meetings as may be undertaken by the Service under this Act for the purpose of aiding in a settlement of the dispute.

SEC. 205. (a) There is hereby created a National Labor-Management Panel which shall be composed of twelve members appointed by the President, six of whom shall be selected from among persons outstanding in the field of Management and six of whom shall be selected from among persons outstanding in the field of labor. Each member shall hold office for a term of three years, except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and the terms of office of the members first taking office shall expire, as designated by the President at the time of appointment, four at the end of the first year, four at the end of the second year, and four at the end

of the third year after the date of appointment. Members of the panel, when serving on business of the panel, shall be paid compensation at the rate of \$25 per day, and shall also be entitled to receive an allowance for actual and necessary travel and subsistence expenses while so serving away from their places of residence.

(b) It shall be the duty of the panel, at the request of the Director, to advise in the avoidance of industrial controversies and the manner in which mediation and voluntary adjustment shall be administered, particularly with reference to controversies affecting the general welfare of the country.

#### NATIONAL EMERGENCIES

SEC. 206. Whenever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public.

SEC. 207. (a) A board of inquiry shall be composed of a chairman and such other members as the President shall determine, and shall have power to sit and act in any place within the United States and to conduct such hearings either in public or in private, as it may deem necessary or proper, to ascertain the facts with respect to the causes and circumstances of the dispute.

(b) Members of a board of inquiry shall receive compensation at the rate of \$50 for each day actually spent by them in the work of the board, together with necessary travel and subsistence expenses.

(c) For the purpose of any hearing or inquiry conducted by any board appointed under this title, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C. 19, title 15, secs. 49 and 50, as amended), are hereby made applicable to the powers and duties of such board.

SEC. 208. (a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

(b) In any case, the provisions of the Act of March 23, 1932, entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", shall not be applicable.

(c) The order or orders of the court shall be subject to review by the appro-

appropriate circuit court of appeals and by the Supreme Court upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 29, secs. 346 and 347).

SEC. 209. (a) Whenever a district court has issued an order under section 208 enjoining acts or practices which imperil or threaten to imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this Act. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.

(b) Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.

SEC. 210. Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action.

#### COMPILATION OF COLLECTIVE BARGAINING AGREEMENTS, ETC.

SEC. 211. (a) For the guidance and information of interested representatives of employers, employees, and the general public, the Bureau of Labor Statistics of the Department of Labor shall maintain a file of copies of all available collective bargaining agreements and other available agreements and actions thereunder settling or adjusting labor disputes. Such file shall be open to inspection under appropriate conditions prescribed by the Secretary of Labor, except that no specific information submitted in confidence shall be disclosed.

(b) The Bureau of Labor Statistics in the Department of Labor is authorized to furnish upon request of the Service, or employers, employees, or their representatives, all available data and factual information which may aid in the settlement of any labor dispute, except that no specific information submitted in confidence shall be disclosed.

#### EXEMPTION OF RAILWAY LABOR ACT

SEC. 212. The provisions of this title shall not be applicable with respect to any matter which is subject to the provisions of the Railway Labor Act, as amended from time to time.

## TITLE III

## SUITS BY AND AGAINST LABOR ORGANIZATIONS

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

## RESTRICTIONS ON PAYMENTS TO EMPLOYEE REPRESENTATIVES

SEC. 302. (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agree-

ment, whichever occurs sooner; or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other place as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than \$10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 17 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., title 28, sec. 381), to restrain violations of this section, without regard to the provisions of sections 6 and 20 of such Act of October 15, 1914, as amended (U. S. C., title 15, sec. 17, and title 29, sec. 52), and the provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (U. S. C., title 29, secs. 101-115).

