FORTY-THIRD

ANNUAL REPORT

OF THE

NATIONAL LABOR RELATIONS BOARD

FOR THE FISCAL YEAR
ENDED SEPTEMBER 30

1978

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NATIONAL LABOR RELATIONS BOARD

Members of the Board

JOHN H. FANNING, *Chairman*

HOWARD JENKINS, JR.
BETTY SOUTHARD MURPHY
JOHN A. PENELLO
JOHN C. TRUESDALE [1]

Chief Counsels to Board Members
WILLIAM C. BAISINGER

HARRY M. LEET
HELEN C. REINER
HENRY L. SEGAL
MARVIN I. KERNER

WILLIAM A. LUBBERS, *Executive Secretary*[2]
SAUL J. JAFFE, *Acting Solicitor*[3]
THOMAS N. KESSEL, *Chief Administrative Law Judge*
THOMAS W. MILLER, JR., *Director of Information*

Office of the General Counsel

JOHN S. IRVING, *General Counsel*
JOHN E. HIGGINS, JR., *Deputy General Counsel*

JOSEPH DESIO
Associate General Counsel
Division of Operations Management

CARL L. TAYLOR[4]
Associate General Counsel
Division of Enforcement Litigation

HAROLD J. DATZ
Associate General Counsel
Division of Advice

ERNEST RUSSELL
Director
Division of Administration

[1] Took office October 25, 1977.
[2] Appointed May 22, 1978, to succeed John C. Truesdale.
[3] Appointed May 26, 1978.
[4] Resigned September 1, 1978.

LETTER OF TRANSMITTAL

NATIONAL LABOR RELATIONS BOARD,
Washington, D.C., March 9, 1979.

SIR: As provided in section 3(c) of the Labor Management Relations Act, 1947, I submit herewith the Forty-Third Annual Report of the National Labor Relations Board for the fiscal year ended September 30, 1978, and, under separate cover, lists containing the cases heard and decided by the Board during this fiscal year.

Respectfully submitted.

JOHN H. FANNING, *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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ERRATA

Notice to Holders of Forty-Second Annual Report for FY 1977

Tables 1, 1A, and 1B in the Annual Report for fiscal year 1977 contained discrepancies in the September 30, 1977, pending figures. Correct figures are shown in the same tables of this report as "Pending October 1, 1977."

Also, Table 4 in last year's report contained incorrect figures for the line items titled "Work stoppages" and "Picketing ended." The correct figures should be 194 and 601, respectively.

Holders of last year's report may wish to make pen-and-ink corrections for these items.

I

Operations in Fiscal Year 1978

A. Summary

The American public utilized the services of the National Labor Relations Board at an unprecedented pace during fiscal 1978.

In administering the Nation's basic labor relations law, the NLRB does not initiate cases. It acts upon those brought before it.

Workers, business firms, and labor organizations asked the NLRB, an independent agency, to process a record 53,261 cases of all types. The total was 0.6 percent larger than the previous record received a year earlier. The largest segment of case filings consisted of 39,652 charges alleging that employers or unions, or both, had committed unfair labor practices in violation of the National Labor Relations Act. The number of charges was a record.

In the other major category of cases, those in which the NLRB was petitioned to conduct secret-ballot elections among employees to settle questions of worker representation, 12,902 such petitions were filed. An additional 707 petitions in related matters were received.

The final processing of cases is the decision of the five-member Board in unfair labor practice proceedings, and of the Board or its regional directors in representation matters. In fiscal 1978 the Board issued an all-time high of 1,146 decisions in unfair labor practice cases contested as to their facts or the applicability of the law. Eclipsing the 1977 total by 19 decisions, the Board completed the busiest 2-year period in its history of ruling on alleged violations of the statute.

In fiscal 1978, the NLRB:

(1) Recovered more than $13.5 million for workers who suffered monetary losses because of unfair labor practices and obtained offers of job reinstatement for 5,533 employees.
(2) Conducted 8,240 conclusive representation elections among some 420,000 employee voters, with workers choosing labor

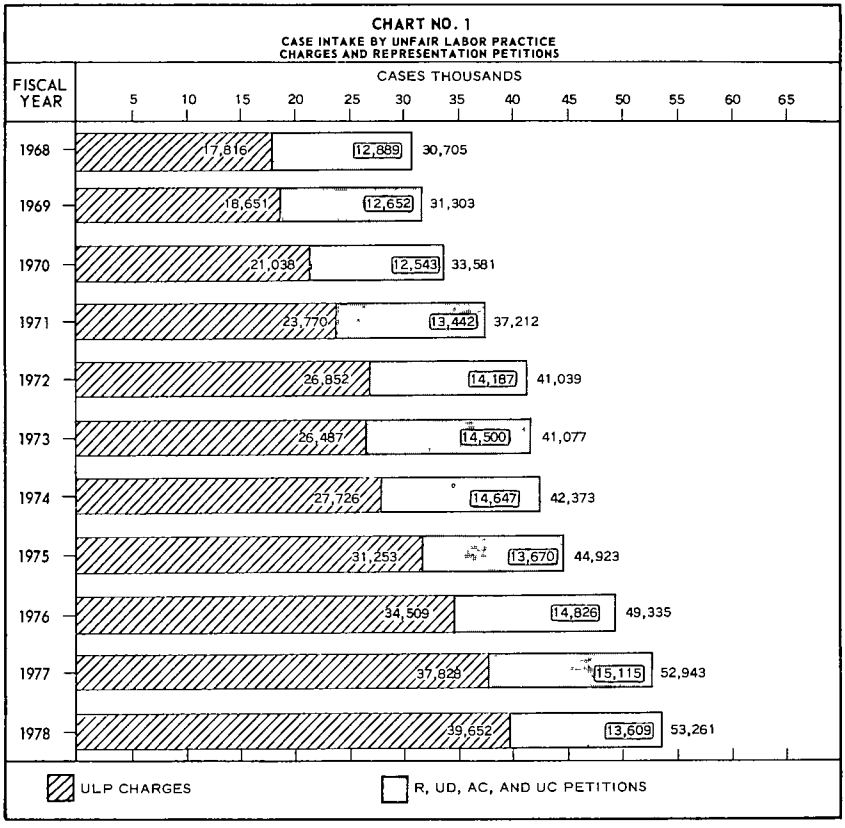
organizations as their bargaining agents in 46 percent of the elections.

(3) Prevailed before the Supreme Court in each of the five decisions under the Act the Court handed down.

To afford the public the best possible service, the NLRB during the year created its 33d regional office, in Peoria, Illinois. It also established a smaller resident office in San Diego, California. The NLRB now has 49 field offices nationwide.

Coping with the substantial problem of processing an ever-increasing caseload, the NLRB was heartened by enactment of a law authorizing 100 additional administrative law judge positions in the Federal Government. The NLRB expects to receive 30. Toward the end of the fiscal year, the NLRB arranged for expanded Washington quarters in fiscal 1979 for its Division of Judges.

President Carter in fiscal 1978 renominated for additional 5-year terms the Board's most experienced decisionmakers. Chair-



man John H. Fanning was chosen for a fifth term, expiring December 16, 1982, and Member Howard Jenkins, Jr., was selected for a fourth term, expiring August 27, 1983.

NLRB Administration

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

Declared constitutional by the Supreme Court in 1937, the Act has been substantially amended in 1947, 1959, and 1974, each amendment increasing the scope of the NLRB's regulatory powers.

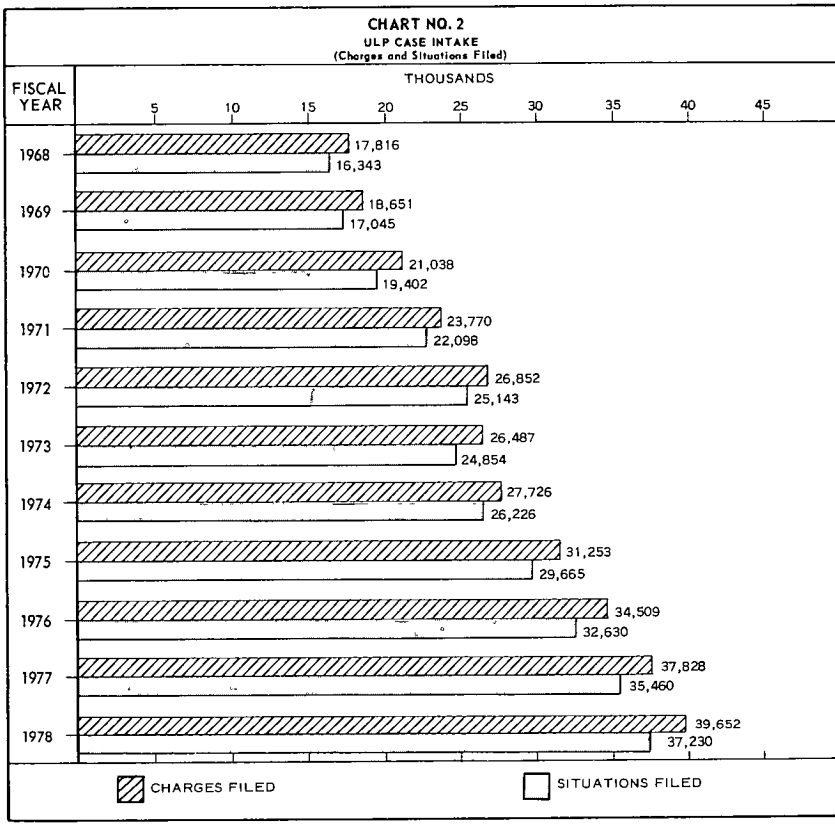
NLRB Members are Chairman John H. Fanning of Rhode Island, Howard Jenkins, Jr., of Colorado, John A. Penello of Maryland, Betty Southard Murphy of New Jersey, and John C. Truesdale of Maryland. John S. Irving of New Jersey is General Counsel.

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

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

The NLRB does not act on its own motion in either function. It processes only those charges of unfair labor practices and petitions for employee elections which are filed in the NLRB's 49 regional, subregional, and resident offices.

The Act's unfair labor practice provisions place certain restrictions on actions of employers and labor organizations in their relations with employees, as well as with each other. Its elec-



tion provisions provide mechanics for conducting and certifying results of representation elections to determine collective-bargaining wishes of employees, including balloting to determine whether a union shall continue to have the right to make a union-shop contract with an employer.

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

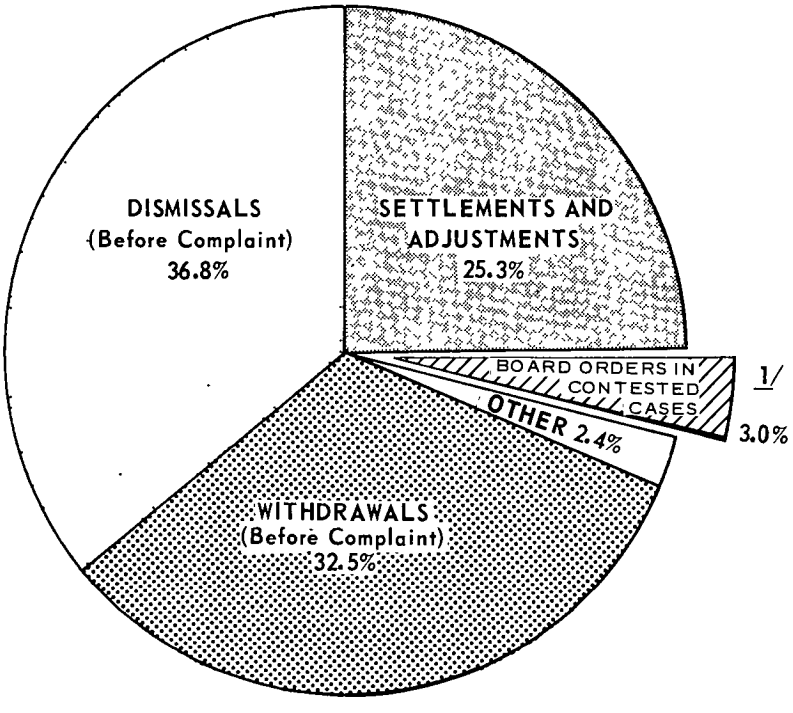
The NLRB has no independent statutory power of enforcement of its decisions and orders. It may, however, seek enforcement in the U.S. courts of appeals, and parties to its cases also may seek judicial review.

NLRB authority is divided by law and by delegation. The five-member Board primarily acts as a quasi-judicial body in deciding cases on formal records. The General Counsel, who, like each

CHART NO. 3

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

FISCAL YEAR 1978



1/ Contested cases reaching Board Members for Decisions.

Member of the Board, is appointed by the President, is responsible for the issuance and prosecution of formal complaints in cases leading to Board decision. He has general supervision of the NLRB's nationwide network of field offices.

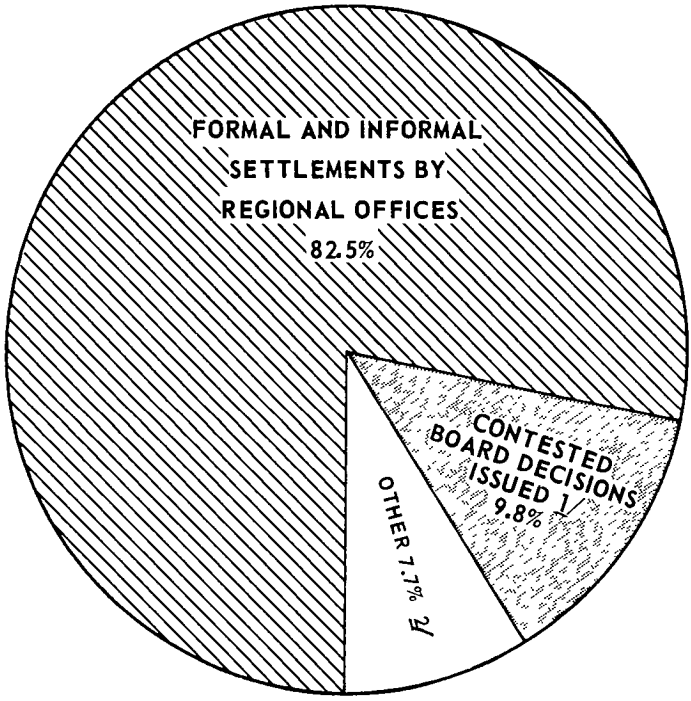
For the conduct of its formal hearings in unfair labor practice cases, the NLRB employs administrative law judges who hear and decide cases. Administrative law judges' decisions may be appealed to the Board by the filing of exceptions. If no exceptions are taken, the administrative law judges' orders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

CHART NO. 3A

DISPOSITION PATTERN FOR MERITORIOUS UNFAIR LABOR PRACTICE CASES

(Based on Cases Closed)

FISCAL YEAR 1978



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

2/ Dismissals, withdrawals, compliance with Administrative Law Judge Decision, stipulated record or summary judgment ruling.

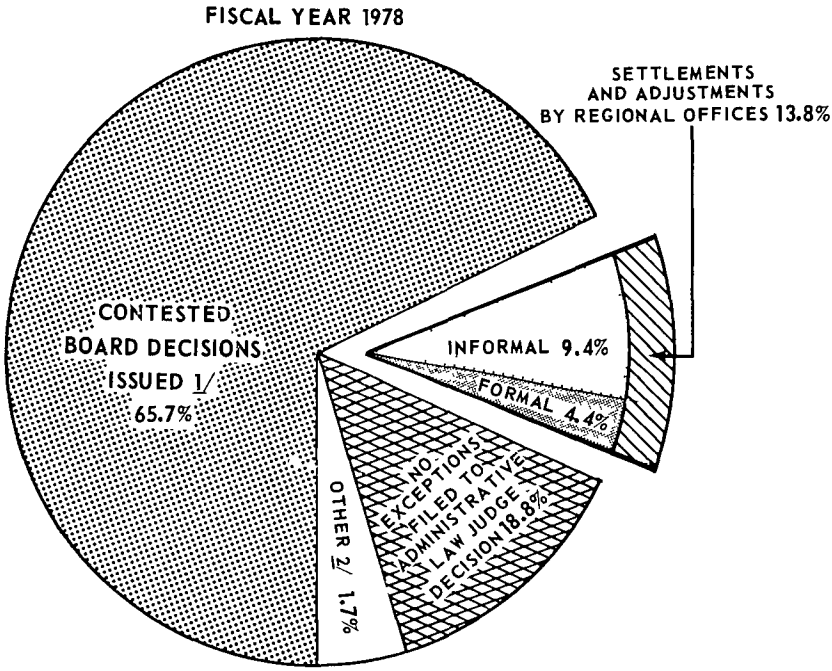
proceedings, the need for additional administrative law judges is an acute operational problem.

As noted, all cases coming to the NLRB begin their processing in the regional offices. Regional directors, in addition to processing

unfair labor practice cases in the initial stages, also have authority to investigate representation petitions, to determine units of employees appropriate for collective-bargaining purposes, to conduct elections, and to pass on objections to conduct of elections. There are provisions for appeal of representation and election questions to the Board.

CHART NO. 3B

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



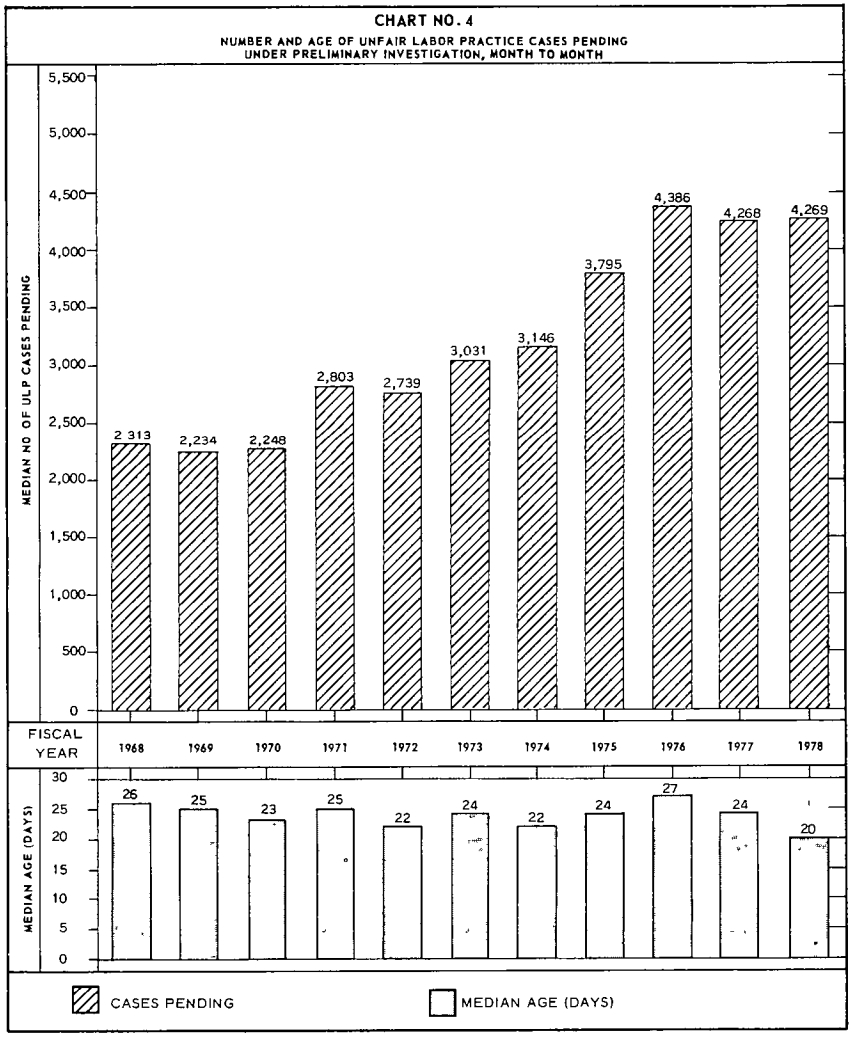
1/ Following Administrative Law Judge Decision, stipulated record or summary judgment ruling.

2/ Dismissals, withdrawals, and other dispositions.

B. Operational Highlights

1. Unfair Labor Practices

In fiscal 1978, 39,652 unfair labor practice cases were filed with the NLRB, an increase of 4.8 percent over the 37,828 filed in fiscal 1977. In situations in which related charges are counted as a single unit, there was a 5-percent increase from fiscal 1977. (Chart 2.)



Alleged violations of the Act by employers increased to 27,056 cases, a 3.6-percent increase from the 26,105 of 1977. Charges against unions increased 7 percent to 12,417 from 11,601 in 1977.

There were 179 charges of violations of section 8(e) of the Act, which bans hot cargo agreements; 128 against unions, 3 against employers, and 48 against unions and employers jointly. (Tables 1A and 2.)

Regarding charges against employers, 17,125, or 63 percent of the 27,056 total, alleged discrimination or illegal discharges of employees. There were 8,136 refusal-to-bargain allegations, about 30 percent of the charges. (Table 2.)

Of charges against unions, there were 8,525 alleging illegal restraint and coercion of employees, about 69 percent as compared with the 70 percent of similar filings in 1977. There were 2,366 charges against unions for illegal secondary boycotts and jurisdictional disputes, 11 percent more than the 2,128 of 1977.

There were 1,771 charges of illegal union discrimination against employees, up from 1,749 in 1977. There were 523 charges that unions picketed illegally for recognition or for organizational purposes, compared with 449 charges in 1977. (Table 2.)

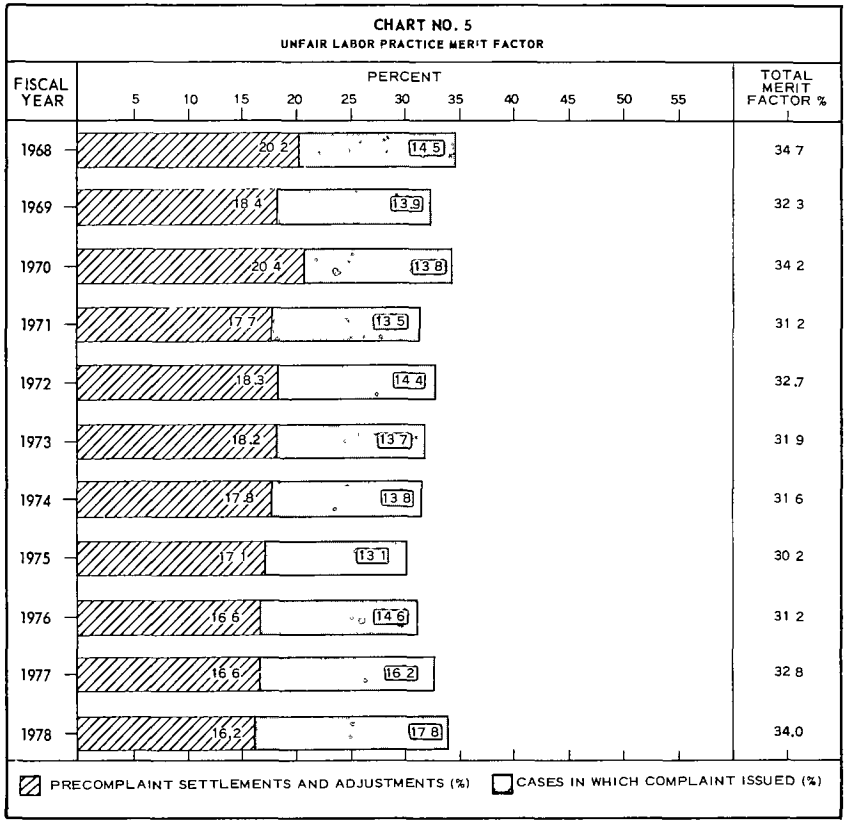
In charges against employers, unions led by filing 55 percent. Unions filed 14,968 charges, individuals filed 12,053, and employers filed 35 charges against other employers.

As to charges against unions, 7,844 were filed by individuals, or 63 percent of the total of 12,417. Employers filed 4,290, and other unions filed the 283 remaining charges. There were 179 hot cargo charges against unions and/or employers: 149 were filed by employers, 8 by individuals, and 22 by unions.

In fiscal 1978, 37,192 unfair labor practice charges were closed. Some 95 percent were closed by NLRB regional offices as compared with 94 percent in 1977. In 1978, 25 percent of the cases were settled or adjusted before issuance of administrative law judges' decisions, 33 percent by withdrawal before complaint, and 37 percent by administrative dismissal. In 1977 the percentages were 25 percent, 33 percent, and 36 percent, respectively.

In evaluation of the regional workload, the number of unfair labor practice charges found to have merit is important. The higher the merit factor the more litigation required. The highest level of cases found to have merit was 36.6 percent in fiscal 1966. In fiscal 1978 it was 34.0 percent. (Chart 5.)

The merit factor in charges against employers was 37.4 percent as compared with 36.0 percent in 1977. In charges against unions,



the merit factor was 26.6 percent, compared with 26.1 percent in 1977.

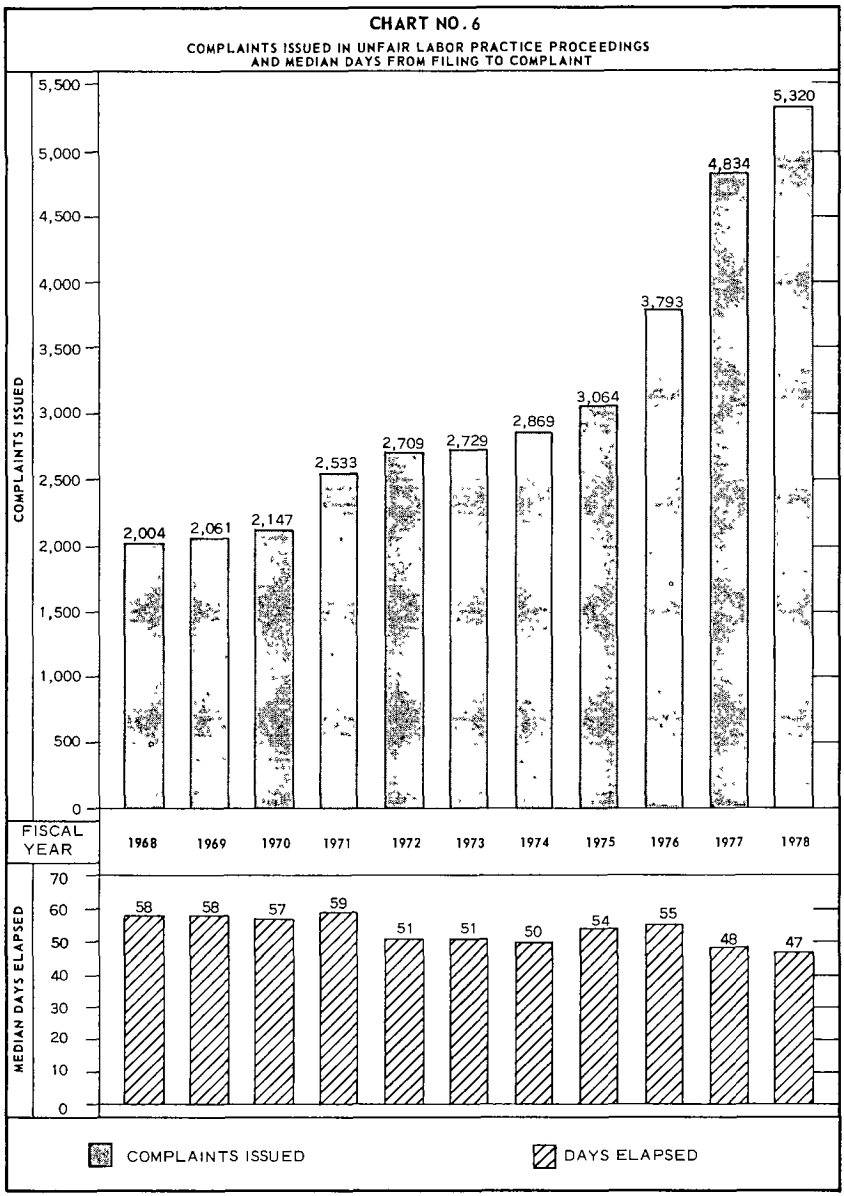
Since 1962, more than 50 percent of merit charges have resulted in precomplaint settlements and adjustments; these amounted to 48 percent in fiscal 1978.

There were 6,966 merit charges which caused issuance of complaints, and 6,326 precomplaint settlements or adjustments of meritorious charges. The two totaled 13,292 or 34 percent of the unfair labor practice cases. (Chart 5.)

NLRB regional offices, acting on behalf of the General Counsel, issued 5,320 complaints, a 10-percent increase over the 4,834 issued in 1977. (Chart 6.)

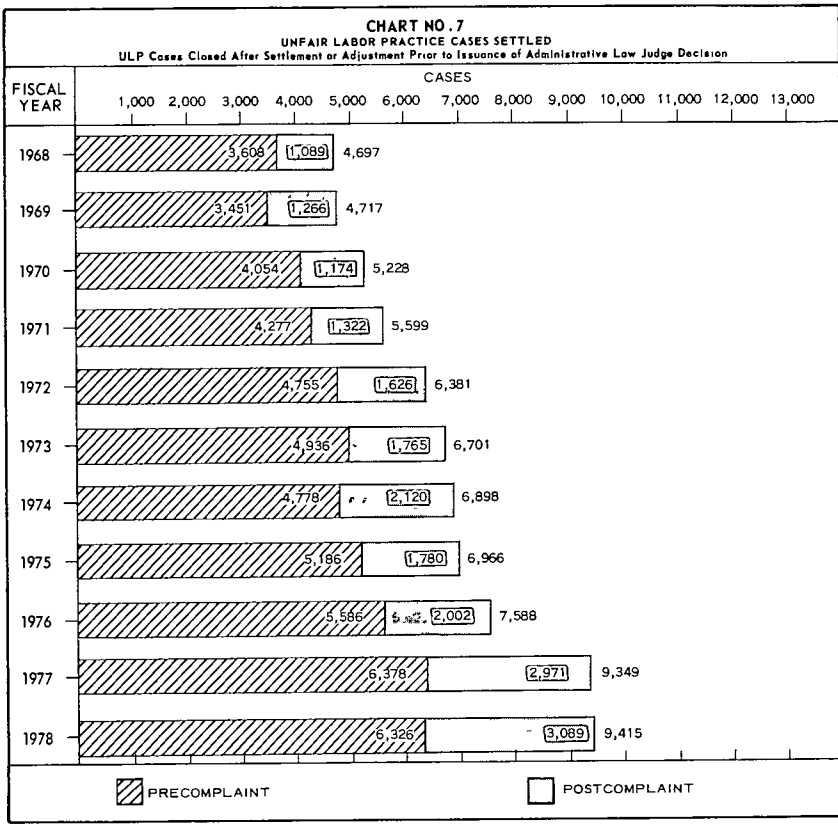
Of complaints issued, 83.5 percent were against employers, 14.0 percent against unions, and 2.5 percent against both employers and unions.

NLRB regional offices processed cases from filing of charges to issuance of complaints in a median of 47 days, compared with



48 days in 1977. The 47 days included 15 days in which parties had the opportunity to adjust charges and remedy violations without resort to formal NLRB processes. (Chart 6.)

Administrative law judges issued 1,211 decisions in 1,878 cases. The judges conducted 1,208 initial hearings, compared with



1,336 in 1977. Administrative law judges conducted 57 additional hearings in supplemental matters. (Chart 8 and Table 3A.)

At the end of fiscal 1978, there were 16,942 unfair labor practice cases being processed in all stages by the NLRB. At the beginning of fiscal 1978, there were 14,482 cases pending.

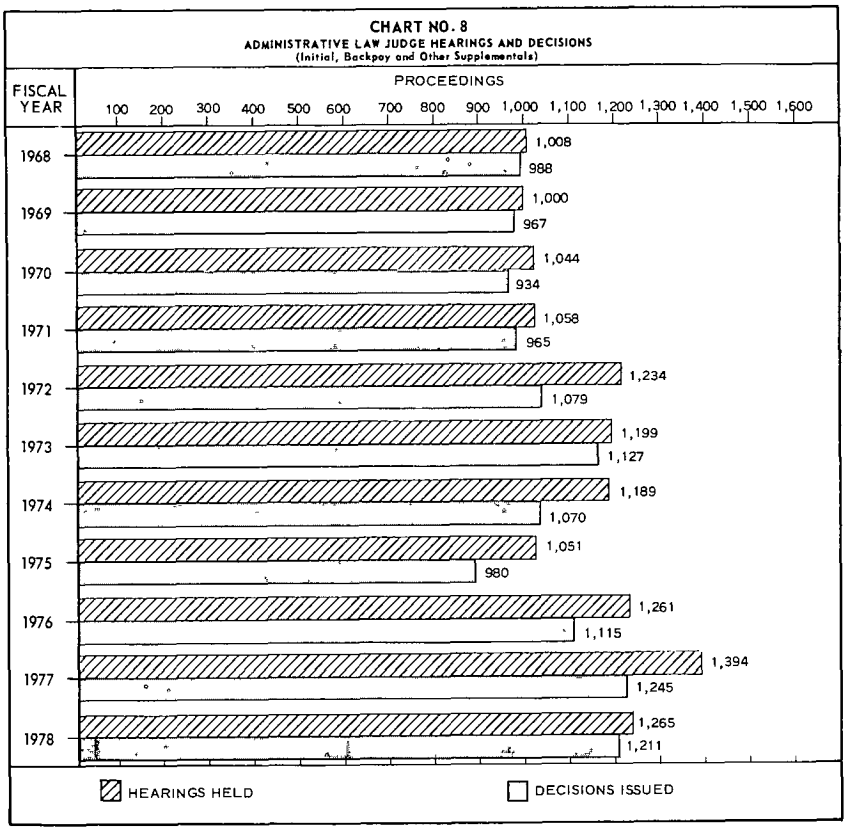
The NLRB awarded backpay to 8,623 workers, amounting to $13.4 million. (Chart 9.)

Some 5,533 employees were offered reinstatement and 72 percent accepted. In fiscal 1977, about 67 percent accepted offers of reinstatement.

Work stoppages ended in 167 of the cases closed in fiscal 1978. Collective bargaining was begun in 2,279 cases. (Table 4.)

2. Representation Cases

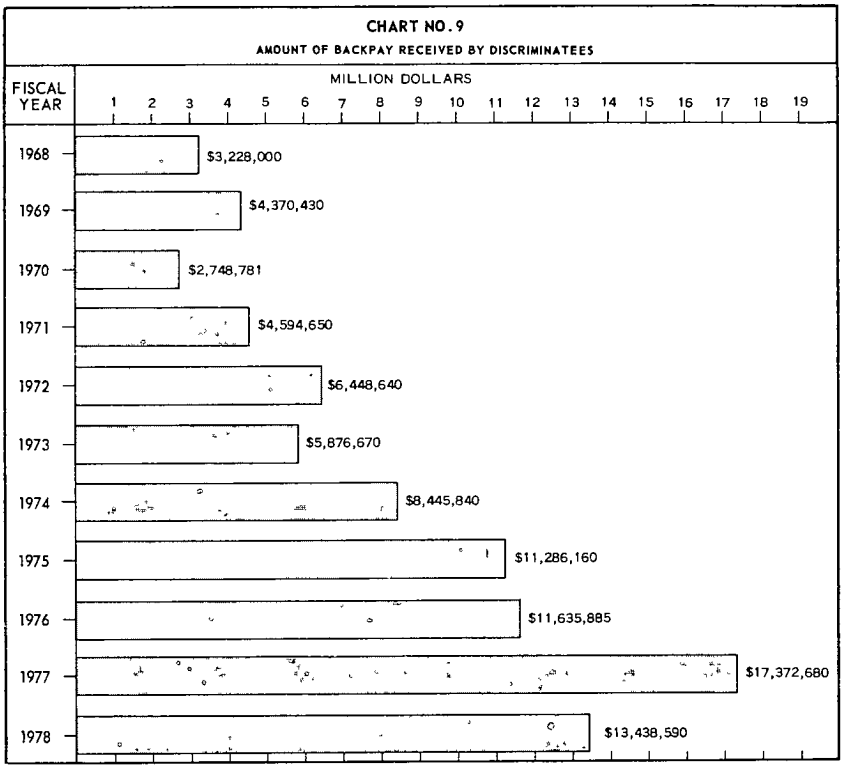
The NLRB received 13,609 representation and related case petitions in fiscal 1978. These included 11,148 collective-bargain-



ing cases; 1,754 decertification petitions; 298 union-shop deauthorization petitions; 82 petitions for amendment of certification; and 327 petitions for unit clarification. The NLRB's total representation intake was 10.0 percent or 1,506 cases less than the 15,115 of fiscal 1977.

There were 13,066 representation and related cases closed, about 20 percent less than the 16,306 closed in fiscal 1977. Cases closed included 10,714 collective-bargaining petitions; 1,724 petitions for elections to determine whether unions should be decertified; 277 petitions for employees to decide whether unions should retain authority for making union-shop agreements with employers; and 351 unit clarification and amendment of certification petitions. (Chart 14 and Tables 1 and 1B.)

NLRB regional directors ordered elections following hearings in 1,497 cases, or 18 percent of those closed by elections. There were 43 cases which resulted in expedited elections pursuant to

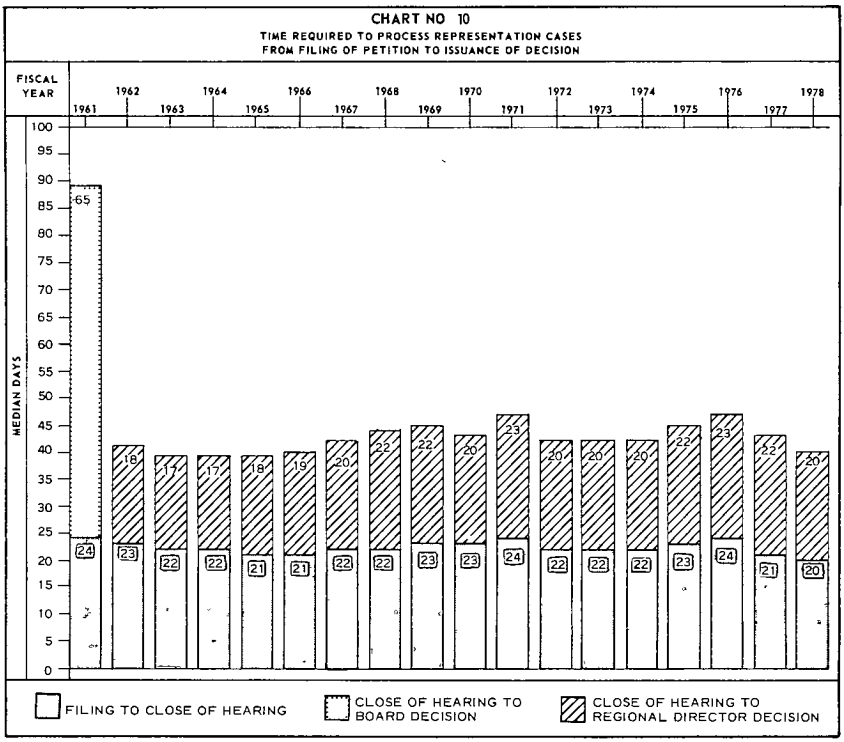


the Act's 8(b) (7) (C) provisions pertaining to picketing. Board-directed elections in 40 cases in 1978, about 0.5 percent of election closures, came after appeals or transfers from regional offices. (Table 10.)

3. Elections

A total of 424,679 employees exercised their right to vote in conclusive representation and related elections conducted by the NLRB in cases closed in 1978, compared with 511,336 voters in conclusive elections in 1977. Unions won 3,842, or 46 percent of 8,380 elections.

These conclusive ballotings were made up of collective-bargaining elections in which employees selected or rejected labor organizations as their bargaining agents, decertification elections to determine whether incumbent unions would continue to represent employees, and deauthorization polls to decide whether



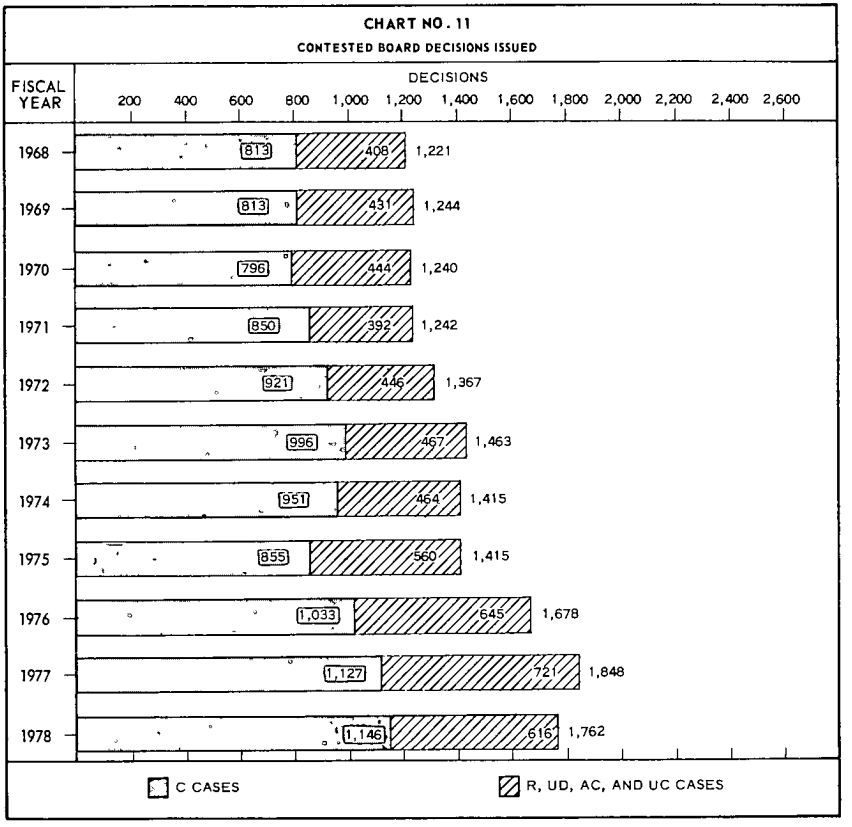
unions would maintain their authority to make union-shop agreements with employers.

In the category of collective-bargaining elections, which numbered 7,433, unions won majority designation in 3,578, or 48 percent.

There were an additional 224 inconclusive representation elections which resulted in withdrawal or dismissal of petitions before certification, or required a rerun or runoff election.

Decertification elections totaled 807, and deauthorization polls numbered 140. The decertification results brought continued representation by unions in 213 elections or 26 percent, covering 19,671 employees. Unions lost representation rights for 19,884 employees in 594 elections they did not win. Unions won in bargaining units averaging 92 employees, and lost in units averaging 34 employees. (Table 13).

Labor organizations lost the right to make union-shop agreements in 89 elections, 64 percent, while they maintained the right in the other 51 such elections which covered 5,973 employees (Table 12.)



For all types of elections in 1978, the average number of employees voting, per establishment, was 51, compared with 53 in 1977. About three-quarters of the collective-bargaining and decertification elections involved 59 or fewer employees. (Table 11 and 17.)

4. Decisions Issued

a. Five-Member Board

Dealing effectively with the remaining cases reaching it from nationwide filings after dismissals, settlements, and adjustments in earlier processing stages, the Board handed down 2,759 decisions concerning allegations of unfair labor practices and ques-

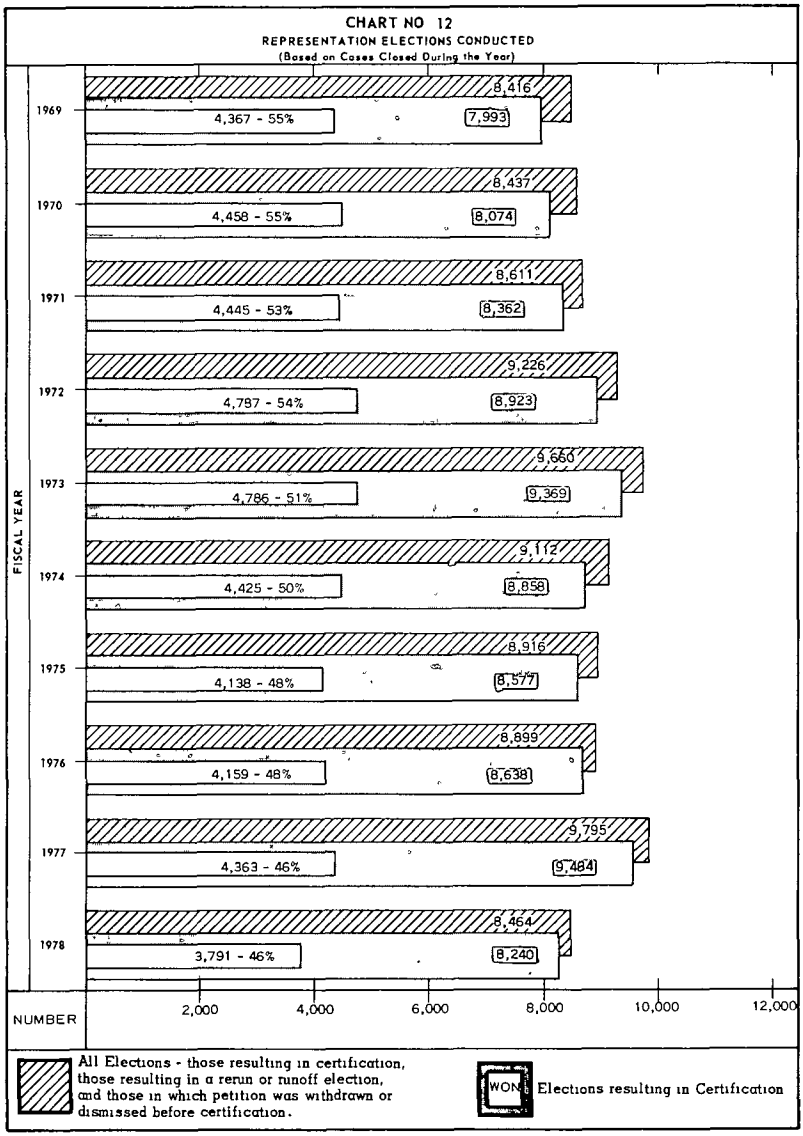


CHART NO 12
REPRESENTATION ELECTIONS CONDUCTED
(Based on Cases Closed During the Year)
FISCAL YEAR
1969
8,416
4,367 - 55%
7,993
1970
8,437
4,458 - 55%
8,074
1971
8,611
4,445 - 53%
8,362
1972
9,226
4,787 - 54%
8,923
1973
9,660
4,786 - 51%
9,369
1974
9,112
4,425 - 50%
8,858
1975
8,916
4,138 - 48%
8,577
1976
8,899
4,159 - 48%
8,638
1977
9,795
4,363 - 46%
9,484
1978
8,464
3,791 - 46%
8,240
NUMBER
2,000
4,000
6,000
8,000
10,000
12,000
All Elections - those resulting in certification, those resulting in a rerun or runoff election, and those in which petition was withdrawn or dismissed before certification.
WON
Elections resulting in Certification

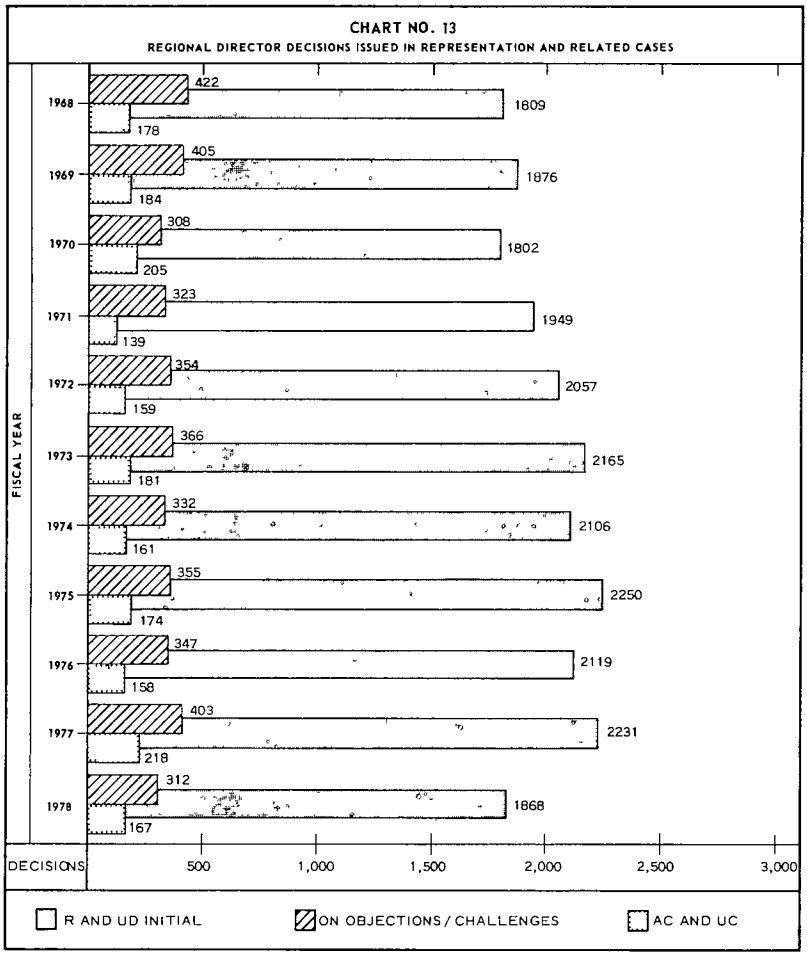
tions relating to employee representation, compared to the 2,887 decisions rendered during fiscal 1977.

A breakdown of Board decisions follows:

Total Board decisions			2,759
Contested decisions			1,762
Unfair labor practice decisions		1,146	
Initial (includes those based on stipulated record)	1,075		
Supplemental	3		
Backpay	28		
Determinations in jurisdictional disputes	40		
Representation decisions		603	
After transfer by regional directors for initial decision	43		
After review of regional director decisions	95		
On objections and/or challenges	465		
Other decisions		13	
Clarification of bargaining unit	11		
Amendment to certification	0		
Union-deauthorization	2		
Noncontested decisions			997
Unfair labor practice	499		
Representation	494		
Other	4		

Thus, it is apparent that the great majority, 64 percent, of Board decisions resulted from cases contested by the parties as to the facts and/or application of the law. (Tables 3A, 3B, and 3C.)

Emphasizing the steadily mounting unfair labor practice caseload facing the Board was the fact that in fiscal 1978 approximately 10 percent of all meritorious charges and 66 percent of all cases in which a hearing was conducted reached the five-member Board for decision. (Charts 3A and 3B.) These high proportions are even more significant considering that unfair labor practice cases in general require about two and one-half times more processing effort than do representation cases.



b. Regional Directors

Meeting the challenge of a high workload, NLRB regional directors issued 2,347 decisions in fiscal 1978, compared with 2,852 in 1977. (Chart 13 and Tables 3B and 3C.)

c. Administrative Law Judges

Again reflecting the continued high number of case filings, the administrative law judges issued 1,211 decisions and conducted 1,265 hearings. (Chart 8 and Table 3A.)

5. Court Litigation

The National Labor Relations Board conducts the most extensive litigation in the United States courts of appeals of any Federal agency. In fiscal 1978, appeals court decisions in NLRB-related cases numbered 333. In these rulings, the NLRB was affirmed in whole or in part in 84 percent. The prior year it was 81 percent.

A breakdown of appeals court rulings in fiscal 1978:

Total NLRB cases ruled on		333
Affirmed in full	218	
Affirmed with modification	53	
Remanded to NLRB	8	
Partially affirmed and partially remanded	7	
Set aside	47	

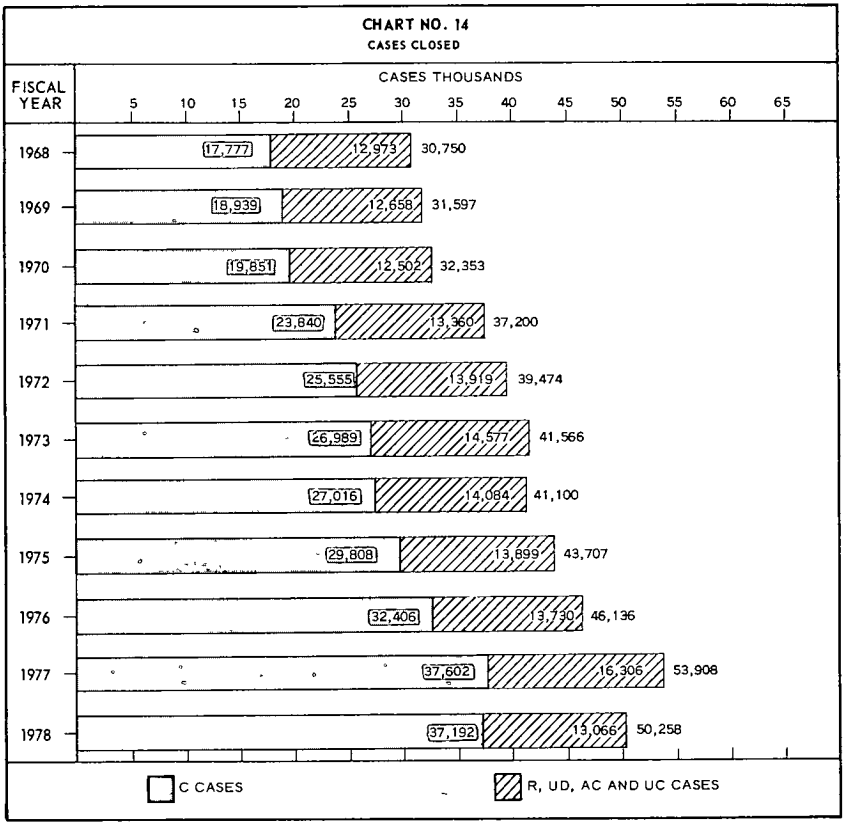
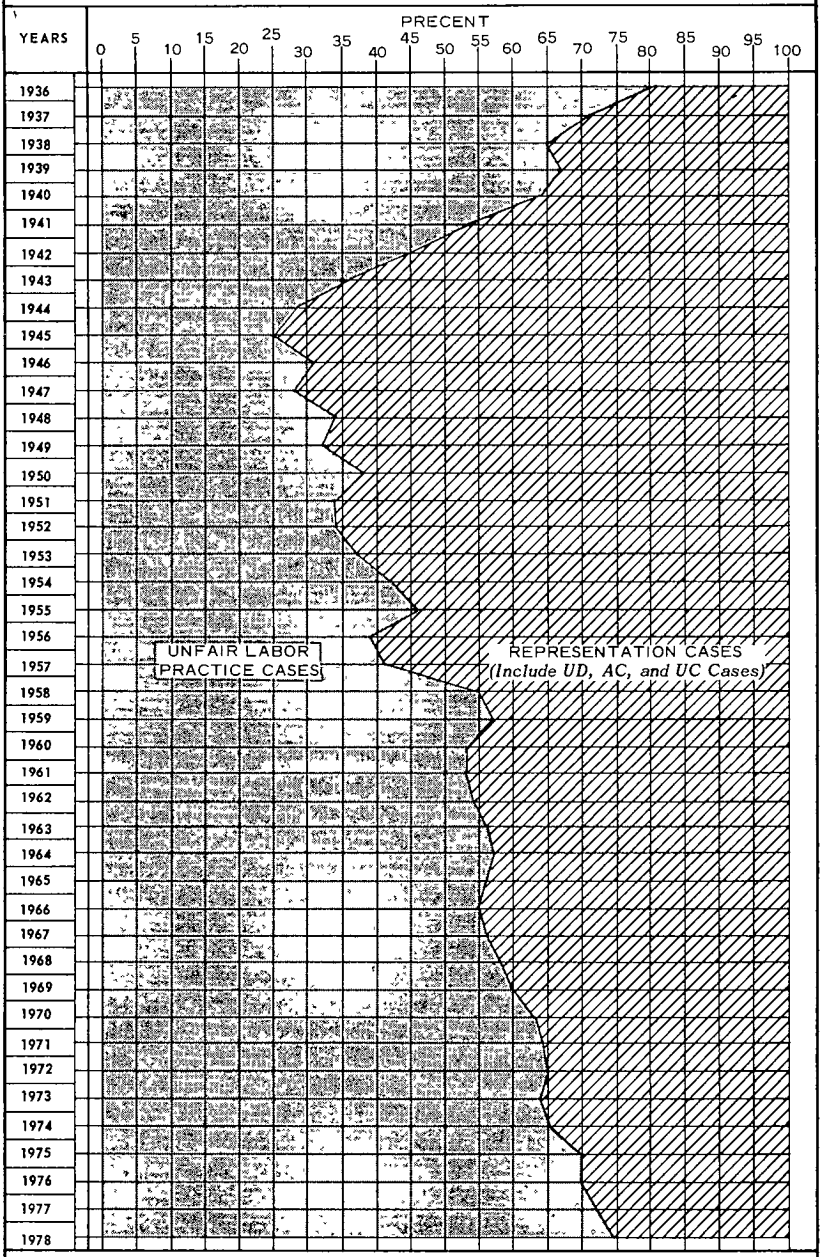


CHART NO. 15

COMPARISON OF FILINGS OF UNFAIR LABOR PRACTICE CASES AND REPRESENTATION CASES



THIS GRAPH SHOWS THE PRECENTAGE DIVISION OF NLRB CASELOAD BETWEEN UNFAIR LABOR PRACTICE CASES AND REPRESENTATION CASES DURING FISCAL YEARS 1936 - 1978

In the 27 contempt cases before the appeals courts, the respondents complied with NLRB orders after the contempt petition had been filed but before decisions by courts in 9 cases, in 16 cases the respondents were held in contempt and in 2 cases petitions were denied. (Table 19.)

The U.S. Supreme Court affirmed the Board in all five NLRB cases that it heard.

The NLRB sought injunctions pursuant to section 10(j) and 10(l) in 262 petitions filed with the U.S. district courts, compared with 229 in fiscal 1977. (Table 20.) Injunctions were granted in 127, or 93 percent, of the 137 cases litigated to final order.

NLRB injunction activity in district courts in 1978:

Granted	127
Denied	10
Withdrawn	25
Dismissed	8
Settled or placed on courts' inactive lists	82
Awaiting action at end of fiscal year	42

There were 59 additional cases involving miscellaneous litigation decided by appellate and district courts. The NLRB's position was upheld in 53 cases. (Table 21.)

C. Decisional Highlights

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

1. Deference to Arbitration Awards

The recurrent issue of the circumstances and standard under which the Board should defer to an arbitration award when the facts and issues involved in an unfair labor practice proceeding have been decided by an arbitrator pursuant to a grievance filed under the parties' bargaining agreement was again examined by the Board in the *Kansas City Star Co.* case.[1] The Board reaffirmed the standards established in its 1955 decision in *Spielberg Mfg. Co.*[2] that such deferral is appropriate where all issues have been presented and considered by the arbitrator whose award is fair and regular on its face, not repugnant to the policies of the Act, and has been reached by a procedure to which the parties have agreed to be bound. It was noted that such deferral is consistent with the labor policy which favors voluntary arbitration, and should take place unless one of the criteria has not been met, without a *de novo* review of the record evidence by the Board.

2. Duration of No-Strike Obligation

Relying upon Supreme Court precedent, the Board in *Goya Foods* [3] held that a no-strike obligation under the parties' bargaining agreement was coextensive with the duty to arbitrate, and extended beyond the term of the contract to bar a strike over issues then in arbitration under the expired agreement. The Board therefore held that a strike in breach of that obligation was unprotected, and an employer did not violate the Act by refusing to reinstate the striking employees.

3. Voluntary Union Recognition

The binding nature of voluntary recognition of a union as employee representative was clarified by the Board in two cases,[4] in each of which the employer had orally agreed to recognize the union upon demonstration of majority support but thereafter attempted to withdraw recognition prior to the date agreed upon to commence contract negotiations. In rejecting the contention that the recognition was not binding because no further actions

[1] 236 NLRB No 119, *infra* at p 34.
[2] 112 NLRB 1080.
[3] 238 NLRB No 204, *infra* at p. 86.
[4] *Jerr-Dan Corp*, 237 NLRB No. 49, and *Brown & Connolly*, 237 NLRB No. 48, *infra* at pp. 103–104.

had taken place in confirmation of or in reliance upon it, the Board explained in *Brown & Connolly*:

> Once voluntary recognition has been granted to a majority union, the union becomes the exclusive collective-bargaining representative of the employees, and withdrawal or reneging from the commitment to recognize before a reasonable time for bargaining has elapsed violates the employer's bargaining obligation. Evidence that an employer has commenced bargaining or has taken other affirmative action consistent with its recognition of the union aids in resolving the evidentiary question as to whether recognition was granted. However, once the fact of recognition is established, such additional evidence is not required for the bargaining obligation arises upon voluntary recognition and continues until there has been a reasonable opportunity for bargaining to succeed.

4. Fund Trustee as Employer Representative

In *Sheet Metal Workers Intl. Assn. (Central Florida Sheetmetal Contractors Assn.)*,[5] the Board considered whether management trustees of a multiemployer, industrywide trust fund, established by a collective-bargaining agreement, were employer collective-bargaining representatives within the meaning of section 8(b)(1)(B) of the Act. The Board concluded that the trustees were not such representatives and that the union did not violate the Act by striking to compel agreement to a contract clause specifying the management trustees by name. In doing so, the Board emphasized that the trustees were required by law to act solely in the interest of the beneficiaries of the trust fund and were bound to exercise their independent judgment when making decisions with respect to the administration of the fund. Although noting that trustees should consider all recommendations submitted by the parties who appointed them, the Board found that the trustees' fiduciary obligations to the beneficiaries of the fund were of overriding importance and precluded considering the trustees to be representatives acting for the advancement of employer interests.

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[5] 234 NLRB No. 162, *infra* at p. 126.

D. Financial Statement

The obligations and expenditures of the National Labor Relations Board for the fiscal year ended September 30, 1978, are as follows:

Personnel compensation	$62,777,500
Personnel benefits	6,362,522
Travel and transportation of persons	4,341,417
Transportation of things	147,640
Rent, communications, and utilities	10,654,109
Printing and reproduction	615,276
Other services	4,410,313
Supplies and materials	900,407
Equipment	520,560
Insurance claims and indemnities	49,742
Total obligations and expenditures	[6] 90,779,486

[6] Includes reimbursable obligations distributed as follows:

Personnel compensation	$9,958
Personnel benefits	2,494

II

Jurisdiction of the Board

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

Several cases were decided during this report year wherein the Board asserted jurisdiction over employers operating Head Start and Day Care programs for preschool age children under contract with Model Cities—Chicago Committee on Urban Opportunity (hereinafter referred to as Model Cities), an agency of

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

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

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

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

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

the city of Chicago. In *Catholic Bishop of Chicago*,[6] the lead case in this area, Chairman Fanning and Members Jenkins and Truesdale asserted jurisdiction over the employer, with Members Penello and Murphy dissenting separately. In doing so, the majority rejected the employer's claims that the Board should not assert jurisdiction inasmuch as (1) the city of Chicago controls the labor relations policies of the 24 Head Start and 4 Day Care centers; (2) the centers are intimately connected with the city; and (3) the centers are nonprofit, noncommercial, charitable institutions. Based on the facts that gross revenues for the Head Start and Day Care programs were approximately $1.6 million and $540,000, respectively, and that indirect and direct inflow exceeded $50,000 for each program, the Board found that the employer's operations affect commerce within the meaning of the Act and that it would effectuate the policies of the Act to assert jurisdiction over the employer.

The Head Start and Day Care centers are operated pursuant to annual service contracts between the city of Chicago and "delegate agencies," generally private employers engaged in providing social services. The contracts are administered by Model Cities.

The Federal Government provides 75 percent of the funds for the Day Care centers with the city of Chicago providing the remaining 25 percent; 80 percent of the funds for the Head Start programs comes from the Federal Government while the remaining 20 percent is supplied by the delegate agencies as in-kind services.

The contracts include budgets and "work programs" which must meet certain guidelines established by Model Cities before the city will provide funds for the centers through a voucher and reimbursement arrangement. These guidelines cover terms and conditions of employment at the centers, including ratio of staff to children; minimum educational and work experience qualifications for each job category; discharge procedures; salary ranges for each job category; vacations; sick leave; holidays; and fringe benefits such as unemployment compensation, hospitalization, and life insurance. If the delegate agency wishes to provide benefits in excess of those indicated in the guidelines, e.g., additional paid vacation or sick leave, it may do so using money from other sources to cover the additional costs. With respect to hiring, the employer decides which applicants to hire and may choose to set higher qualifications than those established by Model Cities. Model

[6] *Catholic Bishop of Chicago, A Corporation Sole, Dept of Federal Programs*, 235 NLRB No 105.

Cities maintains and has exercised the right to veto the hire of unqualified persons. The employer argued that these guidelines set the working conditions which cannot be changed without Model Cities' approval.

Under Federal regulations, Head Start and Day Care employees must receive salaries comparable to the area standard for similar jobs. Model Cities sets a general salary range for each job category with the individual employer proposing a specific salary within the range for each employee and Model Cities approves salaries above these ranges only if sufficient justification is given. Individual agencies may use funding from other sources to improve salaries. For example, until recent years, the Federal Government had provided sufficient funding for annual salary increases of 5 percent. However, for the last 2 years no money was available for these increases. Individual agencies could grant salary increases only if they secured additional funding from other sources.

The majority, in support of their position, relied on the existence of two collective-bargaining agreements between Hull House (another delegate agency) and the Hull House Employees Organization.[7] One of these contracts provided employees with salary and fringe benefit improvements which were not reimbursable under Model Cities' guidelines, thus, demonstrating the employer's flexibility in collective bargaining. Furthermore, the majority cited the testimony of Model Cities' representatives that there is a Federal policy that supports the right of Head Start and Day Care employees to bargain collectively and that such a policy resulted in Hull House employees bargaining without interference from Model Cities' personnel.

From the facts outlined above, the majority rejected the employer's first contention that Model Cities controls the delegate agencies' labor relations and concluded that the effect of the Model Cities' guidelines is to create a base salary and fringe benefit level that can be improved upon by the delegate agency (using funds from sources other than Model Cities), permitting the employer to bargain, without interference, about improvement of salary and fringe benefits within the ranges established by Model Cities. Furthermore, the input of Model Cities into staffing decisions is insignificant, with effective control by the employer of the hire and discharge of employees and with discretion retained by the employer with respect to hours of work, vacation and leave policies, grievance procedures and no-strike, union-security, and dues-checkoff provisions.

[7] See *Hull House Association*, 235 NLRB No. 108 (1978).

Additionally, the majority disagreed with the employer's second contention that the Head Start and Day Care centers are intimately connected with the city inasmuch as the city has not historically furnished universal preschool educational and child custodial services and, accordingly, they concluded that since the employer is not performing an essential, normally required municipal service the intimate-connection test provided no basis for declining jurisdiction.[8] Nor did the fact that the employer is a nonprofit, noncommercial, charitable organization provide a basis for declining jurisdiction under established Board law.[9]

Member Penello, dissenting and relying on *Mon-Yough Community Mental Health & Mental Retardation Services*,[10] would have refused to assert jurisdiction over the employer's operations for the reason that the degree of control exercised by Model Cities over the centers' labor relations disabled the delegate agency from engaging in meaningful collective bargaining with a union over wages, hours, and other working conditions of the employees at the centers. He stated that the budget and work program, contained in each contract, outlined in detail the expenses and operations of each center—resulting in Model Cities' control over virtually all facets of the centers' labor relations, including hours of work, vacations, holidays, fringe benefits, and employee qualifications. Delegate agencies were required to conform to the established salary ranges in order to comply with Federal policy and to discourage the various delegate agencies from raiding each others' staffs. The employer would not be allowed to pay salaries higher than the ceilings imposed by Model Cities. Furthermore, the specific salary for an employee, even within the specified salary range, had to be based on objective criteria, e.g., if the range for teachers was between $9,000 and $11,000, the employer was required to have a valid reason, such as experience, for paying a salary within that range. In fact, Model Cities had disapproved of an employer paying an employee as little as $500 a year more than the salary paid by another delegate agency. Questioning the majority's emphasis on the employer's ability to use funds from sources other than Model Cities to increase employee salaries and fringe benefits, Member Penello pointed out that Model Cities had

[8] In any event, Member Truesdale, like Chairman Fanning, would not have adhered to the intimate-connection test in determining the question of jurisdiction in such a case.

[9] *Rhode Island Catholic Orphan Asylum, a/k/a St Aloysius Home*, 224 NLRB 1344 (1976) (then Member Fanning concurring).

[10] 227 NLRB 1218 (1977).

to approve the use of such supplemental funds and that such use was severely limited. Furthermore, he discounted the majority's reliance on the collective-bargaining agreement between Hull House and the union representing its employees, noting that Model Cities retained the power to veto that labor agreement by terminating the relationship with the agency and that Model Cities would not renew the Hull House contract until the new collective-bargaining agreement had been reviewed to insure that its provisions did not violate the Model Cities' guidelines.

Member Murphy, in a separate dissent, would have declined to assert jurisdiction on the ground that the city of Chicago exercised substantial and pervasive control over the employer's operations.

Taking a "Brandeis Brief" approach to the question presented, Member Murphy examined both the congressional purpose in authorizing and funding (through grants to the States) day care services of the type provided by the employer and the social and economic realities inherent in providing such services to minority children in impoverished areas. On the basis thereof, she concluded that nonprofit child care services are provided in furtherance of the Government's fundamental interest in alleviating poverty and that day care programs are essential to the accomplishment of that objective.

Viewing the employer's centers against the background provided by her examination of underlying congressional intent and social policy, Member Murphy concluded that the city of Chicago, in undertaking to regulate and fund the employer's centers, had implemented the Federal Government's policy in favor of relieving poverty by contracting out to the employer for the delivery of specialized child care service. In addition, she found that the city's control over the employer's centers was underscored by its interest in insuring the delivery of such specialized services in furtherance of governmental policies. She further concluded, contrary to the majority, that the facts established that the city's actual exercise over the employer's labor relations policies was substantial and pervasive.

In the above circumstances, Member Murphy found that the employer did not retain sufficient independent discretion to determine terms and conditions of employment at its centers. Accordingly, she concluded that the Board's established policies precluded the assertion of jurisdiction. In the alternative, Member Murphy concluded that the services provided by the employer were intimately related to fundamental governmental objectives and, ac-

cordingly, that it would not effectuate the policies of the Act to assert jurisdiction.[11]

Following the holding of *Catholic Bishop*, the Board asserted jurisdiction over similar Head Start and Day Care centers in *Hull House Assn.*,[12] *Young Women's Christian Assn. of Metropolitan Chicago*,[13] *Chicago Youth Centers*,[14] and *Chase House*,[15] with Members Penello and Murphy basically adhering, in each case, to their dissenting positions expressed in *Catholic Bishop*.

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[11] Member Murphy noted that, in declining to assert jurisdiction over the employer's operations, her analysis was limited to day care services funded as part of the Federal comprehensive antipoverty program and administered subject to substantial governmental controls, inasmuch as she would assert jurisdiction over private for-profit day care centers providing custodial and educational day care services See *Salt & Pepper Nursery School & Kindergarten No 2*, 222 NLRB 1295 (1976)

[12] 235 NLRB No 108.

[13] 235 NLRB No 106.

[14] 235 NLRB No 126.

[15] 235 NLRB No 107 Additionally, Member Penello would not have asserted jurisdiction over the employer's single day care center, which, unlike its Head Start centers, was privately funded and not subject to Model Cities because it did not meet the $250,000 jurisdictional standard established in *Salt & Pepper Nursery School & Kindergarten No 2, supra.*

III

Effect of Concurrent Arbitration Proceedings

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

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

In the *Collyer* decision, as reapplied in *Roy Robinson*,[6] the Board established standards for deferring to contract grievance procedures before arbitration has been had with respect to a dispute over contract terms which was also, arguably, a violation of section 8(a)(5) of the Act. In *GAT*,[7] the Board modified *Collyer*

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

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

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

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

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

[6] *Roy Robinson Chevrolet*, 228 NLRB 828 (1977).

