FORTY-FOURTH

ANNUAL REPORT

OF THE

NATIONAL LABOR RELATIONS BOARD

FOR THE FISCAL YEAR

ENDED SEPTEMBER 30

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NATIONAL LABOR RELATIONS BOARD

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Director
Division of Administration

[1]Appointed August 1, 1979.

LETTER OF TRANSMITTAL

NATIONAL LABOR RELATIONS BOARD,
Washington, D.C., May 30, 1980

Sir: As provided in section 3(c) of the Labor Management Relations Act, 1947, I submit herewith the Forty-Fourth Annual Report of the National Labor Relations Board for the fiscal year ended September 30, 1979, 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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Operations in Fiscal Year 1979

A. Summary

For the nineteenth consecutive year, the National Labor Relations Board in fiscal 1979 was called upon to process a record number of unfair labor practice and representation election cases arising under the National Labor Relations Act.

The total was 54,907 cases of all types filed by employees, labor organizations, and business firms with the independent agency which administers the basic U.S. labor relations law. The NLRB initiates no cases, it only processes those brought before it.

The case intake was up 3.1 percent from the preceding fiscal year. New cases totaled 1,646 more than the previous year; 23,604 more than a decade ago; and 33,274 cases more than 20 years earlier.

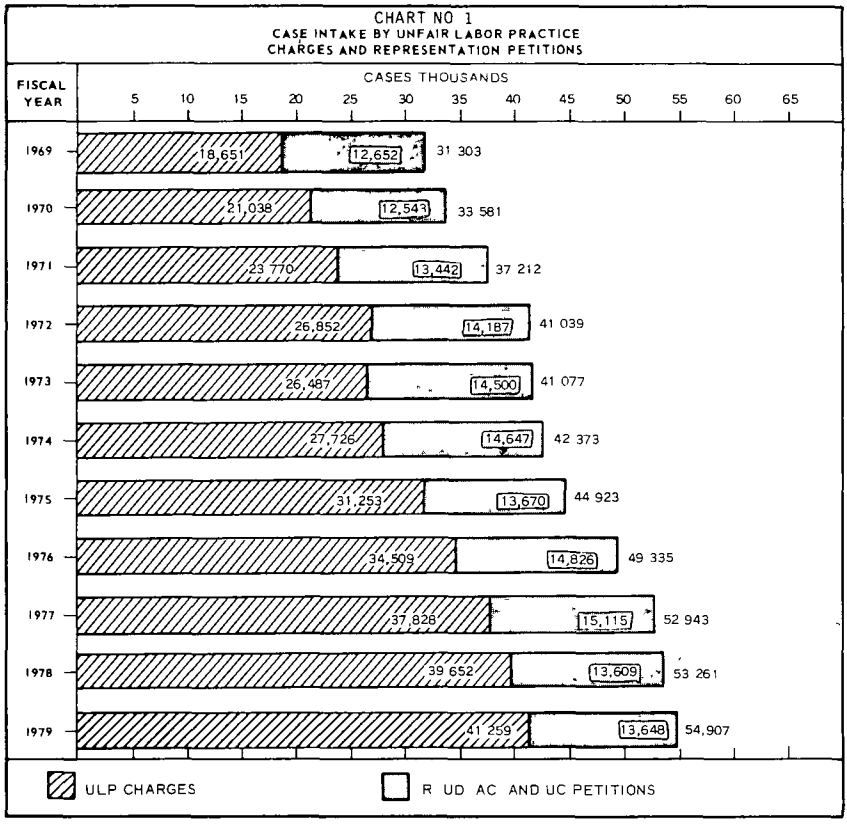
The uninterrupted record growth of the NLRB caseload underscores that the field of labor relations in the United States remains controversial and volatile, an area of national importance and concern, 44 years after the labor relations statute was enacted and the Labor Board was established.

In general voluntary acceptance of national labor policies, labor and management have achieved substantial success in reaching private adjustment of their differences. Each year tens of thousands of collective-bargaining contracts are concluded through the peaceful procedures specified in the Act, and hundreds of thousands of workers exercise self-organizational rights statutorily guaranteed with neither management nor labor interfering.

Yet the steady growth of the Nation's economy, the change in industrial, economic, and social conditions, geographic shifts in industry, and greater reliance on automation, all contribute to the size, variety, and complexity of the NLRB caseload.

In fiscal 1979:

• 41,259 charges were filed with the NLRB alleging that employers or unions, or both, committed unfair labor practices



affecting workers in violation of the Act. Charges a year earlier numbered 39,652.

• In the representation area, 13,235 petitions were filed seeking all types of employee elections, up 0.3 percent from the preceding fiscal period. In addition there were 349 requests for unit clarification and 64 filings for amendment of certification.

• The NLRB closed 55,794 cases of all types, a record number. The total case closings, up 11 percent from fiscal 1978, included 41,544 cases involving unfair labor practice charges and 14,250 cases affecting employee representation. At year's end, cases in all stages of processing totaled 20,324, reduced from 21,211 a year earlier.

• Since the Act seeks remedial, not punitive, resolution of its violations, the NLRB emphasizes unfair labor practice settlements. Under the General Counsel's supervision, NLRB regional offices achieved a record 11,572 cases settled, after investigation indicated that violations of employee rights had occurred. The

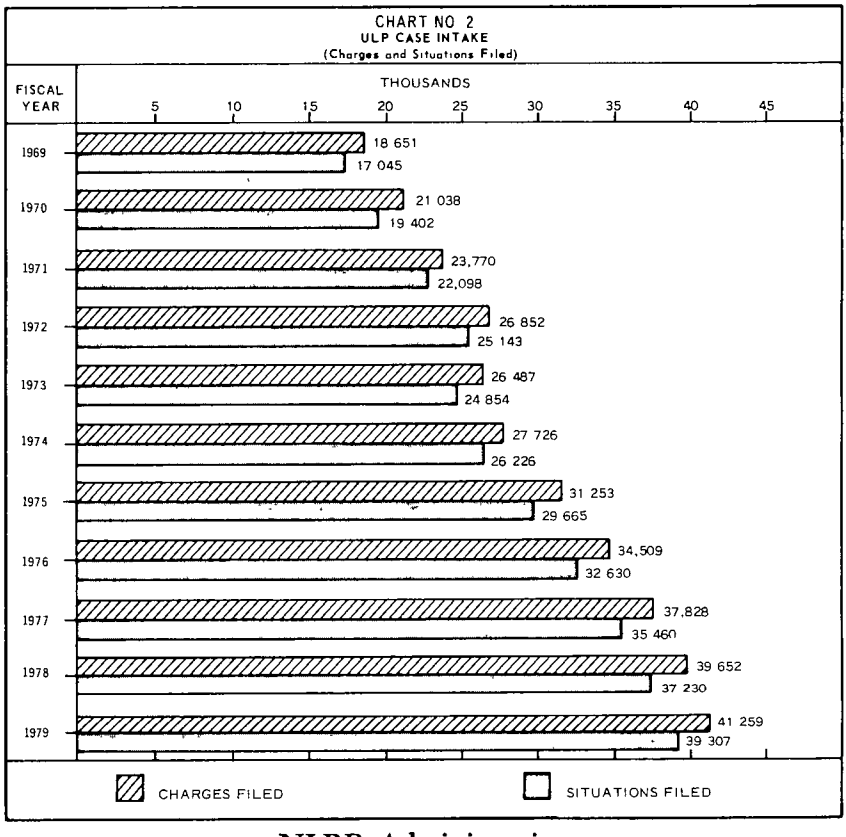
84.5-percent settlement rate of merit cases was the highest in NLRB history.

- Even so, unsettled cases moved through the litigation process to the five-member Board for decision in record number. The Board issued an all-time high of 1,185 decisions in contested unfair labor practice cases. Additionally, there were 338 rulings by NLRB administrative law judges adopted by the Board in the absence of an appeal.
- The NLRB conducted 8,043 conclusive representation elections among some 506,040 employee voters, with workers choosing unions in 45 percent of them. Labor organizations won majority designation in 3,623 elections, earning bargaining rights for 212,027 employees.
- For employees illegally discharged or otherwise discriminated against in violation of their organizational rights, the NLRB obtained from employers and unions the record sum of $17,724,850 as reimbursement for lost earnings, fees, dues, and fines. The NLRB obtained 5,837 offers of job reinstatement for discriminatees, of which 3,817 were accepted.

During the fiscal year, the NLRB created a new subregional office in Hartford, Connecticut, its 50th field office, and authorized the opening of a resident office in Des Moines, Iowa.

In another move to provide improved service to the labor relations public, the NLRB opened a New York office for administrative law judges. Headquarters for the Agency's Division of Judges is in Washington, D.C., and a West Coast Judges Office is in San Francisco.

At the end of the fiscal year, the Board was composed of Chairman John H. Fanning and Members Howard Jenkins, Jr., John A. Penello, Betty Southard Murphy, and John C. Truesdale. John S. Irving, who at mid-summer submitted his resignation effective October 19, a month prior to the end of his 4-year term, was General Counsel.



NLRB Administration

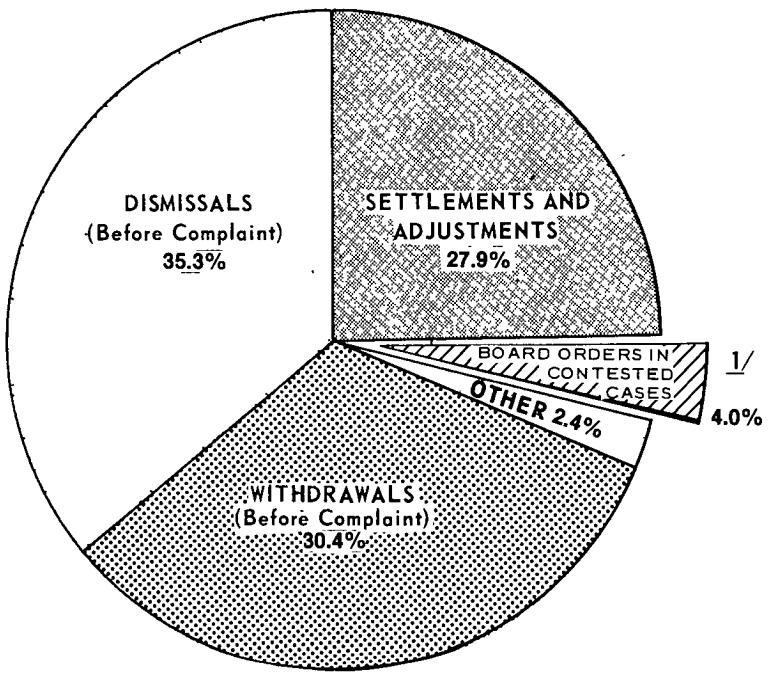
The National Labor Relations Board is an independent Federal agency created in 1935 by Congress to administer the basic law governing relations between labor unions and business enterprises engaged in interstate commerce. This statute, the National Labor Relations Act, came into being at a time when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

CHART NO. 3

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

FISCAL YEAR 1979



1/ Contested cases reaching Board Members for Decisions.

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 em-

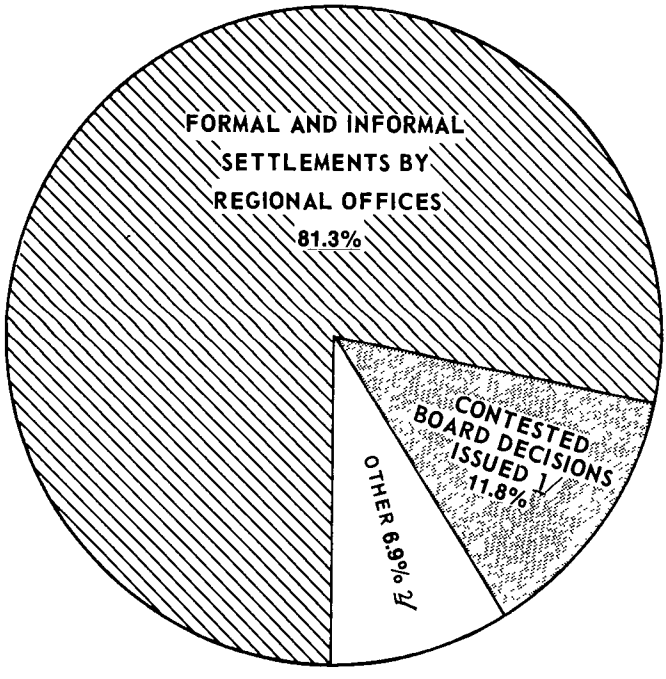
ployers and, if so, by which union, and (2) to prevent and remedy unlawful acts, called unfair labor practices, by either employers or unions or both.

CHART NO. 3A

DISPOSITION PATTERN FOR MERITORIOUS UNFAIR LABOR PRACTICE CASES

(Based on Cases Closed)

FISCAL YEAR 1979



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.

The NLRB does not act on its own motion in either function. It processes only those charges of unfair labor practices and pe-

titions for employee elections which are filed in the NLRB's 50 regional, subregional, and resident offices.

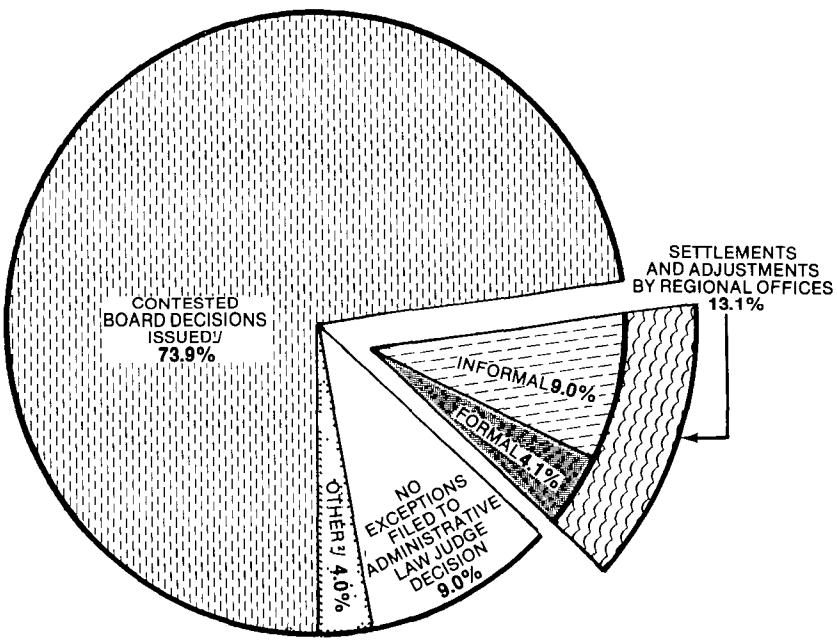
The Act's unfair labor practice provisions place certain restrictions on actions of employers and labor organizations in their relations with employees, as well as with each other. Its election

CHART NO. 3B

DISPOSITION PATTERN FOR UNFAIR LABOR PRACTICES CASES AFTER TRIAL

(Based on Cases Closed)

FISCAL YEAR 1979



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

2/ Dismissals, withdrawals, and other dispositions

provisions provide mechanics for conducting and certifying results of representation elections to detemine 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.

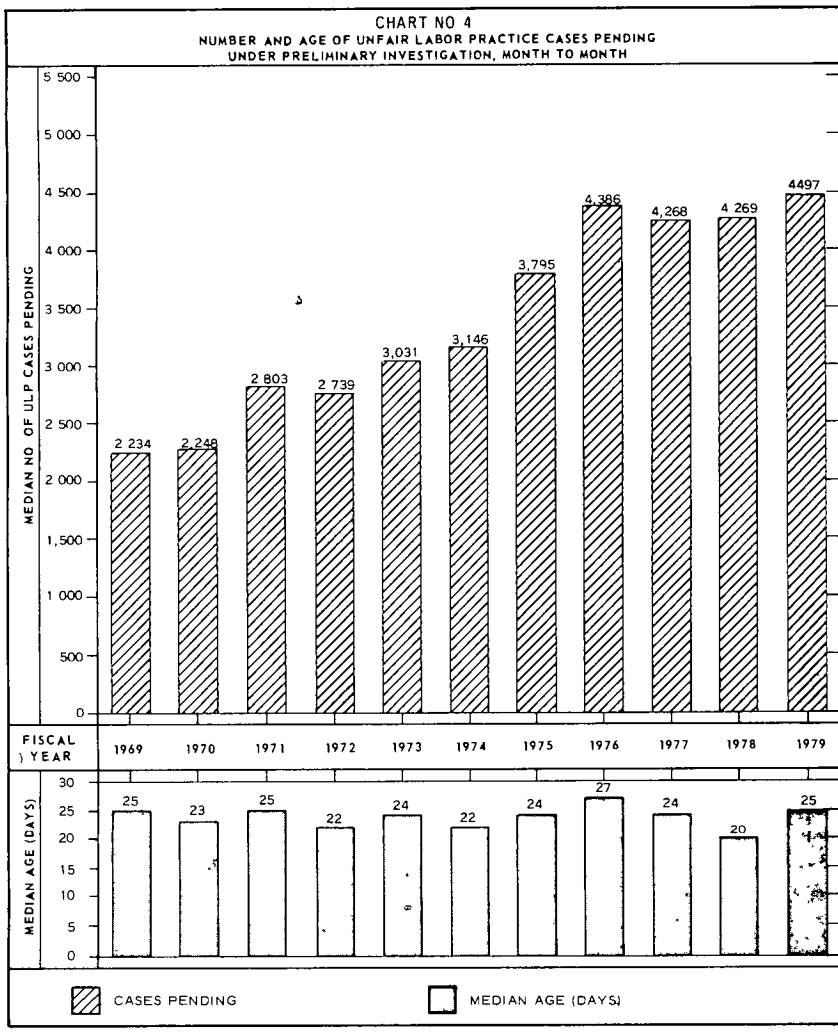
In handling unfair labor practice cases and election petitions, the NLRB is concerned with the adjustment of labor disputes either by way of settlements or through its quasi-judicial proceedings, or by way of secret-ballot employee elections.

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 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 proceedings, the need for additional administrative law judges remains 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.



B. Operational Highlights

1. Unfair Labor Practices

Charges that business firms, labor organizations, or both have committed unfair labor practices in violation of the National Labor Relations Act are filed with the National Labor Relations Board by employees, unions, and employers. These cases provide a major segment of the NLRB workload.

After charges are filed in NLRB field offices nationwide, investigations are conducted by the professional staff to determine whether there is reasonable cause to believe the Act has been violated. If not, the regional director dismisses the charge or it is withdrawn by the charging party. If the charge has merit, the regional director seeks voluntary settlement or adjustment by the parties to the case to remedy the apparent violation. If settlement efforts fail, the case goes to hearing before an NLRB administrative law judge and, lacking settlement at later stages, on to decision by the five-member Board.

Of importance is the fact that more than 90 percent of the unfair labor practice cases filed with the NLRB in the field offices are disposed of in a median of some 40 days without the necessity of formal litigation before the Board. Only about 4 percent of the cases go through to Board decision.

In fiscal 1979, 41,259 unfair labor practice charges were filed with the NLRB, an increase of 4 percent over the 39,652 filed in fiscal 1978. In situations in which related charges are counted as a single unit, there was a 6-percent increase from the preceding fiscal year. (Chart 2.)

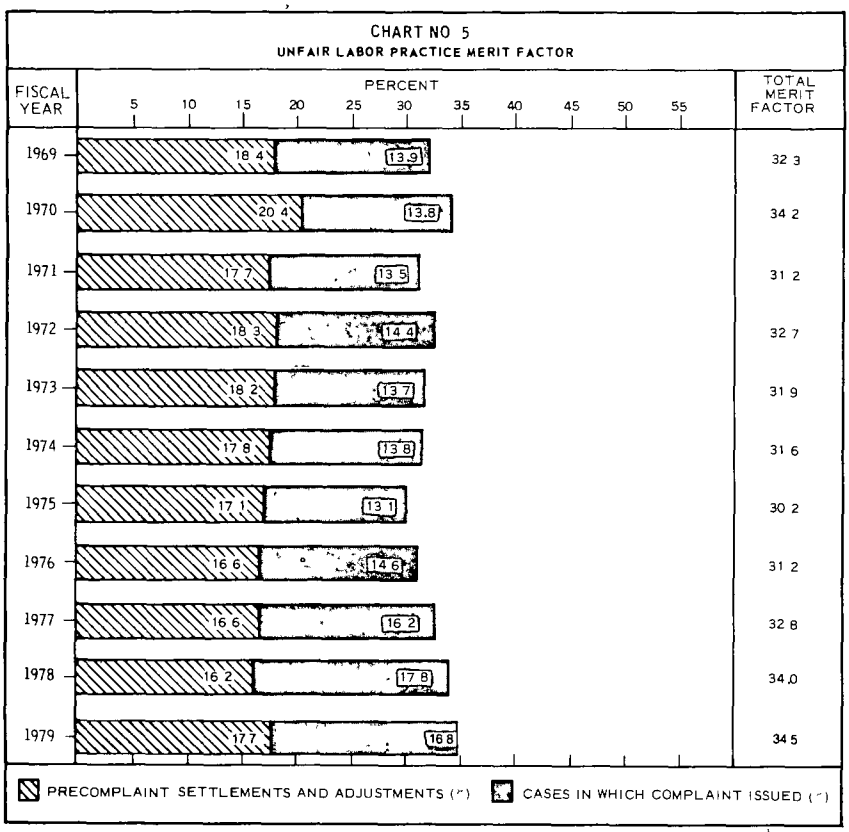
Alleged violations of the Act by employers increased to 29,026 cases, a 7-percent increase from the 27,056 of 1978. Charges against unions decreased 3 percent to 12,105 from 12,417 in 1978.

The overwhelming majority of all charges against employers allege illegal discharge or other discrimination against employees. There were 17,220 such charges, or 59 percent of the total charges that employers committed violations.

Refusal to bargain was the second largest category of allegations against employers, comprising 8,754 charges, or about 30 percent of the total charges. (Table 2.)

Of charges against unions, there were 8,366 alleging illegal restraint and coercion of employees, about 69 percent, the same percentage as in 1978. There were 2,368 charges against unions for illegal secondary boycotts and jurisdictional disputes, virtually the same as the 2,366 of 1978.

There were 1,578 charges of illegal union discrimination against employees, down from 1,771 in 1978. There were 530 charges that unions picketed illegally for recognition or for organizational purposes, compared with 523 charges in 1978. (Table 2.)



In charges against employers, unions led by filing 58 percent. Unions filed 16,780 charges, individuals filed 12,156, and employers filed 90 charges against other employers.

As to charges against unions, 7,622 were filed by individuals, or 63 percent of the total of 12,105. Employers filed 4,284, and other unions filed the 199 remaining charges.

In fiscal 1979, 41,544 unfair labor practice charges were closed. Some 95 percent were closed by NLRB regional offices, unchanged from 95 percent in 1978. During the fiscal year, 27.9 percent of the cases were settled or adjusted before issuance of administrative law judges' decisions, 30.4 percent by withdrawal before complaint, and 35.3 percent by administrative dismissal.

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. Some 34.5 percent of the unfair labor practice cases were found to have merit. The merit factor in charges against employers was 38 percent, against unions 27 percent.

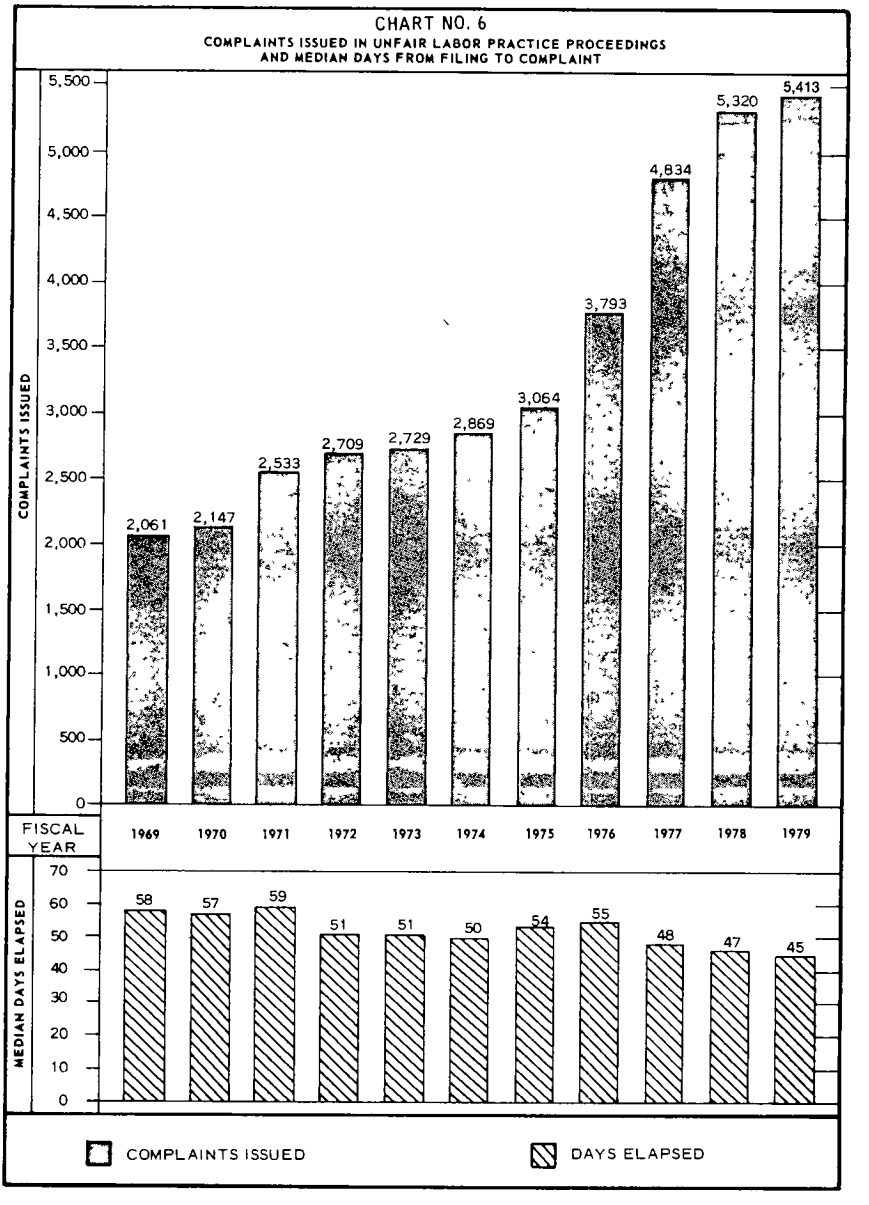


CHART NO. 6
COMPLAINTS ISSUED IN UNFAIR LABOR PRACTICE PROCEEDINGS
AND MEDIAN DAYS FROM FILING TO COMPLAINT
COMPLAINTS ISSUED
5,500
5,000
4,500
4,000
3,500
3,000
2,500
2,000
1,500
1,000
500
0
2,061
2,147
2,533
2,709
2,729
2,869
3,064
3,793
4,834
5,320
5,413
FISCAL YEAR
1969
1970
1971
1972
1973
1974
1975
1976
1977
1978
1979
MEDIAN DAYS ELAPSED
70
60
50
40
30
20
10
0
58
57
59
51
51
50
54
55
48
47
45
COMPLAINTS ISSUED
DAYS ELAPSED

When the regional offices determine that charges alleging unfair labor practices have merit, attempts at voluntary resolution are stressed—to improve labor-management relations and to reduce NLRB litigation and related casehandling. Settlement efforts have been successful to a substantial degree. In fiscal 1979, precomplaint settlements and adjustments were achieved in 7,396 cases, or 51 percent of the merit charges. In 1978 the percentage was 48.