(f) This section shall not apply to any contract in force on the date of enactment of this Act, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c) (5) (B) upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c) (5) (A) be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

## BOYCOTTS AND OTHER UNLAWFUL COMBINATIONS

SEC. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(4) forcing or requiring 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 National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

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

## RESTRICTION ON POLITICAL CONTRIBUTIONS

SEC. 304. Section 313 of the Federal Corrupt Practices Act, 1925 (U. S. C., 1940 edition, title 2, sec. 251; Supp. V, title 50, App., sec. 1509), as amended, is amended to read as follows:

"SEC. 313. It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person

to accept or receive any contribution prohibited by this section. Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than \$5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, in violation of this section shall be fined not more than \$1,000 or imprisoned for not more than one year, or both. For the purposes of this section 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

#### STRIKES BY GOVERNMENT EMPLOYEES

SEC. 305. It shall be unlawful for any individual employed by the United States or any agency thereof including wholly owned Government corporations to participate in any strike. Any individual employed by the United States or by any such agency who strikes shall be discharged immediately from his employment, and shall forfeit his civil service status, if any, and shall not be eligible for reemployment for three years by the United States or any such agency.

#### TITLE IV

#### CREATION OF JOINT COMMITTEE TO STUDY AND REPORT ON BASIC PROBLEMS AFFECTING FRIENDLY LABOR RELATIONS AND PRODUCTIVITY

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#### TITLE V

##### DEFINITIONS

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##### SAVING PROVISION

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##### SEPARABILITY

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**APPENDIX D**  
**NLRB Regional Offices**

The following listing presents the directing personnel, locations, and territories of the regional offices of the National Labor Relations Board.

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**First Region—Boston 8, Mass., 24 School Street.** Director, Bernard L. Alpert; chief law officer, Robert Greene.

Maine; New Hampshire; Vermont; Massachusetts; Rhode Island, and Connecticut except Fairfield County.

**Second Region—New York 16, N. Y., 2 Park Avenue.** Director, Charles T. Douds; chief law officer, John Cuneo.

Fairfield County in Connecticut; in New York State, the counties of Albany, Bronx, Clinton, Columbia, Dutchess, Essex, Greene, Kings, Nassau, New York, Orange, Putnam, Queens, Rensselaer, Richmond, Rockland, Saratoga, Schenectady, Suffolk, Sullivan, Ulster, Warren, Washington, and Westchester [for remainder of New York State, see Third Region], in New Jersey, the counties of Bergen, Essex, Hudson, Passaic, and Union.

**Third Region—Buffalo 3, N. Y., 350 Ellicott Square Building, 295 Main Street.** Director, Merle D. Vincent, Jr.; chief law officer, Thomas H. Ramsey.

New York State except those counties included in the Second Region.

**Fourth Region—Philadelphia 7, Pa., 1500 Bankers Securities Building.** Director, Bennet F. Schaffler; chief law officer, Ramey Donovan.

New Jersey except those counties included in the Second Region; in Pennsylvania, the counties of Adams, Berks, Bradford, Bucks, Carbon, Chester, Columbia, Cumberland, Dauphin, Delaware, Juniata, Lackawanna, Lancaster, Lebanon, Lehigh, Luzerne, Lycoming, Monroe, Montgomery, Montour, Northampton, Northumberland, Perry, Philadelphia, Pike, Schuylkill, Snyder, Sullivan, Susquehanna, Tioga, Union, Wayne, Wyoming, and York [for remainder of Pennsylvania, see Sixth Region], New Castle County in Delaware.

**Fifth Region—Baltimore 2, Md., Sixth Floor, 37 Commerce Street.** Director, John A. Penello; chief law officer, David Sachs.

Maryland, District of Columbia; Virginia; North Carolina, in West Virginia, the counties of Berkeley Grant, Hampshire, Hardy, Jefferson, Mineral, Morgan, and Pendleton [for remainder of West Virginia, see Sixth and Ninth Regions]. Kent and Sussex Counties in Delaware.

**Subregion 34—Nissen Building, Winston-Salem, N. C.** Officer in charge, Reed Johnston.

North Carolina.

**Sixth Region—Pittsburgh 22, Pa., 2107 Clark Building.** Director, Henry Shore; chief law officer, W. G. Stuart Sherman.