[7] *General American Transportation Corp.*, 228 NLRB 808 (1977).

and overruled *National Radio*,[8] which had extended the *Collyer* rationale to cases involving claims that employees' section 7 rights had been abridged in violation of section 8(a)(3). During the report year, a number of cases have been decided which involve the *Collyer* and *Spielberg* doctrines.

A. Deferral to Arbitration Award

In *Kansas City Star Co.*[9] the Board majority deferred to an arbitrator's award under *Spielberg, supra.* In this case, a pressman was transferred to another job for failure to perform his duties. The employee complained to union representatives who asked the employer to revoke the transfer. After reviewing the incident, the employer then discharged the employee for neglect of duty. The employees on the next shift reported to work, but expressed their dissatisfaction with the discharge by standing around and refusing to work. Upon their continued refusal to work, 97 pressmen were fired. They then left the plant and set up a picket line.

The contract with the incumbent union contained a no-strike clause and a grievance procedure culminating in final and binding arbitration. Contending that the walkout was unlawful as a violation of the no-strike clause, the employer rescinded the collective-bargaining agreement and so notified the union, offering to arbitrate grievances that arose when the contract was in effect. The remaining pressmen, who had not been fired, then joined the picket line. The following day the employer gave notice that it would begin seeking permanent replacements for the strikers who had not been fired. The union grieved the discharges of the pressmen, eventually submitting the matter to arbitration.

The arbitrator found that the pressman whose discharge precipitated these events had been discharged solely for negligent performance of his duties, and that the striking employees,[10] including the vice president of the union, had been properly discharged for participating in a strike prohibited by the contract and that the union was in violation of the no-strike clause and responsible for the work stoppage which gave rise to the employer's rescission of the contract.

[8] *National Radio Co.*, 198 NLBR 527 (1972).

[9] 236 NLRB No 119 (Members Penello and Murphy with Member Truesdale concurring, Chairman Fanning and Member Jenkins dissenting).

[10] The arbitrator found that 2 of the 97 employees had not participated in the strike and ordered them reinstated.

The Board majority, with Member Truesdale concurring separately, deferred to the arbitrator's award, finding that it met the standards of *Spielberg* in that it was not repugnant to the Act; it was, on its face, fair and regular; and it was reached by a procedure to which the parties agreed to be bound. In accord with *Spielberg*, the complaint, which alleged violations of section 8(a)(3) and (5) of the Act, was dismissed.

Chairman Fanning and Member Jenkins concurred in part with the majority's deferral under *Spielberg*, but dissented with respect to deferral as to the discharge of the union's vice president, the union's responsibility for the strike, and the subsequent rescission of the contract by the employer. Based on their review of the record, they would have found that the arbitrator's upholding the discharge of the union's vice president was repugnant to the Act since the vice president did not participate in the strike, but instead had attempted to avert it. Therefore, the dissent would also have found that a breach of the non-strike clause could not be attributed to the union and, thus, that the employer's rescission of the contract was not warranted and was in violation of section 8(a)(5) of the Act. Further, they would also have found that the subsequent strike of the employees, in response to the rescission, was an unfair labor practice strike.

The majority agreed with Member Truesdale who, in his concurrence, stated that, under *Spielberg*, it was improper to engage in a *de novo* review of the arbitration record which could only serve to undermine the integrity of the arbitral process. Since all of the factual and legal findings necessary to the resolution of the allegation concerning rescission were of necessity determined by the legality of the discharges, and since all issues had been litigated before the arbitrator who reached his decision on the basis of a full record the majority agreed that no more is required for *Spielberg* deferral.

B. Decisions Not To Defer

The Board has issued several decisions in which it has found it inappropriate to defer to an arbitrator's decision.

In *Montgomery Ward & Co.*,[11] the Board panel declined to defer to the arbitrator's ruling under the *Spielberg* doctrine where the arbitrator had issued a subpena for certain information which the union had requested in preparation for arbitration, but which

[11] 234 NLRB No. 88 (Members Jenkins, Penello, and Murphy).

the employer had at first refused to furnish. The General Counsel's motion for summary judgment was based on a complaint alleging that the employer had violated section 8(a)(5) and (1) of the Act by refusing to furnish the union with requested information in a timely fashion. The employer argued that the arbitrator's ruling on the obligation to provide the requested information was a procedural matter attendant to the arbitration process and that the Board should defer to the arbitrator's ruling to the extent that he determined that the employer was under an obligation to provide the union with the requested information. The panel found that, as the sole grievance submitted to the arbitrator by the parties related to a compensation matter, the issue of the employer's refusal to supply the requested information was not itself subject to the grievance-arbitration provisions of the contract and was not presented to or considered by the arbitrator as a contract violation. While agreeing that the duty to furnish the requested information was a procedural matter attendant to the arbitral process, the panel concluded that "where the parties and an arbitrator treat a union's unfulfilled request for information as a procedural matter attendant to the arbitration process rather than a separate grievance subject to arbitration, the *Spielberg* doctrine is inapplicable." The majority also stated that the refusal to furnish information may be considered an obstruction to the grievance procedure and, therefore, deference to the arbitrator's ruling was rejected and the employer's motion to dismiss denied.[12]

In *Douglas Aircraft,*[13] the Board majority, consisting of Chairman Fanning and Members Jenkins and Murphy, refused to defer under *Spielberg* to an arbitration award on the ground that it was repugnant to the Act. An employee who was a grievance committeeman filed an unfair labor practice charge alleging that his discharge was in violation of section 8(a)(3) of the Act and on the same day filed a grievance under the contract. Action on the charge was deferred under the policy enunciated in *Collyer.* The arbitrator issued an award in which he ordered the employee reinstated, but without backpay, basing the denial of backpay on the employee's pattern of alleged abusive behavior toward the

[12] The panel majority stated that the issue of delay in supplying the information, which in itself might have been sufficient to establish a violation of sec 8(a)(5), was not presented to the arbitrator, and could not have been decided by him as it is neither a matter of contract interpretation nor a procedural matter attendant to the arbitration but is a matter which could only be resolved by reference to rights established by the Act Member Penello disagreed with the majority's conclusion that the issues regarding delay can be resolved only under the Act In his view, such delays could be the subject of a grievance under a contract requiring information to be supplied in a timely fashion.

[13] *Douglas Aircraft Co Component of McDonnel Douglas Corp.*, 234 NLRB No. 80.

employer, and on the conclusion that the employee alone was responsible for the rejection of an earlier settlement agreement under which he would have been reinstated earlier, if he had withdrawn the unfair labor practice charge.

The General Counsel issued an 8(a)(3) complaint on the theory that the award was repugnant to the Act. Thereafter, the parties requested that the arbitrator clarify his reasons for denial of backpay. The arbitrator responded that the refusal to accept the settlement was a supporting argument for the denial of backpay, but that, even in the absence of the rejection of the settlement offer, backpay still would have been denied. The Board majority found the award repugnant to the Act because it was premised, in part, on the charging party's refusal to drop his unfair labor practice charges. In addition, the majority noted that the "clarification" was sought only after issuance of the complaint and stated that "the Board will not sanction and defer to such a prejudicial procedure." The majority pointed out that, while the arbitrator ascribed the employee's pattern of behavior as an independent reason for denying backpay, he failed to consider whether the employee's role as grievance committeeman had any bearing on the backpay decision. Finally, the majority concluded that even under the *Intl. Harvester* test [14] an award which is based in part on an employee's abandoning any of his section 7 rights is "palpably wrong."

In his dissent, Member Penello took the position that the majority misapplied *Spielberg* and distorted the "clearly repugnant" test. He pointed out that the arbitrator clearly would not have granted backpay, regardless of the charging party's rejection of the settlement agreement and that the arbitrator's reference thereto was an inconsequential and nonprejudicial departure from Board law. Member Penello stated that the proper standard for acceptance of an arbitrator's award is the one enunciated in *Intl. Harvester*, i.e., whether the award is "not palpably wrong," not whether the Board is in total agreement with the award. The dissent also attacked the majority's characterization of the arbitrator's clarification as prejudicial because neither the General Counsel nor the charging party took that position and because there was no allegation that the union breached its duty of fair representation to the employee.

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[14] *Intl Harvester Co (Indianapolis Works)*, 138 NLRB 923, 926 (1962), enfd. *sub nom Thomas D. Ramsey* v *N.L.R.B.*, 327 F.2d 784 (7th Cir. 1964), cert. denied 377 U.S. 1003.

Again, in *Pincus*,[15] the Board panel declined to defer to the arbitrator's award on the ground that it was repugnant to the Act and remanded the proceeding to the administrative law judge. In *Pincus*, the individual charging party, an employee, had posted in the restroom handbills critical of the employer's suggested changes in piecework payments, which had been announced at a recent employee meeting. The employer fired the employee later that day, whereupon she filed a grievance which was eventually submitted to arbitration. The arbitrator, in upholding the discharge, found that the employee had abused working time and had distributed during both working and nonworking time and had intentionally misrepresented or distorted facts related to employment practices, business policies, and product status in a denigrating and disparaging fashion so as to constitute unprotected disloyalty.

The Board panel, in concluding that the award was repugnant to the Act and deciding therefore not to defer, analyzed the arbitrator's findings with regard to the purportedly unprotected nature of the statements made in the handbill and found, contrary to the arbitrator, that the writing and distribution of the handbill constituted protected concerted activity and that "there can be no reasonable disagreement as to this finding." The panel stated that the arbitrator's finding that the employee's conduct was unprotected was so clearly in error that it would be repugnant to the policies of the Act to defer. Under these circumstances, the panel concluded that the sound administration of the Act would be better served by a remand for a hearing *de novo* on the merits of the unfair labor practice charge rather than relying on the arbitrator's factual findings.

In *Texaco*,[16] the Board majority rejected deferral to arbitration under *Collyer* on a complaint alleging an independent 8(a)(1) violation and an 8(a)(5) violation arising from the employer's alleged unilateral change of the employees' starting time, from 7 a.m. to 8 a.m. A grievance had been filed thereon and a separate grievance, arising from this change. was filed over denial of premium pay. Subsequently, the employer told the employees that it would not revert to the previous starting time or even discuss the issue with them unless the premium pay grievance was dropped. In an award subsequent to the administrative law judge's decision, and not part of the record herein, the arbitrator

[15] *Pincus Brothers—Maxwell*, 237 NLRB No 159 (Members Jenkins, Murphy, and Truesdale).

[16] *Texaco, Producing Dept., Houston Div.*, 233 NLRB No 43 (Chairman Fanning and Members Jenkins and Murphy, with Member Penello dissenting). See discussion of this case *infra* at p. 93.

ruled in favor of the union on the overtime pay grievance and found as stated by the majority that "under the contract such changes in schedule could not be made unilaterally by [the employer] but must be discussed with the [u]nion."

The Board majority found this case inappropriate for deferral. Chairman Fanning and Member Jenkins rejected deferral not merely on the circumstances of the instant case but also because of their longstanding opposition to the policy established by *Collyer* and its progeny, while Member Murphy declined to defer for the reasons stated in her separate opinion in *GAT*.[17] The Board majority agreed with the General Counsel that certain of the employer's actions and conduct, demonstrating that it had no intention of complying with an arbitration award in the union's favor, further militated against deferral. In addition, the majority stated that the employer's refusal to discuss or rescind the new starting time was in reprisal for the employees' grievance over premium pay, thereby striking at the very foundation of the grievance-arbitration machinery to which the employer would have the Board defer. Finally, the majority attacked the adequacy of the award's remedy of the employer's refusal to bargain because the arbitrator refused to find that section 8(a)(5) was violated, thereby leaving the employer's misconduct unremedied, with no restraint on future misconduct, despite the employer's "intransigent defiance" of its bargaining obligation and its threats to disregard the arbitration award.

In his dissent, Member Penello stated that this case should never have come before the Board, but should have been deferred to the grievance and arbitration provisions of the parties' contract. He explained that the employer, by seeking withdrawal of the premium pay grievance, had not interfered with the grievance procedure, but had been attempting to informally settle both grievances. He characterized the arbitration award, which found that the employer had a contractual right to alter starting times but had to first discuss the change with the appropriate committee, as a model of arbitral craftsmanship fully meeting the *Spielberg* standards. He noted that the arbitrator, by awarding premium pay for the employer's failure to appropriately discuss the changes, gave the employees a more meaningful remedy than the majority's decision herein. In light of the 30 years of bargaining between the parties, the absence of animosity toward the union,

[17] *General American Transportation Corp.*, 228 NLRB 808 (1977), where, in her separate opinion, Member Murphy stated that where a complaint alleges both a violation of sec. 8(a)(5) which she would defer—and a violation of any other section of the Act which she would not defer—she would not fragmentize the complaint by deferring only the 8(a)(5) allegation.

the resolution of the dispute by the parties through their own procedures, and the Board's mounting caseload, Member Penello stated that the majority's refusal to defer was a waste of the Board's limited resources. In his view, the majority lost sight of the Board's mission by impeding the parties dispute resolution machinery and thus interfering with their practice of collective bargaining.

IV

Board Procedure

A. Unfair Labor Practice Procedure

1. Bars to Litigation of Issues

During the report year, the Board, in *Serv-U-Stores,*[1] an unfair labor practice proceeding, rejected the employer's contention that it was improper under section 102.67(f) of the Board's Rules [2] to relitigate in the unfair labor practice proceeding the supervisory status of three store managers, one of whom was alleged to have engaged in 8(a)(1) conduct, because the supervisory issue had already been resolved in a representation case and was therefore *res judicata.* The regional director in his decision and direction of election had found three store managers to be nonsupervisory employees. However, based on the facts uncovered in the investigation of the unfair labor practice case, he subsequently amended his decision to find that the manager in question was a supervisor who would be permitted to vote subject to challenge.

At the unfair labor practice hearing, based on the complaint issued thereafter alleging that the store manager in question was a supervisor within the meaning of the Act and that he had engaged in conduct violative of section 8(a)(1), the General Counsel attempted to litigate the supervisory status of not only the manager who allegedly engaged in 8(a)(1) conduct, but also the remaining two store managers. He argued that he was seeking a bargaining order to remedy the employer's extensive and pervasive unfair labor practices and that it was necessary to establish, with precision, the size of the unit in order to determine if the union had a majority. The Board held that it was proper to introduce evidence with respect to the supervisory status of all three managers.[3] In doing so, the Board distinguished "related"

[1] *Serv-U-Stores,* 234 NLRB No 191 (Members Penello, Murphy, and Truesdale, Chairman Fanning and Members Jenkins concurring in part and dissenting in part).

[2] Sec 102 67(f) provides in pertinent part that the "[f]ailure to request review shall preclude [the] parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding "

[3] The administrative law judge had sustained the employer's objection to the introduction of evidence on the supervisory status of the store managers but was ordered to admit such evidence after interlocutory appeals by the General Counsel were granted by the Board.

subsequent unfair labor practice proceedings, i.e., 8(a)(5) allegations based on a certification in a representation proceeding, and unfair labor practice cases such as the instant matter which involve independent violations of section 8(a)(1) of the Act. In the former circumstances it is, of course, improper to relitigate matters which were or could have been raised in the representation proceeding in the absence of a change in circumstances or newly discovered evidence. However, the Board concluded that when, as here, an independent 8(a)(1) violation is involved, the same does not hold true and especially noted that the regional director herein, because of doubts raised by the investigation of the 8(a)(1) charges, had, *sua sponte,* amended his original decision in the representation case to allow the store manager in question, who allegedly committed the unfair labor practices, to vote subject to challenge. With respect to the relitigation of the status of the other two store managers in the unfair labor practice case where only the store manager in question was alleged to have engaged in 8(a)(1) conduct, the Board stated that it would have been unrealistic to bar such evidence, particularly in light of the employer's assertion that the duties of all the store managers were essentially the same. The Board overruled *Thrifty Supply Co.*[4] and its progeny, to the extent inconsistent with the holding therein as well as other Board decisions which adopted the rationale of the court in *Amalgamated Clothing Workers.*[5]

The Board, in *Heavy Lift Services,*[6] upheld the administrative law judge's refusal to allow the employer, in a hearing on 8(a)(5) allegations, to introduce evidence to support the affirmative defense that the union was not entitled to certification and recognition because it had engaged in racially discriminatory conduct. In the representation case, the employer's objection, that preelection appeals to racial prejudices would require setting aside the election, was overruled and the union was certified. Thereafter, in an amended answer to the complaint alleging refusal to bargain, the employer affirmatively alleged that the union was not entitled to certification or to resort to the Board's remedial processes be-

[4] 153 NLRB 370 (1965), affd 364 F.2d 508 (9th Cir 1966).

[5] *Amalgamated Clothing Workers of America [Sagamore Shirt Co.]* v. *N.L.R.B.,* 365 F.2d 898, 902–905 (D.C. Cir 1966) The court therein also held that such supervisory findings by the regional director, while not a final binding adjudication which cannot be relitigated, may be accorded "persuasive relevance, a kind of administrative comity," but are subject to reconsideration on the basis of the record made and any additional evidence the administrative law judge finds material

[6] *Heavy Lift Services,* 234 NLRB No. 164 (Chairman Fanning and Members Penello and Murphy, Member Jenkins dissenting).

cause it had engaged in unlawful discriminatory acts of racial discrimination. In ruling on the General Counsel's motion for summary judgment, the Board panel of Chairman (then Member) Fanning and Members Jenkins and Penello issued an order remanding for a hearing because the employer's denial of the union's request to bargain raised issues that could best be resolved by a hearing, and also denying the employer's request for a hearing on its affirmative defense that the union was not entitled to certification because of racial discrimination, inasmuch as the employer's unsupported allegations were insufficient to raise factual issues warranting a hearing.[7]

At the hearing the administrative law judge excluded the employer's proffered evidence of the union's alleged postelection, postcertification discriminatory conduct, and found that the employer violated section 8(a)(5) of the Act in refusing to recognize and bargain with the union. The Board majority, Member Jenkins dissenting, affirmed the administrative law judge's exclusion of the evidence. In doing so, the majority explained that the requirement of minimal proof that a factual issue actually exists before ordering a hearing is a procedural necessity. Although the General Counsel had the burden of proving all elements of the unfair labor practice violation, the initial burden of proceeding with the proof of an affirmative defense rests with the employer. While it successfully controverted certain elements of the complaint, thereby raising factual issues requiring a hearing, it did not offer any evidence in support of its affirmative defense that the union engaged in illegal racial discrimination and failed to establish any factual issues warranting a hearing on its affirmative defense. Further, the majority concluded that the rejected evidence of postelection and postcertification conduct was available and could have been discovered prior to the issuance of the Board's order which denied the employer's motion for a hearing on its affirmative defense.[8]

In his dissent, Member Jenkins criticized the majority's failure to provide the employer an opportunity to litigate its claim of racial discrimination by the union during the postcertification

[7] Although the employer, in its amended answer and opposition to the motion for summary judgment, alleged that the union's discriminatory racial practices disqualified it from being certified as a labor organization within the meaning of sec 2(5) of the Act, it offered no affidavits or exhibits in support thereof.

[8] While finding it unnecessary to reach the question of propriety of exploring allegations of invidious union discrimination at this stage of the Board's proceedings, the majority emphasized, in response to the dissent, that the Board is not under a constitutional mandate to consider allegations of a union's discriminatory practices either in a representation proceeding or in an unfair labor practice proceeding when raised as an affirmative defense to an allegation of a refusal to bargain and that they adhered to the majority position in *Handy Andy*, 228 NLRB 447 (1977).

period despite the employer's attempt to do so at three separate stages of the proceedings.[9] To Member Jenkins, the effect of the majority's decision and order was to hold that the due process clause of the fifth amendment does not preclude the Board from upholding the certification of, or extending remedial relief to, a union that engages in racial discrimination. Reiterating the views expressed in his dissent in *Handy Andy, supra,* he stated that the certification of a union as exclusive bargaining representative vests it with public rather than private rights and that upholding a certification for a union that engaged in racial discrimination and protecting this status by extending relief in the form of a bargaining order constitutes governmental action in support of such discrimination and violates the Constitution. Here there were substantial allegations of actual determinations and there had been a full offer of proof. Thus, the dissent would not issue a bargaining order without first considering the claim that the union engaged in discrimination. Furthermore, Member Jenkins did not find that the procedural niceties raised by the majority, i.e., that the evidence now sought to be presented was available or could have been discovered prior to the issuance of the order precluding the employer from litigating its affirmative defense at an unfair labor practice hearing, are grounds for precluding the litigation of the constitutional issues involved.

Further, while disagreeing with the position of the majority in *Handy Andy* that the proper forum for resolution of the issue of a union's invidious discrimination is an unfair labor practice proceeding under section 8(b) of the Act, Member Jenkins distinguished *Handy Andy* because, in that case, allegations of invidious discrimination were premature and speculative. In the instant case, there were substantial allegations of actual discriminatory conduct toward unit employees during the postcertification period so that there was a presently litigable "case or controversy" that could be resolved in an unfair labor practice proceeding with the opportunity for direct judicial review. Thus, he concluded that any due process concerns regarding the consideration of allegations of discrimination in a representation proceeding would have no application to litigation in the instant unfair labor practice proceeding, with all its attendant procedural safeguards.

[9] Although the majority criticized what it characterized as an inconsistency between Member Jenkins' current position and his earlier participation in the order denying the employer a hearing on its affirmative defense, Member Jenkins distinguished his earlier denial of a hearing in that it was warranted on procedural grounds alone and that the Board, at the time, did not consider the merits of the employer's affirmative defense which raises constitutional issues. Furthermore, he vigorously disagreed with the majority's position that the issue could be litigated only in a separate 8(b) proceeding.

In *Sheet Metal Workers*,[10] a Board panel declined to pass on the structural validity of a joint employer-union trust fund (herein SASMI) under section 302(c)(5) of the Labor Management Relations Act, finding that neither the Congress nor the Supreme Court nor any other judicial body has charged the Board with the responsibility of determining the validity of such funds. Finding that SASMI violated section 302(c)(5)[11] and therefore was an unlawful subject of bargaining, the administrative law judge had found that the union violated section 8(b)(3) of the Act by insisting to the point of impasse on the inclusion of SASMI in the collective-bargaining agreement. He concluded that he had the authority to make such a judgment because the Board had previously considered conduct that violated other statutes and predicated unfair labor practice findings thereon to make such a judgment.

In reaching the conclusion that the Board does not possess jurisdiction to determine whether SASMI violates section 302(c), the panel noted that cases cited by the administrative law judge do not support the principle that the Board should, *sua sponte*, extend jurisdiction to encompass alleged violations of section 302(c).[12] Although the Board admittedly has, on other occasions, premised a violation of the Act on conduct found to be in violation of another Federal statute in the area of intraunion political activity, the Board did so only at the specific behest of the Supreme Court.[13] Further, it was the view of the panel that since section 302(e) expressly confers jurisdiction on the Federal district courts to restrain violations of the provisions of that section, it was the intention of Congress that the Federal judiciary will have the exclusive authority to construe the provisions of section 302(c). The panel also pointed out that, to allow concurrent court and Board jurisdiction would create a situation fraught with confusion and uncertainties and possibly subject the parties to the risk of varying determinations as to the validity of their trust funds emanating from different forums. Finally, the panel was of the view that the equitable powers of the court, rather than the Board's usual remedies in unfair labor practice proceedings,

[10] *Sheet Metal Workers Intl Assn. & Edw. J Carlough, President (Central Florida Sheet-metal Contractors Assn)*, 234 NLRB No 162 (Chairman Fanning and Members Jenkins and Penello) See discussion of this case at p 126, *infra*

[11] The administrative law judge found that sec. 302 makes it a criminal act for any employer to contribute or agree to contribute to a trust fund of the type involved herein unless employees and employers are equally represented in the administration of the fund He also found that the express provisions of the trust excluded the employers from any voice in the selection of trustees to administer the fund.

[12] Citing *Carpenters Local Union 22 (Graziano Construction Co)*, 195 NLRB 1 (1972).

[13] Citing *Scofield* v. *N L.R.B*, 394 U S 423 (1969).

are more suited to protecting the interests of the beneficiaries of the trust funds under a statutory scheme that has been operating successfully without Board intervention for approximately 30 years.

In *Rose Knitting Mills,*[14] a Board panel found that the General Counsel cannot first assert at a backpay hearing that an employer, who was not named in the original complaint, is a joint employer or *alter ego* of the employer earlier found to have committed unfair labor practices. Here, the employer had been found by the Board to have violated section 8(a) (1) and (3) of the Act for discriminatorily discharging certain employees and was ordered to make them whole for any loss of earnings by reason of the discrimination against them. The backpay specification issued by the regional director named not only the original employer, but a second employer as being liable for backpay as a joint employer with or *alter ego* of the original employer. Although the second employer was not named as a respondent in the unfair labor practice charge or in the original complaint and denied being a joint employer or *alter ego,* the administrative law judge found both employers liable for the backpay.

Without determining the relationship between the original employer and the second employer, the Board found that the latter was not to be held accountable for any of the unfair labor practices found in the earlier proceeding. Despite the fact that the second employer had not been named in the unfair labor practice charge or the complaint, there was no allegation by the General Counsel that the relationship between the two entities could not have been known to him at the time the original complaint issued, nor was there any claim of concealment or deception on the part of either entity. In these circumstances, the panel concluded it was neither equitable nor in compliance with Board procedures to hold accountable a party who had neither opportunity nor notice to defend itself, especially in the absence of a showing that the facts developed in the backpay proceeding could not have been alleged and proved in the original unfair labor practice proceeding.

During the report year, Board panels considered three cases raising the issues of whether previous settlement agreements barred the litigation of certain unfair labor practice allegations.

In *Hollywood Roosevelt Hotel Co.,*[15] the panel majority affirmed the administrative law judge's refusal to allow litigation of the

[14] *Rose Knitting Mills & Boclaire Fabrics,* 237 NLRB No. 123 (Chairman Fanning and Members Penello and Truesdale).

[15] 235 NLRB No. 185 (Chairman Fanning and Member Murphy, Member Jenkins dissenting in part).

allegation that the employer unilaterally discontinued payments to a union benefit fund in view of a previous agreement which settled allegations that the employer had violated section 8(a) (5) and (1) of the Act by refusing to bargain and by unilaterally changing certain working conditions which affected employee hours. In the instant case, the complaint alleged that the employer, by conduct which predated the above-mentioned settlement agreement, unilaterally discontinued payments to various union benefit funds. The administrative law judge found merit in the contention that the finding of a violation on this issue is precluded by the previous settlement agreement since it is well established that a violation cannot be based on presettlement conduct unless there has been a failure to comply with the settlement or unless subsequent unfair labor practices have been committed.[16]

The majority agreed with the administrative law judge's finding that the earlier charge of unilateral changes in terms and conditions of employment clearly encompassed the unilateral cessation of fund payment of which the union was aware prior to the filing of any charges and that, therefore, litigation of this issue was precluded. Furthermore, the majority took issue with the dissent's interpretation of *Steves Sash & Door Co.*,[17] asserting that the case stands for the proposition that a settlement agreement disposes of all issues involving presettlement conduct unless the prior violations were unknown to the General Counsel, not readily discoverable by investigation, or specifically reserved from the settlement by the mutual understanding of the parties. The majority also noted that there was no evidence that the employer's unilateral discontinuance of benefits came within the above-enunciated exceptions.

In his dissent, Member Jenkins, citing *Steves, supra,* stated that "a settlement agreement settles only matters intended to be determined and has no effect on conduct, presettlement or postsettlement, not within the contemplation of the settlement." He concluded in the first instance that, since the charge relating to the unilateral discontinuance of payments to the benefit funds was not filed until after the execution of the settlement agreement, the General Counsel cannot be said to have known about the violation prior to settlement, and that, because of the difference in subject matter, the facts as to benefit funds were not really discoverable

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[16] *Northern California District Council of Hodcarriers and Common Laborers of America, AFL–CIO (Joseph Landscaping Service)*, 154 NLRB 1384 (1965), enfd 389 F 2d 721 (9th Cir. 1968); *Larrance Tank Corp.*, 94 NLRB 352 (1951).

[17] 164 NLRB 468, 473 (1967), enfd. as modified in other respects 401 F.2d 676 (5th Cir. 1968).

by investigation.[18] Second, the dissent interprets *Steves* to mean that the parties may, by means other than specific language in a settlement agreement, express their intention to exclude certain matters from settlement. In the present case Member Jenkins concluded, from all the circumstances, that the parties did not intend to include in the settlement the unilateral termination of benefit contributions since (1) the earlier complaint did not allege the discontinuance of payments; (2) there is no specific reference to this conduct in the settlement agreement although another specific instance of unilateral change is concluded; and (3) the parties did not understand the settlement to include the change in benefit fund contributions, and that violation had gone unremedied. Accordingly, Member Jenkins would not find that the settlement agreement barred a finding of a violation on the unilateral discontinuance of benefit fund contributions.

In two separate cases issued simultaneously and involving the same employer, the same Board panel reached different results when considering whether litigation should be precluded on the basis of a previous settlement agreement. In both cases, the employer sought summary judgment on the ground that the current litigation was barred by an earlier settlement in a related matter. In one *Laminite Plastics Mfg. Corp.* case,[19] the panel denied the motion for summary judgment of the employer who contended that the 8(a) (3) complaint should be dismissed since the alleged misconduct occurred prior to a hearing and settlement in the earlier case, and there was no claim that the settlement had been violated. The panel rejected the employer's argument and found that the settlement did not preclude litigation inasmuch as there was no evidence indicating that the General Counsel was aware or should have been aware of the discharge which preceded the execution of the settlement agreement but which occurred after the investigation and issuance of the complaint herein. Accordingly, the case was remanded to the regional director for appropriate action.

However, in the other *Laminite Plastics Mfg. Corp.*[20] case, the same panel found that the same settlement agreement blocked the litigation of another presettlement discharge where the General Counsel was aware of the discharge prior to the execution of the

[18] The majority disagreed with this contention on the ground that the fact that the charge was filed after the settlement does not imply that the General Counsel was unaware of the discontinuance of the payments Since the union was aware of these facts and there is no indication that the evidence was unavailable to the regional office, the General Counsel's ignorance of the alleged violation at the time of the settlement was not established

[19] 238 NLRB No 121 (Members Penello, Murphy, and Truesdale).

[20] 238 NLRB No. 173 (Members Penello, Murphy, and Truesdale).

settlement agreement and, accordingly, the panel granted the employer's motion for summary judgment and dismissed the complaint in its entirety. The General Counsel was found to have had full knowledge of the facts of the discharge because the dischargee had testified about his own discharge at the presettlement hearing in the earlier complaint and yet he did not specifically reserve this conduct from the settlement agreement. To countenance the General Counsel's failure to take appropriate steps to deal with this discharge, either by amending the complaint or making provisions in the settlement agreement, whether due to inadvertence or otherwise, the panel held, would be a clear abuse of the administrative process and a waste of Board resources.

2. Trial Procedure and Evidence

Although agreeing with respect to other 8(a) (1) violations, the Board, in *C. P. & W. Printing Ink Co.*,[21] split over whether the General Counsel had presented sufficient evidence to establish a *prima facie* case with respect to an 8(a) (1) allegation concerning a threat of plant closure. Relying upon the administrative law judge's crediting an employee's testimony that the employer had made such a threat, and discrediting the employer's denial based on the demeanor of the witness and a thorough analysis of all the testimony, the majority found that the General Counsel had established a *prima facie* case of an 8(a) (1) violation, without further corroborative testimony.

Members Murphy and Truesdale found that the controverted testimony of the sole witness presented by the General Counsel in support of the alleged threat to close the plant, standing alone, did not establish a *prima facie* case. They stated that the witness' testimony alone was not sufficient to meet the burden of proof because (1) the threat was denied; (2) the sole witness failed, on cross-examination, to testify about the threat and failed to mention the same threat in his affidavit given to a Board agent although this was inconsistent with his testimony and raised doubts as to his credibility; and (3) a second witness called by the General Counsel, despite being present at the time the threat was alleged to have been made, did not testify about the threat and therefore adverse inferences should have been drawn from this failure to corroborate the first witness. For these reasons, and because the administative law judge had relied upon "circumstances" rather than demeanor

[21] 238 NLRB No. 206 (Chairman Fanning and Members Jenkins and Penello; Members Murphy and Truesdale concurring in part and dissenting in part).

in crediting the General Counsel's witness, Members Murphy and Truesdale held that the General Counsel had not established, by a preponderance of the evidence, that the employer threatened to close the plant if the union came in.

The majority, however, stated that the issue of whether or not there was a threat to close the plant is one of credibility and that the dissenters were merely substituting their own credibility preference for the administrative law judge's resolutions which were based on the demeanor of the witnesses.[22] Since the administrative law judge credited the sole General Counsel witness on this issue, there was no need for corroboration and therefore it was inappropriate to draw adverse inferences from the General Counsel's failure to present additional testimony in support of the testimony of the credited witness. The fact that the dissenters would have reached a different conclusion in assessing the facts was irrelevant. Absent a clear preponderance of all relevant evidence that convinces the Board that the administrative law judge's credibility resolutions are incorrect, they will not be overruled. The majority found no basis here for reversing the credibility resolutions.

During the report year the Board reconsidered its policies regarding the sequestration of witnesses in unfair labor practice proceedings. In *Unga Painting Corp.*[23] the Board, Member Murphy dissenting, reexamined the Board's exclusion policy under which the administrative law judge had discretion to exclude witnesses from an unfair labor practice hearing and under which it was not an abuse of discretion to exclude all witnesses except the alleged discriminatees who, the administrative law judge reasoned, have a right to be present as complainants. Analyzing their exclusion policy in light of the provisions of Rule 615 of the Federal Rules of Evidence,[24] and following the suggestion of the U.S. Court of Appeals for the Second Circuit [25] the Board decided (1) to exclude,

[22] The dissent denied substituting their own credibility resolutions for those made by the administrative law judge, noting that the administrative law judge had based his credibility resolutions on his analysis of the circumstances rather than on the demeanor of the witnesses. Thus, it is proper for the Board to make an independent evaluation of credibility. *Intl Brotherhood of Electrical Workers, Local Union 38 (Cleveland Electro Metals Co.)*, 221 NLRB 1073, 1074, fn 5 (1975), *Canteen Corp*, 202 NLRB 767, 769 (1973)

[23] 237 NLRB No. 212.

[24] Rule 615 of the Federal Rules of Evidence, effective July 1, 1975, provides:

> Exclusion of Witnesses
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> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

[25] *N.L.R.B.* v. *Stark*, 525 F 2d 422 (1975), cert. denied 424 U.S. 967 (1976).

upon request of a party, all witnesses who are not alleged discriminatees; and (2) to exclude alleged discriminatees only during that portion of the hearing when another of the General Counsel's or charging party's witnesses is testifying about events to which the discriminatees have testified, or will or may testify, on case-in-chief or on rebuttal, unless the administrative law judge finds there are special circumstances warranting the unrestricted presence of the discriminatees or their total exclusion when not testifying. While exclusion, in general, lessens the possibility of false testimony and enhances the ability to ascertain the truth, the Board noted that there are special problems in the exclusion of alleged discriminatees, particularly charging party discriminatees [26] who, under the Board's previous rules,[27] could be excluded from part of a hearing. However, in weighing the importance of the discriminatees' unrestricted presence during the hearing with the objectives of the exclusion process, the overall purposes of the Act, and public policy, the Board decided to alter its existing practice to provide for exclusion of discriminatees to a limited extent as noted above. The Board also concluded that the limited exclusion of discriminatees would effectuate the spirit of Rule 615 and enhance the credibility of Board proceedings.

Member Murphy, in her dissent, agreed that the Board's practice regarding the exclusion of witnesses should be modified. She, however, rejected the rule adopted by the majority since she concluded it will turn the hearing room "into a revolving door without a turnstile" and will deprive charging parties of their right as parties to be present throughout the hearing. She would apply Rule 615 without limitation, i.e., she would not exclude charging party discriminatees at any time, and would, upon request, exclude other alleged discriminatees throughout the hearing, except while testifying, unless their presence were shown by a party to be essential to the presentation of its case.

In her analysis of this issue, Member Murphy pointed out that section 10(b) of the Act requires the Board to follow the Federal Rules of Evidence "so far as practicable," and that Rule 615 requires unlimited exclusion of discriminatees who are not charging parties.

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[26] The majority observed that, while a noncharging party discriminatee is not a party within the Board's definition, such a person has been regarded as a party by the Board.

[27] Sec. 102.8 of the Board's Rules and Regulations provides, in part:

> . . . but nothing herein shall be construed to prevent the Board or its designated agent from limiting any party to participate in the proceedings to the extent of his interest only.

As to noncharging party discriminates, Member Murphy found highly impractical the majority's policy of excluding discriminatees only during that portion of the hearing when another of the General Counsel's or charging party's witnesses is testifying. She stated that the new procedure will create new problems, as practicing lawyers will immediately recognize. The majority's new policy is cumbersome to administer in that discriminatee-witnesses will be constantly entering and exiting the hearing room during the testimony of witnesses. It will require detailed analysis in advance of each prospective witness' testimony by both the General Counsel and charging party in order to ascertain, with questionable certainty, which witnesses "could be present during which testimony." Finally, Member Murphy pointed out that it will result in numerous motions by respondents, with litigation on the issue and additional delay in the proceedings.

With respect to charging party discriminatees, Member Murphy explained that, under Rule 615, charging parties who are natural persons are exempt from exclusion and under sections 102.8 and 102.38 of the Board's Rules are full parties; under all these rules, they are entitled to participate fully as a matter of right unless it can be shown that it is not practicable to do so. Seeing no major impediment to allowing charging parties to be present at all times, and noting that valuable rights will be lost to a charging party who could not be present during the testimony of other General Counsel or charging party witnesses, Member Murphy concluded —unlike the majority—that the charging parties should be permitted to participate fully, unless they choose not to do so.

In *Alvin J. Bart & Co.*,[28] the Board majority agreed with the administrative law judge's reception into evidence of prehearing affidavits of a nonparty witness written by and given to a Board agent and his crediting the sworn statements to the extent they contradicted the witness' testimony at the hearing.

Member Murphy dissented from finding the violation based solely on the crediting of the prehearing affidavit of a nonparty. She concluded that the substantive use of such affidavits to prove the truth of the matters asserted therein, rather than for impeachment purposes only, is prohibited by the Federal Rules of Evidence (FRE), which the Board, under section 10(b) of the Act as amended in 1947, now is bound to follow "so far as practicable" (previously sec. 10(b) had provided the FRE shall not be controlling). While this language indicates the Board has "some

[28] 236 NLRB No 17 (Chairman Fanning and Members Jenkins and Penello, Member Murphy dissenting).

discretion" in applying rules of evidence, this discretion is only as to application of the FRE—unlike other agencies which need not consider the FRE under the Administrative Procedure Act, 5 U.S.C. § 556(D). Member Murphy explained that an inquiry into the Board's power in this area requires, first, identification of the applicable Federal Rule and, second, the determination made as to whether or not its application is "practicable." After discussing the pertinent provisions, she emphasized that the prehearing affidavits herein met the definition of hearsay in FRE 801(c)[29] and were not within the exception to the hearsay rule in FRE 801(d)(1),[30] concluding that it was not only practicable to apply the FRE in this case, but the only correct way to apply the law to the facts.

In so holding, Member Murphy stated that the legislative history of section 10(b) as revised by the 1947 amendments clearly demonstrates that while Congress did not intend to confine the Board to a rigid and technical application of the Rules of Evidence, it did intend to prevent the use of the same type of discretion which had led to charges that the Board was allowing anything at all to be admitted into evidence and was discriminating in favor of its own witnesses. Accordingly, she determined that the Board clearly should not use—as substantive evidence—affidavits such as those involved herein. In fact, she pointed out that there were circumstances here which indicated that the witness did not understand the serious nature of the affidavits and hence did not think it necessary to argue with the Board agent about the accuracy of the affidavits.

In addition, Member Murphy stated that the application of the FRE in this case would not constitute "a highly technical approach" to the Rules of Evidence, emphasizing that the Board, in the past, has generally held that affidavits may not be used as substantive evidence. Member Murphy stated that her position does not constitute a *per se* rule, inasmuch as she would have the Board engage in the analytical process required by section 10(b) in order to determine whether the applicability of the Federal Rule is practicable in a particular situation. She stated that there are any number of instances where the Board need not strictly apply the FRE, but the substantive use of prehearing affidavits is not such an instance.

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[29] FRE 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted."

[30] FRE 801(d)(1) excepts from the hearsay rule prior statements "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition."

In answer to the dissent and in support of their position, the majority asserted that their dissenting colleague would adopt a *per se* rule which automatically excluded hearsay evidence from Board proceedings because section 10(b) provides that the FRE be applied "so far as practicable." They were reluctant to adopt such a rule which mechanically excludes evidence, noting that administrative agencies ordinarily do not invoke a technical rule of exclusion, but admit the hearsay evidence and give it such weight as its inherent quality justifies.

Contrary to their dissenting colleage, the majority also concluded that nothing in the legislative history or the language of section 10(b) required it to be construed to compel the arbitrary rejection of probative evidence since there is no suggestion that the admission of hearsay evidence, as permitted by the Wagner Act, was one of the abuses sought to be remedied. Further, they stated that the fact that the phrase "so far as practicable" gives an administrative law judge "*considerable discretion* as to how closely he will apply the rules of evidence" hardly commands the *per se* rule. Even assuming that the rules pertaining to hearsay would be applicable to Board proceedings, the majority further pointed out that there is disagreement among the experts whether prior statements of a witness who later is subject to cross-examination thereon would be considered hearsay and that the modern trend is that prior inconsistent statements are not hearsay and may be used substantively.[31]

In *Carpenter Sprinkler Corp.*,[32] the Board unanimously agreed that a tape recording, made in the context of collective bargaining, without the knowledge of one of the parties to the conversation, was inadmissible in an unfair labor practice hearing. The charging union's representative, at the conclusion of a bargaining session, agreed to telephone the company president later that afternoon to get the company's reactions to certain proposals. During the phone call the company president, without informing the union representative, recorded the telephone conversation. At the hearing, the administrative law judge admitted the tape recording into evidence for the impeachment purposes, after the union representative testified that the tape recording was a fair representation of the telephone conversation.

In its exceptions, the union argued that the use of such tape recordings as evidence would encourage the secret taping by em-

[31] Although the majority also stated that the hearsay rules were not applicable herein because there had been no objection to the admission of the affidavits, Member Murphy pointed out that under the FRE the affidavits were admissible into evidence for the purpose of impeachment of credibility.

[32] 238 NLRB No. 139.

ployers of telephone conversations with union agents. While the Board has consistently refused to adopt a *per se* rule with respect to admissibility of tape recordings, preferring instead the flexibility of a case-by-case approach, it here held that recordings of conversations which are part of negotiations and are made without notice to a party to the conversation should be excluded from evidence in Board proceedings. Although the Federal courts have permitted the introduction into evidence of tape recordings made without the knowledge of one of the parties, the Board noted that the principles of collective bargaining are not normally at stake in such situations, and that there was the congressional mandate to develop procedural and substantive rules to encourage the parties to engage in open and free discussion in the course of negotiating collective-bargaining agreements. Further, to exclude from evidence surreptitious recordings of negotiations would be fully consistent with the recent *Bartlett-Collins decision* [33] where the Board held that a party who insists to impasse on the presence of a court reporter during contract negotiations violates section 8(a)(5) of the Act. To permit the introduction of the tape recordings herein would encourage parties to make surreptitious recordings of portions of negotiations conducted over the telephone and would discourage the Board policy of fostering free and open communications between the negotiating parties.

3. Other Issues

In *George Banta,*[34] a Board panel considered whether an employer could withdraw from a formal settlement stipulation prior to the Board's approval of the settlement.[35] The employer, the General Counsel, and the charging party unions entered into a settlement stipulation.[36] After nearly 3 months from the time it first signed the stipulation and before the Board had acted on the settlement, the employer sought to withdraw from the settlement because of delay and because new issues had been raised by recent 8(a)(3) charges against it. The employer argued that it had the right to withdraw from the settlement anytime prior to Board

[33] *Bartlett-Collins Company,* 237 NLRB No 106 (1978). See discussion of this case *infra* at p. .

[34] *George Banta Co., Banta Div.,* 236 NLRB No. 224 (Chairman Fanning and Members Jenkins and Murphy).

[35] The settlement stipulation entered into by the parties was subject to Board approval and provided for the entry of a consent order by the Board and a consent judgment by any appropriate United States court of appeals against the employer.

[36] The charging party unions at first objected to the settlement, but later signed the stipulation.

approval since it had been informed that the agreement would not be binding until it had been approved by the regional director, the General Counsel, and the Board. In support of this contention the employer cited the statement from the Board's *Decker* decision [37] that "it is well settled that only formal approval by the Board will make a settlement binding on the parties." The employer contended that the settlement stipulation constituted at best an offer by the employer to settle, which had to be accepted and approved by the Board, a necessary party to the stipulation, before it would be binding. Thus, the employer's withdrawal herein prior to Board approval must be permitted.

The General Counsel, in opposition to the request to withdraw, relied on analogous cases involving the Federal Trade Commission [38] which denied unilateral withdrawal from a consent decree prior to Commission approval to avoid the risk of undermining the consent order procedures as an alternative to lengthy adjudication. He argued that similar policy considerations underlay the Board's settlement procedures and that the Board, in the public interest, must refuse to permit withdrawal prior to final Board approval, since such unilateral withdrawal would undermine the continued efficacy of the Board's settlement procedures and would allow the use of these procedures as a delaying factor. The General Counsel further contended that the language of the settlement agreement relied on by the employer [39] did not establish the right of unilateral withdrawal pending Board approval. Instead, the General Counsel argued that the settlement stipulation imposed two commitments on the employer. First, the employer expressly committed itself to take certain remedial action if and when the settlement was approved by the Board, and the General Counsel, in turn, agreed that such remedial action taken would be considered a full remedy for the alleged violations. The language of the settlement stipulation was addressed to that commitment. Secondly, there was an implied commitment by the employer that the first commitment would remain outstanding until the Board acted, while the General Counsel agreed not to institute litigation while the matter was pending before the Board.

In denying the employer's request to withdraw from the settlement, the panel noted that the basic disagreement between the

[37] *Decker Truck Lines*, 139 NLRB 65, 66 (1962), enfd. 322 F.2d 238, 242 (8th Cir. 1963)

[38] *Johnson Products Co* v. *FTC*, 549 F 2d 35 (7th Cir. 1977), *Ford Motor Co.* v. *FTC*, 547 F 2d 954 (6th Cir. 1976).

[39] The language of the settlement provided that "the Stipulation is subject to the approval of the Board, and shall be of no force and effect until the Board has granted such approval Upon the Board's approval of the Stipulation, the Respondent will immediately comply with the provisions of the order. . . ."

parties, in effect, came down to a disagreement as to the identity of the parties to the settlement stipulation. The panel rejected the view that the Board was a necessary party to the stipulation whose approval was required before there could be a binding agreement to settle and that therefore the employer could withdraw its "offer" any time prior to "acceptance" by the Board. The panel, instead, adopted the views of the General Counsel that, as far as contract principles govern the situation, there was an agreement between the necessary parties, the employer and the General Counsel, which required the employer to maintain and continue its express commitment to take certain remedial action. In so doing, the panel noted that this approach was more in accord with factual, statutory, and policy considerations bearing on the question.

Thus, under the Act, the General Counsel and the Board, respectively, have separate prosecutory and judicatory roles. The General Counsel has the authority to prosecute or not to prosecute, and by entering into the settlement stipulation the employer relinquished certain procedural rights in return for the General Counsel's decision not to litigate the matter. The Board's judicial function, on the other hand, was exercised by its approval or disapproval of the settlement stipulation. The panel reasoned that if the Board were a necessary party whose approval was required before there could be a binding agreement between the General Counsel and the employer, this would not only intrude on the General Counsel's statutory role but also improperly join the prosecutory and judicatory function which the Act has separated. Finally, the panel stated that it would undermine the efficacy of the settlement procedures, as an alternative to lengthy and expensive litigation, to allow unilateral withdrawal rather than requiring the parties to wait until the Board had acted on the settlement. Accordingly, the employer's request to withdraw from the settlement, stipulation was denied.

In *Community Medical Services,*[40] involving a non-Board settlement, the Board was split on whether to grant a charging party's request to withdraw a charge approved by the administrative law judge over the objections of the General Counsel. The settlement between the union and the employer, which proposed to settle the 8(a)(1), (3), and (5) allegations of the complaint, provided for the execution of a collective-bargaining agreement between the employer and the union, reinstatement of strikers and three other

[40] *Community Medical Services of Clearfield, d/b/a Clear Haven Nursing Home,* 236 NLRB No. 102 (Chairman Fanning and Members Jenkins and Truesdale; Members Penello and Murphy dissenting).

employees, and withdrawal of the charge by the union. There was no backpay provision for the strikers who may have been discriminatorily denied reinstatement upon their unconditional offer to return to work.

The Board majority reversed the administrative law judge's approval of the settlement and withdrawal request and directed a hearing on the merits of the complaint. In so doing, they relied upon legal principles set forth in *Robinson* [41] to the effect that the Board's function is to be performed in the public interest and not in vindication of private rights and that the Board will exercise its discretion to dismiss charges only when the unfair labor practices are substantially remedied and the dismissal would effectuate the policies of the Act. In the instant case, the Board majority found numerous deficiencies in the settlement. They noted that the unfair labor practices alleged, if established, would show the employer's conduct willfully and persistently flouted its basic collective-bargaining obligation under the Act, denied employees their protected rights, triggered a long and bitter strike, and demonstrated its contempt for employee reinstatement rights. There was no provision for the posting of the customary notice to employees informing them of their statutory rights. Nor was there any provision made for backpay for the reinstated strikers and employees. The majority did not agree, despite the 60-to-14 employee vote to accept the settlement, that the purposes and policies of the Act would be effectuated by trading off employees' rights to be made whole in return for the employer's agreement to execute a contract, especially in view of the overriding public interest in the effectuation of statutory rights and of the necessity to prevent employees from unfairly bearing the effects of the employer's violations of the Act. Finally, the majority stated that the approval of this settlement would not encourage the friendly resolution of labor disputes and conserve the Board's limited resources, but would encourage wrongdoers to subvert the Act because the settlement did not require the employer to provide adequate relief to employees for unlawful acts.

Members Penello and Murphy strongly dissented, characterizing the case as one of the most important in which they had participated as Board Members. They questioned whether it was the role of the Board to force unwilling employers and unions to continue lengthy and expensive litigation detrimental to all concerned, or whether it was to promote settlement of disputes at the bargaining table. The dissenters found that the union gained more

[41] *Robinson Freight Lines*, 117 NLRB 1483, 1485 (1957).

for the employees through the settlement agreement than it would have through litigation, emphasizing that, under the agreement, all the strikers were returned to their former or substantially equivalent positions, the employees received the benefits and protection of a labor contract, without the need for a bargaining order, and that the collective-bargaining agreement took into account the backpay expectations of the strikers. Members Penello and Murphy also noted that failure to approve the settlement agreement would result in the voiding of the labor contract, and would produce "unwanted, protracted litigation," likely to hamper the parties in ultimately agreeing on a contract. Finally, they declared that such settlement agreements served the public interest, because they attained ends desired by the Board without litigation, thereby permitting the Board to concentrate its limited resources on cases which cannot be resolved under just conditions.

B. Representation Procedure

1. Consideration of Objectionable Conduct Not Covered by Objections

In two cases decided this year the Board was presented with issues involving whether an election may be set aside based on conduct discovered by the regional director, but not subject to a specific objection.

In *American Safety Equipment Corp.*,[42] the Board majority restated and reaffirmed the Board's policy of permitting a regional director to set aside an election based on conduct discovered during his investigation, even though that conduct was not subject to a specific objection. They asserted that the regional director must consider any evidence of a tainted election which is discovered, because to do otherwise would "make a mockery" of the Board's pledge to preserve employee rights to a fair election and would tend to abdicate the Board's "weighty responsibility" to assure the public and the parties that the selection of a bargaining representative will be determined under conditions as nearly ideal as possible. The Board majority found that it would be untenable not to set aside the election when, as in the subject case, the discovered evidence was closely related to other alleged objectionable conduct. They further noted that the policy of permitting the regional director to go beyond conduct specifically alleged in the

[42] 234 NLRB No. 95 (Chairman Fanning and Members Jenkins, Murphy, and Truesdale; Member Penello concurring in the result).

timely filed objections is in harmony with the Board's practice and procedure and the whole trend of modern pleading.

Member Penello concurred in the results of this case, noting that discussion of the procedural propriety of the objections, raised, *sua sponte,* by the regional director, was inappropriate. Accordingly, he maintained that the majority opinion was nothing but an unsought advisory opinion. However, in concurring, Member Penello relied upon the fact that the employer's request for review on essentially this question had been previously denied by a panel majority, and he further expressed the view that the objection involved had been encompassed in the timely filed objections.

In *Dayton Tire & Rubber Co.,*[43] a Board majority, relying on *American Safety Equipment, supra,* adopted the regional director's recommendation for a hearing on employer conduct, discovered by the regional director's investigation, that was not alleged in the union's specific objections. Contrary to the dissent, the majority concluded that (1) there is no inconsistency between the Board's policy and its requirement, expressed in section 102.69(a) and (c) of the Board's Rules, of a "short statement of reasons" for filed objections; (2) according to section 101.121, the Board's Rules and Regulations should be liberally construed; and (3) there is no evidence of widespread abuse of the Board's processes by the filing of unsubstantiated objections or protracted delays caused by prolonged open-ended investigations of objections.

Member Penello, dissenting, would, with the exception of discovered unalleged flagrant abuse of the Board's processes or Board agent misconduct in handling the election procedures, consider only objectionable conduct which has been specifically and timely alleged. He stated that the majority's current policy (1) is contrary to the Board's Rules and Regulations requiring the filing of specific objections and reverts to the pre-1946 rules permitting general statements of objections; (2) vests impermissibly broad discretion in regional directors as to the scope of their investigations; and (3) promotes an open-ended investigatory period, thereby leading to abuse and delay. Further, Member Penello noted that the election proceedings are essentially administrative rather than quasi-judicial in nature and that, in addition to the interest of the parties, the interest of protecting the rights of all employees must be considered.

[43] 234 NLRB No 96 (Chairman Fanning, Members Jenkins, Murphy, and Truesdale, Member Penello dissenting).

2. Opening of Challenged Ballots Prior to the Resolution of Challenges

The Board twice during the fiscal year dealt with the question of whether challenged ballots should be opened prior to the determination of the voter's eligibility in an unfair labor practice proceeding.

In *Monarch Federal Savings & Loan Assn.*,[44] a majority of the Board panel, reversing the regional director, found it inappropriate to open a determinative challenged ballot until the eligibility of the voter, who allegedly had been discriminatorily discharged prior to the election, had been resolved in the unfair labor practice proceedings. The majority based its decision on the fact that unlike in *ILGWU*,[45] relied on by the regional director in his recommendation to have the ballot opened prior to the determination of the voter's eligibility, the voter in the subject case did not waive her rights to a secret ballot nor request that her ballot be opened to resolve the representation issue.

Member Murphy, dissenting, concluded that the instant case presented essentially the same circumstances as *ILGWU* in that the challenged voter had been active in the union's campaign; if she voted for the union, it would be immaterial whether she was ultimately found eligible or ineligible; and rigid adherence to the policy against counting challenged ballots before eligibility is determined would thwart the Board's policy favoring expeditious resolution of questions concerning representation. She stated that the majority, by engaging in the fiction and the procedural formality of protecting the secrecy of the determinative ballot of the voter, an active union campaigner, was sacrificing the interest of all unit employees in determining whether or not they would be represented by the union without a prolonged delay.

A Board panel, in *El Fenix Corp.*,[46] found, contrary to the regional director, that it would not deviate from the normal procedure of holding challenged ballots in abeyance until their voting eligibility has been determined, where the challenged ballots were not determinative, even though those voters had waived their rights to a secret ballot. Member Murphy stated that the facts did not warrant departure from the Board's usual practices. She noted that, while she would open the challenged ballots of voters subject to unfair labor practice proceedings in certain circumstances to

[44] 236 NLRB No 86 (Chairman Fanning and Member Jenkins, Member Murphy dissenting).
[45] *Intl. Ladies' Garment Workers' Union*, 137 NLRB 1681 (1962)
[46] 234 NLRB No 186 (Chairman Fanning and Members Jenkins and Murphy).

expedite the resolution of representation questions, the subject case did not warrant such departure from the Board's usual practices since the challenges to ballots of voters not subject to unfair labor practice proceedings had yet to be resolved.

V

Representation Proceedings

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

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

A. Validity of Stale Showing of Interest

The Board, in *Big Y Foods,*[1] rejected the employer's contention that the petitioning union's showing of interest should be invali-

[1] 238 NLRB No 114 (Chairman Fanning and Members Jenkins, Penello, and Truesdale).

dated because of staleness of the authorization cards obtained in 1971. The processing of the 1971 petition had been stayed by the regional director while the unfair labor practice charges filed by the union against the employer and another union were being resolved. The delay in processing the petition was thus not the fault of the union. The Board found that a claim of such staleness had no bearing on the validity of the original showing of interest but only whether the employees had changed their minds about union representation. Accordingly, the Board found that employees after once expressing an interest in having an election should not be deprived of an election or be required to reprove their showing of interest because of a delay caused by the processing of unfair labor practices.

In *Struthers-Dunn*,[2] the first election had been set aside because the employer's conduct interfered with employee free choice and a second one was directed. In finding without merit the employer's contention that a second election should not be held without a new showing of interest among the present employee complement, a Board panel stated that it was the Board's established policy not to require a current showing of interest when an election is set aside due to a meritorious objection.

B. Units Appropriate for Bargaining

1. Unit Determinations

In the report year, the Board reached a number of unit determinations in a variety of often interesting and novel circumstances. Several Board decisions involving such unit determinations are summarized below.

a. Physicians Unit

Public Law 93–60 amended the National Labor Relations Act to eliminate the exemption from coverage of the Act previously accorded to private nonprofit hospitals. The Board during the fiscal year dealt with the appropriateness of a physicians unit in a medical center.

In *Montefiore Hospital & Medical Center*,[3] a Board panel found appropriate a requested unit of doctors and dentists employed at the employer's health center, rejecting the employer's contention

[2] 237 NLRB No. 126 (Chairman Fanning and Members Jenkins and Penello).
[3] 235 NLRB No 29 (Chairman Fanning and Members Jenkins and Penello).

that the only appropriate unit was one of all professionals at its various facilities. In finding that these employees had a sufficient community of interest apart from the other professionals to warrant the establishment of a separate unit, the panel pointed out that the health center was geographically separate from the other facilities and operated as an autonomous center; there was a minimal amount of interchange with the professionals at the other facilities; the doctors and dentists comprised the entire complement of professionals at the health center and were the only group of health center employees not represented by a union; there was no history of bargaining in the unit sought; and no union sought to represent a broader unit.

b. Single-Location Units

The Board has held that a single-plant or single-store unit is presumptively appropriate absent a bargaining history in a more comprehensive unit or a functional integration so severe as to negate the identity of a single-plant or single-store unit. Thus, for example, even where there was substantial centralization of authority and considerable product integration between two facilities, the Board held that one of the two facilities could constitute a separate appropriate unit if the requested facility retained a substantial degree of autonomy. Under its broad authority, the Board, in determining whether such a unit is appropriate, has traditionally looked to such factors as the community of interest among the employees sought to be represented; whether they comprise a homogeneous, identifiable, and distinct group; whether they are interchanged with other employees; the extent of common supervision; the previous history of bargaining; and the geographic proximity of the various parts of the employer's operation.

In *Big Y Foods,*[4] a Board panel majority refused to find appropriate a unit confined to a single liquor store within the employer's autonomous division consisting of three liquor stores. The majority concluded that the single-store presumption was rebutted inasmuch as the local managers' autonomy was greatly circumscribed and there was considerable central control over the retail stores. The majority noted that local managers had no authority to discipline or discharge employees, that labor relations and employee benefits were administered centrally, that hiring was done centrally, and that all important management decisions were made centrally.

[4] 238 NLRB No 115 (Members Jenkins and Murphy; Member Truesdale dissenting).

Member Truesdale, dissenting, stated that the presumption favoring single-store units can be overcome only by convincing record evidence illustrating the complete submersion of the interests of the single-store unit employees. Noting that the actual day-to-day supervision was done by the local store manager, that there was only a small amount of employee interchange, and that there was no history of bargaining on a multistore level, he was of the opinion that the presumptive appropriateness of the single-store unit had not been rebutted.

In *Bud's Food Stores, d/b/a Bud's Thrift-T-Wise,* a Board panel majority found appropriate the union's requested two single-store units, out of the employer's five retail stores, on the basis that the presumption favoring single-store units had not been rebutted. They found that the managers exercised substantial authority in their respective stores, relying upon the fact that store managers interviewed prospective employees; hired or effectively recommended the hiring of part-time employees; disciplined employees; granted time off; scheduled shifts, vacations, and overtime; adjusted grievances; and evaluated employees. Further, it was the view of the majority that the small number of transfers did not have a significant impact on the continuing identity of the single-store work force or on the separate community of interests of the employees of the individual stores.

Member Jenkins, dissenting, would have found the single-store units inappropriate primarily on the ground that the autonomy of the store managers on personnel matters was severely circumscribed by the authority retained and exercised by the employer's president. The dissent specifically noted that the president did all the hiring, determined wages and benefits, decided whether employees worked full time or part time, issued weekly directives on how the stores were to be operated, and visited the stores daily. Accordingly, in view of the pervasive role of the employer's president, coupled with the geographic proximity of the stores and the interchange between them, Member Jenkins concluded that the presumptive appropriateness of the single-store units had been rebutted.

In *Loffland Bros. Co.,*[6] a Board panel found employees of separate drilling rigs to be separate appropriate units despite the fact that, in the drilling industry, the Board had consistently defined appropriate units in terms of geographic and administrative areas. The panel concluded that, as the rigs in the subject case had a history of relative stability and continuity of the work force,

[5] 236 NLRB No. 149 (Chairman Fanning and Member Murphy, Member Jenkins dissenting).
[6] 235 NLRB No 26 (Chairman Fanning and Members Penello and Truesdale)

"the mere fact that the unit sought by the Petitioner is described in terms of the employees working at a particular rig is not by itself an obstacle to finding such a unit appropriate." The panel found that the employees at the rigs constituted separate appropriate units in view of the autonomy of the individual rig operations, particularly over day-to-day matters of primary concern to employees such as hiring, firing, promotions, and discipline and in view of the relative integrity and independence of the work force at each rig.

c. Other Unit Determinations

In *Denver Publishing Co.*,[7] the employer had filed a petition for a unit of employees in the technical service department (TSD) which was a consolidation of employees represented by two unions who did simple electronic maintenance and new employees who did sophisticated repair and maintenance service on the employer's electronic and computer systems which had previously been subcontracted out. Based on the separate location, supervision, wages, benefits, and hours of work, the employees of TSD were found to constitute an appropriate unit. Further, the panel found that, since 80 percent of the work performed by the department had never been performed by members of either union because it had been contracted out, TSD constituted a new operation so that the union's contracts did not bar the employer's petition. Finding that the case was controlled by *Westinghouse Electric Corp.*,[8] the panel also found that, since the unions, by filing grievances, claimed, in effect, to represent all the employees in TSD, there was a question concerning representation of those employees and that an election should be directed with both unions on the ballot.

In *La-Z-Boy Chair Co.*,[9] a majority of the Board, weighing the relevant factors set forth in the *Mallinckrodt* precedent,[10] rejected a petition to sever tool-and-die employees from a unit of production and maintenance employees. In so doing, the majority noted such factors as (1) the stable, peaceful bargaining history for over 20 years; (2) the functional integration of the production process; (3) the high degree of participation by tool-and-die employees in contract negotiations; (4) the fact that the tool-and-die department included employees of other classifications; (5) the overlapping of supervision; (6) the plantwide seniority; and (7)

[7] 238 NLRB No 33 (Chairman Fanning and Members Penello and Truesdale)
[8] 144 NLRB 455 (1963).
[9] 235 NLRB No. 11 (Members Jenkins, Penello, and Truesdale, Chairman Fanning and Member Murphy dissenting)
[10] *Mallinckrodt Chemical Works, Uranium Div.*, 162 NLRB 387 (1966).

the lack of evidence that the union was qualified to represent the tool-and-die employees or that the intervenor had inadequately represented them. Accordingly, the majority found that maintaining collective-bargaining stability and uninterrupted production outweighed the factors militating in favor of severance, and dismissed the petition.

Chairman Fanning and Member Murphy predicated their dissent on the separate location and supervision of tool-and-die employees, the inadequate representation of tool-and-die employees by the intervenor, the small degree of integration, and the high degree of skill possessed by the tool-and-die employees.

The Board in *Columbia Transit Corp.*,[11] dismissed the union's severance petition without reaching its merits of the appropriateness of the separate unit of full-time drivers. The Board found that the union had failed to participate in a timely fashion in the State Bureau and Board proceedings which had been instituted by the intervenor and had ignored election notices of the State Bureau and the Board posted at the employer's facilities. It also noted that the full-time drivers whom the union sought were aware of the election, and that some of them voted in the State Bureau election which the intervenor won and upon which its contract covering "all his drivers and yard workers" was based. Finding that the union was not without knowledge of the State Bureau or Board proceedings and that it did not participate in either in timely fashion, the Board dismissed the petition because it would not effectuate the policies of the Act to direct a self-determination election.

2. Employee Placement Determinations

A bargaining unit may include only individuals who are "employees" within the meaning of section 2(3) of the Act. The major categories expressly excluded from the term "employee" are agricultural laborers, independent contractors, and supervisors. In addition, the statutory definition excludes domestic servants, or anyone employed by his parent or spouse, or persons employed by a person who is not an employer within the definition of section 2(2).

These statutory exclusions have continued to require the Board to determine whether the employment functions or relations of

[11] 237 NLRB No. 201.

particular employees preclude their inclusion in a proposed bargaining unit.

In *Tops Club*,[12] a majority of the Board overruled the challenges to the ballots of two employees who were the grandsons of the employer's founder, president, executive director, and member of the board of directors [13] and the sons of the assistant executive director. Relying on the fact that the challenged individuals received wages comparable to those of other employees with similar experience and qualifications; received no special benefits and treatment; had been reprimanded; were not supervised by their father; had little contact at work with their father and grandmother; and were financially independent, the majority concluded that the individuals did not enjoy a special status because of their relationship with the employer's officials warranting their exclusion from the bargaining unit. Further, they noted that section 2(3) of the Act, which excludes from the status of "employee" "any individual employed by his parent or spouse," did not preclude their inclusion in the unit because the employer was a nonprofit, nonstock corporation.

Members Jenkins and Truesdale, dissenting in part, took the position, based on the dissenting opinions in *Toyota Midtown* and *Pargas of Crescent City*,[14] that, as close relatives to the employer's highest officials, the challenged individuals did not share a community of interest with unit employees. They also contended that including the challenged individuals in the unit would inhibit other unit employees from enjoying the fullest freedom in exercising their rights under the Act.

In *Cincinnati Assn. for the Blind*,[15] a Board panel majority asserted jurisdiction over the employer's workshop "clients" (individuals with visual and other disabilities), whom the union sought to represent in a production and maintenance unit. The employer contended that the "clients" were not employees within the meaning of section 2(3) of the Act and, even if they were, the Board should not assert jurisdiction to avoid hindering the employer's rehabilitative efforts. The majority distinguished the subject case from *Goodwill Industries of Southern California*,[16] where the

[12] 238 NLRB No 130 (Chairman Fanning and Members Penello and Murphy, Members Jenkins and Truesdale dissenting in part.)

[13] The employer was a nonprofit, nonstock corporation and the board of directors were elected by the employer's voting membership of 400 persons, none of whom was a member of the founder's family

[14] 233 NLRB No 106 (1978), and 194 NLRB 616 (1971).

[15] 235 NLRB No. 198 (Chairman Fanning and Member Jenkins, Member Murphy dissenting)

[16] 231 NLRB No 49 (1977).

Board declined jurisdiction because rehabilitation was the single overriding purpose of the employer-client relationship, and asserted jurisdiction on the basis that the employer's operation was significantly based on economic conditions. In finding that the production and maintenance unit, including "clients," was appropriate, they noted that the "clients" and other employees had common supervision, similar working conditions, worked closely together, and performed interdependent functions.

Member Murphy dissented for the reasons set forth in the dissenting opinions in *Abilities & Goodwill* [17] and *Goodwill Industries, supra,* i.e., she would not take jurisdiction over charitable, nonprofit, noncommercial institutions. She did not find the subject case to be distinguishable from *Goodwill Industries, supra,* as, in both, the employer's primary concern was maintaining work for the handicapped and not maximizing profits. The fact that it must be competitive with commercial enterprises to obtain or retain a market for its product did not alter its character. Member Murphy concluded that the employer's so-called commercial activities were merely ancillary to the rehabilitative object. Accordingly, she would not have asserted jurisdiction.

A Board panel in *Natl. Detective Agencies* [18] was presented with the issue of whether the employer in providing security guards for an exempt international bank and fund shared their section 2(2) exemptions so as to preclude the inclusion of these guards in the unit. Noting that the exempt institutions screened the guards to be employed at their institutions, determined the number of guards needed, scheduled the guards' hours, designated the guards' duties, directed the guards, checked the guards' public image, and either designated or suggested the guards' wage rates, the panel found that the institutions had effectively removed from the ambit of the employer the power to bargain over essential aspects of the guards' employment conditions. Accordingly, the panel concluded that the employer shared the institutions' exemption from the Act with respect to the security guards furnished, and excluded the guards from the unit.

In *Apple Tree Chevrolet,*[19] the employer, an auto dealer did not employ any janitors until after the parties had stipulated to a bargaining unit, including all nonsales employees. The stipulation also stated that the parties did not intend to include or exclude any specific classifications of employees. When parties stipulate to

[17] 226 NLRB 1224, 1230 (1976).
[18] 237 NLRB No. 72 (Members Jenkins, Penello, and Murphy).
[19] 237 NLRB No. 103 (Members Jenkins and Murphy, Member Truesdale dissenting in part).

a unit, the Board's function is to ascertain the parties' intent and honor it if not inconsistent with the Act or Board policy. A panel majority noted that janitors were basically maintenance employees who worked in all but one of the employer's departments; that their hours overlapped with those of unit employees; that they had similar supervision as unit employees; that no other union sought to represent them; and that they would not be included in a unit of car salesmen, and, accordingly, concluded that the inclusion of janitors in the unit was in accord with the general intent of the parties as expressed in the stipulation.

Member Truesdale, dissenting in part, would have excluded the janitors from the stipulated unit on the grounds that they were not included in the stipulation, and that, although in a clear position to do so, the employer did not notify the regional director of the addition of the janitors to the payroll and did not seek to amend the stipulation to include the janitors. He also disagreed with the majority's implication that the janitors would remain unrepresented if not included in the stipulated unit.

C. Objections to Conduct Affecting an Election

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

1. Election Propaganda

In *Shopping Kart Food Market*,[20] the Board majority enunciated the standard for determining whether electioneering statements or propaganda required setting aside an election. The Board majority stated that it would no longer set aside elections on the basis of misleading campaign statements, except where the Board

[20] 228 NLRB 1311 (1977).

processes were improperly involved by deceptive campaign practices or where forged documents were used which voters would be unable to recognize as propaganda. During the fiscal year, the Board dealt with many cases involving the alleged misuse of the Board's processes or forged documents.