Cases of merit not settled by the regional offices produce formal complaints, issued on behalf of the General Counsel. This action schedules hearings before administrative law judges. During 1979, 5,413 complaints were issued, compared with 5,320 in the preceding fiscal year. (Chart 6.)

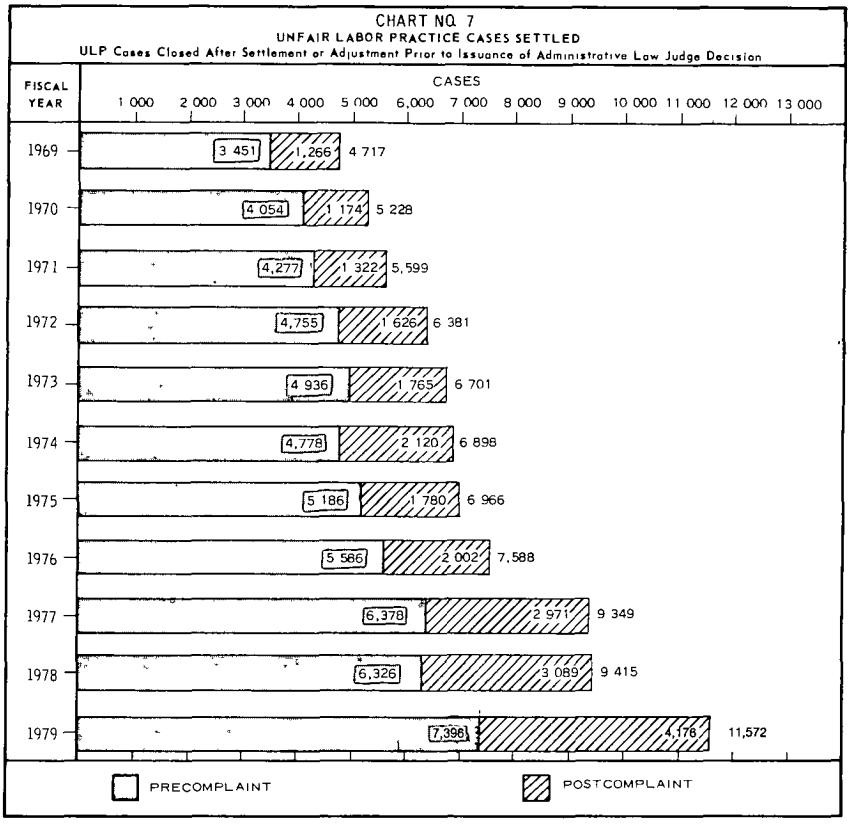
Of complaints issued, 85 percent were against employers, 13 percent against unions, and 2 percent against both employers and unions.

NLRB regional offices processed cases from filing of charges to issuance of complaints in a median of 45 days, compared with 47 days in 1978. The 45 days included 15 days in which parties had the opportunity to adjust charges and remedy violations without resort to formal NLRB processes. (Chart 6.)

Additional settlements occur before, during, and after hearings before administrative law judges. Even so, their hearing and decisional workload is heavy. The judges issued 941 decisions in 1,376 cases during 1979. They conducted 1,150 initial hearings, and 30 additional hearings in supplemental matters. (Chart 8 and Table 3A.)

By filing exceptions to judges' findings and recommended rulings, parties may bring unfair labor practice cases on up to the five-member Board for final NLRB decision.

In fiscal 1979, the Board issued 1,185 decisions in unfair labor practice cases contested as to the law on the facts—1,092 initial decisions, 50 backpay decisions, 39 determinations in jurisdictional work dispute cases, and 4 supplemental decisions. Of the 1,092 initial decision cases, 945 involved charges filed against employers, 139 had union respondents, and 8 contained charges against both employers and unions. The Board held that employers violated the statute in 840 cases, while dismissing in their entirety the complaints in the other 105 proceedings. Of the 139 decisions involving charges against unions, the Board found violations in 110 cases, and dismissed the complaints in the other 29. Violations were found by the Board in six of the eight cases against both employers and unions.



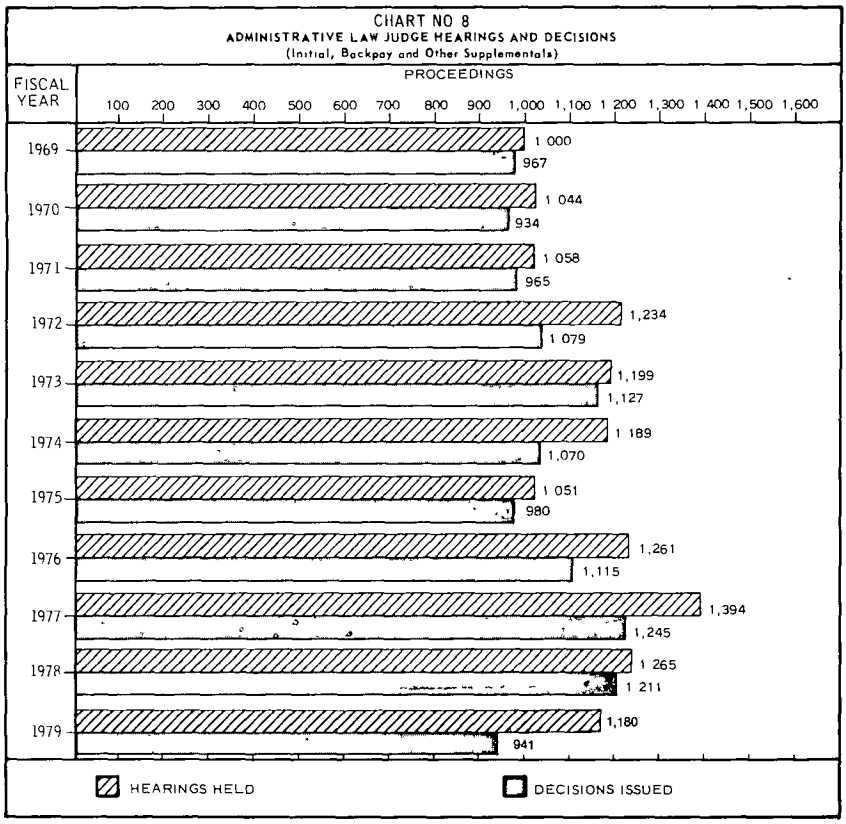
For the year, the NLRB awarded backpay to 14,627 workers, amounting to $16.5 million. (Chart 9.) Reimbursement for unlawfully exacted fees, dues, and fines added another $1.2 million. Backpay is lost wages caused by unlawful discharge and other discriminatory actions detrimental to employees, offset by earnings elsewhere after the discrimination. Some 5,837 employees were offered reinstatement, and 65 percent accepted.

Work stoppages ended in 148 of the cases closed in fiscal 1979. Collective bargaining was begun in 2,374 cases. (Table 4.)

At the end of fiscal 1979, there were 16,657 unfair labor practice cases being processed at all stages by the NLRB, compared with 16,942 cases pending at the beginning of the year.

2. Representation Cases

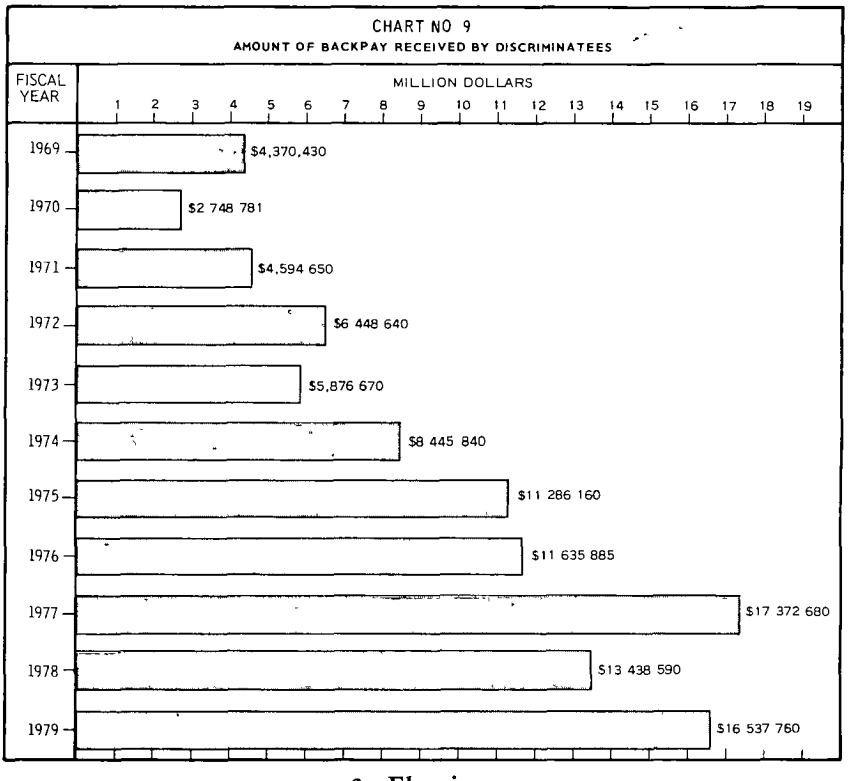
The NLRB received 13,648 representation and related case petitions in fiscal 1979. This compared with 13,609 such petitions a year earlier.



The 1979 total consisted of 11,112 petitions that the NLRB conduct secret-ballot elections where workers select or reject unions to represent them in collective bargaining; 1,793 petitions to decertify existing bargaining agents; 330 deauthorization petitions for referendums on rescinding unions' authority to enter into union-shop contracts; and 349 petitions for unit clarification to determine whether certain classifications of employees should be included in or excluded from existing bargaining units. Additionally, 64 amendment of certification petitions were filed.

During the year, 14,250 representation and related cases were closed, compared with 13,066 in fiscal 1978. Cases closed included 11,627 collective-bargaining election petitions; 1,838 decertification election petitions; 328 requests for deauthorization polls; and 457 petitions for unit clarification and amendment of certification. (Chart 14 and Tables 1 and 1B.)

The overwhelming majority of elections conducted by the NLRB resulted from some form of agreement by the parties on when, where, and among whom the voting should occur. Such agreements are encouraged by the Agency. In 18 percent of representation cases closed by elections, balloting was ordered by NLRB regional directors following hearings on points in issue. In 45 cases, elections were directed by the Board after appeals or transfers of cases from regional offices. (Table 10.) There were 37 cases which resulted in expedited elections pursuant to the Act's 8(b)(7)(C) provisions pertaining to picketing.



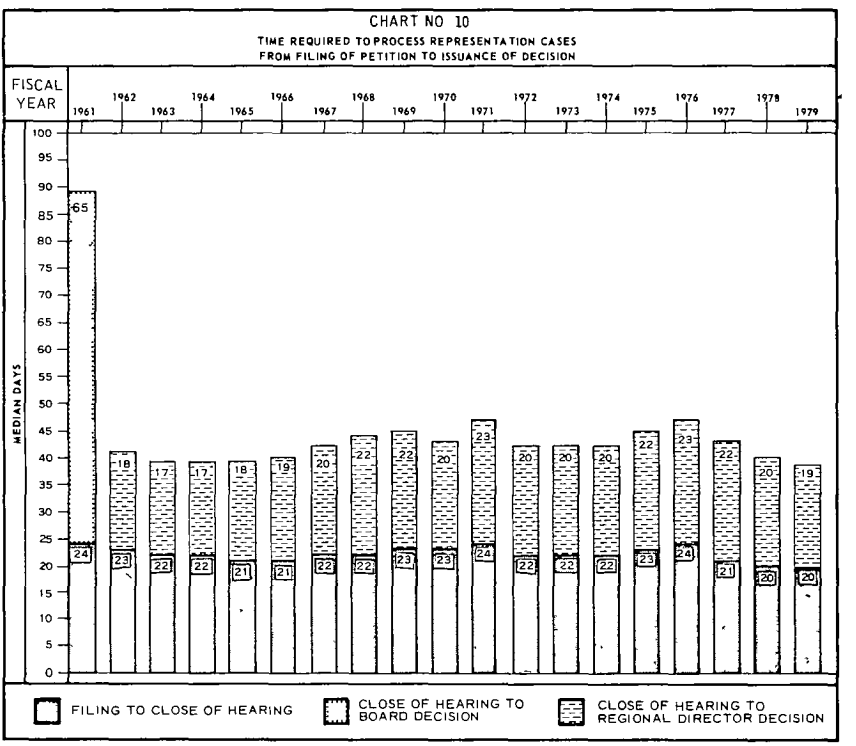
3. Elections

The NLRB conducted 8,043 conclusive representation elections in cases closed in fiscal 1979, compared with the 8,240 such elections a year earlier. Of 577,942 employees eligible to vote, 506,040 cast ballots, virtually 9 of every 10 eligible.

Unions won 3,623 representation elections, or 45 percent. In winning majority designation, labor organizations earned bar-

gaining rights or continued as employee representatives for 212,027 workers. The employee vote over the course of the year was 246,424 for union representation and 259,616 against.

The representation elections were in two categories—the 7,266 collective-bargaining elections in which workers chose or voted down labor organizations as their bargaining agents, plus the 777 decertification elections determining whether incumbent unions would continue to represent employees.



There were 7,649 select-or-reject-bargaining-rights (one union on ballot) elections, of which unions won 3,317, or 43 percent. In these elections, 192,351 employees voted to have unions as their agents, while 246,097 employees voted for no representation. In appropriate bargaining units of employees, the election results provided union agents for 149,647 workers. In NLRB elections, the majority decides the representational status for the entire unit.

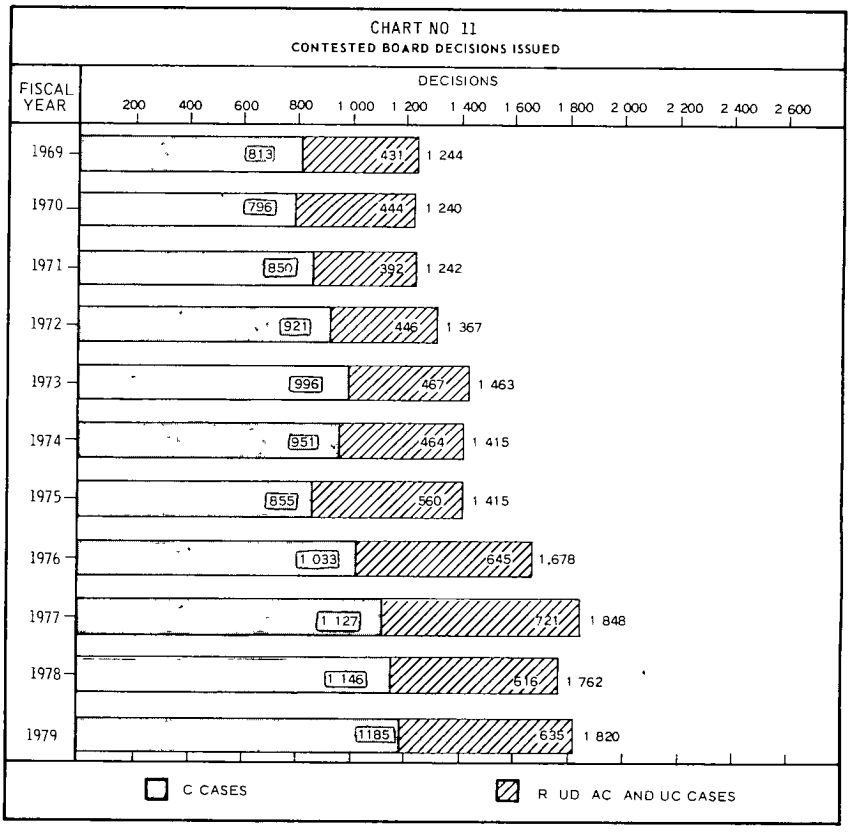
As in previous years, decertification elections went against labor organizations by a substantial percentage, since the filing of a petition to decertify the bargaining representative is indicative of some measure of discontent. The decertification results

brought continued representation by unions in 194 elections, or 25 percent, covering 17,450 employees. Unions lost representation rights for 22,088 employees in 583 elections, or 75 percent. Unions won in bargaining units averaging 90 employees, and lost in units averaging 38 employees. (Table 13.)

Besides the conclusive elections, there were 206 inconclusive representation elections during fiscal 1979 which resulted in withdrawal or dismissal of petitions before certification, or required a rerun or runoff election.

In deauthorization polls, labor organizations lost the right to make union-shop agreements in 92 referendums, or 69 percent, while they maintained the right in the other 42 polls which covered 2,677 employees. (Table 12.)

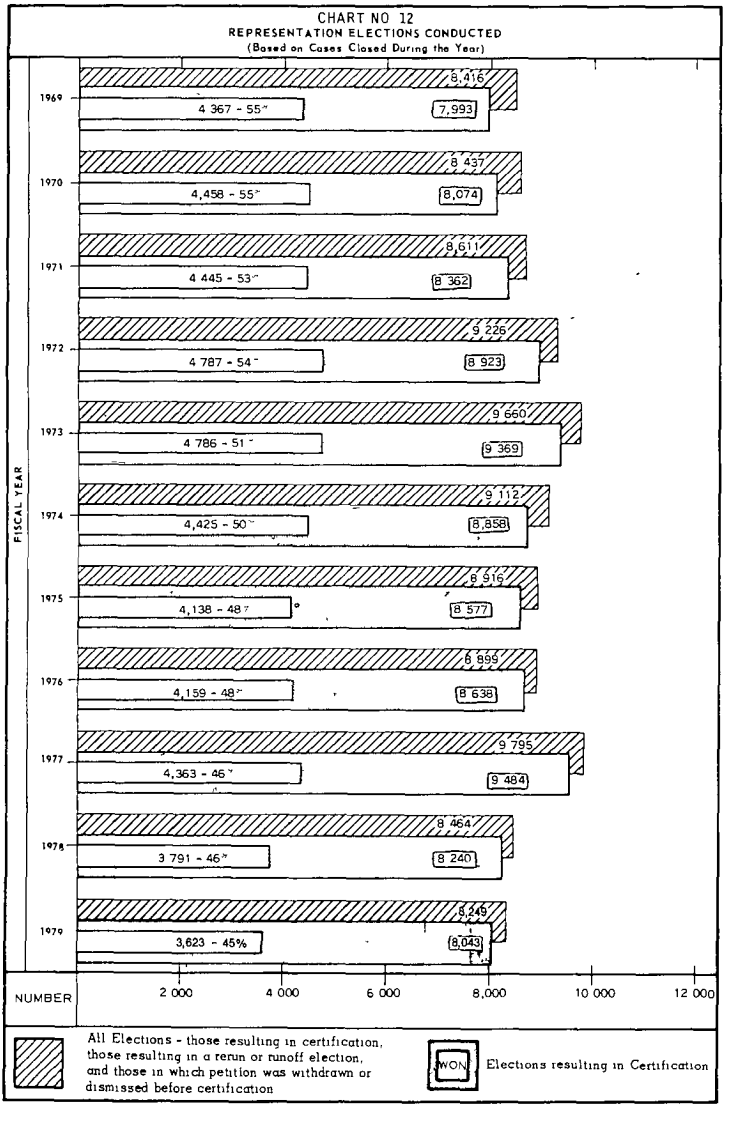
For all types of elections in 1979, the average number of employees voting, per establishment, was 63, compared with 51 in 1978. About three-quarters of the collective-bargaining and decertification elections involved 59 or fewer employees. (Tables 11 and 17.)



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 3,065 decisions concerning allegations of unfair labor practices and questions relating to employee representation. This total compared with the 2,759 decisions rendered during fiscal 1978.

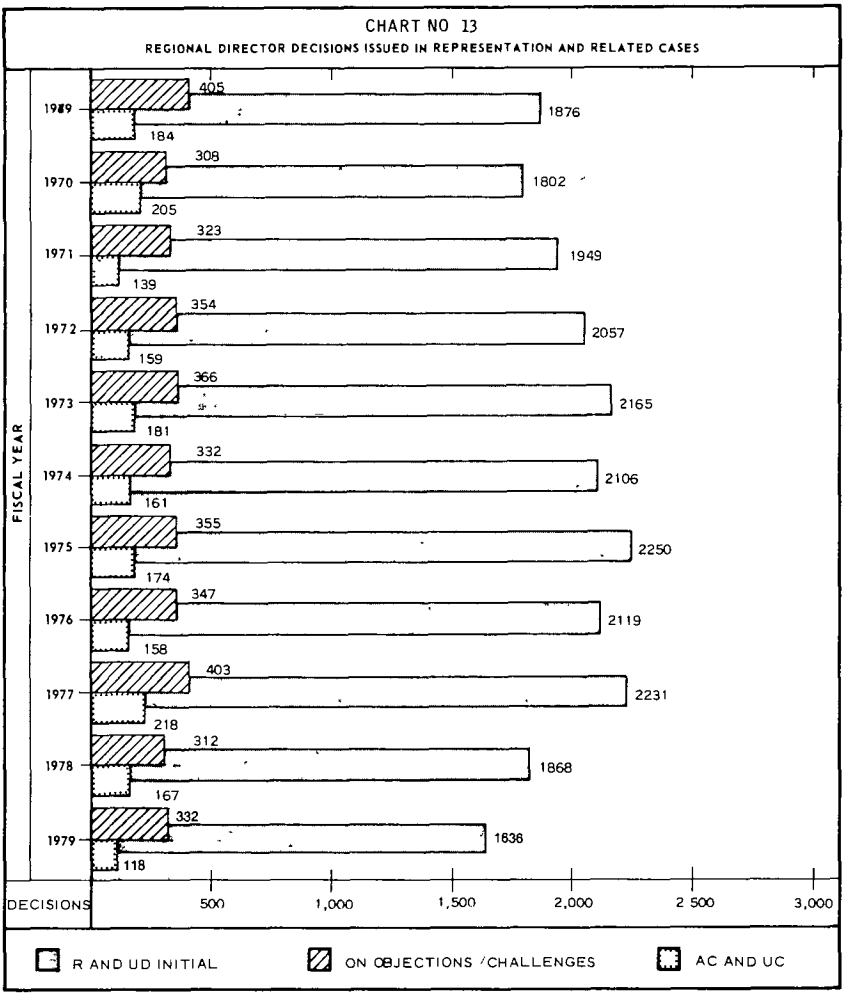


A breakdown of Board decisions follows:

Total Board decisions			3,065
Contested decisions			1,820
Unfair labor practice decisions		1,185	
Initial (includes those based on stipulated record)	1,092		
Supplemental	4		
Backpay	50		
Determinations in jurisdictional disputes	39		
Representation decisions		632	
After transfer by regional directors for initial decision	47		
After review of regional director decisions	100		
On objections and/or challenges	485		
Other decisions		3	
Clarification of bargaining unit	2		
Amendment to certification	1		
Union-deauthorization	0		
Noncontested decisions			1,245
Unfair labor practice	511		
Representation	729		
Other	5		

Thus, it is apparent that the great majority, 59 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 1979 approximately 12 percent of all meritorious charges and 74 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 heavy workload, NLRB regional directors issued 2,086 decisions in fiscal 1979, compared with 2,347 in 1978. (Chart 13 and Tables 3B and 3C.)

c. Administrative Law Judges

Reflecting the continued rise in case filings alleging commission of unfair labor practices, the administrative law judges issued 941 decisions and conducted 1,180 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 1979, appeals court decisions in NLRB-related cases numbered 361. In these rulings, the NLRB was affirmed in whole or in part in 77 percent.

A breakdown of appeal court rulings in fiscal 1979:

Total NLRB cases ruled on	361
Affimed in full	233
Affirmed with modification	35
Remanded to NLRB	20
Partially affirmed and partially remanded	11
Set aside	62

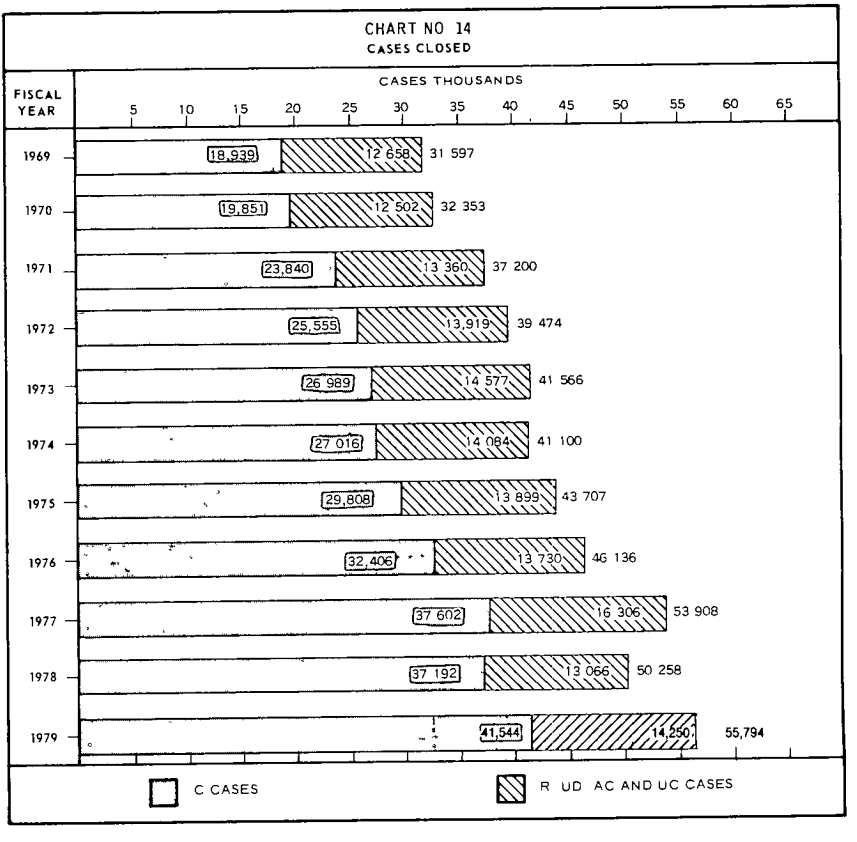
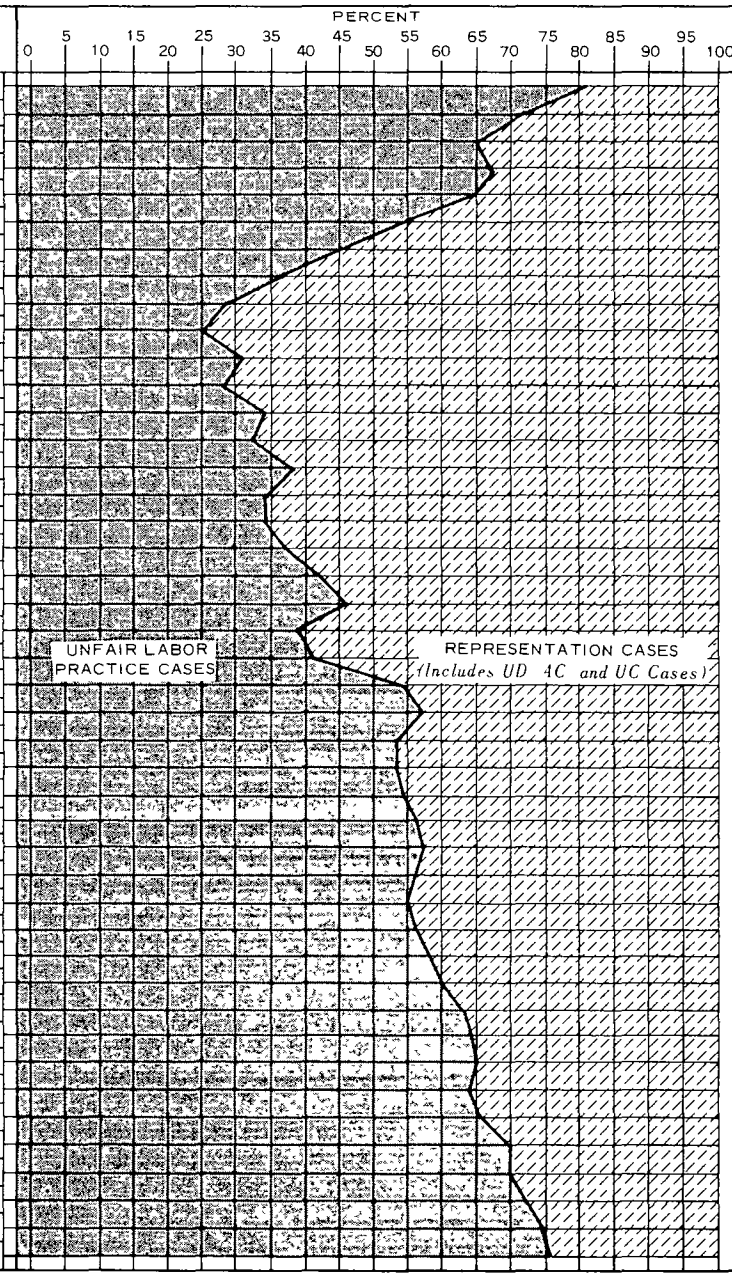


CHART NO. 15

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 – 1979

In the 37 contempt cases before the appeals court, the respondents complied with NLRB orders after the contempt petition had been filed but before decisions by courts in 18 cases, in 16 cases the respondents were held in contempt, and in 3 cases petitions were denied. (Table 19.)