Pennsylvania except those counties included in the Fourth Region; in West Virginia, the counties of Barbour, Brooke, Doddridge, Hancock, Harrison, Lewis, Marion, Marshall, Monongalia, Ohio, Pocahontas, Preston, Randolph, Taylor, Tucker, Upshur, Webster, and Wetzel

**Seventh Region—Detroit 26, Mich., 1740 National Bank Building.** Director, Frank H. Bowen; chief law officer, Harry Casselman.

In Michigan, the counties of Alcona, Allegan, Alpena, Antrim, Arenac, Barry, Bay, Benzie, Berrien, Branch, Calhoun, Cass, Charlevoix, Cheboygan, Clare, Clinton, Crawford, Eaton, Emmet, Genesee, Gladwin, Grand Traverse, Gratiot, Hillsdale, Huron, Ingham, Ionia, Iosco, Isabella, Jackson, Kalamazoo, Kalkaska, Kent, Lake, Lapeer, Leelanau, Lenawee, Livingston, Macomb, Manistee, Mason, Mecosta, Midlane, Missaukee, Monroe, Montcalm, Montmorency, Muskegon, Newaygo, Oakland, Oceana, Ogemaw, Osceola, Oscoda, Otsego, Ottawa, Presque Isle, Roscommon, Saginaw, St. Clair, St. Joseph, Sanilac, Shiawassee, Tuscola, Van Buren, Washtenaw, Wayne, and Wexford [for remainder of Michigan, see Eighteenth Region]

**Eighth Region—Cleveland 14, Ohio**, Ninth-Chester Building. Director, John A. Hull, Jr.; chief law officer, Philip Fusco.

In Ohio, the counties of Allen, Ashland, Ashtabula, Auglaize, Belmont, Carroll, Champaign, Columbiana, Coshocton, Crawford, Cuyahoga, Darke, Defiance, Delaware, Erie, Fulton, Geauga, Guernsey, Hancock, Hardin, Harrison, Henry, Holmes, Huron, Jefferson, Knox, Lake, Licking, Logan, Lorain, Lucas, Mahoning, Marion, Medina, Mercer, Miami, Morro, Muskingum, Ottawa, Paulding, Portage, Putnam, Richland, Sandusky, Seneca, Shelby, Stark, Summit, Trumbull, Tuscarawas, Union, Van Wert, Wayne, Williams, Wood, and Wyandot [for remainder of Ohio, see the Ninth Region]

**Ninth Region—Cincinnati 2, Ohio**, Ingalls Building, Fourth and Vine Streets. Director, Jack G. Evans; chief law officer, Allen Sinsheimer.

Kentucky, Ohio except those counties included in the Eighth Region, in West Virginia, the counties not included in the Fifth and Sixth Regions

**Subregion 35—342 Massachusetts Avenue, Indianapolis 4, Ind.** Officer in charge, F. Robert Volger.

In Indiana, the counties of Bartholomew, Blackford, Boone, Brown, Clark, Clay, Crawford, Daviess, Dearborn, Decatur, Delaware, Dubois, Fayette, Floyd, Franklin, Gibson, Greene, Hamilton, Hancock, Harrison, Hendricks, Henry, Jackson, Jay, Jefferson, Jennings, Johnson, Knox, Lawrence, Madison, Marion, Martin, Monroe, Montgomery, Morgan, Ohio, Orange, Owen, Parke, Perry, Pike, Posey, Putnam, Randolph, Ripley, Rush, Scott, Shelby, Spencer, Sullivan, Switzerland, Union, Vanderburgh, Vermillion, Vigo, Warrick, Washington, and Wayne [for remainder of Indiana, see Thirteenth Region].