In *Wolfrich Corp. d/b/a Thrifty Rent-A-Car,*[21] a panel of the Board considered misrepresentation made by the union's business agent in light of the *Shopping Kart* rationale. The union's business agent telephoned two employees the day before the election. He told the first employee that he was calling from the Board's office after talking to the employer's president and he promised the employee a wage increase if the union won the election; he told the second employee that he had just emerged from a preelection conference, had talked to the employer's president, and promised an increase in pay. The majority, relying on *Shopping Kart, supra,* declined to set aside the election, finding that the union agent's remarks did not improperly involve the Board and its processes, that the reference to the Board's offices was innocuous and did not amount to tacit or implied Board approval of the union's promises of benefits, and that the remarks were not analogous to the forged documents exception of *Shopping Kart.*

Member Jenkins, dissenting, would have remanded the case for a hearing on the grounds that (1) the union's promise of benefits, although generally not objectionable, was presented to employees with tacit or implied Board approval; (2) the union improperly involved the Board and its processes; and (3) the union's conduct was arguably analogous to the forged documents exception of *Shopping Kart.*

In *Monmouth Medical Center,*[22] a majority of a Board panel overruled the employer's objection that the union misused and abused the Board's processes by representing to employees that the Board favored the union in the election. They concluded that the union did not improperly involve the Board in the election by distributing partisan information stating, *inter alia,* that Board attorneys belong to a union and directing employees to call the Board's officer of the day when faced with contradictory statements from the employer and the union. In the majority's view,

[21] 234 NLRB No 76 and 234 NLRB No. 77, a companion case (Members Penello and Murphy, Member Jenkins dissenting)

[22] 234 NLRB No. 50 (Members Jenkins and Penello, Member Murphy dissenting in part).

the union did not create the impression that the Board favored it nor did it disturb the "atmosphere of impartiality."

Member Murphy, dissenting in part, found that the union, by its statements, improperly sought to place the Board in a partisan position with respect to the election and thereby engaged in objectionable conduct. Thus, she concluded that by drawing employee attention to the fact that Board lawyers and agents—"the experts"—have "selected union representation for themselves," and directing employees to call the Board when faced with antiunion claims contradicting what the union had told them, the union was stating, in an unambiguous manner, that the Board "through its unionized attorneys and agents" is prounion and that what the union tells the employees "must be true because the Board will verify" its statements. Because such statements would tend to mislead employees with respect to the Board's fair and impartial role, and as a means of discouraging such attempts to compromise the Board's impartiality, Member Murphy would have directed a second election as soon as possible.

In *GAF Corp.*,[23] the union circulated a campaign leaflet, listing alleged improper employer conduct, which included in the top left-hand corner the words "It's the law," in the top right-hand corner the name of the Board as an agency of the United States Government in the same typeface used in Board election notices, and on the bottom the union's name. A majority of the Board found the form and not the substance of the leaflet to be objectionable, and concluded that it was designed to suggest Board endorsement of the union, just as the use of the letterhead portion of the Board's blank stationery would create the impression that the Board somehow has allied itself with the union. They also held that the fact that the leaflet was not an "official Board document" did not make the leaflet any less objectionable.

Members Jenkins and Penello, dissenting, maintained that since the union had neither converted an official Board document to a partisan use nor conveyed the impression that the Board supported the union the majority decision was contrary to Board precedent. They further asserted that the majority established, in effect a *per se* rule prohibiting a party from using the Board's name on any campaign literature and that this was in conflict with prior precedent.[24]

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[23] 234 NLRB No 182 (Chairman Fanning and Members Murphy and Truesdale, Members Jenkins and Penello dissenting)

[24] *Thiokol Chemical Corp., Hall-Way Plant*, 202 NLRB 434 (1973).

In *Mercury Industries,*[25] a Board panel decided another case concerning election propaganda that contained a reproduction of a Board document. The union distributed a reproduction of a sample Board ballot entitled "Vote for the Union," with an "X" marked in the "yes" box and with the union organizer's name on it. A majority of a Board panel, citing *GAF Corp., supra,* reiterated that the Board's main concern was with form and not the substance of a party's propaganda. Hence, they found that the union's "very use of an altered sample Board ballot creates the impression that the Agency has allied itself with the Union's campaign." The majority further restated adherence to the policy enunciated in *Allied* [26] of not permitting the reproduction of a copy or rendering of the Board's official ballot, other than when it is unaltered in form and content.

Member Penello, dissenting, contended that under *Allied, supra,* and its progeny, the test is whether the source of the alterations of the reproduced ballot was adequately revealed so as not to create the impression that the Board sponsored the additions or alterations. He found that in the subject case the source of the alterations was apparent, and thus he would not set aside the election.

2. Threats

The Board in two cases decided this year was presented with the issue of whether an election should be set aside on the account of threats by one of the parties.

In *Super Thrift Markets, t/a Enola Super Thrift,*[27] a Board panel reversed the administrative law judge and directed a second election following the policy set forth in *Dal-Tex.* [28] Normal Board policy is to direct a new election whenever an unfair labor practice occurs during the critical preelection period since 8(a)(1) violations, *a fortiori,* interfere with the employees' exercise of a free and untrammeled choice in the election. The only exception to this policy is where, based on the number of violations, their severity, the extent of dissemination, the size of the unit, and other factors, it is impossible to conclude that the conduct could have affected the election results. Noting that coercive statements involving interrogations and a serious threat were made by a high employer official to 2 employees out of a unit of 24 employees and

[25] 238 NLRB No 124 (Chairman Fanning and Member Truesdale, Member Penello dissenting).

[26] *Allied Electric Products,* 109 NLRB 1270 (1954).

[27] 233 NLRB No. 66 (Chairman Fanning and Members Jenkins and Murphy).

[28] *Dal-Tex Optical Co.,* 137 NLRB 1782 1786–87 (1962).

that the statements could reasonably be expected to be disseminated and discussed among the employees, a Board panel concluded that the employer interfered with the employees' free choice in the election. Accordingly, the election was set aside and a second election directed.

In *Lyon's Restaurants, A Wholly-Owned Subsidiary of Consolidated Foods Co.*,[29] a majority of a Board panel, reversing the regional director, found that the union committed objectionable conduct by threatening two employees prior to the filing of the petition that if they did not join the union they would not work. As a result, they joined the union. The regional director, citing the *Ideal Electric & Mfg. Co.* rule,[30] had found that since the threats occurred prior to the filing of the election petition they could not be the basis for setting aside the election. However, the majority concluded that, under the circumstances herein similar to those in *Gibson* [31] which involved a prepetition waiver of union dues, an exception to the *Ideal Electric* rule must be made as was made in *Gibson*. They noted that, in light of the prior bargaining history between the employer and a sister union and the length of time the employer continued to deduct dues, the employees may well have been led to believe that the union could have carried out its threat. Accordingly, the majority set aside the election.

Member Murphy dissented from the reliance on prepetition conduct. She found the subject case distinguishable from *Gibson* in that it did not involve "unique circumstances connected with prepetition waivers" or the Supreme Court's holding in *Savair*.[32] She further pointed out that almost any union prepetition threat could be construed as an improper inducement to sign authorization cards or as creating an erroneous impression of union strength and thus would arguably come within the *Gibson* exception. She asserted that the exception was "on its way to swallowing up the rule" and the result here was in part a reversal of *Ideal Electric*. Accordingly, in agreement with the regional director, she would have found that the threats were barred from consideration by *Ideal Electric* and she would have certified the union.

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[29] 234 NLRB No 10 (Chairman Fanning and Member Jenkins, Member Murphy dissenting in part).

[30] 134 NLRB 1275 (1961).

[31] *Gibson's Discount Center, Div. of Scrivner-Boogaart*, 214 NLRB 221 (1974).

[32] *N.L.R.B.* v *Savair Mfg. Co.*, 414 U.S. 270 (1973).

D. Regularity of Ballots

Section 9(c)(1) of the Act requires all Board elections to be conducted by secret ballot. The Board through its entire history has gone to great lengths to establish and maintain the highest standards possible to avoid any taint of the balloting processes.

In *Abtex Beverage Corp.*,[33] a ballot marked with an "X" in both boxes was challenged. The "X" in the "No" box had been scratched over with circular marks. A majority of the Board, overruling *Duvall Transfer & Delivery Service*,[34] concluded that the ballot be counted as a "yes" vote, and not voided, as it was readily apparent that the voter was attempting to obliterate the "No" vote. They maintained that the voter should not be penalized for using a pen and apparently not being able to erase or obliterate the "No" marking. Accordingly, the majority found that the ballot clearly reflected the voter's intent to vote "yes" and should be counted.

Members Jenkins and Murphy, dissenting, would adhere to *Duvall, supra,* wherein, under identical facts, the Board upheld the challenge to the ballot because the intent of the voter was not clearly revealed. They maintained that it was unclear and unduly speculative whether the voter was attempting to obliterate or erase the "No" vote mark as the marking could be interpreted as emphasizing a "No" vote. The dissenters found it unwarranted herein for the Board to speculate as to what probably occurred in the voting booth and they were unwilling to speculate as to the voter's choice by choosing between two valid designations.

In another case, *Staco*,[35] a majority of a Board panel sustained the challenge to a ballot that was not marked on its face, but had "No" written on the reverse side. In so doing, despite contrary decisions of the U.S. Courts of Appeals for the Fourth, Fifth, and Eighth Circuits,[36] they adhered to the policy enunicated in *Columbus Nursing Home*[37] of invalidating ballots marked only on the back on the ground that the voter's intent based upon such markings must be almost entirely speculative. They also noted that the voter displayed a remarkable indifference to the instructions and to the time-honored election procedures in general.

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[33] 237 NLRB No 203 (Chairman Fanning and Members Penello and Truesdale; Members Jenkins and Murphy dissenting)

[34] 232 NLRB No. 133 (1977)

[35] 234 NLRB No 101 (Chairman Fanning and Member Penello; Member Murphy dissenting in part)

[36] *Roberts Door & Window Co* v. *N L R B*, 540 F 2d 350 (8th Cir. 1976), *N L.R.B* v *Tobacco Processors*, 456 F 2d 248 (4th Cir. 1972); *N L R B* v *Titche-Goettinger Co.*, 433 F.2d 1045 (5th Cir. 1970).

[37] 188 NLRB 825 (1971)

Member Murphy dissented on the basis that she would have counted the ballot as it clearly indicated that the voter intended to vote against union representation. She would reevaluate the Board's *Columbus Nursing Home* policy of not counting ballots that are marked only on the back, as it is not consistent with the Board's policy of counting ballots, even if irregularly marked, that clearly indicate the voter's preference.

In *Trico Products Corp.*,[38] a Board panel was presented with the issue of whether there had been a reasonable possibility of irregularity in the conduct of the election, with regard to unused ballots in the custody of the Board agent, requiring the election to be set aside. The Board agent had set a brown envelope of unused ballots on the table 30 feet behind her while she set up the election booth. The envelope had been closed with a string. Five minutes later, when she returned to the envelope, she noticed that the string and envelope flap were torn. The ballots were still inside the envelope and the envelope was in the same position on the table. Noting that not every conceivable possibility of irregularity requires setting aside an election, but only reasonable possibilities, the panel concluded that a reasonable possibility of irregularity had not been demonstrated as (1) the envelope had been in her presence although not in actual sight at the opposite end of the polling area and was out of her view for only a brief period; (2) there was no evidence that any person approached the envelope when it was not in her actual possession; (3) no one who was in the polling area at that time complained of any irregularities; (4) there was no evidence to indicate that the string had not been torn before the Board agent placed it on the table; and (5) circumstantial evidence suggested that the envelope was damaged by the Board agent's attempting to "jam" it into her briefcase prior to her placing the envelope on the table.

E. Transfer of Affiliation of Representative

The Board will grant a motion to amend a certification when the vote transferring affiliation is an accurate reflection of the desires of the participating members, when there have been no complaints or opposing actions taken by the employees involved, and when there would be a continuity of their present organization and representation.[39]

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[38] 234 NLRB No. 61 (Chairman Fanning and Members Jenkins and Penello).
[39] *Hamilton Tool Co*, 190 NLRB 571 (1971).

In *New Orleans Public Service,*[40] the Board was faced with the question of whether or not to grant the union's petition to change the name of the certified bargaining agent from the association to that of the union, a local of the IBEW. In opposing the petition, the employer contended (1) that the unit employees were deprived of a fair opportunity to consider affiliation and to vote thereon with adequate safeguards; and (2) that affiliation with the IBEW would result in a change in the association's identity and in the nature of the bargaining relationship between the employer and the certified representative. The Board found these contentions to be without merit. As to the first contention, the Board noted, *inter alia,* that (1) the unit employees were given the opportunity to consider affiliation at several meetings where officers of the association and IBEW representatives were available for questioning; (2) the motion to affiliate was distributed to all unit employees prior to the scheduled meeting when the affiliation vote was to be taken; (3) in the secret-ballot election, the employees overwhelmingly voted for affiliation; and (4) significantly, no employee objected to the procedure followed, challenged the validity of the election, or claimed he was deprived of due process. Accordingly, the Board concluded that there was record evidence that the requirements considered important by the Board were met.

Affiliation with the IBEW, the employer claimed in its second contention, would result in a new set of bylaws, new system of internal union discipline, different fee schedules, and the involvement of people outside the unit in removal of officers, investigation of membership applications, the amount of initiation fees, and the expenditure of funds. These circumstances, the employer argued, involved a substantial change in the actual identity of the bargaining representative, giving rise to a question concerning representation which could only be resolved by a Board-conducted election. In support of its contention, the employer relied upon the Third Circuit's *American Bridge* decision.[41] The Board found no merit in the contention that the continuity of the bargaining representative had been broken, pointing out that the existing contract, the employees covered by the contract, and the local officers remained the same after affiliation and that it was clear that all contractual commitments made by the association would be honored. Further, the Board noted that the certified association did not oppose the amendment of the certification. Concluding, in

[40] 237 NLRB No 134 (Chairman Fanning and Members Jenkins, Murphy, and Truesdale).
[41] *American Bridge Div., U.S. Steel Corp.* v. *N.L.R.B.,* 457 F 2d 660 (1972).

all these circumstances, that there had been no essential change in the identity of the bargaining representative within the meaning of Board precedent, the Board granted the union's petition and amended the certification to reflect the current name and affiliation of the certified union.

VI

Unfair Labor Practices

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

This chapter deals with decisions of the Board during fiscal year 1978 which involved novel questions or set precedents that may be of substantial importance in the future administration of the Act.

A. Employer Interference With Employee Rights

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

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

1. Forms of Employee Activities Protected

The forms the protected concerted activity may take are numerous. The following cases decided by the Board during the past year provide a representative sample of the types of activity found by the Board to be protected.

a. Concerted Nature of Activity

In *Supreme Optical Co.*,[2] a Board panel unanimously agreed that five employees who had received permission from their immediate supervisor to leave the plant to appear at a state unemployment compensation hearing on behalf of another discharged employee were engaged in protected concerted activity. Hence, the panel agreed with the administrative law judge that the employer violated section 8(a)(1) when the general manager terminated the employees on their return to the plant because they had attended the hearing. In so finding, the panel affirmed the administrative law judge's findings and conclusions: (1) that unemployment compensation benefits are related to the employment relationship; (2) that attendance at the hearing on behalf of the discharged employees was protected concerted activity; (3) that the employer's production problems did not outweigh the employees' protected rights; and (4) that the discharges were because of the employees' attendance at the hearing, not because of the economic reasons alleged by the employer.

Two members of the panel expanded upon the administrative law judge's rationale. They held that it was immaterial that the subject of the concerted activity was or was not directly related to the employees' own conditions of employment with their employer, citing as an example the protected status of sympathy strikers. The panel majority also distinguished cases involving the processing of claims against employers by single employees, pointing out that the appearance of the five employees in support of a former employee was a concerted activity. Finally, the panel majority stated that "[t]his is not to say that we would necessarily reach the same result if advance permission to be absent had not been sought and secured. . . ."

Member Jenkins indicated that he was satisfied with the administrative law judge's decision and he adopted it in its entirety.

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[2] 235 NLRB No. 193 (Chairman Fanning and Members Jenkins and Murphy).

In *Ohio Valley Graphic Arts,*[3] a Board panel held that an employee who engages in individual action aimed at promoting a union is engaged in protected concerted activity, and individual acts in furtherance of that objective do not lose their protection merely because others are not consulted. Nor is the protection of the Act lost because the individual may have acted for personal reasons. Applying these principles in the instant case, the panel agreed with the administrative law judge that a named employee would have been lawfully discharged by a certain date, but reversed his finding that the employer did not violate the Act by accelerating the employee's discharge because he engaged in activities promoting a union. In so doing, the panel specifically found the administrative law judge's reliance on the employee's failure to consult with the union or fellow employees and on the fact that the employee may have acted for personal reasons to be misplaced. Thus, the panel characterized the instant situation as a classic case where the employer takes retaliatory action against a dissatisfied employee who urges his fellow employees to seek union representation. The only difference here was that the employer's action had only the effect of accelerating an already planned discharge; this difference affects the remedy, not the illegality of the conduct.

In *Springfield Library & Museum Assn.,*[4] a Board panel found that the employer violated the Act by disciplining an employee (union president) for her criticism of the employer's chief administrative officer in the union's newspaper. The administrative law judge had found that, although the employee's remarks were union or concerted activity, they were not protected by section 7 of the Act because they lacked specificity and were "unrelated to any protected union or concerted interest." In disagreeing, the panel pointed out that "specificity and/or articulation are not the touchstone of union or protected concerted activity" and that once the concerted nature of the words is established, the burden is on the employer to show that the words were published with knowledge of their falsity or with reckless disregard of whether they were true or false. Thus, although the employer may have been offended by the employee's "rhetorical hyperbole," the Board further noted that the Supreme Court said in *Linn:*[5] "[T]he most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth." Applying these principles, the

[3] 234 NLRB No 90 (Members Jenkins, Murphy, and Truesdale).
[4] 238 NLRB No. 221 (Chairman Fanning and Members Jenkins and Penello).
[5] *Linn* v. *United Plant Guard Workers of America, Local 114,* 383 U.S. 53 (1966).

panel found that the remarks constituted protected concerted union activity because they were related to work problems, i.e., the manner in which the employer's administrators were chosen and also found that the employer made no claim that the words were "false" or made with "reckless disregard of whether they were true or false." Accordingly, the employer's reprimand of the employee violated section 8(a) (1) and (3) of the Act.

In *Capital Times Co.*,[6] a Board panel held that an employee's solo activities on behalf of nonstatutory employees were not concerted activities entitled to protection by section 7 of the Act. Here, the respondent newspaper suspended an art-reviewer-critic who failed to carry out an assignment to review an opera because he refused to cross a picket line which had been established by an organization representing persons employed by a state university. The parties stipulated that the pickets were not employees within the meaning of the Act. Unlike the administrative law judge, the panel found merit in the employer's contention that the employee's conduct was not entitled to be protected under the Act because he had engaged in the activity with persons who were not employees within the meaning of the Act. In reaching its decision to dismiss the complaint on this ground,[7] the panel found that the instant case was controlled by *Panaderia Sucesion Alonso*,[8] involving activities by one statutory employee with an agricultural laborer who was not an employee as defined in section 2(3) of the Act and therefore was not entitled to the benefits and protections of section 7.

b. Strike Activity

In *St. Regis Paper Co.*,[9] a Board panel reaffirmed its original finding [10] that the employer unlawfully discharged eight employees who participated in a strike in support of a recognitional demand of one of two unions, both of which had made representational claims on the employer. The issue addressed by the panel was related to the Board's *Midwest Piping* doctrine which generally mandates that an employer maintain neutrality when presented with conflicting representational claims. The question here was whether concerted activity by employees in support of one of the

[6] 234 NLRB No 62 (Members Jenkins, Penello, and Truesdale).

[7] The administrative law judge had dismissed the complaint on the grounds that suspension was warranted because the employee had failed to give timely notice to the employer of his intention not to carry out his assignment.

[8] 87 NLRB 877 (1949).

[9] 232 NLRB No. 166A (Chairman Fanning and Members Penello and Murphy).

[10] 232 NLRB No. 166.

representational claims was rendered unprotected because the employer might violate section 8(a)(2) and (1) of the Act if it recognized one of the claimants in face of the question concerning representation raised by the other competing union. The panel resolved the question negatively and, with due regard to the Sixth Circuit's contrary position, adhered to its *Hoover Co.* holding.[11]

In finding the employees' activity to be protected, the panel noted that the Board's *Hoover* precedent relied, for the most part, on a "perceived distinction between cases in which an employer is asked to commit an illegal act and those in which it is asked to commit what might amount to an illegal act," and that the *Hoover* principle arose out of precisely the uncertainties as to whether employer acquiescence therein would prove unlawful. Thus, it pointed out that an employer's acquiescence in a demand for recognition in face of competing representational claims need not necessarily result in a violation of the Act because (1) recognition could be extended to one or both claimants on a members-only basis; (2) the rival claim might prove to be defective; or (3) the rival claimant might choose to withdraw its petition or fail to press its claim through unfair labor practice procedures. The panel also acknowledged the possibility that acquiescence in one of the competing claims may prove to be unlawful. It pointed out, however, that an employer may lawfully hire replacements when faced with concerted activity in support of a recognitional demand the employer believes it may not meet and that replacement of employees imposes no greater burden on the employer than termination of employees. Thus, the panel concluded that the *Hoover* principle asks no more of an employer presented with competing claims than of an employer faced with a single claim.

In the instant case, the panel also noted that the employer's basic contention in support of the discharges was that it was "*without knowledge of its employees' involvement in the MWA strike* and that the employees were discharged *solely because they failed to report to work for two weeks without notifying management* of their absence." The panel stated that this contention, coupled with the other record evidence, revealed an absence of *Midwest Piping* implications for the discharges. Accordingly, the panel affirmed its original decision and order.

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[11] 90 NLRB 1614 (1950), enforcement denied 191 F 2d 380 (6th Cir. 1951). After the employer filed in the Sixth Circuit a petition for review of the Board's original decision and order herein, the Board filed a motion indicating that it wished to reconsider its earlier decision in which the Board, though fully considering its *Hoover Co* decision, did not comment on the administrative law judge's reliance on the Board's, as opposed to the Sixth Circuit's, adverse *Hoover* holding. The court granted the motion.

In *Goya Foods*,[12] the Board majority extended the Supreme Court's principle in *Nolde* [13] to no-strike clauses and held that the no-strike clause in the parties' contract had coterminous application with the employer's duty to arbitrate under the expired contract and extended beyond the term of the contract. Hence, the Board found that the strike to force reinstatement of previously discharged employees which began 1 day after the contract expired was unprotected as the employees were bound to their agreement not to strike over this matter. In arriving at their decision, the majority pointed out that the parties did not dispute the fact that the contract covered the discharges, that the only permissible means of settling the dispute over the discharges during the life of the contract or thereafter was arbitration, and that they did take the matter to arbitration. In addition, they found that the words "during the life of the agreement" contained in the no-strike clause did not expressly negate that the duty not to strike should continue with the duty to arbitrate. Finally, the majority found it unnecessary to pass on the effect of additional subsequent demands which might be lawful because the reinstatement of discharged employees remained part of strikers' demands and therefore the strike was unprotected at all times.

Chairman Fanning, who concurred in the result, disagreed with his colleagues that the no-strike promise did not end with the contract. He read the parties' contract to specifically state that the no-strike proviso ended with the contract and found, accordingly, that the post-contract strike to protest employee discharges was protected. However, he further found that the strike lost its protection when the object of the strike changed to include demands for a new contract containing wage improvements and recognition of a rival union. Chairman Fanning commented that the employer's potential for violating section 8(a)(2) by acceding to the additional demands would have been more than a "mere possibility."

In *Newport News Shipbuilding & Dry Dock Co.*,[14] a Board panel found that employees who participated in a brief work stoppage were engaged in protected concerted activity and that the discharge of one employee and the reprimand of other employees violated section 8(a)(1). The record showed that the employees who were engaged in welding and shipbuilding activities on an

[12] 238 NLRB No. 204 (Members Jenkins, Penello, Murphy, and Truesdale; Chairman Fanning concurring).

[13] In *Nolde Bros. v. Local 358, Bakery & Confectionery Workers Union, AFL–CIO*, 430 U.S. 243 (1977), the Supreme Court found that the duty to arbitrate extends beyond the contract term, if over a matter covered or created by the contract

[14] 236 NLRB No. 197 (Chairman Fanning and Members Penello and Truesdale).

exposed platform did not work for 20 minutes on a February morning when the temperature was below freezing and there was strong wind blowing. The panel found that during that brief period of time, the employees were waiting for a response from management as to whether they were going to be sent home and were not attempting to bring pressure on the employer to send them home, which was the type of conduct contemplated by the no-strike provision of the contract. Since the employees' action was purely informational and was not an attempt to subvert the grievance and arbitration procedure, the Board concluded that the brief work stoppage was not violative of the no-strike provision of the applicable contract and therefore the disciplinary action taken against employees violated section 8(a)(1) of the Act.

During the report year the Board considered several cases in which employers discharged employees who engaged in a sympathy strike or honored another union's picket line. The employers contended, *inter alia,* that the *Redwing* doctrine [15] which created a partial exception to the employees' right to refrain from crossing a picket line entitled them to discharge employees for the purpose of preserving the efficient operation of their businesses.

In *Torrington Construction Co.*[16] after noting that the right to engage in a sympathy strike or to honor another union's picket line is a right created and protected by the Act, a Board panel held that while a sympathy striker may be replaced under *Redwing,* where the evidence disclosed that the sole purpose was the continued efficient operation of the employer's business, such employee may not be discharged. The Board noted the substantial difference between replacement and discharge and was of the view that the *Redwing* sympathy strikers here were akin to economic strikers who were entitled to reinstatement upon unconditional application, if not permanently replaced. Since the record in this case showed that the employer did not intend simply to replace the two drivers who refused to deliver concrete to a site where a primary picket line had been set up, but, instead, discharged them in no uncertain terms, the panel found that the employer was not privileged to do so under *Redwing.*

In addition, the Board found that the parties' contract gave the employees the right to respect a primary picket line so that the employer's right under the *Redwing* doctrine to replace the sympathy strikers was clearly and unmistakably waived. Accordingly, the panel found that the discharges violated section 8(a)(1) and

[15] *Redwing Carriers & Rockana Carriers,* 137 NLRB 1545 (1962).
[16] 235 NLRB No. 211 (Chairman Fanning and Members Jenkins and Penello).

(3) not only because they effectively blunted the employees' attempt to give allegiance to a union's lawful picket line, but also because they were in derogation of the employees' attempt to enforce their contractual rights.

Similarly, in *Gould, Switchgear Div.*,[17] a Board panel held that the employer violated section 8(a)(1) by discharging two employees because they participated in a 6-hour sympathy walkout and refused to work behind or cross an informational picket line established by other employees. The employees' action was in sympathy for the division of construction employees of the union who were conducting informational picketing against a nonunion contractor that was performing electrical work in the expansion of the employer's plant. In finding the discharges violative of section 8(a)(1), the panel affirmed the administrative law judge's finding that the *Redwing* doctrine afforded the employer no defense to its discharge of the two employees and noted the Board's recent *Torrington* decision, *supra*, finding that such strikers may be replaced when necessary to the continued operation of the employer's business, but they may not lawfully be discharged.

c. Informational Activity on Company Property

In *Holland Rantos Co.*,[18] a Board panel affirmed the administrative law judge's conclusion that the employers violated section 8(a)(1) by denying employee pickets access to an industrial park for primary picketing of their employer which leased space in the industrial park. The four employers, the three real estate companies which owned the park and the pickets' employer used private guards to deny access for picketing within or at the main entrance of the industrial park. Instead, the pickets were restricted to a grassy knoll on the western side of the industrial park, public property owned by the township, and were not permitted to picket on the public road because it was too dangerous due to the unsafe conditions arising from the heavy traffic.

The panel affirmed the administrative law judge's conclusion that, on balance, picketing at the employer's property within the industrial park was required. In arriving at this conclusion, he found that the facts here came within the Board's decision in the *Peddie* case as modified by the Board's second supplemental deci-

[17] 238 NLRB No. 88 (Chairman Fanning and Members Murphy and Truesdale)
[18] 234 NLRB No. 113 (Chairman Fanning and Members Jenkins and Murphy)

sion in the *Scott Hudgens* case.[19] Specifically, the administrative law judge found that the evidence showed, *inter alia,* that the restricted picketing on public property was dangerous to the pickets and was ineffective because the union was unable to identify and reach important segments of those doing business with the pickets' employer. Furthermore, he found that the use of mass communications media by the union was an unreasonable alternative here, inasmuch as the union was unable to identify specifically its intended audience, not having the names and addresses of the employer's customers and suppliers.

In *Firestone Tire & Rubber Co.,*[20] a Board panel found that the employer violated section 8(a)(1) and (3) by discharging an employee, a union steward, for refusing to remove from his car signs advocating a boycott of the employer's products as a condition for his continued use of the employee parking lot. The signs, which stated "Support URW" (the union) and "Don't Buy Firestone Products," were used by technical employees, who had continued to work, to show support for striking employees of a sister local which was conducting an economic strike and consumer boycott, as publicized by the picket line at the main entrance of the employer's plant. Reversing the administrative law judge, who concluded that the disciplined employee's section 7 rights were outweighed by the employer's property rights because the activity occurred during worktime and was directed to nonemployees, the Board panel found that an employee's section 7 rights must be balanced with an employer's managerial rights rather than its property rights and that, but for the fact that the parking lot was on the employer's premises, the employee was clearly engaged in protected concerted activity. In balancing rights herein, the panel noted that the boycott signs were located on the employee's car in a lot primarily used by employees. It further found that the signs were not taken into work areas, did not interfere with the employee's ability to perform assignment tasks, and did not otherwise interfere with the employer's management rights. In addition, the Board noted that the signs did not disparage the employer's products and were not analogous to cases involving an offensive, obscene, or obnoxious message. Finally, the Board

[19] *Frank Visceglia & Vincent Visceglia t/a Peddie Buildings,* 203 NLRB 265 (1973), enforcement denied 498 F 2d 43 (3d Cir 1974), *Scott Hudgens,* 230 NLRB 414 (1977) The administrative law judge provided an extensive discussion and analysis of these cases and the application of *N L R B* v *Babcock & Wilcox Co*, 351 U S 105 (1956), as they relate to the balancing of employees' sec. 7 rights and employer property rights and noted that the Board had found in *Scott Hudgens* that picketing employees were entitled under sec 7 to at least as much protection as the nonemployee organizers in *Babcock & Wilcox.*

[20] 238 NLRB No 186 (Members Jenkins, Penello, and Truesdale).

found that it was immaterial that the disciplined employee might have had alternative means to convey his message. In these circumstances, the panel concluded that the employer's managerial rights did not outweigh the employee's section 7 rights. Accordingly, the employee's discharge was found to have violated section 8(a) (1) and (3).

2. Discharge of Supervisors

In *Belcher Towing Co.*,[21] a Board majority held that the employer violated section 8(a) (1) by discharging a tugboat captain because of his failure as a supervisor to report to management the presence of a union official aboard his vessel in disobedience of the duty imposed on him by the employer's order under its unlawful no-solicitation rule. In arriving at this finding, they noted that their dissenting colleagues agreed that the employer's no-solicitation rule was unlawful and that the employer discriminatorily denied union representatives access to its vessels. In addition, finding that the record showed that the employer required its captains to enforce the unlawful no-solicitation rule and to engage in surveillance of employees, the majority concluded that, in this context of extensive violations of the Act, it could not be gainsaid that the employer unlawfully required its captains to commit unfair labor practices. Accordingly, the majority decided that the captain was fired precisely because he failed to comply sufficiently with the employer's illegal demands and because he failed to enforce the employer's antiunion policies as set forth in its invalid no-solicitation rule.

Members Penello and Murphy, dissenting, found that the captain, an admitted supervisor, was not discharged for refusing to enforce the employer's invalid no-solicitation rule but, rather, because he refused to supply the employer, as lawfully directed, with information he had legitimately obtained in the course of performing his supervisory duties. Consequently, they found the discharge to be lawful. Although concededly the captain was discharged for failing to report the presence of a union organizer on board his ship, the dissenters found that nothing in the employer's instructions to the captain suggested that he was to engage in illegal activities such as surveillance of employee union or protected concerted activity, or that the information to be reported would be used for unlawful purposes. Thus, the dissenters

[21] 238 NLRB No 63 (Chairman Fanning and Members Jenkins and Truesdale; Members Penello and Murphy dissenting).

concluded that the instructions were separate from the no-solicitation aspects of the employer's rules and bore only a tangential relationship to them. The dissenters found that the captain, having lawfuly obtained the information, had every right to pass it on to his superiors, and they in turn had every right to require him to do just that and lawfully to discipline him for failing to do so.

3. Representation at Disciplinary Interviews

Section 9(a) of the Act, which provides for exclusive representation of employees in an appropriate bargaining unit, contains the following proviso: "*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."

In two cases during the 1975 report year—*Weingarten* and *Quality* [22]—the Supreme Court upheld the Board's determination that section 7 of the Act gives an employee the right to insist on the presence of his union representative at an investigatory interview which he reasonably believes will result in disciplinary action. The Court concluded that the Board's holding "is a permissible construction of 'concerted activities . . . for mutual aid or protection' by the agency charged by Congress with enforcement of the Act . . . ."[23]

During the report year, the Board had occasion to apply the principles set forth in *Weingarten* and *Quality* in a number of cases.

In *Amoco Oil Co.*,[24] a Board panel held that the employer acted lawfully when it effectively acquiesced in an employee's wholly proper refusal to submit to an interview without union represen-

[22] *N.L.R.B.* v *J. Weingarten*, 420 U.S. 251, *Intl. Ladies' Garment Workers' Union, Upper South Dept., AFL–CIO* v *Quality Mfg. Co.*, 420 U.S. 276.

[23] *Weingarten, supra* at 260. In that case, the Supreme Court found that the right to union representation inheres in the sec. 7 right to act in concert for mutual aid and protection, arises only in situations where the employee requests representation, applies only to situations where the employee reasonably believes the investigation will result in disciplinary action, may not be exercised in a manner which interferes with legitimate employer prerogatives and the employer need not justify its refusal, but may present the employee with a choice between having the interview without representation or having no interview, and imposes no duty upon the employer to bargain with any union representative attending the investigatory interview.

[24] 238 NLRB No. 84 (Members Penello, Murphy, and Truesdale).

tation by dispensing with the interview entirely. Thus, the Board found that an employer may dispense with an interview altogether if it does not wish to conduct an interview with a union representative present. It pointed out that an employee's statutory right to refuse to submit without union representation to an interview which he reasonably fears may result in his being disciplined does not impose upon employers the absolute obligation to comply with all such requests. Instead, an employer has an option to dispense with the interview entirely just as the employee has the option either to dispense with the interview and any benefit such interview might confer on him or to proceed with the interview without union representation. The credited testimony here showed that, after the employee repeatedly insisted upon union representation, the employer superintendent simply informed the employee of his suspension in one sentence and made no attempt to question the employee, to engage in any manner of dialogue, or to participate in any other interchange which could be characterized as an interview. In these circumstances, the Board found that the employer lawfully exercised its option to dispense with the interview which it desired. Further, the panel regarded the precedent in *Certified Grocers,*[25] upon which the administrative law judge relied to find a violation of section 8(a)(1) of the Act, as inapposite since the employer therein proceeded with the planned interview after refusing the employee's requst for union representation.[26]

In *Glomac Plastics,*[27] the Board was presented with an issue of whether an employee has a right to representation at an investigatory interview in the absence of a recognized union. In this case, although the union had been certified as the employee representative, the Board panel found that the employer had engaged in bad-faith bargaining designed to oust the union. The panel refused to draw a distinction between union-represented employees and employees who have chosen union representation but have been deprived of the benefits of that representation by the employer's unlawful refusal to bargain. It found that the national labor policy of encouraging good-faith collective bargaining would be undermined if an employer's own misconduct were allowed to reduce or eliminate the employee's right to have a union represen-

[25] *Certified Grocers of California, Ltd.*, 227 NLRB 1211 (1977)

[26] In addition, noting that the employee herein was suspended in accord with a management decision reached prior to his demand for representation, the panel found that substantial evidence in the record as a whole failed to sustain the General Counsel's burden of proving that the disciplinary action of suspension taken against the employee was, under the circumstances, violative of sec 8(a)(1) of the Act Accordingly, the complaint was dismissed in its entirety

[27] 234 NLRB No 199 (Chairman Fanning and Members Jenkins and Truesdale)

tative present. Further, noting that the Supreme Court's *Weingarten* and *Quality Mfg.* decisions, *supra,* are clearly grounded on section 7 of the Act which guarantees the right of employees "to engage in . . . concerted activities for . . . other mutual aid or protection," the Board panel concluded that "Section 7 rights are enjoyed by all employees and are in no wise dependent on union representation for their implementation." Accordingly, the panel held that the employer violated section 8(a)(1) by refusing to permit a member of the union negotiating committee to accompany an employee to an interview with a supervisor and by disciplining the employee for refusing to participate in the interview without union representation.

4. Other Forms of Interference

In *Texaco,*[28] a majority of the Board found that the employer independently violated section 8(a)(1) of the Act by bypassing the incumbent union and dealing directly with the employees to settle grievances. This violation arose in the context of the employer's unilateral change of the employees' starting and quitting times which the majority, declining to defer to the parties' contractual arbitration procedure, found violated section 8(a)(5) of the Act. The unilateral change precipitated grievances seeking to reinstate the earlier starting time and to recover premium pay. While the grievances were pending, the employer told employees that it would not reinstate the previously existing work hours, or even discuss the matter, unless the premium pay grievance was dropped or resolved against the union. The majority found that the employer violated not only its obligation to bargain under section 8(a)(5), but also its contractual obligation to bargain about any changes in the employees' condition of employment, by conditioning such bargaining on the employees giving up their statutory and contractual rights to file a grievance. By so conditioning bargaining, they found that the employer violated section 8(a)(1) of the Act. In response to their dissenting colleague, the majority noted that the union's success in pursuing the grievance arbitration, despite the employer's unlawful efforts to prevent it from doing so, hardly rendered the employer's unlawful conduct more acceptable under the statute.

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[28] *Texaco, Producing Dept., Houston Div.*, 233 NLRB No 43 (Chairman Fanning and Members Jenkins and Murphy, Member Penello dissenting) See discussion of this case at p 38. *supra.*

In his dissent, Member Penello noted that the 8(a)(1) allegation that the employer unlawfully bypassed the union and dealt directly with the employees stemmed from and was incidental to the central issue which he would have deferred to the arbitration procedure. He asserted that the employer was attempting to settle two grievances by granting one if the other were dropped, and that the fact that the union pursued the grievances to and through arbitration demonstrated that the employer did not inhibit access to the grievance procedure. Accordingly, he found that the 8(a)(1) conduct alleged was not the type of interference with the grievance procedure which would make deferral inappropriate.

In *U.S. Postal Service*,[29] a Board panel found that the employers did not violate section 8(a)(1) of the Act by converting an employee's discharge into a suspension in return for his agreement "not to grieve the suspension under the contract procedure or to appeal his suspension to the Equal Employment Opportunity Commission or under the Veterans' Preference Act." The General Counsel argued that the employee had the statutory right to grieve his suspension under the contract or before appropriate governmental agencies and that, by conditioning the conversion of the discharge into a suspension upon the employee's waiver of appeal rights, the employer violated the Act. In disagreeing with the General Counsel and dismissing the complaint, the panel noted that the employee was "precluded from appealing the suspension, and only the suspension by means of the various procedures" and that he was not required to withdraw any charge filed with the Board or to refrain from filing charges or from engaging in protected concerted activities in the future. In short, the agreement settled one dispute and did not extend or apply to any right to grieve other matters which might arise in the future.

In *Perko's*,[30] a Board panel unanimously agreed with the administrative law judge that instructions from the employer's president to a supervisor to reduce the hours of two employees constituted a threat in violation of section 8(a)(1). The administrative law judge found that one of the two employees overheard the president's remarks and concluded that the remarks were "calculated" to have an impact on the employee's exercise of her section 7 right to seek collective representation for the employees. A majority of the panel, noting that the employer did not know the employee overheard the remarks, indicated they did

[29] 234 NLRB No. 116 (Chairman Fanning and Members Penello and Murphy).
[30] 236 NLRB No. 107 (Members Jenkins, Murphy, and Truesdale).

not rely on the administrative law judge's conclusion that the remarks were "calculated" to have an impact on the employee's exercise of section 7 rights. Instead, the panel majority relied on the principle that "intent is not material to a finding of coercion within the meaning of section 8(a)(1) of the Act." Hence, the panel majority found the violation based on the tendency of the comments to interfere with, restrain, or coerce the employee in the exercise of her section 7 rights.

Member Jenkins indicated he would affirm the administrative law judge's finding of a violation.

B. Employer Assistance to Labor Organizations

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

In *Lyndale Mfg. Corp.*,[31] the Board unanimously held that the employer violated, *inter alia*, section 8(a)(2) and (1) by recognizing and entering into a collective-bargaining agreement containing a union-security clause with one union based on a card check despite a "continuing" demand for recognition by another union. The record showed that Local 107 made a "continuing" demand for recognition and offered to prove its majority status by submitting to a card check by an impartial third party. The employer told Local 107 that it doubted Local 107's majority status and it also made several misleading statements concerning the prematurity of the recognition demand that lulled Local 107 into not pursuing the demand further. Six weeks later, however, the employer recognized and entered into a contract with Local 424.

The Board rejected the employer's contention that Local 107 had abandoned its claim, finding that any inaction by Local 107 resulted from the employer's misleading statements that the recognitional demands were premature. Furthermore, based on the timing of the employer's recognition of Local 424 which was found to demonstrate the bad faith and pretextual nature of the refusal to recognize Local 107 on grounds of alleged prematurity, the Board inferred that the employer was aware of and favored Local 424 at that time—an inference which was consistent with and supported by the employer's precipitate negotiation of a

[31] 238 NLRB No. 179.

contract with Local 424. In addition, the Board found that the inducement of Local 107's inactivity and the failure to notify Local 107 of the card check not only had the effect of removing an interested rival organization from employee consideration, but also precluded the possibility of a dual card issue with the derivative possibility that Local 424 would have had to use unreliable authorization cards to establish its majority status. In concluding that the employer afforded preferential treatment and material assistance to Local 424 in violation of section 8(a)(2) and (1) of the Act, the Board found it unnecessary to rely on *Midwest Piping & Supply Co.*, 63 NLRB 1060 (1945).

C. Employer Discrimination in Conditions of Employment

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

1. Discipline of Union Stewards

In *Precision Castings*,[32] a Board panel held, contrary to the administrative law judge, that the employer violated section 8(a)(3) of the Act by suspending five union stewards, who had participated in an unauthorized and unsanctioned strike, because of their status as union officers. In finding merit in the employer's contention that it was entitled to discipline the stewards because they failed to fulfill their responsibilities under the no-strike clause of the parties' collective-bargaining agreement, the administrative law judge also adverted to a clause corollary to the no-strike provision providing that the union shall "take all reasonable steps to restore normal operations" in the event of a work stoppage.

The Board panel, reversing the administrative law judge, found that the fact that the disciplined employees participated in an unauthorized strike in breach of a valid contract provision does

[32] *Precision Castings Co., Div of Aurora Corp., a wholly owned subsidiary of Allied Products Corp*, 233 NLRB No 35 (Chairman Fanning and Members Jenkins and Murphy).

not legitimize the employer's action in the situation herein. The panel pointed out that the employer's freedom to discipline anyone remained unfettered so long as the criteria employed were not union-related. In this case, the employer admitted that the reason for selecting these five employees for discipline was that each held the position of shop steward, but contended that, under the terms of the contract, it could hold the shop stewards to a greater degree of accountability for participating in the strike. In rejecting the employer's contention, the panel concluded that discrimination directed against an employee because of his union office is contrary to the plain meaning of section 8(a)(3) and would frustrate the policies of the Act, if allowed to stand.[33] Accordingly, the employer's disciplinary action was found to be violative of the Act.

In *Gould Corp.*,[34] a majority of the Board affirmed the administrative law judge's finding that the employer violated section 8(a)(3) because its discipline of an employee was based on the employee's union status rather than on his conduct as an employee and also affirmed his reliance on *Precision Castings, supra,* in finding the violation here. In response to their dissenting colleagues, the majority pointed out that it was a fundamental axiom of our national labor policy that "an individual cannot be discriminated against because of his union status." Here, the union steward joined approximately 50 other employees in a 2-hour walkout; he neither instigated nor led the stoppage, but he alone was discharged. The majority found that the union steward was singled out for discipline solely because he was a steward, and he was discharged not because of his action as an employee, but because of his lack of action as a steward. In this latter connection, the parties' contract had a no-strike clause and required union officers to "use every reasonable effort to terminate such unauthorized action." While finding that the contract was binding between the employer and the union, the majority found that it did "not grant the employer the power to enforce it by discharging union officials" and that the employer's "recourse is against the union entity rather than against the individual who serves the unit by holding union office." Otherwise, the majority pointed out,

[33] The panel found *J P Wetherby Construction Corp*, 182 NLRB 690 (1970), relied on by the administrative law judge, was not on point, noting that in that case the steward was discharged for having fomented a strike in violation of a no-strike clause and for his leadership role in the work stoppage and not because he was a steward The panel further pointed out that the suspended stewards in the instant case had not been active in either calling or conducting the strike and concededly were disciplined solely because they failed to urge the strikers to return.

[34] 237 NLRB No 124 (Chairman Fanning and Members Jenkins and Murphy, Member Truesdale concurring in part and dissenting in part, Member Penello dissenting)

an employer could intervene in a union's internal affairs in a way that is specifically barred to unions in the corollary situation by section 8(b)(1)(B), which prohibits restraint or coercion of an employer in the selection of its representative for the purposes of collective bargaining or the adjustment of grievances.

Member Truesdale, dissenting as to the majority's 8(a)(3) finding, cited provisions from the parties' contract which, in effect, provide for disciplining employees who take part in unauthorized work stoppages and obligates the union to take affirmative steps to terminate unauthorized work actions by employees. Yet, the union steward, Member Truesdale found, not only failed to take any steps to end the unauthorized work stoppage, but actively encouraged its continuation. In urging dismissal of the 8(a)(3) allegation, Member Truesdale further stated that *Precision Castings* was not sound either as a matter of law or as public policy, and should be overruled; and that it was well established that an employer faced with an unprotected strike in violation of a no-strike clause need not discharge or otherwise discipline *all* employees who participate as the majority's position would appear to require. In the circumstances here, he concluded that it was not unlawful for the employer to discipline a union agent who took steps to prolong the strike.

Member Penello, in a lengthy dissent, found that the collective-bargaining agreement placed a number of affirmative duties on the union steward in the event of an unauthorized work stoppage and that the discharged union steward not only did nothing to bring the work stoppage to a conclusion, but also affirmatively aided and assisted the stoppage. As a result, Member Penello would have found that the employer did not violate section 8(a)(3) by discharging the steward for his willful failure to fulfill his duties pursuant to the parties' contract. In arriving at the opposite conclusion, Member Penello asserted that the majority completely ignored the following relevant factors: (1) that the steward was discharged not solely because he was a union steward, but rather because, in his position as a union steward, he failed to fulfill his affirmative duties under the collective-bargaining agreement to end the illegal work stoppage; (2) that to violate section 8(a)(3) of the Act a discriminatory discharge not only must be union-related, but must also have as its purpose the encouragement or discouragement of union membership; and (3) that the fundamental importance of the grievance-arbitration system and its companion no-strike agreement to the settlement of labor-management disputes, as mandated by Congress, applied by

Congress, applied by the courts and the Board, and consistently interpreted in a long line of arbitral authority, would be seriously undermined by this decision. In addition, he discussed the fallacy of the *Precision Castings* rationale which is that the stewards were disciplined *not solely* because they were stewards, but also because they failed to fulfill their duties as stewards under the contract. He also commented on the disturbing practical effect of the majority's opinion, which results in an employee who becomes a union steward acquiring a battery of *benefits* and *protections* without an iota of *burdens* and *responsibilities*. Furthermore, he discussed cases in support of the proposition (1) that a union has a greater duty than rank-and-file employees to uphold the no-strike clause of a contract; and (2) that it is unreasonable to expect an employer to discharge or discipline every employee who participated in an illegal work stoppage.

In *Indiana & Michigan Electric Co.*,[35] a Board panel unanimously adopted the administrative law judge's finding that the employer violated section 8(a)(1) and (3) by suspending five employees only because they held the position of union steward, while all other participants in the unauthorized work stoppage were given written warnings. The administrative law judge found that the *Precision Castings* case was dispositive of the instant case. In arriving at his conclusion, the administrative law judge found that *Precision Castings* provided more justification for discipline than did this case. Thus, he found that the union's obligation under the contract as to unauthorized work stoppages was more explicit in *Precision Castings* and that, unlike the stewards who engaged in picketing in *Precision Castings*, in the instant case, three stewards actually made efforts to halt the strike and the other two merely ceased working after the strike began. In these circumstances, the administrative law judge concluded that the employer's contract must not take precedence over the clear rights of employees guaranteed by the Act and that the more severe suspensions violated section 8(a)(1) and (3) of the Act.

In *Owens Corning Fiberglas*[36] a Board panel held that the employer violated section 8(a)(3) and (1) by suspending and later discharging an employee because of his leadership role in the union. The record showed that (1) the union leader was openly drinking alcoholic beverages in the plant on the last day before Christmas along with approximately 13 other employees; (2) such

[35] 237 NLRB No. 35 (Chairman Fanning and Members Jenkins and Murphy).
[36] 236 NLRB No. 32 (Members Penello, Murphy, and Truesdale).

drinking patterns before Christmas occurred in prior years without discipline of employees for such conduct; and (3) the union leader and the union were specifically told that the union leader was being singled out and disciplined because he was a union officer and, as such, was being held to a higher standard of conduct than other employees who engaged in the same misconduct. Finding that such disparate treatment of an employee based on his union activities clearly tends to discourage employees from actively participating in union affairs, the panel concluded that the union leader's discipline violated the Act.

2. Other Forms of Discrimination

In *Bruce Duncan Co.*,[37] the administrative law judge found, without discussion of the motive for the closing, that the employer violated section 8(a)(3) by closing one of its offices because the employer could reasonably have foreseen that the closing would "chill unionism" at one or more of its other facilities. In reversing the administrative law judge, the Board panel pointed out that the permanent closing of an employer's business is not an unfair labor practice proscribed by section 8(a)(3) unless evidence is elicited to support the following two findings: (1) the closing was motivated, at least in part, by a purpose to chill unionism in any of the remaining facilities of the single employer; and (2) that the employer could reasonably have foreseen such an effect.[38] It noted that the Board has found an 8(a)(3) violation, in the absence of direct evidence, where it could fairly infer that the employer's conduct met the two-pronged test of *Darlington, supra.* Among the factors the Board considers are: contemporaneous union activity at the employer's remaining facilities, geographic proximity of the employer's facilities to the closed operation, the likeliness that employees will learn of the circumstances surrounding the employer's unlawful conduct through employee interchange or contact, and representations made by the employer's officials and supervisors to the other employees. Applying these principles, the panel dismissed the 8(a)(3) allegation, finding no evidence in the instant case that would fairly support the inference that the employer's conduct was motivated by a desire to disparage the union interests of its other employees or that the employer could have reasonably foreseen such an effect.

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[37] 233 NLRB No. 176 (Chairman Fanning and Members Jenkins and Murphy)

[38] *Textile Workers Union of America v Darlington Mfg. Co.*, 380 U.S. 263 (1965).

In *Cameron Iron Works,*[39] a Board panel considered whether or not the employer violated section 8(a)(3) by refusing to honor two employees' revocation of their dues-checkoff authorizations. The employees had signed dues-checkoff authorizations which, under the collective-bargaining agreement, required notice only to the employer for revocation to be effective. Later, the employer and the union agreed to modify the dues-deduction procedure to require an employee seeking to revoke his authorization to give written notice to both the employer and the union. Thereafter, the two employees sought to revoke their dues-checkoff authorizations, but the employer refused to honor the valid revocations after the union insisted it had not received notice from the employees. The administrative law judge recommended dismissal of the complaint because the parties could lawfully modify the revocation procedure without the individual assent of the affected employees. In finding contrary to the administrative law judge that the employer violated section 8(a)(3) by refusing to honor the valid revocations, the panel relied on the language of the proviso to section 302(c)(4) of the Act to find that a checkoff authorization is a contract between the employer and the employee, the terms of which are required by statute to be specified in writing. It concluded that it would frustrate the purposes of section 302(c)(4) to hold that an employer and union can, by their subsequent agreement, change the terms of the statutorily required contract without obtaining the employee's signature on a new authorization card reflecting the parties' agreement. To so hold, the panel further found, would undermine the 302(c)(4) prohibition of authorizations which are irrevocable for more than 1 year, because any attempted revocation not in compliance with the changed procedure is ineffective, and the employee thus loses his opportunity to revoke for another year. Accordingly, the panel held that the employer's refusal to honor the employees' valid revocations violated section 8(a)(3).[40]

In *Webco Bodies d/b/a Webco Pacific,*[41] a majority of the Board found that the record evidence established that, during an economic reduction in force, seven employees were discriminatorily discharged, rather than being laid off temporarily, because they had engaged in union activity. In arriving at this conclusion, the

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[39] 235 NLRB No 47 (Chairman Fanning and Members Penello and Truesdale)

[40] The panel also found that the union's insistence that the employer refuse to honor the revocations violated sec 8(b)(1)(A) and caused the employer to violate sec 8(a)(3), thus violating sec 8(b)(2) of the Act

[41] 237 NLRB No 192 (Chairman Fanning and Members Jenkins and Truesdale, Members Penello and Murphy dissenting in part).

majority found that the employer failed to adequately explain why it chose to permanently terminate the seven employees. Thus, they noted that in a similar reduction in force for economic reasons 2 years earlier a substantial number of employees were only temporarily laid off rather than permanently discharged, despite the fact found that there was no evidence in the record that, at the time of the earlier layoff, the employer had some grounds for anticipating an upswing in business that would, within a reasonable period of time, require the recall of at least some employees. Furthermore, the majority pointed out that the discharges, absent adequate explanation, were suspect since the normal expectation is that an employer would prefer to rehire tried and capable employees. Finally, the majority found that the wording of the layoff notice underscored the employer's intent to preclude the terminated employees from voting in the anticipated election and to undermine the union's strength at the polls. In these circumstances, the majority found that the employees were discriminatorily discharged because of their union activities in violation of section 8(a)(3) of the Act.

Members Penello and Murphy, dissenting in part, found that the seven employees were properly discharged for lawful economic reasons with no discriminatory motive. Thus, the dissenters found that (1) there was insufficient work for the seven employees; (2) the employer was having economic difficulties and was suffering from a cash shortage requiring "economic adjustments if the payroll was to be met"; (3) the layoffs were based on seniority; and (4) there was no evidence of independent violations of section 8(a)(1) or other indicia of union animus. In addition, they noted that, at the time of the discharge, no representation petition had been filed, and asserted that the majority's finding that the layoff notice was intended to preclude the laid-off employees from voting in the election was specious and transparently erroneous. Finally, the dissenters argued that any pattern or practice with regard to layoffs could scarcely be discerned from the earlier layoff.

In *Loomis Courier Service,*[42] a Board panel held that the employer violated section 8(a)(3) by discriminatorily terminating its Manteca office employees and thereafter by recalling them as "new hires." Chairman Fanning and Member Murphy found that the record showed that the employer terminated its Manteca employees in order to exert pressure on them in support of the

[42] 235 NLRB No. 60 (Chairman Fanning and Member Murphy, Member Jenkins concurring in part and dissenting in part).

employer's bargaining position, while, at the same time, the employer continued to service the Manteca area routes with new employees as replacements. They found that, by taking the drastic action of discharging its employees for a coercive purpose, the employer exceeded the limits of permissible conduct which allow employers to continue to operate with replacements without disturbing the employee status of their regular work force. Relying on *Great Dane Trailers*,[43] Chairman Fanning and Member Murphy found the employer's conduct to be so inherently prejudicial to employee rights that no other proof of antiunion motive was needed, even if evidence were introduced that the employer's conduct was motivated by business considerations.

Member Jenkins, in a separate concurring opinion, agreed with his colleagues that the employer's lockout and its concomitant discharge of the Manteca branch drivers were inherently destructive of its employees' protected rights to bargain collectively and violated section 8(a)(3) of the Act without further inquiring into the matter of antiunion motivation.[44]

D. Employer Bargaining Obligation

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

1. Voluntary Recognition of Representative

In *Brown & Connolly*,[45] the employer met with a union representative and a majority of its work force, all of whom, it was told, had joined the union and were wearing union buttons. The union claimed a majority and asked for recognition. The employer's president acknowledged that the union represented a majority of the employees and stated that he recognized the union.

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[43] *N.L.R.B. v. Great Dane Trailers*, 388 U.S. 26 (1967).

[44] Member Jenkins indicated that a more complete explication of the record facts underlying the 8(a)(3) violation was necessary to establish an independent violation of sec. 8(a)(1) (by warning employees that the Manteca branch would be closed and the Manteca drivers would lose their jobs) which his colleagues refused to find.

[45] 237 NLRB No. 48.

Thereafter, the employer refused to bargain, contending that it had no obligation to bargain absent commencement of any negotiations between the parties. Contrary to the employer and in agreement with the administrative law judge, the full Board found that once the fact of recognition has been established additional evidence to confirm the fact of a valid oral recognition is not required, for the bargaining obligation arises upon voluntary recognition and continues until there has been a reasonable opportunity for bargaining to succeed. Accordingly, since the employer's refusal to bargain constituted a withdrawal of recognition and a reneging of its commitment to bargain, the Board adopted the administrative law judge's finding of an 8(a)(5) violation.

In *Jerr-Dan Corp.*,[46] the administrative law judge had concluded that at a meeting with the union the employer admitted that the union represented a majority of the unit employees and orally agreed to recognize the union and negotiate with it. However, while finding that the employer had withdrawn its oral recognition, he refused to find a violation of the Act because no substantial action was taken in confirmation of, or in reliance upon, the recognition. The full Board reversed the administrative law judge and found an 8(a)(5) violation, specifically quoting from the *Brown & Connolly* decision to the effect that additional evidence to confirm a valid oral recognition is not required, for the bargaining obligation arises upon voluntary recognition.

In *Trevose Family Shoe Store*,[47] the full Board adopted the administrative law judge's conclusion that there was no obligation to bargain because there was "no credited objective evidence that the [employer] recognized the union or committed itself (impliedly or otherwise) to bargain." In this case, an official of the employer met with a union representative who presented him with authorization cards. The official "thumbed through them once, maybe twice" and then returned them without having verified the authenticity of the signatures. Subsequently, the employer never agreed to negotiate, did not acknowledge that the union had a majority, and never recognized the union by any other statements or actions. In the absence of voluntary recognition, the Board adopted the recommendation that the complaint alleging a violation of section 8(a)(5) of the Act be dismissed in its entirety.

In *Haberman Construction Co.*,[48] the full Board adopted an administrative law judge's decision that the employer violated

[46] 237 NLRB No. 49.
[47] 235 NLRB No 175.
[48] 236 NLRB No. 7.

section 8(a)(5) of the Act by unilaterally abrogating its 8(f) agreement with the union at a time when a majority, if not all, of the employees in the appropriate unit, were union members.[49] It found that the employer's reliance upon *R. J. Smith Construction Co.*,[50] and other cases involving contractual relationships under section 8(f), was misplaced. These cases had not held that an employer could repudiate an 8(f) agreement while the union had a majority. The Board also cited, generally, the Supreme Court's decision in *Higdon Contracting Co.*[51] in this regard.

Member Penello, although agreeing with the result reached by the majority, stated that, under *Dee Cee Floor Covering* [52] and *Higdon, supra,* an 8(f) agreement is enforceable only for the term of the particular project where the union has established a majority if the employer hires on a project-by-project basis, and that, therefore, the employer would be free to repudiate the 8(f) agreement once the project is completed. Accordingly, he would limit the remedy to the duration of the projects underway when the employer repudited its agreement with the union.

2. Double-Breasted Operations

In *A–1 Fire Protection & Corcoran Automatic Sprinklers,*[53] a Board panel considered, in light of the Supreme Court's decision in *South Prairie Construction Co.* v. *Local 627, Operating Engineers,*[54] the problem of a single employer with two identical operations, of which one is union and the other is not. The panel noted that the Court in *South Prairie* held that "finding that two affiliated companies constitute a single employer does not require that a collective-bargaining agreement with one of the companies be extended to the employees of the other and does not imply that the employees of each of the two companies do not comprise separate appropriate bargaining units." [55]

In the instant case, the panel found untenable the administrative law judge's conclusion that the employers (A–1 and CAS) violated section 8(a)(5) of the Act by transferring work from CAS to A–1, thus withdrawing recognition from the union. In so finding, the panel noted that CAS and A–1 were organized on the same day to perform union and nonunion business. When CAS

[49] The unit was defined as all employees engaged in carpentry work on the employer's Austin, Texas, jobsites, excluding guards, watchmen, and supervisors.

[50] 208 NLRB 615 (1974).

[51] *N L R B* v *Local Union 103, Ironworkers* [*Higdon Contracting Co.*], 434 U S 335 (1978)

[52] 232 NLRB No. 72 (1977).

[53] 233 NLRB No 9 (Members Jenkins, Penello, and Murphy).

[54] 425 U.S 800 (1976).

[55] *Id.* at 805.

signed its first collective-bargaining agreement, it had no employees and it sought out the union. From the record facts, the panel concluded that the parties did not intend to include A–1 employees in the most recent contract and that they thereby "at least inferentially stipulated to the appropriateness of the unit." In the panel's view, "the [u]nion should not now be permitted to avoid the terms of the contract or the scope of the unit to which it voluntarily agreed by claiming an unfair labor practice in the [employers'] refusal to extend the CAS contract to A–1." Further, the panel concluded that, since the union was cognizant of and aware of the competitive situation that gave rise to the double-breasted operations, the employment of one company or the other to get the work could "hardly be attributed to any sinister purpose or unlawful motive on the part of the [employers] but must be considered the result of changes in the demand for contracts to be performed under union conditions." Accordingly, the 8(a)(5) allegations of the complaint were dismissed.

Appalachian Construction & SE-OZ Construction Co.[56] presented the Board with another opportunity to consider the ramifications of the Supreme Court's decision in *South Prairie*. In this case, Appalachian entered into a collective-bargaining agreement with the union to perform maintenance work for an electric utility at a particular power station. The work was hindered by work stoppages and absenteeism such that the utility canceled its agreement with Appalachian. After a brief interlude, Appalachian rebid on the maintenance contract, specifying this time, however, that the work would be performed by nonunion labor via a subcontract to a subsidiary, SE-OZ, which had completed its own project. The primary contract between Appalachian and the union was still valid and enforceable, but the employers failed to apply that contract to SE-OZ. On these facts, the Board panel concluded that—in contrast to *South Prairie*—it was not faced with a "double-breasted operation," with two separate appropriate units, since "[t]here were no parallel and simultaneous operations," by the two companies and "[t]his was not an 'arm's-length' subcontracting arrangement." Rather, it concluded that Appalachian and SE-OZ were a single integrated employer, and their employees constituted a single appropriate unit. Accordingly, contrary to the administrative law judge, the panel found the employers violated section 8(a)(5) by refusing to honor the terms and conditions of the collective-bargaining agreement by which they were bound.

[56] 235 NLRB No. 99 (Chairman Fanning and Members Jenkins and Penello).

3. Multiemployer Bargaining

In *Ruan Transport Corp.*,[57] a panel majority found that the employer did not violate section 8(a)(5) of the Act when it refused to execute a multiemployer collective-bargaining agreement negotiated by the union with the multiemployer council and separately with certain individual employers. The majority, pointing out that multiemployer units are consensual in nature, adopted the administrative law judge's conclusion that the employer was not bound by the group bargaining despite a provision in an earlier contract in which individual employers who became parties to the contract acknowledged that they were a part of the multiemployer bargaining unit. Although the employer had argued before the administrative law judge that the provision was ambiguous, the majority assumed *arguendo* that it was clearly written and unambiguous, and they noted that "such a bare covenant by the [employer] by which it agreed to be a part of a multiemployer bargaining group does not itself suffice to clearly demonstrate that the [employer] delegated authority to the [c]ouncil to represent it in future negotiations with the [u]nion." The majority, therefore, reviewed the employer's actions to determine if the employer actually pursued a group course of action with regard to labor relations, and found that it had not since (1) the employer never participated in and was not informed of the dates or location of the subsequent 1976 multiemployer negotiations; and (2) prior to the commencement of negotiations between the union and the council, the employer wrote the union of its intent to negotiate separately, and thereafter they met and discussed the substantive terms of an agreement, including those embodied in the multiemployer contract, but failed to reach an agreement. In these circumstances, the majority concluded that the employer had intended to and did pursue a course of individual bargaining, and that it was not bound by the group agreement.

Member Jenkins, dissenting, agreed with the majority that "[t]he sole test to be used in these instances is whether the [employer] has indicated an unequivocal intention to be bound in collective bargaining by group rather than by individual action." In his view, however, the recognitional clause of the earlier collective-bargaining agreement was unambiguous and was sufficient to establish the employer's unequivocal intent to be bound by the group action despite the fact that it had not formally joined the multiemployer group and never participated in bar-

[57] 234 NLRB No. 31 (Members Penello and Murphy, Member Jenkins dissenting)

gaining on the multiemployer level. Member Jenkins then reviewed the employer's actions subsequent to the signing of the earlier contract and determined that it had failed to withdraw from the multiemployer unit in a timely and unequivocal fashion. Since multiemployer negotiations occurred before the employer wrote its letter to the union and even if the letter were considered to be a timely attempt to withdraw from the multiemployer group, it was not effective as it was not an unequivocal manifestation of an attempt to withdraw. He would have, therefore, found a violation of section 8(a)(5).

In *Typographic Service Co., et al.*,[58] a panel majority found that the employers in a multiemployer bargaining unit were free to withdraw unilaterally from the unit because of "unusual circumstances" which resulted in the effective dissolution of the unit. The majority found that, following a total impasse in multiemployer bargaining and a union-called strike, the union contacted each employer separately and (1) offered to end the strike if the employer reinstated the terms of the expired contract; (2) assured each employer that it was free to operate under the terms of the expired contract or to sign a separate agreement with the union; and (3) "offered to meet with the employers singly or collectively," with or without their multiemployer bargaining representative, the PIA. According to the majority, the union then bypassed the PIA and bargained individually with 7 of the 17 employers, members of PIA. These employers entered into separate oral agreements which reinstated the expired contract. During these negotiations, the union offered to execute a separate agreement with one employer based on a final contract negotiated either with PIA or with two nonunit employers. Thereafter, the PIA representative, because of the union's conduct, including the contractual arrangements with the 7 employers, notified the union that the members were withdrawing from the unit and that he would represent all 17 employers on an individual basis. Despite the union's professed desire to engage in multiemployer unit bargaining, it continued to engage in individual bargaining with three employers. The majority, therefore, concluded that the union's conduct had effectively fragmented and destroyed the integrity of the multiemployer unit and created the "unusual circumstances" authorizing unilateral unit withdrawal by the employers.

Chairman Fanning, dissenting, disagreed with the majority's evaluation of the union's conduct and found no impairment of the

[58] 238 NLRB No 211 (Members Jenkins and Murphy, Chairman Fanning dissenting).

viability of the multiemployer bargaining unit. In his view, the union's offer to cease the strike if the employers returned to the terms of the expired contract gave rise to oral back-to-work agreements which "were interim and contemplated renewed bargaining for, ultimately, a new multiemployer contract." Similarly, the union's offer to one employer to sign an agreement it has previously negotiated with two other companies was "in the nature of trial balloons to explore various bargaining possibilities or areas of agreement" and was consistent with a sincere effort by the union to continue bargaining in the established 17-employer unit. Chairman Fanning found it significant that the employers executed no substitute contracts on an individual basis except in one unusual situation.[59] He would find lawful withdrawal from a multiemployer bargaining unit only if, "after impasse, the union engages in selective picketing *and* enters into substantial individual agreements. Neither of these prerequisites . . . occurred here." Accordingly, he concluded that, since the union's efforts were directed to breaking the impasse and getting all parties back to the bargaining table, he found that the multiemployer unit was, in no sense, fragmented and that the employers had violated section 8(a)(5) of the Act.

In *North American Refractories Co., Div. of Eltra Corp.*,[60] the Board disagreed with the administrative law judge who found that the employer violated section 8(a)(5) of the Act by its timely withdrawal of only one of its plants from the multiemployer bargaining unit and by its refusal to apply the multiemployer contract to that plant. The employer had argued that the economic condition of the plant which was subsequently closed constituted a special circumstance justifying its withdrawal from the multiemployer unit under Board precedents,[61] and that it was willing to bargain separately for the plant, but the union refused. The administrative law judge cited the Board's consistently stated principle that the Board "under ordinary circumstances" does not permit an employer to withdraw only part of its operations from a multiemployer unit leaving the remainder in the unit, and he distinguished the precedents cited by the employer because those cases dealt with the untimely withdrawal of an employer's entire operation, for economic reasons, from the multiemployer unit. Contrary to the administrative law judge and in agreement with

[59] The Chairman viewed this individual agreement as "insubstantial" since the covered employer had two employees in a specialized printing operation and had received prior PIA clearance

[60] 238 NLRB No. 65.

[61] *Spun-Jee Corp. & James Textile Corp*, 171 NLRB 557 (1968).

the employer, the full Board, noting that the historical expansion and contraction of the number of plants included in joint bargaining by each employer had not affected the stability of the multiemployer bargaining unit, found that the facts fell squarely within the legal conclusion reached by the Board in *Spun-Jee, supra,* on which the employer relied. Since, in the Board's view, the economic condition of the withdrawn plant was sufficient to meet the Board's criteria as an unusual circumstance justifying untimely withdrawal from a multiemployer bargaining unit, had it been the only plant of the employer in the unit, they saw no reason to apply a different standard where, as here, the employer sought, in a timely manner, to exclude from the bargaining unit only one of its plants which was in dire economic circumstances. Accordingly, the complaint against the employer was dismissed in its entirety.

4. Subjects for Bargaining

The Board had occasion during the past official year to examine certain matters to determine whether or not they constituted mandatory subjects of bargaining about which parties are obligated to bargain.

In *Axelson, Subsidiary of U.S. Industries,*[62] the issue was presented as to whether the payment of wages to employees for time spent in negotiation of a collective-bargaining agreement was a mandatory subject to bargaining. In the instant case, since employee negotiators had been receiving their production pay for negotiations during worktime, the union requested that a night shift employee negotiator be transferred to the day shift so that he too could be paid. The employer not only refused to do so, but also decided not to pay any of the employees for their negotiating time or to bargain about the subject. Instead, the employer suggested negotiating on nonwork time. The administrative law judge found that remuneration of employee-members of a union negotiating committee was a nonmandatory subject of bargaining and dismissed the 8(a)(5) complaint in its entirety. The Board panel disagreed and reversed the administrative law judge. Noting that the Board has defined a mandatory subject of bargaining as one which either "sets a term or condition of employment or regulates the relation between the employer and its employees," the panel concluded that payment of wages to employees for time spent in negotiations concerned the relations between an employer and its employees, in that it was related to the representation of the mem-

[62] 234 NLRB No. 49 (Chairman Fanning and Members Jenkins and Murphy).

bers of the bargaining unit in negotiations with an employer over terms and conditions of employment. It observed that the Board had previously found to be mandatory subjects similar union functions, such as wages paid to employees during the presentation of grievances, superseniority accorded to union representatives, union security, and checkoff provisions, and that it saw no distinction between an employee's involvement in contract negotiations and involvement in the presentation of grievances. Accordingly, the panel found that the employer violated section 8(a)(5) of the Act for unilaterally ceasing to pay employee negotiators for lost wages and thereafter refusing to bargain concerning the matter.

In *Bartlett-Collins Co.*,[63] the employer insisted on the presence of a certified court reporter at contract negotiations, following a Board decision that the employer had previously bargained in bad faith. It argued that a record of the bargaining was desirable and necessary without resort to credibility determinations. The union refused to accede, but proposed instead that each party bring its own electronic recording equipment. The employer would not agree to this counterproposal and refused to continue negotiations without the court reporter.