The U.S. Supreme Court affirmed the Board in one case, affirmed one other case with modification, and set aside the Board's Order in two cases.

The NLRB sought injunctions pursuant to section 10(j) and 10(l) in 244 petitions filed with the U.S. district courts, compared with 262 in fiscal 1978. (Table 20.) Injunctions were granted in 110, or 88 percent of the 125 cases litigated to final order.

NLRB injunction activity in district courts in 1979:

Granted	110
Denied	15
Withdrawn	18
Dismissed	13
Settled or placed on courts' inactive lists	90
Awaiting action at end of fiscal year	40

There were 78 additional cases involving miscellaneous litigation decided by appellate and district courts. The NLRB's position was upheld in 72 cases. (Table 21.)

C. Decisional Highlights

In the course of the Board's administration of the Act during fiscal 1979, 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 decisions establishing or reexamining basic principles in significant areas.

1. Board Jurisdiction

In *Natl. Transportation Service,*[1] the Board announced that it would no longer utilize its "intimate connection" test in determining whether to assert jurisdiction over an employer with close ties to an entity exempt from the Board's jurisdiction. Under that test, the Board considered not only whether the nonexempt employer had sufficient control over its employees' terms and conditions of employment so as to be capable of effective bargaining, but also the nature of the relationship between the purposes of the exempt institution and the services provided it by the nonexempt employer. The Board pointed out that this latter criteria had no basis in the National Labor Relations Act, and was so vague and lacking in bearing on the employer's ability to bargain effectively as to be of no aid to the Board in determining whether the exercise of jurisdiction would be appropriate. It, therefore, concluded that only the "right of control" criteria should be used as the definitive standard for determining discretionary jurisdictional issues.

2. Campaign Misrepresentations as Objectionable Conduct

The Board also announced a change of principle in *General Knit of Calif.,*[2] where it concluded that the principle it had previously expressed in *Shopping Kart Food Market,* 228 NLRB 1331 (1977), to the effect that elections should not be set aside solely because of misleading campaign statements, absent forgery or deceptive practices involving the Board, was inconsistent with the Board's responsibility to insure fair elections. It, therefore, returned to the standard for review for alleged campaign misrepresentations established in *Hollywood Ceramics Co.,* 140 NLRB 221 (1962), that elections should be set aside where there are substantial misrepresentations at a time when the other party cannot make an effective reply, so that the misrepresentations may reasonably be expected to have a significant impact on the election.

The Board noted that the existence and enforcement of the principle that elections could be set aside for material misrepresentations of facts within the party's special knowledge served to protect employee free choice and acted as a deterrent to the

[1] 240 NLRB No. 99, *infra* at pp 32, 55
[2] 239 NLRB No. 101, *infra* at p. 73.

use of such tactics. The adherence to that standard by the Board was viewed as essential, since it provided further support for the integrity of the electoral process by providing a means of redress for a party doubting the validity of the election because of prejudicial campaigning affecting the employees.

3. Duty to Furnish Information

Information concerning the race and sex of unit employees in various job categories, as well as in hirings and promotions, was held by the Board in several cases [3] to be presumptively relevant to union interests and responsibilities concerning possible race or sex discrimination and the advancement of equal employment opportunities for female and minority group employees in the units represented. It concluded that such information should be supplied by the employer to the union upon request, in order that the union might effectively bargain and administer the collective-bargaining agreement, and fulfill its obligation to fairly represent the interests of the unit employees.

The Board also found that information concerning complaints and charges filed against the employer by bargaining unit employees alleging discriminatory employment practices prohibited by various Federal and state fair employment practice statutes was also to be provided since, although not presumptively appropriate, the union had demonstrated a need for the information as significant indicators of employee disaffection in the areas of discrimination and equal opportunity, and the need to ascertain that none were disposed of in a manner inconsistent with applicable collective-bargaining agreements. However, since the personal identification of the complaining employee was not germane to the uses justifying disclosure of the documents, the Board held that such personal identification could be withheld, particularly in view of the desirability of protecting the privacy and confidentiality interests of the persons filing the charges.

The Board declined to hold that the employer was required to disclose as presumptively relevant its affirmative action plan—the set of procedures to assure equal employment opportunity required of contractors by the Federal government—and further concluded that the union had not demonstrated its relevance to the purposes of collective bargaining. The Board rejected as

[3] I.e., *Westinghouse Electric Corp.*, 239 NLRB No. 19, and *East Dayton Tool & Die Co*, 239 NLRB No. 20, *infra* at p. 114.

speculative the union's assertion that the affirmative action plan was needed to determine if the employer had undertaken future commitments inconsistent with the collective-bargaining agreement.

4. Hot Cargo Agreements

A contention that the Supreme Court decision in *Connell* [4] had narrowed the construction industry exemption for hot cargo clauses created by the proviso to section 8(e) of the Act was considered by the Board in a number of cases. In *Woelke & Romero Framing* [5] the Board rejected the contention that under *Connell* the construction industry exemption was applicable only to privilege otherwise illegal contractual provisions where there was (a) a valid collective-bargaining relationship, (b) the clause operated only when the employer had employees represented by the union present at the site, and (c) the clause did not require contracting with a particular union. The Board concluded that *Connell* had not narrowed the construction of the proviso to agreements in the context of a collective-bargaining relationship, where the clauses were aimed at avoiding the problem of both union and nonunion employees at a particular common situs construction jobsite.

As the clauses in issue before the Board were proposed within the context of an established collective-bargaining relationship, the case was dismissed.

That construction of *Connell* was also applied by the Board in another case [6] to find clauses permitting subcontracting only at rates paid a majority of the workers in the area and making the contractor liable for the failure to do so, violative of section 8(e) and not privileged by the proviso. There was no valid bargaining relationship between the union and the picketed employer, and the clauses were not addressed to the possibility of union and nonunion employees working side by side on the same construction site since their application was not limited to jobsites where the union's members were working. Nor was the union seeking to organize a nonunion subcontractor since there was no subcontracting at the site at which the picketing occurred.

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[4] *Connell Constr. Co.* v. *Plumbers & Steamfitters Local No. 100*, 421 U.S. 616 (1975).

[5] *Carpenters Local No. 944 (Woelke & Romero Framing)*, 239 NLRB No. 40, *infra* at p 160

[6] *Colorado Bldg & Constr. Trades Council (Utilities Services Engineering)*, 239 NLRB No 41, *infra* at p. 162

5. Remedial Order Provisions

Upon careful reconsideration of its policy regarding remedial orders with respect to discharge cases, the Board decided[7] that the automatic adoption of broad cease-and-desist orders was not warranted, and that a narrow order, responsive to the particular actions in the case, would usually be more appropriate, and would not frustrate effective enforcement of the Board's remedial orders. It noted, however, that broad orders would still be warranted when a respondent was shown to have a proclivity to violate the Act, or by its actions had demonstrated a general disregard for employee rights, matters to be determined upon careful examination of the facts of each case.

In another modification of policy, the Board held[8] that a discharged striker was entitled to backpay from the date of discharge until the date he or she is offered reinstatement. The Board concluded that the discharged striker is in the same position as the discharged employee, and the burden in both situations to undo the effect of the unfair labor practice by offering the employee reinstatement should be on the employer who acted unlawfully.

The Board ability to devise appropriate remedies for specific factual situations was demonstrated in *Drug Package*,[9] where the Board ordered immediate offers of reinstatement be made to economic strikers in order that the union would have the backing of bargaining unit employee strength essential to render meaningful the bargaining order entered in the case. Without the reinstatement order, restoration of the conditions as they existed prior to the employer's unfair labor practices would not be possible, since the union would have had few adherents in the changed composition of the bargaining unit, with a resulting inequality of bargaining power.

In *United Dairy Farmers Cooperative Assn.*,[10] upon consideration of the policies of the Act and the proper scope of the Board's remedial powers, the Board concluded that, although its remedial authority may encompass the authority to remedy pervasive unfair labor practices which destroyed the possibility of a free election by issuing a bargaining order in the absence of a prior showing of majority support, it would be less destructive of the Act's purposes to provide a secret-ballot election for the employees to express their choice than to risk negating that choice by im-

[7] *Hickmott Foods*, 242 NLRB No. 177, *infra* at p. 172.
[8] *Abilities & Goodwill*, 241 NIRB No. 5, *infra* at p. 181.
[9] 241 NLRB No. 44, *infra* at p. 183.
[10] 242 NLRB No. 179, *infra* at p. 173.

posing a bargaining representative upon the employees without some expression of majority support. The Board did, however, order extensive additional remedial action designed to inform employees of their rights and provide assurances they would be free to exercise them, and permitting the union to engage in further organizational activities in an atmosphere free of restraint.

D. Financial Statement

The obligations and expenditures of the National Labor Relations Board for the fiscal year ended September 30, 1979, are as follows:

Personnel compensation	$ 68,597,402
Personnel benefits	7,094,501
Travel and transportation of persons	4,967,732
Transportation of things	164,035
Rent, communications, and utilities	11,706,729
Printing and reproduction	756,985
Other services	4,644,047
Supplies and materials	1,131,202
Equipment	1,117,809
Insurance claims and indemnities	39,161
Total obligations and expenditures [11]	$100,219,603

[11] Includes reimbursable obligations distributed as follows:
Personnel compensation $2,175

II

Jurisdiction of the Board

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

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

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

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

[4] These self-imposed standards are primarily expressed in terms of the gross dollar volume of business in question: 23 NLRB Ann. Rep 18 (1958). See also *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.

A. Enterprise "Intimately Connected" to an Exempt Entity

In *Natl. Transportation Service*,[6] jurisdiction was asserted over the provider of daily schoolbus transportation and related charter services to public school systems in Atlanta, Georgia, as well as general public charter and route services. In so doing, the Board majority overruled a decision in an earlier representation proceeding involving the same parties,[7] and determined that they would no longer utilize the "intimate connection" test for ascertaining whether the Board's assertion of jurisdiction over an employer with close ties to an exempt entity is warranted. Rather, the majority stated that in this and future cases they would determine whether the employer itself meets the definition of "employer" in section 2(2) of the Act and, if so, determine whether the employer has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative.

The Board majority examined the "intimate connection" test as set forth in *Rural Fire Protection Co.*,[8] which described the test as having two aspects: (1) whether the nonexempt employer retains sufficient control over its employees' terms and conditions of employment so as to be capable of effective bargaining with the employees' representative, and (2) where the employer retains such control, "the focus of necessity is on the nature of the relationship between the purposes of the exempt institution and the services provided by the nonexempt employer . . . ." The majority decided that the first aspect of this test is by itself the appropriate standard for determining whether to assert jurisdiction in situations such as that presented in the reported case, stating that "[o]nce it is determined that the employer can engage in meaningful collective bargaining with representatives of its employees, jurisdiction will be established."

In concluding that the "right to control" test provides a more objective, precise, and definitive standard for determining discretionary jurisdictional issues than the "intimate connection" test, Chairman Fanning and Members Jenkins and Truesdale noted the absence of any congressional intent that the Board decline to assert jurisdiction over any employer solely because of the rela-

[6] 240 NLRB No. 99 (Chairman Fanning and Members Jenkins and Truesdale; Members Penello and Murphy dissenting).

[7] *Natl. Transportation Service*, 231 NLRB 980 (1977) (Members Murphy and Walther, Member Jenkins dissenting in part).

[8] 216 NLRB 584, 586 (1975) (Members Jenkins, Kennedy, and Penello; then Acting Chairman Fanning dissenting).

tionship between the services it provides to an exempt entity and the purposes of such entity. Further, the majority stated that it was unaware of any valid policy consideration requiring or warranting adherence to the "intimate connection" test, and that the utilization of the "right to control" test would avoid some of the ambiguities presented by the earlier abstract intimate connection test and would better exercise the discretionary jurisdiction allowed the Board under section 14 of the Act. Finally, the majority found that the dissenter's argument concerning the right of public firefighters to strike confused the issue and was an exercise in circular reasoning. The issue before the Board was not the right to strike for public employees, but whether bus mechanics and drivers are public or private employees.

Dissenting Members Penello and Murphy would have adhered to the Board's decision in the related representation case and declined jurisdiction over the employer's operation insofar as it involved the busing of public school children. They would have continued to apply the "intimate connection" test as an appropriate standard for determining whether to assert jurisdiction over an employer whose operation is closely connected to a governmental entity.

Rejecting the majority's assertion that the "intimate connection" test is vague and unnecessary, the dissenting Members expressed the view that the "intimate connection" test is the only test which, in every instance in which extension of the exemption to the employer involved is raised, enables the Board fully to scrutinize and examine that relationship. They pointed out that, by determining that certain types of enterprises are not "employers" within the meaning of the Act, Congress necessarily concluded that subjecting such entities to the strictures of the Act would not effectuate national labor policy. Thus, they stated, it follows that it would also not be in the best national interest for the Board to assert jurisdiction over employers who, although not excluded from the Act's coverage, are so closely related to exempt entities that the policy considerations underlying the latter's exemption also apply to them. Finally, Members Penello and Murphy cautioned that the ramifications of abandoning the "intimate connection" standard extend beyond schoolbus transportation cases. They stated that the effect of the majority holding is to grant to privately employed employees, such as the firefighters in *Rural Fire,* who perform essential government services, the legally recognized right to strike which is not granted to public employees performing the same essential government services for exempt governmental entities.

B. Parochial Schools

Two cases decided during this report year presented questions involving the interpretation and application of the Supreme Court's holding in *N.L.R.B.* v. *Catholic Bishop of Chicago.*[9] In its Supplemental Decision and Order in *Gordon Technical High School, Directed by the Congregation of the Resurrection,*[10] a Board panel reconsidered a previous unfair labor practice Decision and Order[11] asserting jurisdiction over the employer, a private Catholic high school for boys. The Board panel noted that in *Catholic Bishop* the Supreme Court affirmed the decision of the United States Court of Appeals for the Seventh Circuit, that the Board did not have jurisdiction over the employer, on the ground that "in the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board,"[12] it would decline to construe the Act in a manner that would require it to resolve difficult questions arising out of the guarantees of the first amendment freedom of religion clause. Accordingly, the panel vacated the prior decision, concluding that the Board's assertion of jurisdiction over the employer was contrary to the holding of the Supreme Court in *Catholic Bishop.*

In *Roman Catholic Diocese of Brooklyn, Henry M. Hald Assn., Bishop Ford Central Catholic High School,*[13] a consolidated proceeding involving three operators of private Catholic high schools, the Board also reconsidered, in light of *Catholic Bishop,* its previous Decision and Order[14] asserting jurisdiction over each employer. With regard to two employers, *Roman Catholic Diocese of Brooklyn and Henry M. Hald Assn.,* the Board, in accord with the parties' stipulation and remand order of the United States Court of Appeals for the Second Circuit, dismissed the consolidated complaint for lack of jurisdiction. However, with respect to Respondent Bishop Ford Central Catholic High School, a Board majority of Chairman Fanning and Members Jenkins and Truesdale, found that *Catholic Bishop* did not preclude assertion of jurisdiction.

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[9] 440 U S 490.

[10] 243 NLRB No. 124 (Chairman Fanning and Members Jenkins and Penello).

[11] *Gordon Technical High School, Directed by the Congregation of the Resurrection,* 229 NLRB 708 (1977) (Members Jenkins, Penello, and Walther).

[12] *N.L R B.* v. *Catholic Bishop of Chicago, supra,* 440 U S. at 507

[13] 243 NLRB No. 24 (Chairman Fanning and Members Jenkins and Truesdale; Member Penello dissenting).

[14] *Roman Catholic Diocese of Brooklyn, et al.,* 236 NLRB No. 3 (1978) (Chairman Fanning and Members Penello and Truesdale).

Noting that the schools involved in *Catholic Bishop* were operated by the Archbishop of Chicago or the Diocese of Fort Wayne-South Bend, the majority found that Ford Central was not a church-operated school and that *Catholic Bishop* did not apply. They noted that Ford Central was operated as a separate institution, governed by an independent lay board of trustees over which the Diocese had no control and upon which it had no representatives. Ford Central hired its own staff and set its own policies with no input from the church. Further, the majority cited the absence of any evidence that the Diocese exercised any control or influence over the operation of the school. Therefore, stated the majority, it was clearly beyond the definition of a "church-operated" school set forth in *Catholic Bishop*. Rather, Ford Central was an entity separate and distinct from the church. Accordingly, there was no danger of entanglement of the government with the church in asserting jursdiction here, and there was no special church-teacher employment relationship present which the Supreme Court foresaw as possibly leading to serious first amendment questions. Finding in *Catholic Bishop* no impediment to the assertion of jurisdiction, the majority reaffirmed their original Decision and Order with respect to Ford Central.

In his dissent, Member Penello found that the Board's assertion of jurisdiction over Ford Central raised the same serious first amendment questions referred to in *Catholic Bishop*, irrespective of the nature of its governing body. He pointed out that the employer, Ford Central, remained a religious school with a distinctly sectarian mission and philosophy. In Member Penello's view, the fact that the Diocese retained a reversionary interest in the school if it ceased to operate as a Catholic school, that it operated a television studio and tower on the school's premises, and that, under ecclesiastical law, the bishop of the Diocese retained general authority over the school with regard to faith and morals, gave him further cause to conclude that there was no more possibility of avoidance of first amendment issues here than in *Catholic Bishop*. Accordingly, he concluded that, in the absence of a finding of the clear expression of congressional intent to assert jurisdiction, required by the Supreme Court and in light of the first amendment questions raised, the Board was prohibited by the *Catholic Bishop* decision from asserting jurisdiction over Ford Central.

C. Charitable Institutions

In *Lighthouse for the Blind of Houston*,[15] the Board majority reaffirmed its holding in *Rhode Island Catholic Orphan Asylum, a/k/a St. Aloysius Home* [16] and asserted jurisdiction over the industrial division of the employer, a charitable nonprofit corporation providing services to blind persons. In rejecting the Employer's argument that the Board incorrectly overruled *Ming Quong Children's Center* [17] in *St. Aloysius Home,* the Board majority stated that "[i]t is now beyond dispute that the Board will no longer distinguish between profit and nonprofit organizations for jurisdictional purposes and will assert jurisdiction over charitable organizations." Nor, in its opinion, did the Supreme Court's decsion in *N.L.R.B.* v. *Catholic Bishop of Chicago*,[18] require that the Board decline jurisdiction. The majority found that, unlike *Catholic Bishop,* here there were no facts which would suggest that the assertion of jurisdiction would raise any questions about or infringe on any first amendment religious guarantees. Accordingly, and as the Employer satisfied the Board's jurisdictional standards for retail enterprises, the Board majority of Chairman Fanning and Members Jenkins and Truesdale found that it would effectuate the purposes of the Act to assert jurisdiction over the Employer's industrial division.

The Employer also contended that the Board should decline jurisdiction on discretionary grounds because its commercial activity was "merely ancillary" to its purpose of providing rehabilitation to handicapped persons and the impact of the Employer's operations on interstate commerce was not sufficient to warrant the Board's assertion of jurisdiction. The majority found no basis for exercising the Board's discretion to decline jurisdiction, noting that the Employer's substantial production and distribution of items by the industrial division attested to the commercial nature of its operations and that the Employer endeavored essentially to operate as would a private employer.

Member Penello, dissenting, noted that he and Member Murphy had dissented from the Board's holding in *St. Aloysius* on the basis of their interpretation of certain legislative history of the

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[15] 244 NLRB No 155 (Chairman Fanning and Members Jenkins and Truesdale, Member Penello dissenting).

[16] 224 NLRB 1344 (1976) (Members Jenkins and Walther, then Member Fanning concurring; then Chairman Murphy and Member Penello dissenting). A discussion of *St. Aloysius* may be found at 41 NLRB Ann. Rep. 27 (1976).

[17] 210 NLRB 899 (1974) (then Chairman Miller and Member Pennello, Member Kennedy concurring, then Member Fanning dissenting).

[18] 440 U.S 490.

Act and that, in *Catholic Bishop,* the Supreme Court agreed with their interpretation of that legislative history. He pointed out that in discussing the Act's 1947 legislative history pertaining to jurisdiction over nonprofit concerns, the Court, in *Catholic Bishop,* stated:[19] "There was some discussion of the scope of the Board's jurisdiction but the consensus was that *nonprofit institutions in general* did not fall within the Board's jurisdiction because they did not affect commerce." (Emphasis supplied by Member Penello.) In Member Penello's opinion, he could not conceive of a more blunt declaration from the Supreme Court that Congress did not intend that the Board exercise jurisdiction over nonprofit organizations as a rule, as the Board itself had held until *St. Aloysius.* Thus, he concluded that the Board should foreclose needless future litigation by announcing that it will not take jurisdiction over such nonprofit, charitable organizations except where unusual circumstances prevail.

D. Other Issues

In *30 Sutton Place Corp.,* [20] the unanimous Board asserted jurisdiction over the employer, an owner and manager of a residential cooperative apartment building. Overruling *Point East Condominium Owners Assn.,*[21] to the extent inconsistent, the Board found that cooperatives and condominiums are engaged in the business of concerted home management and maintenance, and that this business has a substantial impact on interstate commerce warranting the assertion of jurisdiction.[22] The Board also found that it would effectuate the policies of the Act to limit assertion of jurisdiction to those enterprises which realize at least $500,000 in gross revenue per annum. In reaching this figure, the Board pointed to its experience with retail operations, the hotel and motel industry, and the apartment house industry, and found that such a standard would guarantee jurisdiction over those enterprises which have a substantial impact on interstate commerce without involving the Board in cases of little economic import.

In *Open Taxi Lot Operation—San Francisco Intl. Airport,*[23] the Board asserted jurisdiction over an employer engaged in the

[19] 440 U.S. at 505.

[20] 240 NLRB No. 94 (Chairman Fanning and Members Penello, Murphy, and Truesdale).

[21] 193 NLRB 6 (1971) (then Chairman Miller and Members Jenkins and Kennedy).

[22] The Board noted the irrelevance of the legal differences between cooperatives and condominiums and stated that its concern was with the impact on interstate commerce of their activity in concerted home management and maintenance.

[23] 240 NLRB No. 115 (Chairman Fanning and Members Jenkins, Murphy, and Truesdale).

operation and maintenance of a taxi dispatch system which provided for the orderly flow of taxicabs through San Francisco International Airport. It found that the Employer was essential to the furnishing of taxicab service from the airport to the city of San Francisco and the surrounding area. As such, the Board concluded that the service provided by the employer was an essential link in the transportation of passengers in interstate commerce. Citing the discretionary jurisdictional standard set forth in *H P O Service*,[24] to the effect that jurisdiction will be asserted over an enterprise which functions as an essential link in the transportation of passengers or commodities in interstate commerce, if that enterprise derives in excess of $50,000 gross revenues per annum from such operations, the Board found that it would effectuate the policies of the Act to assert jurisdiction over the Employer which derived in excess of $50,000 gross annual revenues from its taxi dispatch operation.

The issue presented in *Albany Medical College of Union University*[25] was whether a medical school is a "health care institution" as defined in section 2(14), which was enacted in 1974 when the Act was amended to cover nonproprietary hospitals which, along with other "health care institutions," had been excluded from the definition of employer.[26] The majority of Members Jenkins, Penello, Murphy, and Truesdale noted that neither the Senate nor House Committee report on the 1974 health care amendments to the Act offered any further elucidation of the meaning of the term "health care institution" beyond the definition in section 2(14), and that there was no evidence indicating that Congress specifically intended either to include or exclude medical schools from the definition of health care institutions. However, the majority adverted to the fact that, prior to the 1974 amendments, the Board had asserted jurisdiction over medical schools, and stated that they could not assume, in the absence of some affirmative indication from Congress, that the amendments were intended to change the status of such schools. The majority found that the Employer's primary purpose was to train physicians and to promote research, and not to provide medical services to the community and that, whether characterized as substantial or insubstantial, the employer's clinical programs were only auxiliary to the provisions of medical education. Accordingly, the

[24] 122 NLRB 394 (1958).

[25] 239 NLRB No. 106 (Members Jenkins, Penello, Murphy, and Truesdale; Chairman Fanning dissenting).

[26] Sec. 2(14) reads: "The term 'health care institution' shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person."

majority concluded that the employer was a college and not a health care institution within the meaning of section 2(14) of the Act.

Chairman Fanning, dissenting, would have found that the employer was a health care institution as defined in section 2(14) of the Act. Referring to the majority's reasoning that, if Congress wanted to include medical schools within the definition of "health care institutions," it would have done so specifically, he termed such an interpretation of the legislative history a literal and narrow one which would obviate the need for the Board as the primary interpreter of the Act. Rather, Chairman Fanning stated, Congress' purpose in enacting the health care amendments was to protect health care from industrial strife and that Congress clearly intended that the term "health care institution" be construed broadly and inclusively. Accordingly, where, as in this case, a medical school renders a significant clinical service to the public, Chairman Fanning would find that the school's health care facilities fall within section 2(14) for the purposes of the Act.

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

[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).

section 8(a)(5) of the Act. In *GAT*,[7] the Board modified *Collyer* 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.