**Tenth Region—Atlanta 3, Ga.**, 50 Seventh Street, N. E. Director, John C. Getreu; chief law officer, William M. Pate.

Georgia, South Carolina, in Alabama, the counties of Autauga, Bibb, Blount, Calhoun, Chambers, Cherokee, Chilton, Clay, Cleburne, Colbert, Coosa, Cullman, DeKalb, Elmore, Etowah, Fayette, Franklin, Greene, Hale, Jackson, Jefferson, Lamar, Lauderdale, Lawrence, Lee, Limestone, Madison, Marion, Marshall, Morgan, Perry, Pickens, Randolph, St. Clair, Shelby, Sumter, Talladega, Tallapoosa, Tuscaloosa, Walker, and Winston [for remainder of Alabama, see Fifteenth Region] in Tennessee, the counties of Anderson, Bedford, Bledsoe, Blount, Bradley, Campbell, Cannon, Carter, Cheat-ham, Claiborne, Clay, Cocke, Coffee, Cumberland, Davidson, De Kalb, Dickson, Fentress, Franklin, Giles, Grainger, Greene, Grundy, Hamblen, Hamilton, Hancock, Hawkins, Hickman, Houston, Humphreys, Jackson, Jefferson, Johnson, Knox, Lawrence, Lewis, Lincoln, Loudon, McMinn, Macon, Marion, Marshall, Maury, Meigs, Monroe, Montgomery, Moore, Morgan, Overton, Perry, Pickett, Polk, Putnam, Rhea, Roane, Robertson, Rutherford, Scott, Sequatchie, Sevier, Smith, Stewart, Sullivan, Sumner, Trousdale, Union, Van Buren, Warren, Washington, Wayne, White, Williamson, and Wilson [for remainder of Tennessee, see Subregion 32], in Florida, the counties of Alachua, Baker, Bradford, Brevard, Broward, Charlotte, Citrus, Clay, Collier, Columbia, Dade, De Soto, Dixie, Duval, Flagler, Gadsden, Gilchrist, Glades, Hamilton, Hardee, Hendry, Hernando, Highlands, Hillsborough, Indian River, Jefferson, Lafayette, Lake, Lee, Leon, Levy, Madison, Manatee, Marion, Martin, Monroe, Nassau, Okceehobee, Orange, Osceola, Palm Beach, Pasco, Pinellas, Polk, Putnam, St. Johns, St. Lucie, Sarasota, Seminole, Sumter, Suwannee, Taylor, Union, Volusia, and Wakulla [for remainder of Florida, see Fifteenth Region]

**Thirteenth Region—Chicago 3, Ill**, Midland Building, 176 West Adams Street. Director, Ross M. Madden; chief law officer, Robert Ackerberg.

In Wisconsin, the counties of Brown, Calumet, Dane, Dodge, Door, Fond du Lac, Green, Jefferson, Kenosha, Kewaunee, Manitowoc, Milwaukee, Outagamie, Ozaukee, Racine, Rock, Sheboygan, Walworth, Washington, Waukesha, Winnebago [for remainder of Wisconsin, see Eighteenth Region], in Illinois, the counties of Boone, Bureau, Carroll, Cass, Champaign, Cook, De Kalb, De Witt, Douglas, Du Page, Ford, Fulton, Grundy, Hancock, Henderson, Henry, Iroquois, Jo Daviess, Kane, Kankakee, Kendall, Knox, Lake, La Salle, Lee, Livingston, Logan, McDonough, McHenry, McLean, Macon, Marshall, Mason, Menard, Mercer, Morgan, Moultrie, Ogle, Peoria, Piatt, Putnam, Rock Island, Sangamon, Schuyler, Stark, Stephenson, Tazewell, Vermilion, Warren, Whiteside, Will, Winnebago, Woodford [for remainder of Illinois, see Fourteenth Region], Indiana except those counties included in Subregion 35.

**Fourteenth Region—St. Louis 2, Mo**, 520 Boatmen's Bank Building, 314 North Broadway. Director, V. Lee McMahon; chief law officer, Harry G. Carlson.