In considering whether the insistence that there be a court reporter or recording device present at negotiations was in good or bad faith, the Board, in the past, had treated the issue of the presence of a count reporter or recording device as a mandatory rather than a nonmandatory subject of bargaining.[64] However, the full Board noted that in *N.L.R.B.* v. *Wooster Div. of Borg-Warner Corp.*,[65] where the Supreme Court restated the definition of both mandatory and nonmandatory subjects of bargaining under the Act, the Court found that mandatory subjects of bargaining concern "wages, hours, and other terms and conditions of employment" and that "other matters" are nonmandatory subjects, about which the parties are free to bargain or not to bargain. The Board concluded that the issue of the presence of a court reporter or device to record negotiations is not a mandatory subject of bargaining because it does not fall within "wages, hours, or other terms and conditions of employment," but rather is a nonmandatory subject included in "other matters" as defined by the Supreme Court about which the parties may lawfully bargain, but over which neither party may lawfully insist to impasse. Accordingly, the Board found that the employer's de-

[63] 237 NLRB No. 106.

[64] *Reed & Prince Mfg Co.*, 96 NLRB 850 (1951), enfd. on other grounds 205 F.2d 131 (1st Cir. 1953), cert. denied 346 U.S. 887.

[65] 356 U.S. 342, 349 (1958).

mand for a court reporter during negotiations was a nonmandatory subject of bargaining and that the employer violated section 8(a)(5) of the Act by insisting thereon to impasse. Prior Board cases indicating to the contrary were overruled.

In *Keystone Steel & Wire, Div. of Keystone Consolidated Industries,*[66] a Board panel held that the identity of the administrator/processor of the employer's health insurance plan was a mandatory subject of bargaining. The employer provided health and dental benefits to its employees under two separate plans and these benefits were specifically mentioned in the collective-bargaining agreement between the employer and the union. In late 1976, the employer informed the union that because of the constantly increasing charges for the administration of their different benefits programs it wished to consolidate its benefits policies under one administrator/processor and to use the same insurer nationally. The union would not agree to the change and, after several meetings, the employer unilaterally changed the insurer. The panel found that the identity of the administrator/processor of the health benefits program was a mandatory subject of bargaining since the effects on the terms and conditions of employment of the unit employees as a result of the change in the administrator/processor were substantial and significant in that there was a substantial difference in the administration and processing of the new plan with respect to schedules, the speed with which claims were paid, information services, surgical claim forms, and terms of the conversion plans available to employees who terminate their employment—matters which intimately affect employees and are of vital interest to them. Accordingly, the panel found that the employer violated section 8(a)(5) and (1) of the Act by unilaterally changing the administrator/processor of its health program. With respect to the change in the identity of the administrator/processor of the dental program, the panel found no violation because the General Counsel failed to present evidence as to how the dental plan was administered and whether there was any significant difference between the plans, and therefore failed to prove that the identity of the administrator/processor had any effect on wages, hours, and working conditions of unit employees.

5. Duty To Furnish Information

In several cases decided during this report year, the Board had occasion to consider the nature and scope of information which an employer is obligated to furnish to a union.

[66] 237 NLRB No. 91 (Chairman Fanning and Members Penello and Truesdale).

In *Western Massachusetts Electric Co.*,[67] a Board panel reversed the administrative law judge and decided that the employer had a duty under section 8(a)(5) to provide information to a union, with which it was bargaining, concerning a formula the employer was using to revise certain established meter-reading routes.

The administrative law judge had found no violation, because, in his view, the rerouting formula was merely a management tool to reduce the amount of time required by the supervisors to arrive at scheduling, and the union's need for the information to assess the validity of potential grievances and to deal with anticipated layoffs was more general and theoretical than immediate and practical, especially since there were no grievances or layoffs pending at the time of the request. The panel disagreed, noting that the union's obligation to represent employees also included the duty to formulate wages and other proposals for future contract negotiations. It found that there was a significant and substantial relationship between the employer's use of the formula to effect a restructuring of its entire meter-reading system and the working conditions of employees represented by the union since the rerouting would alter the length of the routes and also, in all probability, result in layoffs. Further, with respect to the absence of grievances and layoffs, the panel concluded that "it is well settled that a labor organization's entitlement to information is not to be limited merely to that which would be pertinent to a particular existing controversy but rather extends to all information that is necessary for the labor organization properly and intelligently to perform its duties in the general course of bargaining."

In *Montgomery Ward & Co.*,[68] a Board panel concluded that the employer had violated section 8(a)(5) of the Act when, although it furnished certain information which the union requested for a grievance arbitration proceeding, it failed to provide the information in timely fashion. Three months prior to arbitration, the union requested data on employee wages relevant to the upcoming arbitration hearing. Seven days before the hearing the employer informed the union that it would not furnish the information, and that it would request the arbitrator to decide whether it should provide the information. After the arbitrator subpenaed the information, the employer finally gave the information to the union.

Noting that an employer under section 8(a)(5) of the Act must either promptly supply relevant information or adequately explain

[67] 234 NLRB No 19 (Chairman Fanning and Members Jenkins and Penello).
[68] 234 NLRB No 88 (Members Jenkins, Penello, and Murphy).

its reasons for failing to do so, the panel found that the employer had failed to bargain in good faith as it did not timely provide the information, having waited 3 months before providing it. The panel also found that the employer's reason for the delay—that the duty to provide information was arbitrable under the collective-bargaining agreement—was no defense since the existence of arbitration provisions in a collective-bargaining agreement cannot excuse delay in furnishing the requested information and since, in the absence of a provision with regard to the parties' obligation to provide information, the union was not obligated to arbitrate the employer's refusal. The panel, therefore, concluded that the employer violated section 8(a)(5) of the Act by failing to provide the requested relevant information in a timely fashion.

In *Anheuser-Busch,*[69] the full Board considered whether the duty to furnish requested relevant information, as established in *N.L.R.B.* v. *Acme Industrial Co.,*[70] extended to witness statements obtained by an employer during the course of its investigation of employee misconduct. Contrary to the administrative law judge, who found that the employer violated section 8(a)(5) of the Act by refusing to honor the requests for such statements relevant to the union's determination whether to process a grievance to arbitration, the Board held, "without regard to the particular facts of this case," that the general obligation to honor requests for information, as set forth in *Acme* and related cases, does not encompass the duty to furnish witness statements themselves" and, accordingly, they dismissed the complaint in its entirety. In so holding, the Board noted that witness statements are "fundamentally different from the types of information contemplated in *Acme,* and disclosure of witness statements involves critical considerations which do not apply to requests for other types of information." Rather, the Board found that the request for witness statements prior to arbitration was more analogous to the question of whether the parties should have access to witness statements prior to a Board unfair labor practice hearing.

While recognizing that *Robbins Tire* involved a "narrow issue" of an exemption under the Freedom of Information Act,[71] the Board concluded that "the same underlying considerations apply here and that requiring either party to a collective-bargaining

[69] 237 NLRB No. 146

[70] 385 U.S 432 (1967).

[71] In *N L R B* v *Robbins Tire & Rubber Co*, 437 U.S. 214 (1978), the Supreme Court held that the Board was not required under Exemption 7(a) of the Freedom of Information Act to disclose statements of witnesses prior to an unfair labor practice hearing In so holding, the Court discussed the potential dangers from the premature release of such statements, including the risk that witnesses would be coerced in an effort to persuade them to change their testimony or not testify at all, and that witnesses would become reluctant to give statements.

relationship to furnish witness statements to the other party would diminish rather than foster the integrity of the grievance and arbitration process." The Board, therefore, found no violation of section 8(a)(5) by virtue of the employer's refusal to provide the statements requested.

In four separate decisions,[72] the same unanimous Board panel held that newspaper employers were obligated to furnish to the union with which each was negotiating information concerning the wages of nonunit employees performing work similar to that of unit employees.

In *Times-Herald,* the union requested the names of nonunit columnists, each item published, and the amount paid for it. While the employer provided information with respect to payments to high school students covering sports events, as well as the names of its nonunit contributors (columnists), it refused to reveal the amounts paid to columnists. The union persisted in its request on the grounds that the wage information was relevant to its contract proposal of minimum rates for nonunit editorial workers, and the contract proposals for unit employees.

The administrative law judge addressed the problem on the basis of the relevancy of the union's final position. With respect to the union's proposed contract provison for minimum wages for nonunit personnel, the Board panel adopted the administrative law judge's finding that the contract proposal did not "vitally affect" unit employees and therefore was not a mandatory subject of bargaining, and his conclusion that the employer had no duty to furnish the information on that basis.

The administrative law judge concluded, however, and the panel agreed that the union was entitled to the information concerning the nonunit columnists' compensation for assistance in framing its wage proposal covering the unit employees it represented since there was an "obvious relationship" between compensation paid nonunit columnists and that paid unit employees for unit editorial work. In so concluding, the administrative law judge applied the test recognized by the courts as probable relevance and use to the union in carrying out its statutory duties and responsibilities [73] and cited the earlier Board precedent, *Northwest Publications.*[74]

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[72] *Times-Herald,* 237 NLRB No 135, *Amphlett Printing Co*, 237 NLRB No 139, *Press Democrat Publishing Co*, 237 NLRB No. 216, and *Brown Newspaper Publishing Co*, 238 NLRB No. 187 (Chairman Fanning and Members Jenkins and Truesdale)

[73] See *N.L R B.* v *Rockwell-Standard Corp*, 410 F.2d 953 (6th Cir 1969), citing *N L R B.* v. *Acme Industrial Co*, 385 U S. 432, 437, fn 6 (1967), where the Supreme Court spoke of a "discovery-type standard" for ascertaining pretrial information which of necessity will be more liberal as to relevance.

[74] 211 NLRB 464 (1974).

Contrary to the employer, the panel found that this precedent was not distinguishable since the nonunit columnists were working for the same papers as were the unit employees and their product and the creative effort the product represented were notably similar. It also distinguished an intervening decision,[75] in which the Board had found that a newspaper employer had no duty to furnish information concerning the training of nonunit employees, since the union's request was not made during negotiations for a new contract nor for the purpose of framing a wage proposal.

In *Amphlett Printing Co., supra,* the same panel considered a request by the same union from a different employer newspaper for the same information concerning payments to nonunit correspondents. As in *Times-Herald,* the panel agreed with the administrative law judge that the union's proposed contract provision for minimum wages for nonunit personnel did not "vitally affect" unit employees and, accordingly, was not a mandatory subject of bargaining. The employer, therefore, was not obligated to supply the requested wage information. However, the administrative law judge, relying on *Adams Insulation Co.,*[76] and noting that the union did not advance the reasons for its need for the information—to formulate wage proposals for unit employees—as a basis for the request until the hearing, concluded that the union was not entitled to the requested information because it had failed to adequately inform the employer as to the basis of its request, or of the employer's obligation to honor such request. The panel disagreed for the reasons set forth in *Times-Herald,* as well as for other reasons. It found that *Adams Insulation* was distinguishable since there the union stated no reasons for its information request, the request itself lacked "specificity and clarity," and there were no pending negotiations between the parties which would have alerted the employer to the union's purpose. The panel then noted that, in *Amphlett,* the union had a collective-bargaining agreement with the employer who at the hearing was furnished with reasons which showed the potential relevance of the information sought. The panel emphasized that the "appropriate inquiry is simply whether the information was 'potentially relevant' to the [u]nion in connection with bargainable issues then being pursued," and that, since information about compensation of the nonunit correspondents, who perform virtually the same editorial function for the employer as do the unit employees, was potentially relevant to negotiation of unit wages, any incon-

[75] *San Diego Newspaper Guild, Local 95, Newspaper Guild [Union-Tribune Publishing Co.] v. N.L.R.B.*, 548 F 2d 863 (9th Cir 1977), affg. 220 NLRB 1226 (1975).

[76] 219 NLRB 211 (1975).

sistencies in the union's asserted reasons for wanting the information upon which the administrative law judge had relied did not warrant refusal to furnish the requested information.

In *Press Democrat Publishing Co., supra,* and *Brown Newspaper Publishing Co., supra,* the same panel considered the same issue with the same union in the same factual context as in *Times-Herald* and *Amphlett,* but with respect to two different newspapers. As in *Times-Herald* and *Amphlett,* the panel herein concluded that the employers had a duty to furnish information concerning compensation of their nonunit correspondents or columnists. Consistent with the decision in *Amphlett,* the employers were not required to specify the amounts paid to designated individuals, but, rather, had only to furnish, upon request, the information in dollar amounts as to that portion of the editorial budget expended in aggregate for nonunit correspondents or columnists.

6. Other Issues

In *Peerless Food Products,*[77] the Board once again considered the issue of the kind of unilateral change in work rules which would constitute a material, substantial, and significant breach of the bargaining obligation. In the instant case, while prior to March 1977 the union's business representative, a nonemployee, had enjoyed virtually unlimited plant access in connection with his duties, his access to unit employees was limited to meeting and conversing with employees and the shop steward in the lunchroom during break and lunch periods. The ban apparently did not apply where access to production areas was requested by the business representative for the purposes of investigating or processing grievances. A Broad majority held that such a unilateral change in access rules did not "materially, substantially, or significantly" reduce employee access to union business representatives, since the net effect of the change was to remove the business representative's former "right" to engage unit employees on the production floor in conversations unrelated to contract matters. Accordingly, the 8(a)(5) complaint was dismissed in its entirety.

Member Penello, concurring in the dismissal, reiterated his oft-expressed position that, in view of the agency's backlog of cases awaiting hearing and of its limited resources, the "General Counsel should exercise his discretion under [s]ection 3(d) of the Act to refuse to process violations of minor or isolated character."

[77] 236 NLRB No 23 (Chairman Fanning and Members Jenkins and Murphy; Member Penello concurring).

Steiner Trucraft [78] presented the Board panel with an interesting problems concerning the bargaining obligation of an employer to execute a contract upon which agreement had been reached prior to the lawful closing of his plant. In January 1977, the employer and the incumbent union agreed on the terms of a collective-bargaining agreement. Prior to any formal request from the union that the agreement be signed, the employer in March announced its decision to close the plant for economic reasons. Thereafter, the union requested that the employer sign the written agreement which had been prepared in final form, but the employer refused. The panel held that the decision to close the plant for economic reasons did not relieve the employer of its obligation to execute the collective-bargaining agreement and to abide by the applicable terms of the contract, for example, severance pay, vacation pay, and pensions, as well as a duty to arbitrate. The Board, therefore, found that the employer had violated section 8(a)(5) of the Act by refusing to sign the agreement and to abide by its applicable terms after the plant closed.

E. Union Interference With Employee Rights

Even as section 8(a) of the Act imposes certain restrictions on employers, section 8(b) limits the activities of labor organizations and their agents. Section 8(b)(1)(A), which is generally analogous to section 8(a)(1), makes it an unfair labor practice for a union or its agents to restrain or coerce employees in the exercise of their section 7 rights, which generally guarantee them freedom of choice with respect to collective activities. However, an important proviso to section 8(b)(1)(A) recognizes the basic right of a labor organization to prescribe its own rules for acquisition and retention of membership.

1. Duty of Fair Representation

During the past fiscal year, the Board considered cases involving the principle that a labor organization has a duty to represent fairly all employees in a bargaining unit for which it is statutory representative.

In *The Emporium,*[79] a Board panel, relying on a finding that the union failed to represent every employee in the unit fairly,

[78] 237 NLRB No. 163 (Members Jenkins, Murphy, and Truesdale).

[79] *Warehouse Union, Local 860, IBT (The Emporium)*, 236 NLRB No. 101 (Chairman Fanning and Members Jenkins and Murphy).

impartially, and in good faith by persisting in demanding a wage increase that it knew would result in the termination of the employees, concluded that the union had violated section 8(b)(1)(A). In this case, the union, which represented both warehousemen and clericals at the employer's facility, had insisted, during bargaining for a new contract, that the clericals receive the same wage increases as the warehousemen. The union was informed by the employer that a wage increase of that magnitude for the clericals would lead to the termination of the clerical unit. Although the clericals had initially requested that they receive the same wage increase as the warehousemen, the union never advised the clericals that such a wage demand would jeopardize their jobs. After agreeing to the wage increase demanded for the clericals, the employer permanently laid off the clericals. The Board panel concluded that the union had failed to meet its duty of fair representation to the clericals, thereby violating section 8(b)(1)(A) of the Act.

In *General Motors Corp., Delco Moraine Div.*,[80] a Board panel affirmed an administrative law judge's finding that a union's failure to investigate and pursue the grievances filed by two employees who were discharged violated section 8(b)(1)(A) of the Act. Both employees had been supporters of a dissident group of employees, and both employees alleged that they were discharged for pretextual reasons and for their support of the dissident group. The Board panel agreed with the administrative law judge that the fact that no investigation and no contentions were made by the union in handling the grievances warranted a finding that the union's hostility towards the dissident group was translated into conduct adverse to the two employees as regards their grievances. Under these circumstances, the Board panel found that the union failed to pursue the grievances for arbitrary and capricious reasons and thereby violated the Act.[81]

2. Enforcement of Union Rules

In one case,[82] the Board had occasion to decide the lawfulness of the union's resolution—mailed to members, including those

[80] 237 NLRB No 167 (Members Penello, Murphy, and Truesdale)

[81] The Board panel also affirmed the administrative law judge's finding the union violated sec. 8(b)(1)(A) of the Act by failing to investigate the grievance of a third employee who alleged she had been disciplined for engaging in activities protected by sec. 7 of the Act

[82] *Amalgamated Meat Cutters & Allied Workers of North America, Local 593 (S & M Grocers)*, 237 NLRB No 181 (Chairman Fanning and Members Jenkins and Truesdale, Members Penello and Murphy dissenting).

employed by the employer—which threatened discipline, including but not limited to expulsion, against current members should those members actively oppose or refrain from assisting the union in its organizational drive at the employer's stores.[83] The Board majority viewed the basic problem in this case as one of reconciling the union's right of solidarity during an organizing drive with the public policy of employees being free of coercion or restraint in choosing their collective-bargaining representative. They concluded that, on balance, the union's resolution promoted its legitimate interest of organizing unrepresented employees and did not so restrict employees in the exercise of their right to select a representative as to contravene public labor policy. Noting that union members are free to resign any time that the union sets out on a course with which they do not agree, the Board majority found that the union's threat of discipline did not unlawfully coerce union members, but was a valid enforcement of a legitimate internal regulation. Accordingly, the Board majority dismissed the complaint.

Members Penello and Murphy, dissenting, concluded that the threat of discipline contained in the union resolution constituted unjustified coercion and restraint of the employees in the selection of their collective-bargaining representative and violated section 8(b)(1)(A). They agreed with the majority that this case involved the balancing of legitimate union interests with public policy considerations. However, the dissenters found that the employees' right to select freely a bargaining agent was so great that it precluded the union from coercing its members to achieve solidarity during an organizing campaign and requiring them to resign to escape discipline. This case involved the union's conduct of an organizing campaign in which employees were deciding what their future course of action should be and in which full freedom to exchange ideas is needed, rather than a union currently functioning as a collective-bargaining representative acting in furtherance of objectives already approved by a majority of the employees. Further, employees who were already members by virtue of simultaneous employment elsewhere should not be compelled to choose between remaining members and retaining an effective voice in union affairs concerning the other unit and having a right to exercise fully their rights in the election being conducted with respect to the unorganized employer. Accordingly, the dissent concluded that finding the union's threat to discipline

[83] Many of the employer's employees also held part-time or full-time jobs in other stores which had union-security contracts with the union.

to be lawful would permit substantial interference with the holding of a fair election.

In *Davis-McKee,*[84] the union sought to fine two members who has crossed the picket line and worked during a union-authorized sympathy strike. The Board majority noted that if the union had waived, in a collective-bargaining contract, the statutory right of its members to engage in sympathy strikes then members observing the picket line would have engaged in unprotected activities and the union would have violated section 8(b)(1)(A) by fining those members who refused to engage in such unprotected activity. Continuing to apply a strict standard which requires a "clear and unmistakeable" waiver of the fundamental right to strike in general, and the right to engage in sympathy work stoppages in particular, they concluded that a waiver of the right to engage in sympathy strikes would not be inferred solely from an agreement to refrain from all "stoppages of work." [85] Rather, the Board majority would require that said waiver be found in express contractual language or in unequivocal extrinsic evidence bearing upon ambiguous contractual language. Applying this standard, they concluded in this case that sympathy strikes were not prohibited by the broad no-strike clause and that therefore the union did not violate section 8(b)(1)(A) of the Act by fining members for refusing to participate in a protected sympathy strike.

Member Penello, though concurring in the result, "profoundly disagreed with the standard applied by the majority for deciding whether the right to participate in a sympathy strike has been waived. Citing the holding in an earlier Board decision,[86] he would find that a broadly written no-strike clause, such as one containing a ban on "any strike or slow-down," applies to sympathy strikes and that a union's fining members for refusing to honor a sympathy strike, where such a clause exists, violates section 8(b)(1)(A). However, concluding that the clause in this case waived only the employees' right to strike for matters in direct dispute between the union and the employer, and that, thus, the sympathy strike here did not constitute a breach of contract by the union, Member Penello agreed with the majority that the union did not violate the Act by fining members for refusing to take part in the sympathy strike.

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[84] *Intl Union of Operating Engineers, Local 18 (Davis-McKee)*, 238 NLRB No 58 (Chairman Fanning and Members Jenkins, Murphy, and Truesdale, Member Penello concurring in the result).

[85] The material clause herein stated: "There shall be no stoppage of work because of any difference of opinion or dispute which arise [sic] between the union and the employer"

[86] *Local 12419, District 50, UMWA (Natl. Grinding Wheel Co.)*, 176 NLRB 628 (1969).

In *Maui Surf Hotel Co.*,[87] a Board panel majority found that the union violated section 8(b)(1)(A) of the Act by causing the employer to require certain of its employees to cease work and forfeit an hour's pay to attend a union meeting on the employer's premises. The collective-bargaining agreement between the union and the employer provided that, under certain circumstances, the union could hold a "stop-work meeting" for which employees, except those essential to the operation of the employer, would be released from work in order to attend the meeting. In this case, when certain employees objected to having to sign out and thereby lose an hour's pay, they were informed by the employer, who was complying with the union's request that if they remained at their desks they would receive a citation for insubordination. They signed out under protest, but did not attend the "stop work meetings." The panel majority concluded that those employees who thus lost an hour's pay were unlawfully subjected to improper pressure because they chose to remain at work and exercise their statutory right to refrain from union activity.[88]

Member Jenkins, dissenting, found that the "stop-work" provision validly encouraged, without coercion, greater member participation in union affairs and thus contributed to a more meaningful and stable collective-bargaining relationship. He concluded that employees, although forced to cease working, were not unlawfully coerced in that there was no evidence that they were coerced into actually attending meetings or otherwise engaging in union activity or penalized for declining to engage in such activity.

In *John Hancock*[89] a Board panel majority found that the union did not violate section 8(b)(1)(A) of the Act by threatening to discipline, and actually initiating intraunion disciplinary proceedings against, certain of its members because they refused to participate in union-sponsored "lunch demonstrations." The union here sponsored lunch-time demonstrations in order to protest what it considered to be a unilateral change in working conditions by the employer relating to sales requirements. Noting that a union may not discipline a member for refusing to engage in unprotected activity, the majority viewed the determinative question to be whether or not the applicable collective-bargaining agreement between the union and the employer prohibited the

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[87] 235 NLRB No. 134 (Chairman Fanning and Member Penello, Member Jenkins dissenting).

[88] The panel majority also found that the employer had violated sec 8(a)(1) and (3) of the Act by threatening employees with citations of insubordination in order to comply with the union's request

[89] *Insurance Workers Intl. Union, Local 60 (John Hancock Mutual Life Insurance Co.)*, 236 NLRB No. 50 (Members Jenkins and Penello, Member Murphy dissenting).

lunch-time demonstrations, thereby rendering such activities unprotected. Agreeing with the administrative law judge that the contractual provision prohibiting all strikes and slowdowns did not prohibit the lunch-time demonstrations occurring in this case, the majority concluded that the concerted activities sponsored by the union were protected and that the union could therefore initiate disciplinary proceedings against those members who refused to participate in such activities.

In her dissent, Member Murphy construed the contractual provision prohibiting all strikes and slowdowns to be applicable to the lunch-time demonstrations that took place in this case. Noting that employees would have been engaged in normal sales activities but for the demonstrations, she found that the union-sponsored activity was a slowdown as defined by the contract and that the union could not lawfully discipline its members for declining to participate in such unprotected demonstrations. Moreover, even assuming that the demonstrations were protected, Member Murphy would find unlawful a union's penalizing a member who acted out of concern about employer reprisals for allegedly violating the contract, however reasonable that concern may be in light of the contract's ambiguity, for the member would be presented with a dilemma in being subjected to exposure to adverse action by one of the contracting parties whichever course of action were chosen.

In *20th Century Fox*,[90] the respondent, a local union, attempted to fine members who worked in two-man crews, as it had insisted on a three-man minimum and it refused to ratify any contract permitting two-man crews as it had agreed in an earlier contract. However, the international union—the contractually recognized bargaining representative—had executed a contract with the employer which permitted two-man crews. The panel concluded that the local union's members had a section 7 right to rely on the terms of the collective-bargaining agreement as covering their employment, and therefore the local violated section 8(b)(1)(A) by fining its members for accepting employment pursuant to a valid collective-bargaining agreement negotiated by the international union.[91]

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[90] *Intl. Sound Technicians Local 695 (20th Century Fox & Chas Fries Productions)*, 234 NLRB No. 107 (Chairman Fanning and Member Penello, Member Jenkins concurring).

[91] Member Jenkins, in concurring, noted that the contract between the international and the employer was a valid contract binding on all members of the international's locals, including the local union involved here. Accordingly, Member Jenkins concluded that the local violated sec. 8(b)(1)(A) by disciplining its members for accepting employment pursuant to a valid collective-bargaining agreement.

3. Other Forms of Interference

In *Grinnell Fire Protection*,[92] a Board majority found that a union joint council and two local unions did not violate section 8(b)(1)(A) when they transferred jurisdiction over an employer and the representational rights over that employer's employees from one of the locals to the other, resulting in the transfer of one employee's union membership without his consent. Finding that the transfer was prompted by legitimate reasons, they concluded that there was no pervasive reason as to why a nondiscriminatory attempt to substitute one local of an international union for another should be unlawful. They further stated that the incumbent local's disclaimer of the power and authority to represent the unit employees did not result in any coercion of those employees. Accordingly, concluded the majority, the transfer involved no coercion of employees, but rather was an internal union matter protected by the proviso to section 8(b)(1)(A).

Member Jenkins, dissenting, concluded that the union had engaged in coercive conduct with respect to the employee who objected to the change of his union membership. He found the conduct of the unions was coercive in that it forced employees to join a labor organization without their consent and could not be justified as an internal union matter protected by the proviso to section 8(b)(1)(A). Member Jenkins further stated that a union's obtaining recognition as a collective-bargaining agent without the consent of unit employees and when it does not represent a majority of employees in the unit clearly violates section 8(b)(1)(A).

In *Shenango*,[93] a Board panel found, contrary to the administrative law judge, that the union could lawfully remove a safety committee chairman from his position because of his activities in supporting opposition candidates in an internal union election and that it was lawful for the union to make an announcement to that effect. However, in agreement with the administrative law judge, the panel found that the union violated section 8(b)(1)(A) by threatening members with reprisals because they engaged in internal union activity. It noted that the issue was one of balancing employees' section 7 rights to engage in internal union affairs against legitimate union interests at stake. The panel concluded that a union had a legitimate interest in removing opposition

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[92] *Joint Council of Teamsters No. 42, IBT (Grinnell Fire Protection Systems Co.)*, 235 NLRB No. 156 (Chairman Fanning and Members Penello and Truesdale, Member Jenkins dissenting).

[93] 237 NLRB No. 220 (Chairman Fanning and Members Jenkins and Penello).

members from important union offices, but that it had no legitimate interest in threatening them with reprisals for intraunion activities.

F. Union Coercion of Employer in Selection of Representative

Section 8(b)(1)(B) of the Act makes it an unfair labor practice for a union to coerce or restrain an employer in the selection of its representative for the purposes of collective bargaining or the adjustment of grievances.

In *Intl. Organization of Masters, Mates & Pilots (Newport Tankers Corp.)*,[94] a panel majority reversed the administrative law judge's finding that the union violated section 8(b)(1)(B) when it picketed an employer's ship in order to force it to hire an additional third mate to its complement of deck officers. Although the union argued that it was engaged in "area standards" picketing to obtain the same manning requirement as contained in its collective-bargaining agreement with the operator of the ship, the administrative law judge had found that the picketing was in order to coerce the employer in its selection of its collective-bargaining representative, since, in his view, there was no real distinction between picketing to force the hiring of an additional third mate and picketing to seek the replacement of all deck officers which the Board had previously found to have violated section 8(b)(1)(B) of the Act.[95] Contrary to the administrative law judge, the panel majority found, however, that such a distinction did exist under section 8(b)(1)(B) since the record showed that the union only sought "to add to the [e]mployer's complement of officers, with the actual selection of such officers left entirely to the [e]mployer's discretion," and since there was some evidence in the legislative history that "Congress, in enacting [s]ection 8(b)(1)(B), sought only to prevent unions from interfering with an employer's selection of a particular representative." They, therefore, concluded that the union did not violate section 8(b)(1)(B) of the Act.

Member Penello dissented from this interpretation of section 8(b)(1)(B) and its legislative history. Like the administrative law judge, he found that picketing for an additional mate had the

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[94] 233 NLRB No 42 (Chairman Fanning and Member Murphy, Member Penello dissenting)

[95] *Laborers' Intl Union of North America, Local 478 (Intl. Builders of Florida)*, 204 NLRB 357 (1973), enfd 503 F.2d 192 (D.C. Cir. 1974)

same effect, for 8(b)(1)(B) purposes, as the picketing for the replacement of deck officers. He argued that "an employer's selection of his 8(b)(1)(B) representatives, however, cannot be artificially subdivided into selection of a particular individual or group, which the statute is said to protect, as opposed to the number of such representatives, which is asserted to be left subject to union pressure," because "the right to designate a particular individual as a grievance adjustor or collective-bargaining representative carries with it the implicit authority to confine the exercise of 8(b)(1)(B) responsibilities to that person." Further, he stated that he did not believe that "Congress intended that the statute be so narrowly limited as to allow a union to pursue a practice nearly as useful to it as forcing the employer to select a different 8(b)(1)(B) representative altogether." In addition, Member Penello found, in the circumstances, that the actual object of the union was the replacement of the employer's 8(b)(1)(B) representative.

In *Sheet Metal Workers*,[96] a Board panel held, on its first encounter with this issue, that the trustees to a joint employer-union trust (SASMI), established pursuant to section 302(c)(5) of the Labor Management Relations Act, were not collective-bargaining representatives within the meaning of section 8(b)(1)(B). The trustee designation clause of SASMI required the employer to accept preselected employer trustees as its representatives in the administration of the funds, and the issue was raised whether the union's strike to obtain the inclusion of SASMI in the collective-bargaining agreement unlawfully coerced the employer association in its selection of a collective-bargaining representative. In concluding that the trustees were not 8(b)(1)(B) collective-bargaining representatives, the panel analyzed the differences in the duties and responsibilities of a traditional collective-bargaining representative and a trustee who is a fiduciary. It noted that while a traditional collective-bargaining representative would negotiate a collective-bargaining agreement on behalf of either the union or the employer, the trustees "have not been appointed . . . for the purpose of negotiating collective-bargaining agreements"; but rather, "their primary function is to administer the SASMI Trust Fund in accordance with the dictates of the Trust Agreement and in compliance with applicable laws and regulations" and to act solely in the interests of the beneficiaries of the trust fund. Further, it agreed with the view of a majority

[96] *Sheet Metal Workers Intl. Assn & Edw J. Carlough, President (Central Florida Sheet-metal Contractors Assn.)*, 234 NLRB No 162. See discussion of this case, *supra* at p. 45.

of the courts of appeals that, as 302(c)(5) trustees, they had a fiduciary obligation of "overriding importance" to act solely on behalf of the beneficiaries of the trust fund—the employees—and were not supposed to consider the interests of either the unions or management in administering the trust. Finally, the panel concluded, "in agreement with the weight of judicial precedent on this issue, that there is nothing in either the statute or its underlying legislative history to support the contention that Congress intended that trust funds established pursuant to [s]ection 302 (c)(5) are to deviate from the established principle of trust law that a trustee must always act in a manner that operates solely to the advantage of the beneficiaries." Accordingly, it found that the SASMI trustees were solely fiduciaries and not collective-bargaining representatives within the meaning of section 8(b)(1)(B) and dismissed that portion of the complaint.

Finally, in *United Mine Workers of America, Local 1854 & UMWA (Amax Coal Co., Div. of Amax)*,[97] the full Board considered two separate issues under section 8(b)(1)(B). First, following *Sheet Metal Workers, supra*, the Board found that "the trustees of a jointly administered, multiemployer trust fund are solely fiduciaries, owing undivided loyalty to the beneficiaries of such a plan, and are not, therefore, collective-bargaining representatives within the meaning of [s]ection 8(b)(1)(B) of the Act." It, therefore, adopted the finding of the administrative law judge that the unions did not violate section 8(b)(1)(B) by insisting to impasse and striking to obtain the employer's participation in the trust funds, which of necessity required it to accept a preselected management trustee as its representative in the funds' administration.

In addition, the Board adopted the administrative law judge's finding that the unions violated section 8(b)(1)(B) of the Act by threatening to strike the employer in order to compel it to bargain through a multiemployer group. However, the Board disagreed with the administrative law judge that the strike against all western coal operators which subsequently occurred did not violate section 8(b)(1)(B) since, on facts that were found but not considered by the administrative law judge and on undenied testimony, the Board found that the unions' strike was motivated, *in part*, by the desire to compel the employer to bargain as a member of the multiemployer group, and that the unions thereby violated section 8(b)(1)(B) of the Act.

[97] 238 NLRB No. 214.

G. Union Causation of Employer Discrimination

Section 8(b)(2) of the Act prohibits labor organizations from causing, or attempting to cause, employers to discriminate against employees in violation of section 8(a)(3), or to discriminate against one to whom union membership has been denied or terminated for reasons other than the failure to tender dues and initiation fees. Section 8(a)(3) outlaws discrimination in employment which encourages or discourages union membership, except insofar as it permits the making of union-security agreements under specified conditions. By virtue of section 8(f), union-security agreements covering employees "in the building and construction industries" are permitted under lesser restrictions.

1. Employment Preference for Union Representatives

During the past fiscal year, the Board had occasion to examine and define the permissible limits regarding clauses granting superseniority to stewards established by the Board in its Decision in *Dairylea Cooperative.*[98]

In *Seaway Food Town,*[99] a Board panel considered a provision of a collective-bargaining agreement that required the employer to pay union stewards an additional 5 cents per hour. The panel majority, finding *Dairylea* applicable, agreed with the administrative law judge that this provision was presumptively unlawful and further that the union had not rebutted the presumption of illegality. They found that the union did not show that the additional payment was in any way related to the effective administration of the collective-bargaining agreement. Accordingly, the panel majority concluded that, regardless of the magnitude of the additional payment, the provision unlawfully encouraged union activity by granting stewards higher wages than nonsteward employees in violation of sections 8(b)(1)(a) and 8(b)(2) of the Act.

Chairman Fanning, dissenting, adhered to his dissent in *Dairylea.* Further, even applying the rationale of the majority in *Dairylea,* he would have found that the union had given ample justification for the wage differential in that the small additional compensation would serve to cover out-of-pocket expenses incurred by employees while performing stewards' duties.

[98] 219 NLRB 656 (1975). 41 NLRB Ann. Rep 86–88 (1976).

[99] *Intl. Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 20 (Seaway Food Town),* 235 NLRB No. 214 (Members Jenkins and Murphy, Chairman Fanning dissenting).

In *Preston Trucking Co.*,[1] a Board panel majority found violative of sections 8(b)(1)(A) and 8(b)(2) of the Act a superseniority clause which provided that union stewards receive superseniority for "all purposes, including layoff, rehire, bidding and job preference." The union defended the grant of superseniority for "all purposes" provision, contending that the contract, as written and as applied, was not overly broad as it gave no benefits based on seniority other than those mentioned in the disputed clause. With respect to the express benefits of "bidding and job preference," the union stated that this benefit involved only a preference for route assignment and that such preference was justified because the routes assigned to the stewards best enabled them to perform their duties by being present to process grievances and to attend to necessary business at the union hall. The panel majority rejected the union's contentions, finding that the union had not provided sufficient justification for maintaining the clause in its entirety. The majority found that it did not matter that the provision granting stewards superseniority for "all purposes" was not enforced and they noted that the enumeration of some of the purposes did not detract from the effects of that forceful statement. Further, finding no indication that a steward would need to exercise the job preference option to carry out satisfactorily his responsibilities, the majority found no adequate justification for enforcing the clause as to job bidding.

In his dissenting opinion, Chairman Fanning, while noting that he adhered to his dissent in *Dairylea,* concluded that even under the principles of *Dairylea* no violation should be found. He concluded that preference in route selection was lawful in that it would further the effective administration of the collective-bargaining agreement by permitting the continued presence of the steward on the job.

2. Other Forms of Discrimination

In *Intl. Assn. of Bridge, Structural & Ornamental Ironworkers, Local 480 (Bldg. Contractors Assn. of New Jersey)*,[2] a Board panel found that the union had violated sections 8(b)(1)(A) and 8(b)(2) by engaging in a consistent pattern of unlawful discrimination by refusing to refer, pursuant to its exclusive hiring hall arrangement, nonmembers[3] to jobs at which they would

[1] 236 NLRB No. 56 (Members Jenkins and Murphy, Chairman Fanning dissenting).

[2] 235 NLRB No 212 (Chairman Fanning and Members Jenkins and Penello).

[3] "Nonmembers" referred to the lack of membership in the respondent local as the evidence showed that all applicants for referral were members of one of the other various locals of the international union.

serve as union stewards. Pursuant to its exclusive hiring hall arrangement with the employer association, the union had agreed that referrals would be made to those jobs for which applicants had indicated they were qualified, in chronological order of the applicants' registration. However, one exception to the hiring hall arrangement provided that "senior, experienced applicants" could be referred out of chronological order to act as stewards for the work crew at a particular jobsite. The Board panel, agreeing with the administrative law judge, concluded that, by comparing the overall statistics regarding the incidence of referrals of members and nonmembers as stewards, it must be found that there was a "statistically significant difference" showing that members had been referred more than nonmembers. It found that the union's explanation of the disparity was pretextual and that the union had been motivated by a desire to favor its members on the basis of their membership in the union. Thus, concluded the panel, the union had engaged in a pattern of discrimination against nonmembers which violated sections 8(b)(1)(A) and 8(b)(2).[4]

In *Tribune Co.*,[5] the charging party, a nonmember of the respondent union who had been demoted from his position as supervisor, sought, after his demotion, to be accorded job priority in order to bid on a day shift position. The charging party contended he was entitled to such priority based on his lengthy continuous service in both supervisory and nonsupervisory classifications. The Board panel found that the union, by denying the charging party the same job priority that had previously been accorded to other demoted supervisors, had treated him in a disparate manner. Although the current collective-bargaining agreement accorded the charging party no contractual right to job priority when he returned to the bargaining unit, the panel found that priority was, in actuality, determined by the union itself, not by the contract. Agreeing with the administrative law judge that the charging party's lack of union membership was a "salient consideration" in the union's disposition of his job priority claim, the panel concluded that the union violated section

[4] In addition, the Board panel concluded, contrary to the administrative law judge, that the General Counsel had presented sufficient evidence with respect to the five named discriminatees to establish discriminatory motivation by the union in the referral of stewards Based on a careful study of the referral register, it found that after each of the five named discriminatees had signed the referral register other members of the union were referred ahead of them as stewards Accordingly, the panel concluded that the union had violated the Act by discriminatorily referring its members as stewards over these five individual nonmembers.

[5] *Tampa Printing & Graphic Communications Union No 180 IPGCU (Tribune Co.)*, 238 NLRB No 1 (Chairman Fanning and Members Penello and Truesdale).

8(b)(2) by causing the company to reject the charging party's bid for a day shift position because of his lack of union membership.

In *Capitol-Husting Co.*,[6] a Board panel had occasion to consider the effect on checkoff of a union member's resignation from membership during the term of the collective-bargaining agreement.[7] The contract in effect between the union and the employer provided that employees who were not members of the union would be required to pay an initial service fee and monthly service fees for the purpose of aiding the union in defraying various costs. However, the service fees were of an amount less than the initial fees and membership dues paid by those employees who joined the union. The contract provided for checkoff of membership dues and nonmember service fees. The panel noted that a valid checkoff authorization, such as that executed by the charging party, is considered a contract between the employer and the employee under which the employer's obligation to deduct dues ordinarily remains in effect until the employee revokes the authorization pursuant to its terms. Here, the charging party did not properly revoke his authorization. However, following the charging party's valid resignation, the union was entitled to receive only the monthly service fees owed by the charging party as a nonmember of the union, rather than the full membership dues. Accordingly, in causing the employer to continue to deduct full membership dues, the union violated section 8(b)(2) of the Act.

In *Tallman Constructors, a Joint Venture*,[8] a Board panel found that the union violated sections 8(b)(1)(A) and 8(b)(2) by refusing to clear for hire a member because he had become delinquent in his dues while working outside the bargaining unit. In this case, the charging party sought to work again for an employer (Tallman) for whom he had previously worked, but he was told by the union steward at the Tallman jobsite that "you can't start, your dues aren't paid." The charging party thereupon left the jobsite.

When previously employed by Tallman, the charging party's dues were not in arrears. Later, he became delinquent in his dues

[6] *Sales, Service & Allied Workers' Union, Local 80, Distillery Workers (Capitol-Husting Co.)*, 235 NLRB No 168 (Members Jenkins, Penello, and Murphy)

[7] Initially, the Board panel concluded that the union violated sec 8(b)(1)(A) of the Act by refusing to acknowledge the effectiveness of the union member's resignation from the union. Finding no impediments in the union's constitution or bylaws prohibiting resignation, the panel found that the member had indicated a clear intention to resign from the union and his resignation was thus valid.

[8] *Millwright & Machinery Erectors Local 740, District Council of New York City & Vicinity, Carpenters (Tallman Constructors, a Joint Venture)*, 238 NLRB No. 20 (Members Penello, Murphy, and Truesdale).

while working for other employers who were signatories to contracts with the union. The Board panel found it clear in this case that, as a signatory to a single-employer contract with the union,[9] Tallman alone constituted a separate bargaining unit so that, as the charging party was not delinquent when previously employed by Tallman, his dues arrearages were incurred during employment outside the bargaining unit. In these circumstances, the charging party's rights, in the panel's view, were those of a new employee with respect to Tallman. Therefore, the charging party was entitled to the statutorily sanctioned grace period before the union could seek, through its steward, to prevent him from working because of his delinquency in dues. Further, a majority of the Board panel concluded that the union steward, in denying employment to the charging party, was acting not only as an agent of the union but also as an agent of Tallman. The panel majority noted that both the union and management had acquiesced in or encouraged an arrangement which placed the union steward in a position to act as Tallman's agent and to deny clearance to the charging party for employment by Tallman. Accordingly, contrary to the administrative law judge, the panel majority found that the union violated sections 8(b) (1) (A) and 8(b) (2) by causing Tallman not to hire the charging party.

Member Truesdale agreed with his colleagues' finding that the union's conduct in telling the charging party that he could not work for Tallman because of his dues delinquency, without affording him the statutorily sanctioned contractual grace period, constituted a violation of section 8(b) (1) (A). However, concluding, contrary to his colleagues, that the facts were insufficient to warrant a finding that the union steward was acting as an agent of Tallman, he did not concur in finding a violation of section 8(b) (2) based thereon.

H. Union Bargaining Obligation

A labor organization, as exclusive bargaining representative of the employees in an appropriate unit, no less than an employer, has a duty imposed by the Act to bargain in good faith about wages, hours, and other terms and conditions of employment. A labor organization or an employer respectively violates section 8(b) (3) or 8(a) (5) if it does not fulfill its bargaining obligation.

[9] The contract provided, *inter alia*, a nonexclusive hiring hall and contained a valid 7-day union-security clause.

In *Oakland Press Co.*,[10] a Board panel, reversing the administrative law judge, found that the union violated section 8(b) (3) of the Act when it refused during collective-bargaining negotiations to provide the employer with information concerning its referral system. The parties' collective-bargaining agreement contained a "manning table" provision under which additional persons were hired to work on a daily basis when certain types of machinery were in use or when certain operations were necessitated. To implement the provision, the union agreed to refer persons to the employer who were eligible to work at straight-time rates, "provided straight time men are available." In actual practice, however, the union consistently allowed the regular pressroom employees the choice of working the extra hours at overtime rates before it would refer straight-time personnel. The employer proposed contract modifications to remedy this practice when the issue of providing straight-time personnel arose during negotiations and requested information as to the names and availability of straight-time personnel, the name of the union official in charge of the referral system, and an explanation of how the referral system operated.

Narrowly construing this case as one involving good-faith bargaining and credibility of witnesses, the administrative law judge found that the union had bargained in good faith to an impasse on the employer's proposed modifications and, therefore, had no duty to supply the information. The panel, however, found that whether the union had bargained in good faith with respect to the employer's proposed modification of the contract's referral provisions was irrelevant as the issue was whether the requested information regarding referrals was relevant and necessary to the bargaining process. It noted that a union, like an employer, has a duty to furnish information which is relevant and necessary to provisions under negotiation, and that the information requested here was analogous to information furnished by employers to unions as to employee job classifications and wage rates. Finding that the information was relevant and necessary to the bargaining process so as to enable the employer to evaluate the present referral practices and to test the validity of its bargaining proposals, the panel directed the union to furnish the requested information to the employer.

[10] *Local 13, Detroit Newspaper Printing & Graphic Communications Union, IPGCU (Oakland Press Co., subsidiary of Capital Cities Communications)*, 233 NLRB No. 144 (Members Jenkins, Penello, and Murphy).

In *Steinmetz Electrical Contractors*,[11] the Board panel was asked to decide whether a union could lawfully refuse to bargain on behalf of a classification of employees it had formerly represented. In that case, the union had recognized and bargained with the employer in a unit of all employees doing both commercial and residential work. During negotiations for a new contract, however, the parties voluntarily signed an agreement which covered only employees doing residential work. After the issuance of the 8(b)(3) complaint herein, the union formally and unequivocally disclaimed any and all interest in representing those employees doing commercial work. Contrary to the administrative law judge, the panel concluded that the union did not violate section 8(b)(3) by refusing to bargain with the employer in the historically appropriate unit of residential and commercial employees and dismissed the complaint in its entirety. The panel noted that parties, as here, can, by mutual consent, "voluntarily change the scope of the bargaining unit, if the new unit is not obviously improper," and concluded that since the smaller unit of residential employees was also appropriate, the employer's demand that the union bargain on a broader basis than the established residential bargaining unit was not a mandatory subject of bargaining and the refusal of the demand did not violate section 8(b)(3) of the Act. Further, the panel found, in effect, that the union's disclaimer of interest in representing the employer's commercial employees was effective despite the previous bargaining history on a broader basis and concluded that the "Board cannot compel a union to represent employees it no longer desires to represent, and a refusal to bargain over such employees does not violate section 8(b)(3) of the Act."

In *Intl. Union of Operating Engineers, Local 12, et al. (Maas & Feduska)*,[12] a Board panel reversed the administrative law judge who held that the respondent union refused to bargain in violation of section 8(b)(3) of the Act when it threatened to strike to enforce payment of trust fund delinquencies on behalf of two nonunit executives. The issue herein was whether this threat concerned a mandatory subject of bargaining. The union's contract with the employer provided for the voluntary participation of executives, who were excluded by the contract but who performed bargaining unit work, in the various fringe benefit plans which were administered by union trusts. Two of the em-

[11] *Intl Brotherhood of Electrical Workers & its Local 58 (Steinmetz Electrical Contractors Assn & Thos. Edison Club of Detroit)*, 234 NLRB No 106 (Chairman Fanning and Members Jenkins and Murphy)

[12] 234 NLRB No. 167 (Chairman Fanning and Members Jenkins and Murphy).

ployer's executives, supervisors within the meaning of the Act, voluntarily participated in the trusts. The employer had been delinquent in making the required fringe benefit payments to the trusts on behalf of the two supervisors. When the employer refused to pay the assessed delinquencies, the union threatened to strike the employer to force payment. The administrative law judge found a violation of section 8(b)(3) of the Act on the ground that the threat was to force the employer to agree to a nonmandatory subject of bargaining, i.e., the payment of deficiencies on behalf of statutory supervisors. He reasoned that by its threat the union was coercing the employer to consider statutory supervisors, when they performed bargaining unit work, as employees in the bargaining unit and covered by the contract and this was prohibited by statute since Congress had specifically excluded supervisors from the 2(3) definition of an "employee."

The panel, however, disagreed and found that the threat to strike did concern a mandatory subject of bargaining, i.e., "protecting encroachment on benefit funds by supervisory participation on a minimum hours, noncontract basis." It concluded that the union was acting to protect unit employees' trust funds from liability for benefits without adequate contribution and not to force the employer to include supervisors in the unit. The panel found the interest in maintaining trust fund payments and that of preserving unit work from supervisory erosion, subjects which the Board held to be mandatory in *Crown Coach Corp.*,[13] "are part and parcel of the same overall problem: conserving work, wages, and benefits for unit employees." Accordingly, the panel dismissed the complaint.

In *New England Telephone*,[14] a panel majority affirmed the administrative law judge's finding that the union violated section 8(b)(3) of the Act by establishing an internal union rule that their members could not accept temporary supervisory positions, since that rule unilaterally altered the employer's established right to assign employees to supervisory positions on a temporary basis.

The majority found, in agreement with the administrative law judge, that the employer's right to make temporary assignments was established by past practice and was embodied in a prior arbitration award, and implicitly in the collective-bargaining agreement which had a clause concerning the seniority rights of

[13] 155 NLRB 625 (1965)

[14] *System Council 1–6, IBEW, et al (New England Telephone & Telegraph Co.)*, 236 NLRB No. 143 (Members Murphy and Truesdale, Member Jenkins dissenting).

those unit employees who were made temporary supervisors. They further found, in agreement with the administrative law judge, that, although the unions had, on occasion, imposed this ban before, the employer had not waived its right by not objecting, since a waiver will not be inferred unless clear and unmistakable. They also noted that the fact that this contract provided for an agency rather than a union shop was not even considered in a similar decision.[15] The panel majority, relying on the precedents in *New York Telephone, supra,* and *Rochester Telephone* [16] which involved similar internal bans on union members accepting temporary supervisory assignments, concluded that the unions' internal rule constituted an unlawful attempt to alter the collective-bargaining agreement and a unilateral change of a term and condition of employment, over which they were required to bargain, in violation of sections 8(d) and 8(b) (3) of the Act.

Member Jenkins, dissenting, would have dismissed the complaint. First, he did not agree that the employer had an established right to make temporary supervisory appointments. He was of the view that the bargaining history clearly belied the majority's reliance on the seniority provision which was not intended to preclude the unions' ban, and that the unions' occasional imposition of a ban in the past did not establish a past practice of temporary supervisory assignments. Moreover, in his view, the union rule did not interfere with the employer's right to make temporary assignments since it applied only to union members and the contract had an agency-shop provision which did not require anyone to be a member. Because the employees were not required to join the unions, it was "apparent that notwithstanding the [u]nion's insistence on their right to direct their members not to accept assignments, many unit members could be, and in fact were, designated as temporary supervisors." Furthermore, union members could accept assignments and avoid discipline simply by resigning from the union.

I. Prohibited Strikes and Boycotts

The statutory prohibitions against certain types of strikes and boycotts are contained in section 8(b) (4). Clause (i) of that section forbids unions to strike, or to induce or encourage strikes

[15] *Communications Workers of America, Local 1122 (New York Telephone Co.),* 226 NLRB 97, 98 (1976).

[16] *Communications Workers of America, Local 1170 (Rochester Telephone Corp.),* 194 NLRB 872 (1972), enfd. 474 F.2d 778 (2d Cir.).

or work stoppages by any individual employed by any person engaged in commerce, or in any industry affecting commerce; and clause (ii) makes it unlawful for a union to threaten, coerce, or restrain any such person, where the actions in clause (i) or (ii) are for any of the objects proscribed by subparagraphs (A), (B), (C), or (D). Provisos to the section exempt from its prohibitions "publicity, other than picketing," and "any primary strike or primary picketing."

1. Consumer Picketing

The Board has held that consumer picketing in front of a secondary establishment constitutes restraint and coercion within the meaning of section 8(b)(4)(ii), and violates section 8(b)(4)(ii)(B) when an object is forcing or requiring any person to cease selling or handling the products of any other producer or processor.

Cases decided during the fiscal year involved the application of the *Tree Fruits decision* [17] in which the Supreme Court held that the Act does not proscribe all peaceful consumer picketing at secondary sites, but only that picketing used to persuade customers of the secondary employer to cease trading with it in order to force it to cease dealing with, or to put pressure upon, the primary employer. The Supreme Court held that consumer picketing—limited to asking customers not to buy a struck product—is lawful because it is part of, or confined to, the primary dispute. Such picketing becomes unlawful only when it extends beyond the struck product to embrace other products or parts of the business of the secondary employer selling the struck product.

In *K & K Construction Co.*,[18] a Board majority concluded that the union did not violate section 8(b)(4)(ii)(B) of the Act by publicizing a primary area standards dispute to the consuming public by means of peaceful pickets and handbills. The union picketed entrances to a construction site, seeking to publicize the carpentry subcontractor's failure to pay wages and benefits commensurate with union standards. The majority found that the union's conduct constituted lawful area standards picketing in that the union's activity was shown to have been in furtherance

[17] *N.L.R.B.* v. *Fruit & Vegetable Packers & Warehousemen, Local 760* [*Tree Fruits Labor Relations Committee*], 377 U.S. 58 (1964).

[18] *Local 399, Carpenters* (*K & K Construction Co.*), 233 NLRB No. 99 (Chairman Fanning and Members Jenkins and Murphy, Member Penello dissenting).

of a lawful primary object—the preservation of area standards. Further, contrary to the administrative law judge and their dissenting colleague, they did not view the issue of the applicability of the "merged product" doctrine to consumer boycotts in the construction industry to be before them at this time. In this connection, the majority concluded that Congress did not intend that the fundamental right to engage in legitimate primary activity would be totally unavailable in certain industries—such as the construction industry—because of the fortuity that the primary employer's product usually ends up incorporated in a secondary employer's product.

Member Penello, dissenting, found the "merged product" doctrine applicable to this case and concluded that a finding that the union violated section 8(b)(4)(ii)(B) was mandated by clear Board precedent. Noting that the primary employer here supplied wooden frames which the secondary employer utilized in construction of houses, he reasoned that the primary employer's product was not clearly identifiable from that of the secondary. Accordingly, finding that the primary's product was merged into the secondary's product, Member Penello concluded that the picketing necessarily resulted in a boycott of the secondary employer's product and was therefore violative of the secondary boycott provisions of the Act.

In *Duro*,[19] a Board panel found that the union's picketing of supermarkets, in furtherance of its dispute with the manufacturer of paper bags for the supermarkets, constituted lawful consumer picketing. It found that the picket signs adequately identified the struck product (i.e., the paper bags) and that the bags had not lost their identity in the overall operation of the supermarket. The panel rejected the argument that the paper bags lost their identity as a product because they were offered as a "service" of the supermarket. This "service," according to the panel, was not so integrated into the supermarket's operation that the loss of it would *per se* equal a cessation of business for the supermarket so that it could not be said that the picketing had such a cessation as its intended result. Accordingly, applying the principles of *Tree Fruits, supra,* the panel dismissed the complaint.

2. Other Issues

In *J. L. Simmons*,[20] the full Board, after seeking and obtaining remand of the case from a court of appeals, reconsidered the case

[19] *United Paperworkers Intl Union, Local 832 (Duro Paper Bag Mfg. Co.)*, 236 NLRB No. 183 (Chairman Fanning and Members Jenkins and Truesdale).

[20] *Local 742, Carpenters, et al. (J. L. Simmons Co.)*, 237 NLRB No. 82.

in light of the Supreme Court's decision in *Enterprise.*[21] In *Enterprise,* the Court upheld the validity of the Board's right-to-control test as a determinative factor in ascertaining whether a union's conduct was proscribed by section 8(b) (4) (B) of the Act. In this case, the employer had entered into a contract with a hospital association to enlarge the latter's existing hospital facility. Pursuant to the requirements of the contract with the hospital association, the employer ordered and attempted to use plastic-faced doors which were "premachined" at the factory. The union refused to allow its members to hang these doors, demanding instead that the employer use unfinished doors which would be fitted and prepared for hardware at the project site. During the dispute over the doors, the union suggested to the employer that the parties might negotiate the payment of a wage premium for each precut door installed. However, the Board concluded that the union's premium pay proposal did not immunize its conduct from the reach of section 8(b) (4) (B). The Board noted the union never unequivocally abandoned its boycott of the disputed doors. Further, assuming the union had abandoned its boycott, the Board found that its willingness to accept premium pay—which the employer had the power to pay—did not convert the employer from its status as a neutral. The union's proposal was not made in the context of bargaining for a new contract but sought premium pay for a matter (i.e., the use of precut doors) over which the employer had no control. Accordingly, the Board concluded the union's demand of premium pay as a *quid pro quo* for hanging the disputed doors did not change the fact that the union sought to satisfy union objectives elsewhere, thereby violating section 8(b) (4) (B) of the Act.

In *Amax Coal,*[22] the Board concluded that the union's strike was motivated, in part, by a desire to compel the employer to bargain as a member of a mutiemployer bargaining association and that it, therefore, violated section 8(b) (4) (i) and (ii) (A) of the Act,[23] as well as section 8(b) (1) (B). The Board noted that the nonmember employer, though faced with an impending strike,

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[21] *N.L.R.B.* v. *Enterprise Assn., Pipefitters, Local 638,* 429 U.S. 507.

[22] *United Mine Workers of America, Local 1854 & UMWA (Amax Coal Co., Div. of Amax),* 238 NLRB No. 214.

[23] The Board initially found that the union's prestrike conduct was violative of sec. 8(b) (1) (B) of the Act. The Board found that the union had attempted, by a course of conduct that included strike threats, to compel the employer to relinquish its right to negotiate independently and instead negotiate through a multiemployer association. The Board concluded that the union had engaged in a classic example of the type of conduct which Congress sought to proscribe in enacting sec. 8(b) (1) (B) of the Act. See discussion of this case *supra* at p. 127.

was precluded by the union from bargaining separately and that the employer's only hope to have input into resolving the strike would have been to bargain through the multiemployer association. During the strike, the union, though bargaining separately with another nonmember of the multiemployer association, while negotiations were stalled with the association, refused to acknowledge the employer's request to pursue independent negotiations. Thus, the Board concluded that the union's strike was in furtherance of the proscribed objective of forcing the employer to join the association and/or to engage in multiemployer bargaining. The Board commented that the fact that the strike also had a lawful objective (i.e., lawful economic considerations) did not diminish the fact that the other objective was unlawful.

J. Jurisdictional Dispute Proceedings

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

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

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

the event recourse to the method agreed upon to adjust the dispute fails to result in an adjustment.

In order to proceed with the determination under section 10(k), the Board must find (1) that there is reasonable cause to believe that the union charged with having violated section 8(b)(4)(D) has induced or encouraged employees to strike or refuse to perform services in order to obtain a work assignment within the meaning of section 8(b)(4)(D); and (2) that a dispute within the meaning of section 10(k) currently exists.

In *U.C. Moving Services*,[24] the Board majority quashed the 10(k) notice of hearing, finding that there were no competing claims to the disputed work in view of the fact that one of the unions had effectively disavowed its claim to the work and despite the fact that some of its individual members continued to claim the work in question. In this case, the employer, a moving company, was a party to a collective-bargaining agreement with Teamsters Local 70, which represented the employer's employees. Teamsters Local 85, although not a party to any collective-bargaining agreement with the employer, asserted that a long-established practice in the area required an employer to hire helpers from the hiring hall of the Teamsters local in whose jurisdiction the work was being performed. On two occasions when attempting to work in Local 85's jurisdiction, employees represented by Local 70 were met by Local 85 pickets. On the first occasion the employer, under protest, hired Local 85 helpers for the job, while in the other instance the customer did not allow the employer to perform the work because of the presence of the Local 85 pickets.

After the employer filed 8(b)(4)(D) charges, a hearing was conducted pursuant to section 10(k), at which Local 70 officially disclaimed its interest in the dispute work. However, throughout the hearing, some individual members of Local 70 employed by the employer continued to claim the disputed work. The Board majority discounted the employer's assertion that Local 70's disclaimer was ineffective, noting that the absence of convincing evidence that the disclaimer was equivocal distinguishes the instant case from *Decora*,[25] upon which the dissent relied. It found that to render ineffective Local 70's disclaimer solely on the basis of independent activity of some individual members would undermine the position of Local 70 as statutory bargaining representa-

[24] *Teamsters & Auto Truck Drivers Local 85, IBT (United California Express & Storage Co., d/b/a U C Moving Services)*, 236 NLRB No 22 (Chairman Fanning and Members Penello and Truesdale, Members Jenkins and Murphy dissenting).

[25] *Local 2 of Detroit, Bricklayers, Masons & Plasterers Intl. Union of America (Decora)*, 152 NLRB 278 (1965).

tive and would counter the well-established principle of exclusive representation.

Members Jenkins and Murphy, in their dissent, found the disclaimer ineffective, citing *Decora* and its progeny, and disagreed that the minor distinctions between *Decora* and the instant case raised by the majority required a different result. In *Decora,* the Board held that a union's disclaimer was visited by the contrary claims of its members and the equivocal conduct of its agents. The dissent stated that jurisdictional disputes occur between groups of employees, not between local unions, and concluded that, as in *Decora,* Local 70's disclaimer was vitiated by the continuing claims of its members and the equivocal conduct of its agents who did not seek to remove its members from the jobsites when the picketing occurred and did not take any steps to discourage its members from performing the work in question. Accordingly, the dissent would have proceeded to determine the merits of the dispute.

Once the Board determines that there is reasonable cause to believe that section 8(b) (4) (D) has been violated and that a jurisdictional dispute exists, section 10(k) requires the Board to make an affirmative award of disputed work after giving due consideration to various relevant factors traditionally considered by the Board in resolving disputes of this nature.

In *General Electric Co.,*[26] a Board panel concluded that none of the factors favored the exclusive award of the work to employees represented by either labor organization involved. Instead, the work (involving the occasional and intermittent repair of steam boilers), which in the past the employer had assigned to whomever was available, was awarded to employees represented by either of the two unions, to the exclusion of all other possible claimants, with the right to assign the work to either or both groups of employees preserved in the employer, depending on the circumstances confronting the employer when the work must be done. In so holding, the panel noted that the Supreme Court, in *Columbia Broadcasting System,*[27] indicated its awareness of certain selective situations in which an award need not be made on an exclusive basis between the two disputants, when it stated that "[t]o determine or settle the dispute [between two groups of employees] would *normally* require a decision that one or the other is entitled to do the work in dispute."[28]

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[26] *Intl Assn. of Machinists & Aerospace Workers, Lodge 70 (General Electric Co.),* 233 NLRB No. 51 (Members Jenkins, Penello, and Murphy).

[27] *N L R.B.* v *Radio & Television Broadcast Engineers Union, Local 1212, IBEW* [*Columbia Broadcasting System*], 364 U.S 573 (1961)

[28] *Id.* at 579 (emphasis supplied).

K. Unit Work Preservation Issues

Section 8(e) makes it an unfair labor practice for an employer and a union to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains, or agrees to cease or refrain, from handling, using, selling, transporting, or otherwise dealing in any products of any other employer or to cease doing business with any other person. It also provides that any contract "entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void." Exempted by its proviso, however, are agreements between unions and employers in the "construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work," and certain agreements in the "apparel and clothing industry."

During the past fiscal year the Board had occasion to determine whether various contract clauses came within the purview of section 8(e). The proper standard for evaluation of such clauses had earlier been set forth by the Supreme Court in *Natl. Woodwork Manufacturers Assn.* v. *N.L.R.B.*,[29] where the Court held that section 8(e) does not prohibit agreements made between an employee representative and the primary employer to preserve for the employees work traditionally done by them and that in assessing the legality of a challenged clause "[t]he touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees." (386 U.S. at 645.)

In *Angelus Auto Parks*,[30] a Board panel found violative of section 8(e) a clause restricting leasing or subcontracting contained in an agreement between the union and a multiemployer association (representing proprietors of bowling alleys). The clause provided that if an employer leased out or subcontracted out its operation or any part of its operation covered by the agreement and if the lessee and subcontractor utilized the services of employees performing work covered by the contract, then the contract shall be binding upon the lessee or subcontractor. This case arose over the union's threat to strike the employer unless the lessee of the employer's coffee shop entered into a collective-bargaining

[29] 386 U.S. 612 (1967), 32 NLRB Ann Rep. 139 (1967)

[30] *Hotel & Restaurant Employees & Bartenders' Union, Local 531 (Angelus Auto Parks & Elnic Corp. d/b/a Verdugo Hills Bowl)*, 237 NLRB No. 190 (Members Jenkins, Murphy, and Truesdale).

agreement with the union. The panel noted that it was well established that contract clauses which purport to limit subcontracting to employers who are signatories to union contracts, so-called union signatory clauses, are proscribed by section 8(e) as they are not designed to protect the wages and job opportunities of unit employees. It concluded that the clause herein had the effect of a union signatory clause, unlawful under section 8(e), since the employer was prohibited from dealing with any persons who did not recognize and become bound to observe the union's agreement. In rejecting the union's contention that the leasing of a portion of a business is similar to a sale of capital goods and, as such, does not constitute "doing business" within the meaning of section 8(e), the panel, although noting that a sale or transfer of an enterprise is generally not viewed as a business transaction within the scope of section 8(e), found that the leasing here was not comparable to a sale because no permanent transfer took place where one entity was substituted for another. Accordingly, the panel found the leasing here constituted a form of "doing business" within section 8(e) and that the clause in question violated section 8(e).

In *Mobile Steamship Assn.*,[31] a Board panel affirmed an administrative law judge's finding that certain "lighter[32] royalty" clauses in a contract between Intl. Longshoremen's Assn. Local 1410 and an association of shipping companies violated section 8(e). The clause in question provided that a $2 lighter royalty be paid ($1 for an employee benefit fund and $1 into an account for a guaranteed annual income plan) for cargo that was loaded or discharged from Lash and/or Seabee lighters by "other than ILA labor," but exempted from the royalty cargo loaded or discharged from lighters by ILA labor. Though noting that the employee benefit funds served a salutory unit purpose, the administrative law judge stated that what was under attack in this case was not the use to which the royalties were put, but the discriminatory manner in which the royalties were assessed. He found that the clause—by assessing a royalty only to cargo loaded or unloaded at any port by "other than ILA labor"—reflected an objective broader than, or in addition to, aiding employees adversely affected by the new system of cargo handling. The administrative law judge reasoned

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[31] *Intl. Longshoremen's Assn. Local 1410 (Longshore Div.) (Mobile Steamship Assn.)*, 235 NLRB No. 32 (Members Penello, Murphy, and Truesdale).

[32] A recent technological advance in the shipping industry has been the development of the Lash/Seabee system of cargo transportation The Lash and Seabee vessels are huge "motherships" which carry barges (i e , the so-called lighters—also described as "containers that float"). Under this system, cargo is loaded on a lighter which is then towed to a seaport and lifted or hauled aboard the "mothership" for transporting.

that the clause drew a distinction between exempt and nonexempt lighters based on union considerations that bore no relationship to lost work opportunities for employees in the bargaining unit. Thus, the clause was found to be a "union signatory" provision directed at an unlawful secondary objective. Further, the administrative law judge fond that, inasmuch as the clause restricted the right of carriers to do business—by imposing the payment of penalty—with non-ILA stevedores or with shippers using non-ILA ports, it met the "cease doing business" requirement of section 8(e). The union was therefore found to have violated section 8(e) by maintaining and giving full force to the agreement containing the lighter royalty clauses.[33]

L. Remedial Order Provisions

1. Bargaining Orders

In *Safeway Trails*,[34] a Board panel, after accepting a remand from a court of appeals in order to reconsider its decision, reversed its earlier decision dismissing the complaint and found, upon reconsideration that the employer had violated section 8(a)(5) of the Act by seeking to undermine the bargaining representative of its employees. Subsequent to the Board's original decision dismissing the complaint, a representation election was conducted among the employees pursuant to a representation petition filed by the employer. The union, which had represented the employer's employees for over 37 years, lost that election and thereby also lost its certification. Under the *Irving Air Chute* doctrine,[35] the Board generally issues a bargaining order in an unfair labor practice proceeding in favor of the union that lost the election only if there is a basis for setting aside the election lost by the union on meritorious objections. However, in *Safeway*, the panel noted that *Irving Air Chute* presupposes that it was appropriate to have conducted an election. Where, as here, the Board, after accepting a remand from a court, decides to reverse its dismissal of the complaint and find a violation of the Act, it must further decide whether, had it initially found a violation, an election would have been proper. In this case, the panel noted that had it originally

[33] Finding no evidence that the union threatened, coerced, or restrained any employer-member of the association or any shipper, the administrative law judge found no violation of sec 8(b)(4)(ii)(A) and (B). The panel also affirmed this finding

Also, for similar findings regarding the same sort of royalty clauses, see *General Longshore Workers, ILA Locals 1418 & 1419 (New Orleans Steamship Assn.)*, 235 NLRB No. 31 (1978)

[34] 233 NLRB No 171 (Chairman Fanning and Members Penello and Truesdale)

[35] *Irving Air Chute Co., Marathon Div.*, 149 NLRB 627 (1964)

found a violation of section 8(a)(5), then the employer's petition would have been dismissed and no election held. Accordingly, to remedy the unfair labor practices found, the panel set aside the results of the election and issued a bargaining order in favor of the union.

Peoples Gas System [36] also involved a situation where the Board accepted a remand from a court of appeals and, upon reconsideration, reversed its earlier decision to dismiss the complaint. In a supplemental decision, a panel majority found that the employer had withdrawn recognition of the incumbent union in violation of section 8(a)(5) of the Act. As in *Safeway,* subsequent to the Board's original dismissal of the complaint, the union lost the election held pursuant to a representation petition filed by the union. No objections to the election were filed and the Board certified the results thereof. However, the panel majority concluded that the only conceivable way to remedy the unfair labor practices and to establish the *status quo ante* was to issue a bargaining order in favor of the union. As this case involved an incumbent union rather than a union seeking initial recognition, they stated that accepting the results of the election would have the effect of forcing the union into an election to regain what was unlawfully taken from it. The panel majority further noted that it would have been futile for the union to have filed objections to the election based on the employer's withdrawal of recognition because, at the time of the election, the Board had held such withdrawal to be lawful. Accordingly, the majority concluded that a bargaining order was necessary and uniquely appropriate to remedy the employer's unfair labor practices and that such order was not barred by the principle enunciated in *Irving Air Chute.*

Member Penello, dissenting, noted that the union itself had sought, some 2 years after the withdrawal of recognition, the holding of an election which would be free and fair. Further, he concluded that even if there had been an unlawful refusal to bargain —a refusal he would not find on the merits—the union's filing a petition 2 years later indicated that the effects of that refusal were so attenuated as not to preclude holding of a fair election and the Board, by directing the election, obviously agreed that such an election could be held. Member Penello, therefore, would not extend *Irving Air Chute* to the instant situation and would not have issued a bargaining order herein where no objections had been filed and the Board had certified the election results.

[36] 238 NLRB No 143 (Chairman Fanning and Member Murphy, Member Penello dissenting)

2. Backpay and Reinstatement Provisions

In *Carpenter Sprinkler Corp.*,[37] the full Board found that the employer had violated section 8(a) (5) by unilaterally reducing the wages and other economic benefits of employees. In direct response to the employer's actions, employees elected to go out on strike, and subsequently the employer hired replacements to assume the duties of the striking employees, paying the replacements the reduced wages and benefits. The Board noted that both the strike and the hiring of replacements resulted directly from the employer's unilateral modification of wages and benefits, which was found to be violative of section 8(a) (5) of the Act. In remedying the employer's unfair labor practices, the Board concluded that, in order to restore the status quo, all employees who performed unit work, including both the returning strikers and the strike replacements, were entitled to restitution of the wages and economic benefits lost as a result of the employer's unlawful unilateral actions and it so ordered.