Deferral to Arbitration Awards

In *United States Postal Service*,[9] the Board had occasion to consider whether to defer to an arbitrator's award on an employee's grievance under the standards in *Spielberg, supra*.[10] With respect to the charging party employee's grievance that she was unlawfully denied the services of a union steward in an interview with the employer, the arbitrator found that the employee had never made a timely request for union representation and that there was no violation of the employee's statutory rights. In her petition to the Board for *Spielberg* review, the Charging Party alleged, *inter alia*, that the arbitration procedure was neither fair nor regular.[11] In rejecting this claim, the majority of Members Penello, Murphy, and Truesdale found that the issue of the Charging Party's request for a representative at the interview was fully litigated before the arbitrator who decided the issue directly and who concluded, on the basis of credibility resolutions, that the Charging Party never requested representation. Further, the majority found that fundamental due processes was accorded to the Charging Party as she was represented by counsel and was not restricted in any manner in the presentation of her case. The majority refused to consider as evidence the Charging Party's notes of the proceedings as they were prepared solely for the use of the Charging Party, were not a part of the arbitration record, and were at most secondary or hearsay evidence. Further, the majority decided that the arbitrator's use of the "clear, concise and direct" standard of proof did not undermine the adequacy of the proceeding as it was not necessary for the arbitrator to phrase his findings in terms of judicial evidentiary

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

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

[9] 241 NLRB No 192

[10] In its earlier Decision and Order, 225 NLRB 220, the Board, deferring to arbitration, dismissed the unfair labor practice complaint, but retained jurisdiction to consider a motion that the arbitration procedures had not been fair and regular or had reached a result repugnant to the Act.

[11] The Charging Party also alleged that the arbitrator was unduly biased and acted in a prejudicial fashion toward the grievant. The Board majority found no support for this allegation and also concluded that the arbitration of the Charging Party's discharge was not before the Board.

standards such as "beyond a reasonable doubt" or by a "preponderance of the evidence." Rather, the majority stated, it was sufficient that the arbitrator allowed all parties to be heard, considered all of the evidence before him, and conducted the hearing in an evenhanded manner. Accordingly, the majority concluded that the arbitral proceeding was fair and regular and the Charging Party's petition should be denied.

In their dissent, Chairman Fanning and Member Jenkins argued the arbitrator did not give adequate or proper consideration to the alleged infringement of the Charging Party's *Weingarten* right [12] to have union representation at the investigatory interview with a supervisor and that the Charging Party had raised substantial questions regarding the fairness and regularity of the arbitration proceeding which, standing alone, required a hearing. They pointed out that the majority had refused to examine the Charging Party's transcript of the arbitration proceedings which was "possibly the best available evidence of what occurred," even though unofficial. Further, the dissent argued that the arbitrator's "casual disposition" of the alleged *Weingarten* violation through the application of a strict "clear, concise and direct" standard of proof could hardly be deemed consistent with the Act, which provides in section 10(c) for a less stringent "preponderance of the evidence" standard. Accordingly, they would not have deferred to the arbitrator's award insofar as it purported to resolve the Charging Party's alleged denial of her right to be represented by a union steward at the investigatory interview, and would have remanded the proceeding for a hearing on the merits of the complaint.

Reversing an administrative law judge, a Board panel decided to defer to an arbitrator's award in *Atlantic Steel Co.*,[13] but differed as to the reasons for deferral. Finding that the arbitrator had confined his decision to legal issues arising under the contract and failed to consider whether the employer's conduct amounted to an unfair labor practice, the administrative law judge refused to defer to the arbitrator's award under *Spielberg*, and found that the employer violated section 8(a)(1) and (3) of the Act. The panel majority of Members Murphy and Truesdale reversed, finding that the Board, under its *Spielberg* doctrine, should have deferred to the arbitrator's award upholding the lawfulness of the employer's action.

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[12] See, generally, *Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276 (1975); *N.L.R.B.* v. *Weingarten*, 420 U.S. 251 (1975).

[13] 245 NLRB No 107.

The majority stated that the administrative law judge refused to defer because (1) the arbitrator had not decided the underlying unfair labor practice, and (2) alternatively, the arbitrator's conclusion was not consistent with Board law. Applying *Kansas City Star Co.*[14] and other *Spielberg* precedents, including *Raytheon Co.*[15] where the Board added the requirement to *Spielberg* that, in order for the Board to defer, the arbitrator must have considered the unfair labor practice in his decision, the majority determined that the Board should defer to the arbitrator's decision. They decided that, while it may be preferable for the arbitrator to pass on the unfair labor practice directly, it was necessary only that the arbitrator had considered all of the evidence relevant to the unfair labor practice in reaching his or her decision. Accordingly, they concluded that this standard was satisfied by the arbitrator whose findings were complete, comprehensive, and factually parallel to the alleged unfair labor practice.

The majority also disagreed with the administrative law judge's alternative finding that the arbitrator's award, based on the employee's use of obscenity warranting his discharge, was repugnant to the Act. Finding that the arbitrator properly considered the factors used by the Board to determine whether an employee who is engaged in concerted protected activity can, by opprobrious conduct, lose the protection of the Act, the majority found nothing in the arbitrator's decision that was repugnant to the Act, and decided that it would effectuate the purposes of the Act to give conclusive effect to the grievance award. Accordingly, they dismissed the complaint in its entirety.

Member Penello, concurring, agreed that this case was properly deferred to the arbitrator's award. However, he disagreed with the majority's standard for deferral which he stated was whether the award was in accord with the Act and Board precedent, rather than whether, under the *Spielberg* standards, the award is clearly repugnant to the Act or wholly at odds with Board precedent. In his view, the majority did not "defer" to the arbitrator's award, but instead "adopted" it as if the arbitrator was some sort of unofficial administrative law judge. He stated that deferral under such a standard furthers neither the aim nor the efficient administration of the Act, but encourages full litigation before the Board of deferrable disputes. Strict attention to *Spielberg* standards would, in Member Penello's opinion, further the

[14] 236 NLRB No. 119 (1978) (Members Penello and Murphy, Member Truesdale concurring; Chairman Fanning and Member Jenkins dissenting).
[15] 140 NLRB 883 (1963).

purposes of the Act by encouraging the reliance on collective bargaining and its correlative offspring, grievance arbitration.

In *Sea-Land Service*,[16] a Board majority of Chairman Fanning and Member Jenkins, with Member Truesdale concurring separately, declined to defer to an arbitration award, on the ground that it was repugnant to the Act. In this case, an employee filed a grievance and, as a result, was issued a written reprimand. During a subsequent grievance meeting, the employee used an obscenity and was summarily discharged. The arbitrator found that the employee's discharge was based, at least in substantial part, on his filing of the grievance—conduct which was protected by section 7 of the Act. However, since he ruled that discharge was too severe for engaging in that protected activity, the arbitrator awarded a suspension as an appropriate penalty for an obscenity uttered in that connection. Pointing out that the Board has long held that any discharge predicated in whole or in part on the effort of an employee to present a grievance, absent unusual circumstances not present here, would be a discharge for protected activities and therefore a violation of the Act, the majority found that the arbitrator's decision was clearly repugnant to the Act. Accordingly, they refused to defer to the arbitrator's award.

Member Truesdale, concurring, agreed that the arbitrator's decision was repugnant to the Act. He did so, however, only because the arbitrator himself found that one of the reasons for the disciplinary meeting which precipitated the employee's outburst and, in turn, his immediate discharge, was the fact that the employee had filed a grievance against the employer the previous day. As the Board has consistently held that an employer may not lawfully discipline or discharge an employee for alleged insubordination where such insubordination was itself provoked by the employer's unfair labor practice, Member Truesdale agreed that the arbitrator's contrary conclusion was clearly repugnant to the Act.

In his dissent, Member Penello stated that the opinion of the majority again demonstrated their predilection to defer to an arbitrator's award only when they happen to agree with the arbitrator's decision. In his view, the majority sought to change the third *Spielberg* criteria from "merely repugnant" to "merely erroneous," thereby substituting their judgment for that of an arbitrator. Member Penello stated that this was at odds with the policies to encourage collective bargaining and private dispute resolution firmly embedded in the Act and embodied in the *Spielberg* doctrine for over two decades. Accordingly, he concluded that

[16] 240 NLRB No. 147.

the majority's failure faithfully to follow that policy unfortunately resulted in unwarranted delay and increased resort to adversary and bureaucratic proceedings.

Disagreeing with an administrative law judge, in *Brown Co.*[17] the Board majority refused to defer to an award made by a joint labor-management grievance committee, consisting of three representatives each from the unions and management. They noted that although the Board has honored the awards of similar joint committees, the Board will not honor such an award where it appears that members of the committee have interests which are directly in conflict with those of the grieving party. Finding that a community of interest existed between the committee members which was in conflict with the interests of the grievants herein and which precluded the impartiality the Board deems necessary in an arbitration proceeding, the majority concluded that they would not honor the award of the committee in deciding the unfair labor practice allegations before them.

In their dissent, Members Penello and Murphy state that this is another instance in which their colleagues gave "lip service" to the *Spielberg* principle. In their view, the majority's position amounted to a rejection of any joint grievance committee as a body capable of impartiality considering a grievance. Pointing out that such committees, by their nature, cannot be entirely neutral because all are involved in the same industry, all are bound by the same contract, and any interpretation of the contract will necessarily interest the committee members, the dissenters argued that the majority offered no evidence to establish that the interests of the committee members were any different from those of any other potential representative to the committee. Accordingly, Members Penello and Murphy found no merit to the majority's assertion that conflicting interests precluded an impartial decision by the committee and would have deferred to the joint committee's decision.

In *Triple A Machine Shop* [18] a Board panel majority decided that deferral to the arbitrator's awards was inappropriate. The majority first noted that it appeared that the arbitrator did not consider that the statutory issue was before him or that it was of any concern to him in making his awards. They then stated that the arbitrator failed to make necessary credibility and factual findings, and that, in lieu of such findings, it appeared that the

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[17] *Brown Co., Brown Co, Livingston-Graham Division; Brown Co., Tri-City Concrete Division; L-T Transport,* 243 NLRB No. 100 (Chairman Fanning and Members Jenkins and Truesdale; Members Panello and Murphy dissenting).

[18] 245 NLRB No. 24.

arbitrator decided to issue "compromise" awards. Under these circumstances, Chairman Fanning and Member Jenkins declined to defer to the arbitrator's awards.

In his dissent, Member Penello disagreed, stating that the awards fully met the *Spielberg* criteria for deferral. In his view, the majority misread the arbitration awards and misapplied the *Spielberg* criteria. He found that, although the arbitrator did not specifically rule on the underlying statutory issues, the arbitrator was aware of them and did consider them in reaching his decision. Member Penello further found that while the arbitrator did not spell out in detail his credibility resolutions and factfindings, it was apparent from the awards as a whole that the arbitrator made determinations sufficient to resolve the questions before him and the unfair labor practice issues. In his opinion, while the awards showed flexibility in their remedies, this was one of the values of arbitration and was not proof of "compromise" awards. In sum, he found that the proceedings were fair and regular, the parties agreed to be bound, and the results were not clearly repugnant to the purposes and policies of the Act. Accordingly, Member Penello would have deferred to the awards of the arbitrator.

IV

Board Procedure

A. Unfair Labor Practice Procedure

During the report year, a Board panel, in *Camay Drilling Co.*,[1] reopened the record and remanded the proceeding to the administrative law judge in order to allow the trustees of several trust funds to intervene. The complaint alleged, *inter alia,* that the employer unilaterally withheld wage and/or fringe benefit contribution increases that were required by the parties' current collective-bargaining agreement and thus violated section 8(a)(5) and (1) of the Act. At the hearing, the trustees moved to intervene on the basis that the trusts were entitled to receive the contribution increases. The administrative law judge denied the trustees' motion on the ground that they had no interest in the matter until the issue of the alleged violation of the Act was resolved.

Relying, in part, on section 554(c) of the Administrative Procedure Act,[2] the Board panel found that the administrative law judge committed prejudicial error by refusing the trustees' request to intervene. The panel was of the opinion that, in light of the rigorous fiduciary obligations imposed on the trustees by the Employee Retirement Income Security Act of 1974,[3] the trustees were "interested parties" as the term is used in the Administrative Procedure Act, and that none of the qualifying language in section 554(c) served as a basis for excluding the trustees from intervening. Additionally, the panel noted that the trustees, whose interests were not identical with that of the Charging Party, had indicated that they possessed certain evidence bearing upon issues before the administrative law judge whose findings with respect to those issues were matters in which the trustees had a vital

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[1] 239 NLRB No. 138 (Chairman Fanning, Members Penello, and Truesdale).

[2] 5 U.S.C. 554(c) provides, in pertinent part

> (c) The agency shall give all interested parties opportunity for—
>
> (1) submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit.

[3] 29 U.S.C. § 1001, *et seq.*

interest. Accordingly, it was deemed necessary to grant the trustees' motion to intervene in order to afford them due process.

In *Curlee Clothing Co.*,[4] the Board majority found that an administrative law judge did not abuse his discretion by failing to grant the employer's motion for the sequestration of witnesses during a portion of the hearing. Assuming, *arguendo*, that the administrative law judge's ruling was inconsistent with the Board's present policy set forth in *Unga Painting Corp.*,[5] the majority found that the effect of nonsequestration in this case was not sufficient to warrant a reversal. Noting that at the time of the hearing the Board had not yet decided *Unga Painting* and that the Board's policy at that time was one of allowing administrative law judges considerable discretion with regard to the sequestration of witnesses, they held that the administrative law judge neither abused his discretion nor was there prejudice to the employer.

In a separate concurrence, Member Murphy agreed that since the hearing was held prior to the issuance of the Board's decision in *Unga Painting*, the administrative law judge did not err in failing to sequester the nondiscriminatee witnesses. However, she could not agree with the rationale used by the majority because it suggested that "they are about to embark on a wholly unacceptable procedural sea in applying the rule set forth in *Unga*." She stated that the majority erred twice: first, by giving retroactive application to what she described as the "revolving turnstile" rule set forth in *Unga*, and, second, by holding that even a blatant failure to follow the Board's mandatory rules with respect to sequestration would not be treated as prejudicial error *per se*. The majority disagreed with their colleague asserting that neither statement was "remotely related" to the holding in this case.

B. Representation Procedure

In *Sunnyvale Medical Clinic*,[6] the Board, unanimously reversing the regional director, found merit in the employer's contention that the regional director erred in denying its request for withdrawal from a Stipulation for Certification Upon Consent Elec-

[4] 240 NLRB No 41 (Chairman Fanning and Members Jenkins, Penello, and Truesdale; Member Murphy concurring).

[5] 237 NLRB No. 122 (Chairman Fanning and Members Jenkins, Penello, and Truesdale; Member Murphy dissenting). A discussion of *Unga Painting* may be found at 43 NLRB Ann Rep. 50 (1978).

[6] 241 NLRB No. 161.

tion, after an intervenor had been accorded a place on the ballot. Analyzing the facts, the majority of Chairman Fanning and Members Jenkins and Murphy noted that the election agreement had been agreed on and executed prior to the intervenor's interest becoming known and that the employer requested permission to withdraw from the election agreement because, *inter alia,* the intervention of the second labor organization created "changed circumstances" under which it would not have entered into the agreement had it known both labor organizations would be on the ballot. Stating that it is the practice and policy of the Board that a party may withdraw from an election agreement, after approval of the agreement, upon an affirmative showing of unusual circumstances and that they would not overrule *Unifemme,*[7] the majority decided that this case presented an "unusual" factual situation in that the petitioning union and intervenor arose from common origins under circumstances which confused the identities of the two labor organizations. Accordingly, they found that it was an abuse of discretion for the regional director to refuse the employer's withdrawal request.

Members Penello and Truesdale, concurring, agreed that the election should have been set aside and the stipulation vacated. Unlike their colleagues, however, they would have done so by overruling *Unifemme, supra,* and finding that the addition of an intervenor to a ballot is, of itself, sufficient ground for granting a party's request to withdraw from an earlier election agreement and that it was an abuse of discretion for the regional director to deny that request.

C. Declaratory Orders

In *Wilkes-Barre Publishing Co.,*[8] the employer petitioned the Board to issue a declaratory order under section 5 U.S.C. § 554 (e), clarifying the state of the law and removing any uncertainty with respect to the legal issues posed by its petition, particularly with respect to its statutory obligation to bargain with the Unions as representatives of its employees where the Unions were also business competitors. It acknowledged that it had filed unfair labor practice charges with regard to one aspect of the controversy between it and the unions involved leaving other legal issues unresolved.

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[7] 226 NLRB 607 (1976), enforcement denied 570 F 2d 230 (8th Cir. 1978).
[8] 245 NLRB No. 117.

The panel unanimously concluded that the petition must be dismissed. Members Jenkins and Penello found it clear that at least some of the matters sought to be decided here were raised by the unfair labor practice charges filed by the employer, so that, even assuming the petition sought resolution of certain controversies not within the scope of the unfair labor practice charges, there was "no valid justification for bifurcating decision of certain issues where all those issues had their genesis in the same events and labor dispute." Further, they found that the types of issues involved, arising under a complex set of facts, would best be resolved after a full hearing before an administrative law judge. Accordingly, and without deciding the issue as to the power and jurisdiction of the Board to issue such declaratory order, the petition was dismissed.

Chairman Fanning concurred for the reasons set forth in his concurrence in *American Federation of Television & Radio Artists, AFL–CIO (W. F. Buckley)*.[9] In his view, the issues raised by the Employer could properly be resolved only pursuant to section 3(d) of the Act which places in the General Counsel the final authority over the investigation of charges and the issuance of complaints based on such charges. He stated that inasmuch as the petition here sought to circumvent the procedural requirements of section 3(d) of the Act, it must be dismissed.

[9] 222 NLRB 197, 199 (1976).

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. Status as Party

1. Status as Employee

A bargaining unit may include only individuals who are "employees" within the meaning of Section 2(3) of the Act. The

major categories expressly excluded from the term "employee" are agricultural laborers, independent contractors, and supervisors. In addition, the statutory definition excludes domestic servants, or anyone employed by his parent or spouse, or persons employed by a person who is not an employer within the definition of section 2(2).

These statutory exclusions have continued to require the Board to determine whether the employment functions or relations of particular employees preclude their inclusion in a proposed bargaining unit.

In *Ankh Services*,[1] the Board majority found no merit in the contention that the Board should decline jurisdiction over the Employer on the ground that its in-home service workers were "domestic servants" employed in the domestic service of families or persons in their homes, and were thus excluded from the definition of "employees" in section 2(3) of the Act. The employer, a private, nonprofit, corporation, provided, through its in-home service workers, in-home personal care and housekeeping services for aged, low-income, emotionally disturbed, or mentally or physically disabled individuals. Over 90 percent of the Employer's in-home service to clients was rendered pursuant to a contract with an agency of the State of Missouri.

In finding that the individuals in the stipulated unit were employees within the meaning of the Act, the majority focused on the principals to whom the employer-employee relationship in fact ran, and not merely on the undisputably "domestic" nature of some of the services rendered. In this regard, the Board majority noted that the in-home service workers were paid by the employer, and not by the homeowners or residents who, themselves, paid nothing for the services rendered them. In the majority's view, although the in-home services were for the clients, these services were nevertheless performed on behalf of the Employer who clearly employed the workers. Moreover, the Board majority pointed out that neither Congress nor the courts had given the Board any reason to believe that Congress intended to exclude from the coverage of the Act any other than those individuals whose employment fell within the commonly accepted meaning of the term "domestic servant."

In their dissent, Members Penello and Murphy found it unnecessary to pass on the issue of whether in-home service workers fell within the "domestic service" exclusion of section 2(3) of the Act. Rather, in accord with their dissent in *Natl. Transportation*

[1] 243 NLRB No. 68 (Chairman Fanning and Members Jenkins and Truesdale, Members Penello and Murphy dissenting).

Service,[2] where the Board majority abandoned the so-called intimate connection jurisdictional test, they would have declined to assert jurisdiction on the ground that the employer was so intimately connected with the functions and purposes of exempt state agencies that the national policy considerations underlying the exemption of those state agencies applied with equal force to this employer, which was performing a service previously provided by the State.

In *Sav-On Drugs*,[3] a majority of the Board found, contrary to a decision by a regional director, that pharmacy managers as a class were not supervisors and therefore included them in the unit of registered pharmacists. The majority noted first that pharmacists were clearly professionals and that the Board was careful in "applying the definition of 'supervisor' to professionals who direct other pharmacy employees in the exercise of their professional judgment, which direction is incidental to the practice of their profession and thus is not the exercise of supervisory authority in the interest of the Employer." They also noted, in this regard, that pharmacy managers did not hire, transfer, suspend, layoff, recall, promote, discharge, or reward other pharmacists, nor effectively recommend such action. The majority further found that the administrative hierarchy within each store applied to the pharmacy department, and thus rejected the importance of the fact, relied on by the dissent that, if individual pharmacy managers were found not to be supervisors, it would result in a disproportionate employee-to-supervisor ratio. In sum, the majority concluded that, while pharmacy managers exercised discretion and judgment in the performance of their duties, such exercise fell clearly within the ambit of their professional responsibilities, and did not constitute the exercise of supervisory authority in the interest of the employer.

In dissenting, Members Jenkins and Murphy concluded that the majority was substituting its interpretation of the record for that of the regional director, rather than basing their decision on compelling factors as required by section 102.67(c) of the Board's Rules and Regulations. The dissenters disagreed with the majority's distinction between "professional" authority, which lay with the pharmacy managers, and "administrative" authority, which lay with the store managers. In their view, at the local level no one but the pharmacy managers had significant authority

[2] 240 NLRB No. 99. See discussion, *supra* at p. 32.

[3] 243 NLRB No. 149 (Chairman Fanning and Members Panello and Truesdale; Members Jenkins and Murphy dissenting).

over personnel in the pharmacy departments. Although conceding that the majority was essentially correct in asserting that pharmacy managers do not hire, transfer, suspend, layoff, recall, promote, discharge, or reward other pharmacists, the dissenters stated that the majority ignored several qualifications to this finding, such as on occasion pharmacy managers interviewed applicants and recommended terminations and more significantly, evaluated staff pharmacists for promotions and evaluated new employees after 30 days.

In addition, the dissenters pointed to the regional director's undisputed findings that pharmacy managers (1) had authority to issue warning notices to pharmacists and counseled them about poor performance, etc.; (2) exercised independent judgment in scheduling pharmacy employees; (3) possessed authority to direct their work and to adjust their grievances; and (4) attended annual management meetings. Accordingly, they found that the record supported the regional director's finding that pharmacy managers were statutory supervisors.[4]

2. Status as Employer

In *Singer Co., Education Div., Career Systems, Detroit Job Corps Center,*[5] the Board considered a regional director's decision declining to assert jurisdiction over the employer operating a job corps center because he found that the U.S. Department of Labor (DOL) exercised such substantial control over its labor relations policies as to prevent the employer from effectively bargaining in good faith. The regional director had followed the precedent in *Teledyne Economic Development Co.*[6] In reversing the regional director's decision and directing an election, the Board majority found that, although the facts before them were not significantly different from those in *Teledyne,* it had decided to overrule *Teledyne* and assert jurisdiction over the employer. In doing so, the majority noted that: (1) day-to-day labor relations at job corps centers were not directly controlled by DOL,

[4] Premised upon their finding that pharmacy managers are statutory supervisors, Members Jenkins and Murphy further found the involvement of pharmacy managers in the formation and internal affairs of the petitioner would pose a clear and present danger to meaningful collective bargaining. Accordingly, they would have disqualified the petitioner from representing the petitioned-for unit of pharmacists and dismissed the petition. See *Sierra Vista Hospital,* discussed *infra.*

[5] 240 NLRB No. 130 (Chairman Fanning and Members Jenkins and Truesdale; Members Penello and Murphy dissenting).

[6] 223 NLRB 1040 (1976).

and any indirect control of the employer under its contract with DOL was not so pervasive as to preclude meaningful good-faith bargaining; (2) the employer alone was responsible for hiring, firing, promotions, demotions, and transfers of employees in the unit sought, as well as being primarily responsible for establishing the terms and conditions of employment in the unit sought; (3) in the past, the employer had instituted both job posting and a form of grievance procedure, without prior DOL approval; and (4) the employer had bargained with a union representing its food service employees for 3 years.

Members Penello and Murphy dissented as the facts were virtually identical to those in *Teledyne*. In their view, the facts clearly revealed that DOL indirectly controlled virtually every important aspect of the employer's labor relations, with the DOL's project manager overseeing its operations on a daily basis. In addition, they disputed the majority's reliance on the fact that the employer had bargained with a union representing their food service workers following a Board certification proceeding in which the employer had not contested jurisdiction, asserting that the employer's voluntary agreement to bargain with another labor organization did not mean that it could be required to do so under law.

Finally, they emphasized that, as in *Teledyne*, the employer could make no binding commitments without prior DOL approval and/or acquiescence, so that, in practical effect, any bargaining with a labor organization would constitute an attempt to bargain with DOL, an exempt instrumentality under the Act. Accordingly, Members Penello and Murphy concluded that the employer shared the DOL exemption from the Act, and that, therefore, the representation petition should be dismissed.

3. Status of Labor Organization

In *Lutheran Hospitals & Homes Society of America, d/b/a Kodiak Island Hospital,*[7] the Board considered a regional director's decision in which he found, contrary to the employer, that the petitioning union was a labor organization within the meaning of section 2(5) of the Act.[8] The Petitioner's constitution

[7] 244 NLRB No 151 (Chairman Fanning and Members Penello, Murphy and Truesdale).

[8] Sec. 2(5) provides:

The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

and bylaws restricted membership to registered nurses (RNs), while the overwhelming majority of the unit sought by the petitioner were non-RNs, meaning that most unit employees could not participate in the petitioner's internal affairs. In affirming the regional director's decision, the Board noted that (1) although the petitioner's constitution limited membership to RNs, its bylaws provided for representation of non-RN units on a "fee-for-services" basis; and (2) the petitioner provided its services through a committee which guaranteed local units complete autonomy with respect to collective-bargaining decisions. Stating that in determining labor organization status, the willingness of a union to represent employees, rather than eligibility of the employees to membership in that union, was controlling, the Board concluded that the petitioner was a labor organization which could represent the employees in which the unit employees could participate. The Board also found no merit in the employer's contention that the petitioner was not a labor organization because it had contractually relinquished all powers of representation to another organization noting that the contractual relationship was a *revocable* delegation of bargaining authority which merely established a principal-agent relationship.

B. Disclaimers and Disqualifications

Two cases decided by the Board during the report year concerned the effect of disclaimers of representational interest filed by incumbent labor organizations.

In *East Mfg. Corp.*,[9] a Board panel reversed a regional director's decision finding that a disclaimer of interest filed by an unaffiliated incumbent union removed its collective-bargaining agreement with the Employer as a bar to an election. Although there was a current collective-bargaining agreement, the petitioner filed a petition claiming to represent the same production and maintenance employees as were covered by the agreement. During the hearing on the petition, six officers of the incumbent union's executive committee executed and filed with the hearing officer a disclaimer of interest in further representing the petitioned-for employees. The regional director, in finding the disclaimer effective so as to remove the contract as a bar, found no evidence of collusion or an agreement between the incumbent union and the petitioner, nor any evidence of a design to avoid

[9] 242 NLRB No. 5 (Members Penello, Murphy, and Truesdale)

the contract. In reversing the regional director, the panel noted that his decision was not based on a determination of defunctness, but rather on the incumbent's disclaimer of interest. There was no evidence that the incumbent union was either defunct or unable to administer the extant contract, and, in fact, the incumbent was a viable contracting representative. Therefore, and as the reason for the disclaimer was a general dissatisfaction with the incumbent union by certain members, the panel stated that the disclaimer executed under such circumstances was ineffective and inconsistent with the Board's established contract-bar doctrine. Accordingly, the panel held that the collective-bargaining agreement between the incumbent union and the employer was a bar to the election.