Illinois, except those counties included in the Thirteenth Region, in Missouri, the counties of Afton, Bollinger, Butler, Callaway, Cape Girardeau, Carter, Clark, Crawford, Dent, Dunklin, Franklin, Gasconade, Iron, Jefferson, Knox, Lewis, Lincoln, Madison, Maries, Marion, Mississippi, Monroe, Montgomery, New Madrid, Oregon, Osage, Pemiscot, Perry, Phelps, Pike, Ralls, Reynolds, Ripley, St. Charles, St. Francois, St. Louis, Ste. Genevieve, Scotland, Scott, Shannon, Shelby, Stoddard, Warren, Washington, and Wayne [for remainder of Missouri, see Seventeenth Region].

**Fifteenth Region—New Orleans 13, La.**, 820 Lowich Building, 2026 St. Charles Street. Director, John F. LeBus; chief law officer, Richard Keenan.

Louisiana, in Arkansas, the counties of Ashley, Bradley, Calhoun, Chicot, Clark, Cleveland, Columbia, Dallas, Desha, Drew, Hempstead, Howard, Lafayette, Lincoln, Little River, Miller, Nevada, Pike, Ouachita, Sevier, and Union [for remainder of Arkansas, see Subregion 32]; in Mississippi the counties of Adams, Amite, Attala, Bolivar, Calhoun, Carroll, Chickasaw, Choctaw, Claiborne, Clarke, Clay, Copah, Covington, Forrest, Franklin, George, Greene, Grenada, Hancock, Harrison, Hinds, Holmes, Humphreys, Issaquena, Jackson, Jasper, Jefferson, Jefferson Davis, Jones, Kamper, Lamar, Lauderdale, Lawrence, Leake, Leflore, Lincoln, Lowndes, Madison, Marion, Monroe, Montgomery, Neshoba, Newton, Noxubee, Oktobeha, Pearl River, Perry, Pike, Rankin, Scott, Sharkey, Simpson, Smith,

Stone, Sunflower, Tallahatchie, Walthall, Warren, Washington, Wayne, Webster, Wilkinson, Winston, Yalobusha, and Yazoo [for remainder of Mississippi, see Subregion 32], Alabama except those counties included in the Tenth Region, Florida except those counties included in the Tenth Region

**Subregion 32—714 Falls Building, 22 North Front Street, Memphis 3, Tenn.** Officer in charge, Anthony Sabella.

Arkansas except those counties included in the Fifteenth Region, Tennessee except those counties included in the Tenth Region, Mississippi except those counties included in the Fifteenth Region

**Sixteenth Region—Fort Worth 2, Tex., 1101 Texas & Pacific Building.** Director, Edwin A. Elliot; chief law officer, Elmer P. Davis.

Oklahoma; in Texas, the counties of Anderson, Angelina, Archer, Armstrong, Bailey, Baylor, Bell, Bosque, Bowie, Briscoe, Brown, Burnet, Callahan, Camp, Carson, Cass, Castro, Cherokee, Childress, Clay, Cochran, Coke, Coleman, Collin, Collingsworth, Comanche, Concho, Cooke, Coryell, Cottle, Crockett, Crosby, Dallam, Dallas, Deaf Smith, Delta, Denton, Dickens, Donley, Eastland, Ellis, Erath, Falls, Fannin, Fisher, Floyd, Foard, Franklin, Freestone, Garza, Glasscock, Gray, Grayson, Gregg, Hale, Hall, Hamilton, Hansford, Hardeman, Harrison, Hartley, Haskell, Hemphill, Henderson, Hill, Hoekley, Hood, Hopkins, Houston, Howard, Hunt, Hutchinson, Irion, Jack, Johnson, Jones, Kaufman, Kent, Kimble, King, Knox, Lamar, Lamb, Lampasas, Leon, Limestone, Lipscomb, Llano, Lubbock, McCulloch, McLennan, Madison, Marion, Mason, Menard, Milam, Mills, Mitchell, Montague, Moore, Morris, Motley, Nacogdoches, Navarro, Nolan, Ochiltree, Oldham, Palo Pinto, Panola, Parker, Parmer, Potter, Rains, Randall, Reagan, Red River, Roberts, Robertson, Rockwell, Runnels, Rusk, Sabine, San Augustine, San Saba, Schleicher, Scurry, Shackelford, Shelby, Sherman, Smith, Somervell, Stephens, Sterling, Stonewall, Sutton, Swisher, Tarrant, Taylor, Throckmorton, Titus, Tom Green, Trinity, Upshur, Van Zandt, Wheeler, Wichita, Wilbarger, Williamson, Wise, Wood, and Young [for remainder of Texas, see Subregions 32 and 39].