In *Federated Publications d/b/a The State Journal*,[38] a Board panel concluded that the employer did not comply with the Board's backpay order by paying the backpay due the discriminatee to the discriminatee's former wife. The employer claimed that it had acted in good faith pursuant to a wage assignment made by the discriminatee, and consistent with the Board's order, though the wage assignment had been revoked prior to the employer's making the payment. The panel noted that it was not within the employer's prerogative to decide who, if anyone, other than the discriminatee was entitled to receive the payment and, therefore, the employer must bear the burden which was caused by its failure to comply with the Board's order. Accordingly, the panel concluded that the employer had not complied with the Board's order to make the discriminatee whole for the loss of earnings he suffered as a result of the discrimination against him and ordered it to do so.

In *Bryan Infants Wear Co.*,[39] a Board panel concluded that an employer was not obligated to offer economic strikers reinstatement at a location not within the bargaining unit. In this case, employees at Bryan's plant went on strike, but thereafter made an unconditional offer "for reinstatement to their old jobs or the maximum opportunity which the law allows." The issue arose as to whether or not the strikers were entitled to reinstatement at the employer's Bixby plant, located 12 miles away. The panel concluded

[37] 238 NLRB No. 139.
[38] 238 NLRB No 69 (Chairman Fanning and Members Jenkins and Penello)
[39] 235 NLRB No. 180 (Chairman Fanning and Members Jenkins and Penello).

that the union did not specifically request reinstatement for the strikers at the Bixby plant. It found that, regardless of whether the owners of the Bryan and Bixby plants were joint employers, the Bixby plant must be an accretion to the Bryan bargaining unit before it could be found that the employer had a duty under the Act to offer recall to Bryan economic strikers at the Bixby plant. Concluding that the Bixby plant could constitute a separate appropriate unit and accordingly was not an accretion to the Bryan plant, the panel found that the employer did not violate section 8(a) (1) and (3) of the Act by its failure to offer recall at the Bixby plant to Bryan economic strikers.

3. Other Remedial Provisions

In *Liberty Mutual Insurance Co.*,[40] a Board panel affirmed an administrative law judge's finding that the employer had discharged the charging party, one of its sales agents, in violation of section 8(a)(3) and (1) of the Act. After the discharge, the sales agent had attempted to form his own insurance agency and the employer then brought an action in state court to enforce a noncompetition agreement that the charging party had entered into upon commencing his employment with the employer. To restore the discriminatee to his *status quo ante*, and to prevent or deter recurrence of the unlawful activity involved, the panel found it appropriate to recompense the charging party for attorney fees incurred in defense of the injunction action brought against him in state court by the employer. It noted that, but for the employer's unlawful discharge, the charging party would not have been forced to mitigate damages by selling insurance in the contravention of the noncompetitive covenant.

In *Betra Mfg. Co.*,[41] a Board panel found that the employer had violated section 8(a) (5) and (1) of the Act by failing and refusing to bargain in good faith with the union. A panel majority, however, rejected the General Counsel's request for the same remedy issued by the Board in *Tiidee Products*.[42] In the *Tiidee* case, the Board had noted the need to keep crowded court and Board dockets free from frivolous litigation and ordered an employer who refused to meet and negotiate with the certified representative of its employees to reimburse the Board and the union for their costs and expenses incurred in the investigation, preparation, presenta-

[40] 235 NLRB No. 197 (Members Jenkins, Penello, and Truesdale)

[41] 233 NLRB No. 156 (Chairman Fanning and Member Penello, Member Murphy dissenting in part).

[42] 194 NLRB 1234 (1972)

tion, and conduct of the case. However, concluding that all of the employer's defenses in this case, although lacking in merit and/or unsupported by the record, were not patently frivolous, the panel majority deemed it inappropriate to apply the requested monetary remedy awarded in the *Tiidee* case. While finding that a full *Tiidee* remedy was not warranted, the panel majority, noting that it was not an adequate remedy merely to refer the parties back to the bargaining table, and that other *Tiidee* remedial measures were warranted, directed that the employer mail the "notice to employees" to all unit employees, grant the union reasonable access to its bulletin board, and make available to the union a list of names and addresses of all unit employees to be kept current for a period of 1 year.

Member Murphy, dissenting in part, would have granted the General Counsel's request for an extraordinary remedy. Where as here, an employer has continually circumvented the possibility of finalizing extended contract negotiations by insisting on contract provisions which would effectively emasculate the union as the bargaining representative of the employees, particularly after it also failed to comply with the terms of an earlier settlement agreement, she would find an extraordinary remedy to be warranted. Since the employer here depleted the union's time and financial resources, as well as expended the time of Federal mediators and the Board, in a "duplicitous bargaining charade," Member Murphy found it unlikely that the employer would return to the bargaining table and bargain in good faith, absent a more compelling remedy than that imposed by the majority. Therefore, she would require that the employer reimburse the Board and union for all costs and expenses denied by the panel majority, and also reimburse the union for negotiating costs, as requested by the General Counsel.

VII

Supreme Court Litigation

During fiscal year 1978, the Supreme Court decided five cases in which the Board was a party, and the Board prevailed in all five. The Board also participated as *amicus curiae* in two other cases.

A. Picketing To Compel Compliance With Prehire Agreement Where Union Has Not Acquired Majority Employee Support

Local 103, Ironworkers[1] involved the question whether a union may picket to compel compliance with a prehire agreement where it had not acquired support of a majority of the unit employees. There, an employer in the construction industry entered into a prehire agreement with the union under section 8(f) of the Act, which provides that it shall not be an unfair labor practice for unions and employers in the construction industry to enter into agreements before the majority status of the union has been established. The agreement did not contain a union-security clause. When the employer later undertook construction projects with nonunion labor, the union picketed those projects (one for more than 30 days) with signs stating that the employer was violating its agreement with the union. The Board, finding that the union never represented a majority of the employees at any of the employer's projects and had not petitioned for a representation election, concluded that the picketing violated section 8(b)(7)(C) of the Act. That provision makes it an unfair labor practice for an uncertified union to picket for recognition as the employees' bargaining representative for more than 30 days, unless a petition for an election has been filed within that period.

The 8(b)(7)(C) finding was premised on the Board's view that an 8(f) prehire agreement does not entitle a minority union to be treated as the majority representative until and unless it

[1] *N.L.R.B.* v. *Local Union 103, Ironworkers* [*Higdon Contracting Co.*], 434 U.S 335, reversing 535 F 2d 87 (D.C. Cir 1976), reversing and remanding 216 NLRB 45 (1975).

attains majority support in the relevant unit. Until that time the prehire agreement is voidable, and may not be enforced either through an 8(a)(5) refusal-to-bargain proceeding,[2] or by picketing which would otherwise violate section 8(b)(7)(C).

The Supreme Court,[3] reversing the court of appeals, held that the Board's construction of the Act "is an acceptable reading of the statutory language and a reasonable implementation of the purposes of the relevant statutory sections." 434 U.S. at 341. The Court explained:

> Because of § 8(f), the making of prehire agreements with minority unions is not an unfair labor practice as it would be in other industries. But § 8 (f) itself does not purport to authorize picketing to enforce prehire agreements where the union has not achieved majority support. Neither does it expand the duty of an employer under § 8(a)(5), which is to bargain with a *majority* representative, to require the employer to bargain with a union with which he has executed a prehire agreement but which has failed to win majority support in the covered unit. [434 U.S. at 346.]

B. Union Discipline of Supervisor-Members for Crossing Picket Lines To Perform Supervisory Duties

In *Writers Guild*,[4] the issue was whether a union's discipline of members who are supervisors for crossing the union's picket line during a strike to perform regular supervisory duties, which included the adjustment of grievances or collective bargaining, violated section 8(b)(1)(B) of the Act. That provision makes it an unfair labor practice for a union to restrain an employer "in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances." The Supreme Court,[5] reversing the court of appeals, sustained the Board's conclusion that such discipline was unlawful.

The Supreme Court rejected the contention that its earlier decision in *Florida Power & Light Co.* v. *Intl. Brotherhood of Elec-*

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[2] See *R. J. Smith Construction Co*, 191 NLRB 693 (1971), enforcement denied *sub nom. Local 150 Engineers*, v. *N.L.R.B*, 480 F.2d 1186 (D.C. Cir. 1973).

[3] Justice White delivered the opinion of the Court. Justice Stewart, joined by Justices Blackmun and Stevens, dissented.

[4] *American Broadcasting Companies* v. *Writers Guild of America, West*, 98 S.Ct. 2423, reversing 547 F.2d 159 (2d Cir. 1976), denying enforcement of 217 NLRB 957 (1975).

[5] Justice White delivered the opinion of the Court. Justice Stewart, joined by Justices Brennan, Marshall, and Stevens, dissented.

trical Workers, Local 641, 417 U.S. 790 (1974), holding that union discipline of supervisor-members who crossed picket lines to perform struck rank-and-file work did not violate section 8(b)(1)(B), meant that "it is never an unfair practice for a union to discipline a supervisor-member for working during a strike, regardless of the work that he may perform behind the picket lines." 98 S.Ct. at 2434. Rather, the Court agreed with the Board that *Florida Power* stands for the proposition that, "in ruling upon a § 8(b)(1)(B) charge growing out of union discipline of a supervisory member who elects to work during a strike, [the Board] may—indeed, it must—inquire whether the sanction may adversely affect the supervisor's performance of his collective-bargaining or grievance-adjustment tasks and thereby coerce or restrain the employer contrary to § 8(b)(1)(B)." *Ibid.*

The Court found that substantial evidence supported the Board's findings that the union discipline here could reasonably be expected to affect the supervisors' performance of such duties. Thus, insofar as the union's threats of discipline kept supervisors from reporting for work, the employer was deprived of the opportunity to choose particular supervisors as its collective-bargaining or grievance-adjustment representatives during the strike. And, as to the supervisors who reported to work during the strike, there was no assurance as to how long they would remain on the job in the face of the union's continued threats of discipline, including the threat of a union blacklist. Moreover, after the strike, the supervisors who had worked during the strike still faced charges and trials or were appealing large fines and long suspensions. "At the same time," the Court noted, "they were expected to perform their regular supervisory duties and to adjust grievances whenever the occasion demanded, functions requiring them to deal with the same union which was considering the appeal of their personal sanctions." 98 S.Ct. at 2436. The Court concluded:

> As to these supervisors, who had felt the union's wrath, not for doing rank-and-file work contrary to union rules, but for performing only their primary supervisory duties during the strike and who were in a continuing controversy with the union, it was not untenable for the Board to conclude that these disciplined [supervisors] had a diminished capacity to carry out their grievance-adjustment duties effectively and that the employer was deprived of the full range of services from his supervisors. [*Id.*]

C. Distribution of "Political," But Labor-Related, Literature on Company Property

Eastex [6] involved the right of employees to distribute "political," but labor-related, literature on company property. In that case, the company denied employee officers of the incumbent union permission to distribute a four-part union newsletter in nonworking areas of the plant during nonworking time. The first and fourth sections of the newsletter urged employees to support the union and extolled union solidarity. The second section encouraged employees to write their legislators to oppose incorporation of the state "right-to-work" statute into the state constitution. The third section criticized a Presidential veto of an increase in the Federal minimum wage and urged employees to register to vote to "defeat our enemies and elect our friends." The company did not contend that the distribution of this literature interfered with plant discipline or production, but rather asserted that the literature fell outside the protection of section 7 of the Act because the second and third sections contained "political propaganda" which did not "relate . . . to our association with the Union." The Board rejected this contention, and, applying the principle enunciated in *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793 (1945), that a ban on employee literature distribution during nonworking time in nonworking areas of the plant is invalid absent a showing that it is necessary to maintain production or discipline, concluded that the company's refusal to permit the distribution violated section 8(a)(1) of the Act.

The Supreme Court,[7] affirming the court of appeals, enforced the Board's order. The Court agreed with the Board that the second and third sections of the newsletter were protected under the "mutual aid or protection" clause of section 7 of the Act. The Court noted that the Board and the courts long have held that the "mutual aid or protection clause" protects "employees when they engage in otherwise proper concerted activities in support of employees of employers other than their own." 98 S.Ct. at 2512. It further noted that the "mutual aid or protection" clause has traditionally been held to protect employee efforts "to improve working conditions through resort to administrative and judicial forums," and "employees' appeals to legislators to protect their interests as employees." *Id.* While assuming that at some point the

[6] *Eastex* v *N L R.B.*, 98 S Ct. 2505, affg. 550 F.2d 198 (5th Cir 1977), enfg 215 NLRB 271 (1974).

[7] Justice Powell delivered the opinion of the Court Justice White concurred. Justice Rehnquist, joined by Chief Justice Burger, dissented

relationship of particular concerted activity to "employees' interests as employees' could be "so attenuated that [the] activity cannot fairly be deemed to come within the 'mutual aid or protection' clause," the Court concluded that the Board "acted within the range of its discretion" in ruling that "right-to-work" and minimum wage legislation bears such a relation to employees' interests as to come within the guarantee of the "mutual aid or protection" clause. 98 S.Ct. at 2514.

The Court further held that the Board was not required to apply a rule different from the one it applied in *Republic Aviation* merely because part of the newsletter " 'does not involve a request for any action on the part of the employer, or does not concern a matter over which the employer has any degree of control . . .' " 98 S.Ct. at 2516. Here, as in *Republic Aviation,* the company's employees are " 'already rightfully on the employer's property.' " Hence, it is the " 'employer's management interests rather than [its] property interests' that primarily are implicated." The company, however, "made no attempt to show that its management interests would be prejudiced in any manner by distribution" of the sections to which it objected, and "any incremental intrusion on [the company's] property rights from their distribution together with the other sections would be minimal." 98 S.Ct. at 2517.

D. Employee Solicitation and Distribution in Health Care Facilities

Beth Israel Hospital[8] involved the propriety of the Board's policy respecting the application of no-solicitation/no-distribution rules in a hospital setting. There, the hospital invoked its rule prohibiting employees from soliciting and distributing literature except in certain employee locker rooms and adjacent restrooms to bar such activity in the cafeteria, a facility used primarily by employees, but also by visitors and patients. The Board, applying the policy adopted in *St. John's Hospital & School of Nursing,* 222 NLRB 1150 (1976), concluded that the hospital's action violated section 8(a)(1) of the Act. In *St. John's,* the Board ruled that, since "the primary function of a hospital is patient care" and "a tranquil atmosphere is essential to carrying out that function," a hospital may be warranted in imposing more stringent restrictions on employee solicitation and distribution in immediate

[8] *Beth Israel Hospital* v. *N L.R.B.*, 98 S.Ct. 2463, affg. 554 F.2d 477 (1st Cir 1977), enfg as modified 223 NLRB 1193 (1976).

patient care areas than are generally permitted other employers, but the balance should be struck against such restrictions in other patient access areas, such as lounges and cafeterias, absent a showing by the hospital that patient care would necessarily be disrupted.

The Supreme Court,[9] affirming the court of appeals, enforced the Board's order. The Court rejected the hospital's contention that, "in enacting the 1974 Health Care Amendments, Congress intended the Board to apply different principles regarding no-solicitation and no-distribution rules to hospitals because of their patient care functions." 98 S.Ct. at 2477. The Court therefore held that "the Board's general approach of requiring health-care facilities to permit employee solicitation and distribution during nonworking time in nonworking areas, where the facility has not justified the prohibitions as necessary to avoid disruption of health care operations or disturbance of patients, is consistent with the Act." *Id.*

The Court further held that the Board's conclusion that the possibility of any disruption in patient care resulting from employee solicitation or distribution in the hospital cafeteria is remote was rational and fully supported by cogent evidence. The Court noted that only 1.5 percent of the cafeteria patrons are patients and the hospital itself permitted nonunion solicitation and distribution in the cafeteria. Moreover, the hospital introduced no evidence of untoward effects on patients during an earlier period when the rules permitted limited union solicitation in the cafeteria.

Finally, the Court found that the Board was not irrational in upholding a ban against solicitation in the dining area of public restaurants,[10] where such solicitation tends to upset patrons, while prohibiting a ban on such activity in a hospital cafeteria. The Court stated that employee solicitation in the dining area of a public restaurant, if disrupting, "necessarily would directly and substantially interfere with the employer's business." 98 S.Ct. at 2476. On the other hand, the "main function of the hospital is patient care and therapy and those functions are largely performed in areas such as operating rooms, patients' rooms, and patients' lounges." A hospital cafeteria, whose patrons are largely employees, "functions more as an employee service area than a patient care area." *Id.*

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[9] Justice Brennan delivered the opinion of the Court Justices Blackmun and Powell each delivered a concurring opinion, in both of which Chief Justice Burger and Justice Rehnquist joined

[10] See, e.g., *Marriott Corp. (Children's Inn)*, 223 NLRB 978 (1976).

E. Prehearing Disclosure of Witness Statements in Board Proceedings Under the Freedom of Information Act

In *Robbins Tire*,[11] the Supreme Court,[12] reversing the court of appeals, sustained the Board's position that witness statements in pending unfair labor practice proceedings are protected against disclosure by Exemption 7(A) of the Freedom of Information Act (FOIA).[13] That provision exempts from disclosure "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records . . . would interfere with enforcement proceedings."

The Court held that Congress, in the FOIA, did not intend to overturn the Board's longstanding policy against prehearing disclosure of witness statements.[14] It further held that the disclosure of such statements before completion of the Board proceeding necessarily would involve the kind of "interference with enforcement proceedings" that Exemption 7(A) was designed to avoid. Such release would give "a party litigant earlier and greater access to the Board's case than he would otherwise have." 437 U.S. at 241. Moreover, it would entail the risk that "employers or, in some cases, unions will coerce or intimidate employees and others who have given statements, in an effort to make them change their testimony or not testify at all." 437 U.S. at 239.

F. Cases in Which the Board Participated as *Amicus Curiae*

1. *Sears* v. *Carpenters* [15] involved the question whether the National Labor Relations Act preempted a state court suit brought by the employer to enjoin, under state trespass laws, picketing occurring on its property which was arguably prohibited or arguably protected by the Act. The Supreme Court [16] held that the suit was not foreclosed under the *Garmon* preemption principles.[17]

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[11] *N.L.R.B* v *Robbins Tire & Rubber Co*, 437 U.S. 214, reversing 563 F.2d 724 (5th Cir. 1977), affirming an unreported decision of the United States District Court for the Northern District of Alabama

[12] Justice Marshall delivered the opinion of the Court. Justice Stevens filed a concurring opinion, in which Chief Justice Burger and Justice Rehnquist joined Justice Powell filed an opinion concurring in part and dissenting in part, in which Justice Brennan joined.

[13] 5 U S C § 552(b)(7)(A).

[14] Under the Board's rules, a witness statement is not disclosed unless and until he or she has testified in a formal proceeding, and then it can only be utilized for purposes of cross-examination See 29 C.F R. § 120.118(b)(1).

[15] *Sears, Roebuck & Co.* v *San Diego County District Council of Carpenters*, 436 U.S. 180, reversing and remanding 533 P 2d 603 (Cal Sup Ct 1976)

[16] Justice Stevens delivered the opinion of the Court Justices Blackmun and Powell issued separate concurring opinions Justice Brennan, joined by Justices Stewart and Marshall, dissented

[17] *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959).

The Court noted that permitting the state court to adjudicate the employer's trespass claim would create no real risk of interference with the Board's primary jurisdiction to enforce the statutory prohibition against unfair labor practices. For, had the employer filed a charge against the union, the Board would have been concerned with the objective of the picketing, while, in the state action, the employer only challenged the location of the picketing.

The Court recognized that, to the extent that the union's picketing was arguably protected by section 7, there existed a potential overlap between the controversy presented to the state court and that which the union might have brought before the Board. But, the Court concluded:

> The primary-jurisdiction rationale justifies pre-emption only in situations in which an aggrieved party has a reasonable opportunity either to invoke the Board's jurisdiction himself or else to induce his adversary to do so. In this case, Sears could not directly obtain a Board ruling on the question whether the Union's trespass was federally protected. Such a Board determination could have been obtained only if the Union had filed an unfair labor practice charge alleging that Sears had interfered with the Union's § 7 right to engage in peaceful picketing on Sears' property. By demanding that the Union remove its pickets from the store's property, Sears in fact pursued a course of action which gave the Union the opportunity to file such a charge. But the Union's response to Sears' demand foreclosed the possibility of having the accommodation of § 7 and property rights made by the Labor Board; instead of filing a charge with the Board, the Union advised Sears that the pickets would only depart under compulsion of legal process. [436 U.S. at 201.]

2. *White Motor Corporation* [18] involved the question whether the National Labor Relations Act preempted application of the Minnesota Pension Act—which established minimum standards for the funding and vesting of terminated employees' pension plans—to a collectively bargained pension agreement.[19] The Supreme Court [20] held that there was no preemption.

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[18] *Malone* v. *White Motor Corp.*, 435 U S. 497, reversing and remanding 545 F.2d 599 (8th Cir. 1976), reversing 412 F.Supp. 372 (D.C. Minn., 1976)

[19] The events involved all occurred prior to the enactment of the Employment Retirement Income Security Act of 1974 (ERISA), 88 Stat. 832, which contains a provision expressly preempting all state laws regulating covered plans

[20] Justice White delivered the opinion of the Court. Justices Stewart and Powell dissented, joined by Chief Justice Burger. Justices Brennan and Blackmun did not participate.

The Court noted that "whether the Minnesota statute is invalid under the Supremacy Clause depends on the intent of Congress." 435 U.S. at 504. The Court found that, while there is little doubt that under the National Labor Relations Act "pension benefits are proper subjects of compulsory bargaining," nothing in that Act "expressly forecloses all state regulatory power with respect to those issues, such as pension plans, that may be the subject of collective bargaining." 435 U.S. at 504–505. Moreover, the Court found that certain provisions of the Pension Plans Disclosure Act of 1958, 72 Stat. 997,[21] together with the legislative history of that statute, indicate Congress' intention to preserve state regulatory authority over pension plans, including those resulting from collective bargaining. The legislative history of the Disclosure Act also shows that Congress was concerned not only with corrupt pension plans, "but also with the possibility that honestly managed pension plans would be terminated by the employer, leaving the employees without funded pensions at retirement age." 435 U.S. at 509. In the light of this history, the Court concluded, "we cannot hold that the [Minnesota] Pension Act is nevertheless implicitly pre-empted by the collective-bargaining provisions of the NLRA." 435 U.S. at 512.

[21] Sec. 10(b) of the Disclosure Act provides that the act shall not exempt any person from liability "provided by any present or future" Federal or state law affecting the operation of pension plans. Sec. 10(a) of the Disclosure Act provides that the act shall not be construed to prevent any State from obtaining additional information relating to a pension plan "or from otherwise regulating such plan."

VIII

Enforcement Litigation

A. Board and Court Procedure

1. Court Jurisdiction Under Section 10(e) and (f)

The Ninth Circuit denied judicial review in two cases of issues not properly presented to the Board for its consideration. In *Polynesian Cultural Center* v. *N.L.R.B.*,[1] the Polynesian Cultural Center, a nonprofit corporation wholly owned by the Church of Jesus Christ of Latter Day Saints, asserted for the first time in a supplemental brief submitted to the court in connection with the enforcement proceeding that the Board lacked jurisdiction over it because of the religion clauses of the first amendent. The Center premised its contention on a recently issued decision in the Seventh Circuit [2] holding that the Board improperly asserted jurisdiction over lay teachers in parochial schools. The court responded that there were two types of jurisdictional issues: "jurisdiction in the sense of 'power to hear and determine the controversy,' " which can be raised at any time, and jurisdiction in the sense of the Board's authority to act under the particular circumstances of the case, which the Supreme Court has held [3] can be raised for the first time in enforcement proceedings only under "exceptional circumstances." The court held that the Board had authority to hear the case because a labor controversy was clearly presented; with respect to the Board's authority to act in the case presented, the court held that "a decision by another circuit suggesting that perhaps jurisdiction in the second sense is lacking does not constitute an 'exceptional circumstance' " justifying judicial consideration of the issue in this case. The court noted that, although the Center and its counsel "undoubtedly were aware of the lurking First Amendment issues and the necessity for a careful factual development before the Board upon which a conscientious disposition thereof would depend," it made "no effort . . . to make such a disposition possible."

[1] 582 F.2d 467

[2] *Catholic Bishop of Chicago* v *N L.R.B.*, 559 F 2d 1112 (1977), cert granted 434 U.S 1061.

[3] *N L.R B.* v *Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961).

The court demonstrated a similar concern for presenting the Board with an adequate opportunity to rule on disputed issues in *N.L.R.B.* v. *Children's Baptist Home of Southern California.*[4] In that case, the Children's Baptist Home had contested both the Board's exercise of its discretionary jurisdiction and its resolution of the Home's election objections in the representation proceedings but had only asserted its jurisdictional defense to an 8(a)(5) charge issued against it in the unfair labor practice proceeding. The Home then argued its election objections in its brief to the Ninth Circuit. That court refused to consider the Home's contentions concerning the validity of the election; it held: "an objection made during the course of a representation proceeding must be reasserted in the subsequent unfair labor practice case in order to be preserved for review by this court." Quoting a similar First Circuit case,[5] the court noted that an objection in the representation case "did not fairly put the Board on notice that the asserted validity of the election was to be posed as a defense to the 8(a)(5) charge." It rejected the contention that the Board's rule [6] against relitigation of representation issues in the unfair labor practice proceeding would reduce a subsequent objection to "meaningless form." It relied on a Supreme Court decision [7] holding that a court reviewing an ICC order had erred in considering a claim not pressed in the administrative proceedings even though the commission had a policy of rejecting all such claims. The Supreme Court had stated that "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction," [8] and the court noted that the Board by example [9] has shown that its relitigation rule is not inflexible and that it may consider previously litigated representation issues.

2. Board Procedure

a. Unfair Labor Practice Proceedings

In this case,[10] the Fifth Circuit found, contrary to the Board, that the doctrine of collateral estoppel applies where the question of an employee's strike misconduct is first litigated in an 8(b)(1)(A) proceeding against the striking union and is then the subject

[4] 576 F.2d 256.
[5] *N.L.R.B.* v. *Southbridge Sheet Metal Works*, 380 F 2d 851, 854 (1st Cir. 1967).
[6] 29 C F R § 102.67(f).
[7] *U.S* v *L. A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952).
[8] *Id.*
[9] *American Bread Co.* v. *N.L.R B.*, 411 F.2d 147, 152 (6th Cir. 1969).
[10] *Mosher Steel Co* v *N.L.R.B.*, 568 F.2d 436.

of a second unfair labor practice proceeding arising from the employer's refusal of reinstatement. Citing *Hyman* v. *Regenstein*,[11] the court agreed that collateral estoppel is applicable "only if the same parties or their privies are involved in both actions and if it was foreseeable that the facts to be the subject of estoppel would be of importance in future litigation." The court found, however, that the union was the party involved in both proceedings because it was the employees' bargaining agent and had "prosecuted" both cases. Moreover, in the court's view it was also foreseeable that the alleged acts of misconduct would be important in any future reinstatement proceeding. Accordingly, the court held the facts of the employee's misconduct could not be relitigated in the subsequent case. Finally, the court noted that a number of policy considerations—namely, economy of judicial and agency administration and a greater likelihood of an accurate determination—favor compelling the parties to try the factual issues in the initial proceeding.

In *N.L.R.B.* v. *Houston Distribution Services*,[12] the Fifth Circuit found that there was no error in amending the complaint to include the actual employer, the parent corporation of a wholly owned subsidiary named in the unfair labor practice charge. The court noted that "the addition of the correct corporate entity [was not] so completely outside the original charge that the Board could be said to have initiated a proceeding on its own motion" and observed that working men filing an unfair labor practice charge "are not required to wander the maze of corporate structure."

In *N.L.R.B.* v. *Auto Warehousers*,[13] the court rejected, on the ground that the complaint was barred by section 10(b) of the Act,[14] the Board's finding that the employer and the union had violated the Act by maintaining and enforcing a provision in their collective-bargaining agreement which allowed shop stewards to be granted superseniority for purposes beyond layoff and recall. The execution of the contract and the steward's exercise of his supersenority to obtain a newly created job all took place outside the 10(b) period. Within that period, however, the steward used his superseniority to retain a new position during the annual job bidding and to obtain overtime on a regular basis. The administrative law judge, with the Board's affirmance, found that, under

[11] 258 F 2d 502, 510–511 (5th Cir. 1958).

[12] 573 F.2d 260.

[13] 571 F 2d 860 (5th Cir.).

[14] Sec. 10(b) of the Act provides in relevant part 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 . . ."

Dairylea,[15] the broad superseniority clause was presumptively unlawful, that the contracting parties established no adequate business justification for the clause, and that each act enforcing the provision constituted a reaffirmance or renewed "entering into" of the superseniority clause and therefore established an independent violation. The Seventh Circuit, however, did not reach the *Dairylea* issue. The court held that mere maintenance of the clause was not unlawful because the clause was valid on its face and establishing its invalidity would require a showing that no valid justification existed at the time the contract was executed—an event occurring outside the 10(b) period. Applying similar principles, the court also held that the steward's rebidding for the job with superseniority did not constitute an independent enforcement of the provision.

In *Natter Mfg. Corp.* v. *N.L.R.B.*,[16] the Ninth Circuit sustained the Board's refusal to conduct a hearing on Natter's allegation that the certified union engaged in unlawful discriminatory practices, because "Natter [had] presented no *facts* which would establish a prima facie case that this particular union is guilty of racial discrimination." Natter claimed that the international union and other affiliated locals had been found to have engaged in such discrimination but failed to show that the certified union was "virtually dominated" by either the international or a tainted local and, absent such a showing, the court held, "the allegations concerning the other organizations are little, if any, evidence that [the certified union] engages in discriminatory practices." The court also was unpersuaded by Natter's claim that without a hearing it could not acquire the relevant evidence, because Natter should have been able to obtain "affidavits of persons who have witnessed or suffered the discrimination," if any in fact had occurred. Accordingly, the court agreed with the Board that Natter was not "entitled to a fishing expedition in order to prove its wholly unsubstantiated assertions that *this particular* local practices invidious discrimination." In so holding, the court found it unnecessary to pass upon either the correctness or the retroactive applicability of the Board's decision in *Handy Andy* [17] that it would handle allegations of racial discrimination in appropriate unfair labor proceedings rather than in the representation proceedings.

[15] *Dairylea Cooperative*, 219 NLRB 656 (1975), enfd. 531 F 2d 1162 (2d Cir. 1976).
[16] 580 F 2d 948
[17] *Handy Andy*, 228 NLRB 447 (1977); 42 NLRB Ann. Rep. 25, 41 (1977).

b. Representation Proceedings

In two cases, courts disagreed with the Board regarding the effects of consent election agreements and refused to enforce Board bargaining orders in favor of the unions which won elections conducted pursuant to such agreements. In *N.L.R.B.* v. *Unifemme*,[18] the company attempted to withdraw from the stipulation for consent election it had entered into with one union when a second union intervened. The company argued that the second union's intervention was fraudulent and untimely and that it would not have agreed to the stipulated bargaining unit if it had known that the intervening union would be on the ballot. The regional director rejected the company's arguments and the intervening union was victorious. When the Board adopted the regional director's recommendation that its objections to the election be overruled, the company refused to bargain with the certified union. The Eighth Circuit relied on dicta in the Second Circuit's decision in *Buffalo Arms* [19] to hold that the regional director abused his discretion in refusing to allow the company to withdraw from the election agreement in light of the changed circumstances and parties created by the second union's intervention.

In *N.L.R.B.* v. *Flowers Baking Co. of Gadsden*,[20] the consent election agreement provided that the parties would furnish an "accurate list of all the eligible voters to the Regional Director." Pursuant to this agreement, the company submitted a list which named 12 employees but excluded an employee who was on maternity leave. Through telephone conversations with a Board agent, the union accepted the company's voter list and agreed that a unit determination hearing was unnecessary. When the employee who was on maternity leave attempted to vote, the company objected on the ground that she was not an employee, claiming that her retention on the payroll was due to clerical error. The Board determined that the individual was, in fact, an employee and counted her challenged ballot to give the union a majority. The court found it unnecessary to consider whether or not the voter was an employee since it determined that she was ineligible to vote on the basis of her omission from the eligibility list orally agreed to by the parties. The court held that the Board agent's participation in telephone conversations regarding the list was sufficient to make the parties' agreement binding under the *Banner Bedding* excep-

[18] 570 F.2d 230 (8th Cir.).
[19] *Buffalo Arms* v *N.L.R.B.*, 224 F.2d 105 (1955).
[20] 578 F 2d 1145 (5th Cir.)

tion [21] to the *Norris-Thermador* rule [22] requiring that such agreements be in writing, despite the absence of a personal meeting between the parties and the lack of any discussion of the individual's status prior to the election.

In *N.L.R.B.* v. *Mercy Hospitals of Sacramento*,[23] the Ninth Circuit examined the Board's authority to alter bargaining unit stipulations. In *Mercy*, the parties had stipulated to a unit including both hospital and business office clericals. The Board overturned this unit in one of the initial representation cases decided following the expansion of the Board's jurisdiction to cover nonprofit hospitals. The Board reasoned that unit stipulations in the hospital industry were not controlling since the Board had not yet determined unit policies for the industry. The Board found that the community of interest of hospital clericals lay with service and maintenance employees, rather than with business office clericals, and established a policy for the hospital industry of placing the clericals in separate units. The Ninth Circuit refused enforcement, holding that "[t]he Board is bound by the stipulation unless the stipulation violates applicable statutes or settled Board policy." The court rejected the argument that the expansion of the Board's jurisdiction required the establishment of unit policies for the hospital industry before stipulations could be honored, noting that the only reason advanced by the Board for rejecting the stipulation was the Board's application of the community-of-interest doctrine and that this doctrine was "insufficient to override the intent of the parties in making a stipulation; it is not one of the settled Board policies which justify a refusal to accept a stipulation."

It is the policy of the Board to recognize the results of representation proceedings conducted by a responsible state agency and to extend comity to a certification issued pursuant to such proceedings. In *Long Island College Hospital* v. *N.L.R.B.*,[24] the court overturned the Board's extension of comity to the New York State Labor Board's certification of a separate unit of hospital maintenance and engineering employees, the employer's position being that an appropriate unit should include service as well as maintenance personnel. Unlike the Third Circuit, which held in the *Roxborough* case [25] that the Board is precluded by section 9(b) of

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[21] *Banner Bedding*, 214 NLRB 1013 (1974), remanded without published opinion 556 F.2d 588 (9th Cir 1977).

[22] *Norris-Thermador Corp*, 119 NLRB 1301 (1958).

[23] 98 LRRM 2800.

[24] 566 F.2d 833 (2d Cir.)

[25] *Memorial Hospital of Roxborough* v. *N.L.R.B.*, 545 F.2d 351 (1976)

the Act from extending comity to state unit determinations, the court of appeals in *Long Island College Hospital* indicated that the Board is permitted, in proper circumstances, to defer to unit determinations of a state agency. However, the court held that the particular provisions of the New York statute upon which the state certification in this was grounded were not congruent with the Federal policy against over-compartmentalization of bargaining units in the health care industry reflected in the legislative history of the 1974 hospital amendments to the National Labor Relations Act. In addition to the statutory differences involved, the court held that comity was particularly inappropriate in this case because of the unsettled state of the Board's position, as reflected in its various decisions, as to whether a separate unit of maintenance employees is appropriate in health care institutions.

B. Representation Issues

1. Unit Issues

a. College and University Units

In *Yeshiva University*,[26] the Board issued an order requiring the university to recognize and bargain with the certified representative of the full-time teaching faculty at most of the university's schools. In the Board proceedings and before the Second Circuit, the university maintained that all its faculty members are managerial personnel or statutory supervisors, not employees entitled to the benefit of the Act, and that therefore no faculty bargaining unit could properly be certified. The Board initially considered and rejected this contention in its decision and direction of election, as it found that the faculty members' role and authority in "hiring, promotion, salary increases, the granting of tenure, and other areas of governance are not significantly different" from the role of the faculty in prior cases involving university bargaining units.[27] In particular, the Board found that the Yeshiva faculty members exercised no individual authority but rather participated only in collegial decisionmaking on a collective basis, exercised their collective authority on their own behalf rather than in the interest of management, and were subject to final authority which

[26] *N.L.R.B.* v. *Yeshiva University*, 582 F 2d 686 (2d Cir).

[27] *Yeshiva University*, 221 NLRB 1053, 1054 (1975), citing *Northeastern University*, 218 NLRB 247 (1975), *University of Miami*, 213 NLRB 634 (1974); *Adelphi University*, 195 NLRB 639 (1972), *Fordham University*, 193 NLRB 134 (1971), *C. W Post Center of Long Island University*, 189 NLRB 904 (1971), *New York University*, 205 NLRB 4 (1973).

rests in the board of trustees of the university. Accordingly, the Board found that the faculty members are "professional employees under the Act who are entitled to vote for or against collective-bargaining representation." [28]

The Second Circuit rejected the Board's finding and denied enforcement of the bargaining order, stating that "in this case the facts compel the conclusion under long established standards that the full-time faculty has managerial status," and that the Board's contrary finding was based on "unjustified, arbitrary standards." In reaching its conclusion, the court agreed with the Board that individual faculty members are professional employees under section 2(12) of the Act, and that each member's "attributes of professionalism"—described by the court as "the authority to determine the contents of his course, the method he employs in teaching it, and the evaluation of his students' academic performance"—should not "characterize [him] as managerial or supervisory." The court further found, however, that the role of the faculty in the university exceeded the simple exercise of "individual professional expertise," and that collectively the faculty were, "in effect, substantially and pervasively operating the enterprise." The court then rejected each of the factors on which the Board relied in finding that the faculty failed to qualify as managerial or supervisory personnel. Noting that the Board's own definition of "managerial" personnel was not limited to an "individual" exercise of authority, the court found that the collegial nature of faculty action would not preclude a finding of managerial status. The court dismissed, as unsupported by the record, the Board's finding that Yeshiva faculty acted solely in their own behalf, and added that, assuming *arguendo* the faculty did act in their own interests, in fact their interests and those of the university management "were almost always coextensive." In the view of the court, this "demonstrates the inapplicability of the 'interest of the faculty' " analysis to a university which operates under a principle of " 'shared authority.' " Finally, the court found "particularly unconvincing" the Board's "concept that the faculty has neither managerial or supervisory status because it is subject to the ultimate authority of the Board of Trustees." As the court noted, "[n]ormally, every corporation is ultimately operated by its Board of Directors . . . and yet that fact obviously has never precluded a finding that there are managerial or supervisory employees in the corporation." For all these reasons, which would apply to the faculty members at most other colleges and universities despite

[28] 221 NLRB at 1054.

the court's statement that it was addressing itself "solely to the situation involved in this proceeding," the court found the Yeshiva faculty to be managerial employees excluded from the protection and benefits of the Act.[29]

In contrast, the Seventh Circuit in *Kendall College* v. *N.L.R.B.*[30] enforced a Board order requiring a private junior college to recognize and bargain with the union representing its faculty members. The sole issue presented to the court in this case was the propriety of the Board's determination that a unit which included all full-time faculty and those part-time faculty members employed on the basis of prorated full-time contracts, but which excluded those part-time faculty members employed under "per-course" contracts, was appropriate for collective bargaining. Rejecting the college's contention that the Board's unit determination in this case of first impression required "close scrutiny," the court emphasized that its scope of review of such determinations is "narrowly circumscribed," and that the Board's determination may be disturbed only if found to be unreasonable, arbitrarily or capriciously made, or outside the bounds of the law. Applying these standards of review, the court stated that the college's "contention that the Board's *New York University* decision [31] resulted in a *per se* principle of excluding part-time members from faculty bargaining units cannot be seriously asserted." Similarly, the court found no merit to the assertion that the exclusion of part-time faculty from the unit represented an "unprecedented exception" to the general principle of including regular part-time employees with their full-time counterparts. As the court noted, this argument assumes that the Board is "obsequiously bound" to apply general rules inflexibly, when in fact the Board's exercise of its "primary responsibility in making unit determinations" involves "the adaptation of the Act to the changing patterns of industrial life." Noting that "fragmentation of units and impairment of rights of excluded employees are always a necessary possibility" whenever the Board certifies a bargaining unit which "encompasses less than all employees," the court further found that the Board acted within its discretion by following a "community of interest" analysis, as set forth in *New York University*, to determine the scope of a faculty bargaining unit. On a record showing that the excluded "per-course" part-time members were compensated at a rate at least 20 percent lower than the included faculty, were ineligible for fringe benefits received by the included faculty members, were not

[29] The Board's petition for certiorari was filed November 27, 1978

[30] 570 F 2d 216.

[31] 205 NLRB 4, 5 (1973).

required to participate in college governance, and were ineligible for tenure, the court found substantial evidence to support the Board's determination that "per-course" part-time faculty members lacked a substantial community of interest with full-time and prorated part-time faculty and that a bargaining unit which excluded them was appropriate.

b. Health Care Institution Units

St. Vincent's Hospital v. *N.L.R.B.*[32] and *N.L.R.B.* v. *West Suburban Hospital*[33] reflect the concern of the courts that the Board's unit determinations pertaining to health care facilities pay strict heed to the congressional admonition against undue proliferation of units in the health care field.[34] Both the unit of 4 boiler operators in *St. Vincent's* and the 21-person maintenance unit in *West Suburban* were readily justifiable—and had been found appropriate by the Board—under traditional unit criteria. Indeed, the *St. Vincent's* unit was deemed appropriate even by those members of the Board who would require health care units to be "composed of licensed craftsmen engaged in traditional craft work, which is performed in a separate and distinct location from other employees in the health care facility."[35] The courts found that satisfaction of such criteria did not provide adequate justification for overriding the policy against proliferation. The courts indicated that, in their view, Board health care unit determinations must not only evidence a general awareness of the nonproliferation policy, but also demonstrate precisely how that policy is served on the facts of the particular case. Because the *St. Vincent's* and *West Suburban* Board decisions lacked findings couched in these terms, and because the decisions appeared to conflict with other Board health care cases in which similar units were found inappropriate, the courts declined to enforce the Board's bargaining orders in both cases.

c. Single-Location Units

In two cases[36] which were consolidated for decision, the Seventh Circuit considered "whether the Board abused its discretion in

[32] 567 F.2d 588 (3d Cir.).

[33] 570 F.2d 213 (7th Cir.).

[34] S. Rep. No. 93-766, 93d Cong., 2d sess. 5 (1974), Leg. Hist. 12, H.R. Rep. No. 93-1051, 93d Cong., 2d sess. 6-7 (1974), Leg. Hist. 274-275. See also statements by Representative Ashbrook, 120 Cong. Rec. 22949 (1974), Leg. Hist. 411, and Senator Taft, 120 Cong. Rec. 12944 (1974), Leg. Hist. 113-114.

[35] *St. Vincent's Hospital*, 223 NLRB 638, 640 (1976).

[36] *N.L.R.B.* v. *Chicago Health & Tennis Clubs* and *N.L.R.B.* v. *Saxon Paint & Home Care Centers*, 567 F.2d 331, cert. denied 98 S.Ct. 3089.

certifying a single retail store as an appropriate unit for collective bargaining where such store constitutes only one of a chain of stores owned and operated by the company in [a] metropolitan area." Recognizing that the Board considers single-store units presumptively appropriate in the retail chain industry, the court also pointed out that the Board had determined that the presumption could be overcome where the facts indicated that a single-store unit was inappropriate. Juxtaposing the facts in the two cases, the court held that a single-store unit was appropriate in the *Chicago Health* case but inappropriate in the *Saxon Paint* case. Thus, while both cases involved the same geographic distribution of stores over a metropolitan area, the court found, in *Saxon Paint,* that the centralization of management, the functional integration of operations, the great extent of employee interchange, and the lack of store manager autonomy concerning personnel matters when combined with a bargaining history showing a metropolitanwide "pattern of unionization" were factors sufficient to rebut the presumptive appropriateness of the single-store unit. By contrast, the court found the single-store unit in *Chicago Health* appropriate based on the absence of any collective-bargaining history, the minimal employee interchange, and, in particular, the fact that the store manager "exercise[d] a marked degree of control over personnel and labor relations matters."

d. Inclusion of Aliens in Unit

In *N.L.R.B.* v. *Sure-Tan,*[37] the Board had certified a union as the representative of a bargaining unit in which six of the seven eligible employees were aliens unlawfully residing and working in the United States. Before the Board and the Seventh Circuit, the employer defended its refusal to bargain with the union on the grounds that the Board's certification was inconsistent with Federal immigration laws and therefore invalid, and that all six illegal aliens had been deported following the representation election. Rejecting the employer's contentions, the Seventh Circuit held that the aliens were statutory "employees" and entitled to vote in a Board election. Noting that the definition of "employee" in section 2(3) of the Act "is written broadly" and does not exclude aliens, the court deferred to the Board's "longstanding and consistent interpretation" of the statute, which, as the court recognized, "is entitled to great weight." The court further found that Board certification entailed no conflict with Federal immigration law or

[37] 583 F 2d 355 (7th Cir.).

policy because no statute prohibited illegal aliens from either "working or voting in a Board election," because certification would in no way impede enforcement of applicable immigration statutes against alien law violators, and because the union which benefits from certification was innocent of wrongdoing. To the contrary, the court noted, the rule urged by the employer, rather than certification, would conflict with immigration policy, for, "by refusing to certify unions with a majority of alien members we would be giving employers an extra incentive to hire aliens" in order "to gain immunity from labor unions." Finally, adhering to the established principles that, absent unusual circumstances, a union's majority status is conclusively presumed during the initial certification year, and that, absent objective evidence to the contrary, new employees are presumed to support the union in the same percentage as their predecessors, the court upheld the bargaining order in this case despite the substantial employee turnover caused by the deportation of six of the seven bargaining unit employees.

2. Objections to Conduct of Election

In *Provincial House* v. *N.L.R.B.*,[38] the Sixth Circuit reviewed a bargaining order where a Board agent, investigating unfair labor practice charges, conducted interviews in the same room the union was holding an organizing meeting and a union representative introduced the agent to some of those attending the meeting. Finding that "the neutrality of the Board's procedures" had been compromised, the court denied enforcement.

The First Circuit in *Trustees of Boston University* v. *N.L.R.B.*[39] agreed with the Board that an article critical of the university's president in union campaign literature did not warrant setting aside the election. The court noted that the "voters in this election were as sophisticated and literate a group as ever vote in a union certification election," that the article concerned conduct at another university over 7 years earlier, and that the faculty had "the advantage of four and one-third years of experience under the administration of the man criticized."

[38] 568 F.2d 8.
[39] 575 F.2d 301.

C. Unfair Labor Practices

1. Employer Interference With Employee Rights

a. Discharge for Engaging in Protected Activity

Among the employee rights protected by section 8(a)(1) of the Act is the right to engage in concerted activities for the purpose of "mutual aid or protection." In *N.L.R.B.* v. *Empire Gas*,[40] the Tenth Circuit upheld the Board's determination that an employer violated that section by discharging an employee because he wrote a letter to his fellow employees urging them to refrain from working on October 1 and, if such action did not cause any change in employee compensation, to engage in a second work stoppage on October 17 and 18. The court found that the efforts of an individual employee to initiate group support for a concerted refusal to work were within the bounds of section 7. It rejected the contention that it was necessary that the employee present his grievance to the employer prior to attempting to organize the work stoppage. Although the employee only suggested that employees engage in two separate work stoppages, the court considered whether such threatened activity resulted in the employee's losing the Act's protection. The court first held that the letter was protected "irrespective of whether the proposed act would be protected." (556 F.2d at 685). The court then proceeded to determine whether the strike activity, if carried out, would have been within the Act's protection. The employer argued that under *Briggs & Stratton*[41] intermittent strikes are unprotected. In concluding that the proposed strike activity was protected, the court found that there was nothing to indicate that the strikes would have been violent, nor were they in breach of contract. Also significant was the fact that the employee was not seeking to have the employees strike and receive pay for time when they did no work. Finally, the court concluded that this was an area in which the courts properly defer to the expertise of the Board.

The Board's decisions in *Interboro Contractors*[42] and *Alleluia Cushion Co.*[43] regarding concerted activity by a single employee were discussed by the Eighth Circuit when it denied enforcement of the Board's order in *N.L.R.B.* v. *Dawson Cabinet Co.*[44] In *Dawson*, the Board found that when an employee refused to perform

[40] 566 F 2d 681.

[41] *UAW Local 232* [*Briggs & Stratton Corp*] v *Wisconsin Employment Relations Board*, 336 U S 245 (1949)

[42] 157 NLRB 1295 (1966), enfd 388 F.2d 495 (2d Cir. 1967).

[43] 221 NLRB 999 (1975).

[44] 566 F.2d 1079

assigned work she was engaged in a protected work stoppage—protesting inequality in pay—and, thus, that the employer violated section 8(a)(1) when it discharged her for refusing to do the assigned work. The court denied enforcement of the Board's order on the ground that substantial evidence did not support the Board's finding that the employee was engaged in concerted activity, since she was acting alone when she refused to do the assigned work. The court noted the Board's decision in *Interboro Contractors,* that the activity of a single employee directed at enforcing the terms of a collective-bargaining agrement was concerted activity within the meaning of section 7. The court acknowledged that the *Interboro* principle had been approved by some circuits and not by others, but concluded that it need not pass upon the validity of *Interboro* here, since in *Dawson* "the employees are not unionized and no collective bargaining agreement is in effect." The court also stated that the Board, in *Alleluia Cushion,* went beyond *Interboro* to find that the activity of one employee is concerted "[w]here an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation." The court added, however, that *Alleuluia Cushion* was not reviewed by a court of appeals, and that the Fifth Circuit, in *Buddies Supermarkets,*[45] had refused to extend *Interboro* "to a non-union and non-collective bargaining situation."

Judge Lay, concurring, stated that he joined with the majority "solely on the ground that there exists no substantial evidence . . . to demonstrate that when [the discharged employee] refused to work she was acting for the mutual aid or protection of other employees." He noted that the Eighth Circuit had impliedly accepted *Interboro* in *N.L.R.B.* v. *Selwyn Shoe Mfg. Corp.*[46] He also stated that the fact that *Dawson* does not involve a collective-bargaining agreement does not "at least on this record . . . require us to decide whether the *Interboro* rule should be extended to situations where no collective bargaining agreement exists," since it is settled that employees may engage in section 7 activity in the absence of a collective-bargaining agreement.

Section 8(a)(4) of the Act makes it unlawful for an employer to discriminate against an employee "because he has filed charges or given testimony under the Act." In *Scrivener*[47] the Supreme

[45] 481 F.2d 714 (1973).

[46] 428 F.2d 217 (1970).

[47] *N.L.R.B.* v. *Robert Scrivener, d/b/a AA Electric Co.,* 405 U.S. 117 (1972); see 37 NLRB Ann. Rep. 148 (1972).

Court held that section 8(a)(4) encompassed the discharge of employees because they had given statements to a Board agent investigating an unfair labor practice charge filed against the employer, notwithstanding that they had neither filed the charge nor testified at the formal hearing. In *Retail Store Employees Union, Local 876*,[84] the Sixth Circuit upheld the Board's view that the protections of section 8(a)(4) are also available to an employee who, in response to her employer's request that she testify in an unfair labor practice case, *refused to testify voluntarily* on the ground that she lacked firsthand knowledge of the subject matter. The court found that, as in *Scrivener*, the employee's conduct did not fall within the literal language of section 8(a)(4), but did fall within its purpose of assuring that the Board not be cut off from information about unfair labor practices because of employer intimidation. In the court's view, coercion which resulted in the Board's being provided with inaccurate information was just as damaging to the integrity of the Board's processes as coercion which resulted in the Board's being cut off from information altogether. The court was convinced that if employers could freely discharge an employee who, on the grounds of lack of knowledge, was unwilling to testify voluntarily then employees would feel pressure to give testimony that was misleading or false rather than manifest any reluctance to provide the testimony desired by their employer. Further, the court's examination of the legislative history convinced it that, in enacting section 8(a)(4), the intent of Congress "was that workers should not feel compelled by the threat of employer retaliation to misrepresent their own knowledge or beliefs on matters relevant to the Act."

b. Union Representation at Disciplinary Interviews

In *Climax Molybdenum Co.* v. *N.L.R.B.*,[49] the Tenth Circuit affirmed the Board's holding that the *Weingarten* right [50] to union representation at an investigatory interview includes the right to confer with a union representative before the interview. The court held, however, that an employer is not required to permit such consultation on company time if the employer schedules the interview so as to afford the employee sufficient opportunity, prior to the interview, to confer with a union representative on the employee's own time. The court disagreed with the Board's

[48] *N.L.R.B.* v *Retail Store Employees Union, Local 876, Retail Clerks Intl. Assn., AFL–CIO*, 570 F.2d 586, cert. denied 99 S.Ct. 81.

[49] 584 F.2d 360.

[50] *N.L.R.B.* v. *J. Weingarten*, 420 U.S. 251 (1975).

finding that the company violated section 8(a)(1) by denying the union vice president's request to confer with two employees on company time prior to the investigatory meeting which resulted in discipline to the employees. Noting that under *Weingarten* the employee must request union representation, the court held that neither of the employees "manifested any interest in consulting with their union representative prior to the investigatory interview, notwithstanding a time lapse of 17½ hours between the time they were advised of the pending investigation and the time it took place," during which time "the employees could have, but elected not to, consult with their union representatives on their own time." 584 F.2d at 363. The court concluded that to require union consultation on company time in these circumstances would "place a harsh and unfair burden upon the employer."

c. Health Care Institution No-Solicitation/No-Distribution Rules

During the past year, prior to the Supreme Court's decision in *Beth Israel Hospital* v. *N.L.R.B.*,[51] there was a split among the courts of appeals as to the Board's policy concerning the permissible scope of no-solicitation/no-distribution rules at health care institutions. In *Lutheran Hospital of Milwaukee* v. *N.L.R.B.*,[52] the Seventh Circuit upheld the policy laid down in the Board's lead decision in this area, *St. John's Hospital & School of Nursing*.[53] The court found the Board's *St. John's* policy to be "logical and just," and it affirmed the Board's conclusion that a hospital violated section 8(a)(1) of the Act by promulgating and maintaining a rule that prohibited employees from soliciting union support and distributing union literature during nonworking time in any area to which hospital patients and visitors have access.

However, in *N.L.R.B.* v. *Baylor University Medical Center*,[54] the District of Columbia Circuit rejected the Board's *St. John's* policy. Reversing the Board's finding, the court concluded that a ban on solicitation in the hospital's corridors was justified because of the likelihood of congestion and commotion that would result

[51] See discussion, pp. 155–156, *supra*.

[52] 564 F.2d 208, certiorari granted and the case remanded to the court of appeals for reconsideration in light of the Supreme Court's decision in *Beth Israel Hospital* v *N L.R B*, 98 LRRM 2463

[53] 222 NLRB 1150 (1976), enforcement denied 557 F.2d 1368 (10th Cir 1977). In *St. John's* the Board held that, while a hospital may lawfully ban employee solicitation and distribution, even during nonworking time, in immediate patient care areas—such as the patients' rooms, operating rooms, and places where patients receive treatment—a ban on such activity in other areas accessible to patients and visitors is unlawful absent a showing by the hospital that such a ban is necessary to avoid disruption of patient care

[54] 578 F 2d 351, cert. granted in part 99 LRRM 2953.

from such activity, and because it held that wherever patients and visitors are present special circumstances come into play which justify in the hospital environment an otherwise overly broad no-solicitation rule. The court added that, as to the hospital's cafeteria and vending machine areas, the proscription on solicitation was warranted because these areas are not different from commercial restaurants and retail stores where the Board has recognized the validity of such bans.[55]

In *N.L.R.B.* v. *Baptist Hospital*,[56] the Sixth Circuit also rejected the Board's *St. John's* policy and reversed the Board's conclusion that a hospital no-solicitation rule violated section 8(a)(1) of the Act because it prohibited such activity in any area open to the public or where work was performed. The court found that the testimony of two physicians and a hospital administrator as to the necessity of creating and maintaining a tranquil atmosphere throughout the hospital was sufficient to establish "special circumstances" that warranted the hospital's proscription of employee solicitation in all areas accessible to patients and visitors, including the hospital's cafeteria. While the Supreme Court subsequently reached a contrary conclusion in *Beth Israel Hospital*, *supra*, and upheld the Board's *St. John's* policy, the Sixth Circuit agreed with the District of Columbia Circuit's conclusion in *Baylor* that the Board's *St. John's* policy failed to give sufficient weight to the needs of hospital patients and was contrary to the intent of Congress in enacting the 1974 health care amendments to the Act.

d. Interference With Board Proceedings

Employees have a section 7 right to invoke the Board's processes and to testify at its hearings.[57] In *Iowa Beef Processors* v. *N.L.R.B.*,[58] the Eighth Circuit agreed with the Board that the company counsel's opening statements at the hearing, even though they may have been technically correct, interfered with the Board's proceeding in violation of section 8(a)(1) of the Act. The General Counsel's theory of the case was that the discharge of a union adherent for theft was discriminatory because other

[55] With respect to the *Baylor* court's conclusion as to the ban on solicitation in the hospital cafeteria, the Supreme Court granted certiorari and remanded the case for reconsideration in light of its *Beth Israel Hospital* decision. However, the Supreme Court refused to disturb the lower court's ruling as to the hospital corridors, because that ruling rested on a finding that there was no substantial evidence supporting the Board's conclusion that the corridors were not entitled to the same protection accorded other areas devoted essentially to patient care.

[56] 576 F 2d 107, Board petition for certiorari filed August 8, 1978.

[57] *N L R.B* v. *Scrivener*, 405 U.S. 117 (1972).

[58] 567 F.2d 791.

employees involved in the theft had not also been identified and discharged. In his opening remarks, company counsel stated that prospective witnesses should be aware that if the evidence indicated that anyone else was involved in the theft the company would investigate and take appropriate action. Company counsel stated further that he would grant anonymity to all employees involved in the theft in exchange for a General Counsel stipulation that "disparate treatment" was not one of the theories of his case. Five employee witnesses refused to testify to the names of the other employees involved in the theft. The court held that, since these statements by company counsel caused the employee witnesses to refuse to name the other employees involved in the theft, they intimidated prospective employee witnesses in the exercise of their section 7 right to testify at the hearing in violation of section 8(a)(1) of the Act and clearly jeopardized and interfered with the presentation and development of the General Counsel's case.

2. Employer Discrimination Against Employees

The First Circuit has held in recent years that for the Board to establish that an employer discriminated against an employee in violation of section 8(a)(3) and (1) of the Act, it must prove that union animus was the dominant motive and not merely a factor in the decision.[59] In *N.L.R.B.* v. *Rich's of Plymouth*,[60] that court declined to enforce the Board's order that an employer had violated section 8(a)(3) and (1) of the Act by refusing to rehire an employee who voluntarily quit and then requested reinstatement. The employee had quit during working hours over a dispute concerning holiday pay. Several hours after her resignation, she called the employer and requested her job back. At the time the employer refused to reinstate her, it was aware of her support for the union, and the employer had also demonstrated union animus. The court held that the employer had a valid business justification for refusing to rehire the employee, as she had walked out at an especially bad time and that the evidence of union animus was not sufficient to "overcome the legitimate business justification."

In *N.L.R.B.* v. *William S. Carroll, Inc.*,[61] the First Circuit refused to enforce the Board's finding that an employer violated

[59] See, for example, *Coletti's Furniture* v. *N.L.R.B.*, 550 F.2d 1292 (1977); *N.L.R.B.* v. *Fibers International Corp.*, 439 F 2d 1311 (1971).

[60] 578 F 2d 880.

[61] 578 F.2d 1.

section 8(a)(1) of the Act by discharging an employee who refused to cross a picket line at the premises of another employer. The First Circuit has held that an employee's refusal to cross a picket line at the premises of his own employer is protected concerted activity.[62] However, it did not reach the issue here whether a refusal to cross a picket line at a stranger employer is similarly protected, as it found that, even if it is so protected, the employer in this case had a valid business justification for discharging the employee. Here, the employee refused to drive his bus carrying nonstriking employees across a picket line set up by striking employees, even though he knew in advance that he would be required to do so in order to complete the job and had the opportunity to refuse to take it.

3. Employer Bargaining Obligation

a. Majority Status of Representative

Under section 8(a)(5) of the Act, a union which is either certified by the Board or voluntarily recognized by an employer as the majority representative of employees in an appropriate bargaining unit enjoys a continuing presumption of majority status, and this presumption is virtually irrebuttable during the first year, but rebuttable thereafter.[63] Thus, an employer who withdraws union recognition after the first year risks violating section 8(a)(5) unless it can sustain the burden of rebutting the presumption by presenting evidence of actual loss of majority or of objective considerations to support a good-faith doubt that the union no longer represents a majority of the employees.[64] Two cases decided by the Ninth Circuit during the year involved application of the presumption to unions whose claims to majority status rested on the fact that the employers had agreed to be bound by collective-bargaining agreements several years before. Thus, in *Pioneer Inn Associates* v. *N.L.R.B.*,[65] the company, a Nevada casino operator, withdrew recognition from the incumbent union 4 years after signing the first of a series of collective-bargaining contracts containing a union recognition clause. The court enforced the Board's bargaining order without questioning the validity of applying the presumption where there was no

[62] *N L R B.* v *C K. Smith & Co.*, 569 F 2d 162 (1977).
[63] *Celanese Corp of America*, 95 NLRB 664 (1951).
[64] *N L.R B.* v *Vegas Vic*, 546 F 2d 828 (9th Cir. 1977)
[65] 578 F.2d 835.

independent evidence of a union majority at the time of recognition. However, in *Tahoe Nugget* v. *N.L.R.B.*,[66] this issue was addressed directly. There the employer, another Nevada casino, joined an employer association in 1962 and adopted the multiemployer agreement which recognized the union as representative in a groupwide unit. In 1974, the company withdrew from the association and thereafter refused to recognize or bargain with the union. The company contended that the presumption of continuing majority status was thereafter inapplicable because the union's representative status was based solely on the company's adherence to the multiemployer contract, and withdrawal from the association rendered the presumption inoperative. The court held that recognition of the union in 1962, not membership in the association, gave rise to the presumption. Furthermore, it held that under the Supreme Court's decision in *Bryan Mfg. Co.*[67] the company could not rely on the lack of evidence of majority support for the union at the time it joined the association to justify its refusal to bargain, since this would require receipt of evidence of an unfair labor practice—namely, recognition by the company of a minority union in violation of section 8(a)(2) of the Act—occurring outside the 6-month limitation period under section 10(b) of the Act. Accordingly, the presumption attached at the time of the company's initial recognition, and its withdrawal from the association had no bearing on its applicability. Lastly, the court agreed with the Board that the company failed in its attempt to show objective considerations to support a good-faith doubt of the union's majority status.

In *New York Printing Pressmen, Union No. 51*,[68] the Second Circuit sustained the Board's finding that an employer had a good-faith doubt of three respective unions' majority status when it withdrew recognition from them. The employer permanently replaced the employees represented by these unions after they refused to cross the primary picket line of a fourth union and report to work. The replaced employees and the unions then had no contact with the employer for over 7 months. The unions made no effort to enforce the union-security and dues-checkoff provisions of their collective-bargaining agreements or to require the employer to make contractually mandated fund contributions. The court found that the employer reasonably doubted the striker

[66] 584 F.2d 293, consolidated with *N L R B* v *Nevada Lodge*

[67] *Local Lodge 1424, IAM [Bryan Mfg Co.]* v *N.L R B*, 362 U S 411 (1960).

[68] *New York Printing Pressmen & Offset Workers Union, No 51, IPGCU [Arkay Packaging Corp.]* v. *N.L R.B.*, 575 F.2d 1045

replacements' union support in light of the unions' inactivity and failure to police their contracts. As for the striking employees (who outnumbered the replacements), the court found that the presumption of their union support was rebutted by their failure to contact the employer after it warned them of replacement, their violation of contractual no-strike clauses against their unions' admonitions, and their failure to show any interest in the unions.

The Second Circuit's decision in *N.L.R.B.* v. *Windham Community Memorial Hospital & Hatch Hospital Corp.*,[69] also involved the issue of permanent striker replacements' union support. The employer withdrew recognition from the union when there were 48 strikers, 42 permanent striker replacements, and 24 incumbent employees who refused to strike. The court affirmed the Board's finding that the withdrawal of recognition violated section 8(a)(5) and (1). It held that the employer could not presume that the permanent striker replacements and incumbent employees who refused to strike opposed the union, and that the employer was required to establish their union opposition with objective proof. The court noted the Board's explanation that it reached a different result with respect to striker replacements in *Arkay Packaging Corp.*[70] only because of the union's abandonment of the units in that case. The court also rejected the employer's assertion that the union sought reinstatement of only some of the strikers and that the remainder should therefore be excluded from the bargaining unit for purposes of determining the union's majority. It further rejected the employer's contentions that both the reduction and eventual elimination of picketing and the announced displeasure of some employees with the union's tactics also rebutted the presumption of majority status.

b. Successor Employer Status

During fiscal 1978, the District of Columbia Circuit affirmed Board decisions, finding in one case that a successor employer was not required to bargain about initial terms and conditions of employment and in another case that new corporations spun off during a corporate reorganization were not required to bargain at all with the union which represented the original company's employees. In *Intl. Assn. of Machinists & Aerospace Workers, AFL–CIO* [*Boeing Co.*] v. *N.L.R.B.*,[71] Boeing was chosen to re-

[69] 577 F 2d 805

[70] 227 NLRB 397 (1976), petition denied *sub nom. New York Printing Pressmen, Local 51* v. *N L R B*, *supra*

[71] 98 LRRM 2787 (D C Cir.).

place TWA in providing certain services for NASA. In its contract bid, Boeing indicated that it intended to hire as many current employees as possible and that it expected incumbents to comprise about 85 percent of its work force. However, Boeing's bid was expressly based upon the terms of its own national contract with IAM, rather than the higher benefits contained in TWA's contract with IAM covering the current employees, and Boeing indicated in its bid that it would fill its employee needs from the local labor market if it was unable to attract enough current employees. When Boeing actually began work for NASA, a majority of its workers were not incumbents. The court rejected the union's contention that Boeing had shown the sort of "perfectly clear" intention to retain most of the current employees which would obligate it to bargain with the union over initial terms and conditions of employment under the Supreme Court's reasoning in *Burns*.[72] Agreeing with the Board that it is never clear that most current employees will necessarily choose to retain their current jobs at reduced compensation, the court endorsed the Board's *Spruce Up* rule [73] in holding that "a successor employer need consult with an incumbent union with respect to initial employment terms prior to fixing them only when he has not evinced any intention substantially to modify the pre-existing terms before expressing a willingness to rehire incumbents." Since Boeing had consistently conditioned its willingness to rehire TWA's employees upon their acceptance of lower benefits, Boeing was not obligated to bargain about initial employment terms.

In *United Telegraph Workers, AFL–CIO* v. *N.L.R.B.*,[74] the Western Union Telegraph Company, whose employees were represented by the union, reorganized into a holding company and five wholly owned subsidiaries in order to get around Federal Communications Commission regulations and corporate charter restrictions which inhibited diversification into new business areas. The telegraph company became one of the subsidiaries, and other subsidiaries, headed by former telegraph company personnel, were established to engage in such new businesses as data processing and real estate. The telegraph company obtained certain support services from the new companies which it had formerly performed for itself, and also acted as subcontractor for some of the new companies during a transition period. Arguing that the telegraph company had merely incorporated its former

[72] *N.L.R.B.* v. *Burns Intl Security Services*, 406 U S. 272, 294–295 (1972)
[73] *Spruce Up Corp.*, 209 NLRB 194 (1974).
[74] 571 F.2d 665 (D.C. Cir.), cert. denied 99 S.Ct. 101.

divisions, whose employees the union represented, and that the new corporate group continued to operate as an integrated enterprise, the union contended that under the principles of *Local 627, Operating Engineers* [*South Prairie Construction Co.*] v. *N.L.R.B.*,[75] the companies constituted a "single employer" and were all bound by the telegraph company's bargaining obligation. The court rejected this contention, agreeing with the Board that the corporations were not a "single employer" even though they were commonly owned, since they substantially lacked interrelated operations, common management, and common control of labor relations. Although he agreed that the companies were not a single employer, Judge Bazelon, dissenting, would have remanded to the Board for consideration of whether the new companies should be required to bargain with the union under either a successorship or alter ego theory. The majority concluded that the Board's factual findings precluded the possibility that either doctrine could be applicable and noted that remand would be inappropriate in any event because the parties had consistently disavowed reliance upon a successorship theory.

c. Withdrawal From Multiemployer Bargaining

When a member of a multiemployer bargaining unit attempts to withdraw from the unit after negotiations have begun, his withdrawal is "untimely," absent the consent of the union or the presence of unusual circumstances, and therefore ineffectual to relieve the employer of its obligation to recognize the union in that unit and to be bound by any agreement ultimately reached. In *N.L.R.B.* v. *Independent Assn. of Steel Fabricators*,[76] the Second Circuit, in accord with the other circuits which have considered the issue,[77] held that an impasse in negotiations justifies an employer's unilateral withdrawal from the multiemployer association. While recognizing that the Board's general rule limiting withdrawals after the commencement of negotiations is designed to preserve stability of multiemployer bargaining, the court also stated that "the objectives of collective bargaining would be ill-served by compelling employers to remain in the bargaining unit once it becomes clear that no progress is being made within that framework." The court, disagreeing with the Board, found that

[75] 518 F 2d 1040 (D.C. Cir. 1975), affd. in part *sub nom. South Prairie Construction Co.* v. *Local 627, Operating Engineers*, 425 U.S. 800 (1976).

[76] 582 F 2d 135.

[77] See *N L.R B.* v. *Beck Engraving Co*, 522 F 2d 475 (3d Cir. 1975), *N.L.R B.* v. *Hi-Way Billboards*, 500 F.2d 181 (5th Cir. 1974), *Fairmont Foods Co.* v *N L.R.B.*, 471 F.2d 1170 (8th Cir. 1972).

the union and the association reached impasse shortly after commencement of negotiations and that, consequently, association members were entitled to withdraw from the association. The court held, however, that withdrawal did impose certain obligations on the withdrawing employer. The court held that an employer's withdrawal is not effective until communicated to the union and, on that basis, found that a group of employers who signed agreements with another union prior to notifying the incumbent union of their withdrawal from the association violated section 8(a)(5) by disabling themselves from bargaining with the incumbent union. The court also held that employers who notified the union of their withdrawal and then subsequently signed agreements with another union were under a duty to seek bargaining with the incumbent union on an individual basis before negotiating with any other union, and that their failure to do so, absent evidence of an actual loss of majority or good-faith doubt of the majority status of the incumbent union, violated section 8(a)(5). However, the court further held that employers who withdrew but neither bargained with the incumbent union nor signed agreements with any other union did not violate the Act. The court stated that the incumbent union apparently never elected to request bargaining with the individual employers but instead maintained its position that the withdrawals were ineffective and that, therefore, the failure of these employers to arrive at individual agreements with the incumbent union did not constitute a refusal to bargain.