On the other hand, in *American Sunroof Corp.-West Coast, d/b/a American Sunroof/Customcraft,*[10] a Board majority affirmed an acting regional director's decision that, based on a disclaimer of interest filed by an incumbent union, the current contract with the employer was not a bar to the election petition filed by the petitioner after the disclaimer. The disclaimer had been filed as a result of an earlier deauthorization petition filed by a unit employee. When the deauthorization petition was subsequently withdrawn, the Petitioner shortly thereafter filed the petition seeking an election among the employees formerly represented by the incumbent union. Finding that there were no special circumstances such as defunctness [11] or collusion between the petioner and an incumbent union [12] upon which the earlier precedent relied and that the union herein had not acted inconsistently with its disclaimer from the time it was made, the majority found no basis for not giving the disclaimer full effect since the contracting union had properly disclaimed interest in the employees covered by the contract.[13]

Member Penello, dissenting, pointed out that the principle that a disclaimer would not operate to remove a contract as a bar to an election, absent a showing that the disclaiming union was defunct, was recently reiterated by the Board in *East Mfg.* Accord-

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[10] 243 NLRB No. 172 (Chairman Fanning and Members Jenkins and Truesdale, Member Penello dissenting)

[11] *Gate City Optical Company, Div. of Cole Natl Corp.*, 175 NLRB 1059 (1969).

[12] *Mack Trucks*, 209 NLRB 1003 (1974).

[13] Member Truesdale, in agreeing with his colleagues that the disclaimer removed the contract as a bar to the election, would distinguish *East Mfg., supra*, on the grounds, *inter alia*, that in *East Mfg.* the incumbent union consisted only of employees of the employer, and that the organizational activity among them and the filing of the petition preceded the incumbent union's disclaimer In contrast, in *American Sunroof*, the employees were left with no representation at all by virtue of their representative's arm's-length disclaimer following the employees' petition to deauthorize the incumbent's union-shop authority

ing to Member Penello, the only exceptions to the contract-bar doctrine are in cases of a schism, defunctness, or a substantially expanded bargaining unit, because in each such case the contract is no longer a stabilizing force and only the direction of an immediate election can restore stability and assure employees of their right to select a representative. In his view, the simple disclaimer of interest herein was not one of these exceptions. To Member Penello, the majority decision would encourage circumvention of the contract-bar doctrine and make all collective-bargaining agreements terminable at will, thereby frustrating the predictability and stability in labor relations supplied by the mutual and binding commitments contained in collective-bargaining agreements and by the Board's contract-bar principles.

In *Sierra Vista Hospital*,[14] the full Board unanimously indicated that it would no longer condition certification of state nurses' associations on the delegation of their bargaining authority to autonomous chapters or locals. In this connection, the Board noted that the conditional certification approach had been ineffective as a means for resolving the problems created by the participation of supervisors in labor organizations and had obfuscated the distinction between nurses' associations as statutory labor organizations and the issue of whether the participation of supervisors in the internal affairs of the association disqualified it as a bargaining representative. The Board clearly delineated the distinction by stating that "[a]s long as nurse-employees participate in the association and one of its purposes is representing employees in collective bargaining, a nurses' association, like any other, meets the definition of 'labor organization' in Section 2(5) of the Act."

A majority of the Board (Chairman Fanning and Members Jenkins, Penello, and Murphy) went on to state, however, that while the presence of supervisors in an association did not bear upon its "labor organization" status, the identity and role of those supervisors in the labor organization may operate, nonetheless, to disqualify it from bargaining in certain instances. In the first instance, they expressed concern that "active participation" by an employer's *own* supervisors in the internal affairs of a labor organization seeking to bargain with that employer could raise doubts as to that labor organization's ability to deal with that employer at arm's length. In addition, the majority indicated that active internal union participation by supervisors employed by a third party may impinge upon the employees' right to a bar-

[14] 241 NLRB No. 107.

gaining representative whose undivided concern was for their interest. With respect to third party supervisors, however, the majority emphasized that in order for a conflict of interest to exist there must be a demonstrated connection between the employer of the unit employees and the employer of those supervisors.

In either instance, however, to avoid fishing expeditions delaying representation proceedings, the Board majority stressed that the burden of showing a disqualifying conflict of interest is a heavy one and, if an employer "is unable to adduce probative evidence substantiating a claim that supervisory participation in the affairs of the union presents a clear and present danger of interference with the bargaining process, its contention will be summarily found lacking in merit." Accordingly, the majority remanded for a hearing in the reopened representation case to receive evidence to resolve the issue raised by the motion to revoke the association's certification; namely, whether or not the presence of supervisors as officers in, on the board of directors of, or in the position of authority to speak for or bargain on behalf of the state nurses association disqualified it as the collective-bargaining representative of nonsupervisory nurses.[15]

Member Truesdale, dissenting in part, stated that in cases such as the instant one, in which it was alleged that an entity found to be a labor organization was dominated by supervisors, he would apply the Board's normal rule of not permitting litigation of unfair labor practice issues in a representation proceeding. Nor would he allow this matter to be litigated in an 8(a)(5) case testing the certification since, in his view, that would be merely an outgrowth of the representation proceeding. He reasoned that if an employer was truly concerned about its own supervisors' participation in a union, it had a "self-help" remedy readily available in that all that needed to be done was to instruct them to stop, to resign as officers, or to remove themselves as members of the negotiating committee. As for employees, Member Truesdale indicated that he would direct them to the 8(a)(2) forum if they were concerned about the loyalty of their bargaining representative. He also noted that employees had a more direct remedy in that they might select a more "loyal" representative initially, if

[15] With respect to procedural aspects of the remand pertaining to the litigation of these issues in the representation proceeding, rather than in an unfair labor practice case as their dissenting colleague would, the majority stated that issues concerning the qualification of a labor organization to bargain for employees have been traditionally considered in representation proceedings, wherein they are viewed from a conflict-of-interest perspective rather than as litigation of unfair labor practice issues in a representation proceeding.

that were their concern. Finally, Member Truesdale found that with respect to the concern posed by supervisors of third parties, the employees have the remedies set forth above, and the employer may interpose a *Bausch & Lomb* [16] type defense. Accordingly, finding incongrous the majority's decision to delay resolution of the representation case, Member Truesdale would have affirmed the certification of the association.

C. Unit Determinations

1. Health Care Institution Units

Several cases decided by the Board this year concerned the appropriateness of separate maintenance units in health care institutions.

In *Allegheny General Hospital,*[17] the Board reconsidered a previous Decision and Order [18] extending comity to the certification by the Pennsylvania Labor Relations Board of a separate unit of maintenance department employees, in light of the decisions by the United States Court of Appeals for the Third Circuit in *Memorial Hospital of Roxborough* v. *N.L.R.B.*[19] and *St. Vincent's Hospital* v. *N.L.R.B.*[20] In the latter case, the court decided that the legislative history of the 1974 amendments to the Act extending coverage to nonprofit hospitals, specifically the statement in the Senate and House committee reports that "[d]ue consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry," precluded the Board from finding appropriate separate units of maintenance and powerhouse employees at health care institutions. After carefully reconsidering the legislative history of the 1974 amendments, the Board majority, in *Allegheny,* concluded that Congress did not intend to prohibit such units.

Citing the Board's decision in *Jewish Hospital Assn. of Cincinnati d/b/a Jewish Hospital of Cincinnati,*[21] the majority noted that the entire Board agrees that "Congress left the matter of the

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[16] *Bausch & Lomb Optical Co*, 108 NLRB 1555 (1954). In *Bausch & Lomb* the Board held that an employer may lawfully refuse to bargain with a bargaining representative which itself was a competing business

[17] 239 NLRB No. 104 (Chairman Fanning and Members Murphy and Truesdale; Member Penello dissenting).

[18] 230 NLRB 954 (1977) (Member Penello dissenting).

[19] 545 F 2d 351 (1976).

[20] 567 F.2d 588 (1977).

[21] 223 NLRB 614 (1976) (Chairman Fanning and Members Jenkins and Penello, Member Fanning dissenting).

determination of appropriate units to the Board, and the desire for nonproliferation does not . . . necessarily preclude . . . granting maintenance units in the health care area." The majority then reasoned that Congress intended that the Board should rely on the traditional community-of-interest criteria in making unit determinations in the health care industry, but that the Board should consider the proliferation problem as a factor in making such unit determinations. In deciding what Congress meant by "proliferation," the majority reviewed the statements of various sponsors of the amendments and concluded that Congress wanted the Board to avoid grouping health care employees into units according to "*each* professional interest and job classification," such as was the practice in the construction industry. The majority then extensively reviewed the Board's previous decisions regarding unit determinations in health care institutions and concluded that through the application of traditional community-of-interest criteria, proliferation of units had not occurred and the unit pattern in the health care industry did not even remotely resemble that in the construction industry. Accordingly, the members of the majority agreed to continue to apply the traditional community-of-interest test, originally established in *American Cyanamid Co.*[22] In order to determine the appropriateness of separate maintenance units in health care institutions. Under that test, as summarized by the majority, "the issue is essentially whether the employees sought are an identifiable group with a community of interest that is sufficiently separate or distinct from the other unrepresented service and maintenance employees to warrant separate representation." Applying the test of *American Cyanamid Co.* to the facts before them, the majority found that a maintenance unit separate from the hospital's housekeeping employees was appropriate. In so finding, the majority specifically relied on the following factors: (1) the vast majority of maintenance department employees were skilled craftsmen who performed craft work and must possess craft skills when hired, unlike the housekeeping employees; (2) the less skilled maintenance employees performed tasks which were integrated with those of skilled maintenance employees; (3) the maintenance employees were separately supervised and worked under different terms and conditions than the housekeeping employees; and (4) the maintenance employees never did the work of housekeeping employees, and vice versa.

[22] 131 NLRB 909 (1961).

Member Penello, in a lengthy dissent, strongly disagreed with his colleagues approach, asserting that it was founded "upon misrepresentation of legislative history, improper reliance upon 'post-passage' personal remarks of one legislator, misleading discussion of Board and court cases, and astonishing assertions that application of traditional principles of unit determination have prevented, and will prevent, the mushrooming of bargaining units in health care institutions."

Although he readily agreed with his colleagues that Congress did not intend to *preclude* the Board from using traditional principles in making unit determinations in the health care industry, Member Penello argued that if Congress had wanted the Board to employ *exclusively* its usual community-of-interest standard, there would have been no need to caution the Board in the committee reports to avoid proliferation of bargaining units in the health care industry. Under Member Penello's analysis of the legislative history, "the congressional mandate against multiplication of bargaining units in this field forms a 'factor of public interest,' beyond that of community of interest among employees, which the Board is required to take into account when making decisions about the appropriateness of units in a health care institution." Relying on his concurring opinion in *St. Vincent's Hospital*,[23] Member Penello would find separate craft *maintenance* units in the health care industry to be appropriate only when, after applying the traditional criteria for the establishment of maintenance units and ensuring that it does not conflict with the congressional mandate against proliferation, "the unit sought is composed of licensed craftsmen engaged in traditional craft work, which is performed in a separate and distinct location apart from other employees in the health care facility . . . and there is, at most, minimal transfer or interchange to and from the craft unit." Applying his test from *St. Vincent's Hospital* to the facts before him, Member Penello found that the employees in the unit sought did not possess such an exceptionally high degree of community of interest among themselves to permit them separate representation. In so finding, he specifically relied on the following factors: (1) the maintenance employees in the unit sought were both skilled and unskilled; (2) the maintenance employees worked throughout the hospital and came into regular contact with other nonprofessional employees; (3) the maintenance and housekeeping employees received the same fringe benefits, used the same entrance and timeclock, were housed in the same part of the

[23] 223 NLRB 638 (1976).

hospital, had the same relaxation facilities and opportunities, and were entitled to receive the same continuing education and tuition assistance benefits.

In *Riverside Methodist Hospital,*[24] the same Board majority as in *Allegheny General Hospital* found appropriate a unit composed of maintenance and powerhouse employees, rejecting the employer's contention that only a unit encompassing all service and maintenance employees was appropriate. The majority noted that in a previous decision involving the same employer, *Riverside Methodist Hospital*[25] (herein called *Riverside I*), the Board dismissed a petition for essentially the same unit that was now being sought. Nevertheless, upon a reconsideration of the facts indicating that the maintenance department has expanded in size, and in light of their decision in *Allegheny General Hospital,* the majority concluded that the roughly 50 maintenance employees possess a well-defined community of interest which easily distinguished them from those workers who merely provide routine support services for the employer. In so concluding, they specifically relied on: (1) the special skills possessed by maintenance employees; (2) the higher wages they received; (3) the fact that they had long been organized by the employer into a separate administrative department with a separate budget; (4) the separate training program for maintenance department employees; and (5) the fact that there had been no significant number of transfers of employees to or from the maintenance department and service classifications.

Dissenting Member Jenkins, who was a member of the majority in *Riverside I,* adhered to that decision and found the petitioned-for unit inappropriate. In his view the majority failed to prove that the increase in size of the petitioned-for unit had resulted in those employees possessing greater skills, experience, or qualifications than those composing the *Riverside I* work force, or that those employees performed more complex tasks, or were less integrated with the remainder of the hospital work force.

Member Penello, who was also a member of the majority in *Riverside I,* stated in a separate dissent that the unit of employees, which the petitioner sought and which the majority granted, was no more appropriate than it had been when the petitioner unsuccessfully sought the same unit more than 2 years earlier. Citing from his dissenting opinion in *Allegheny General*

[24] 241 NLRB No. 184 (Chairman Fanning and Members Murphy and Truesdale, Members Jenkins and Penello dissenting).

[25] 223 NLRB 1084 (1976) (Members Jenkins, Penello, and Walther, Chairman Fanning and Member Murphy dissenting).

Hospital that separate units are appropriate in health care institutions "only where the employees in the proposed unit enjoy an exceptionally high degree of community of interest among themselves, distinct and apart from other employees," and relying on his concurring opinion in *St. Vincent's Hospital* as to the appropriateness of maintenance units in particular, Member Penello found that the maintenance employees in this case did not constitute a separate appropriate unit. Specifically, he found that: (1) the maintenance workers did not have substantially higher skills or wages than service employees; (2) they worked throughout the hospital; (3) significant number of employees have transferred to and from the maintenance department; (4) area practice and patterns of bargaining disclose that service and maintenance employees were virtually always grouped together for collective-bargaining purposes in Ohio; and (5) service and maintenance employees worked essentially the same hours, received identical fringe benefits, had similar working conditions, and were subject to the same grievance procedure.

Similarly, in *Fresno Community Hospital,*[26] a majority of the Board applied its decision in *Allegheny General Hospital* to find that the employer's engineering, electronics, and maintenance employees shared a community of interest sufficiently separate and distinct from the broader community of interest which they shared with service employees as to warrant their representation as a separate bargaining unit. The majority specifically noted that the engineering, electronics, and maintenance employees: (1) formed a distinct administrative grouping apart from other service employees; (2) interchanged with one another but not with service employees; and (3) exercised a variety of skills not exercised by service employees. Since the petitioner already represented the employer's engineering department employees, the Board majority directed a self-determination election among the electronics and maintenance department employees to determine whether they wanted to be included with the already-represented engineering department in a single bargaining unit.

For the reasons expressed in his concurring opinion in *St. Vincent's Hospital,* and his dissenting opinion in *Allegheny General Hospital,* Member Penello dissented from his colleague's conclusion that a separate voting group of all engineering, electronic, and maintenance employees was appropriate. Member Penello specifically noted that (1) there appeared to be no requirement

[26] 241 NLRB No 73 (Chairman Fanning and Members Murphy and Truesdale; Member Penello dissenting).

that any of the employees involved be licensed or registered; (2) although some exhibited craft-like skills, others possessed minimal skills; and (3) the employees sought did not perform work in a separate and distinct location and came into regular contact with other nonprofessional employees.

Finally, in *Mary Thompson Hospital*,[27] a Board panel modified a regional director's direction of a self-determination election in a voting group from which he excluded unrepresented technical employees. The employer previously had a collective-bargaining agreement with some of its service and maintenance employees and all of its licensed practical nurses (LPNs). The petitioner sought a residual unit or, alternatively, a self-determination election among all unrepresented service and maintenance employees and all business office clericals, but excluding all unrepresented technical employees. The regional director found a residual unit inappropriate, but approved the petitioner's alternative request for a self-determination election. In agreeing to the exclusion of the unrepresented technical employees, the regional director reasoned that the technical employees may constitute an appropriate unit and may properly be excluded because they have been omitted since 1972 from the historical bargaining unit which included LPNs. The Board panel found merit in the employer's contention that in directing a self-determination election, precedent mandated the inclusion of all unrepresented employees who qualify for inclusion in the unit sought to be perfected and at a minimum required the voting group to be coextensive with the existing unit. According to the panel, to be appropriate "the voting group must at least include all unrepresented employees of the same type or category included in the existing unit so that their addition would 'complete' or 'correct' the existing unit so as to bring it into conformity with some unit which the Board would find appropriate for the health care industry." Applying that standard, the panel concluded that because the existing incomplete unit contained some but not all service, maintenance, and technical employees, the voting group must contain all unrepresented employees in the same categories. Accordingly, the panel directed a self-determination election in a voting group consisting of all unrepresented full-time and regular part-time nonprofessional employees, a unit which the Board has found appropriate in the health care industry.

[27] 242 NLRB No. 83 (Members Penello, Murphy, and Truesdale).

2. Other Unit Issues

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.

In two cases involving the same employer, *New England Telephone & Telegraph Co.*,[28] herein called *New England Telephone I* and *II*, a majority of the Board distinguished the Board's decisions in *Michigan Bell Telephone Co.*,[29] and held that all the petitioned-for units, being less than systemwide in scope, were inappropriate. Relying on *Michigan Bell*, in which the Board found that the systemwide unit, optimum for the highly integrated public utilities, was not necessarily the only grouping of employees which may be found appropriate, the Regional Director, in *New England Telephone I*, found appropriate a unit of all employees at two separate commercial offices of the Employer in Manchester, New Hampshire. In applying *Michigan Bell*, the Regional Director found that the two Manchester offices serviced a well-defined geographic area and their day-to-day operations were directly supervised by commercial managers and their local managers possessed the authority to issue warnings, to recommend discipline and discharge, to grant and deny wage increases and promotions, to set the hours of work, and to assign and direct that work. The Board majority, in distinguishing *Michigan Bell*, noted, however, that (1) the unit was not a "self-contained economic unit" having one manager with substantial autonomy in controlling day-to-day employee activities; (2) there was employee-interchange among all New Hampshire offices; (3) the evidence was lacking that the requested employees shared a separate community of interest sufficient to warrant a separate unit for bargaining; and (4) the unit did not conform to any administrative district of the employer.

Chairman Fanning and Member Truesdale, dissenting, asserted that, for the reasons stated by the regional director, they would direct an election in the unit sought at Manchester.

In *New England Telephone II*, the Board majority dismissed 10 separate petitions by two different petitioners because in each case the unit sought was too narrow in scope and, thus, was inappropriate. The two petitioners sought to represent certain em-

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[28] 242 NLRB No. 120 and 242 NLRB No. 121 (Members Jenkins, Penello, and Murphy; Chairman Fanning and Member Truesdale dissenting).

[29] 192 NLRB 1212 (1971) and 217 NLRB 424 (1975).

ployees in the employer's commercial department at various locations in New Hampshire, Massachusetts, and Maine. As it did in *New England Telephone I,* the majority concluded that such factors, as clearly defined geographical area, separate community of interest, and no employee interchange, relied on by the Board decisions in *Michigan Bell* in finding appropriate a unit which was less than systemwide in scope, were not present in the petitioned-for units before them. The majority noted instead that the employer's centralized control of policies resulted in a lack of autonomy in the employer's local offices, particularly with respect to hiring and transferring employees, and that the degree of temporary interchange of employees throughout the system negated a separate community of interest limited to the separate offices sought.

Chairman Fanning and Member Truesdale, in dissenting, would have directed elections in the separate units sought by the petitioners, based on their dissent in *New England Telephone I.*

Calco Plating,[30] concerned the appropriateness of a requested unit of production and maintenance employees, excluding truckdrivers. In reversing the regional director's direction of an election in the requested unit, a Board panel majority concluded that under the criteria set forth in *E. H. Koester Bakery Co.,*[31] on which the regional director had also relied, the truckdrivers shared a community of interest with the production and maintenance employees so as to require their inclusion in the requested unit. In support of their decision, the panel majority noted that: (1) the truckdrivers spent a substantial amount of time at the employer's plant working with production employees or in close proximity thereto, and regularly performing production work; (2) the production and maintenance employees performed drivers' work on a regular basis; (3) both truckdrivers and production and maintenance employees were directly supervised by the employer's vice president and had the same working conditions, comparable wages based on the same pay scale, and the same mode of compensation, pay raises, and fringe benefits. In responding to their dissenting colleague, they stated that he failed to consider the record in its entirety, and they offered specific examples of the functional integration between the truckdrivers and the production and maintenance employees. The panel ma-

[30] 242 NLRB No. 200 (Chairman Fanning and Member Penello; Member Truesdale dissenting).
[31] 136 NLRB 1006 (1962).

jority also distinguished *Chin Industries*,[32] the principle case upon which their dissenting colleague relied, on the ground, *inter alia*, that there the production and maintenance employees were geographically separated from the excluded employees none of whom performed production work.

In his dissent, Member Truesdale stated that, in agreement with the regional director, he would rely on *Chin Industries* to find the petitioned-for unit appropriate. He concluded from his analysis of the record that the character and frequency of interaction between the truckdrivers and the production and maintenance employees were not so extensive as to "obliterate," within the meaning of *Chin Industries*, significant distinctions that existed between them. Specifically, Member Truesdale noted that the truckdrivers spent the great majority of their worktime away from the plant and away from the production and maintenance employees, they ate lunch outside the plant, they did not engage in typical production tasks, and they spent much of their in-plant time engaged in work directly related to truckdriving, not production and maintenance.

D. 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. Secrecy of Ballot

In *General Photo Products Div. of Anken Industries*,[33] a Board panel overruled a regional director's recommendation with regard to the disposition of one challenged ballot which was deter-

[32] 232 NLRB 176 (1977).
[33] 242 NLRB No. 197 (Members Jenkins, Murphy, and Truesdale).

minative of the outcome of the election which had been conducted over a 2-day period. On the first day, a voter was given a ballot by the Board agent and was told to mark his ballot in the voting booth. Instead, he marked his ballot, went over to the line of waiting voters, held up the ballot, and informed everyone that he had cast a "no" vote. The Board agent took the ballot away, declared it void, and told the voter that he could not engage in such conduct. The voter eventually left the area and his ballot was placed in a sealed envelope. The next day, the same voter reappeared and voted in an orderly manner. The petitioner challenged his ballot on the grounds that he had voted twice. The Regional Director concluded that, as the voter's original ballot was never commingled or counted with the other ballots and thus had not been cast, the voter was eligible to vote on the second day of the election and that the challenge to his ballot should be overruled. In considering this unique factual situation, the panel drew an analogy to the Board's policy in so-called marked-ballot cases, under which it is well established that, where a voter places an identifying mark on his ballot, the ballot is declared void and the voter is not afforded an opportunity to vote again. The rationale behind that policy is based on the requirement of secrecy, the latter being a matter of public concern rather than a personal privilege subject to waiver by an individual voter. In the panel's view, the same considerations apply with equal, if not greater, force where the violation of secrecy was purposeful and flagrant. Accordingly, since the voter knowingly violated the secrecy of his vote, thereby voiding his ballot, he forfeited any right to have his ballot counted or be given another opportunity to cast a ballot, and the challenge to his ballot was sustained.

In another case dealing with the secrecy of ballots, a Board panel in *Sewell Plastics,*[34] rejected a hearing officer's recommendation that an election be set aside because two observers testified that, during the election, they could see how a substantial number of ballots were marked. Since the facts revealed that the voters were unaware that observers could see how ballots were marked, and as the two observers did not tell anyone except company representatives and Board agents until after the election, the panel reasoned that "any possible impairment of the secrecy of the ballot could not have affected the outcome of the election or intimidated the voters in making their choice as to representation."

[34] 241 NLRB No 144 (Chairman Fanning and Members Penello and Murphy).

2. Adequacy of Investigation of Objections

In two cases involving the same employer, *Howard Johnson Co. d/b/a Howard Johnson Distribution Center*,[35] the Board considered the adequacy of a regional director's investigation of objections to an election. The employer, in its request for a remand, contended that the investigation of three of its objections was insufficient because the Board agent failed to interview certain witnesses who allegedly would have supported the objections. In rejecting the employer's contention, a Board majority reasoned that, even assuming that it was the manner in which the Board agent conducted the investigation which resulted in the employer's failure to present certain evidence to the Board agent, the employer was not precluded from presenting such evidence to the Board itself in support of its objections. Thus, the majority stated in both cases that "regardless of the nature of the investigation here, the Employer, in seeking to have the Board overrule a regional director's recommendation, was still required, under established Board policy, to supply *the Board* with specific evidence, tantamount to an offer of proof, which *prima facie* would warrant setting aside the election before the Board will direct a hearing or require the Regional Director to pursue the investigation further." Since the employer in both cases failed to present to the Board any evidence which would contradict the regional director's findings and recommendations, a remand was not justified.

Member Murphy, dissenting in part, found that the regional director's investigation of two objections was inadequate, thereby requiring a further investigation. Relying upon her dissenting opinion in *Aurora Steel Products*,[36] she asserted that once an objecting party has alleged specific objectionable conduct and provided the names of witnesses, "it was incumbent upon the Region to interview the individuals named by the Employer to determine the merits of the objection, and the failure of the Regional Director to have that done constituted an abuse of discretion."

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[35] 242 NLRB No 183 and 242 NLRB No 184 (Chairman Fanning and Members Jenkins, Penello, and Truesdale, Member Murphy dissenting).

[36] 240 NLRB No. 76

3. Election Propaganda

In the 1977 *Shopping Kart Food Market*[37] decision, a Board majority enunciated a standard for determining whether electioneering statements or propaganda required setting aside an election. That standard stated that the Board would no longer set aside elections on the basis of misleading campaign statements, except where the Board processes were improperly involved by deceptive campaign practices or where forged documents were used which voters would be unable to recognize as propaganda. During this report year, a majority of the Board, in *General Knit of Calif.*,[38] a case involving a misleading campaign statement by a union, announced that it would overrule *Shopping Kart* and return to the standard of review for alleged misrepresentations most cogently articulated in *Hollywood Ceramics Co.*[39] In returning to the rule of *Hollywood Ceramics,* they noted that, by enforcing that rule in the past, the Board had successfully established and preserved the integrity of its electoral processes, since the parties, knowing the serious consequences of their engaging in substantial and material misrepresentations of fact, were deterred from engaging in such conduct. In addition, the majority noted that the *Hollywood Ceramics* standard provided a means of redress for a party who doubted the validity of the election results because of prejudicial campaigning by the prevailing side, and that its enforcement had not been administratively burdensome in the past, especially when compared with the substantial benefit to the Board's electoral procedure. In response to their dissenting colleagues' assertions that the *Hollywood Ceramics* rule lacked predictability and provided a vehicle for delay of the ultimate result of an election, they stated that any inconsistencies in the results of cases where the *Hollywood Ceramics* rule had been applied stemmed from judgmental differences as to the reasonable effect of a misrepresentation on the electorate, not from any fundamental difference in standards or from any desire to regulate the conduct of one party more closely than that of another. In any event, in applying the *Hollywood Ceramics* standard in

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[37] 228 NLRB 1311.