**Subregion 33—El Paso, Tex., 504 North Kansas.** Officer in charge, Aubrey McEachern.

New Mexico, in Texas, the counties of Andrews, Borden, Brewster, Crane, Culberson, Dawson, Ector, El Paso, Games, Hudspeeth, Jeff Davis, Loving, Lynn, Martin, Midland, Pecos, Presidio, Reeves, Terrell, Terry, Upton, Ward, Winkler, Yoakum [for remainder of Texas, see Sixteenth Region and Subregion 33].

**Subregion 39—Houston, Tex., 306 Republic Building, 1018 Preston Avenue.** Officer in charge, Clifford W. Potter.

All of Texas except the counties included in the Sixteenth Region and in Subregion 33.

**Seventeenth Region—Kansas City 6, Mo., 1411 Federal Office Building, 911 Walnut Street.** Director, Hugh E. Sperry, chief law officer, Robert S. Fousek.

Nebraska; Kansas; Missouri except those counties included in the Fourteenth Region.

**Subregion 30—411 Ernest and Cramer Building, 930 Seventeenth Street, Denver 2, Colo.** Officer in charge, Clyde F. Waers.

Wyoming, Colorado.

**Eighteenth Region—Minneapolis 1, Minn., 601 Metropolitan Life Building, Second Avenue S and Third Street.** Director, C. Edward Knapp, chief law officer, Clarence Meter.

North Dakota, South Dakota, Minnesota, Iowa, Wisconsin except those counties included in the Thirteenth Region, Michigan except those counties included in the Seventh Region

**Nineteenth Region—Seattle 4, Wash., 407 U. S. Court House, Fifth Avenue and Spring Street.** Director, Thomas P. Graham, Jr.; chief law officer, Patrick H. Walker.

Alaska; Montana, Idaho, Washington except Clark County.

**Subregion 36—715 Mead Building, Portland 4, Oreg.** Officer in charge, Robert J. Wiener.

Oregon, Clark County in Washington.

**Twentieth Region—San Francisco 3, Calif., 663 Pacific Building, 821 Market Street.** Director, Gerald A. Brown; chief law officer, Louis Penfield.

Nevada; Utah, in California, the counties of Alameda, Alpine, Amador, Butte, Calaveras, Colusa, Contra Costa, Eldorado, Fresno, Glenn, Humboldt, Inyo, Kings, Lake, Lassen, Madera, Marin, Mariposa, Merced, Modoc, Mono, Monterey, Napa, Nevada, Placer, Plumas, Sacramento, San Benito, San Joaquin, San Mateo, Santa Clara, Santa Cruz, Shasta, Sierra, Siskiyou, Solano, Sonoma, Stanislaus, Sutter, Trinity, Tulare, Tuolumne, Yolo, and Yuba [for remainder of California, see Twenty-first Region]

**Subregion 37—341 Federal Building, Honolulu 2, T. H.** Officer in charge, Arnold F. Wills.

Territory of Hawaii.

Twenty-first Region—**Los Angeles 14**, Calif., 111 West Seventh Street. Director, Howard F. LeBaron; chief law officer, Charles K. Hackler.

Arizona; California except those counties included in the Twentieth Region.

Twenty-fourth Region—**Santurce**, P. R., P. O. Box 3656. Director, Salvatore Cosentino; chief law officer, George L. Weasler.

Puerto Rico.