In *N.L.R.B.* v. *Acme Wire Works*,[78] a case related to *Independent Steel Fabricators*, the Second Circuit reiterated its holding that impasse justified unilateral withdrawal but found, on the facts of the case, that the parties had not reached an impasse in negotiations at the time when the withdrawing employer withdrew from the association and communicated its withdrawal to the union.

d. Subject Matter for Bargaining

The First, Fourth, and Seventh Circuits previously rejected Board holdings that inplant cafeteria and vending machine food prices are mandatory subjects of bargaining and that the employ-

[78] 582 F.2d 153.

ers violated section 8(a)(5) by refusing to bargain about them.[79] In *Ford Motor Co. (Chicago Stamping Plant)* v. *N.L.R.B.*,[80] the Seventh Circuit stated that the courts in those cases merely held that such matters were not "necessarily" mandatory subjects of bargaining and that the court holdings that the employers had not refused to bargain about them in violation of section 8(a)(5) were based on the specific facts of each case. The court then found that the instant case was factually distinguishable from the earlier cases in which the courts had denied enforcement of Board orders and held that "under the facts and circumstances of this case, in-plant cafeteria and vending machine food prices and services materially and significantly affect and have an impact upon terms and conditions of employment, and therefore are mandatory subjects of bargaining." The facts which the court found that distinguished this case from the earlier cases were: (1) the company here retained influence over cafeteria and vending machine prices with the possibilty for the company to make a profit on the food service operation; (2) the company had previously bargained with the union over in-plant food services; (3) it was not feasible for the employees to leave the plant during their lunch hour, "brown-bagging" was not a viable alternative, and there were no mobile food vending trucks available; (4) the employees had participated in a boycott of the company's food service operations; and (5) the employees were represented by a single union.

In *Brockway Motor Trucks, Div. of Mack Trucks* v. *N.L.R.B.*,[81] the Third Circuit was asked to review a Board decision finding that the employer's refusal to bargain about its decision, based solely on economic considerations, to close its Philadelphia facility violated section 8(a)(5) and (1) of the Act. Although the Board has held since *Ozark Trailers*[82] that an economically motivated partial closing is a mandatory subject of bargaining unless it results in the complete termination of a distinct line of the employer's business,[83] the Third Circuit noted that several circuits

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[79] *N.L.R.B* v. *Package Machinery Co.*, 457 F 2d 936 (1st Cir 1972), denying enforcement of 191 NLRB 268 (1971), *McCall Corp.* v *N L R B*, 432 F 2d 187 (4th Cir 1970), denying enforcement of 172 NLRB 540 (1968), *Westinghouse Electric Corp* v. *N.L R B*, 387 F.2d 542 (4th Cir 1967) (Judges Sobeloff and Craven dissenting), reversing 369 F.2d 891 (1966), denying enforcement of 156 NLRB 1080 (1966), *N L R.B* v. *Ladish Co.*, 538 F.2d 1267 (7th Cir 1976), denying enforcement of 219 NLRB 354 (1975)

[80] 571 F.2d 993, cert granted 99 S.Ct. 247

[81] 582 F 2d 720

[82] 161 NLRB 561 (1966).

[83] *General Motors Corp*, 191 NLRB 951 (1971), petition for review denied *sub nom Intl Union, UAW* v. *N L R B.*, 470 F 2d 422 (D C Cir 1972), *Summit Tooling Co*, 195 NLRB 479, 480 (1972), enfd 474 F 2d 1352 (7th Cir. 1973), *Kingwood Mining Co*, 210 NLRB 844, 845 (1974).

had refused to enforce Board orders requiring employers to bargain over partial closings.[84] The Third Circuit distinguished these cases and its own prior decision in *N.L.R.B.* v. *Royal Plating & Polishing Co.*[85] as presenting situations of "pressing economic necessity" which could not be ameliorated by collective bargaining. After examining in detail the law on this issue, the Third Circuit refused to adopt a *per se* rule either that "the employer *always* has an obligation to bargain about a partial closing, or . . . that there *never* is a responsibility to bargain in such a situation." [86] Instead, the court concluded that, while there is an initial presumption that a partial closing is a mandatory subject of bargaining, the facts must be evaluated and the conflicting interests of the employer and union must be balanced in each case to determine whether there is a duty to bargain over the partial closing. Since the case was submitted to the Board on a stipulation stating only that the closing was for economic reasons, the court denied enforcement of the Board's order without prejudice to the Board to commence additional proceedings.

e. Duty To Furnish Information

In *Teleprompter Corp.* v. *N.L.R.B.*,[87] the First Circuit affirmed the Board's finding that a parent corporation that had declared a wage freeze among all of its subsidiaries because of the asserted inadequacy of its profits violated section 8(a)(5) and (1) of the Act by refusing to furnish data concerning the profits of three of those subsidiaries that were engaged in bargaining with local unions. The parent corporation operated cable television systems through subsidiaries in numerous States. The employees of some of the subsidiaries were represented by various local unions of the International Brotherhood of Electrical Workers, and bargaining was conducted on a local basis between each subsidiary and the corresponding local union. In support of its claim of financial hardship, the parent corporation furnished both the international union and the local unions data concerning its own profits, but refused to furnish data concerning the profits of the three subsidiaries in question on the ground that the issue of whether they were profitable was irrelevant to the bargaining. In rejecting this con-

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[84] *N.L.R.B.* v. *Transmarine Navigation Corp.*, 380 F.2d 933, 939 (9th Cir. 1967); *N.L.R.B.* v. *Thompson Transport*, 406 F.2d 698, 703 (10th Cir. 1969), *Royal Typewriter Co.* v. *N.L.R.B.*, 533 F.2d 1030, 1038-39, fn. 9 (8th Cir. 1976), *N.L.R.B.* v. *Rapid Bindery, Inc.*, 293 F.2d 170, 175 (2d. Cir. 1961).

[85] 350 F.2d 191 (1965).

[86] 582 F.2d at 731 (emphasis in original).

[87] 570 F.2d 4.

tention, the court agreed with the Board that, without the data concerning a subsidiary's profits, a local union "would have difficulty both in determining whether itself to accept, and whether to urge its members to accept, the employer's offer, since it would be in the dark as to what extent the company for which its members worked had 'contributed to the difficulties." Further, the court noted that the employees of each subsidiary "would be curious, and legitimately so, of their immediate employer's financial status upon being told that the parent had declared itself too poor to allow a wage increase" and that "it would be natural for the subsidiary's employees, in contemplating the wage freeze, to be as concerned with the economic capability of the subsidiary as with the parent's broader financial situation." 570 F. 2d at 10.

f. Other Issues

In *Merchants Home Delivery Service* v. *N.L.R.B.*,[88] the Ninth Circuit rejected the Board's finding that Merchants' truckdrivers were employees, not independent contractors, within the meaning of section 2(3) of the Act. The court concluded that because the truckdrivers "are independent contractors excluded from [the Act's] coverage" Merchants had not violated section 8(a)(5) and (1) of the Act by refusing to bargain with the union purporting to represent them. In January 1976, Merchants contracted with J. C. Penney to deliver household appliances and furniture to Penney's customers in the St. Louis, Missouri, area. All nine of the truckdrivers hired by Merchants had been performing the same delivery work for Penney as employees of another delivery company (Am-Del-Co), which in an earlier unfair labor practice proceeding the Board had found to have unlawfully refused to bargain with the same union.[89] Each truckdriver signed both an "Independent Truckman's Agreement" and a "Lease and Service Agreement" with Merchants; one signed as an individual and the others signed as four two-man business entities, of which three were incorporated and one a partnership. The Board, evaluating the two agreements signed by the truckdrivers, as well as Merchants' contract with Penney, concluded that Merchants retained the right of control over the manner and means by which the drivers did their work, and that thus the owner-operators were employees within the meaning of the Act. The Board relied upon the fact, among other things, that the drivers received only 60 percent of the gross

[88] 580 F.2d 966.

[89] *Am-Del-Co & Compton Service Co.*, 225 NLRB 698 (1976), enfd. upon consent (8th Cir. 1977).

revenue paid to Merchants by Penney "to assume complete responsibility for Penney's deliveries, and to provide sufficient supervision over the owner-operators to assure a prompt, efficient, and satisfactory service." The Board further found that because the truckdrivers could not reject assigned deliveries or use their trucks except for Penney deliveries, and were paid by the number of stops which Merchants in its sole discretion assigned to them, "there is no way through ability, resourcefulness, or entrepreneurial skill that they can increase their income" other than, to a limited degree, reduce expenses. The court, while recognizing that generally the various factors rarely "point with unanimity in one direction or the other" and that in this case "a balancing of the various indicia of control is somewhat inconclusive," nevertheless concluded that "the entrepreneurial characteristics of the owner-operators tip decidedly in favor of independent contractor status." The court relied upon the fact that the owner-operators, with one exception, did business either as corporations or partnerships; had substantial investments in their trucks, which they were required to fuel and maintain; hired and paid their own helpers; and "the risk of loss [was] placed squarely on the shoulders of the owner-operators, who [had to] indemnify Merchants for lost or damaged merchandise, and who [would] suffer more from a loss of business than Merchants, which [had] no capital invested."

In *Hooker Chemicals & Plastics Corp.* v. *N.L.R.B.*,[90] the Seventh Circuit held that an employer could lawfully institute a lockout less than 30 days following the union's late 8(d)(3) notice to mediation services but more than 60 days following the union's initial 8(d)(1) bargaining notice. In rejecting the Board's conclusion that Congress intended to guarantee a 30-day mediation period insulated from strike or lockout, the court reasoned that the union, as the party initiating the bargaining process in this case, was obligated under section 8(d)(3) to give a timely notice to mediation services and that the union's failure to meet its 8(d)(3) obligation should not deprive the employer of its right to institute a lockout more than 60 days after the initial bargaining notice. The court explicitly recognized, however, that section 8(d)(4) does impose a 30-day waiting period following a late mediation notice upon whichever party gives the 8(d)(1) bargaining notice and thereby clarified an early decision[91] which had suggested that section 8

[90] 573 F 2d 965

[91] *N L R B.* v *Peoria Chapter of Painting & Decorating Contractors*, 500 F 2d 54 (7th Cir. 1974).

(d) (4) requires only a 60-day waiting period following the initial bargaining notice.

4. Union Interference With Employee Rights

In *Anna M. D'Amico* v. *N.L.R.B.*,[92] the Third Circuit affirmed the Board's dismissal of an 8(b) (1) (A) and (2) complaint in *United Electrical, Radio & Machine Workers of America, Local 623 (Limpco Mfg.)*.[93] The court agreed with the Board's finding that the union did not violate the Act by enforcing in favor of its recording secretary a provision in its collective-bargaining agreement which accorded the highest seniority preference to union officers and stewards for purposes of layoff. In holding that superseniority is permissible when there appears a proper justification for according it, the court adopted the *Great Dane* substantial jurisdiction standard [94] applied by the Board in *Dairylea Cooperative*.[95] The court concluded that, by showing that the official responsibilities of the recording secretary bore a direct relationship to the effective and efficient representation of unit employees in implementing the collective-bargaining agreement, the union demonstrated sufficient justification for the application of the superseniority provision to the recording secretary.

In a case of first impression,[96] the Fifth Circuit enforced a Board decision that a union violated section 8(b) (1) (A) of the Act when, in disregard of its contractual duty, it refused to refer an employee union member to an employer who wished to use the employee *in a supervisory capacity*. The court agreed that this conduct operated to coerce the employee—as well as his fellow employees—into supporting the union in order to preserve their job opportunities. The court rejected the union's contention that its conduct was nevertheless insulated from censure because supervisory employees are expressly excluded from the protection of the Act.[97] The court noted that construction workers frequently cycle in and out of supervisory jobs, so that the union's discriminatory treatment of the employee in his attempt to become a supervisor "would carry over to intimidate him once he again became a statutory employee." The court also agreed with the Board that the

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[92] 582 F 2d 820.

[93] 230 NLRB 406 (1977).

[94] *N L R B* v *Great Dane Trailers*, 388 U S. 26 (1967)

[95] 219 NLRB 656 (1975), enfd. 531 F 2d 1162 (2d Cir. 1976).

[96] *N L R B* v. *Local Union 725, Plumbers [Powers Regulator Co]*, 572 F 2d 550

[97] Sec 2(3) of the Act provides that "the term 'employee' . . . shall not include . . an individual employed as a supervisor. . . ."

union could be required to make the employee whole for lost wages since "only a make-whole remedy for [the employee] could remove the coercive impact of the union's illegal conduct."

5. Union Coercion of Employers in Selection of Representatives

Section 8(b) (1) (B) provides that it shall be an unfair labor practice for a union "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." In *Cove Tankers,*[98] the District of Columbia Circuit held, affirming the Board, that a union composed primarily of supervisors violated section 8(b) (1) (B) by picketing and filing an *in rem* action to secure the replacement of supervisors with grievance-adjusting authority represented by a rival union, to force recognition of the picketing union, and to adopt that union's standard contract terms. In finding the filing of the *in rem* action an unfair labor practice, the court took note that the lawsuit had an unlawful objective and may not have been entered into in good faith.

In *Newport Tankers,*[99] the Fourth Circuit held, reversing the Board, that union picketing to compel an employer to hire an *additional* person to a position with grievance-adjusting authority violated section 8(b) (1) (B), even though the union did not specify the identity or union affiliation of the proposed additional grievance adjuster. The Fourth Circuit essentially adopted Member Penello's dissenting opinion that forcing the employer to increase the number of such persons would impermissibly compel dilution of the authority of those whom the employer would prefer handle all its grievances and that, in any event, the union's conduct in this case was, in fact, motivated by an unlawful replacement objective.

6. Union Bargaining Obligation

The Ninth Circuit upheld the Board's dismissal of an 8(b) (3) complaint in *David J. Bergman, as representative of the employees of Sierra Glass Service* v. *N.L.R.B.*[1] The petitioner contended that the union was not the majority representative of the employer's employees at the employer's only remaining facility and that the union had violated section 8(b) (3) by instituting a district court

[98] *Intl Organization of Masters, Mates & Pilots, AFL–CIO [Cove Tankers Corp.]* v. *N L R B.*, 575 F 2d 896

[99] *Newport Tankers Corp.* v. *N.L.R.B.*, 575 F.2d 477, cert. denied 99 LRRM 2955.

[1] 577 F.2d 100.

action under section 301 to enforce the collective-bargaining agreement at that location, where the petitioner contended that it had never been applicable. Relying on *Clyde Taylor* [2] and its progeny, the court held that, where a party in good faith seeks judicial enforcement of a facially valid and binding labor agreement, it would be inconsistent with the basic principles underlying section 301 to burden it "with the threat such action may precipitate an unfair labor practice charge and its concomitant administrative proceedings."

In *Retail Clerks Local 588*,[3] the court rejected the Board's finding that the union violated section 8(b)(3) by seeking through arbitration to require the employer to expand the coverage of their collective-bargaining agreement to include drug center employees at newly remodeled stores where both food and drugs were sold, when those employees had never selected the union to represent them and were separately represented by another union pursuant to a Board certification. The food and drug selling areas of the stores were operated as separate business entities under separate managements, but the remodeling was designed to achieve greater integration of selling areas and thereby increase sales. The Retail Clerks collective-bargaining agreement with the employer provided that its coverage included persons working in nonfood departments and specified that rates of pay were to be established for such persons. Following the employer's refusal to extend the bargaining agreement to the drug center employees in the remodeled stores, the union invoked arbitration. In rejecting the Board's finding that the union thereby violated section 8(b)(3), the court held that, in the circumstances of this case, the union's seeking of arbitration, without reliance on any other coercive measures, did not entail the adamant insistence on an inappropriate unit that constitutes the unfair labor practice. The court held that the union had a colorable claim that the collective-bargaining agreement had been breached, and that arbitration might well resolve the dispute without derogating from the Board's ultimate authority to determine the appropriateness of bargaining units.

7. Secondary Boycotts and Strikes

One case [4] presented the question of whether a union, by engaging in unlawful secondary action purportedly to enforce an other-

[2] 127 NLRB 103 (1960).

[3] *Retail Clerks Local 588, RCIA, AFL–CIO* [*Raley's*] v. *N L R.B.*, 565 F.2d 769 (D C. Cir.).

[4] *Chamber of Commerce* v. *N.L.R.B.*, 574 F.2d 457 (9th Cir.), cert. denied Nov. 27, 1978, enfg. 217 NLRB 902 (1975).

wise lawful work preservation clause, thereby transforms the clause into a "hot cargo" clause violative of section 8(e). In this case, the union removed its member carpenters from jobs of employers who were signatory to the work preservation clause because they were installing prefabricated homes on which certain carpenter work had been done. Since the employers were making the installation pursuant to subcontracts and had never had the "right to control" the assignment of the carpenter work on the homes, the union's removal of the employees from the jobs constituted a secondary boycott in violation of section 8(b)(4)(B). Had the employers been installing the prefabricated homes for their own account, the union under *National Woodwork* [5] could have lawfully refused to install them to preserve the carpenter work for the employees it represented. Accordingly, the Board held that the clause was lawful and it did not become unlawful merely because of the union's effort to enforce it by unlawful means. The court agreed, declaring that "just because the union miscalculates the circumstances under which it can act to enforce the clause, it does not render the clause invalid."

In a "right-to-control" case,[6] the court sustained the Board's view that, where an employer enters into a subcontract which, contrary to its work preservation agreement with the union representing its employees, excludes work that its employees traditionally performed, the subcontracting employer does not lose its neutral status in a dispute over the work assignment unless it initiated the subcontract provision withholding such work from its employees. In this case, the employer entered into a subcontract by which the prime contractor kept for its own employees certain electrical work which came within the subcontractor's work preservation clause. The union withdrew the subcontractor's employees from the jobs because they were not being permitted to do this work. Since there was no evidence that the subcontractor had by any affirmative conduct initiated the denial of the work to its employees, the Board held that the subcontractor did not lose its neutral status in the work assignment dispute because it "did not try hard enough" to retain the work when negotiating the subcontract. Accordingly, the union's withdrawal of the employees violated the secondary boycott ban of section 8(b)(4)(B). The court agreed, finding that the Board's test in such a situation—whether the subcontractor *initiated* the subcontract's restrictions of the

[5] *Natl. Woodwork Manufacturers Assn.* v. *N L R B*, 386 U S 612 (1967).

[6] *Intl Brotherhood of Electrical Workers, Local 501 [Atlas Construction Co.]* v *N.L.R B*, 566 F.2d 348 (D C. Cir.), enfg. 216 NLRB 417 (1975).

work assignment—was consistent with *Enterprise*[7] in which the Supreme Court approved the right-to-control doctrine.

8. Recognitional Picketing

The Board's construction of section 8(b)(7)(C) of the Act as proscribing threats to picket, as well as actual picketing, was upheld in *A–1 Security Service Co.*[8] The union contended that subsection (C) of section 8(b)(7) refers only to picketing and hence that threats alone are not covered. The court of appeals, however, relying on the broader introductory language of the section as well as congressional intent, as revealed by the legislative history of the provision, held that the proscription also extends to threats to picket directed against an employer by a labor union which has not been certified by the Board or which has not invoked the election procedures of the Act within 30 days of commencement of its conduct, where an object of the union's conduct is to force the employer to recognize it for the purpose of collective bargaining. The court also upheld the Board's rejection of the union's claim in this case that no violation occurred, since the union could not be certified by the Board because it admitted guards and nonguards and thus was foreclosed by section 9(b)(3) of the Act from filing a valid election petition to trigger the Board's election machinery. The court thus held that a union ineligible for certification as a recognized collective agent is unconditionally prohibited by section 8(b)(7)(C) from threatening to picket or picketing for a recognitional object, and that such a union may not take advantage of the clause permitting such activity for a reasonable period not exceeding 30 days, or for a longer period provided an election petition is filed.

9. Strikes and Picketing at Health Care Institutions

Before engaging in any strike or picketing at a health care institution, a labor organization is required by section 8(g)[9] to give the institution not less than 10 days' written notice of its intentions. The application of that section to picketing by local

[7] *N L R B* v. *Enterprise Assn., Pipefitters Local 638 [Austin Co.]*, 429 U S 507 (1977).

[8] *General Service Employees Union Local 73, SEIU [A–1 Security Service Co.]* v. *N L R B*, 578 F 2d 361 (D C. Cir.)

[9] Sec. 8(g) of the Act, 29 U S C. § 158(g), provides in pertinent part that "A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention . . . ."

unions representing nonhealth care employees involved in construction of hospital facilities again reached a court of appeals. In a decision [10] involving reserved gate picketing by such unions partially on hospital property, the District of Columbia Circuit followed the Seventh Circuit [11] in finding that the notice was not required. Although noting that the picketing was "at" a health care institution, the court, in agreement with the earlier decision, relied on the legislative history as indicating that Congress intended to reach only picketing which involved health care employees. In another case,[12] the Ninth Circuit, agreeing with the Board's view as set forth in *Walker Methodist* [13] held that the 10-day notice requirement was inapplicable to a strike by unrepresented employees. As the Board has recognized, one statement in the legislative history—a remark by Senator Taft during the debates—directly supports the view that it would not be protected activity for employees acting without a labor organization to engage in a work stoppage without giving the 10-day notice. The Board further noted, however, that section 8(g) on its face applies only to labor organizations and that a reading of the legislative history as a whole evidences congressional concern with sudden massive strikes endangering the health of patients. In adopting the Board's view, that court accepted the conclusion that a "brief work stoppage by a few organized employees simply was not the type of disruption with which Congress was concerned."

D. Remedial Order Provisions

1. Bargaining Order Remedies

The need for a clear articulation of the reasons for a *Gissel* bargaining order [14] was emphasized in *N.L.R.B.* v. *Matouk Industries.*[15] Although the First Circuit found the Board's statement of the reasons for a bargaining order adequate, it cautioned: "We share with other circuits, however, concern that the Board in issuing bargaining orders, which are extreme remedies, is doing so without adequately explaining its reasons or performing the

[10] *Laborers' Intl. Union of North America, AFL–CIO, Local 1057* [*Mercy Hospital of Laredo*] v. *N L R.B*, 567 F 2d 1006

[11] *N L R B.* v *Intl. Brotherhood of Electrical Workers, Local 388* [*St Joseph's Hospital*], 548 F.2d 704 (1977); 42 NLRB Ann Rep 182–183 (1977).

[12] *Kapiolani Hospital* v. *N.L R.B*, 581 F.2d 230.

[13] *Walker Methodist Residence & Health Care Center*, 227 NLRB 1630 (1977); 42 NLRB Ann. Rep 26, 141 (1977).

[14] *N.L R B.* v. *Gissel Packing Co*, 395 U S 575, 610 (1969).

[15] 582 F.2d 125.

kind of analysis necessary to permit a court of appeals to perform its statutory review obligation." *Id.* at 130. Acknowledging the difficulty of predicting the effect of unfair labor practices on employee free choice and the Supreme Court's admonition in *Gissel* that reviewing courts should not substitute their judgment for the Board's, the court nonetheless warned that "where the Board fails to support its conclusions with reasoning that we can evaluate, we may feel obliged to remand to the Board for further proceedings."

In *Kenworth Trucks of Philadelphia* v. *N.L.R.B.*, the Third Circuit also expressed concern about the adequacy of the Board's statement of reasons for a *Gissel* bargaining order and the relation between the Board's decision and that of the administrative law judge. The court initially held that the Board could not adopt the rationale of its administrative law judge for a *Gissel* bargaining order by short form decision.[16] On rehearing before the original panel, the court reversed that holding and enforced the Board's order in its entirety.[17] The court reaffirmed its view that "before a court of appeals may enforce a bargaining order, the record should contain an elaboration of the basis for the determination that such relief is necessary." However, the court held, on reconsideration, that, "[s]o long as the ALJ has provided a statement of reasons for its recommendation of a bargaining order as it did here, and so long as the NLRB has specifically indicated its adoption of the findings and reasoning of the ALJ, as was done in the present case, the need for a separate elaboration of the factors prompting a bargaining order would appear to have been met." *Id.* at 62–63. "To go beyond that by asking the NLRB itself to provide an independent statement of reasons," the court held, "would seem to impose a requirement of 'proper procedures' upon an agency entrusted with substantive functions by Congress,' and thus to be inconsistent with the approach taken in *Vermont Yankee Nuclear Power*." [18] *Id.* at 63. To the extent that the court's earlier decision in *N.L.R.B.* v. *Craw & Son* [19] takes a position that is inconsistent with *Vermont Yankee Nuclear Power*, the court observed that "it is of course no longer viable."

In *N.L.R.B.* v. *Cott Corp.*,[20] the First Circuit refused to enforce a bargaining order against a successor employer which had acquired a business and all of its employees with knowledge that

[16] 580 F 2d 55.
[17] 580 F.2d 61.
[18] *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U S. 519.
[19] 565 F.2d 1267, 1271–72 (1977).
[20] 578 F.2d 892.

the Board had previously issued such an order against the predecessor employer. The court rejected the Board's theory that under the Supreme Court's decision in *Golden State Bottling Co.* v. *N.L.R.B.*,[21] a successor employer is required to remedy a predecessor's unlawful refusal to bargain, much as it is required to assume the predecessor's reinstatement and backpay obligations. The court noted that the predecessor's bargaining obligation was based not on a Board certification or voluntary recognition, but on the commission of unfair labor practices which, under the Supreme Court's ruling in *N.L.R.B.* v. *Gissel Packing Co.*,[22] made the holding of a fair election impossible. The elements which supported the bargaining order against the predecessor, in the court's view, were not present in the case of the successor which had not itself committed any unfair labor practices or otherwise "poisoned the electoral climate." Accordingly, the court concluded that "a bargaining order [against the successor employer] not only is unnecessary, but may even frustrate the policy of allowing employees to pick the representative of their choice that *Gissel* was intended to promote." The court distinguished the *Golden State* case on the ground that the bargaining order against a successor employer which the Supreme Court indicated it would approve was one "tied to the continuance of the bargaining agent in the unit involved," whereas in the case before the court only one of the predecessor employer's original eight employees remained in the successor employer's employ by the time the Board instituted its proceeding against the successor employer.

In order to ensure the remedial effectiveness of settlement agreements in a refusal-to-bargain context, the Board held in *Poole*[23] that an employer who executes a settlement agreement containing an agreement to bargain must bargain with the union for a reasonable period of time, irrespective of any fluctuations in the union's majority status. The *Poole* doctrine in effect creates an insulated bargaining period following execution of the settlement agreement. During fiscal 1978, the Seventh Circuit twice had occasion to review the scope of this doctrine. In *N.L.R.B.* v. *Key Motors Corp.*[24] the Seventh Circuit rejected the Board's extending the *Poole* doctrine to a Board-approved settlement agreement which contained a bargaining provision but settled no underlying refusal-to-bargain charge. In *Key Motors*, the union,

[21] 414 U.S. 168 (1973).

[22] 395 U S 575 (1969)

[23] *Poole Foundry & Machine Co.*, 95 NLRB 34 (1951), enfd. 192 F.2d 740 (4th Cir. 1951), cert denied 342 U.S. 954.

[24] 579 F.2d 1388.

which had unsuccessfully bargained with the employer towards a new collective-bargaining agreement, charged the employer with violating section 8(a)(1) and (3) of the Act by discriminatorily discharging an employee, interrogating its employees concerning union membership, and encouraging the filing of a decertification petition. The employer thereafter entered into a Board-approved settlement agreement settling these charges which, notwithstanding the absence of an underlying refusal-to-bargain charge, contained an agreement to bargain. Shortly after execution of this agreement, the employer, asserting a good-faith doubt of the union's majority status, withdrew recognition from the union, but the Board, applying the *Poole* doctrine, found that the employer's withdrawal of recognition violated its settlement commitment to bargain. The Seventh Circuit disagreed with the Board's conclusion. In its view, the rationale for the *Poole* doctrine was "to restore with some force a bargaining relationship that was interrupted as a result of the employer's refusal to bargain." The court concluded that this rationale did not apply where the employer was not charged with a refusal to bargain and there was no reason to assume that it had done so. In such circumstances there was "no justification for sacrificing employee free choice by ordering the employer to bargain with a minority union." The court acknowledged that the result would have been different if the bargaining provision in the settlement agreement had clearly stated that the employer was under an obligation to bargain for a reasonable time notwithstanding the union's majority support. It added that the Board was free to withhold its approval of the settlement agreement until such a provision was inserted.

In *Vantran Electric* [25] the union and the employer negotiated an agreement by which the employer agreed to withdraw a lawsuit for strike damages against the union and the striking employees, and the union agreed to seek withdrawal of a pending charge and complaint alleging an unlawful refusal to bargain by the employer. The administrative law judge found that the union's principal concern in negotiating the agreement was to obtain withdrawal of the employer's lawsuit against it. Therefore, he concluded, the agreement did not require the employer to bargain after the union lost its majority in the plant even though the employer had not bargained for a total of 1 year's time since the union was certified by the Board as bargaining representative. The Board reversed, finding that the Board's requirement of bar-

[25] *N.L.R.B.* v *Vantran Electric Corp.*, 580 F 2d 921 (7th Cir.), denying enforcement of 231 NLRB 1014 (1977).

gaining for a total of a year after certification applied. The court disagreed, finding that in such a private "out of Board" settlement, the Board's standard remedies did not apply unless the agreement or its negotiation indicated that the parties so intended. In such settlement, the court declared, it was important to determine "whether the employer's agreement to bargain was a *quid pro quo* for the union's agreement to withdraw its § 8(a)(5) charge." Relying upon the administrative law judge's finding that the union's principal concern was to obtain withdrawal of the employer's damage suit against it, the court found that the employer's agreement to bargain was "at best only incidental" to the settlement agreement. The court added that, if the Board believed that its remedies should be applied in such a situation, it could refuse to permit withdrawal of the charge unless the agreement included the remedies which the Board deemed necessary.

Where 8(a)(1) and (3) violations prevented holding a fair election, the Board under *Steel-Fab* [26] would issue a bargaining order effective only from the date of the Board's decision. Because experience showed that such prospective bargaining orders failed to remedy unilateral changes in working conditions made after a union established majority status, the Board in *Trading Port* [27] held that a bargaining order should be effective as of the time the employer has embarked on a clear course of unlawful conduct or has engaged in sufficient unfair labor practices to undermine the Union's majority status." In *Drug Package* v. *N.L.R.B.*,[28] the union commenced organizing Drug Package employees in early 1974, when *Steel-Fab* was in effect. By May 10, the union obtained a card majority and demanded recognition, which the company refused. On May 23, employees struck "for recognition and a contract." Subsequently, the union offered to end the strike on condition that the company reinstate all strikers, but the company refused to reinstate replaced strikers. The Board found that the company's extensive 8(a)(1) violations destroyed the likelihood that a fair election could be held and, applying *Trading Port* retroactively, held that the company's bargaining obligation commenced on May 10. The Board also found that since the company's refusal to bargain on May 10 violated section 8(a)(5) the subsequent walkout of May 23 "for recognition and a contract" was an unfair labor practice strike from its inception, and hence all strikers were entitled to reinstatement upon appli-

[26] *Steel-Fab*, 212 NLRB 363 (1974).
[27] *Trading Port*, 219 NLRB 298 (1975).
[28] 570 F.2d 1340 (8th Cir.).

cation. The court enforced the Board's bargaining order prospectively from the date of the Board's decision. In the court's view, retroactive application of *Trading Port* would be "unfair," because the crucial actions by the parties occurred prior to that decision. Thus, the company refused reinstatement in reliance on *Steel-Fab* as assurance that even if the Board ultimately issued a bargaining order, the order would operate prospectively only. Retroactive application of *Trading Port* resulted in the finding that the subsequent walkout was an unfair labor practice strike and that the company was obligated to offer reinstatement to all strikers and grant them "substantial" backpay. "It would be fair to assume," the court stated, "that the Company, had it known of the possibility of these penalties, might have given the Union's offer greater consideration."

2. Other Issues

In *Winn-Dixie Stores* v. *N.L.R.B.*,[29] the Fifth Circuit refused to enforce several portions of the Board's affirmative order as unduly speculative and burdensome. The court affirmed the Board's conclusion that the employer had violated section 8(a)(1), (3), and (5) of the Act by maintaining a clause in its profit-sharing/retirement plan that automatically excluded from coverage those unit employees covered by a union-sponsored pension plan and by refusing to bargain about coverage under both plans during the negotiation of a 1970 bargaining agreement, which required forfeiture of existing profit-sharing accounts and extended coverage of the union pension plan to unit employees. The court refused, however, to enforce that portion of the Board's order which required the employer to create new profit-sharing accounts for the employees who would have become eligible since the 1970 bargaining agreements and to make annual contributions to these accounts, as well as cash payments. While the court agreed that the employer had unlawfully refused to bargain about double coverage, it concluded that the Board's order did not restore the *status quo ante* and was unduly speculative and burdensome because there was no certainty that there would have been agreement in 1970 or thereafter as to simultaneous coverage under both the company and union plans. Likewise, the court refused to enforce that aspect of the Board's order which required the employer to pay the unit employees the difference, if any, between

[29] 567 F.2d 1343, petition for rehearing *en banc* denied 575 F.2d 1107.

the benefits they received and those received by employees at another comparable company warehouse. This remedy was intended to make the unit employees whole for any losses they may have incurred because of the employer's unlawful unilateral actions, which the Board found to have impeded the bargaining process.[30] While the court upheld the Board's finding that the employer had violated section 8(a)(5) and (1) by unilaterally increasing health insurance and wage benefits, it rejected this make-whole remedy as unduly burdensome and speculative; the court found that the record did not support the Board's assumptions that the employer had a policy of uniform benefits for all its employees or that any differences in benefits were due to the employer's unfair labor practices and not other factors.

[30] See 224 NLRB 1418, 1422 (1976).

IX

Injunction Litigation

Sections 10(j) and 10(l) authorize application to the U.S. district court, by petition on behalf of the Board, for injunctive relief pending hearing and adjudication of unfair labor practice charges by the Board.

A. Injunctive Litigation Under Section 10(j)

Section 10(j) empowers the Board, in its discretion, after issuance of an unfair labor practice complaint against an employer or a labor organization, to petition a U.S. district court for appropriate temporary relief or restraining order in aid of the unfair labor practice proceeding pending before the Board. In fiscal 1978, the Board filed 46 petitions for temporary relief under the discretionary provisions of section 10(j): 37 against employers and 9 against unions. Of this number, together with 10 petitions pending in court at the beginning of this report period, injunctions were granted by the courts in 20 cases and denied in 2. Of the remaining cases, 19 were settled prior to court action, 3 were withdrawn, 11 were pending further processing in court, and 1 case was in inactive status at the close of the period.[1]

Injunctions were obtained against employers in 13 cases and against labor organizations in 7 cases. The cases against employers variously involved alleged interference with organizational activity, bad-faith bargaining, minority union recognition, interference with access to Board processes, and, in one case, refusal to permit protected activity on an employer's property. The cases against unions involved alleged bad-faith bargaining, picket line misconduct, and forcing an employer to refuse to hire nonunion members.

In *Eisenberg* v. *Holland Rantos Co.*,[2] the Third Circuit reviewed a district court's issuance of a 10(j) injunction following charges alleging that Holland Rantos, the primary employer, and

[1] See table 20 at p 283, *infra*.
[2] 583 F 2d 100.

Central Jersey Industrial Park, the owner of an industrial park, violated section 8(a)(1) by denying employees engaged in an economic strike against Holland Rantos access to the industrial park to picket in front of the building leased by Holland Rantos. The strikers were thereby limited to picketing on public property along a heavily traveled highway near an entrance to the industrial park. The district court granted an injunction prohibiting the employers from denying the strikers access to the industrial park, but limited its duration to 90 days, rather than to the pendency of a Board determination of the case. The primary employer and the industrial park owner appealed the grant of 10(j) injunctive relief, and the Board cross-appealed from the court's imposition of a specific time limitation on the duration of the injunction. Subsequently, the district court granted two extensions of the injunction, by which time the Board's decision and order had issued. The Board then moved to dismiss the appeal as moot, while the employers moved to consolidate the appeals with the employers' petition for review of the Board's order. The appellate court denied the Board's motion to dismiss and granted the employers' motion to consolidate the proceedings. The court then upheld the district court's action, finding "no abuse of discretion" by the district court in granting the injunction. Relying on its decision in *Eisenberg* v. *Hartz Mountain Corp.*,[3] where it held that a 10(j) injunction should be limited to no more than 6 months pending an administrative law judge's decision, and another 6 months pending the Board's final order, the court found the time limitations on the injunction were within the bounds of that decision. Further, the court reasoned, the availability of a hearing at the time of each extension of the injunction assured the parties an opportunity to be heard and present evidence concerning the continued need for the injunction. Accordingly, the court concluded that "there is no persuasive reason to modify the . . . *Hartz Mountain* principles on the record now before us."[4]

The Seventh Circuit also reviewed the question of the duration of 10(j) injunctive relief in *Barbour* v. *Central Cartage*.[5] There, the district court had ordered the employer to cease and desist from numerous unfair labor practices allegedly committed during a union organization campaign, but had denied the Board's request for an interim bargaining order. The Board appealed from the denial of the bargaining order and the employer cross-appealed

[3] 519 F.2d 138 (1975).
[4] The court also affirmed the Board's order.
[5] 583 F.2d 335

from the cease-and-desist order; however, after argument, but before decision, the Board issued its order in the unfair labor practice proceeding. While recognizing that the appeal would normally be rendered moot by the issuance of the Board's decision and order, noting the split of authority in the Second and Fifth Circuits,[6] the Board suggested that the issue of whether an interim bargaining order may be "just and proper" relief in appropriate cases was sufficiently important that the court should rule on that issue for the future guidance of the district courts within its judicial circuit. The court acknowledged the significance of the issue raised, but ruled that an injunction under section 10(j), like one under section 10(l), "should last only until the Board's adjudication of the unfair labor practice charges." Notwithstanding the difference in the language of section 10(j) and 10(l), the court viewed the legislative history of section 10(l), which indicated that Congress intended injunctive relief to lapse upon a Board determination, as equally applicable to section 10(j). Thus the court concluded that an appeal from a 10(j) injunction is moot once the Board rules on the underlying charge. The case was remanded to the district court with directions to vacate its order as moot.

In two cases district courts were requested to issue bargaining orders to preserve the status quo pending Board decision. In *Hendrix* v. *S. S. Kresge Co.*,[7] the regional director sought injunctive relief based on the employer's alleged misconduct during negotiations, including insistence on a broad management-rights clause, unilateral changes in existing programs and economic benefits, refusal to accept implementation of a temporary grievance procedure while negotiations were continuing, and refusal to make a wage proposal until noneconomic issues were resolved. The court initially noted that before an injunction could issue the court must find: first, that there is reasonable cause to believe that the acts alleged actually occurred; second, that there is reasonable cause to believe that the acts alleged constitute unfair labor practices; and third, that injunctive relief was just and proper. The court then concluded that, even assuming that the Board had established reasonable cause to believe the employer violated section 8(a)(1) and (5), an injunction would not be proper under the circumstances. It found that the question of

[6] *Seeler* v. *Trading Port*, 517 F.2d 33 (2d Cir. 1975) (interim bargaining order granted), *Boire* v *Pilot Freight Carriers*, 515 F.2d 1185 (5th Cir. 1975) (interim bargaining order denied).

[7] 440 F.Supp. 1335 (D.C. Kans.).

good-faith bargaining was extremely complex from a factual and legal standpoint, and it was not in the position to make such a determination. The court foresaw further problems in formulating an order sufficiently specific so that the employer "could govern its conduct in the interim with impunity," and was concerned that to grant injunctive relief would thrust the court into the bargaining arena. Finally, the court concluded the alleged bad-faith bargaining did not require the expedited treatment of section 10(j). In the second case [8] the employer took over the operation of a restaurant located on the premises of an inn. The union, prior to the change in control, represented the restaurant employees and was a party to a contract with the inn. Following the employer's takeover, a controversy developed over the hiring of a nonunion, part-time waitress. The union shop steward was subsequently fired as a result of the dispute. During an employee meeting in which the employer allegedly made several statements violative of section 8(a)(1), a straw poll was taken in which a majority of employees voted against the union. The employer thereafter refused to confer with the union regarding the steward's discharge or any other matter. The court found that the law was well established regarding the employer's ability to assert a good-faith doubt of the union's majority status. The duty to recognize and bargain with an incumbent union exists even in the absence of Board certification, and that obligation extends to a successor employer as well where there is a "continuity of operations with substantial continuity in the identity of the work force." The timing and circumstances surrounding the employer's poll were such that neither the results of the poll nor a subsequent filing of a decertification petition were sufficient to establish with certainty that the union had lost its majority status. Accordingly, injunctive relief, including reinstatement of the shop steward and recognition of and bargaining with the union, was just and proper.

In a case [9] involving an unusual type of discrimination, the Board sought and obtained an injunction against an employer who filed a civil lawsuit in state court seeking $10,000 in damages from an employee who had filed 8(a)(3) charges against the employer following her discharge. The employer alleged in the lawsuit that the employee misrepresented her intention of entering into a long-term employment relationship in order to obtain training and employment while in fact she intended to provoke her discharge under circumstances which would permit her to file an

[8] *Seeler* v. *Sidewheeler Restaurant*, 97 LRRM 2764 (D C N Y)
[9] *Humphrey* v. *United Credit Bureau of America*, 99 LRRM 3459 (D.C. Md.).

unfair labor practice charge which the employer would, as a matter of expediency, settle and offer the employee reinstatement and backpay. The employer sought damages consisting of wages paid during training, the *pro rata* cost of operating the training program, and the costs of defending against the unfair labor practice charge. Complaint issued alleging a violation of section 8(a)(1) and (4), and the Board sought an injunction to prevent irreparable harm to statutory policy, since the lawsuit could have a chilling effect on employees of the employer who otherwise might file charges with the Board. The district court found that the lawsuit was in retaliation for the employee's participation in the prior 8(a)(3) proceeding and enjoined the employer from "prosecuting or participating in" the suit against the employee, as well as suits against any other employees, based on their having been involved in Board proceedings.[10]

In *U.S.* v. *Union Nacional de Trabajadores*,[11] the First Circuit upheld an adjudication in criminal contempt against a union and its secretary-treasurer for willfully refusing to obey a district court's order issued pursuant to section 10(j). The injunction order, directing the union, its officers, and its agents to terminate a strike, was predicated on the district court's finding of reasonable cause to believe the union's strike violated sections 8(b)(3) and 8(d) of the Act. In the contempt proceeding, the union and its secretary-treasurer were found guilty of willfully and defiantly continuing the strike by threatening nonstrikers with physical injury, by failing to take any action to terminate the strike, and by conducting a demonstration in front of the Board's regional office with picket signs announcing defiance and disobedience of the injunction. The district court sentenced the union officer to 3 months' imprisonment and fined the union $500. On appeal, the union argued that the evidence was insufficient to establish contempt, but the court of appeals found that the union's secretary-treasurer had "knowingly and willfully" violated the district court's order. The union contended that the Norris-LaGuardia Act's stringent standard of "clear proof of actual participation in, or authorization of" the misconduct controlled its liability for the acts of its officers, rather than the lesser, common law standards of agency incorporated into section 2(13) of the LMRA. The court rejected the argument that the Norris-LaGuardia standards applied, but considered it unnecessary to determine whether the "simple agency standard of liability" applied since the evidence

[10] The employer has appealed to the Fourth Circuit.
[11] 576 F.2d 388.

established that, even under a stricter standard, the union actively endorsed the strike. The court also rejected the defendants' additional contentions that the Government's responses to their demands for disclosure of electronic surveillance were inadequate, that evidence it produced at the trial was tainted by illegal wire tapping, that the union had been discriminatorily selected for prosecution, and that the Government had wrongfully destroyed witnesses' statements before the trial.

B. Injunctive Litigation Under Section 10 (l)

Section 10(l) imposes a mandatory duty on the Board to petition for "appropriate injunctive relief" against a labor organization or its agent charged with a violation of section 8(4)(A), (B), and (C),[12] or section 8(b)(7),[13] and against an employer or union charged with a violation of section 8(e),[14] whenever the General Counsel's investigation reveals "reasonable cause to believe that such charge is true and a complaint should issue." In cases arising under section 8(b)(7), however, a district court injunction may not be sought if a charge under section 8(a)(2) of the Act has been filed alleging that the employer had dominated or interfered with the formation or administration of a labor organization and, after investigation, there is "reasonable cause to believe such charge is true and that a complaint should issue." Section 10(l) also provides that its provision shall be applicable, "where such relief is appropriate," to violations of section 8(b)(4)(D) of the Act, which prohibits strikes and other coercive conduct in support of jurisdictional disputes. In addition, under section 10(l) a temporary restraining order pending the hearing on the petition for an injunction may be obtained, without notice to the respondent, upon a showing that "substantial and irreparable injury to the charging party will be unavailable" unless immediate injunctive relief is granted. Such *ex parte* relief, however, may not extend beyond 5 days.

[12] Sec 8(b)(4)(A), (B), and (C), as enacted by the Labor Management Relations Act of 1947, prohibited certain types of secondary strikes and boycotts, strikes to compel employers or self-employed persons to join labor or employer organizations, and strikes against Board certifications of bargaining representatives These provisions were enlarged by the 1959 amendments of the Act (Title VII of Labor Management-Reporting and Disclosure Act) to prohibit not only strikes and the inducement or work stoppages for these objects but also to proscribe threats, coercion, and restraint addressed to employers for these objects, and to prohibit conduct of this nature where an object was to compel an employer to enter into a hot cargo agreement declared unlawful in another section of the Act, sec 8(e).

[13] Sec. 8(b)(7), incorporated in the Act by the 1959 amendments, makes organizational or recognitional picketing under certain circumstances an unfair labor practice.

[14] Sec. 8(e), also incorporated in the Act by the 1959 amendments, makes hot cargo agreements unlawful, with certain exceptions for the construction and garment industries.

In this report period, the Board filed 216 petitions for injunctions under section 10(l). Of the total caseload, comprised of this number together with 22 cases pending at the beginning of the period, 51 cases were settled, 8 dismissed, 11 continued in an inactive status, 22 withdrawn, and 31 pending court action at the close of the report year.[15] During this period, 115 petitions went to final order, the courts granting injunctions in 107 cases and denying them in 8 cases. Injunctions were issued in 78 cases involving secondary boycott action proscribed by section 8(b)(4)(B), as well as violations of section 8(b)(4)(A) which proscribes certain conduct to obtain hot cargo agreements barred by section 8(e). Injunctions were granted in 7 cases involving jurisdictional disputes in violation of section 8(b)(4)(D). Injunctions were issued in 18 cases to proscribe alleged recognitional or organizational picketing in violation of section 8(b)(7). The remaining 4 cases in which injunctions were granted arose out of charges involving violations of section 8(e).

Of the 8 cases in which injunctions were denied, 3 involved secondary picketing activity by labor organizations, 2 involved secondary pressures in furtherance of jurisdictional disputes, and 3 involved implementation of illegal hot cargo clauses.

In *Kaynard* v. *Local 282, Teamsters* [*John T. Brady, Inc.*],[16] the Second Circuit reversed a district court's determination that a union violated section 8(b)(4)(D), but not section 8(b)(4)(B), in a secondary picketing situation. The union picketed a construction site to obtain the assignment of work, covered by its contract with the general contractor, from the employees of a subcontractor who either were represented by another union or were unrepresented. The district court based its injunction solely on section 8(b)(4)(D), finding no reasonable cause to believe that the union's actions constituted secondary picketing prohibited by section 8(b)(4)(B). While acknowledging that the district court's injunction reached most of the potential difficulties at the construction site, the Board appealed because of the harmful precedent set by the case. The court of appeals noted that the issuance of an injunction against 8(b)(4)(D) violations would have a different effect than one against 8(b)(4)(B) violations, since circumstances might develop in which the union's secondary picketing might be other than for a work assignment objective; additionally, the Board might finally adjudicate the 8(b)(4)(D) allegation, thereby dissolving the injunction, before reaching the 8(b)(4)(B) claim. The court found

[15] See table 20 at p. 283, *infra*

[16] 576 F.2d 471.

that the regional director was justified in concluding that the union's actions taken against the general contractor were designed to alter the employment practices of the subcontractor. The union, however, contended that the picketing was lawful primarily picketing designed to enforce its contract with the general contractor. The court disagreed, emphasizing that a collective-bargaining agreement "can never protect what is otherwise illegal secondary activity." It was further clear that under the *Natl. Woodwork* decision [17] the union's actions were "tactically calculated to satisfy [the union's] objectives elsewhere." In concluding that there was reasonable cause to believe the union violated section 8(b)(4)(B), the court noted that the union's picketing was designed to force the general contractor to cease doing business with the subcontractor, for it was only when the general contractor ordered the subcontractor off the construction site that the union removed its pickets. Accordingly, the court remanded the case to the district court for modification of the injunction.

The district court in *Solien* v. *United Steelworkers of America [Hussman Refrigerator Co.]* [18] denied the Board's request for injunctive relief. In support of an economic strike against a primary employer, the union urged, through newspaper advertisements and handbills, that consumers totally boycott all products and businesses of the parent corporation of the primary employer. No boycott material was distributed in the vicinity of any retail establishment owned by the parent corporation; nor did any handbilling occur in the vicinity of any establishment selling the parent corporation's products. Injunctive relief was sought on the premise that the consumer boycott was directed at the parent corporation and its divisions to cause a diminution or cessation of business between the parent corporation's divisions and their suppliers or distributors. While the court recognized that the union sought a consumer boycott in order to exert economic pressure on the primary employer, the court found no reasonable cause to believe that the union thereby violated section 8(b)(4)(ii)(B). The court, noting the absence of handbilling at any facility owned by the parent or at any facility selling products of the parent, concluded there was no evidence of restraint or coercion of the parent corporation or its divisions. The court also concluded that there was an absence of evidence that the union had as its object forcing or requiring any persons to cease doing business with the primary

[17] *Natl Woodwork Manufacturers Assn.* v. *N.L.R B.*, 386 U.S. 612 (1967).
[18] 449 F Supp. 580 (D.C. Mo.).

employer. The court concluded the union's actions did not fall within the prohibitions of the Act and dismissed the petition.[19]

[19] The Board's appeal is pending before the Eighth Circuit.

X

Contempt Litigation

During fiscal 1978, petitions for adjudication in contempt for noncompliance with decrees enforcing Board orders were filed in 32 cases, 30 seeking civil contempt and 2 criminal contempt.[1] As to the civil petitions, five were granted and civil contempt adjudicated,[2] while a like number were discontinued upon full compliance.[3] In seven cases, the courts referred the issues to special masters for trials and recommendations; four to U.S. magistrates,[4] and three to other experienced triers.[5] Four cases are awaiting

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[1] *N.L.R.B.* v. *Teamsters, Local 85, IBTCWA*, in criminal contempt of 448 F.2d 789 (9th Cir. 1971) and 454 F.2d 875 (9th Cir. 1972), see 42 NLRB Ann Rep. 194, fn 6 (1977), *N.L.R.B.* v *Sequoia District Council of Carpenters*, in criminal contempt of 499 F 2d 129 (9th Cir. 1974), see fn. 17, below Both cases involve unlawful secondary activity.

[2] *N.L.R.B* v *Kevin Steel Products*, order of Sept. 7, 1978, in civil contempt of the backpay judgment of Oct 1, 1974, in No. 74-1872 (2d Cir.), *N.L.R.B* v *Unweld*, order of Aug. 16, 1978, in civil contempt of the reinstatement provision of the judgment of May 18, 1977, in No. 77-4105 (2d Cir.), *N.L.R.B.* v. *Rivers Bros Ambulette Service*, order of Aug 16, 1978, in civil contempt of the bargaining and reinstatement provisions of the judgment of Jan 12, 1978, in No. 77-4214 (2d Cir.), *N.L.R.B* v. *McCorvey Sheet Metal Works*, order of June 27, 1978, in civil contempt of the notice-posting provision of the judgment of Nov 1, 1975, in No. 75-2163 and the backpay provisions of the judgment of Nov. 21, 1977, in No. 77-3099 (5th Cir.); *N.L.R.B.* v *Thurner Heat Treating Corp*, order of Jan 7, 1978, in civil contempt of the reinstatement, bargaining, and anti-coercion provisions of the judgment of June 13, 1977, in No 77-1174 (7th Cir.)

[3] *N.L.R.B.* v. *Security Services*, order of May 22, 1978, upon payment of backpay, in compliance with the judgment of April 8, 1976, in No 75-2141 (6th Cir.); *N.L.R.B* v. *O. R. Cooper & Son*, order of Feb. 17, 1978, upon respondent's compliance with the discovery portion of protective restraining order of May 25, 1977, in No 78-1813 (7th Cir.); *N.L.R.B.* v. *Valmac Industries*, order of May 17, 1978, upon reinstatement of discriminatee, in compliance with 533 F.2d 1075 (8th Cir. 1976), *N.L.R.B.* v. *Carter's of California*, order of Aug. 21, 1978, upon entering into a collective-bargaining agreement in compliance with judgment of March 11, 1977, in No. 77-1079 (9th Cir.), *N.L.R.B* v. *West Coast Door*, order of May 31, 1978, upon payment of backpay in compliance with the judgment of July 16, 1976, in No 76-3421 (9th Cir.)

[4] *Bagel Bakers Council of Greater N.Y.* v. *N.L.R.B.*, in civil contempt of 555 F.2d 304 (2d Cir. 1977); *N.L.R.B.* v. *Fort Lock Corp.*, in civil contempt of the anti-coercion provisions of the judgment of Dec. 29, 1975, in No. 75-1223 (7th Cir.); *N.L.R.B. v. Royal Typewriter Co., Div. of Litton Business Systems*, in civil contempt of 533 F.2d 1030 (8th Cir. 1976), *N.L.R.B* v. *Suburban Yellow Taxi Co.*, in civil contempt of the bargaining provisions of the judgments of Jan. 26, 1977, in No 77-1024 and of Aug. 9, 1977, in No. 77-1583 (8th Cir. 1977).

[5] *N.L.R.B.* v. *Union Nacional de Trabajadores*, in civil contempt of 540 F.2d 1 (1st Cir. 1976), cert. denied 429 U.S. 1039 (1977); *N.L.R.B.* v. *Croft Metals*, in further civil contempt of 516 F.2d 436 (5th Cir. 1975), cert. denied 424 U.S. 914 (1976) and the bargaining order of Jan. 13, 1978. See 42 NLRB Ann. Rep. 194, fn. 6 (1977), and fn. 12, below, *N.L.R.B.* v. *Aircraft and Helicopter Leasing & Sales*, in civil contempt of the backpay provisions of the judgment of Jan. 27, 1978, in No. 77-1538 (9th Cir.).

referral to a special master.[6] The remaining nine cases are before the courts in various stages of litigation: three await the issuance of an order to show cause,[7] one is awaiting disposition of the Board's motion for summary adjudication,[8] one was discontinued of settlement under the aegis of the court,[9] one was discontinued upon the union's disclaimer of further interest in the unit,[10] and, in three, answers to the Board's petitions have not yet been filed.[11]

Seventeen cases which were commenced prior to fiscal 1978 were disposed of during the period. In eight of these, civil contempt was adjudicated;[12] in three, fines were assessed for violation of the purgation provisions of prior civil contempt ad-

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[6] *N L R B.* v *M D I. Trucking Corp*, in civil contempt of the backpay provisions of the judgment of March 24, 1977, in No. 77-1187 (3d Cir), *N L R B* v *Local 8220, Steelworkers, AFL-CIO-CLC*, picket line violence, in civil contempt of the judgment of June 8, 1978, in No 78-1216, *N L R B* v *Super Giant Foods*, in civil contempt of the reinstatement and discovery provisions of the judgment of April 18, 1978, in No. 78-1287 (7th Cir.), *N L R.B* v *Rabco Metal Products*, in civil contempt of the bargaining provisions of the judgment of Feb 17, 1978, in No. 76-3132 (9th Cir.).

[7] *Oil Chemical & Atomic Workers Intl Union, AFL-CIO* [*Kansas Refined Helium Co*] v. *N L R B*, in civil contempt of 547 F.2d 575 (D C Cir 1977), *N L R B* v *Klapps Packinghouse Market*, in civil contempt of the bargaining provisions of the judgment of Nov. 3, 1977, in No 77-3013 (9th Cir), *N L R B* v. *ILWU, Local 9*, in civil contempt of the backpay provisions of the judgment of June 16, 1978, in No 78-1888 (9th Cir.).

[8] *IBEW Local 1547* v *N L R B*, in civil contempt of the notice-posting and reinstatement provisions of the judgment of Dec 23, 1977, in No 76-1758 (D C. Cir.)

[9] *N L R B* v. *Garden Fashions*, in civil contempt of the backpay provisions of the judgment of Oct 19, 1977, in No. 76-4161 (2d Cir).

[10] *N L R B* v. *M & B Industries Corp*, in civil contempt of the bargaining provisions of the judgment of June 17, 1977, in No. 77-4014 (2d Cir)

[11] *N L R B* v. *Dawson Masonry*, in civil contempt of the backpay and discovery provisions of the judgment of March 15, 1977, in No. 77-1222 (5th Cir), *N L.R.B.* v. *Intl. Union of Elevator Constructors, Local 8*, in civil contempt of the hiring hall provisions of the judgment of March 16, 1978, in No 78-1156 (8th Cir.), *N.L R B.* v *Ship Scalers & Painters Union, Local 56*, in further civil contempt of the job referral provisions of the judgments of July 25, 1965, in No 20259 and of May 26, 1970, in No 25821 (9th Cir.).

[12] *N L R B* v *Mr Electric Service Co*, order of July 26, 1978, in civil contempt of the 8(a)(3) and (5) provisions of the judgments of July 24, 1974, and July 20, 1976, in No. 74-1961 (2d Cir), *N L R B.* v *Bancroft Mfg Co*, order of Jan 13, 1978, adjudging that the company was in violation of portions of the judgments in 516 F 2d 436 (5th Cir. 1975) and 520 F 2d 1406 (5th Cir. 1975), *N.L.R.B.* v *J. P. Stevens & Co, Gulistan Div.*, order of Jan 9, 1978, in civil contempt of the bargaining provisions of 441 F.2d 514 (5th Cir 1971) and 455 F 2d 607 (5th Cir. 1971); *N L R B.* v *Dust-Tex Service*, order of July 19, 1978, in civil contempt of 521 F 2d 1404 (8th Cir. 1975), *N.L.R.B* v. *Sequoia District Council of Carpenters, AFL-CIO*, 568 F 2d 628 (9th Cir. 1977), *N L R B* v *Ship Scalers & Painters Local 56, ILWU*, order of Sept 20, 1978, in civil contempt of the hiring hall provisions of the judgments of July 24, 1965, and May 26, 1970, in Nos 20259 and 25851 (9th Cir), *N.L R.B* v *Timberland Packing Corp*, order of Nov 28, 1977, in civil contempt of the bargaining and notice-posting provisions of 550 F 2d 500 (9th Cir 1977), *N L R B* v *IBEW, Local 354*, order of Oct. 20, 1977, in civil contempt of the secondary boycott provisions of the judgment of Nov. 13, 1974, in No. 74-1652 (10th Cir.).

judications,[13] and one was disposed of by an order granting full compliance.[14] Of the remaining cases, one was dismissed for failure of proof,[15] and four were discontinued by the Board upon full compliance or other satisfactory remedial disposition.[16]

Several cases of interest were decided during the reporting period. In a somewhat unusual factual setting, the Ninth Circuit, in *N.L.R.B.* v. *Sequoia District Council of Carpenters*,[17] was called upon to decide whether certain principal officers of the union, who were personally charged with contempt, had adequate notice of the court's order broadly prohibiting secondary boycott activity. Only the union's attorney had been served with the judgment, and the Board's notice was defectively drawn so that it only proscribed conduct against named secondary employers; the contumacious conduct, however, involved other neutral employers. The court rejected the officers' claim that personal service was required, and concluded that the union officers had actual knowledge of the judgment's terms by virtue of their relationship, as union officers, to the underlying controversy, a major issue of which concerned the propriety of the broad decree. The officers' duty to comply with that decree was not diminished by the later, deficiently narrow notices furnished by the Board's regional office. In the second case, *N.L.R.B.* v. *Construction & General Laborers' Union Local*

[13] *N L R B* v *Local 282, Teamsters*, order of June 20, 1978, in civil contempt of the secondary boycott provisions of 344 F 2d 649 (2d Cir 1965) and the judgment of Sept 19, 1966, in No 29149, imposing a $12,000 fine for violation of contempt adjudication in 428 F 2d 994 (2d Cir 1970), *N L R B.* v *Local 295, Teamsters*, order of March 14, 1978, in civil contempt of the secondary boycott provisions of the judgments of June 26, 1974, in No 74–1631 and 521 F 2d 1166 (2d Cir 1975) in Nos 74–2098 and 74–2132, imposing a fine of $15,000 for violation of the contempt adjudication of Jan. 13, 1976 (2d Cir), *N L R.B* v. *Construction & General Laborers' Union Local 1140*, 577 F 2d 16, in civil contempt of the secondary boycott provisions of the judgment of May 13, 1968, in No 19297, imposing a $19,000 fine for violation of the contempt adjudication of Feb 9, 1972 (8th Cir)

[14] *N L R B* v *Helrose Bindery*, order of Dec 23, 1977, for violation of the bargaining and backpay provisions of the judgments of Dec 19, 1973, and Jan. 9, 1976, in Nos 73–1993 and 75–2400 (3d Cir), *N L R B* v *Bancroft Mfg Co*, order of Jan. 13, 1978, adjudging that the company was in violation of portions of the judgments in 516 F 2d 436 and 520 F 2d 1406 (5th Cir.).

[15] *N L.R.B.* v *Warehouse Union Local 860, Teamsters*, order of October 13, 1977, dismissing the contempt petition alleging violation of the judgment of June 11, 1968, in No. 22968 (9th Cir.).

[16] *N L R B* v *J. P Stevens & Co.*, order of Oct 19, 1977, granting leave to withdraw the contempt motion for violation of the 8(a)(1) provisions of the judgments of Sept 1, 1967, March 26, 1968, and Sept 13, 1972, in Nos 31914, 30391, 31245, and 31164 (see 563 F 2d 8, 13, fn 4 (2d Cir 1977)), *Hickman Garment Co* v *N L R B*, order of March 27, 1978, discontinuing contempt proceedings upon satisfaction of the backpay judgment of April 8, 1976, in No. 75–2178 (6th Cir), *N L R B* v *La-Ron Corp.*, order of Feb 22, 1978, granting leave to withdraw motion for writ of body attachment upon compliance with the recordkeeping and notice-mailing provisions of the judgment of Oct 8, 1976, in No 76–1682 and the contempt adjudication of Aug 24, 1977 (6th Cir.), *N.L.R.B* v *Brandis Aircraft*, order of Sept 8, 1978, discontinuing contempt and discovery proceedings upon settlement of the backpay provisions of the judgment of Feb 12, 1975, in No. 74–1881, and the contempt adjudication of Sept 8, 1975 (7th Cir).

[17] See fns. 1 and 12, *supra*.

1140,[18] the union was adjudged in contempt and fined $19,000 for its noncompliance with a 1972 purgation order. The issue involved whether an individual, who was both an officer of the union and a trustee of a multiunion trust fund, was picketing on behalf of the fund as the legend on the picket sign indicated, or in furtherance of the union's secondary objectives. Finding the picketing to be pretextual, the Eighth Circuit concluded that the individual was acting in the former capacity and therefore in violation of the court's decree. The placard's wording and the mere existence of a minor dispute between the fund and the picketed employers did not insulate the union from liability for secondary activity. To assure against repetition of such conduct, the court doubled the amount of the prospective compliance fines but cautioned, however, that these amounts would not automatically be assessed.

To minimize delay in the commencement of negotiations after a bargaining order issues, the Board's recent practice has been to authorize contempt proceedings where an employer refuses to bargain simply because of the pendency of its certiorari petition. In the third case, which presented this issue, the District of Columbia Circuit in *N.L.R.B.* v. *Blevins Popcorn Co.*[19] sanctioned the Board's practice. The court held that the company, in deciding, in effect, to "grant itself a stay" of the bargaining order, had engaged in contumacious conduct which could not be "permitted or tolerated consistently with sound judicial administration." However, the court provided in its bargaining order that any contract reached could be made subject to termination should the Supreme Court ultimately decide the company had no bargaining obligation.

[18] See fn 13, *supra*.

[19] 96 LRRM 2857 (D.C Cir. 1977); see 42 NLRB Ann. Rep. 193 (1977).

XI

Special and Miscellaneous Litigation

A. Litigation Involving the Board's Jurisdiction

In *N.L.R.B.* v. *State of New York*,[1] the district court granted the Board's request, based on the Supreme Court's decision in *N.L.R.B.* v. *Nash-Finch Co.*,[2] to enjoin the State of New York insofar as the State was seeking to regulate health care employees' right to strike, including New York's pending state proceedings and the preliminary injunction issued against the union in state court. The district court's decision recognized that it would be difficult to imagine an interest "more deeply rooted in local feeling and responsibility" (*San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 243 (1959)), than the health of a state's citizens. However, it also found that under section 7 of the Act Congress guaranteed to employees the right to strike, occupying the field of peaceful strike activity and thereby closing it to state regulation. Moreover, the court found that in 1974 Congress accorded health care institution employees this federally guaranteed right. The court therefore concluded that the State cannot use its inherent police power to enjoin peaceful strikes by nursing home employees even if such strikes threaten to cut off this essential public service.

The State subsequently filed a motion to dismiss the Board's action on the grounds of mootness since the State had discontinued its state court proceeding seeking to enjoin the strike. The district court refused to dismiss the action,[3] however, because the union's contract granting the right to strike was effective until December 31, 1978, and the State had refused to stipulate that it would comply with the court's earlier decision, stating instead that what it would do the next time the union threatened to strike would depend on the circumstances. The district court then entered a broad order granting the Board's request for a preliminary injunction.

[1] 436 F Supp 335 (D C. N Y. 1977).
[2] 404 U S. 138 (1971).
[3] 98 LRRM 2307.

In *J. P. Stevens Employees Educational Committee* v. *N.L.R.B.*,[4] the Fourth Circuit affirmed a district court's holding that it lacked subject matter jurisdiction to compel the Board to permit the employee committee to intervene in an unfair labor practice proceeding against J. P. Stevens & Co. The committee filed suit in district court after the Board denied its request to intervene in the unfair labor practice proceedings which were initiated by charges filed by the Amalgamated Clothing Workers Union. The court of appeals held that, under the principle established in *Myers* v. *Bethlehem Shipbuilding Corp.*,[5] orders issued by the Board during the course of its administrative proceedings are not reviewable until termination of the proceedings and entry of a final order by the Board. The court rejected the committee's contention that on the facts of this case the assertion of jurisdiction was justified by the *Leedom* v. *Kyne* exception [6] to the *Myers* principle. Expressly disapproving of *Fay* v. *Douds*,[7] the court also rejected the committee's contention that district court jurisdiction could be predicated upon the Board's alleged denial of constitutional due process.

Finally, citing the Supreme Court's recent decision in *Califano* v. *Sanders*,[8] the court of appeals held that the Administrative Procedure Act does not provide an independent basis for district court jurisdiction over Board proceedings. In this regard, the court noted that its own decision in *Deering Milliken* v. *Johnston* [9] was overruled by *Califano* v. *Sanders, supra.*

In *Physicians Natl. House Staff Assn.* v. *Murphy*,[10] the District Court for the District of Columbia ruled that it was without jurisdiction to review the Board's decision that interns and residents are not "employees" within the meaning of section 2(3) of the Act. The court noted that the *Leedom* v. *Kyne* exception [11] to the rule of nonreviewability of Board decisions in the district courts is a narrow one, extending only to situations where the Board has violated a "clear, specific, and mandatory provision of the Act." The court further noted that a district court may not review "the appropriateness of the Board's factual determinations." Turning to the issue at hand, the court stated that there was no statutory mandate requiring the Board to treat interns

[4] 582 F.2d 326.
[5] 303 U.S. 41 (1938).
[6] 358 U.S. 184 (1958).
[7] 172 F.2d 720 (2d Cir. 1949).
[8] 430 U.S. 99 (1977).
[9] 295 F 2d 856 (4th Cir. 1961).
[10] 83 LC ¶ 10,321.
[11] 358 U.S. 184 (1958).

and residents as employees within the meaning of the Act. Rather, the court said, the issue of the status of interns and residents is "primarily a factual and definitional determination of the type traditionally left to the discretion of the Board."

In *Telephone Commercial Employees' Union* [*Indiana Bell Telephone Co.*] v. *N.L.R.B.*,[12] a union attempted to challenge the Board's determination that certain employees who were transferred from the Illinois Bell Telephone Company to the Indiana Bell Telephone Company constituted an accretion to the systemwide unit of Indiana Bell employees, represented by the Communications Workers of America. The union, which represented nearly all of Illinois Bell's commercial employees, filed a petition with the Board seeking to represent a separate unit of certain commercial employees employed in telephone operations which had been transferred to the Indiana company. Reversing the regional director, the Board dismissed the petition, holding that a separate unit of the transferred employees was inappropriate, and clarified the existing systemwide unit of Indiana Bell employees, represented by the CWA, to include these employees.[13] The union sought review in the Northern District of Indiana and asked the court for an injunction postponing the effective date of the Board's decision on the ground that it was arbitrary, was inconsistent with its own prior decision in a similar case,[14] and deprived the employees of constitutional rights. The court dismissed the union's complaint, holding that it lacked subject matter jurisdiction despite the unavailability of any other form of judicial review since the union had failed to show that the Board had acted contrary to any specific provision of the Act [15] and had also failed to make "a strong or clear showing of a deprivation of constitutional rights." [16]

In *Provincial House* v. *N.L.R.B.*,[17] the district court dismissed, for lack of subject matter jurisdiction, a complaint requesting that the Board be enjoined from conducting a second election without requiring a new showing of interest. The court found that the Board's decision was clearly a matter of policy within its discretion and not subject to district court review.

In *Ithaca College* v. *N.L.R.B.*,[18] the District Court for the Northern District of New York denied the college's motion for a tempo-

[12] 96 LRRM 2709 (D.C. Ind.).
[13] *Indiana Bell Telephone Co.*, 229 NLRB 187 (1977).
[14] *Illinois Bell Telephone Co.*, 222 NLRB 485 (1976).
[15] *Leedom* v. *Kyne*, 358 U.S. 184 (1958).
[16] *Squillacote* v. *Intl. Brotherhood of Teamsters, Local 344*, 561 F.2d 31 (7th Cir. 1977).
[17] Unpublished decision, Docket G 78-485 (D.C. Mich.).
[18] Docket 78-CV-485 (D.C. N.Y.).

rary restraining order and dismissed the complaint in its entirety for lack of subject matter jurisdiction. The Board had conducted a hearing and a two-union election in a unit of the college's full-time faculty, during which the college did not allege that its full-time faculty were supervisory/managerial employees. The election results were inconclusive and a runoff election was scheduled. Prior to the runoff election date, the Second Circuit issued its decision in *N.L.R.B.* v. *Yeshiva University*,[19] finding Yeshiva's full-time faculty to be supervisory/managerial employees. On the basis of *Yeshiva*, the college requested that the Board reopen the representation hearing to enable it to litigate the supervisory/managerial status of its full-time faculty. The Board denied the college's request and the college filed suit in the district court seeking to enjoin the runoff election or, in the alternative, the counting of ballots, until the Board reopened the hearing and decided the supervisory/managerial issue. The district court held that it lacked jurisdiction to grant the relief sought. Alternatively, the court held that the college did not meet any of the prerequisites for injunctive relief and that its complaint failed to state a claim upon which relief could be granted.

B. Litigation Involving the Freedom of Information Act

In *Margo Poss* v. *N.L.R.B.*,[20] the Tenth Circuit held that affidavits and interview notes compiled by a Board agent investigating an unfair labor practice charge were subject to disclosure under the Freedom of Information Act (FOIA) following the regional director's dismissal of a charge and the General Counsel's denial of the charging party's appeal. In finding Exemption 7(A)[21] not applicable, the court reasoned that disclosure of the requested documents would not constitute "premature disclosure" and would not prevent the General Counsel from presenting its "strongest case in court" because no further prosecution by the General Counsel was contemplated. Accordingly, the court concluded that the Board had failed to demonstrate that disclosure would "interfere with enforcement proceedings" under Exemption 7(A).[22] In

[19] 582 F.2d 686.

[20] 565 F.2d 654.

[21] Exemption 7 excepts from disclosure "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, . . . (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source . . ."