[38] 239 NLRB No. 101 (Chairman Fanning and Members Jenkins and Truesdale, Members Penello and Murphy dissenting).

[39] 140 NLRB 221 (1962). According to the majority in *General Knit,* under that standard, "an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentations, whether deliberate or not, may reasonably be expected to have a significant impact on the election."

the future, the majority indicated that it would adhere to the standard strictly and would apply it equally to both sides. In addition, in order to act expeditiously on objections involving alleged misrepresentations and thereby decrease the delay between the election and its ultimate resolution, the majority stated that it would also rely on the standard for evaluating campaign statements set out in *Modine Mfg. Co.*,[40] so that it would not insist on "improbable purity of word and deed" nor "direct hearings as a matter of course in any case in which misrepresentations are alleged to have been made."

Member Penello, in dissenting, indicated that he would adhere to the sound principles of *Shopping Kart* rather than revive the *Hollywood Ceramics* rule. According to him, the postponement of collective bargaining pending Board and court perusal of campaign puffery was part and parcel of the *Hollywood Ceramics* approach, and the vagueness and flexibility of the *Hollywood Ceramics* standard led to considerable disagreement between the Board and the courts on the treatment of misrepresentation objections, with the election loser frequently choosing to litigate rather than negotiate. Member Penello cited the majority decision in *Blackman-Uhler Chemical Div.—Synalloy Corp.*,[41] issued the same day as *General Knit*, as containing all of the familiar elements inherent under the *Hollywood Ceramics* approach: extensive analysis of campaign propaganda, judicial disagreement with the Board's treatment of the alleged misrepresentation, and, as a consequence, a refusal to enforce a Board bargaining order years after a majority of employees had voted for collective representation in a secret-ballot election. In addition, the inability of the *General Knit* majority to agree among themselves on the treatment of the misrepresentation objection in *Blackman-Uhler* dramatically demonstrated to Member Penello that the *Hollywood Ceramics* standards were so flexible that opposite conclusions could almost be reached on the same or similar facts. He further asserted that the majority's announced intention to adhere strictly to the *Hollywood Ceramics* standards directly conflicted with the Board's earlier announced intention in *Modine Mfg. Co.* to apply *Hollywood Ceramics* in a *less* restrictive fashion. As a result, it was Member Pennello's view that the new standard would result in delays in the processing of objection cases far beyond those experienced under prior interpretations of *Hollywood Ceramics*.

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[40] 203 NLRB 527 (1973), enfd 500 F.2d 914 (8th Cir 1974).

[41] 239 NLRB No 102 (Chairman Fanning and Member Jenkins, Member Murphy concurring, Member Truesdale concurring in part and dissenting in part, Member Penello dissenting).

Member Murphy, in her dissent, stated that the majority, by overruling *Shopping Kart* and returning to the *Hollywood Ceramics* standard, had restored a proven delaying tactic to the arsenal of those who would forestall the certification of election results. Although she agreed with the announced policy goal of *Hollywood Ceramics,* i.e., assuring free choice, she vigorously asserted that the rule had been expanded and misapplied and far beyond the original intent of the Board. As a result, she stated that the practical effect of the majority's attempt to fulfill the duty of insuring fair elections by returning to the rule of *Hollywood Ceramics* would be simultaneously to abrogate the more fundamental duty of insuring speedy elections.

In her words, "the new majority's position is analogous to the surgical removal of a nonmalignant growth by means of a procedure which guarantees the death of the patient." Member Murphy also pointed out emphatically that *Shopping Kart* had been predictably applicable, had reduced the incentive for protracted litigation and delay, and had proved in its short lifetime to be a useful and effective tool in effectuating one of the major purposes of the Act—speedy elections.

In a case that issued on the same day as *General Knit, Blackman-Uhler Chemical Div.—Synalloy Corp., supra,* the Board, on remand from the United States Court of Appeals for the Fourth Circuit,[42] decided not to apply *Shopping Kart* retroactively. In the underlying representation proceeding,[43] the Board applied the then-existing law under *Hollywood Ceramics* to find that a union campaign leaflet contained no material misrepresentation of the employer's profits which would warrant setting the election aside. The circuit court, in reviewing the Board's bargaining order based on the employer's refusal to bargain with the certified union, indicated that it would deny enforcement under its own application of *Hollywood Ceramics;* but, noting the Board's decision in *Shopping Kart,* it remanded the case for a determination as to whether the rule in *Shopping Kart* was applicable to the case. While adverting to the traditional practice of applying a pronouncement of a new rule of law retroactively to the case in which it arose and to all pending cases, the Board majority concluded, however, that it would not effectuate the policies and purposes of the Act to apply Shopping Kart retroactively to the case before them, since the Board had not only decided the represen-

[42] *Blackman-Uhler Chemical Div.-Synalloy Corp.* v *N.L.R.B.*, 558 F.2d 705; 561 F.2d 1118 (4th Cir. 1977).

[43] 217 NLRB 38 (1975)

tation case, but also rendered a bargaining order under the law as it then existed (*Hollywood Ceramics*). Accordingly, accepting as the law of the case the circuit court's opinion that it would not enforce the Board's order under the *Hollywood Ceramics* standards, the majority set aside the election and directed a new one. Member Truesdale, who was not a member of the Board when the underlying decision in the representation case was issued, specifically stated that, in applying *Hollywood Ceramics,* he would have found that there had been a material misrepresentation and therefore he joined his colleagues in directing a second election.

Contrary to his colleagues, Member Penello stated in his dissent that he would give full effect to the employees' secret-ballot choice for collective representation by applying the *Shopping Kart* decision retroactively and directing the employer to the bargaining table. Applying the Supreme Court's decision in *Securities & Exchange Commission* v. *Chenery Corp.*,[44] he concluded that retroactive application of *Shopping Kart* would impose no "hardship" upon the employer, whereas the failure to apply *Shopping Kart* retroactively would nullify the employees' free choice of a bargaining representative.

In *Cormier Hosiery Mill & Central New Hampshire Dye,*[45] the Board, in the context of a summary judgment proceeding, reexamined the decision in the underlying representation proceeding as a result of the reformulation of the Board's policy concerning election campaign misrepresentations announced in *General Knit.* In the representation proceeding, the acting regional director found that the union had distributed a campaign letter less than 24 hours before the election which distorted the nature and amount of a certain financial transaction made by the employer. Applying *Hollywood Ceramics,* the acting regional director recommended that the election be set aside. Thereafter, the Board announced its opinion in *Shopping Kart,* and, based on that case, it overruled the objections to the election and certified the union. In reconsidering that decision in light of *General Knit,* the majority concluded that it would effectuate the purposes of the Act to apply *General Knit,* citing the Supreme Court's rule in *Chenery, supra,* in support of its decision and, accordingly, further concluded that the Union's campaign statements so interfered with the conduct of a free and fair election as to warrant setting aside that election and directing a new election.

[44] 332 U.S. 194 (1947).

[45] 243 NLRB No. 5 (Chairman Fanning and Members Jenkins and Truesdale, Members Penello and Murphy dissenting).

Member Penello, for the reasons set forth in his dissenting opinions in *General Knit* and *Blackman-Uhler*, would continue to apply the *Shopping Kart* rule to the underlying representation proceeding so as to overrule the employer's objections and certify the petitioner. In doing so, he noted that this was the third decision since *General Knit* in which a union's certification had been vacated and a complaint dismissed, and that, in four other cases, misrepresentation objections filed by employers had been sustained or remanded for further investigation or hearing. Thus, it was clear to Member Penello that, only months after the issuance of *General Knit,* Board application of the *Hollywood Ceramics* rule has served to delay and frustrate collective bargaining, as he had always maintained.

Member Murphy, in her dissent, stated that the majority's decision was another example of the inordinate delay caused by their insistence on following the outdated and outmoded rule of *Hollywood Ceramics.* She stated that the Board properly relied on *Shopping Kart* in certifying the union in the underlying representation proceeding, and that "the majority's adamance in making *General Knit* retroactive to representation cases decided under *Shopping Kart* exhibits a slavish adherence to a point of view whose rigid application is achieved at the expense of employees and the very collective-bargaining process which this Agency is entrusted to further and safeguard."

4. Other Objectionable Conduct

In *Hickory Springs Mfg. Co.*,[46] a Board majority refused to set aside an election where it was alleged that during the election campaign union officials made or adopted statements threatening violent action against uncooperative employees in the event of a strike. The majority, overruling *Provincial House*,[47] and returning to the standard set out in *Great Atlantic & Pacific Tea Co.*,[48] reasoned that none of the statements allegedly made or adopted by the union officials involved any threat or hint of threat towards employees based on how they would vote in the upcoming election, but related to possible strikes after the union became the employees' bargaining representative. As the remarks were not related to events surrounding the election, the majority found that they were not likely to coerce employees to vote for the union;

[46] 239 NLRB No. 103 (Chairman Fanning and Members Jenkins and Truesdale; Member Penello dissenting and Member Murphy dissenting in part).
[47] 209 NLRB 215 (1974).
[48] 177 NLRB 942 (1969).

in fact, the majority believed that such statements would more likely have the opposite effect on employees who eschew violence. In response to dissenting Member Penello, the majority emphasized that the alleged threats related to violence if the employees crossed a union picket line, but that no such picket line was in existence nor was one imminent. Thus, the threats were conditioned on the union winning the election, the failure of contract negotiations, and the union calling a strike, with some employees opting not to honor the picket line. With these contingencies standing between the threats and their possible execution, the majority perceived little, if any, likelihood of the statements having any immediate coercive impact on the employees and the election results.

In his dissent, Member Penello stated that the majority's legal distinction between threats that relate to the actual casting of ballots and threats that relate to future labor confrontations ignored simple realities. In his view, a practical result of the union's threats of violent reprisals with regard to strikes was the inhibition of any antiunion discussion and politicking during the campaign, thereby having a devastating effect on employee free choice in the election. In addition, he asserted that the majority's suggestion that the union's threats of bodily harm against employees might actually have the effect of encouraging employees to vote against the union ignored the basic issues of "laboratory conditions" of the election campaign which thereby were thoroughly polluted by the union. Finally, Member Penello noted that the threats did relate to events concerning the election, as a significant issue in the election campaign was the union's policy in the event of a strike. Accordingly, he would adhere to the standard set out in *Provincial House* that the threats of future picket line violence—threats of the raw exercise of power—were not consistent with the atmosphere necessary for the conduct of a free and fair election.

Member Murphy, dissenting in part, would have directed a hearing on the statements alleged to be objectionable, because if they were found to be made or adopted by union agents, it would warrant setting aside the election. She too would rely on the reasoning in *Provincial House* that threats of physical assaults for crossing a picket line would have a spillover effect, in that employees would assume that the union would also be willing to engage in such assaults for any conduct contrary to its interest, including opposing it in the election. Member Murphy also disputed the majority's assumption that a strike could only occur if the union won the election and was unable to negotiate a collec-

tive-bargaining agreement with the employer, as the Union could have meant that it might engage in a preelection strike to force employee support, or in a postelection strike in reprisal for losing the election. In either instance, the threatened action would be related to the election and would therefore have the tendency to interfere with the exercise of free choice by the employees.

In *Electro-Wire Products*,[49] a Board majority reversed a hearing officer's sustaining an objection that the employer violated the 24-hour *Peerless Plywood* [50] rule when, on the morning of the election, its president spoke to each eligible voter on the first shift encouraging them to vote and suggesting that they vote "no." The individual talks lasted only a few minutes at the work stations of each employee on company time, and there was testimony that employees, both before and after they spoke to the president, observed the president delivering similar remarks to other employees. Relying on the Board's decision in *Associated Milk Producers*,[51] the majority reasoned that the brief comments made to employees individually could not be construed as a speech to a massed employee assembly and were, therefore, unlikely to create the mass psychology referred to in *Peerless Plywood*. The repetitious nature, reach, location, and timing of the individual conversations did not amount to a speech made to all employees collectively, and, accordingly, the president's remarks to the first-shift employees on the day of the election were not objectionable within the meaning of the *Peerless Plywood* rule.

Chairman Fanning, in his dissent, concluded that the employees were captive since they were at their work stations when addressed and noted that all the employees were aware that all the other employees on the shift were being addressed so that the mass psychology to which *Peerless Plywood* alludes was fully operative. Finally, in Chairman Fanning's view, as the employees were addressed personally by their employer and there could be no more apt "locus of employer authority," the Board should not permit an employer to accomplish indirectly precisely what *Peerless Plywood* directly proscribed.

Member Truesdale's dissenting opinion viewed the majority as placing undue emphasis on form over substance. In his view, the same improper end specifically eschewed by *Peerless Plywood* was achieved by the employer's planned and systematic remarks to individual employees as would have been obtained had the em-

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[49] 242 NLRB No. 144 (Members Jenkins, Penello, and Murphy; Chairman Fanning and Member Truesdale dissenting).

[50] *Peerless Plywood Co.*, 107 NLRB 427 (1953).

[51] 237 NLRB No. 120 (1978).

ployer called a meeting on company time to address these remarks to them en masse. Thus, although a member of the majority in *Associated Milk Producers,* Member Truesdale disassociated himself from that decision and concluded that "when agents of either the employer or the union systematically importune all or a substantial number of the employees at their work stations within 24 hours of the election, the mass psychology which *Peerless Plywood* sought to avoid is set in motion," requiring that the election be set aside.

A panel majority in *Admiral Petroleum Corp.*[52] adopted a hearing officer's finding that the prounion conduct of an admitted supervisor prior to an election did not constitute objectionable conduct sufficient to set the election aside. The hearing officer found that the supervisor had signed a union authorization card, talked in favor of the union to the employees in the production area of the plant, and told them that he thought they would all get better working conditions, especially the two part-time employees. The discussions were of a conversational nature and took place on three or four occasions. Applying the twofold standard from *Stevenson Equipment Co.*[53] to the facts before him, the hearing officer concluded that: (1) although there was no evidence that higher management expressed a contrary position, thereby raising the possibility that the supervisor was speaking on behalf of higher management, the election need not be set aside because his statements were personal and contained no unlawful or objectionable elements; and (2) there was no possibility that the supervisor's conduct coerced an employee out of fear of future retaliation by a union-oriented supervisor, as his statements were not threatening in nature nor did they indicate that he would use his authority to punish those employees who did not support the union.

Member Murphy, in dissenting, argued that, under *Stevenson,* the supervisor's conduct had two different objectionable effects on employees. Thus, the absence of an employer position on unionization and the extent of the supervisor's encouragement of the union's organizing and his considerable supervisory authority were enough to find his conduct objectionable under the first *Stevenson* test. Further, Member Murphy found that the second *Stevenson* test was satisfied as well, since the employees were aware that after the election they would continue to be super-

[52] 240 NLRB No. 122 (Chairman Fanning and Member Jenkins; Member Murphy dissenting).

[53] 174 NLRB 865 (1969).

vised by the supervisor, and this fact might well have caused them concern about the consequences of his displeasure should the union be defeated.

Finally, in *Cabs Housekeeper Service*,[54] a majority of a Board panel overruled a regional director's recommendation that an election be set aside because the employer distributed campaign propaganda to employees during the hours of voting in an area proximate to where electioneering activity was prohibited. The regional director had found that during the election hours the employer distributed, along with paychecks, a card indicating on one side why the employees should vote "no" and on the other side a ballot was printed with an "X" in the "no" box. A majority of voters entered the voting area carrying the cards, and many of them asked the Board agents if the cards were ballots. A few voters had to be prevented from casting the cards as their ballots, and the Board agents repeatedly advised all voters that the cards were not ballots. Noting that the literature was distributed during voting hours in close proximity to the no-electioneering area, the regional director concluded that the apparent confusion the literature caused among the voters destroyed the laboratory conditions for a fair election. The panel majority disagreed with the regional director's reliance on the proximity of the card distribution to the no-electioneering area, as the issue should be whether electioneering occurred *within* that area, not *proximate* to it. In addition, the panel majority noted that any confusion created by the literature was corrected by the periodic announcements and careful instructions provided by the Board agents.

Member Truesdale dissented, as he agreed with the regional director's conclusion that a new election was warranted based on the apparent confusion among the voters at the election caused by the employer's campaign literature. Noting his colleagues' reliance on the measures taken by the Board agents to support their conclusion that any apparent confusion which occurred at the election was corrected, he asserted that the fact that the Board agents deemed it necessary periodically to announce to new groups of voters the purpose of the employer's cards and the mechanics of voting, particularly when coupled with the attempt by some voters to place their cards into the ballot box, was as indicative of the extent of apparent confusion among the voters as it was supportive of the conclusion reached by his colleagues.

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[54] 241 NLRB No. 202 (Chairman Fanning and Member Penello, Member Truesdale dissenting).

E. Postelection Issues

In *Williamson Co.*,[55] the Board considered a petition by the union to amend the certification of representative issued to the intervenor, who intervened in support of the request. The union sought to substitute its name as the certified representative based on the international's affiliation with the union. In opposition, the employer argued, *inter alia,* that the petition raised a question concerning representation which could only be resolved through a Board-conducted election. The regional director, relying on *Mosler Safe Co.*,[56] dismissed the petition, as he concluded that it was barred because various locals of the union's international had been rejected by unit employees in three previous elections conducted by the Board and, thus, granting the requested amendment would in effect reverse the outcome of a Board-conducted election. He also found that the procedural safeguards provided in the affiliation were not in accord with the standards of Board-conducted elections. A Board majority, however, reversed the regional director and granted the amendment of certification. They noted that the regional director's reliance on *Mosler Safe* was misplaced, because in that case a major official of the incumbent union opposed affiliation, there was a substantive irregularity in the conduct of the affiliation election, and insufficient time (1 year) had elapsed between the Board's election and the affiliation election to remove any doubt that the affiliation was an attempt to circumvent the statute's normal processes for achieving representative status. In the case before them, the majority noted that no major official of the intervenor opposed affiliation, the affiliation election was conducted in accord with the minimal standards required by the Board, and more importantly, nearly 19 months had passed since the last election involving a local of the international and the affiliation election. In addition, the majority pointed out that the organization of the certified union remained in tact, with only its name being changed to reflect the affiliation. Since the Board has never stated, as an inflexible proposition, that it would never permit amendment of a union's certification if it is affiliating with another labor organization that had previously been rejected by unit employees, and since the evidence before them demonstrated the *bona fides* of the affiliation election, the majority granted the requested amendment of certification.

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[55] 244 NLRB No. 147 (Chairman Fanning and Members Jenkins and Truesdale; Member Penello dissenting).

[56] 210 NLRB 934 (1974).

In his dissenting opinion, Member Penello stated that for the reasons expressed in his dissent in part in *Providence Medical Center*,[57] he would apply the principles of *American Bridge* [58] and find that the proposed affiliation raised a question concerning representation which can only be resolved by a Board-conducted election. In his view, the affiliation of the intervenor, a small, independent local union, with a large international union, would effect such a substantial change in the identity of the bargaining representative that he could not, in the absence of a Board-conducted election, approve the privately conducted affiliation vote.

A Board panel in *Seattle-First Natl. Bank* [59] considered a petition to amend the certification to change the name of the certified bargaining agent from "First Bank Independent Employees Association" (FIEA) to "Financial Institution Employees of America, Local 1182, Chartered by Retail Clerks International Union, AFL–CIO" (Retail Clerks). Pursuant to an affiliation election conducted by the Washington State Public Employment Relations Commission (PERC), a majority of voting employees approved the affiliation. The employer attacked the affiliation on three grounds: (1) the substitution of the Retail Clerks for FIEA was a substantial change in the bargaining representative and thus raised a question concerning representation requiring a Board election; (2) only members of FIEA were allowed to vote; and (3) FIEA did not follow its own constitution in establishing voter eligibility standards. Stating that the case was controlled by the Board's recent decision in *Amoco Production Co.*,[60] the panel rejected each of the employer's contentions. First, the panel noted that an affiliation did not create a new organization, nor did it result in the dissolution of an already existing organization. Second, the panel emphasized that since an affiliation vote was basically an internal union matter into which the Board did not ordinarily intrude, the Board determined only whether the vote was conducted with adequate due process. Finally, the employer's third contention was found to be without merit, since under the circumstances faced by the FIEA prior to the election, the broadening of the franchise was not intended to undermine the electoral process. Accordingly, the panel granted the petition to amend the certification of representative.

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[57] 243 NLRB No 61.

[58] *American Bridge Div , United States Steel Corp.* v. *N L R B.*, 457 F.2d 660 (3d Cir. 1972).

[59] 241 NLRB No 116 (Chairman Fanning and Members Murphy and Truesdale)

[60] 239 NLRB No 182 See discussion *infra* at p. 124

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 1979 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.

In *Krispy Kreme Doughnut Corp.*,[2] the Board unanimously held that the employer violated section 8(a)(1) of the Act when it discharged an employee because of his expressed intent to file a workmen's compensation claim. In so finding, the Board relied on *Self Cycle & Marine Distributor Co.*,[3] where the discharge of an employee for pursuing an unemployment compensation claim was held unlawful. In the Board's view, such types of activity are protected because both workmen's compensation and unemployment benefits arise out of the employment relationship, they are of common interest to other employees, and the affected employees in both cases were discharged for opposing their respective employers' attempts to deny both them and their fellow employees access to such benefits.[4]

In *Richboro Community Mental Health Council*,[5] a Board panel considered an administrative law judge's decision that the employer did not act unlawfully when it denied a promotion to an employee because he drafted and distributed a letter which protested the discharge of a fellow employee, allegedly for union activity, and which also contained critical comments regarding the Respondent's operations. The administrative law judge had found that the sole reason for the failure to promote was the employee's criticism of the operation and that the criticism, reflecting a basic disloyalty to the employer, was unprotected. In disagreeing with the administrative law judge and finding a violation of section 8(a)(1) the panel concluded that the employee's criticism involved protected conduct as it was part of and related to the employee's concededly protected activity of protesting a fellow employee's discharge and was not so extreme as to reflect disloyalty to the employer.

In *Montefiore Hospital & Medical Center*,[6] a Board panel considered a case where the employer, operating an outpatient health

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[2] 245 NLRB No. 135 (Chairman Fanning and Members Jenkins, Penello, Murphy, and Truesdale).

[3] 237 NLRB No. 9 (1978).

[4] In so holding, the Board overruled *Hunt Tool Co.*, 192 NLRB 145 (1971), which held it was not violative of sec. 8(a)(1) for an employee to be discharged for filing a lawsuit seeking damages for an alleged on-the-job injury under the Jones Act and/or the Longshoremen's and Harbor Workers Compensation Act

[5] 242 NLRB No. 174 (Chairman Fanning and Members Jenkins and Truesdale).

[6] 243 NLRB No. 106 (Members Jenkins, Murphy, and Truesdale).

clinic, discharged two doctors who had engaged in a lawful sympathy strike in support of striking clinic employees and who, while picketing the premises, approached prospective patients and, after identifying themselves as clinic physicians, informed the patients that there was a current strike involving most clinic workers, that the clinic accordingly was not then a full-service facility, and that better medical care would be received at a full-service nonstruck facility. The two doctors were discharged after the end of the strike and were subsequently reinstated. Although the administrative law judge found the discharge of the doctors for the protected activity of joining the strike without prior individual notice [7] to the employer and refusing to perform their customary duties violated section 8(a)(1), he also found that, insofar as it was based on their attempts to dissuade patients from entering the struck clinic, the discharge was not for unlawful reasons and that backpay was not warranted. He held that such activity constituted picket line misconduct sufficient to remove the doctors from the Act's protection because they not only had improperly rendered "medical advice" but also utilized their professional status in their attempt to prevent prospective patients from seeking medical care at the employer's clinic. In his view, physicians can only engage in such conduct on a protected basis if they ascertain the condition for which the patient seeks treatment and then either provide adequate medical care or see that the patient receives such care elsewhere. The panel, reversing the administrative law judge and finding an 8(a)(1) violation, concluded that the doctors' conduct was protected because: (1) their statements did not constitute "medical advice" as that term is commonly used and generally understood for they did no more than reflect the fact of the strike and picketing and the apparent impact of such factors on the clinic's operations; (2) in the context of these prospective patients seeking services of a nonemergency nature, there was no reason to require the picketing doctors to make even a tentative diagnosis of the medical condition of the prospective patients before urging them to seek care elsewhere; and (3) as long as such appeals and attempts to discourage patronage were not accompanied by, nor made in the form of, threats of violence or the like and did not disparage the product or service, they were privileged and their authors were entitled to the Act's protection, for, in this respect, the Act makes no distinction between physicians and nonphysicians who choose to picket. Accordingly, the panel directed that the doctors who had

[7] The union had given the notice required under sec 8(g) of the Act.

been reinstated be made whole for any loss of pay suffered as a result of the unlawful discrimination against them.

In *Puerto Rico Food Products Corp.*,[8] the employer discharged five employees for engaging in a brief work stoppage to secure an explanation for the discharge of their immediate supervisor—a man who had their confidence and who made extra efforts to meet with them for discussions and counseling on matters directly bearing on their employment relationship. The majority noted that the protected character of the employees' activity was dependent, not on whether the supervisor was discharged for unlawful reasons, but, rather, on whether the identity and capability of the supervisor involved had a direct impact on the employees' own job interests. After a review of the record, the panel majority determined that the affected employees held the reasonable belief that the termination of their supervisor would adversely alter their work environment and, as such, have a direct impact, both real and perceived, on their job interests. Accordingly, the panel majority, reversing the administrative law judge but disavowing any intention to establish a *per se* rule or presumption, found that the work stoppage constituted protected concerted activity and that the resultant discharge of the employees was, therefore, violative of section 8(a)(1).

Member Murphy, dissenting, would find the discharges lawful as she, agreeing with the administrative law judge, regarded the work stoppage activity as unprotected. In her view, the record failed to indicate that the discharged supervisor had any more impact on the protesting employees' legitimate job interests than did any other supervisor. In her view, the holding of the panel majority established both a *per se* rule that employee protests over the discharge of any supervisor were protected and a presumption that, by virtue of supervisory status alone, an individual sufficiently impacts on employee working conditions to render protected any concerted employee protests over the selection of such individual, thereby effectively sanctioning every such employee protest.

In *Johnston-Tombigbee Furniture Co.*,[9] three employees in a contractual bargaining unit were engaged in a campaign to increase their union's membership, during which two of them filled out and signed, and the third witnessed, the signatures on both membership applications and dues-checkoff authorizations on behalf of 18 employees who had agreed to join and who had tend-

[8] *Puerto Rico Food Products Corp., Tradewinds Food, and Island Can Corp.*, 242 NLRB 126 (Members Jenkins and Truesdale, Member Murphy dissenting).