[22] The court did not directly respond to the Board's principal contention that disclosure would "interfere with enforcement proceedings" by deterring potential sources of information from cooperating with future investigations.

finding Exemptions 7(C) and (D) not applicable, the court found that the persons interviewed were not given a guarantee of "total anonymity" or "absolute confidentiality"; that the employees and supervisors interviewed were not "confidential sources" in the "traditional sense of the term"; and that, since the interviewees "[p]resumably . . . were simply relating what they knew concerning Poss' employment termination," disclosure would not constitute an unwarranted invasion of the interviewees' "personal privacy." The court also rejected the Board's reliance upon Exemption 5,[23] finding that the requested affidavits and notes did not constitute "inter-agency or intra-agency memorandums or letters" and could not be deemed "the work product of an attorney."

In *AMF Head Div. of AMF* v. *N.L.R.B.*,[24] the Tenth Circuit reversed a district court holding that witness affidavits must be disclosed after the Board issues a final decision. The court reasoned that an enforcement proceeding remains active for purposes of FOIA Exemption 7(A) until all Board and judicial proceedings are completed relying, *inter alia*, on *Abrahamson Chrysler-Plymouth* v. *N.L.R.B.*,[25] which reached the same result.

On remand, the district court, in *AMF Head Div. of AMF* v. *N.L.R.B.*,[26] dismissed the complaint rejecting the company's contention that the court should retain jurisdiction until all enforcement proceedings had ended. First, the court noted that what constitutes the end of an enforcement proceeding is a disputable issue; second, following *New England Medical Center Hospital* v. *N.L.R.B.*,[27] it noted that a new FOIA request to the Board would be necessary in order to seek relief from a district court when the enforcement proceeding is completed.

In *Pacific Molasses Co.* v. *N.L.R.B.*,[28] the Fifth Circuit found that union authorization cards fell within Exemption 6 of the Freedom of Information Act which protects "personnel, medical or similar files" against disclosure which would constitute a "clearly unwarranted invasion of personal privacy." The court held that employees have a strong privacy interest in their personal sentiments regarding union representation, that this right to privacy is necessary to full and free exercise of the organiza-

[23] Exemption 5 excepts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The Supreme Court has interpreted Exemption 5 as encompassing the attorney work product privilege. *N L.R.B.* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 150–154 (1975).

[24] 564 F.2d 374.

[25] 561 F.2d 63 (7th Cir. 1977).

[26] Unreported decision, Docket 76–F–124 (D.C. Colo.).

[27] 548 F.2d 377 (1st Cir. 1976).

[28] 577 F.2d 1172.

tional rights guaranteed by the Act, and that little if any public benefit would result from disclosure. The court also found that Board Form 4069 ("Report on Investigation of Showing of Interest") did not fall within Exemption 5 of the FOIA which protects inter- and intra-agency memoranda and letters from disclosure which exceeds that permitted to a party, other than an agency, in litigation with an agency. The court reasoned that the report is "little more than a mechanically compiled statistical report which contains no subjective conclusions and, as a result, must be considered 'purely factual' in nature." [29] The court did not find Exemption 7(A) applicable to Form 4069 because there was no proceeding pending before the Board or the courts and the case was completely closed with no reasonable prospect of reopening in the future.

In *Committee on Masonic Homes of R. W. Grand Lodge* v. *N.L.R.B.*,[30] the district court, on remand, held that Board Form 4069 was protected from disclosure by Exemption 5 of the FOIA. The court reasoned that Board Form 4069 constituted a predecisional report on showing of interest by a subordinate to the decisionmaker and therefore fell within the executive privilege embodied in Exemption 5 as interpreted by the Supreme Court in *N.L.R.B.* v. *Sears, Roebuck & Co.*,[31] and *Renegotiation Board* v. *Grumman Aircraft Engineering Co.*[32]

[29] Citing *EPA* v. *Mink*, 410 U.S. 73, 87, 89 (1973).
[30] Unreported decision, Docket 76-851 (D.C. Pa.).
[31] 421 U.S. 132 (1975).
[32] 421 U S. 168 (1975).

INDEX OF CASES DISCUSSED

APPENDIX

Statistical Tables for Fiscal Year 1978

Readers are encouraged to communicate with the Agency as to questions on the tables by writing to the Office of the Executive Secretary, National Labor Relations Board, 1717 Pennsylvania Avenue, NW., Washington, D.C. 20570.

GLOSSARY OF TERMS USED IN STATISTICAL TABLES

The definitions of terms contained in this glossary are not intended for general application but are specially directed toward increasing comprehension of the statistical tables that follow. Thus the definitions are keyed directly to the terms used in such tables.

Adjusted Cases

Cases are closed as "adjusted" when an informal settlement agreement is executed and compliance with its terms is secured. (See "Informal Agreement," this glossary.) In some instances, a written agreement is not secured but appropriate remedial action is taken so as to render further proceeding unnecessary. A central element in an "adjusted" case is the agreement of the parties to settle differences without recourse to litigation.

Advisory Opinion Cases

See "Other Cases—AO" under "Types of Cases."

Agreement of Parties

See "Informal Agreement" and "Formal Agreement," this glossary. The term "agreement" includes both types.

Amendment of Certification Cases

See "Other Cases—AC" under "Types of Cases."

Backpay

Amounts of money paid or to be paid employees as reimbursement for wages lost because they were discriminatorily discharged or unlawfully denied employment, plus interest on such money. Also included is payment for bonuses, vacations, other fringe benefits, etc., lost because of the discriminatory acts, as well as interest thereon. All moneys noted in table 4 have been reported as paid or owing in cases closed during the fiscal year. (Installment payments may protract some payments

beyond this year and some payments may have actually been made at times considerably in advance of the date a case was closed; i.e., in a prior fiscal year.)

Backpay Hearing

A supplementary hearing to receive evidence and testimony as to the amount of backpay due discriminatees under a prior Board or court decree.

Backpay Specification

The formal document, a "pleading," which is served on the parties when the regional director and the respondent are unable to agree as to the amounts of backpay due discriminatees pursuant to a Board order or court decree requiring payment of such backpay. It sets forth in detail the amount held by the regional director to be owing each discriminatee and the method of computation employed. The specification is accompanied by a notice of hearing setting a date for a backpay hearing.

Case

A "case" is the general term used in referring to a charge or petition filed with the Board. Each case is numbered and carries a letter designation indicating the type of case. See "Types of Cases."

Certification

A certification of the results of an election is issued by the regional director or the Board. If a union has been designated as the exclusive bargaining representative by a majority of the employees, a certification of representative is issued. If no union has received a majority vote, a certification of results of election is issued.

Challenges

The parties to an NLRB election are entitled to challenge any voter. At the election site, the challenged ballots are segregated and not counted when the other ballots are tallied. Most frequently, the tally of unchallenged ballots determines the election and the challenged ballots are insufficient in number to affect the result of the election. The challenges in such a case are never resolved, and the certification is based on the tally of (unchallenged) ballots.

When challenged ballots are determinative of the result, a determination as to whether or not they are to be counted rests with the regional director in the first instance, subject to possible appeal to the Board. Often, however, the "determinative" challenges are resolved informally by the parties by mutual agreement. No record is kept of nondeterminative challenges or determinative challenges which are resolved by agreement prior to issuance of the first tally of ballots.

Charge

A document filed by an employee, an employer, a union, or an individual alleging that an unfair labor practice has been committed. See "C Cases" under "Types of Cases."

Complaint

The document which initiates "formal" proceedings in an unfair labor practice case. It is issued by the regional director when he concludes on the basis of a completed investigation that any of the allegations contained in the charge have merit and adjustment or settlement has not been achieved by the parties. The complaint sets forth all allegations and information necessary to bring a case to hearing before an administrative law judge pursuant to due process of law. The complaint contains a notice of hearing, specifying the time and place of hearing.

Compliance

The carrying out of remedial action as agreed upon by the parties in writing (see "Formal Agreement," "Informal Agreement"); as recommended by the administrative law judge in his decision; as ordered by the Board in its decision and order; or as decreed by the court.

Dismissed Cases

Cases may be dismissed at any stage. They are dismissed informally when, following investigation, the regional director concludes that there has been no violation of the law, that there is insufficient evidence to support further action, or for a variety of other reasons. Before the charge is dismissed, however, the charging party is given the opportunity to withdraw the charge by the administrative law judge, by the Board, or by the courts through their refusal to enforce orders of the Board.

Dues

See "Fees, Dues, and Fines."

Election, Consent

An election conducted by the regional director pursuant to an agreement signed by all parties concerned. The agreement provides for the waiving of a hearing, the establishment of the appropriate unit by mutual consent, and the final determination of all postelection issues by the regional director.

Election, Directed

Board-Directed

An election conducted by the regional director pursuant to a decision and direction of election by the Board. Postelection rulings are made by the regional director or by the Board.

Regional Director-Directed

An election conducted by the regional director pursuant to a decision and direction of election issued by the regional director after a hearing. Postelection rulings are made by the regional director or by the Board.

Election, Expedited

An election conducted by the regional director pursuant to a petition filed within 30 days of the commencement of picketing in a situation in which a meritorious 8(b)(7)(C) charge has been filed. The election is conducted under priority conditions and without a hearing unless the regional director believes the proceeding raises questions which cannot be decided without a hearing.
Postelection rulings on objections and/or challenges are made by the regional director and are final and binding unless the Board grants an appeal on application by one of the parties.

Election, Rerun

An election held after an initial election has been set aside either by the regional director or by the Board.

Election, Runoff

An election conducted by the regional director after an initial election, having three or more choices on the ballot, has turned out to be inconclusive (none of the choices receiving a majority of the valid votes cast). The regional director conducts the runoff election between the choices on the regional ballot which received the highest and the next highest number of votes.

Election, Stipulated

An election held by the regional director pursuant to an agreement signed by all the parties concerned. The agreement provides for the waiving of hearing and the establishment of the appropriate unit by mutual consent. Postelection rulings are made by the Board.

Eligible Voters

Employees within an appropriate bargaining unit who were employed as of a fixed date prior to an election, or are otherwise qualified to vote under the Board's eligibility rules.

Fees, Dues, and Fines

The collection by a union or an employer of dues, fines, and referral fees from employees may be found to be an unfair labor practice under section 8(b)(1)(A) or (2) or 8(a)(1) and (2) or (3), where, for instance such moneys were collected pursuant to an illegal hiring hall arrangement, or an invalid or unlawfully applied union-security agreement; where dues were deducted from employees' pay without their authoriza-

tion; or, in the case of fines, where such fines restrained or coerced employees in the exercise of their rights. The remedy for such unfair labor practices usually requires the reimbursement of such moneys to the employees.

Fines

See "Fees, Dues, and Fines."

Formal Action

Formal actions may be documents issued or proceedings conducted when the voluntary agreement of all parties regarding the disposition of all issues in a case cannot be obtained, and where dismissal of the charge or petition is not warranted. Formal actions are, further, those in which the decisionmaking authority of the Board (the regional director in representation cases), as provided in sections 9 and 10 of the Act, must be exercised in order to achieve the disposition of a case or the resolution of any issue raised in a case. Thus, formal action takes place when a Board decision and consent order is issued pursuant to a stipulation, even though the stipulation constitutes a voluntary agreement.

Formal Agreement (in unfair labor practice cases)

A written agreement between the Board and the other parties to a case in which hearing is waived and the specific terms of a Board order agreed upon. The agreement may also provide for the entry of a consent court decree enforcing the Board order.

Informal Agreement (in unfair labor practice cases)

A written agreement entered into between the party charged with committing an unfair labor practice, the regional director, and (in most cases) the charging party requiring the charged party to take certain specific remedial action as a basis for the closing of the case. Cases closed in this manner are included in "adjusted" cases.

Injunction Petitions

Petitions filed by the Board with respective U.S. district courts for injunctive relief under section 10(j) or section 10(e) of the Act pending hearing and adjudication of unfair labor practice charges before the Board. Also, petitions filed with the U.S. court of appeals under section 10(e) of the Act.

Jurisdictional Disputes

Controversies between unions or groupings of employees as to which employees will perform specific work. Cases involving jurisdictional disputes are received by the Board through the filing of charges alleging a violation of section 8(b)(4)(D). They are initially processed under section 10(k) of the Act which is concerned with the determination of the jurisdictional dispute itself rather than with a finding as to whether

an unfair labor practice has been committed. Therefore, the failure of a party to comply with the Board's determination of dispute is the basis for the issuance of an unfair labor practice complaint and the processing of the case through usual unfair labor practice procedures.

Objections

Any party to an election may file objections alleging that either the conduct of the election or the conduct of a party to the election failed to meet the Board's standards. An election will be set aside if eligible employee-voters have not been given an adequate opportunity to cast their ballots, in secrecy and without hindrance from fear or other interference with the expression of their free choice.

Petition

See "Representation Cases." Also see "Other Cases—AC, UC, and UD" under "Types of Cases."

Proceeding

One or more cases included in a single litigated action. A "proceeding" may be a combination of C and R cases consolidated for the purposes of hearing.

Representation Cases

This term applies to cases bearing the alphabetical designations RC, RM, or RD. (See "R Cases" under "Types of Cases," this glossary, for specific definitions of these terms.) All three types of cases are included in the term "representation" which deals generally with the problem of which union, if any, shall represent employees in negotiations with their employer. The cases are initiated by the filing of a petition by a union, an employer, or a group of employees.

Representation Election

An election by secret ballot conducted by the Board among the employees in an appropriate collective-bargaining unit to determine whether the employees wish to be represented by a particular labor organization for purposes of collective bargaining. The tables herein reflect only final elections which result in the issuance of a certification of representative if a union is chosen, or a certification of results if the majority has voted for "no union."

Situation

One or more unfair labor practice cases involving the same factual situation. These cases are processed as a single unit of work. A situation may include one or more CA cases, a combination of CA and CB cases, or a combination of other types of C cases. It does not include representation cases.

Types of Cases

General: Letter designations are given to all cases depending upon the subsection of the Act allegedly violated or otherwise describing the general nature of each case. Each of the letter designations appearing below is descriptive of the case it is associated with.

C Cases (unfair labor practice cases)

A case number which contains the first letter designation C, in combination with another letter, i.e., CA, CB, etc., indicates that it involves a charge that an unfair labor practice has been committed in violation of one or more subsections of section 8.

CA: A charge that an employer has committed unfair labor practices in violation of section 8(a)(1), (2), (3), (4), or (5), or any combination thereof.

CB: A charge that a labor organization has committed unfair labor practices in violation of section 8(b)(1), (2), (3), (5), or (6), or any combination thereof.

CC: A charge that a labor organization has committed unfair labor practices in violation of section 8(b)(4)(i) and/or (A), (B), or (C), or any combination thereof.

CD: A charge that a labor organization has committed an unfair labor practice in violation of section 8(b)(4)(i) or (ii)(D). Preliminary actions under section 10(k) for the determination of jurisdictional disputes are processed as CD cases. (See "Jurisdictional Disputes" in this glossary.)

CE: A charge that either a labor organization or an employer, or both jointly, have committed an unfair labor practice in violation of section 8(e).

CG: A charge that a labor organization has committed unfair labor practices in violation of section 8(g).

CP: A charge that a labor organization has committed unfair labor practices in violation of section 8(b)(7)(A), (B), or (C), or any combination thereof.

R Cases (representation cases)

A case number which contains the first letter designation R, in combination with another letter, i.e., RC, RD, RM, indicates that it is a petition for investigation and determination of a question concerning representation of employees, filed under section 9(c) of the Act.

RC: A petition filed by a labor organization or an employee alleging that a question concerning representation has arisen and seeking an election for the determination of a collective-bargaining representative.

RD: A petition filed by employees alleging that the union previously certified or currently recognized by the employer as their collective-bargaining representative no longer represents a majority of the employees in the appropriate unit and seeking an election to determine this.

RM: A petition filed by an employer alleging that a question concerning representation has arisen and seeking an election for the determination of a collective-bargaining representative.

Other Cases

AC: (Amendment of Certification cases): A petition filed by a labor organization or an employer for amendment of an existing certification to reflect changed circumstances, such as changes in the name or affiliation of the labor organization involved or in the name or location of the employer involved.

AO: (Advisory Opinion cases): As distinguished from the other types of cases described above, which are filed in and processed by regional offices of the Board, AO or "advisory opinion" cases are filed directly with the Board in Washington and seek a determination as to whether the Board would or would not assert jurisdiction, in any given situation on the basis of its current standards, over the party or parties to a proceeding pending before a state or territorial agency or a court. (See subpart H of the Board's Rules and Regulations, Series 8, as amended.)

UC: (Unit Clarification cases): A petition filed by a labor organization or an employer seeking a determination as to whether certain classifications of employees should or should not be included within a presently existing bargaining unit.

UD: (Union Deauthorization cases): A petition filed by employees pursuant to section 9(e)(1) requesting that the Board conduct a referendum to determine whether a union's authority to enter into a union-shop contract should be rescinded.

UD Cases

See "Other Cases—UD" under "Types of Cases."

Unfair Labor Practice Cases

See "C Cases" under "Types of Cases."

Union Deauthorizing Cases

See "Other Cases—UD" under "Types of Cases."

Union-Shop Agreement

An agreement between an employer and a labor organization which requires membership in the union as a condition of employment on or

after the 30th day following (1) the beginning of such employment or (2) the effective date of the agreement, whichever is the later.

Unit, Appropriate Bargaining

A grouping of employees in a plant, firm, or industry recognized by the employer, agreed upon by the parties to a case, or designated by the Board or its regional director, as appropriate for the purposes of collective bargaining.

Valid Vote

A secret ballot on which the choice of the voter is clearly shown.

Withdrawn Cases

Cases are closed as "withdrawn" when the charging party or petitioner, for whatever reasons, requests withdrawal of the charge or the petition and such request is approved.

SUBJECT INDEX TO ANNUAL REPORT TABLES

Table 1.—Total Cases Received, Closed, and Pending, Fiscal Year 1978 [1]

	Total[2]	Identification of filing party[2]					
		AFL-CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
	All cases						
Pending[2] October 1, 1977	18,208	7,118	2,188	601	688	5,924	1,689
Received fiscal 1978	53,261	16,701	6,143	1,547	1,514	21,974	5,382
On docket fiscal 1978	71,469	23,819	8,331	2,148	2,202	27,898	7,071
Closed fiscal 1978	50,258	15,618	5,917	1,364	1,430	21,029	4,900
Pending September 30, 1978	21,211	8,201	2,414	784	772	6,869	2,171
	Unfair labor practice cases[3]						
Pending October 1, 1977	14,482	5,345	1,359	410	468	5,472	1,428
Received fiscal 1978	39,652	10,663	2,881	897	832	19,905	4,474
On docket fiscal 1978	54,134	16,008	4,240	1,307	1,300	25,377	5,902
Closed fiscal 1978	37,192	9,887	2,732	749	781	19,016	4,027
Pending September 30, 1978	16,942	6,121	1,508	558	519	6,361	1,875
	Representation cases[4]						
Pending October 1, 1977	3,560	1,741	826	189	210	372	222
Received fiscal 1978	12,902	5,837	3,222	631	638	1,764	810
On docket fiscal 1978	16,462	7,578	4,048	820	848	2,136	1,032
Closed fiscal 1978	12,438	5,561	3,150	599	611	1,729	788
Pending September 30, 1978	4,024	2,017	898	221	237	407	244
	Union-shop deauthorization cases						
Pending October 1, 1977	75	----	----	----	----	75	----
Received fiscal 1978	298	----	----	----	----	298	----
On docket fiscal 1978	373	----	----	----	----	373	----
Closed fiscal 1978	277	----	----	----	----	277	----
Pending September 30, 1978	96	----	----	----	----	96	----
	Amendment of certification cases						
Pending October 1, 1977	9	5	0	1	2	0	1
Received fiscal 1978	82	52	5	4	10	1	10
On docket fiscal 1978	91	57	5	5	12	1	11
Closed fiscal 1978	59	36	4	3	10	0	6
Pending September 30, 1978	32	21	1	2	2	1	5
	Unit clarification cases						
Pending October 1, 1977	82	27	3	1	8	5	38
Received fiscal 1978	327	149	35	15	34	6	88
On docket fiscal 1978	409	176	38	16	42	11	126
Closed fiscal 1978	292	134	31	13	28	7	79
Pending September 30, 1978	117	42	7	3	14	4	47

[1] See Glossary for definitions of terms Advisory Opinion (AO) cases not included. See table 22.

[2] Pending October 1, 1977, totals and identification of filing party breakdown replace pending September 30, 1977, totals and identification of filing party breakdown for this table for fiscal year 1977.

[3] See Table 1A for totals by types of cases.

[4] See table 1B for totals by types of cases.

Table 1A.—Unfair Labor Practice Cases Received, Closed, and Pending, Fiscal Year 1978 [1]

	Total[2]	Identification of filing party[2]					
		AFL–CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
CA cases							
Pending[2] October 1, 1977	11,227	5,301	1,352	402	391	3,750	31
Received fiscal 1978	27,056	10,540	2,858	857	713	12,053	35
On docket fiscal 1978	38,283	15,841	4,210	1,259	1,104	15,803	66
Closed fiscal 1978	25,326	9,772	2,711	711	681	11,421	30
Pending September 30, 1978	12,957	6,069	1,499	548	423	4,382	36
CB cases							
Pending October 1, 1977	2,308	35	7	3	20	1,694	549
Received fiscal 1978	9,469	86	19	16	44	7,720	1,584
On docket fiscal 1978	11,777	121	26	19	64	9,414	2,133
Closed fiscal 1978	9,082	84	18	14	47	7,471	1,448
Pending September 30, 1978	2,695	37	8	5	17	1,943	685
CC cases							
Pending October 1, 1977	568	3	0	0	28	19	518
Received fiscal 1978	1,961	9	2	15	46	90	1,799
On docket fiscal 1978	2,529	12	2	15	74	109	2,317
Closed fiscal 1978	1,745	8	1	13	30	84	1,609
Pending September 30, 1978	784	4	1	2	44	25	708
CD cases							
Pending October 1, 1977	132	4	0	2	2	1	123
Received fiscal 1978	405	15	1	0	4	13	372
On docket fiscal 1978	537	19	1	2	6	14	495
Closed fiscal 1978	367	11	1	0	5	13	337
Pending September 30, 1978	170	8	0	2	1	1	158
CE cases							
Pending October 1, 1977	119	1	0	0	25	3	90
Received fiscal 1978	179	3	1	1	17	8	149
On docket fiscal 1978	298	4	1	1	42	11	239
Closed fiscal 1978	144	2	1	1	10	4	126
Pending September 30, 1978	154	2	0	0	32	7	113
CG cases							
Pending October 1, 1977	25	0	0	0	0	1	24
Received fiscal 1978	59	0	0	0	1	1	57
On docket fiscal 1978	84	0	0	0	1	2	81
Closed fiscal 1978	57	0	0	0	0	1	56
Pending September 30, 1978	27	0	0	0	1	1	25
CP cases							
Pending October 1, 1977	103	1	0	3	2	4	93
Received fiscal 1978	523	10	0	8	7	20	478
On docket fiscal 1978	626	11	0	11	9	24	571
Closed fiscal 1978	471	10	0	10	8	22	421
Pending September 30, 1978	155	1	0	1	1	2	150

[1] See Glossary for definitions of terms.

[2] Pending October 1, 1977, totals and identification of filing party breakdown replace pending September 30, 1977, totals and identification of filing party breakdown for this table for fiscal year 1977.

Table 1B.—Representation Cases Received, Closed, and Pending, Fiscal Year 1978 [1]

	Total[2]	Identification of filing party[2]					
		AFL-CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
	RC cases						
Pending[2] October 1, 1977	2,971	1,739	825	189	209	9	
Received fiscal 1978	10,338	5,831	3,220	631	636	20	
On docket fiscal 1978	13,309	7,570	4,045	820	845	29	
Closed fiscal 1978	9,926	5,553	3,147	599	610	17	
Pending September 30, 1978	3,383	2,017	898	221	235	12	
	RM cases						
Pending October 1, 1977	222						222
Received fiscal 1978	810						810
On docket fiscal 1978	1,032						1,032
Closed fiscal 1978	788						788
Pending September 30, 1978	244						244
	RD cases						
Pending October 1, 1977	367	2	1	0	1	363	
Received fiscal 1978	1,754	6	2	0	2	1,744	
On docket fiscal 1978	2,121	8	3	0	3	2,107	
Closed fiscal 1978	1,724	8	3	0	1	1,712	
Pending September 30, 1978	397	0	0	0	2	395	

[1] See Glossary for definitions of terms.
[2] Pending October 1, 1977, totals and identification of filing party breakdown replace pending September 30, 1977, totals and identification of filing party breakdown for this table for fiscal year 1977.

Table 2.—Types of Unfair Labor Practices Alleged, Fiscal Year 1978

	Number of cases showing specific allegations	Percent of total cases
A Charges filed against employers under sec 8(a)		
Subsections of sec 8(a) Total cases	27,056	100.0
8(a)(1)	3,919	14 5
8(a)(1)(2)	334	1 2
8(a)(1)(3)	13,414	49 7
8(a)(1)(4)	219	0.8
8(a)(1)(5)	5,321	19 7
8(a)(1)(2)(3)	321	1 2
8(a)(1)(2)(4)	4	0 0
8(a)(1)(2)(5)	117	0.4
8(a)(1)(3)(4)	681	2 5
8(a)(1)(3)(5)	2,368	8 8
8(a)(1)(4)(5)	13	0 0
8(a)(1)(2)(3)(4)	28	0 1
8(a)(1)(2)(3)(5)	191	0 7
8(a)(1)(2)(4)(5)	4	0 0
8(a)(1)(3)(4)(5)	83	0 3
8(a)(1)(2)(3)(4)(5)	39	0 1
Recapitulation [1]		
8(a)(1) [2]	27,056	100 0
8(a)(2)	1,038	3.8
8(a)(3)	17,125	63 3
8(a)(4)	1,071	4.0
8(a)(5)	8,136	30 1
B. Charges filed against unions under sec 8(b)		
Subsections of sec 8(b) Total cases	12,358	100.0
8(b)(1)	6,807	55.3
8(b)(2)	282	2.3
8(b)(3)	614	5 0
8(b)(4)	2,366	19.1
8(b)(5)	8	0.1
8(b)(6)	19	0 2
8(b)(7)	523	4.2
8(b)(1)(2)	1,393	11.3
8(b)(1)(3)	233	1 9
8(b)(1)(5)	2	0 0
8(b)(1)(6)	6	0 0
8(b)(2)(3)	17	0.1
8(b)(2)(6)		
8(b)(3)(6)	4	0 0
8(b)(1)(2)(3)	53	0 4
8(b)(1)(2)(5)	16	0.1
8(b)(1)(2)(6)	3	0 0
8(b)(1)(3)(6)	4	0 0
8(b)(1)(5)(6)	1	0 0
8(b)(1)(2)(3)(5)	2	0 0
8(b)(1)(2)(3)(6)	1	0 0
8(b)(1)(2)(5)(6)	4	0 0

	Number of cases showing specific allegations	Percent of total cases
Recapitulation [1]		
8(b)(1)	8,525	69.0
8(b)(2)	1,771	14.3
8(b)(3)	928	7 5
8(b)(4)	2,366	19.1
8(b)(5)	33	0 3
8(b)(6)	42	0.3
8(b)(7)	523	4.2
B1 Analysis of 8(b)(4)		
Total cases 8(b)(4)	2,366	100 0
8(b)(4)(A)	175	7 4
8(b)(4)(B)	1,635	69 0
8(b)(4)(C)	18	0 8
8(b)(4)(D)	405	17.1
8(b)(4)(A)(B)	122	5 2
8(b)(4)(A)(C)	2	0 1
8(b)(4)(B)(C)	5	0 2
8(b)(4)(A)(B)(C)	4	0.2
Recapitulation [1]		
8(b)(4)(A)	303	12.8
8(b)(4)(B)	1,766	74.6
8(b)(4)(C)	29	1 2
8(b)(4)(D)	405	17 1
B2. Analysis of 8(b)(7)		
Total cases 8(b)(7)	523	100 0
8(b)(7)(A)	104	19.9
8(b)(7)(B)	27	5 2
8(b)(7)(C)	375	71.6
8(b)(7)(A)(B)	1	0.2
8(b)(7)(A)(C)	15	2 9
8(b)(7)(A)(B)(C)	1	0.2
Recapitulation[1]		
8(b)(7)(A)	120	22.9
8(b)(7)(B)	29	5.5
8(b)(7)(C)	391	74.8
C Charges filed under sec. 8(e)		
Total cases 8(e)	179	100.0
Against unions alone	128	71.5
Against employers alone	3	1.7
Against unions and employers	48	26.8
D Charges filed under sec. 8(g)		
Total cases 8(g)	59	100.0

[1] A single case may include allegations of violations of more than one subsection of the Act. Therefore, the total of the various allegations is greater than the total number of cases.

[2] Sec. 8(a)(1) is a general provision forbidding any type of employer interference with the rights of the employees guaranteed by the Act, and therefore is included in all charges of employer unfair labor practices

Table 3A.—Formal Actions Taken in Unfair Labor Practice Cases, Fiscal Year 1978 [1]

Types of formal actions taken	Cases in which formal actions taken	Formal actions taken by type of case											
		Total formal actions taken	CA	CB	CC	CD		CE	CG	CP	CA combined with CB	C combined with representation cases	Other C combinations
						Jurisdictional disputes	Unfair labor practices						
10(k) notices of hearings issued	85	68				68							
Complaints issued	6,966	5,320	4,357	445	162		8	21	10	37	134	87	59
Backpay specifications issued	186	120	105	7	0		0	0	0	0	4	4	0
Hearings completed, total	1,897	1,297	1,000	102	23	32	1	5	1	6	41	72	14
Initial ULP hearings	1,820	1,240	948	99	23	32	1	5	1	6	41	71	13
Backpay hearings	54	40	36	3	0		0	0	0	0	0	1	0
Other hearings	23	17	16	0	0		0	0	0	0	0	0	1
Decisions by administrative law judges, total	1,878	1,211	937	95	24		1	3	1	4	50	86	10
Initial ULP decisions	1,793	1,157	891	92	24		1	3	1	4	47	85	9
Backpay decisions	67	40	34	3	0		0	0	0	0	3	6	0
Supplemental decisions	18	14	12	0	0		0	0	0	0	0	1	1
Decisions and orders by the Board, total	2,446	1,645	1,250	143	36	40	6	3	3	8	60	77	19
Upon consent of parties													
Initial decisions	212	116	68	16	11		1	1	1	1	9	0	8
Supplemental decisions	12	7	5	0	1		0	0	0	0	1	0	0
Adopting administrative law judges decisions (no exceptions filed)													
Initial ULP decisions	474	363	293	28	8		1	0	2	1	10	14	6
Backpay decisions	21	13	11	2	0		0	0	0	0	0	0	0
Contested													
Initial ULP decisions	1,611	1,081	824	92	14	40	3	2	0	5	36	61	4
Decisions based on stipulated record	44	34	26	3	1		1	0	0	1	1	0	1
Supplemental ULP decisions	5	3	2	0	0		0	0	0	0	1	0	0
Backpay decisions	67	28	21	2	1		0	0	0	0	2	2	0

[1] See Glossary for definitions of terms.

Table 3B.—Formal Actions Taken in Representation and Union Deauthorization Cases, Fiscal Year 1978 [1]

Types of formal actions taken	Cases in which formal actions taken	Formal actions taken by type of case				
		Total formal actions taken	RC	RM	RD	UD
Hearings completed, total	2,471	2,291	2,008	76	207	5
Initial hearings	2,177	2,008	1,750	67	191	5
Hearings on objections and/or challenges	294	283	258	9	16	0
Decisions issued, total	2,107	2,000	1,762	67	171	6
By regional directors	1,959	1,862	1,631	63	168	6
Elections directed	1,679	1,606	1,420	48	138	4
Dismissals on record	280	256	211	15	30	2
By Board	148	138	131	4	3	0
Transferred by regional directors for initial decision	51	43	40	3	0	0
Elections directed	43	37	34	3	0	0
Dismissals on record	8	6	6	0	0	0
Review of regional directors' decisions						
Requests for review received	709	675	629	18	28	0
Withdrawn before request ruled upon	6	6	6	0	0	0
Board action on requests ruled upon, total	676	649	615	15	19	0
Granted	99	96	91	2	3	0
Denied	572	548	520	13	15	0
Remanded	5	5	4	0	1	0
Withdrawn after request granted, before Board review	0	0	0	0	0	0
Board decision after review, total	97	95	91	1	3	0
Regional directors' decisions						
Affirmed	35	35	35	0	0	0
Modified	23	21	21	0	0	0
Reversed	39	39	35	1	3	0
Outcome						
Elections directed	78	76	72	1	3	0
Dismissals on record	19	19	19	0	0	0

[1] See Glossary for definitions of terms.

Table 3B.—Formal Actions Taken in Representation and Union Deauthorization Cases, Fiscal Year 1978 [1]—Contd.

Types of formal actions taken	Cases in which formal actions taken	Formal actions taken by type of case				
		Total formal actions taken	RC	RM	RD	UD
Decisions on objections and/or challenges, total	1,320	1,262	1,127	41	94	15
By regional directors	318	303	272	11	20	9
By Board	1,002	959	855	30	74	6
In stipulated elections	953	916	815	29	72	5
No exceptions to regional directors' reports	522	494	433	21	40	4
Exceptions to regional directors' reports	431	422	382	8	32	1
In directed elections (after transfer by regional director)	46	40	37	1	2	1
Review of regional directors' supplemental decisions						
Request for review received	187	184	180	2	2	0
Withdrawn before request ruled upon	0	0	0	0	0	0
Board action on requests ruled upon, total	188	177	173	2	2	0
Granted	22	22	21	1	0	0
Denied	162	154	151	1	2	0
Remanded	4	1	1	0	0	0
Withdrawn after request granted, before Board review	0	0	0	0	0	0
Board decision after review, total	3	3	3	0	0	0
Regional directors' decisions						
Affirmed	1	1	1	0	0	0
Modified	1	1	1	0	0	0
Reversed	1	1	1	0	0	0

[1] See Glossary for definitions of terms.

Table 3C.—Formal Actions Taken in Amendment of Certification and Unit Clarification Cases, Fiscal Year 1978 [1]

Types of formal actions taken	Cases in which formal actions taken	Formal actions taken by type of case	
		AC	UC
Hearings completed	118	8	108
Decision issued after hearing	120	7	110
By regional directors	109	7	99
By Board	11	0	11
Transferred by regional directors for initial decision	9	0	9
Review of regional directors' decisions			
Requests for review received	9	0	9
Withdrawn before request ruled upon	0	0	0
Board action on requests ruled upon, total	7	0	7
Granted	4	0	4
Denied	3	0	3
Remanded	0	0	0
Withdrawn after request granted, before Board review	0	0	0
Board decision after review, total	2	0	2
Regional directors' decisions			
Affirmed	2	0	2
Modified	0	0	0
Reversed	0	0	0

[1] See Glossary for definitions of terms

Table 4.—Remedial Actions Taken in Unfair Labor Practice Cases Closed, Fiscal Year 1978 [1]

Action taken	Total all	Remedial action taken by—											
		Employer						Union					
		Total	Pursuant to—					Total	Pursuant to—				
			Agreement of parties		Recommendation of administrative law judge	Order of—			Agreement of parties		Recommendation of administrative law judge	Order of—	
			Informal settlement	Formal settlement		Board	Court		Informal settlement	Formal settlement		Board	Court
A. By number of cases involved	[2] 10,478												
Notice posted	4,816	3,721	2,753	119	9	570	270	1,095	886	50	0	104	55
Recognition or other assistance withdrawn	64	64	44	10	0	3	7						
Employer-dominated union disestablished	14	14	11	1	0	2	0						
Employees offered reinstatement	1,738	1,738	1,328	40	2	242	126						
Employers placed on preferential hiring list	74	74	59	1	0	8	6						
Hiring hall rights restored	28							28	19	0	0	8	1
Objections to employment withdrawn	48							48	38	0	0	7	3
Picketing ended	648							648	621	10	1	8	8
Work stoppage ended	167							167	159	4	1	3	0
Collective bargaining begun	2,279	2,086	1,792	34	2	162	96	193	185	1	0	5	2
Backpay distributed	2,617	2,489	2,043	45	3	267	131	128	89	2	0	27	10
Reimbursement of fees, dues, and fines	123	74	63	3	0	6	2	49	38	3	0	5	3
Other conditions of employment improved	2,754	1,850	1,828	2	1	10	9	904	891	2	0	11	0
Other remedies	22	15	15	0	0	0	0	7	7	0	0	0	0

B. By number of employees affected													
Employees offered reinstatement, total	5,533	5,533	4,133	164	2	655	579						
Accepted	3,990	3,990	3,137	122	1	400	330						
Declined	1,543	1,543	996	42	1	255	249						
Employees placed on preferential hiring list	462	462	392	8	0	49	13						
Hiring hall rights restored	91							91	80	0	0	10	1
Objections to employment withdrawn	79							79	67	0	0	9	3
Employees receiving backpay													
From either employer or union	8,615	8,270	6,009	375	3	1,202	681	345	126	53	0	137	29
From both employer and union	8	8	6	0	0	2	0	8	6	0	0	2	0
Employees reimbursed for fees, dues, and fines													
From either employer or union	4,341	3,386	1,996	178	0	537	675	955	704	168	0	63	20
From both employer and union	0	0	0	0	0	0	0	0	0	0	0	0	0
C. By amounts of monetary recovery, total	13,543,750	12,820,080	7,657,130	405,880	16,750	2,776,530	1,963,790	723,670	264,280	33,810	0	320,650	104,930
Backpay (includes all monetary payments except fees, dues, and fines)	13,438,590	12,767,010	7,619,400	399,450	16,750	2,767,800	1,963,610	671,580	228,180	25,960	0	317,980	99,460
Reimbursement of fees, and fines	105,160	53,070	37,730	6,430	0	8,730	180	52,090	36,100	7,850	0	2,670	5,470

[1] See Glossary for definitions of terms. Data in this table are based on unfair labor practice cases that were closed during fiscal year 1978 after the company and/or union had satisfied all remedial action requirements.

[2] A single case usually results in more than one remedial action; therefore, the total number of actions exceeds the number of cases involved.

Table 5.—Industrial Distribution of Cases Received, Fiscal Year 1978 [1]

Industrial group[2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Food and kindred products	2,491	1,841	1,304	472	40	15	2	0	8	615	512	16	87	9	7	19
Tobacco manufacturers	28	26	10	16	0	0	0	0	0	2	2	0	0	0	0	0
Textile mill products	525	384	313	65	4	0	0	0	2	137	110	4	23	1	1	2
Apparel and other finished products made from fabric and similar materials	798	620	474	116	10	0	0	0	20	175	139	19	17	3	0	0
Lumber and wood products (except furniture)	860	537	426	100	8	2	0	0	1	313	262	14	37	7	0	3
Furniture and fixtures	630	475	392	82	1	0	0	0	0	151	125	7	19	3	0	1
Paper and allied products	870	658	469	157	30	1	0	0	1	196	167	6	17	6	6	10
Printing, publishing, and allied products	1,567	1,112	798	287	14	8	0	0	5	413	307	22	84	10	2	30
Chemicals and allied products	1,038	751	566	158	22	4	0	0	1	269	225	5	39	8	4	6
Petroleum refining and related industries	316	240	174	48	12	4	0	0	2	72	60	0	12	1	0	3
Rubber and miscellaneous plastic products	931	642	511	117	12	1	0	0	1	280	228	8	44	7	0	2
Leather and leather products	245	185	149	35	0	0	0	0	1	59	56	1	2	0	0	1
Stone, clay, glass, and concrete products	1,058	783	527	202	30	9	2	0	13	264	210	19	35	6	0	5
Primary metal industries	1,762	1,436	951	452	23	6	0	0	4	306	261	14	31	6	0	14
Fabricated metal products (except machinery and transportation equipment)	2,158	1,593	1,078	425	46	18	4	0	22	541	456	24	61	17	5	2
Machinery (except electrical)	1,975	1,477	1,068	363	39	2	0	0	5	479	388	23	68	14	0	5
Electrical and electronic machinery, equipment and supplies	1,472	1,171	851	293	18	4	0	0	5	277	229	9	39	5	6	13
Aircraft and parts	308	264	165	92	5	1	0	0	1	41	29	0	12	1	0	2
Ship and boat building and repairing	539	495	321	165	4	2	0	0	3	41	36	0	5	1	1	1
Automotive and other transportation equipment	1,537	1,322	905	400	14	3	0	0	0	205	179	6	20	4	2	4
Measuring, analyzing, and controlling instruments, photographic, medical, and optical goods, watches and clocks	376	280	216	61	1	0	0	0	2	86	73	4	9	6	1	3
Miscellaneous manufacturing industries	1,554	1,181	713	447	14	3	3	0	1	357	313	7	37	7	1	8
Manufacturing	23,038	17,473	12,381	4,553	347	83	11	0	98	5,273	4,367	208	698	122	36	134

Metal mining	166	141	102	34	5	0	0	0	0	24	22	1	1	0	1	0
Coal mining	529	461	248	100	96	1	5	0	11	64	47	6	11	0	1	3
Oil and gas extraction	54	38	26	5	4	2	0	0	1	15	14	0	1	0	0	1
Mining and quarrying of nonmetallic minerals (except fuels)	167	108	68	21	12	0	1	0	6	58	40	10	8	1	0	0
Mining	916	748	444	160	117	3	6	0	18	161	123	17	21	1	2	4
Construction	4,729	4,245	1,646	1,067	962	243	82	0	245	470	312	126	32	5	0	9
Wholesale trade	3,044	1,756	1,345	332	56	6	3	0	14	1,249	997	91	161	21	1	17
Retail trade	5,413	3,534	2,746	634	76	11	6	0	61	1,789	1,253	180	356	67	4	19
Finance, insurance, and real estate	787	545	405	99	23	4	4	0	10	229	198	10	21	6	3	4
U S Postal Service	1,212	1,201	923	278	0	0	0	0	0	9	7	0	2	0	0	2
Local and suburban transit and interurban highway passenger transportation	540	391	284	100	4	0	0	0	3	141	117	5	19	5	2	1
Motor freight transportation and warehousing	3,262	2,530	1,763	640	90	4	15	0	18	700	586	46	68	9	6	17
Water transportation	460	399	157	157	59	6	14	0	6	53	46	0	7	1	2	5
Other transportation	359	269	150	69	35	3	7	0	5	89	79	5	5	0	0	1
Communication	1,133	807	540	249	7	9	2	0	0	294	237	13	44	5	2	25
Electric, gas, and sanitary services	742	554	381	125	33	11	4	0	0	164	135	5	24	1	5	18
Transportation, communication, and other utilities	6,496	4,950	3,275	1,340	228	33	42	0	32	1,441	1,200	74	167	21	17	67
Hotels, rooming houses, camps, and other lodging places	809	614	469	111	18	4	5	0	7	186	148	12	26	6	0	3
Personal services	333	249	170	74	3	0	0	0	2	76	61	5	10	8	0	0
Automotive repair, services, and garages	431	238	178	48	8	0	0	0	4	189	141	15	33	4	0	0
Motion pictures	271	239	130	82	12	2	5	0	8	32	29	1	2	0	0	0
Amusement and recreation services (except motion pictures)	291	208	110	68	20	0	8	0	2	78	48	8	22	1	0	4
Health services	2,764	1,755	1,443	231	17	1	1	59	3	938	775	38	125	24	11	36
Educational services	335	208	168	35	5	0	0	0	0	116	106	0	10	1	2	8
Membership organizations	432	349	232	100	14	0	3	0	0	74	55	6	13	2	1	6
Business services	1,453	1,025	733	215	41	14	3	0	19	406	362	12	32	7	4	11
Miscellaneous repair services	168	97	79	15	2	1	0	0	0	69	60	1	8	0	1	1
Legal services	50	25	22	3	0	0	0	0	0	25	24	0	1	0	0	0
Museums, art galleries, botanical and zoological gardens	5	3	2	1	0	0	0	0	0	2	2	0	0	0	0	0
Social services	171	115	104	11	0	0	0	0	0	52	43	1	8	2	0	2
Miscellaneous services	73	49	38	5	6	0	0	0	0	24	13	5	6	0	0	0
Services	7,586	5,174	3,878	999	146	22	25	59	45	2,267	1,867	104	296	55	19	71
Public administration	40	26	13	7	6	0	0	0	0	14	14	0	0	0	0	0
Total, all industrial groups	53,261	39,652	27,056	9,469	1,961	405	179	59	523	12,902	10,338	810	1,754	298	82	327

[1] See Glossary for definitions of terms.
[2] Source: Standard Industrial Classification, Statistical Policy Division, Office of Management and Budget, Washington, 1972.

Table 6A.—Geographic Distribution of Cases Received, Fiscal Year 1978 [1]

Division and State [2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Maine	199	112	92	18	0	1	1	0	0	84	71	1	12	1	1	1
New Hampshire	102	73	49	18	2	1	1	1	1	28	22	2	4	0	0	1
Vermont	75	42	34	7	1	0	0	0	0	31	27	1	3	1	0	1
Massachusetts	1,533	1,141	839	258	24	16	1	1	2	370	315	17	38	7	1	14
Rhode Island	255	189	123	46	8	6	0	2	4	58	46	4	8	2	0	6
Connecticut	655	459	308	122	13	6	0	2	8	190	154	6	30	3	0	3
New England	2,819	2,016	1,445	469	48	30	3	6	15	761	635	31	95	14	2	26
New York	4,848	3,627	2,097	1,242	137	45	11	11	84	1,146	952	79	115	30	4	41
New Jersey	1,955	1,368	970	331	26	14	1	2	24	562	492	20	50	15	1	9
Pennsylvania	3,098	2,256	1,493	558	131	46	6	4	18	794	665	28	101	19	9	20
Middle Atlantic	9,901	7,251	4,560	2,131	294	105	18	17	126	2,502	2,109	127	266	64	14	70
Ohio	3,026	2,203	1,651	444	73	15	1	6	13	783	662	27	94	15	7	18
Indiana	2,239	1,883	1,209	544	87	6	14	0	23	341	274	17	50	8	1	6
Illinois	3,724	3,000	1,906	914	110	28	5	1	36	663	532	33	98	31	15	15
Michigan	2,512	1,792	1,284	389	79	23	5	4	8	682	575	28	79	18	3	17
Wisconsin	1,208	861	616	206	21	12	0	2	4	325	253	18	54	6	3	13
East North Central	12,709	9,739	6,666	2,497	370	84	25	13	84	2,794	2,296	123	375	78	29	69
Iowa	424	277	199	33	26	7	3	1	8	145	116	8	21	0	0	2
Minnesota	710	376	257	61	41	2	4	1	10	316	270	15	31	10	1	7
Missouri	2,235	1,878	1,299	493	44	23	3	1	15	332	248	19	65	15	2	8
North Dakota	68	21	20	1	0	0	0	0	0	47	42	2	3	0	0	0
South Dakota	59	26	20	5	1	0	0	0	0	33	27	5	1	0	0	0
Nebraska	218	135	101	23	8	1	0	0	2	81	68	4	9	1	0	1
Kansas	312	248	175	46	20	3	0	0	4	60	45	9	6	1	0	3
West North Central	4,026	2,961	2,071	662	140	36	10	3	39	1,014	816	62	136	27	3	21
Delaware	109	79	52	19	7	1	0	0	0	30	26	3	1	0	0	0
Maryland	855	648	382	224	27	6	1	8	0	198	170	6	22	3	1	5
District of Columbia	390	332	216	90	25	1	0	0	0	56	49	4	3	0	0	2
Virginia	801	640	471	158	6	2	0	1	2	160	141	7	12	0	0	1

West Virginia	543	148	315	97	15	4	3	1	13	90	79	4	7	0	0	5
North Carolina	724	587	508	77	1	1	0	0	0	137	121	2	14	0	0	0
South Carolina	246	188	164	21	3	0	0	0	0	56	52	1	3	0	0	2
Georgia	874	686	557	104	16	5	0	0	4	181	145	11	25	0	3	4
Florida	1,018	781	571	165	28	5	6	1	5	231	193	11	27	0	1	5
South Atlantic	5,560	4,389	3,236	955	128	25	10	11	24	1,139	976	49	114	3	5	24
Kentucky	942	779	493	151	100	6	3	0	26	152	133	3	16	3	2	6
Tennessee	940	684	525	118	30	4	6	0	1	250	218	8	24	0	3	3
Alabama	531	381	290	73	13	2	2	1	0	150	131	6	13	0	0	0
Mississippi	287	224	177	40	5	2	0	0	0	60	56	0	4	0	1	2
East South Central	2,700	2,068	1,485	382	148	14	11	1	27	612	538	17	57	3	6	11
Arkansas	333	215	172	37	5	0	1	0	0	115	92	2	21	1	0	2
Louisiana	468	348	249	80	9	3	2	0	5	114	94	4	16	0	2	4
Oklahoma	364	243	200	34	8	1	0	0	0	113	91	4	18	4	0	4
Texas	1,652	1,299	950	300	27	17	0	0	5	335	262	20	53	0	2	16
West South Central	2,817	2,105	1,571	451	49	21	3	0	10	677	539	30	108	5	4	26
Montana	220	133	101	14	12	1	1	1	3	76	62	4	10	9	0	2
Idaho	160	86	59	15	4	7	0	0	1	70	54	7	9	1	0	3
Wyoming	73	49	41	7	1	0	0	0	0	22	21	1	0	0	1	1
Colorado	620	463	343	89	21	4	2	0	4	156	113	9	34	0	1	0
New Mexico	281	211	158	44	5	1	1	0	2	65	47	1	17	2	2	1
Arizona	652	518	387	91	23	4	3	1	9	132	114	1	17	0	0	2
Utah	166	107	80	18	6	1	1	0	1	57	44	5	8	1	0	1
Nevada	289	229	150	51	21	1	4	0	2	59	49	5	5	0	0	1
Mountain	2,461	1,796	1,319	329	93	19	12	2	22	637	504	33	100	13	4	11
Washington	1,351	869	599	169	63	23	6	1	8	454	289	60	105	16	1	11
Oregon	490	277	176	57	35	3	3	0	3	194	142	20	32	13	2	4
California	7,522	5,590	3,511	1,222	574	44	78	5	156	1,824	1,246	249	329	53	12	43
Alaska	402	315	191	101	14	1	0	0	8	84	65	7	12	2	0	1
Hawaii	151	95	73	19	3	0	0	0	0	54	44	1	9	1	0	1
Guam	1	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0
Pacific	9,917	7,146	4,550	1,568	689	71	87	6	175	2,610	1,786	337	487	86	15	60
Puerto Rico	308	159	133	23	2	0	0	0	1	136	122	1	13	5	0	8
Virgin Islands	43	22	20	2	0	0	0	0	0	20	17	0	3	0	0	1
Outlying areas	351	181	153	25	2	0	0	0	1	156	139	1	16	5	0	9
Total, all States and areas	53,261	39,652	27,056	9,469	1,961	405	179	59	523	12,902	10,338	810	1,754	298	82	327

[1] See Glossary for definitions of terms.
[2] The States are grouped according to the method used by the Bureau of the Census, U.S. Department of Commerce.

Table 6B.—Standard Federal Administrative Regional Distribution of Cases Received, Fiscal Year 1978 [1]

Standard Federal Regions [2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Connecticut	655	459	308	122	13	6	0	2	8	190	154	6	30	3	0	3
Maine	199	112	92	18	0	1	1	0	0	84	71	1	12	1	1	1
Massachusetts	1,533	1,141	839	258	24	16	1	1	2	370	315	17	38	7	1	14
New Hampshire	102	73	49	18	2	1	1	1	1	28	22	2	4	0	0	1
Rhode Island	255	189	123	46	8	6	0	2	4	58	46	4	8	2	0	6
Vermont	75	42	34	7	1	0	0	0	0	31	27	1	3	1	0	1
Region I	2,819	2,016	1,445	469	48	30	3	6	15	761	635	31	95	14	2	26
Delaware	109	79	52	19	7	1	0	0	0	30	26	3	1	0	0	0
New Jersey	1,955	1,368	970	331	26	14	1	2	24	562	492	20	50	15	1	9
New York	4,848	3,627	2,097	1,242	137	45	11	11	84	1,146	952	79	115	30	4	41
Puerto Rico	308	159	133	23	2	0	0	0	1	136	122	1	13	5	0	8
Virgin Islands	43	22	20	2	0	0	0	0	0	20	17	0	3	0	0	1
Region II	7,263	5,255	3,272	1,617	172	60	12	13	109	1,894	1,609	103	182	50	5	59
District of Columbia	390	332	216	90	25	1	0	0	0	56	49	4	3	0	0	2
Maryland	855	648	382	224	27	6	1	8	0	198	170	6	22	3	1	5
Pennsylvania	3,098	2,256	1,493	558	131	46	6	4	18	794	665	28	101	19	9	20
Virginia	801	640	471	158	6	2	0	1	2	160	141	7	12	0	0	1
West Virginia	543	448	315	97	15	4	3	1	13	90	79	4	7	0	0	5
Region III	5,687	4,324	2,877	1,127	204	59	10	14	33	1,298	1,104	49	145	22	10	33
Alabama	531	381	290	73	13	2	2	1	0	150	131	6	13	0	0	0
Florida	1,018	781	571	165	28	5	6	1	5	231	193	11	27	0	1	5
Georgia	874	686	557	104	16	5	0	0	4	181	145	11	25	0	3	4
Kentucky	942	779	493	151	100	6	3	0	26	152	133	3	16	3	2	6
Mississippi	287	224	177	40	5	2	0	0	0	60	56	0	4	0	1	2
North Carolina	724	587	508	77	1	1	0	0	0	137	121	2	14	0	0	0
South Carolina	246	188	164	21	3	0	0	0	0	56	52	1	3	0	0	2
Tennessee	940	684	525	118	30	4	6	0	1	250	218	8	24	0	3	3
Region IV	5,562	4,310	3,285	749	196	25	17	2	36	1,217	1,049	42	126	3	10	22

Illinois	3,724	3,000	1,906	914	110	28	5	1	36	663	532	33	98	31	15	15
Indiana	2,239	1,883	1,209	544	87	6	14	0	23	341	274	17	50	8	1	6
Michigan	2,512	1,792	1,284	389	79	23	5	4	8	682	575	28	79	18	3	17
Minnesota	710	376	257	61	41	2	4	1	10	316	270	15	31	10	1	7
Ohio	3,026	2,203	1,651	444	73	15	1	6	13	783	662	27	94	15	7	18
Wisconsin	1,208	861	616	206	21	12	0	2	4	325	253	18	54	6	3	13
Region V	13,419	10,115	6,923	2,558	411	86	29	14	94	3,110	2,566	138	406	88	30	76
Arkansas	333	215	172	37	5	0	1	0	0	115	92	2	21	1	0	2
Louisiana	468	348	249	80	9	3	2	0	5	114	94	4	16	0	2	4
New Mexico	281	211	158	44	5	1	1	0	2	65	47	1	17	2	2	1
Oklahoma	364	243	200	34	8	1	0	0	0	113	91	4	18	4	0	4
Texas	1,652	1,299	950	300	27	17	0	0	5	335	262	20	53	0	2	16
Region VI	3,098	2,316	1,729	495	54	22	4	0	12	742	586	31	125	7	6	27
Iowa	424	277	199	33	26	7	3	1	8	145	116	8	21	0	0	2
Kansas	312	248	175	46	20	3	0	0	4	60	45	9	6	1	0	3
Missouri	2,235	1,878	1,299	493	44	23	3	1	15	332	248	19	65	15	2	8
Nebraska	218	135	101	23	8	1	0	0	2	81	68	4	9	1	0	1
Region VII	3,189	2,538	1,774	595	98	34	6	2	29	618	477	40	101	17	2	14
Colorado	620	463	343	89	21	4	2	0	4	156	113	9	34	0	1	0
Montana	220	133	101	14	12	1	1	1	3	76	62	4	10	9	0	2
North Dakota	68	21	20	1	0	0	0	0	0	47	42	2	3	0	0	0
South Dakta	59	26	20	5	1	0	0	0	0	33	27	5	1	0	0	0
Utah	166	107	80	18	6	1	1	0	1	57	44	5	8	1	0	1
Wyoming	73	49	41	7	1	0	0	0	0	22	21	1	0	0	1	1
Region VIII	1,206	799	605	134	41	6	4	1	8	391	309	26	56	10	2	4
Arizona	652	518	387	91	23	4	3	1	9	132	114	1	17	0	0	2
California	7,522	5,590	3,511	1,222	574	44	78	5	156	1,824	1,246	249	329	53	12	43
Hawaii	151	95	73	19	3	0	0	0	0	54	44	1	9	1	0	1
Guam	1	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0
Nevada	289	229	150	51	21	1	4	0	2	59	49	5	5	0	0	1
Region IX	8,615	6,432	4,121	1,383	621	49	85	6	167	2,069	1,453	256	360	55	12	47
Alaska	402	315	191	101	14	1	0	0	8	84	65	7	12	2	0	1
Idaho	160	86	59	15	4	7	0	0	1	70	54	7	9	1	0	3
Oregon	490	277	176	57	35	3	3	0	3	194	142	20	32	13	2	4
Washington	1,351	869	599	169	63	23	6	1	8	454	289	60	105	16	1	11
Region X	2,403	1,547	1,025	342	116	34	9	1	20	802	550	94	158	32	3	19
Total, all Federal regions	53,261	39,652	27,056	9,469	1,961	405	179	59	523	12,902	10,338	810	1,754	298	82	327

[1] See Glossary for definitions of terms.
[2] The States are grouped according to the 10 Standard Federal Administrative regions.

Table 7.—Analysis of Methods of Disposition of Unfair Labor Practice Cases Closed, Fiscal Year 1978[1]

Method and stage of disposition	All C cases			CA cases		CB cases		CC cases		CD cases		CE cases		CG cases		CP cases	
	Number	Percent of total closed	Percent of total method	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed
Total number of cases closed	37,192	100 0	.....	25,326	100 0	9,082	100 0	1,745	100 0	367	100 0	144	100 0	57	100 0	471	100 0
Agreement of the parties	9,232	24 8	100 0	6,870	27 0	1,416	15 5	744	42 6	3	0 8	35	24 3	19	33 3	145	30 8
Informal settlement	9,060	24 3	98 1	6,747	26 6	1,385	15 2	734	42 1	3	0 8	32	22 2	19	33.3	140	29.8
Before issuance of complaint	6,143	16 5	66 5	4,361	17 2	1,053	11.6	590	33 8	(2)	.....	16	11.1	17	29 8	106	22 6
After issuance of complaint, before opening of hearing	2,757	7 4	29 9	2,251	8 9	313	3 4	139	8 0	3	0.8	16	11 1	2	3 5	33	7 0
After hearing opened, before issuance of administrative law judge's decision	160	0 4	1 7	135	0 5	19	0 2	5	0 3	0	.....	0	.....	0	.....	1	0 2
Formal settlement	172	0 5	1.9	123	0 4	31	0 3	10	0 5	0	.....	3	2.1	0	.....	5	1 0
After issuance of complaint, before opening of hearing	96	0 3	1 1	61	0 2	18	0 2	9	0 5	0	.....	3	2 1	0	.....	5	1.0
Stipulated decision	25	0 1	0 3	22	0 1	1	0 0	1	0 0	0	.....	0	.....	0	.....	1	0.2
Consent decree	71	0 2	0 8	39	0 1	17	0 2	8	0.5	0	.....	3	2 1	0	.....	4	0.8
After hearing opened	76	0 2	0 8	62	0 2	13	0.1	1	0 0	0	.....	0	.....	0	.....	0	.....
Stipulated decision	9	0 0	0 1	8	0 0	0	.....	0	.....	0	.....	0	.....	0	.....	0	.....
Consent decree	67	0 2	0.7	54	0 2	13	0.1	0	.....	0	.....	0	.....	0	.....	0	.....
Compliance with	1,063	2 8	100 0	896	3 6	106	1 2	31	1 8	6	1.7	9	6 3	1	1 8	14	2.9
Administrative law judge's decision	7	0 0	0 7	7	0.0	0	.....	0	.....	0	.....	0	.....	0	.....	0	.....
Board decision	716	1.9	67 3	604	2 4	80	0.9	14	0 8	5	1 4	2	1 4	1	1.8	10	2 1
Adopting administrative law judge's decision (no exceptions filed)	199	0 5	18 7	170	0.7	19	0 2	6	0 3	0	.....	1	0 7	0	.....	3	0 6
Contested	517	1 4	48.6	434	1 7	61	0 7	8	0.5	5	1.4	1	0 7	1	1.8	7	1 5
Circuit court of appeals decree	326	0 9	30.7	272	1 1	26	0 3	17	1 0	1	0.3	7	4 9	0	.....	3	0 6
Supreme Court action	14	0 0	1.3	13	0.1	0	.....	0	.....	0	.....	0	.....	0	.....	1	0.2

Withdrawal	12,391	33.3	100.0	8,321	32.9	3,151	34 7	638	36.5	3	0.8	63	43 8	30	52.5	185	39.3
Before issuance of complaint	11,967	32.2	96.6	7,990	31.6	3,089	34 0	624	35 8	(2)	-------	63	43.8	28	49 0	173	36 8
After issuance of complaint, before opening of hearing	406	1.1	3 3	319	1.3	57	0 6	13	0 7	3	0 8	0	-------	2	3 5	12	2.5
After hearing opened, before administrative law judge's decision	5	0 0	0 0	4	0 0	0	-------	1	0 0	0	-------	0	-------	0	-------	0	-------
After administrative law judge's decision, before Board decision	4	0 0	0.0	4	0 0	0	-------	0	-------	0	-------	0	-------	0	-------	0	-------
After Board or court decision	9	0 0	0 1	4	0 0	5	0 1	0	-------	0	-------	0	-------	0	-------	0	-------
Dismissal	14,125	38.0	100 0	9,213	36 4	4,409	48.6	332	19 1	0	-------	37	25 6	7	12 4	127	27 0
Before issuance of complaint	13,646	36 8	96 7	8,824	34 9	4,336	47.8	322	18 5	(2)	-------	37	25.6	3	5 3	124	26.4
After issuance of complaint, before opening of hearing	120	0.3	0 8	103	0 4	13	0 1	3	0 2	0	-------	0	-------	0	-------	1	0.2
After hearing opened, before administrative law judge's decision	5	0 0	0 0	4	0.0	1	0.0	0	-------	0	-------	0	-------	0	-------	0	-------
By administrative law judge's decision	1	0 0	0 0	1	0.0	0	-------	0	-------	0	-------	0	-------	0	-------	0	-------
By Board decision	312	0 8	2 2	245	1.0	58	0 7	7	0 4	0	-------	0	-------	0	-------	2	0.4
Adopting administrative law judge's decision (no exceptions filed)	122	0 3	0 9	105	0.4	15	0.2	0	-------	0	-------	0	-------	0	-------	2	0.4
Contested	190	0 5	1 3	140	0 6	43	0 5	7	0 4	0	-------	0	-------	0	-------	0	-------
By circuit court of appeals decree	40	0 1	0 3	36	0.1	1	0.0	0	-------	0	-------	0	-------	3	5.3	0	-------
By Supreme Court action	1	0 0	0 0	0	-------	0	-------	0	-------	0	-------	0	-------	1	1.8	0	-------
10(k) actions (see table 7A for details of dispositions)	355	1 0	-------	-------	-------	-------	-------	-------	-------	355	96.7	-------	-------	-------	-------	-------	-------
Otherwise (compliance with order of administrative law judge or Board not achieved—firm went out of business)	26	0.1	-------	26	0.1	0	-------	0	-------	0	-------	0	-------	0	-------	0	-------

[1] See table 8 for summary of disposition by stage. See Glossary for definitions of terms.
[2] CD cases closed in this stage are processed as jurisdictional disputes under sec. 10(k) of the Act. See table 7A.

Table 7A.—Analysis of Methods of Disposition of Jurisdictional Dispute Cases Closed Prior to Unfair Labor Practice Proceedings, Fiscal Year 1978 [1]

Method and stage of disposition	Number of cases	Percent of total closed
Total number of cases closed before issuance of complaint	355	100 0
Agreement of the parties—informal settlement	174	49 1
Before 10(k) notice	151	42 6
After 10(k) notice, before opening of 10(k) hearing	22	6 2
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	1	0 3
Compliance with Board decision and determination of dispute	9	2.5
Withdrawal	123	34.6
Before 10(k) notice	107	30 1
After 10(k) notice, before opening of 10(k) hearing	14	3 9
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	1	0.3
After Board decision and determination of dispute	1	0 3
Dismissal	49	13 8
Before 10(k) notice	36	10 1
After 10 (k) notice, before opening of 10(k) hearing	2	0.6
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	0	
By Board decision and determination of dispute	11	3.1

[1] See Glossary for definitions of terms.

Table 8.—Disposition by Stage of Unfair Labor Practice Cases Closed, Fiscal Year 1978 [1]

Stage of disposition	All C cases		CA cases		CB cases		CC cases		CD cases		CE cases		CG cases		CP cases	
	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed
Total number of cases closed	37,192	100 0	25,326	100 0	9,082	100 0	1,745	100 0	367	100 0	144	100 0	57	100 0	471	100.0
Before issuance of complaint	32,111	86 4	21,175	83 6	8,478	93 3	1,536	88.0	355	96 7	116	80 5	48	84.1	403	85.7
After issuance of complaint, before opening of hearing	3,379	9 1	2,734	10 8	401	4.4	164	9 4	6	1 6	19	13 2	4	7.0	51	10 8
After hearing opened, before issuance of administrative law judge's decision	246	0.7	205	0 8	33	0 4	7	0 4	0	-------	0	-------	0	-------	1	0.2
After administrative law judge's decision, before issuance of Board decision	12	0.0	12	0 0	0	-------	0	-------	0	-------	0	-------	0	-------	0	-------
After Board order adopting administrative law judge's decision in absence of exceptions	327	0 9	281	1 1	34	0 4	6	0 3	0	-------	1	0.7	0	-------	5	1.0
After Board decision, before circuit court decree	719	1.9	581	2 3	109	1 2	15	0 9	5	1 4	1	0.7	1	1.8	7	1.5
After circuit court decree, before Supreme Court action	383	1.0	325	1.3	27	0 3	17	1.0	1	0 3	7	4.9	3	5.3	3	0.6
After Supreme Court action	15	0.0	13	0.1	0	-------	0	-------	0	-------	0	-------	1	1.8	1	0 2

[1] See Glossary for definitions of terms.

Table 9.—Disposition by Stage of Representation and Union Deauthorization Cases Closed, Fiscal Year 1978 [1]

Stage of disposition	All R case		RC cases		RM cases		RD cases		UD cases	
	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed
Total number of cases closed	12,438	100.0	9,926	100 0	788	100 0	1,724	100.0	277	100 0
Before issuance of notice of hearing	4,393	35.3	2,934	29 6	494	62.7	965	56.0	177	63.9
After issuance of notice before close of hearing	6,022	48.5	5,240	52.7	206	26 1	576	33 4	14	5 1
After hearing closed before issuance of decision	135	1.1	105	1.1	14	1.8	16	0.9	4	1.4
After issuance of regional director's decision	1,834	14.7	1,598	16.1	71	9.0	165	9.6	79	28.5
After issuance of Board decision	54	0.4	49	0.5	3	0.4	2	0.1	3	1.1

[1] See Glossary for definitions of terms.

Table 10.—Analysis of Methods of Disposition of Representation and Union Deauthorization Cases Closed, Fiscal Year 1978 [1]

Method and stage of disposition	All R cases		RC cases		RM cases		RD cases		UD cases	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total, all	12,438	100 0	9,926	100 0	788	100 0	1,724	100 0	277	100 0
Certification issued, total	8,319	66.9	7,177	72.3	320	40 5	822	47 6	143	51 6
After										
Consent election	641	5 2	524	5 3	28	3.5	89	5 2	20	7 2
Before notice of hearing	301	2 4	233	2 3	15	1.9	53	3 1	17	6 1
After notice of hearing, before hearing closed	335	2 8	286	2 9	13	1.6	36	2.1	0	----------
After hearing closed, before decision	5	0 0	5	0 1	0	----------	0	----------	3	1.1
Stipulated election	6,174	49 7	5,349	53 8	226	28.6	599	34 7	47	17.0
Before notice of hearing	2,079	16.7	1,648	16 5	135	17 1	296	17.2	41	14 8
After notice of hearing, before hearing closed	4,050	32 6	3,662	36.9	91	11.5	297	17 2	5	1 8
After hearing closed, before decision	45	0.4	39	0 4	0	----------	6	0 3	1	0 4
Expedited election	43	0.3	22	0 2	15	1 9	6	0 3	0	----------
Regional director directed election	1,421	11 4	1,246	12.6	49	6 2	126	7 3	76	27.4
Board directed election	40	0.3	36	0 4	2	0.3	2	0 1	0	----------
By withdrawal, total	3,057	24 5	2,228	22 5	281	35 7	548	31 9	100	36 1
Before notice of hearing	1,460	11.7	891	9.0	200	25.4	369	21.5	92	33.2
After notice of hearing, before hearing closed	1,402	11.3	1,175	11.8	66	8.4	161	9.3	8	2.9
After hearing closed, before decision	39	0.3	26	0.3	8	1.0	5	0 3	0	----------
After regional director's decision and direction of election	151	1 2	131	1.3	7	0 9	13	0 8	0	----------
After Board decision and direction of election	5	0.0	5	0 1	0	----------	0	----------	0	----------
By dismissal, total	1,062	8.6	521	5.2	187	23 8	354	20.5	34	12 3
Before notice of hearing	537	4.3	161	1.6	129	16 4	247	14.3	27	9.7
After notice of hearing, before hearing closed	209	1.7	97	1.0	36	4.6	76	4.4	1	0.4
After hearing closed, before decision	45	0.4	34	0 3	6	0 8	5	0.3	0	----------
By regional director's decision	262	2.1	221	2 2	15	1.9	26	1.5	3	1.1
By Board decision	9	0.1	8	0.1	1	0.1	0	----------	3	1.1

[1] See Glossary for definitions of terms.

Table 10A.—Analysis of Methods of Disposition of Amendment of Certification and Unit Clarification Cases Closed, Fiscal Year 1978

	AC	UC
Total, all	59	292
Certification amended or unit clarified	20	32
Before hearing	0	0
By regional director's decision	0	0
By Board decision	0	0
After hearing	20	32
By regional director's decision	20	32
By Board decision	0	0
Dismissed	12	120
Before hearing	2	17
By regional director's decision	2	17
By Board decision	0	0
After hearing	10	103
By regional director's decision	10	97
By Board decision	0	6
Withdrawn	27	140
Before hearing	25	136
After hearing	2	4

Table 11.—Types of Elections Resulting in Certification in Cases Closed, Fiscal Year 1978 [1]

Type of case	Total	Type of election				
		Consent	Stipulated	Board-directed	Regional director-directed	Expedited elections under 8(b)(7)(C)
All types, total						
Elections	8,380	658	6,197	49	1,457	19
Eligible voters	480,879	16,256	357,458	3,922	102,852	391
Valid votes	424,679	13,873	318,101	3,139	89,238	328
RC cases						
Elections	7,168	534	5,369	39	1,224	2
Eligible voters	424,481	13,111	318,970	3,541	88,807	52
Valid votes	376,483	11,298	284,839	2,814	77,488	44
RM cases						
Elections	265	19	186	2	42	16
Eligible voters	7,783	293	5,999	63	1,106	322
Valid votes	6,529	244	5,103	57	854	271
RD cases						
Elections	807	89	595	2	121	0
Eligible voters	39,555	2,294	29,395	104	7,762	0
Valid votes	34,551	1,889	25,690	97	6,875	0
UD cases						
Elections	140	16	48	6	70	----
Eligible voters	9,060	558	3,111	214	5,177	----
Valid votes	7,116	442	2,482	171	4,021	----

[1] See Glossary for definitions of terms.

Table 11A.—Analysis of Elections Conducted in Representation Cases Closed, Fiscal Year 1978

Type of election	All R elections				RC elections				RM elections				RD elections			
	Elections conducted				Elections conducted				Elections conducted				Elections conducted			
	Total elections	Withdrawn or dismissed before certification	Resulting in a rerun or runoff	Resulting in certification[1]	Total elections	Withdrawn or dismissed before certification	Resulting in a rerun or runoff	Resulting in certification	Total elections	Withdrawn or dismissed before certification	Resulting in a rerun or runoff	Resulting in certification	Total elections	Withdrawn or dismissed before certification	Resulting in a rerun or runoff	Resulting in certification
All types	8,464	55	169	8,240	7,311	53	153	7,168	270	0	5	265	820	2	11	807
Rerun required			141				129				4				8	
Runoff required			28				24				1				3	
Consent elections	646	2	2	642	538	2	2	534	19	0	0	19	89	0	0	89
Rerun required			1				1				0				0	
Runoff required			1				1				0				0	
Stipulated elections	6,314	37	127	6,150	5,521	35	117	5,369	190	0	4	186	603	2	6	595
Rerun required			105				98				3				4	
Runoff required			22				19				1				2	
Regional director-directed	1,439	15	37	1,387	1,207	15	31	1,224	43	0	1	42	126	0	5	121
Rerun required			32				27				1				4	
Runoff required			5				4				0				1	
Board-directed	46	0	3	43	42	0	3	39	2	0	0	2	2	0	0	2
Rerun required			3				3				0				0	
Runoff required			0				0				0				0	
Expedited—sec 8(b)(7)(C)	19	1	0	18	3	1	0	2	16	0	0	16	0	0	0	0
Rerun required			0				0				0				0	
Runoff required			0				0				0				0	

[1] The total of representation elections resulting in certification excludes elections held in UD cases which are included in the totals in table 11.

Table 11B.—Representation Elections in Which Objections and/or Determinative Challenges Were Ruled On in Cases Closed, Fiscal Year 1978

	Total elections	Objections only		Challenges only		Objections and challenges		Total objections [1]		Total challenges [2]	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
All representation elections	8,464	697	8.2	302	3.5	159	1.8	856	10 1	461	5 4
By type of case											
In RC cases	7,311	626	8.5	263	3 5	141	1 9	767	10.4	404	5 5
In RM cases	270	19	7.0	14	5.1	5	1 8	24	8.8	19	7.0
In RD cases	820	52	6.3	25	3.0	13	1.5	65	7.9	38	4 6
By type of election											
Consent elections	646	11	1.7	10	1.5	0	0.0	11	1.7	10	1.5
Stipulated elections	6,314	482	7.6	219	3.4	125	1.9	607	9.6	344	5.4
Expedited elections	19	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Regional director-directed elections	1,439	187	12 9	72	5.0	30	2 0	217	15.0	102	7.0
Board-directed elections	46	17	36.9	1	2.1	4	8 6	21	45 6	5	10 8

[1] Number of elections in which objections were ruled on, regardless of number of allegations in each election.
[2] Number of elections in which challenges were ruled on, regardless of individual ballots challenged in each election.

Table 11C.—Objections Filed in Representation Cases Closed, by Party Filing, Fiscal Year 1978 [1]

	Total		By employer		By union		By both parties [2]	
	Number	Percent by type	Number	Percent by type	Number	Percent by type	Number	Percent by type
All representation elections	1,057	100 0	448	42.4	582	55 0	27	2.6
By type of case								
RC cases	954	100.0	416	43.6	516	54 1	22	2 3
RM cases	27	100 0	7	25.9	17	63 0	3	11 1
RD cases	76	100 0	25	32 9	49	64 5	2	2.6
By type of election								
Consent elections	24	100 0	7	29 2	16	66.6	1	4 2
Stipulated elections	751	100 0	320	42.6	416	55 4	15	2.0
Expedited elections	0	100 0	0	0 0	0	0 0	0	-------
Regional director-directed elections	260	100 0	115	44 2	134	51.5	11	4.3
Board-directed elections	22	100 0	6	27.3	16	72.9	0	-------

[1] See Glossary for definitions of terms.
[2] Objections filed by more than one party in the same case are counted as one.

Table 11D.—Disposition of Objections in Representation Cases Closed, Fiscal Year 1978 [1]

	Objections filed	Objections withdrawn	Objections ruled upon	Overruled		Sustained [2]	
				Number	Percent of total ruled upon	Number	Percent of total ruled upon
All representation elections	1,057	201	856	693	80 95	163	19.4
By type of case							
RC cases	954	187	767	618	80.5	149	19.4
RM cases	27	3	24	19	79.1	5	20 8
RD cases	76	11	65	56	86 1	9	13.8
By type of election							
Consent elections	24	13	11	9	81 8	2	18.1
Stipulated elections	751	144	607	490	80.7	117	19.2
Expedited elections	0	0	0	0	0.0	0	0 0
Regional director-directed Eelections	260	43	217	186	85.7	31	14.2
Board-directed elections	22	1	21	8	38.0	13	61.9

[1] See Glossary for definitions of terms.
[2] See table 11E for rerun elections held after objections were sustained. In one election in which objections were sustained, the case was subsequently withdrawn. Therefore, in that case no rerun election was conducted.

Table 11E.—Results of Rerun Elections Held in Representation Cases Closed, Fiscal Year 1978 [1]

	Total rerun elections [2]		Union certified		No union chosen		Outcome of original election reversed	
	Number	Percent by type	Number	Percent by type	Number	Percent by type	Number	Percent by type
All representation elections	129	100 0	42	32 6	87	67.4	34	26.4
By type of case								
RC cases	120	100 0	42	35 0	78	65 0	33	27.5
RM cases	3	100 0	0		3	100 0	1	33.3
RD cases	6	100 0	0		6	100 0	0	
By type of election								
Consent elections	6	100 0	2	33 3	4	66.7	2	33 3
Stipulated elections	90	100.0	31	34 4	59	65.6	25	27.8
Expedited elections	0		0		0		0	
Regional director-directed elections	30	100 0	8	26.7	22	73.3	6	20 0
Board-directed elections	3	100.0	1	33 3	2	66.7	1	33.3

[1] See Glossary for definitions of terms.

[2] Includes only final rerun elections; i.e., those resulting in certification. Excluded from the table are 33 rerun elections which were conducted and subsequently set aside pursuant to sustained objections. The 33 invalid rerun elections were followed by valid rerun elections which are included in the table.

Table 12.—Results of Union-Shop Deauthorization Polls in Cases Closed, Fiscal Year 1978

Affiliation of union holding union-shop contract	Number of polls					Employees involved (number eligible to vote) [1]					Valid votes cast			
	Total	Resulting in deauthorization		Resulting in continued authorization		Total eligible	In polls				Total	Percent of total eligible	Cast for deauthorization	
							Resulting in deauthorization		Resulting in continued authorization					
		Number	Percent of total	Number	Percent of total		Number	Percent of total	Number	Percent of total			Number	Percent of total eligible
Total	140	89	63.6	51	36 4	9,060	3,087	34.1	5,973	65 9	7,116	78 5	2,451	27.1
AFL-CIO Unions	96	59	61.5	37	38 5	5,563	2,436	43 8	3,127	56 2	4,441	79 8	1,888	33 9
Teamsters	34	25	73 5	9	26 5	3,138	499	15 9	2,639	84.1	2,362	75.3	436	13 9
Other national unions	5	3	60 0	2	40 0	159	68	42 8	91	57 2	133	83 6	55	34.6
Other local unions	5	2	40.0	3	60 0	200	84	42 0	116	58.0	180	90 0	72	36.0

[1] Sec. 8(a)(3) of the Act requires that to revoke a union-shop agreement a majority of the employees eligible to vote must vote in favor of deauthorization.

Table 13.—Final Outcome of Representation Elections in Cases Closed, Fiscal Year 1978 [1]

Participating unions	Total elections [2]	Elections won by unions: Percent won	Total won	AFL-CIO unions	Teamsters	Other national unions	Other local unions	Elections in which no representative chosen	Employees eligible to vote: Total	In elections won	In units won by: AFL-CIO unions	Teamsters	Other national unions	Other local unions	In elections where no representative chosen
	A. All representation elections														
AFL-CIO	4,577	44.7	2,047	2,047				2,530	265,779	85,510	85,510				180,269
Teamsters	2,495	42 0	1,049		1,049			1,446	85,491	28,091		28,091			57,400
Other national unions	433	47 3	205			205		228	36,662	14,471			14,471		22,191
Other local unions	321	55 8	179				179	142	23,486	10,814				10,814	12,672
1-union elections	7,826	44 5	3,480	2,047	1,049	205	179	4,346	411,418	138,886	85,510	28,091	14,471	10,814	272,532
AFL-CIO v AFL-CIO	101	64 4	65	65				36	15,198	4,207	4,207				10,991
AFL-CIO v Teamsters	95	71 6	68	28	40			27	11,888	7,520	3,045	4,475			4,368
AFL-CIO v national	44	79 5	35	7		28		9	6,275	4,783	759		4,024		1,492
AFL-CIO v local	80	82 5	66	27			39	14	13,122	9,860	6,024			3,836	3,262
Teamsters v national	15	80 0	12		5	7		3	1,494	952		177	775		542
Teamsters v local	19	84.2	16		8		8	3	1,717	1,598		463		1,135	119
Teamsters v Teamsters	4	25 0	1		1			3	138	80		80			58
National v local	13	100 0	13			8	5	0	5,110	5,110			2,865	2,245	0
National v national	3	100 0	3			3		0	68	68			68		0
Local v local	20	85 0	17				17	3	2,339	2,136				2,136	203
2-union elections	394	75.1	296	127	54	46	69	98	57,349	36,314	14,035	5,195	7,732	9,352	21,035
AFL-CIO v AFL-CIO v. AFL-CIO	1	0.0	0	0				1	207,	0	0				207
AFL-CIO v AFL-CIO v. Teamsters	2	50 0	1	1	0			1	408	28	28	0			380
AFL-CIO v AFL-CIO v national	1	100 0	1	0		1		0	358	358	0		358		0
AFL-CIO v AFL-CIO v local	6	83 3	5	2			3	1	780	497	232			265	283
AFL-CIO v Teamsters v local	2	100 0	2	0	0		2	0	633	633	0	0		633	0
AFL-CIO v national v. local	1	100.0	1	0		0	1	0	176	176	0		0	176	0
AFL-CIO v. local v local	3	66.7	2	0			2	1	102	68	0			68	34
Teamsters v local v local	1	100 0	1		1		0	0	125	125		125		0	0

AFL-CIO v. AFL-CIO v. AFL-CIO v AFL-CIO	1	100 0	1	1				0	106	106	106				0
AFL-CIO v. AFL-CIO v Teamsters v local	1	100 0	1	0	1		0	0	65	65	0	65		0	0
3 (or more) union elections	20	75 0	15	4	2	1	8	5	3,052	2,056	366	190	358	1,142	996
Total representation elections	8,240	46 0	3,791	2,178	1,105	252	256	4,449	471,819	177,256	99,911	33,476	22,561	21,308	294,563
B Elections in RC cases															
AFL-CIO	3,902	48 0	1,872	1,872				2,030	235,820	73,467	73,467				162,353
Teamsters	2,198	44 9	988		988			1,210	78,087	26,340		26,340			51,747
Other national unions	394	48 0	189			189		205	33,776	12,314			12,314		21,462
Other local unions	293	58 4	171				171	122	22,887	10,628				10,628	12,259
1-union elections	6,787	47 4	3,220	1,872	988	189	171	3,567	370,570	122,749	73,467	26,340	12,314	10,628	247,821
AFL-CIO v AFL-CIO	96	63 5	61	61				35	15,134	4,145	4,145				10,989
AFL-CIO v Teamsters	84	70 2	59	27	32			25	10,747	6,680	2,845	3,835			4,067
AFL-CIO v national	41	78.0	32	6		26		9	5,670	4,178	639		3,539		1,492
AFL-CIO v local	76	81 6	62	24			38	14	9,287	6,025	2,551			3,474	3,262
Teamsters v national	14	85 7	12		5	7		2	1,132	952		177	775		180
Teamsters v local	14	85 7	12		5		7	2	1,473	1,372		283		1,089	101
Teamsters v Teamsters	3	33 3	1		1			2	98	80		80			18
National v local	12	100 0	12			8	4	0	5,082	5,082			2,865	2,217	0
National v national	3	100 0	3			3		0	68	68			68		0
Local v local	20	85 0	17				17	3	2,339	2,136				2,136	203
2-union elections	363	74 7	271	118	43	44	66	92	51,030	30,718	10,180	4,375	7,247	8,916	20,312
AFL-CIO v AFL-CIO v AFL-CIO	1	0 0	0	0				1	207	0	0				207
AFL-CIO v AFL-CIO v. Teamsters	2	50 0	1	1	0			1	408	28	28	0			380
AFL-CIO v. AFL-CIO v national	1	100 0	1	0		1		0	358	358	0		358		0
AFL-CIO v AFL-CIO v local	6	83 3	5	2			3	1	780	497	232			265	283
AFL-CIO v Teamsters v local	2	100 0	2	0	0		2	0	633	633	0	0		633	0
AFL-CIO v national v. local	1	100 0	1	0		0	1	0	176	176	0		0	176	0
AFL-CIO v local v local	3	66 7	2	0			2	1	102	68	0			68	34
Teamsters v local v local	1	100 0	1		1		0	0	125	125		125		0	0
National v local v local	1	0 0	0			0	0	1	92	0			0	0	92
3 (or more) union elections	18	72 0	13	3	1	1	8	5	2,881	1,885	260	125	358	1,142	996
Total RC elections	7,168	48 9	3,504	1,993	1,032	234	245	3,664	424,481	155,352	83,907	30,840	19,919	20,686	269,129
C Elections in RM cases															
AFL-CIO	176	23 9	42	42				134	5,949	1,556	1,556				4,393
Teamsters	70	28 6	20		20			50	1,506	459		459			1,047
Other national unions	6	50 0	3			3		3	107	47			47		60
Other local unions	6	66.7	4				4	2	95	87				87	8
1-union elections	258	26.7	69	42	20	3	4	189	7,657	2,149	1,556	459	47	87	5,508

Table 13.—Final Outcome of Representation Elections in Cases Closed, Fiscal Year 1978 [1]—Continued

Participating unions	Total elections [2]	Elections won by unions: Percent won	Total won	AFL-CIO unions	Teamsters	Other national unions	Other local unions	Elections in which no representative chosen	Employees eligible to vote: Total	In elections won	In units won by: AFL-CIO unions	Teamsters	Other national unions	Other local unions	In elections where no representative chosen
AFL-CIO v AFL-CIO	2	50 0	1	1				1	4	2	2				2
AFL-CIO v. Teamsters	2	100 0	2	0	2			0	16	16	0	16			0
AFL-CIO v national	1	100 0	1	0		1		0	11	11	0		11		0
AFL-CIO v local	1	100 0	1	1			0	0	55	55	55			0	0
Teamsters v Teamsters	1	0 0	0		0			1	40	0		0			40
2-union elections	7	71 4	5	2	2	1	0	2	126	84	57	16	11	0	42
Total RM elections	265	27.9	74	44	22	4	4	191	7,783	2,233	1,613	475	58	87	5,550
	D Elections in RD cases														
AFL-CIO	499	26.7	133	133				366	24,010	10,487	10,487				13,523
Teamsters	227	18 1	41		41			186	5,898	1,292		1,292			4,606
Other national unions	33	39.4	13			13		20	2,779	2,110			2,110		669
Other local unions	22	18 2	4				4	18	504	99				99	405
1-union elections	781	24 5	191	133	41	13	4	590	33,191	13,988	10,487	1,292	2,110	99	19,203
AFL-CIO v AFL-CIO	3	100 0	3	3				0	60	60	60				0
AFL-CIO v Teamsters	9	77 8	7	1	6			2	1,125	824	200	624			301
AFL-CIO v. national	2	100 0	2	1		1		0	594	594	120		474		0
AFL-CIO v local	3	100.0	3	2			1	0	3,780	3,780	3,418			362	0
Teamsters v. national	1	0 0	0		0	0		1	362	0		0	0		362
Teamsters v local	5	80 0	4		3		1	1	244	226		180		46	18
National v local	1	100 0	1			0	1	0	28	28			0	28	0
2-union elections	24	83 3	20	7	9	1	3	4	6,193	5,512	3,798	804	474	436	681
AFL-CIO v AFL-CIO v. AFL-CIO v. AFL-CIO	1	100 0	1	1				0	106	106	106				0
AFL-CIO v AFL-CIO v. Teamsters v local	1	100 0	1	0	1		0	0	65	65	0	65		0	0
3 (or more) union elections	2	100 0	2	1	1	0	0	0	171	171	106	65	0	0	0
Total RD elections	807	26.4	213	141	51	14	7	594	39,555	19,671	14,391	2,161	2,584	535	19,884

[1] See Glossary for definitions of terms.

Table 14.—Valid Votes Cast in Representation Elections, by Final Results of Election, in Cases Closed, Fiscal Year 1978 [1]

Participating unions	Total Valid votes cast	Valid votes cast in elections won						Valid votes cast in elections lost					
		Votes for unions					Total votes for no union	Votes for unions					Total votes for no union
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions	
	A All representation elections												
AFL-CIO	234,988	49,518	49,518				25,966	53,107	53,107				106,397
Teamsters	76,480	16,829		16,829			8,314	16,517		16,517			34,820
Other national unions	33,403	8,729			8,729		4,198	7,561			7,561		12,915
Other local unions	19,837	6,280				6,280	2,581	3,773				3,773	7,203
1-union elections	364,708	81,356	49,518	16,829	8,729	6,280	41,059	80,958	53,107	16,517	7,561	3,773	161,335
AFL-CIO v AFL-CIO	13,247	3,102	3,102				626	3,324	3,324				6,195
AFL-CIO v Teamsters	10,481	5,618	2,559	3,059			997	1,444	502	942			2,422
AFL-CIO v national	5,605	3,852	1,285		2,567		464	497	235		262		792
AFL-CIO v local	11,748	8,386	4,245			4,141	418	699	369			330	2,245
Teamsters v national	1,353	620		136	484		247	212		66	146		274
Teamsters v local	1,477	1,300		602		698	64	50		46		4	63
Teamsters v Teamsters	121	67		67			0	26		26			28
National v local	4,895	4,757			2,431	2,326	138	0			0	0	0
National v national	68	66			66		2	0			0		0
Local v local	1,127	939				939	66	40				40	82
2-union elections	50,122	28,707	11,191	3,864	5,548	8,104	3,022	6,292	4,430	1,080	408	374	12,101
AFL-CIO v AFL-CIO v AFL-CIO	199	0	0				0	72	72				127
AFL-CIO v AFL-CIO v Teamsters	377	17	15	2			10	157	8	149			193
AFL-CIO v AFL-CIO v. national	356	256	8		248		100	0	0		0		0
AFL-CIO v AFL-CIO v. local	669	393	208			185	10	64	64			0	202
AFL-CIO v Teamsters v local	533	510	10	173		327	23	0	0	0		0	0
AFL-CIO v national v. local	168	167	76		4	87	1	0	0		0	0	0
AFL-CIO v local v local	86	54	2			52	0	15	0			15	17
Teamsters v local v local	96	96		51		45	0	0		0		0	0
National v local v local	84	0			0	0	0	22			18	4	62
AFL-CIO v AFL-CIO v AFL-CIO v AFL-CIO	102	90	90				12	0	0				0
AFL-CIO v AFL-CIO v Teamsters v local	63	57	12	45		0	6	0	0	0		0	0
3(or more) union elections	2,733	1,640	421	271	252	696	162	330	144	149	18	19	601
Total representation elections	417,563	111,703	61,130	20,964	14,529	15,080	44,243	87,580	57,681	17,746	7,987	4,166	174,037

Table 14.—Valid Votes Cast in Representation Elections, by Final Results of Election, in Cases Closed, Fiscal Year 1978—Continued

Participating unions	Total Valid votes cast	Valid votes cast in elections won						Valid votes cast in elections lost					
		Votes for unions					Total votes for no union	Votes for unions					Total votes for no union
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions	
	B Elections in RC cases												
AFL-CIO	209,359	42,641	42,641				22,095	48,980	48,980				95,643
Teamsters	69,962	15,772		15,772			7,792	15,166		15,166			31,232
Other national unions	30,891	7,524			7,524		3,557	7,312			7,312		12,498
Other local unions	19,362	6,169				6,169	2,550	3,692				3,692	6,951
1-union elections	329,574	72,106	42,641	15,772	7,524	6,169	35,994	75,150	48,980	15,166	7,312	3,692	146,324
AFL-CIO v AFL-CIO	13,188	3,055	3,055				616	3,324	3,324				6,193
AFL-CIO v Teamsters	9,471	4,954	2,337	2,617			944	1,338	473	865			2,235
AFL-CIO v national	5,063	3,361	1,076		2,285		413	497	235		262		792
AFL-CIO v local	8,167	4,903	2,263			2,640	320	699	369			330	2,245
Teamsters v national	1,015	620		136	484		247	63		59	4		85
Teamsters v. local	1,290	1,133		488		645	62	41		37		4	54
Teamsters v Teamsters	83	67		67			0	7		7			9
National v local	4,869	4,732			2,421	2,311	137	0			0	0	0
National v national	68	66			66		2	0			0		0
Local v local	1,127	939				939	66	40				40	82
2-union elections	44,341	23,830	8,731	3,308	5,256	6,535	2,807	6,009	4,401	968	266	374	11,695
AFL-CIO v AFL-CIO v AFL-CIO	199	0	0				0	72	72				127
AFL-CIO v AFL-CIO v. Teamsters	377	17	15	2			10	157	8	149			193
AFL-CIO v AFL-CIO v national	356	256	8		248		100	0	0		0		0
AFL-CIO v. AFL-CIO v local	669	393	208			185	10	64	64			0	202
AFL-CIO v Teamsters v local	533	510	10	173		327	23	0	0	0		0	0
AFL-CIO v. national v local	168	167	76		4	87	1	0	0			0	0
AFL-CIO v local v local	86	54	2			52	0	15	0			15	17
Teamsters v local v local	96	96		51		45	0	0		0		0	0
National v local v local	84	0			0	0	0	22			18	4	62
3(or more) union elections	2,568	1,493	319	226	252	696	144	330	144	149	18	19	601
Total RC elections	376,483	97,429	51,691	19,306	13,032	13,400	38,945	81,489	53,525	16,283	7,596	4,085	158,620

C Elections in RM cases													
AFL–CIO	4,940	882	882				500	832	832				2,726
Teamsters	1,310	306		306			108	207		207			689
Other national unions	102	33			33		12	25			25		32
Other local unions	62	48				48	7	0				0	7
1-union elections	6,414	1,269	882	306	33	48	627	1,064	832	207	25	0	3,454
AFL–CIO v AFL–CIO	4	2	2				0	0	0				2
AFL–CIO v. Teamsters	16	16	2	14			0	0	0	0			0
AFL–CIO v national	10	10	2		8		0	0	0		0		0
AFL–CIO v local	47	44	26			18	3	0	0			0	0
Teamsters v Teamsters	38	0		0			0	19	0	19			19
2-union elections	115	72	32	14	8	18	3	19	0	19	0	0	21
Total RM elections	6,529	1,341	914	320	41	66	630	1,083	832	226	25	0	3,475
D. Elections in RD cases													
AFL–CIO	20,689	5,995	5,995				3,371	3,295	3,295				8,028
Teamsters	5,208	751		751			414	1,144		1,144			2,899
Other national unions	2,410	1,172			1,172		629	224			224		385
Other local unions	413	63				63	24	81				81	245
1-union elections	28,720	7,981	5,995	751	1,172	63	4,438	4,744	3,295	1,144	224	81	11,557
AFL–CIO v AFL–CIO	55	45	45				10	0	0				0
AFL–CIO v Teamsters	994	648	220	428			53	106	29	77			187
AFL–CIO v. national	532	481	207		274		51	0	0		0		0
AFL–CIO v. local	3,534	3,439	1,956			1,483	95	0	0			0	0
Teamsters v. national	338	0		0	0		0	149		7	142		189
Teamsters v local	187	167		114		53	2	9		9		0	9
National v. local	26	25			10	15	1	0			0	0	0
2-union elections	5,666	4,805	2,428	542	284	1,551	212	264	29	93	142	0	385
AFL–CIO v AFL–CIO v. AFL–CIO v AFL–CIO	102	90	90				12	0	0	0			0
AFL–CIO v AFL–CIO v. Teamsters	63	57	12	45		0	6	0	0	0		0	0
3(or more) union elections	165	147	102	45	0	0	18	0	0	0	0	0	0
Total RD elections	34,551	12,933	8,525	1,338	1,456	1,614	4,668	5,008	3,324	1,237	366	81	11,942

[1] See Glossary for definitions of terms.

Table 15A.—Geographic Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1978

Division and State [1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for union					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		
Maine	44	14	9	5	0	0	30	4,097	3,695	1,375	1,045	159	0	171	2,320	244
New Hampshire	18	10	7	3	0	0	8	1,130	1,041	387	352	35	0	0	654	146
Vermont	16	9	7	2	0	0	7	972	921	347	211	58	16	62	574	279
Massachusetts	243	104	45	45	3	11	139	14,396	12,687	5,094	2,716	1,355	549	474	7,593	2,802
Rhode Island	33	18	9	4	2	3	15	5,059	4,651	1,704	1,345	187	28	144	2,947	506
Connecticut	100	45	24	9	5	7	55	5,781	4,952	2,231	1,341	452	152	286	2,721	1,708
New England	454	200	101	68	10	21	254	31,435	27,947	11,138	7,010	2,246	745	1,137	16,809	5,685
New York	598	294	183	53	27	31	304	30,645	26,409	14,341	6,885	2,124	2,440	2,892	12,068	14,804
New Jersey	352	167	80	48	11	28	185	17,696	15,468	7,706	3,979	2,249	426	1,052	7,762	8,404
Pennsylvania	510	212	123	61	15	13	298	33,276	29,363	14,601	7,359	2,608	3,069	1,565	14,762	12,421
Middle Atlantic	1,460	673	386	162	53	72	787	81,617	71,240	36,648	18,223	6,981	5,935	5,509	34,592	35,629
Ohio	519	235	136	79	13	7	284	28,355	25,858	10,941	6,878	1,806	1,751	506	14,917	7,867
Indiana	249	111	64	33	10	4	138	17,134	15,266	8,414	5,163	703	1,342	1,206	6,852	7,784
Illinois	436	202	107	69	14	12	234	19,978	17,283	7,604	4,987	1,549	694	374	9,679	6,174
Michigan	476	231	104	58	41	28	245	23,234	20,284	10,941	3,782	1,334	3,464	2,361	9,343	11,275
Wisconsin	211	94	50	35	3	6	117	12,078	10,755	4,892	3,356	974	323	239	5,863	3,584
East North Central	1,891	873	461	274	81	57	1,018	100,799	89,446	42,792	24,166	6,366	7,574	4,686	46,654	36,684
Iowa	104	47	26	16	4	1	57	5,234	4,801	2,152	1,005	280	853	14	2,649	1,490
Minnesota	192	90	49	31	9	1	102	7,162	6,431	2,911	1,707	897	296	11	3,520	2,349
Missouri	198	105	46	48	8	3	93	6,638	5,801	2,939	1,875	733	180	151	2,862	2,562
North Dakota	31	16	10	5	0	1	15	639	561	289	143	123	0	23	272	177
South Dakota	18	5	1	4	0	0	13	860	768	253	207	46	0	0	515	134
Nebraska	44	23	18	4	1	0	21	1,954	1,567	644	531	104	6	3	923	592
Kansas	61	21	13	7	1	0	40	2,173	1,932	787	541	231	15	0	1,145	447
West North Central	648	307	163	115	23	6	341	24,660	21,861	9,975	6,009	2,414	1,350	202	11,886	7,751
Delaware	20	11	6	3	2	0	9	1,421	1,297	642	511	71	60	0	655	824
Maryland	156	53	25	25	1	2	103	8,009	7,110	2,860	1,955	704	73	128	4,250	1,610
District of Columbia	32	17	14	1	0	2	15	2,006	1,532	822	517	13	0	292	710	1,255

Virginia	102	50	38	8	3	1	52	8,157	7,413	3,549	2,610	312	589	38	3,864	3,399
West Virginia	73	37	22	10	5	0	36	4,563	3,838	2,219	1,367	269	365	218	1,619	1,974
North Carolina	101	31	16	14	1	0	70	13,269	12,146	5,680	3,699	1,956	25	0	6,466	4,912
South Carolina	34	13	7	5	0	1	21	3,252	2,984	1,297	1,151	133	0	13	1,687	1,055
Georgia	143	59	47	10	2	0	84	12,503	11,425	5,125	3,636	1,385	104	0	6,300	4,030
Florida	151	54	31	21	1	1	97	7,718	6,858	2,893	1,827	786	167	113	3,965	2,851
South Atlantic	812	325	206	97	15	7	487	60,898	54,603	25,087	17,273	5,629	1,383	802	29,516	21,910
Kentucky	119	55	25	19	9	2	64	10,502	9,512	4,057	1,779	1,459	723	96	5,455	2,715
Tennessee	151	68	44	20	2	2	83	11,276	10,357	4,863	3,404	1,230	189	40	5,494	3,917
Alabama	104	53	42	6	5	0	51	13,817	12,518	6,006	4,894	479	451	182	6,512	5,155
Mississippi	59	30	26	4	0	0	29	5,887	5,462	2,775	2,663	112	0	0	2,687	2,790
East South Central	433	206	137	49	16	4	227	41,482	37,849	17,701	12,740	3,280	1,363	318	20,148	14,577
Arkansas	73	31	22	7	2	0	42	7,454	6,769	2,949	1,995	572	382	0	3,820	2,281
Louisiana	77	31	17	11	2	1	46	5,195	4,755	2,260	1,468	385	325	82	2,495	2,285
Oklahoma	80	36	25	6	3	2	44	4,216	3,840	1,573	788	219	557	9	2,267	984
Texas	236	121	79	27	6	9	115	24,342	21,525	10,262	6,245	1,729	547	1,741	11,263	8,611
West South Central	466	219	143	51	13	12	247	41,207	36,889	17,044	10,496	2,905	1,811	1,832	19,845	14,161
Montana	50	24	15	5	0	4	26	1,826	1,594	782	363	141	0	278	812	836
Idaho	40	15	10	5	0	0	25	2,537	2,343	927	427	500	0	0	1,416	452
Wyoming	17	10	5	0	5	0	7	749	663	405	243	0	162	0	258	442
Colorado	109	53	39	12	1	1	56	4,005	3,546	1,582	1,290	205	47	40	1,964	1,351
New Mexico	53	30	26	4	0	0	23	1,512	1,313	700	598	99	3	0	613	932
Arizona	87	47	28	17	1	1	40	5,425	4,727	2,304	1,805	440	4	55	2,423	2,613
Utah	27	14	7	6	1	0	13	1,107	938	423	293	112	18	0	515	587
Nevada	22	6	5	1	0	0	16	1,066	878	358	277	78	0	3	520	272
Mountain	405	199	135	50	8	6	206	18,227	16,002	7,481	5,296	1,575	234	376	8,521	7,485
Washington	285	142	71	61	4	6	143	7,497	6,546	3,290	1,933	1,067	95	195	3,256	3,406
Oregon	140	61	35	20	1	5	79	5,592	4,832	2,582	1,385	410	24	763	2,250	2,613
California	1,048	477	285	146	22	24	571	46,565	40,651	20,541	12,247	5,049	1,708	1,537	20,110	21,508
Alaska	44	19	12	5	1	1	25	1,789	1,509	804	280	451	6	67	705	864
Hawaii	39	22	12	5	5	0	17	1,593	1,374	830	279	218	310	23	544	734
Guam	1	0	0	0	0	0	1	160	130	5	5	0	0	0	125	0
Pacific	1,557	721	415	237	33	36	836	63,196	55,042	28,052	16,129	7,195	2,143	2,585	26,990	29,125
Puerto Rico	100	60	23	2	1	34	40	7,694	6,200	3,067	1,171	119	54	1,723	3,133	3,748
Virgin Islands	14	8	8	0	0	0	6	624	484	298	298	0	0	0	186	501
Outlying Areas	114	68	31	2	1	34	46	8,318	6,684	3,365	1,469	119	54	1,723	3,319	4,249
Total, all States and areas	8,240	3,791	2,178	1,105	253	255	4,449	471,819	417,563	199,283	118,811	38,710	22,592	19,170	218,280	177,256

[1] The States are grouped according to the method used by the Bureau of the Census, U.S. Department of Commerce.

Table 15B.—Standard Federal Administrative Regional Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1978

Standard Federal regions[1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		
Connecticut	100	45	24	9	5	7	55	5,781	4,952	2,231	1,341	452	152	286	2,721	1,708
Maine	44	14	9	5	0	0	30	4,097	3,695	1,375	1,045	159	0	171	2,320	244
Massachusetts	243	104	45	45	3	11	139	14,396	12,687	5,094	2,716	1,355	549	474	7,593	2,802
New Hampshire	18	10	7	3	0	0	8	1,130	1,041	387	352	35	0	0	654	146
Rhode Island	33	18	9	4	2	3	15	5,059	4,651	1,704	1,345	187	28	144	2,947	506
Vermont	16	9	7	2	0	0	7	972	921	347	211	58	16	62	574	279
Region I	454	200	101	68	10	21	254	31,435	27,947	11,138	7,010	2,246	745	1,137	16,809	5,685
Delaware	20	11	6	3	2	0	9	1,421	1,297	642	511	71	60	0	655	824
New Jersey	352	167	80	48	11	28	185	17,696	15,468	7,706	3,979	2,249	426	1,052	7,762	8,404
New York	598	294	183	53	27	31	304	30,645	26,409	14,341	6,885	2,124	2,440	2,892	12,068	14,804
Puerto Rico	100	60	23	2	1	34	40	7,694	6,200	3,067	1,171	119	54	1,723	3,133	3,748
Virgin Islands	14	8	8	0	0	0	6	624	484	298	298	0	0	0	186	501
Region II	1,084	540	300	106	41	93	544	58,080	49,858	26,054	12,844	4,563	2,980	5,667	23,804	28,281
District of Columbia	32	17	14	1	0	2	15	2,006	1,532	822	517	13	0	292	710	1,255
Maryland	156	53	25	25	1	2	103	8,009	7,110	2,860	1,955	704	73	128	4,250	1,610
Pennsylvania	510	212	123	61	15	13	298	33,276	29,363	14,601	7,359	2,608	3,069	1,565	14,762	12,421
Virginia	102	50	38	8	3	1	52	8,157	7,413	3,549	2,610	312	589	38	3,864	3,399
West Virginia	73	37	22	10	5	0	36	4,563	3,838	2,219	1,367	269	365	218	1,619	1,974
Region III	873	369	222	105	24	18	504	56,011	49,256	24,051	13,808	3,906	4,096	2,241	25,205	20,659
Alabama	104	53	42	6	5	0	51	13,817	12,518	6,006	4,894	479	451	182	6,512	5,155
Florida	151	54	31	21	1	1	97	7,718	6,858	2,893	1,827	786	167	113	3,965	2,851
Georgia	143	59	47	10	2	0	84	12,503	11,425	5,125	3,636	1,385	104	0	6,300	4,030
Kentucky	119	55	25	19	9	2	64	10,502	9,512	4,057	1,779	1,459	723	96	5,455	2,715
Mississippi	59	30	26	4	0	0	29	5,887	5,462	2,775	2,663	112	0	0	2,687	2,790
North Carolina	101	31	16	14	1	0	70	13,269	12,146	5,680	3,699	1,956	25	0	6,466	4,912
South Carolina	34	13	7	5	0	1	21	3,252	2,984	1,297	1,151	133	0	13	1,687	1,055
Tennessee	151	68	44	20	2	2	83	11,276	10,357	4,863	3,404	1,230	189	40	5,494	3,917
Region IV	862	363	238	99	20	6	499	78,224	71,262	32,696	23,053	7,540	1,659	444	38,566	27,425

Illinois	436	202	107	69	14	12	234	19,978	17,283	7,604	4,987	1,549	694	374	9,679	6,174
Indiana	249	111	64	33	10	4	138	17,134	15,266	8,414	5,163	703	1,342	1,206	6,852	7,784
Michigan	476	231	104	58	41	28	245	23,234	20,284	10,941	3,782	1,334	3,464	2,361	9,343	11,275
Minnesota	192	90	49	31	9	1	102	7,162	6,431	2,911	1,707	897	296	11	3,520	2,349
Ohio	519	235	136	79	13	7	284	28,355	25,858	10,941	6,878	1,806	1,751	506	14,917	7,867
Wisconsin	211	94	50	35	3	6	117	12,078	10,755	4,892	3,356	974	323	239	5,863	3,584
Region V	2,083	963	510	305	90	58	1,120	107,941	95,877	45,703	25,873	7,263	7,870	4,697	50,174	39,033
Arkansas	73	31	22	7	2	0	42	7,454	6,769	2,949	1,995	572	382	0	3,820	2,281
Louisiana	77	31	17	11	2	1	46	5,195	4,755	2,260	1,468	385	325	82	2,495	2,285
New Mexico	53	30	26	4	0	0	23	1,512	1,313	700	598	99	3	0	613	932
Oklahoma	80	36	25	6	3	2	44	4,216	3,840	1,573	788	219	557	9	2,267	984
Texas	236	121	79	27	6	9	115	24,342	21,525	10,262	6,245	1,729	547	1,741	11,263	8,611
Region VI	519	249	169	55	13	12	270	42,719	38,202	17,744	11,094	3,004	1,814	1,832	20,458	15,093
Iowa	104	47	26	16	4	1	57	5,234	4,801	2,152	1,005	280	853	14	2,649	1,490
Kansas	61	21	13	7	1	0	40	2,173	1,932	787	541	231	15	0	1,145	447
Missouri	198	105	46	48	8	3	93	6,638	5,801	2,939	1,875	733	180	151	2,862	2,562
Nebraska	44	23	18	4	1	0	21	1,954	1,567	644	531	104	6	3	923	592
Region VII	407	196	103	75	14	4	211	15,999	14,101	6,522	3,952	1,348	1,054	168	7,579	5,091
Colorado	109	53	39	12	1	1	56	4,005	3,546	1,582	1,290	205	47	40	1,964	1,351
Montana	50	24	15	5	0	4	26	1,826	1,594	782	363	141	0	278	812	836
North Dakota	31	16	10	5	0	1	15	639	561	289	143	123	0	23	272	177
South Dakota	18	5	1	4	0	0	13	860	768	253	207	46	0	0	515	134
Utah	27	14	7	6	1	0	13	1,107	938	423	293	112	18	0	515	587
Wyoming	17	10	5	0	5	0	7	749	663	405	243	0	162	0	258	442
Region VIII	252	122	77	32	7	6	130	9,186	8,070	3,734	2,539	627	227	341	4,336	3,527
Arizona	87	47	28	17	1	1	40	5,425	4,727	2,304	1,805	440	4	55	2,423	2,613
California	1,048	477	285	146	22	24	571	46,565	40,651	20,541	12,247	5,049	1,708	1,537	20,110	21,508
Hawaii	39	22	12	5	5	0	17	1,593	1,374	830	279	218	310	23	544	734
Guam	1	0	0	0	0	0	1	160	130	5	5	0	0	0	125	0
Nevada	22	6	5	1	0	0	16	1,066	878	358	277	78	0	3	520	272
Region IX	1,197	552	330	169	28	25	645	54,809	47,760	24,038	14,613	5,785	2,022	1,618	23,722	25,127
Alaska	44	19	12	5	1	1	25	1,789	1,509	804	280	451	6	67	705	864
Idaho	40	15	10	5	0	0	25	2,537	2,343	927	427	500	0	0	1,416	452
Oregon	140	61	35	20	1	5	79	5,592	4,832	2,582	1,385	410	24	763	2,250	2,613
Washington	285	142	71	61	4	6	143	7,497	6,546	3,290	1,933	1,067	95	195	3,256	3,406
Region X	509	237	128	91	6	12	272	17,415	15,230	7,603	4,025	2,428	125	1,025	7,627	7,335
Total, all Federal regions	8,240	3,791	2,178	1,105	253	255	4,449	471,819	417,563	199,283	118,811	38,710	22,592	19,170	218,280	177,256

[1]The States are grouped according to the 10 Standard Federal Administrative regions.

Table 16.—Industrial Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1978

Industrial group [1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL–CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL–CIO unions	Teamsters	Other national unions	Other local unions		
Food and kindred products	425	202	111	74	6	11	223	27,297	24,353	11,041	5,774	4,768	71	428	13,312	10,035
Tobacco manufactures	1	0	0	0	0	0	1	38	38	16	0	16	0	0	22	0
Textile mill products	78	29	22	3	0	4	49	10,758	9,847	4,556	3,679	725	19	133	5,291	3,119
Apparel and other finished products made from fabrics and similar materials	96	28	24	3	0	1	68	12,560	11,401	4,701	4,420	217	0	64	6,700	3,365
Lumber and wood products (except furniture)	210	95	78	13	2	2	115	14,129	12,754	5,583	4,738	555	229	61	7,171	4,484
Furniture and fixtures	116	55	35	17	3	0	61	10,085	9,115	4,741	3,255	1,140	343	3	4,374	5,270
Paper and allied products	127	51	34	12	1	4	76	7,062	6,329	3,193	2,006	410	37	740	3,136	2,638
Printing, publishing, and allied industries	262	123	102	7	3	11	139	13,705	12,418	5,914	3,862	1,451	184	417	6,504	4,552
Chemicals and allied products	193	90	47	33	6	4	103	12,724	11,337	5,530	3,574	1,225	388	343	5,807	3,987
Petroleum refining and related industries	67	29	16	10	1	2	38	2,614	2,375	1,116	539	273	83	221	1,259	915
Rubber and miscellaneous plastics products	198	84	47	22	9	6	114	15,571	14,092	6,207	4,046	1,054	908	199	7,885	4,579
Leather and leather products	30	11	7	2	2	0	19	5,584	4,916	2,290	1,909	61	320	0	2,626	1,778
Stone, clay, glass, and concrete products	170	69	32	30	3	4	101	10,062	9,160	4,357	2,193	1,668	418	78	4,803	4,704
Primary metal industries	227	112	70	18	13	11	115	20,789	18,700	9,217	5,558	1,040	1,102	1,517	9,483	9,445
Fabricated metal products (except machinery and transportation equipment)	389	158	96	35	22	5	231	27,929	25,404	11,593	6,315	2,294	2,670	314	13,811	8,928
Machinery (except electrical)	376	147	100	19	20	8	229	31,673	29,181	14,897	8,364	1,528	2,710	2,295	14,284	12,764
Electrical and electronic machinery, equipment, and supplies	210	80	54	16	6	4	130	23,271	20,968	8,881	6,032	952	1,801	96	12,087	5,879
Aircraft and parts	142	61	13	13	33	2	81	17,297	16,230	9,845	1,727	799	6,133	1,186	6,385	9,863
Ship and boat building and repairing	23	11	10	1	0	0	12	4,967	4,579	1,618	1,427	191	0	0	2,961	440
Automotive and other transportation equipment	21	11	9	0	1	1	10	1,650	1,498	732	442	69	186	35	766	672
Measuring, analyzing, and controlling instruments, photographic, medical, and optical goods, watches and clocks	68	35	25	5	4	1	33	5,455	5,007	2,703	1,869	174	356	304	2,304	2,593
Miscellaneous manufacturing industries	136	58	26	21	5	6	78	10,152	9,186	4,630	2,167	1,209	417	837	4,556	4,333
Manufacturing	3,565	1,539	958	354	140	87	2,026	285,372	258,888	123,361	73,896	21,819	18,375	9,271	135,527	104,343

Metal mining	19	7	5	1	1	0	12	1,201	1,063	494	441	9	40	4	569	507
Coal mining	42	23	3	0	18	2	19	2,071	1,857	1,358	255	2	932	169	499	1,487
Crude petroleum and natural gas production	9	5	5	0	0	0	4	158	130	72	56	16	0	0	58	79
Mining and quarrying of nonmetallic minerals (except fuels)	35	17	10	6	0	1	18	1,217	1,110	605	415	140	0	50	505	551
Mining	105	52	23	7	19	3	53	4,647	4,160	2,529	1,167	167	972	223	1,631	2,624
Construction	205	95	73	12	6	4	110	4,563	3,871	1,860	1,407	179	166	108	2,011	1,817
Wholesale trade	844	393	99	269	18	7	451	17,508	15,706	7,593	2,503	4,276	632	182	8,113	7,025
Retail trade	1,079	442	289	103	29	21	637	37,922	32,469	13,828	9,900	2,913	402	613	18,641	10,984
Finance, insurance, and real estate	155	76	61	8	0	7	79	4,572	3,912	1,618	1,218	227	29	144	2,294	1,387
U S Postal Service	3	3	1	1	0	1	0	58	44	44	20	3	0	21	0	58
Local and suburban transit and interurban highway passenger transportation	55	29	14	11	0	4	26	3,933	3,243	1,636	1,069	293	0	274	1,607	1,441
Motor freight transportation and warehousing	415	213	32	171	5	5	202	12,105	10,660	4,958	797	2,874	52	1,235	5,702	3,985
Water transportation	22	14	7	3	1	3	8	1,599	1,444	1,138	482	233	93	330	306	1,248
Other transportation	57	31	10	17	2	2	26	1,752	1,565	760	303	289	26	142	805	813
Communication	215	118	105	7	3	3	97	8,933	7,751	4,061	3,654	236	111	60	3,690	4,822
Electric, gas, and sanitary services	128	68	50	14	1	3	60	4,747	4,349	2,353	1,825	400	8	120	1,996	2,482
Transportation, communication, and other utilities	892	473	218	223	12	20	419	33,069	29,012	14,906	8,130	4,325	290	2,161	14,106	14,791
Hotels, rooming houses, camps, and other lodging places	98	34	27	2	1	4	64	6,441	4,991	2,069	1,464	246	216	143	2,922	2,054
Personal services	55	24	11	12	1	0	31	1,116	982	566	314	223	28	1	416	731
Automotive repair, services, and garages	114	67	25	38	2	2	47	1,998	1,708	883	317	523	21	22	825	1,010
Motion pictures	9	5	5	0	0	0	4	81	70	36	36	0	0	0	34	29
Amusement and recreation services (except motion pictures)	36	12	8	3	1	0	24	2,064	1,755	815	373	140	271	31	940	929
Health services	596	324	229	29	11	55	272	51,276	43,100	20,670	13,812	2,214	693	3,951	22,430	19,592
Educational services	64	33	20	3	0	10	31	3,644	3,196	1,435	813	173	2	447	1,761	1,027
Membership organizations	32	21	9	2	0	10	11	1,118	951	537	227	24	0	286	414	839
Business services	274	138	80	34	11	13	136	13,201	9,970	4,994	2,277	1,163	267	1,287	4,976	6,446
Miscellaneous repair services	37	15	12	2	1	0	22	697	633	283	226	26	31	0	350	222
Legal services	22	16	5	0	0	11	6	490	426	315	94	0	0	221	111	369
Social services	38	23	21	1	1	0	15	1,659	1,421	825	532	57	178	58	596	917
Miscellaneous services	10	1	1	0	0	0	9	217	197	60	56	0	4	0	137	11
Services	1,385	713	453	126	29	105	672	84,002	69,400	33,488	20,541	4,789	1,711	6,447	35,912	34,176
Public administration	7	5	3	2	0	0	2	106	101	56	29	12	15	0	45	51
Total, all industrial groups	8,240	3,791	2,178	1,105	253	255	4,449	471,819	417,563	199,283	118,811	36,710	22,592	19,170	218,280	177,256

[1] Source: Standard Industrial Classification, Statistical Policy Division, Office of Management and Budget, Washington 1972.

Table 17.—Size of Units in Representation Election Cases Closed, Fiscal Year 1978 [1]

Size of unit (number of employees)	Number eligible to vote	Total elections	Percent of total	Cumulative percent of total	Elections in which representation rights were won by								Elections in which no representative was chosen	
					AFL-CIO unions		Teamsters		Other national unions		Other local unions			
					Number	Percent by size class	Number	Percent by size class	Number	Percent by size class	Number	Percent by size class	Number	Percent by size class
	A Certification elections (RC and RM)													
Total RC and RM elections	432,264	7,433	100.0		2,037	100 0	1,054	100 0	239	100 0	248	100 0	3,855	100 0
Under 10	10,047	1,755	23 6	23 6	523	26 1	457	43 3	47	19 7	38	15 3	690	17 9
10 to 19	22,530	1,604	21 6	45.2	447	21 9	247	23.4	57	23 8	47	19 2	806	20.9
20 to 29	22,747	945	12 7	57 9	288	14 1	116	11 0	26	10 9	38	15 3	477	12 4
30 to 39	22,181	646	8.7	66.6	189	9 3	67	6 4	17	7 1	25	10 1	348	9 0
40 to 49	19,103	433	5 8	72 4	132	6 5	32	3 0	15	6 3	15	6.0	239	6 2
50 to 59	16,167	297	4 0	76 4	82	4 0	27	2 6	9	3.8	16	6.5	163	4 2
60 to 69	17,089	266	3.6	80 0	62	3 0	21	2.0	8	3 3	9	3.6	166	4 3
70 to 79	13,274	179	2 4	82.4	45	2.2	12	1.1	6	2.5	7	2.8	109	2.8
80 to 89	13,143	156	2 1	84.5	45	2 2	16	1 5	2	0 8	8	3.2	85	2.2
90 to 99	11,707	124	1.7	86 2	38	1 9	10	0 9	0		6	2 4	70	1 8
100 to 109	11,669	112	1 5	87 7	27	1.3	8	0 8	5	2 1	5	2 0	67	1 7
110 to 119	10,204	89	1 2	88 9	18	0 9	10	0 9	7	2 9	4	1 6	50	1 3
120 to 129	7,278	59	0 8	89 7	19	0 9	3	0.3	3	1 3	1	0.4	33	0.9
130 to 139	9,689	72	1.0	90.7	13	0 6	2	0 2	1	0 4	0		56	1 5
140 to 149	8,972	62	0.8	91 5	8	0 4	2	0 2	3	1 3	2	0 8	47	1.2
150 to 159	6,604	43	0.6	92.1	7	0 3	2	0 2	4	1.7	1	0 4	29	0.8
160 to 169	7,866	48	0.6	92.7	6	0.3	2	0 2	3	1.3	1	0 4	36	0 9
170 to 179	6,284	36	0.5	93 2	9	0 4	1	0 1	2	0.8	4	1.6	20	0 5
180 to 189	6,820	37	0 5	93 7	8	0 4	2	0 2	0		1	0.4	26	0.7
190 to 199	5,819	30	0 4	94 1	6	0 3	0		2	0 8	0		22	0 6
200 to 299	45,388	192	2 6	96 7	35	1 7	5	0.5	6	2 5	6	2 4	140	3.6
300 to 399	36,442	107	1 4	98 1	14	0.7	4	0 4	5	2 1	3	1 2	81	2.1
400 to 499	25,495	57	0.8	98 9	9	0.4	2	0.2	3	1 3	3	1 2	40	1.0
500 to 599	16,082	30	0 4	99 3	5	0.2	0		2	0 8	3	1 2	20	0.5
600 to 799	18,440	27	0 4	99 7	1	0 0	4	0.4	3	1.3	1	0 4	18	0 5
800 to 999	7,885	9	0 1	99 8	1	0.0	0		2	0 8	1	0 4	5	0 1
1,000 to 1,999	19,200	13	0.2	100 0	0		2	0 2	0		3	1.2	8	0 2
2,000 to 2,999	7,013	3	0.0	100 0	0		0		1	0 4	0		2	0.1
3,000 to 9,999	7,126	2	0.0	100.0	0		0		0		0		2	0.1

	B Decertification elections (RD)													
Total RD elections	39,555	807	100 0	----------	141	100 0	51	100 0	14	100 0	7	100 0	594	100 0
Under 10	1,296	232	29 1	29 1	13	9 2	9	17 6	1	7 1	0	----------	209	35 2
10 to 19	2,758	200	24 8	53 9	22	15 7	11	21 5	5	35 9	3	42 8	159	26 8
20 to 29	2,200	91	11 3	65 2	18	12 8	10	19 5	0	----------	1	14 3	62	10 4
30 to 39	2,344	68	8 4	73 6	19	13 5	5	9 7	0	----------	0	----------	44	7 4
40 to 49	1,351	31	3.8	77 4	8	5 7	2	3 9	0	----------	1	14 3	20	3 4
50 to 59	2,084	39	4.8	82 2	11	7 8	3	5 9	1	7 1	1	14 3	23	3 9
60 to 69	1,578	25	3.1	85 3	4	2 8	3	5 9	0	----------	0	----------	18	3.0
70 to 79	979	13	1.6	86 9	5	3 6	1	2 0	1	7.1	0	----------	6	1 0
80 to 89	678	8	1 0	87 9	4	2.8	1	2 0	0	----------	0	----------	3	0 5
90 to 99	750	8	1 0	88 9	2	1.4	1	2 0	0	----------	0	----------	5	0.8
100 to 109	1,024	10	1 2	90.1	4	2 8	1	2 0	0	----------	0	----------	5	0.8
110 to 119	576	5	0.6	90 7	2	1.4	1	2 0	0	----------	0	----------	2	0.3
120 to 129	745	6	0 7	91.4	2	1 4	0	----------	0	----------	0	----------	4	0.7
130 to 139	1,344	10	1.2	92.6	3	2 1	1	2 0	0	----------	0	----------	6	1 0
140 to 149	874	6	0.7	93.3	1	0.7	1	2 0	0	----------	0	----------	4	0.7
150 to 159	621	4	0 5	93.8	3	2.1	0	----------	0	----------	0	----------	1	0 2
160 to 169	826	5	0 6	94.4	2	1.4	0	----------	0	----------	0	----------	3	0 5
170 to 199	899	5	0 6	95 0	4	2 8	0	----------	0	----------	0	----------	1	0 2
200 to 299	3,949	17	2 1	97.1	5	3 6	0	----------	2	14 3	0	----------	10	1.7
300 to 399	6,594	18	2.2	99.3	5	3 6	1	2.0	3	21 4	1	14.3	8	1.3
500 to 799	2,667	4	0.5	99.8	2	1 4	0	----------	1	7.1	0	----------	1	0 2
800 and over	3,418	2	0.2	100 0	2	1 4	0	----------	0	----------	0	----------	0	----------

[1] See Glossary for definitions of terms.

Table 18.—Distribution of Unfair Labor Practice Situations Received, by Number of Employees in Establishments, Fiscal Year 1978 [1]

Size of establishment (number of employees)	Total number of situations	Total		Type of situations																	
		Percent of all situations	Cumulative percent of all situations	CA		CB		CC		CD		CE		CG		CP		CA–CB combinations		Other C combinations	
				Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class
Total	[2] 35,127	100 0	-------	23,728	100 0	6,891	100 0	1,448	100.0	316	100 0	120	100 0	39	100 0	408	100 0	1,832	100 0	345	100.0
Under 10	9,898	28.3	28 3	6,257	26.5	2,180	31 7	597	41 1	98	31.5	62	51.8	2	5 1	176	43 0	372	20.5	154	44 5
10–19	2,900	8.3	36.6	2,100	8 9	369	5.4	158	10 9	43	13 6	7	5 8	3	7 6	82	20 1	103	5 6	35	10 1
20–29	2,296	6 5	43 1	1,672	7 0	303	4 4	127	8.8	32	10 1	12	10 0	1	2 6	33	8 1	94	5 1	22	6.4
30–39	1,645	4.7	47.8	1,220	5.1	238	3.5	70	4 8	14	4.4	2	1 7	1	2.6	19	4 7	65	3 5	16	4 6
40–49	1,242	3.5	51 3	911	3.8	200	2 9	39	2 7	10	3 2	2	1 7	0	-------	17	4 2	52	2 8	11	3 2
50–59	1,322	3.8	55 1	943	4 0	233	3 4	50	3.5	13	4 1	1	0.8	6	15.4	9	2 2	53	2 9	14	4 1
60–69	868	2 5	57.6	625	2 6	130	1 9	27	1 9	13	4.1	4	3.3	1	2 6	11	2.7	54	2 9	3	0 9
70–79	693	2 0	59.6	518	2 2	104	1 5	21	1.5	2	0 6	2	1.7	2	5 1	6	1 5	31	1.7	7	2 0
80–89	537	1.5	61.1	426	1 8	75	1 1	11	0 8	1	0.3	0	-------	2	5 1	4	1 0	16	0 9	2	0.6
90–99	341	1 0	62.1	242	1 0	57	0 8	16	1 1	3	0.9	0	-------	0	-------	4	1 0	14	0 8	5	1 4
100–109	1,339	3 8	65 9	848	3 6	278	4 0	49	3 4	16	5.1	1	0 8	0	-------	17	4 2	116	6 3	14	4.1
110–119	217	0.6	66 5	168	0 7	28	0.4	8	0 6	1	0.3	0	-------	0	-------	1	0 2	11	0 6	0	-------
120–129	416	1.2	67.7	307	1 3	77	1 1	10	0 7	3	0.9	0	-------	0	-------	2	0.5	16	0 9	1	0.3
130–139	200	0.6	68 3	148	0 6	32	0 5	7	0 5	1	0.3	0	-------	1	2 6	0	-------	11	0 6	0	-------
140–149	187	0.5	68 8	144	0.6	24	0 3	5	0.3	1	0.3	0	-------	0	-------	2	0 5	11	0 6	0	-------
150–159	739	2.1	70.9	517	2.2	134	1 9	29	2 0	3	0.9	1	0 8	3	7.6	6	1 5	44	2 4	2	0.6
160–169	165	0.5	71.4	121	0 5	27	0 4	9	0 6	2	0 6	0	-------	0	-------	2	0 5	4	0 2	0	-------
170–179	189	0.5	71 9	132	0 6	41	0.6	5	0.3	2	0.6	0	-------	0	-------	0	-------	8	0 4	1	0.3
180–189	165	0.5	72 4	136	0 6	17	0 2	4	0 3	3	0 9	0	-------	1	2 6	0	-------	4	0 2	0	-------
190–199	46	0 1	72 5	36	0 2	4	0 1	2	0 1	0	-------	0	-------	0	-------	0	-------	3	0 2	1	0.3
200–299	1,869	5.3	77 8	1,287	5.4	385	5.6	32	2 2	18	5 7	1	0 8	9	23.1	3	0.7	121	6.6	13	3 8
300–399	1,315	3.7	81.5	872	3.7	285	4 1	36	2.5	9	2 8	1	0.8	0	-------	8	2 0	94	5 1	10	2 9
400–499	818	2.3	83 8	561	2.4	187	2 7	19	1.3	5	1 6	0	-------	1	2.6	0	-------	41	2.2	4	1.2
500–599	789	2 2	86.0	543	2.3	164	2 4	18	1.2	4	1.3	0	-------	1	2.6	2	0.5	56	3.1	1	0.3
600–699	427	1 2	87 2	291	1 2	99	1.4	8	0.6	0	-------	0	-------	0	-------	0	-------	27	1 5	2	0 6
700–799	301	0.9	88 1	201	0 8	73	1 1	6	0 4	0	-------	0	-------	0	-------	0	-------	17	0 9	4	1 2
800–899	287	0.8	88.9	168	0.7	89	1.3	8	0 6	1	0 3	1	0.8	0	-------	0	-------	19	1 0	1	0.3
900–999	139	0 4	89 2	82	0 3	43	0 6	0	-------	2	0 6	0	-------	0	-------	0	-------	12	0 7	0	-------
1,000–1,999	1,311	3.7	93 0	816	3 4	319	4 6	31	2.1	8	2.5	16	13.3	3	7.6	3	0 7	110	6 0	5	1 4
2,000–2,999	661	1 9	94 9	412	1.7	168	2.4	8	0 6	2	0.6	0	-------	1	2.6	0	-------	62	3.4	8	2 3
3,000–3,999	386	1 1	96 0	231	1 0	114	1.7	7	0 5	0	-------	2	1.7	0	-------	0	-------	31	1 7	1	0.3
4,000–4,999	212	0.6	96.6	113	0 5	70	1 0	3	0.2	0	-------	0	-------	0	-------	0	-------	26	1 4	0	-------
5,000–9,999	538	1.5	98.1	294	1 2	173	2.5	10	0 7	5	1 6	2	1 7	0	-------	1	0.2	50	2.7	3	0.9
Above 9,999	669	1.9	100.0	386	1.6	171	2 5	18	1.2	1	0.3	3	2.5	1	2.6	0	-------	84	4.6	5	1.4

[1] See Glossary for definitions of terms.
[2] Based on revised situation count which absorbs companion cases, cross-filings, and multiple filings as compared to situations shown in Charts 1 and 2

Table 19.—Litigation for Enforcement and/or Review of Board Orders, Fiscal Year 1978; and Cumulative Totals, Fiscal Years 1936–1978

	Fiscal year 1978									July 5, 1935–June 30, 1978	
	Number of proceedings [1]					Percentages					
	Total	Vs employers only	Vs unions only	Vs both employers and unions	Board dismissal [2]	Vs employers only	Vs. unions only	Vs both employers and unions	Board dismissal	Number	Percent
Proceedings decided by U.S. courts of appeals	360	303	48	2	7						
On petitions for review and/or enforcement	333	284	41	2	6	100 0	100 0	100 0	100.0	6,856	100 0
Board orders affirmed in full	218	176	36	1	5	62.0	87 8	50 0	83 0	4,346	63.4
Board orders affirmed with modification	53	51	1	1	0	18.0	2.4	50.0		1,112	16.3
Remanded to Board	8	6	2	0	0	2.1	4.9			296	4.3
Board orders partially affirmed and partially remanded	7	7	0	0	0	2.5				106	1.5
Board orders set aside	47	44	2	0	1	15 4	4 9		17.0	996	14 5
On petitions for contempt	27	19	7	0	1	100 0	100.0		100.0		
Compliance after filing of petition, before court order	9	9	0	0	0	47 4					
Court orders holding respondent in contempt	16	10	6	0	0	52 6	85.7				
Court orders denying petition	2	0	1	0	1		14.3		100.0		
Proceedings decided by U S Supreme Court [3]	5	3	2	0	0	100 0	100 0			222	100.0
Board orders affirmed in full	5	3	2	0	0	100 0	100 0			135	60.7
Board orders affirmed with modification	0	0	0	0	0					16	7.2
Board orders set aside	0	0	0	0	0					34	15 3
Remanded to Board	0	0	0	0	0					18	8.1
Remanded to court of appeals	0	0	0	0	0					16	7 2
Board's request for remand or modification of enforcement order denied	0	0	0	0	0					1	0 5
Contempt cases remanded to court of appeals	0	0	0	0	0					1	0.5
Contempt cases enforced	0	0	0	0	0					1	0 5

[1] "Proceedings" are comparable to "cases" reported in annual reports prior to fiscal year 1964. This term more accurately describes the data inasmuch as a single "proceeding" often includes more than one "case." See Glossary for definitions of terms

[2] A proceeding in which the Board had entered an order dismissing the complaint and the charging party appealed such dismissal in the courts of appeals.

[3] The Board filed *amicus* briefs in two cases involving preemption questions. *Sears, Roebuck & Co.* v. *San Diego Council of Carpenters,* 436 U.S. 180; and *Malone* v. *White Motor Corp.,* 435 U.S. 497. The Board's position was sustained in the latter, but not in the former.

Table 19A.—Proceedings Decided by Circuit Courts of Appeals on Petitions for Enforcement and/or Review of Board Orders, Fiscal Year 1978, Compared With 5-Year Cumulative Totals, Fiscal Years 1973 Through 1977 [1]

Circuit courts of appeals (headquarters)	Total fiscal year 1978	Total fiscal years 1973–1977	Affirmed in full				Modified				Remanded in full				Affirmed in part and remanded in part				Set aside			
			Fiscal Year 1978		Cumulative fiscal years 1973–1977		Fiscal Year 1978		Cumulative fiscal years 1973–1977		Fiscal Year 1978		Cumulative fiscal years 1973–1977		Fiscal Year 1978		Cumulative fiscal years 1973–1977		Fiscal Year 1978		Cumulative fiscal years 1973–1977	
			Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total all circuits	333	1,419	218	65 5	1,033	72 8	53	15 9	132	9 3	8	2 4	67	4 7	7	2 1	24	1 7	47	14 1	163	11 5
1. Boston, Mass	18	59	12	66.7	45	76 8	4	22 2	8	13 5	0	------	3	5 1	0	------	0	------	2	11 1	3	5.1
2. New York, N.Y	18	132	12	66 7	101	76 5	3	16 7	10	7 6	1	5 5	3	2 3	0	------	2	1 5	2	11.1	16	12.1
3 Philadelphia, Pa	41	94	29	70.7	71	75 5	6	14 6	5	5 3	2	4 9	6	6.3	0	------	1	1 1	4	9 8	11	11 7
4 Richmond, Va	14	81	7	50 0	59	72.8	6	42 9	12	14.8	1	7.1	2	2 5	0	------	0	------	0	------	8	9 9
5 New Orleans, La	55	197	37	67 3	154	78 2	10	18.2	16	8 1	0	------	5	2 5	1	1 8	2	1 0	7	12.7	20	10 2
6 Cincinnati, Ohio	33	203	22	66.7	143	70 4	2	6.1	18	8 9	2	6 1	8	3.9	1	3 0	3	1 5	6	18.1	31	15 3
7. Chicago, Ill	31	160	14	45 2	119	74.4	9	29 0	13	8 1	0	------	7	4.4	1	3.2	0	------	7	22 6	21	13 1
8 St. Louis, Mo	29	109	16	55.2	69	63 3	5	17 2	21	19 3	0	------	3	2 8	2	6 9	2	1.8	6	20.7	14	12 8
9. San Francisco, Calif	70	215	52	74 3	151	70 2	6	8.6	19	8 8	1	1.4	13	6.1	2	2 8	5	2 3	9	12.9	27	12 6
10. Denver, Colo	9	50	4	44 4	41	82 0	1	11 1	3	6 0	1	11.1	0	------	0	------	0	------	3	33 4	6	12.0
Washington, D C	15	119	13	86 6	80	67 2	1	6.7	7	5.9	0	------	17	14.3	0	------	9	7.6	1	6.7	6	5 0

[1] Percentages are computed horizontally by current fiscal year and total fiscal years.

Table 20.—Injunction Litigation Under Section 10(e), (j), and (l), Fiscal Year 1978

	Total proceedings	Injunction Proceedings		Total dispositions	Disposition of Injunctions						Pending in district court Sept. 30, 1978
		Pending in district court Oct 1, 1977	Filed in district court fiscal year 1978		Granted	Denied	Settled	Withdrawn	Dismissed	Inactive	
Under sec 10(e), total	9	0	9	6	2	3	1	0	0	0	3
Under sec 10(j), total	56	10	46	45	20	2	19	3	0	1	11
8(a)(1)	1	1	0	1	1	0	0	0	0	0	0
8(a)(1)(2)	3	1	2	2	0	0	1	1	0	0	1
8(a)(1)(3)	5	0	5	5	2	1	1	1	0	0	0
8(a)(1)(4)	1	0	1	1	1	0	0	0	0	0	0
8(a)(1)(5)	9	5	4	5	2	1	2	0	0	0	4
8(a)(1)(2)(3)(5)	4	1	3	4	0	0	3	1	0	0	0
8(a)(1)(2)(3),8(b)(1)	2	0	2	2	0	0	2	0	0	0	0
8(a)(1)(2)(3),8(b)(1)(2)	8	1	7	7	0	0	7	0	0	0	1
8(a)(1)(3)(4)	2	0	2	1	0	0	1	0	0	0	1
8(a)(1)(3)(4)(5)	2	0	2	1	1	0	0	0	0	0	1
8(a)(1)(3)(5)	9	1	8	7	6	0	0	0	0	1	2
8(a)(1)(3)(5),8(b)(1)(2)	1	0	1	1	0	0	1	0	0	0	0
8(b)(1)	5	0	5	4	4	0	0	0	0	0	1
8(b)(1)(2)	1	0	1	1	1	0	0	0	0	0	0
8(b)(1)(3)	1	0	1	1	1	0	0	0	0	0	0
8(b)(3)	1	0	1	1	0	0	1	0	0	0	0
8(g)	1	0	1	1	1	0	0	0	0	0	0
Under sec. 10(l), total	238	22	216	207	107	8	51	22	8	11	31
8(b)(4)(A)	9	0	9	8	6	1	1	0	0	0	1
8(b)(4)(A)(B)	6	1	5	4	2	0	0	0	2	0	2
8(b)(4)(A),8(e)	1	0	1	0	0	0	0	0	0	0	1
8(b)(4)(B)	129	14	115	119	62	2	32	11	4	8	10
8(b)(4)(B)(D)	3	0	3	3	1	0	1	0	1	0	0
8(b)(4)(B),7(A)	3	1	2	3	3	0	0	0	0	0	0
8(b)(4)(B),7(C)	8	0	8	8	4	0	3	1	0	0	0
8(b)(4)(B),8(e)	1	0	1	1	0	0	1	0	0	0	0
8(b)(4)(D)	31	1	30	24	7	2	7	7	1	0	7
8(b)(7)(A)	9	2	7	9	7	0	0	1	0	1	0
8(b)(7)(B)	2	1	1	1	1	0	0	0	0	0	1
8(b)(7)(C)	25	2	23	17	10	0	5	2	0	0	8
8(e)	11	0	11	10	4	3	1	0	0	2	1

Table 21.—Miscellaneous Litigation Involving NLRB; Outcome of Proceedings in Which Court Decision Issued in Fiscal Year 1978

Type of litigation	Number of proceedings								
	Total—all courts			In courts of appeals			In district courts		
	Number decided	Court determination		Number decided	Court determination		Number decided	Court determination	
		Upholding Board position	Contrary to Board position		Upholding Board position	Contrary to Board position		Upholding Board position	Contrary to Board position
Totals—all types	59	53	6	22	20	2	37	33	4
NLRB-initiated actions or interventions	7	7	0	0	0	0	7	7	0
To enforce subpena	1	1	0	0	0	0	1	1	0
To restrain dissipation of assets by respondent	0	0	0	0	0	0	0	0	0
To defend Board's jurisdiction	4	4	0	0	0	0	4	4	0
To dissolve bankruptcy stay	2	2	0	0	0	0	2	2	0
Action by other parties	52	46	6	22	20	2	30	26	4
To restrain NLRB from	13	13	0	4	4	0	9	9	0
Proceeding in R case	8	8	0	3	3	0	5	5	0
Proceeding in unfair labor practice case	5	5	0	1	1	0	4	4	0
Proceeding in backpay case	0	0	0	0	0	0	0	0	0
Other	0	0	0	0	0	0	0	0	0
To compel NLRB to	38	32	6	18	16	2	20	16	4
Issue complaint	3	3	0	1	1	0	2	2	0
Seek injunction	1	1	0	1	1	0	0	0	0
Take action in R case	11	9	2	3	3	0	8	6	2
Comply with Freedom of Information Act	20	16	4	13	11	2	[1] 7	5	2
Other	3	3	0	0	0	0	3	3	0
Other	1	1	0	0	0	0	[2] 1	1	0

[1] Fifty-nine other cases involving the Freedom of Information Act were resolved by the Supreme Court's decision in *N.L.R.B.* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, upholding the Board's position.
[2] Suit brought in state small claims court.

Table 22.—Advisory Opinion Cases Received, Closed, and Pending, Fiscal Year 1978 [1]

	Total	Number of cases			
		Identification of petitioner			
		Employer	Union	Courts	State boards
Pending October 1, 1977	2	2	0	0	0
Received fiscal 1978	9	5	3	0	1
On docket fiscal 1978	11	7	3	0	1
Closed fiscal 1978	10	6	3	0	1
Pending September 30, 1978	1	1	0	0	0

[1] See Glossary for definitions of terms.

Table 22A.—Disposition of Advisory Opinion Cases, Fiscal Year 1978 [1]

Action taken	Total cases closed
	10
Board would assert jurisdiction	0
Board would not assert jurisdiction	2
Unresolved because of insufficient evidence submitted	0
Dismissed	7
Withdrawn	1

[1] See Glossary for definitions of terms.

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