[9] 243 NLRB No 21 (Chairman Fanning and Member Jenkins; Member Penello dissenting).

ered their identification badges for that purpose. The employer, charging that such conduct with respect to the execution of the authorization cards was violative of a plant rule prohibiting "falsification" of payroll records, discharged the three employee solicitors. A panel majority found the discharges violative of section 8(a)(1) and (3), holding that the record established that the employer's stated reason for the discharges was pretextual, the real motive being hostility toward the union in general and toward the three dischargees' efforts to increase union membership in particular. In addition, the majority found that there was no "falsification" with respect to the checkoff cards because there was a principal-agent relationship under which employees desiring union membership impliedly authorized the dischargees to act as their agents in executing the dues-checkoff cards when they tendered their identification badges to them with full knowledge that joining the union meant paying dues by checkoff. Finally, the panel majority concluded that even if the employer had acted in a good-faith, albeit mistaken, belief that the dischargees had engaged in "falsification," there would still be an 8(a)(1) violation as they were engaged in protected organizing activities, and, under the Supreme Court decision in *N.L.R.B.* v. *Burnup & Sims*,[10] they were entitled to reinstatement; otherwise their protected activity would lose some of its immunity.

Member Penello, dissenting, would have dismissed the complaint because of the misconduct of entering the signatures of the 18 employees on the dues-checkoff authorization cards. In his view, a principal-agent relationship, authorizing the discharges to make entries on the checkoff cards, was not established. Further, he was of the view that the conclusion that the employer's asserted reason for the discharges—falsification of checkoff authorizations—was pretextual could not be justified because evidence of union animus was lacking and the employer had committed no other violations of the Act. Finally, he noted that the discharged employees engaged in misconduct which could hardly be dismissed as trivial since it could have subjected the employer to legal sanctions had it honored the invalid cards and checked off dues.

2. Limitations on Activities on Employer Property

In *Giant Food Markets*,[11] a union was engaged in area-standards picketing and handbilling against the retail food store em-

[10] 379 U.S. 21 (1964).

[11] 241 NLRB No. 105 (Chairman Fanning and Members Jenkins and Truesdale).

ployer located within a shopping center subleased from the lessor of the shopping center, Kresge, a lessee of Wiggins. The picketing and handbilling took place on the sidewalk immediately in front of the food store. A Board panel was presented with the issue of whether section 8(a)(1) was violated when both the food store operator and the lessor, Kresge, demanded that all pickets and handbillers leave the privately owned shopping center property. The employers also sought an injunction against the picketing and secured a temporary restraining order. The panel, in accord with the criteria set forth in the Supreme Court decisions in *Babcock & Wilcox* [12] and *Hudgens*,[13] weighed the competing statutory right of the pickets to engage in area-standards picketing against the private property rights of the employers and concluded that, in the particular circumstances of this case, the employer's property rights must yield. In reaching this conclusion, the panel reasoned as follows: (1) the picketed food store was the employer with whom the union had its dispute and, accordingly, that business location was where the union could reasonably expect its picketing and handbilling to have the most impact; (2) the primary intended audience of the pickets, in addition to the food store employer's employees, consisted of potential customers who became readily identifiable only when they attempted to enter the store and as to whom other means of communication could not be considered "reasonable" in relation to their possible effectiveness; (3) to require that such picketing and handbilling be conducted off the private shopping center property at parking lot entrance 250 feet from the store would have too greatly diluted the union's message as the food store was not the only store at that center and customers at that point would be more concerned with making a safe entrance from the public road than with reading picket signs; (4) picketing at parking lot entrances, rather than in front of the food store, would be more likely to enmesh neutral employers, as shoppers might well infer that the entire shopping center was being picketed; and (5) the shopping center property was generally held open to the public, there were no grounds for finding the picketing to be a nuisance, and there was no evidence of violence or interference with ingress or egress at any of the stores. Having found, in these circumstances, that the factors weighed in favor of the union's rights to picket and handbill in front of the food store and against the employers' property rights, the panel considered whether the employers'

[12] *N.L.R.B* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956).
[13] *Hudgens* v. *N.L.R.B*, 424 U.S. 507 (1975).

conduct violated section 8(a) (1) of the Act. While finding that the employers' petitioning for an injunction did not constitute unlawful interference, the panel rejected the contention that the demand that pickets leave must be accompanied by a threat of arrest or similar threat before there would be unlawful interference. The panel held instead that pickets should not be required to subject themselves to the possibility of arrest or some physical act by the parties demanding their departure in order to carry on such protected activity. Accordingly, a violation by Giant and Kresge of section 8(a) (1) of the Act was found.

The Board had long held that employer restrictions on employee distribution of literature during nonworking times in nonwork areas are presumptively invalid, as such concerted activity is protected within the "mutual aid or protection" clause of section 7 of the Act. However, in *Firestone Steel Products,*[14] a Board panel found that the employer acted lawfully when it imposed such restrictions against the distribution of union leaflets espousing the merits of candidates running for statewide political office because, as previously set forth by the Board in *Ford Motor Co.,*[15] cited with approval by the Supreme Court in *Eastex* v. *N.L.R.B.,*[16] purely political tracts were sufficiently removed from employees' interests as employees so as to remove such distribution from protection under the "mutual aid or protection" clause of section 7 of the Act.

In *Lucky Stores,*[17] a Board panel found that the employer, the operator of a warehouse and distribution center, violated section 8(a) (1) of the Act when it expelled from its premises union "lumpers" who had previously been granted unrestricted access to the receiving docks where they would unload merchandise from incoming delivery trucks of independent trucking firms. Prior to the employer's taking this action, ambulatory pickets, striking against a particular independent trucking company, followed one of the trucks to the employer's premises. There, they established a picket line at the entrance gate which they persisted in maintaining at that location despite the employer's request that, instead, they enter the premises and picket only the truck of the company with which they had their dispute. As a result of the picket line at the entrance gate, the employer's own drivers refused to drive its trucks across the picket line to make deliveries

[14] *Firestone Steel Products Co, a Div. of Firstone Tire & Rubber Co,* 244 NLRB No. 148 (Chairman Fanning and Members Jenkins and Penello).

[15] 221 NLRB 663 (1975), enfd. 546 F.2d 418 (3d Cir 1976).

[16] 437 U S 556 (1978).

[17] 243 NLRB No 125 (Chairman Fanning and Members Jenkins and Penello).

to the employer's retail stores. After the truck and the ambulatory pickets left, the union was told that, in the future, the lumpers no longer would be allowed to remain on the premises, but would have to enter and leave with the truck delivering the merchandise. Immediately thereafter, the lumpers—who were members of the Charging Party, the same union as the pickets—were expelled from the premises. From record evidence pertaining to the timing of events, statements made by the employer's officials when such actions were effectuated, and other surrounding circumstances, the panel concluded that the lumpers' expulsion was motivated by the employer's desire to retaliate against the union for unlawfully picketing the employer's entrance gate. In finding such action violative of the Act, the panel pointed out that the Board had uniformly held it to be unlawful for an employer to discharge an employee for the concerted activity of a relative and that the same principle was equally applicable where the connection between two persons or groups of individuals was rooted in their common membership in the same labor organization. Further, the panel rejected the employer's contention that no violation of the Act occurred because the picket line activity which gave rise to these events was unprotected, holding that the status of the picketing was immaterial as the lumpers who were retaliated against, unlike the drivers who honored the picket line, did not act directly in support of the allegedly unprotected picketing activity.

3. Representation at Disciplinary or Investigative 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* [18]—the Supreme Court upheld the Board's determination that section 7 of the Act gives an employee the right to insist on

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

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 . . . ." [19]

During the report year, the Board had occasion to apply the principles set forth in *Weingarten* and *Quality* in a number of cases. In *Lennox Industries*,[20] the Board was presented with an issue respecting the identity of the person to whom an employee —summoned for an interview—must direct his request for union representation. The employee in this case was told by his supervisor to report to a plant official's office and appeared there with his union representative. The plant official refused to talk with the employee in the union representative's presence and, when the latter protested, terminated the meeting. Later that day, the employee's supervisor again told him to report to the official's office, the employee requested representation but the supervisor did not respond. The employee, accompanied by two union representatives, reported instead to the office of the industrial relations manager (the plant official's superior) where they protested what they regarded as an attempt to send the employee back to the plant official without union representation. The industrial relations manager, after indicating that he was fully familiar with the previous incident, told the employee that he would be in serious trouble if he failed to report to the plant official. The employee then went to the plant official's office alone and a short discussion ensued. There was no evidence that he renewed his request for representation at that time.

The Board unanimously held that, in the first instance, the plant official acted lawfully in excusing the employee and union representative from his office when they refused to allow the interview to proceed on an unrepresented basis.[21] The Board majority further found that there was no *Weingarten* violation with respect to the subsequent interview between the employee

[19] *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.

[20] 244 NLRB No. 88 (Members Penello, Murphy, and Truesdale, Chairman Fanning and Member Jenkins dissenting in part).

[21] See *Amoco Oil Co*, 238 NLRB No. 84 (1978). 43 NLRB Ann Rep 91–92 (1978).

and the plant official because the employee failed to direct his request for union representation to the plant official who conducted the interview. In the majority's view, the industrial relations manager had merely warned the employee that he could get in serious trouble for disobeying an order to report to the plant official's office and his direction to that effect did not constitute a denial of the request for representation. The majority stated that, as only the plant official knew why he wanted to talk with the employee, it was incumbent on the employee to make his representation request to that official; and it was for that official alone to determine whether to grant such request or not hold the meeting, or give the employee the choice between having an interview without representation or having no interview at all. Finally, the majority noted that there was no showing that the plant official would have rejected a renewed demand for representation or that the employee was threatened with discipline should he renew his demand for representation.

Chairman Fanning and Member Jenkins, dissenting in part, would have also found a violation of section 8(a)(1) of the Act on the ground that the industrial relations manager coerced the employee's unrepresented presence at the plant official's interview when—with full knowledge that the employee's request for union representation had been rejected earlier the same day and after that issue was again raised before him by the union representatives—he threatened the employee with "serious trouble" if he did not report for the interview. Further, the dissenters asserted that the employee's failure to continue insisting on representation and his submission to the interview did not waive his right to have union assistance during the interview.

In *U.S. Postal Service*,[22] a Board panel found that the employer violated section 8(a)(1) of the Act when—after an employee made a valid request for union representation at an interview he reasonably feared might result in his discipline—it refused his request and continued the interview without offering him the choice between voluntarily continuing the interview unassisted or having no interview at all, thereby contravening the employee's section 7 right to union representation. In so finding, the panel rejected the employer's contentions that because the interview was conducted by Postal Service inspectors as part of a criminal investigation: (1) it satisfied its *Weingarten* obligation by informing the employee of his rights under *Miranda* v. *State of Ariz.*,[23] and (2) by signing a *Miranda* waiver at the outset of the

[22] 241 NLRB No. 18 (Chairman Fanning and Members Penello and Truesdale).
[23] 384 U.S. 436 (1966).

interview, the employee effectively waived his *Weingarten* rights. In the panel's view, because *Weingarten* rights are different in both foundation and scope from rights under *Miranda*, the employee's *Weingarten* rights were unaffected by any rights he may also have possessed or been accorded under *Miranda*. Accordingly, the employee's waiver of his *Miranda* rights was irrelevant to his subsequent assertion of *Weingarten* rights since, when he requested union representation, the employer failed to offer him the option of continuing the interview unassisted by a union representative or having no interview at all. Thus, once having asserted his *Weingarten* rights, he never expressed a willingness to waive them and was never given an opportunity to do so. Further, the panel refused to accept the employer's argument that "legitimate employer prerogatives" and the public safety require the exclusion of all union representatives from the criminal investigations conducted by the Postal Inspection Service since this argument would in effect nullify the *Weingarten* rights of any Postal Service employee who might be administratively disciplined as a result of a criminal investigation. In the panel's view, such an outcome would be clearly repugnant to the *Weingarten*-approved Board principle that section 7 created a statutory right to refuse to submit, without union representation, to an interview which the employee reasonably feared may result in discipline.

4. Exclusion of Union Adherents From Benefits

In *Delchamps*,[24] the employer excluded certain known union supporters from a series of luncheon and dinner meetings it held during its preelection campaign. Employees attending all but one of the meetings were paid for the time spent. The panel found the employer's policy of excluding union supporters to be violative of section 8(a)(1) of the Act because it permitted invited employees scheduled for offdays to clock in for the sole purpose of getting paid for attending such meetings. Thus, the employer's policy had the effect of granting invited employees an opportunity to be paid for hours above and beyond their normal working hours, thereby affording a clear benefit to those employees and a denial of similar benefits to others on the basis of their union adherence.

In *Citizens Natl. Bank of Willmar*,[25] the employer's vice president held a picnic at his home and at his own expense to which he

[24] 244 NLRB No. 51 (Chairman Fanning and Members Jenkins and Penello).
[25] 245 NLRB No 47.

invited certain of the employer's officials, a few neighbors, and three bargaining unit employees who were nonmembers of the charging union and had been excluded from an earlier employee picnic held exclusively for union members. No union members were invited by the vice president. In these circumstances, the full Board unanimously concluded, contrary to the administrative law judge who found violations of section 8(a) (3) and (1) of the Act that the evidence was insufficient to establish that the picnic was sponsored by the employer and that the employer had discriminatorily excluded union members therefrom in violation of the Act.

5. Other Forms of Interference

In *Dependable Lists*,[26] an administrative law judge found that the employer did not act unlawfully when its officials interrogated an employee with respect to the identity of the leaders of the union's organizational campaign. The administrative law judge concluded that since the employer in good faith, though in error, considered the employee to be a supervisor, as did the employee himself, the interrogation did not tend to restrain or coerce employees in violation of section 8(a) (1) of the Act. A Board panel reversed the administrative law judge and found a violation of the Act. The panel held that, while under certain circumstances an employer, in order to protect itself from union activity by its supervisors, may lawfully question an employee, a purported supervisor, concerning his own union activity, there existed no justification for the employer's questioning of purported supervisors aimed at determining which of its other employees were engaged in protected activity as there was an implied threat of possible retaliation in such interrogation. Further, the panel noted that the employer here had no legitimate purpose in requesting that information.

In *Preterm*,[27] the union sent the employer, a health care institution, a 10-day notice of its intention to strike as required by section 8(g) of the Act. Thereafter, a supervisor questioned 11 employees as to whether they intended to report for work on the strike's first day, telling those who declined to respond that it would be assumed that they were not coming to work and were therefore putting their jobs in jeopardy. Subsequently, the employer circulated to its employees a questionnaire on the same subject which stated that its purpose was to facilitate the sched-

[26] 239 NLRB No. 195 (Chairman Fanning and Members Penello and Truesdale).
[27] 240 NLRB No. 81 (Chairman Fanning and Members Jenkins and Murphy).

uling of incoming patients and the availability of employees to take care of them. It also assured the employees that no reprisals would be taken against them whatever their decision on reporting for work. A Board panel agreed with the administrative law judge that a health care institution which had received a 10-day strike notice may properly attempt to determine the need for replacements by asking employees if they intend to strike since, in enacting section 8(g), Congress was concerned about insuring the continuity of patient health care. In the instant case, however, the panel concluded the bounds of permissible inquiry on this subject were exceeded and section 8(a)(1) of the Act was violated when the supervisor warned employees that, by failing to respond, it would be assumed that they would not report for work during the strike and that they were putting their jobs in jeopardy. The panel reasoned that such remarks could reasonably have been interpreted by the employees as a threat to discharge employees who participated in the strike. On the other hand, the questionnaire was deemed lawful because it contained the safeguards outlined in *Johnnie's Poultry Co. & John Bishop Poultry Co.*,[28] and *Struksnes Constr. Co.*,[29] which regulate the manner in which such interrogation is conducted. To lessen the inherently coercive effect of the polling on its employees, the employer had an obligation—an obligation which it fulfilled with respect to the questionnaire but not with respect to the questioning of the employees—to explain fully the purpose of the questioning, to assure employees that no reprisals will be taken against them as a result of their response, and to refrain from otherwise creating a coercive atmosphere.

In *Chevron U.S.A.*,[30] a Board panel considered an allegation that the employer violated section 8(a)(1) of the Act when it suspended three of its employees for refusing to cross a picket line established by a union which represented only employees of a subcontractor performing maintenance work for the employer at its refinery. The panel majority found that the employer had acted lawfully inasmuch as the employees' sympathy strike activity was unprotected because the picket line they observed had an unlawful secondary objective—to force the neutral employer to cease doing business with the subcontractor. The majority noted that, under well-settled Board law, honoring an unlawful picket line constituted unprotected activity *per se* and that sympathy

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[28] 146 NLRB 770 (1964), enforcement denied 344 F 2d 617 (8th Cir. 1965).

[29] 165 NLRB 1062 (1967).

[30] 244 NLRB No. 160 (Member Truesdale, Chairman Fanning concurring in part and dissenting in part, Member Penello concurring in part and dissenting in part).

strikers need not possess knowledge of the unprotected character of a primary strike for their conduct also to be unprotected. The majority went on to hold that, although in this case the primary strike against the subcontractor itself was lawful and therefore protected, the primary strikers proceeded to erect an unlawful secondary picket line in an effort to draw the neutral employer and its employees into the conflict in contravention of the policies reflected in section 8(b)(4) of the Act.

Member Penello, concurring in part and dissenting in part, agreed with Member Truesdale that the sympathy strikers' activity was unprotected because of the unlawful secondary nature of the picket line. However, he would also have found their conduct unprotected on the ground that the no-strike clause in the applicable collective-bargaining agreement waived the employees' right to strike citing his separate opinion in *IUOE, Local Union 18, AFL–CIO (Davis-McKee)*, 238 NLRB No. 58 (1978).

Chairman Fanning, concurring in part and dissenting in part, would have found the sympathy strikers' activity protected and their suspensions unlawful. The Chairman concluded that prior Board cases, holding that sympathy strikers were unprotected regardless of whether they know the primary strike was unprotected, were inapplicable here as the primary strike itself was lawful and as the sympathy strikers were "standing in the same shoes" as the primary employees. Further, as the panel majority's finding that the picketing was unlawfully motivated was based entirely on facts of which the sympathy strikers were ignorant, Chairman Fanning was of the view that the majority, in dismissing the complaint, had failed properly to reconcile the right of the employer to continue his business during a strike with the statutory right to strike and thereby failed to construe the Act in a way that would not interfere with, impede, or diminish in any way the right to strike unless it is specifically provided for in the Act.[31]

B. Employer Discrimination in Conditions of Employment

Section 8(a)(3) of the Act 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

[31] Sec. 13.

motivation. Other cases, however, present substantial questions of policy and statutory construction.

1. Discrimination in Hiring and Reinstatement

In *St. Anne's Hospital,*[32] a Board panel, reversing an administrative law judge, held that the employer's refusal to offer available temporary supervisory work to two employees because of their protected concerted activity[33] violated section 8(a)(1) of the Act. The administrative law judge held that the process of hiring supervisors, temporary or otherwise, was not subject to the protection of the Act, relying on *Pacific American Shipowners Assn.*[34] In that case, a Board majority found that eight individuals, who were applying for supervisory positions through a hiring hall, were not entitled to the protection of section 8(a)(3) of the Act. In dismissing the 8(a)(3) allegation in that case, the majority stated that "when Congress amended the Act to exclude supervisors from the definition of the term 'employee,' it thereby denied to those seeking and to those holding supervisory jobs the protection of section 8(a)(3)."

However, the panel noted that the Board majority in *Pacific American* was speaking of those applicants for supervisor who were not already employed by the hiring employer and had made it clear that its decision was not intended to deprive present nonsupervisory employees of the Act's protection who were seeking promotion to a supervisory position with their employer. Accordingly, in this case, finding that present employees were denied promotions and denied consideration for promotion, albeit temporary, because of their involvement in protected concerted activities, the panel found a violation of section 8(a)(1) of the Act.

In *Pfizer,*[35] a Board panel held that the employer could not lawfully place reliance on a reference check it conducted regarding an applicant for employment. In this case, the employer did not hire a job applicant after its reference check revealed that the applicant was an "ex-president of the union who tends to be an instigator" and "a troublemaker."[36] The administrative law judge specifically found that the applicant would have been hired if it were not for the information received from the reference

[32] 245 NLRB No 130 (Members Penello, Murphy, and Truesdale).

[33] The protected concerted activity involved an attempt by operating room nurses to effect changes in their working conditions.

[34] 98 NLRB 582 (1952)

[35] 245 NLRB No 18 (Chairman Fanning and Members Jenkins and Murphy).

[36] The information received came from the supervisor of personnel and industrial relations at the applicant's former employer.

check. The panel noted that the employer was lawfully entitled to conduct a reference check. However, as the whole theme of the information received was that the job applicant was an ex-union president and a troublemaker, and, as such, unlawfully tainted the whole evaluation, the panel failed to see how many other aspects of the evaluation could be given credence. Thus, reasoned the panel, the employer could not place any reliance on the information received as part of the reference check. Accordingly, concluding that the sole and only basis for the refusal to hire the applicant was an unlawful one, the panel found a violation of section 8(a)(3) of the Act.

In *MCC Pacific Valves*,[37] a Board panel, disagreeing with the administrative law judge, concluded that the employer violated section 8(a)(3) of the Act by denying initial job vacancies, created as replacements departed, to qualified strikers awaiting reinstatement in preference to strike replacements then on the payroll. In this case, a union engaged in an economic strike, lasting for 1 month, and thereafter made an unconditional offer to return to work on behalf of striking employees. During the strike, the employer had hired about 108 strike replacements, but, upon receiving the union's offer, the employer ceased hiring new employees and further returned about two-thirds of the strikers to work.

Shortly after the strike ended, the employer began posting jobs for bidding by employees then on the payroll, including permanent strike replacements and reinstated strikers. At the same time those jobs were posted, there remained a number of strikers who had not yet been reinstated and who were, in fact, qualified to perform the posted jobs. However, some posted jobs were not offered to unreinstated strikers at all and others were offered to them only if there were no successful bidders on those jobs from within the plant. Further, in a number of cases, unreinstated strikers were not offered the initial jobs that were posted but were instead invited to bid on lower-level jobs vacated by an employee on the payroll who had moved up to fill the initial job opening.

The Board panel, applying the principles set forth in *Laidlaw Corp.*,[38] held that the employer, in opening jobs for bidding and in filling them, was not entitled to give preference to strike replacements then on the payroll over qualified strikers awaiting

[37] *MCC Pacific Valves, a Unit of Mark Controls Corp*, 244 NLRB No. 138 (Chairman Fanning and Members Jenkins and Penello).

[38] 171 NLRB 1366 (1968), enfd. 414 F 2d 99 (7th Cir 1969), cert denied 397 U.S 920 (1970).

reinstatement. Further, reasoned the panel, the employer could not bypass qualified unreinstated strikers by waiting to make a job offer to them only if there were no successful bidders from among active strike replacements or by waiting to offer them a job made available after an employee on the payroll filled the initial job opening. The panel found that the employer, having failed to show business justification for its actions, was obligated to offer the initial job vacancies created by the departure of strike replacements to unreinstated, qualified strikers.[39]

Additionally, the panel held, contrary to the administrative law judge that the employer violated section 8(a)(3) of the Act when it applied a contractual "loss of seniority" provision in such a manner as to cause the loss of previously earned seniority to strikers who were reinstated more than a year after the strike ended.[40] Six strikers, who were reinstated by the employer more than a year after the strike ended, were treated as new employees and thus lost all previously earned seniority. The employer claimed its denying the six their full seniority was mandated by the "loss of seniority" contractual provision, but the union contended that the "loss of seniority" clause was never discussed by the parties in the context of time lost because of a strike.

The panel held that clauses serving to put limitations on the rights of employees will be accepted by the Board where those clauses resulted from informed, good-faith negotiation. Here, the panel found no evidence to show that the curtailment of seniority rights of economic strikers was a right acquired by the employer through the collective-bargaining process. Accordingly, finding no valid agreement limiting the rights of returning economic strikers, the panel concluded that the employer violated section 8(a)(3) of the Act by treating recalled economic strikers as new employees and by refusing to credit them with seniority for their prior service.

[39] The panel recognized that not every job opening was one that an unreinstated striker, though qualified, is entitled to fill. The panel noted that there may be circumstances, for example, in which the rights of unreinstated strikers may conflict with the rights of those strikers who had been reinstated or even with the rights of permanent strike replacements. However, the panel found it unnecessary in this case to reach and pass on these issues.

[40] The contract provision read, in relevant part, that "[s]eniority shall be lost and continuous service broken by . . . [a]n employee not performing any work for any reason . . . for the period of one (1) year, except those employees who have been granted an illness leave of absence as a result of a work-incurred injury or illness . . . ."

2. Discipline of Union Stewards

In *Midwest Precision Castings Co.*,[41] the full Board, for differing reasons, found that the employer's disciplining of a union steward did not violate section 8(a)(1) and (3) of the Act. The administrative law judge, citing *Precision Castings Co.*[42] and *Gould Corp.*,[43] found the disciplining of the union steward violated section 8(a)(3) of the Act because "discrimination against an employee on the basis of her holding union office is contrary to the plain meaning of section 8(a)(3), and would frustrate the policies of the Act if allowed to continue." In this case where production on a merged job had not increased as expected, a union steward was disciplined for telling an employee "all the girls are mad at you. You better slow down. You are getting out too many parts. We can't keep up with you."

Member Jenkins stated that the Board, in *Precision Castings* and *Gould,* held that a union steward who neither instigated nor led a work stoppage could not be disciplined for his "lack of actions as a steward." However, in the instant case, as it was clear that the union steward had urged support of and sought to induce employee participation in an unauthorized, illegal work slowdown in direct violation of a contractual no-strike, no-slowdown clause, he concluded that the employer did not violate section 8(a)(3) of the Act by disciplining the steward for such conduct.

Member Murphy, in joining Member Jenkins, relied solely on the fact that the steward was discharged for engaging in improper conduct in direct violation of a contractual clause, finding it unnecessary to extend, rely on, or distinguish *Gould* or *Chrysler Corp., Dodge Truck Plant,* 232 NLRB 466 (1977).

Chairman Fanning, concurring, applied the following test, the same as in *Gould* and *Precision Castings,* to the facts of this case: "When the employer discharges a union leader who has broken shop rules, the problem posed is to determine whether the employer has acted purely in disinterested defense of shop discipline or has sought to damage employee organization." Here, Chairman Fanning concluded that the employer was justified in disciplining the union steward for her unprotected comments.

Member Penello, concurring, adhered to the views expressed in his dissent in *Gould* that an employer may lawfully discharge a

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[41] 244 NLRB No. 63.
[42] 233 NLRB 183 (1977), see 43 NLRB Ann. Rep 96 (1978).
[43] 237 NLRB No. 124 (1978), see 43 NLRB Ann Rep 97 (1978).

union steward who participated in an unauthorized, illegal work stoppage and who fails to abide by his responsibilities and duties under a collective-bargaining agreement to bring such a work stoppage to an end. Under this analysis, Member Penello found the employer was entirely justified in disciplining the union steward for failing to abide by the contract's prohibition against engaging in work slowdowns. While noting that he and his colleagues in the majority agreed there was no violation in this case, Member Penello expressed his concern with his colleagues' refusal to recognize that the effect caused by a union steward who failed to urge employees who were engaged in an illegal, unauthorized work stoppage to return to work was no different from the effect caused by a union steward who affirmatively instigated or led an illegal, unauthorized work stoppage.

Member Truesdale, concurring, found no relevant distinction between the union steward's conduct in this case and the conduct at issue in *Gould*. He stated that in both cases employees had already begun a course of action contrary to the contractual commitment when the steward became involved and the stewards encouraged employees to take actions contrary to the contractual commitment. Thus, for the reasons set forth in his partial dissent in *Gould*, Member Truesdale found that the employer did not violate the Act by disciplining the steward for urging a fellow employee to slow down in violation of a contractual no-strike, no-slowdown commitment.

In *Westinghouse Electric Corp.*,[44] the Board, for differing reasons, affirmed an administrative law judge's finding that the employer's disciplining of six union stewards violated section 8(a)(3) of the Act.

Chairman Fanning, with Member Jenkins concurring, concluded that, under the rationale of *Precision Castings*, the employer's imposition of more severe discipline upon six stewards than that imposed on other employees violated section (a)(3) of the Act. They found that, in light of the employer's having meted out more severe discipline to stewards who were not even present at the plant during the work stoppage, the employer could not legitimately contend that its disciplining of stewards was based on any alleged failure by the stewards to urge employees to return to work. Accordingly, Chairman Fanning and Member Jenkins held that the employer violated section 8(a)(3) of the Act by imposing harsher discipline on six employees solely be-

[44] 243 NLRB No. 44 (Chairman Fanning and Members Penello and Truesdale; Member Jenkins concurring in part and dissenting in part).

cause they held, or were believed to have held, the position of union steward.

Members Penello and Truesdale, noting they had dissented in *Gould,* agreed that the more severe discipline given to the stewards violated section 8(a) (3) of the Act only because it was clear (1) Stewards Slonaker, Pierce, and Kurta made a good-faith effort to get the striking employees to return to work and did not voluntarily participate in the strike; (2) Steward Shaver was working on a "road job" rather than at the plant on the day of the strike and, upon being informed of the strike, he continued working; (3) Steward Caputo was legitimately absent from work on the day of the strike and never participated in, or lent his support to, the strike; and (4) Steward Piccini had ceased to be a steward prior to the day of the strike, and the sole reason that he was more severely disciplined was because the employer thought he was still a steward.

3. Discipline for Refusal to Cross Picket Line

In *Southern Calif. Edison Co.,*[45] the administrative law judge, after examining the collective-bargaining history of the parties, decided that the contract language, including the no-strike clause, did not constitute a waiver of the right of employees to honor another union's picket line. A Board panel, agreeing with the finding that a union had not contractually waived its right to honor picket lines of other unions, found that the employer could not rely on the contract to prohibit unit employees from refusing to cross such picket lines. Further, the panel distinguished between the following two types of picket line situations: "Where the employee engages in a *total* work stoppage, as when he refuses to cross a picket line at his own place of employment, the employer may treat the employee as a striker and replace him without having to demonstrate a business necessity for so doing. Where, however, an employee engages in a partial refusal to work by refusing to cross the picket line of one of the employer's customers, the *Redwing Carrier*[46] doctrine applies, and the employer must prove that it was necessary to replace the employee to preserve the efficient operation of its business."

In this case, one employee was suspended for his refusal to cross the picket line at one of the employer's customers. The employee, Blum, informed the employer of another qualified em-

[45] 243 NLRB No. 62 (Chairman Fanning and Members Jenkins and Murphy).
[46] *Redwing Carriers & Rockana Carriers,* 137 NLRB 1545 (1962).

ployee, Tanner, who was willing to and later did cross the picket line and do the work. However, when Blum stated he did not want to cross the picket line, the employer immediately told him there was no work for him and that he could leave for the day. Under these circumstances, the panel found that the employer did not present evidence of a sufficient business justification for replacing Blum. To show justification, stated the panel, the employer must show more than that someone else may have to be transferred or reassigned to do the work. Accordingly, the panel held that the employer violated section 8(a)(3) of the Act by refusing to schedule Blum for work and by suspending him, and that the violation occurred as of the time Blum was first sent home.

In *Dow Chemical Co.*,[47] the full Board, having accepted a remand from the Third Circuit Court of Appeals, reconsidered the issues in the case. In so doing, a majority of the Board, consisting of Members Penello, Murphy, and Truesdale, reaffirmed the Board's *Arlan's* rule[48] that a strike in violation of a no-strike clause of a collective-bargaining agreement is a breach of contract and, absent "serious" unfair labor practices by the employer, is unprotected. Thus, under *Arlan's*, if the employer's unfair labor practices are "non-serious," the union cannot avoid its no-strike commitment. The majority deemed it wise to retain this distinction in Board law—between "serious" and "non-serious" unfair labor practices—as a deterrent to possible hasty strike action.

Chairman Fanning and Member Jenkins on the other hand would have overruled *Arlan's*. They stated that they would return to the basic holding of the Supreme Court in *Mastro Plastics, supra*, that a contractual waiver of the right to strike does not preclude an unfair labor practice strike unless the contract specifically waives the right to strike because of unfair labor practices. In their view, allowing *Mastro Plastics* to exert its full impact would tend to foster labor peace by discouraging employers to take unilateral action that the Board might construe as "non-serious."

In the instant case, a four-member Board majority, concluding that the employer's unfair labor practices were *serious* within the meaning of *Arlan's*, found that the union's strike was a protected one despite the no-strike clause. Member Penello, after extensive analysis of the legal and factual issues, dissented from the con-

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[47] 244 NLRB No. 129 (Chairman Fanning and Members Jenkins and Murphy, Member Penello concurring in part and dissenting in part, Member Truesdale concurring).

[48] *Arlan's Dept. Store of Mich.*, 133 NLRB 802 (1961); see also *Mastro Plastics Corp* v. *N.L.R.B.*, 350 U.S. 270 (1956).

clusion that the employer's unfair labor practices were serious within the meaning of *Arlan's*. Accordingly, he would reaffirm the Board's original Order dismissing the complaint in its entirety because there the *Arlan's* rule had been properly applied by the Board.

4. Other Forms of Discrimination

In *Electric Machinery Co.*,[49] a Board panel, reversing an administrative law judge, held that the employer constructively discharged certain employees in violation of section 8(a)(3) and (1) of the Act. In this case, the employer unilaterally changed its employees' terms and conditions of employment before impasse and engaged in individual bargaining in derogation of the union's status as exclusive bargaining representatives. Thereafter, the employees refused to accept the new terms and, instead, left work. While concluding that the employer's unilateral changes and individual bargaining violated section 8(a)(5) and (1) of the Act, the administrative law judge found no constructive discharges, apparently because the alleged discriminatees could have retained their membership or standing in the union had they remained on their jobs under the new conditions of employment.

The Board panel, in reversing the administrative law judge, stated that the Board did not require, as a prerequisite for finding employees to have been constructively discharged, that the employer's unilateral actions must have required those employees to abandon or lose their union membership. Relying on *Superior Sprinkler*,[50] to the effect that "forcing employees to make such a choice; namely, to work under illegally imposed conditions or to quit their employment 'discourages union membership almost as effectively as actual discharge,' " the panel held that the employees in this case who quit rather than accept the employer's unlawfully imposed conditions of employment were constructively discharged by the employer in violation of section 8(a)(3) of the Act.

In *Wickes Lumber, a div. of Wickes Corp., d/b/a Home Lumber & Supply Co.*,[51] a panel majority, reversing an administrative law judge, found that the employer did not violate section 8(a)(3) and (1) of the Act by suspending 11 employees who left work to vote in a Board-conducted election. The employer had two facilities located a few blocks apart, a main lumber yard and a truss

[49] 243 NLRB No. 47 (Chairman Fanning and Members Jenkins and Penello).
[50] *Superior Sprinkler, d/b/a Wm. Augusta Fire Protection Services*, 227 NLRB 204 (1976)
[51] 245 NLRB No. 7 (Members Jenkins and Truesdale; Member Murphy dissenting).

department. The union, in seeking to represent employees, sought a unit limited to employees working in the main lumber yard. The regional director found the unit sought to be appropriate and directed an election therein. The employer's *Excelsior* list included only employees at the main lumber yard. When certain truss department employees discussed the possibility of leaving work to vote in the election, the employer informed them that they were not eligible to vote and that they would be disciplined for leaving work without permission. Eleven employees who ignored the employer's directive and left work to vote in the election were suspended for 3 days.

The panel majority disagreed with the administrative law judge's holding that *E.H. Limited, d/b/a Earringhouse Imports,*[52] was dispositive here. The panel majority found a "critical distinction" between *Earringhouse* and the instant case in that *Earringhouse* involved employees' own on-the-job interests, while here the employees' own employment interests would not be affected by the election because they were excluded from the unit, a fact about which they were well aware.[53] Consequently, as the conduct of the employees in leaving their workplace to vote, in contravention of the employer's direction to remain, was unprotected, the panel majority found the suspension of the 11 employees was not unlawful.[54]

Member Murphy, concurring in part and dissenting in part found, in agreement with the administrative law judge, that the actual suspending of 11 employees because they voted in a Board-conducted election violated section 8(a)(3) of the Act. She found that the employees in this case, like the employees in *Earringhouse,* were disciplined by the employer for participating in the Board's processes. In fact, she noted that an argument could be made that this case was a stronger one for finding a violation, for the right to vote in a Board-conducted election should surely be as protected as the right to be present at a Board hearing.[55]

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[52] 227 NLRB 1107 (1976). In *Earringhouse,* the Board concluded that an employee had a right, protected by the Act, to attend a Board hearing or otherwise participate in various stages of the Board's processes and that a discharge for such attendance or participation was unlawful.

[53] The panel majority, contrary to their dissenting colleague, found it "plain as a pikestaff" that the truss department employees were fully aware that they were not eligible to vote in the main yard election and that they insisted on voting (and walked off the job to do so) out of a sense of pique

[54] Member Truesdale, who was not a member of the panel that decided *Earringhouse,* found it unnecessary to pass on whether *Earringhouse* was correctly decided.

[55] Contrary to the administrative law judge and her colleagues, Member Murphy did not find it clear that the truss department employees knew that they were excluded from the unit. In light of the fact that the employer had engaged in numerous and egregious unfair labor practices, she would not find that the truss department employees were obligated to rely on their supervisor's bald assertion that they were not eligible to vote.

C. Employer Discrimination for Employee Recourse to Board Processes

Several cases were decided during the report year wherein the Board found that employers violated section 8(a)(4) and (1) of the Act by filing civil suits against employees as a result of the employees' recourse to Board processes. In a leading case, *Power Systems,*[56] a unanimous Board panel noted that the Board, with the Supreme Court's approval,[57] has consistently given an expansive scope to the protections afforded by section 8(a)(4), thereby confirming the crucial importance of that section to the effective operation of the National Labor Relations Act. Here, the employer originally filed a civil suit seeking the recovery of legal fees incurred by it in defending against alleged nonmeritorious and harassing charges filed by the Charging Party with the Board and the Occupational Safety and Health Administration (OSHA). The panel found that, while the Charging Party had filed charges with the Board against other employers and labor organizations in 46 different cases over a period of 11 years, the vast majority of which were found to be nonmeritorious, he had filed only one charge against the employer, based on his own discharge. As he had been informed at the time of the discharge that one of the reasons for his termination involved conduct while serving as a union steward, the panel found that it was not unreasonable for the Charging Party to believe that he had been discharged for engaging in activities protected by the Act.

The panel concluded, the employer had no reasonable basis on which to assert that the charging party's single charge with the Board was filed without probable cause or to harass it, and the nature of its lawsuit, including a request for a permanent injunction which was later dropped, was clearly aimed at penalizing him for having utilized the Board's processes against it. Concluding that the employer's lawsuit was an attempt to penalize the charging party for filing charges with the Board, the panel found that the employer had thereby discriminated against him in violation of section 8(a)(4) and (1) of the Act. However, in rejecting the employer's further assertion that the Board's decision in *Clyde Taylor, d/b/a Clyde Taylor Co.*[58] and its progeny

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[56] 239 NLRB No 56 (Chairman Fanning and Members Penello and Truesdale), enforcement denied 601 F 2d 936 (7th Cir. 1979).

[57] *N.L.R.B.* v. *Robert Scrivener, d/b/a AA Electric Co.*, 405 U S 117 (1972); *N.L.R.B.* v. *Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO* [*U S. Lines Co*], 391 U S. 418 (1968).

[58] 127 NLRB 103 (1960)

precluded the Board from finding any unfair labor practice for the filing of a lawsuit, the panel noted that the Board had, on several occasions, departed from a literal application of *Clyde Taylor* where the civil lawsuit was brought in order to pursue an unlawful objective. Having found that the employer had no reasonable basis for the filing of its lawsuit, and that the lawsuit had as its purpose the unlawful objective of penalizing the charging party for filing a charge with the Board, the panel concluded that *Clyde Taylor* did not preclude the Board from finding an unfair labor practice against the employer for the filing of its civil lawsuit.

In *George A. Angle,*[59] *d/b/a Kansas Refined Helium Co.*, the complaint alleged that the employer filed a lawsuit for malicious prosecution against a former employee, Rodgers, because he filed charges with the Board and gave testimony under the Act against the employer. In finding a violation of section 8(a)(4), the Board panel reviewed the long history of unfair labor practice litigation involving the employer and Rodgers, which had commenced when Rodgers was first discriminatorily discharged in 1966.[60] Following enforcement of the Board's orders by the United States Court of Appeals for the District of Columbia Circuit [61] and the refusal of the United States Supreme Court to grant the employer's petition for certiorari,[62] Rodgers was reinstated in March 1972. When he was again discharged in July 1972 for attempting to represent a fellow employee at a disciplinary interview, the Board initiated contempt proceedings for violation of the circuit court's decree.[63] The court ultimately found the employer in contempt, *inter alia*, for failing to properly reinstate Rodgers and for subsequently discharging him, but not for his later resignation, alleged as a constructive discharge, because Rodgers had engaged in attempts to fabricate evidence on which to base contempt charges against the employer.[64]

Based on the foregoing litigation history, the employer filed its lawsuit for malicious prosecution, alleging that Rodgers had "induced" and "caused" the contempt proceedings which the Board initiated in July 1972. The Board panel was of the view that, as in

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[59] 242 NLRB No. 112 (Chairman Fanning and Members Penello and Truesdale).

[60] 176 NLRB 1032 and 176 NLRB 1037 (1969).

[61] *Oil, Chemical & Atomic Workers Intl. Union, AFL-CIO* v. *N L R B.*, 445 F.2d 237 (D C. Cir (1971).

[62] *Angle, George A , d/b/a Kansas Refined Helium Co.* v *N.L R B*, 404 U S 1039 (1972).

[63] Pending the court's decision on the contempt charges, Rodgers was again reinstated but later resigned because of the working conditions imposed on him by the employer. Rodgers' resignation was then added to the contempt proceedings as an allegedly constructive discharge.

[64] *Oil, Chemical & Atomic Workers Intl. Union, AFL-CIO* v. *N L R B*, 547 F.2d 575 (D.C Cir. 1976).

Power Systems, supra, the evidence relied on by the employer in support of its lawsuit clearly indicated that it did not have reasonable grounds on which to file suit. The panel observed that the record was clear that (1) the decision to institute the contempt proceedings was made solely by the Board; (2) the employer's conduct toward Rodgers was only *one* of the grounds on which the Board alleged contempt; (3) the contempt allegation for constructively discharging Rodgers was *added* to the contempt proceedings almost 1 year after the proceedings were instituted; and (4) "of crucial importance," the court had found the employer in contempt on every ground alleged by the Board at the time it instituted the contempt proceeding in July 1972, when Rodgers' conduct *prior* to that time was entirely protected by the Act.

Chairman Fanning and Members Penello and Truesdale noted that the employer now contends that its lawsuit was based solely on Rodgers' unprotected conduct in attempting to fabricate evidence. The panel found that contention wholly without merit. Even if they were to assume that the employer relied solely on this unprotected conduct, which occurred *after* July 1972, they found that any such reliance was completely negated by the fact that the employer's lawsuit against Rodgers was brought because he allegedly induced and caused the institution of contempt proceedings *in* July 1972. Accordingly, the panel concluded that, as in *Power Systems,* the lawsuit had been aimed at penalizing Rodgers for having utilized the Board's processes against the employer and thereby the employer had discriminated against Rodgers in violation of section 8(a)(4) and (1) of the Act.

Finally, in *United Credit Bureau of America,*[65] the Board panel adopted the administrative law judge's finding that the employer violated section 8(a)(4) and (1) by filing a civil action seeking damages against a former employee. The civil action alleged that the employee defrauded the employer by falsely representing an intention to enter into a long-term employment relationship, while intending to work no longer than necessary to obtain training and thereafter to provoke her discharge so that she could file a charge with the expectation that the employer would settle rather than litigate her discharge. The administrative law judge found that, while the civil action sounded in fraud, the key element on which it was based was the employee's filing of the unfair labor practice charge alleging a discriminatory discharge, for only by the filing of the charge could her alleged scheme have been carried out. Otherwise, he stated that the employee could not have reaped any

[65] 242 NLRB No. 138 (Chairman Fanning and Members Penello and Truesdale).

benefit from provoking her own discharge. Noting that the employee's charge in this case had sufficient merit to cause the issuance of a complaint and a hearing thereon, the administrative law judge found that employer's claim of the employee's alleged scheme was based on no more than speculation and that the employer's civil action was filed purely to retaliate against the employee for seeking redress from the Board for her discharge and to discourage other employees from ever seeking to enforce their rights under the Act.

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) of the Act, 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. Duty to Furnish Information

Section 8(d) defines the obligation to "bargain collectively" imposed by the Act as requiring that bargaining be carried on in "good faith." The statutory duty of an employer to bargain in good faith has been interpreted to include the duty to supply to the bargaining representative information which is "relevant and necessary" to the intelligent performance of its collective-bargaining duty in contract administration functions.[66] The scope of this obligation was considered by the Board this past year in a number of cases.

In *Westinghouse Electric Corp.*,[67] a union requested from the employer certain statistical information concerning the employer's employment practices. The information sought included a breakdown by race, sex, and Spanish surname with respect to (1) labor grade; (2) classification and wage rate; (3) day work and incentive basis; (4) seniority; (5) hiring; and (6) promotions or upgrades. A Board majority found that the employer's refusal to supply the requested data violated section 8(a)(5) of the Act.

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[66] See, e.g., *Curtiss-Wright Corp.*, 145 NLRB 152 (1963), enfd. 347 F.2d 61 (3d Cir. 1965).

[67] 239 NLRB No 19 (Chairman Fanning and Members Jenkins and Truesdale, Member Murphy concurring in part and dissenting in part).

Noting the antidiscrimination clause in the collective-bargaining agreement between the parties, the majority found that the request for race and sex data constituted an effort to determine whether policy was being implemented and was a legitimate effort by the union to monitor and police the terms of the collective-bargaining agreement. Further, they held that, regardless of the existence of an antidiscrimination clause in the collective-bargaining agreement, the very nature of the collective-bargaining representative's status as a representative of all unit employees imposed on it a legal obligation to the employees it represents to represent them with due diligence. Finding that the statistical information of the type requested was relevant to a determination of whether discrimination existed and that the union has a statutory and contractual right to make a good-faith effort to correct any discrimination, the Board majority held that the relevance of the information for that purpose was clearly established. Accordingly, they stated that it would apply the same standard to requests for statistical data relating to employment practices as it applied to requests for wage data; namely, that such information is presumed relevant to the collective-bargaining process and that the union is not required initially to show the relevance of the requested information.

The Board majority also ruled that the employer was obligated to honor the union's request for a list of all complaints and charges filed against the employer pursuant to various Federal and state fair employment practices laws, and copies of each complaint and charge. They held that, unlike the requested statistical information, the relevance of the charges and complaints was not plainly obvious and thus the information requested was not presumptively relevant. However, finding that the union demonstrated a need for the information insofar as it related directly to its representation of unit employees, the Board majority, while not unmindful of the need for confidentiality, ruled that the union had established the relevance of the requested information and, therefore, was entitled to receive it.[68]

Finally, the majority held that the employer was not obligated to furnish the union with its affirmative action programs. With regard to these programs, they held that, except for certain statistics contained therein, the affirmative action programs were not presumptively relevant to or necessary for bargaining and further that the union had not demonstrated the relevance of the

[68] Although the charges and complaints involving nonunit employees might affect the unit, the majority concluded that the union had not yet demonstrated the relevance of such information.

plans. The majority had noted that the employer had not chosen to consult with the union regarding the formation of the affirmative action programs and that there was no indication that the union ever sought a role in the development of the plans.

Member Murphy, concurring in part and dissenting in part, argued that a finding that unions have a right to information imposes the corresponding obligation to act on it, under the duty of fair representation, and that the majority decision might help to destroy employers' willingness to comply voluntarily with Title VII of the Civil Rights Act of 1964 and other fair employment statutes. With respect to the specific items of information sought, Member Murphy concluded that requiring employers to provide unions with a statistical breakdown of the unit would result in unions being charged with failure to fairly represent employees or in union liability for employer discrimination. In reaching this conclusion, Member Murphy emphasized that unions which did not avail themselves of the opportunity to obtain and analyze such information risked being found to have acquiesced in any subsequent unlawful discriminatory practices of employers with whom they had bargaining relationships, and that imposing the burden of requesting and analyzing such information, which unions would be required to do in order to protect themselves, established new, expensive, and time-consuming responsibilities for unions which they were not equipped to fulfill. She also noted that such statistical information was required to be submitted to the Equal Employment Opportunity Commission, which was precluded from disclosing it, and thus the Board was ordering employers to provide information compiled pursuant to the instruction of another agency which itself was required to keep the information confidential. Member Murphy further emphasized that it was "patent and admitted" that the information was not sought for collective-bargaining purposes, and thus the mere fact that nondiscrimination was mentioned in the collective-bargaining agreement did not automatically entitle the union to the information.

With respect to copies of charges and of complaints of discrimination, Member Murphy noted that many agencies with which such charges are filed are required to keep them confidential. She found no merit to the majority determination that deletion of the name of the charging party was sufficient to preserve confidentiality, because other information contained in the charge would make it possible for the union to deduce the name of the charging party.

Finally, regarding affirmative action plans, Member Murphy agreed with the majority that such plans need not be furnished, but did so on grounds that their purpose is to enable employers to monitor their own fair employment programs and to encourage voluntary compliance with equal employment opportunity requirement. She argued that ordering disclosure of the plans would cause employers to be less than candid in preparing them and thus defeat their purpose. She further noted that the majority had failed to specify what information in the work force analysis section of the affirmative action plan was "unrelated" to the statistical information that the majority ordered the employer to supply to the union, and that it would therefore be impossible for employers to ascertain what the Board was requiring them to provide.

Overall, Member Murphy stated that the Board majority's decision had extended Title 7 of the Civil Rights Act, "beyond the wildest dreams of its framers," interferred with the confidentiality guaranteed to charging parties under other Federal statutes, and placed an unfair burden on both employers and unions.

In a similar case, *East Dayton Tool & Dye Co.*,[69] a Board majority held that the employer was obligated to supply the union with statistical information regarding the race and sex of applicants for employment.[70] They noted that the collective-bargaining agreement between the parties specified that the parties would "provide equal employment opportunities without regard to race, color, creed, or national origin"; that "this Agreement shall apply to hiring"; and that "the Company and the Union pledge to do any and all things which may be necessary in the future to provide equal employment opportunities." The majority held that the union's request was based on the need to implement the nondiscrimination provisions of the contract and further that the union did not forfeit its right to the information because it may have been seeking the information, at least in part, to protect itself from charges that it had engaged in unlawful discrimination. Accordingly, they found that the requested information as to race and sex of applicants for employment was necessary and relevant to the union's performance of its bargaining obligation.[71]

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[69] 239 NLRB No. 20 (Chairman Fanning and Members Jenkins and Truesdale; Member Murphy concurring in part and dissenting in part).

[70] The union requested, *inter alia*, that the employer supply it with, "the total number of males, females, whites, blacks, and other minorities who sought employment, and the total number in each group who were actually hired in 1973 and 1974, respectively."

[71] The Board majority, disagreeing with the administrative law judge, found that the employer was not required to respond to the union's query as to why the employer had no female and very few black employees The Board noted that the request by the union sought a subjective response or argument rather than objective information.

Member Murphy, in her partial dissent, stated that the decision of the Board majority would expand the responsibility and liability of unions under the National Labor Relations Act and under Title VII of the Civil Rights Act of 1974. She argued vigorously that the majority was placing a heavy burden on unions; namely, the duty to represent applicants for employment even though they were not hired for reasons other than those barred by the National Labor Relations Act. Accordingly, she would have dismissed the allegations of the complaint in that she found no relevance of the race and sex information sought to any collective-bargaining obligation of the union. Nor, in her view, did the information become relevant because the collective-bargaining agreement between the parties provided for equal employment opportunities, especially since the union was not seeking the information for purposes of unit employee representation or for the administration of the contract. Rather, she concluded that the union wanted the information in order to protect itself from possible future charges before the EEOC that it had engaged in unlawful discrimination rather than police the contract in existence.[72]

In *Automation & Measurement Div., Bendix Corp.*,[73] a Board majority affirmed an administrative law judge's finding that the employer was obligated to furnish the union with certain requested sex and race information.[74] The Board majority held that, insofar as the requested information related to bargaining unit employees, it was presumptively relevant and must be supplied by the employer. Further, the requested data with regard to job applicants was presumptively relevant because the data was integral to the union's fulfillment of its functions as the statutory bargaining representative of unit employees.[75]

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[72] Member Murphy agreed with the majority that the union was not entitled to information concerning the employer's "reasons" for not hiring more female or black employees. She stated that such subjective information was unrelated to the performance of any collective-bargaining responsibility.

[73] 242 NLRB No 8 (Chairman Fanning and Members Jenkins and Truesdale, Member Murphy concurring in part and dissenting in part).

[74] The employer was ordered to supply the following

(a) The total number of individuals who sought employment with the employer in the certified unit, including their race and sex

(b) The actual number hired, including their race and sex and the department and classification in which they were placed.

(c) Job-posting data, including the names of employees who bid on jobs, their race and sex, and the name, race, and sex of the employees awarded the unit jobs

(d) Copies of requisition forms used to requisition employees for unit positions.

[75] The Board majority dismissed an allegation of the complaint alleging that the employer unlawfully refused to supply the union with a "survey" concerning whether race and/or sex discrimination existed at one of its plants The majority did so because it found the evidence insufficient to establish the existence of the survey

Member Murphy, adhering to her dissents in *Westinghouse Electric Corp.* and the *East Dayton Tool & Dye Co.*, concluded that the employer had no obligation to supply the requested information. She found that the information sought—the race and sex of both job applicants as well as that of those hired into various departments and classifications—was not properly obtainable in this proceeding.[76] She emphasized the Board was improperly expanding the liability of unions and placing an equally untenable burden on employers.

Kentile Floors,[77] also involved a request by a union to the employer for information regarding minority employment.[78] For the reasons set forth in *Westinghouse Electric Corp.*, the Board majority found the requested information to be presumptively relevant insofar as it related to unit employees. Thus, according to the majority, the employer violated section 8(a)(5) and (1) of the Act by refusing to supply the requested information.

Member Murphy, dissenting in part and referring to her earlier dissents in this area, would not have required that the information be supplied because the union involved admitted that it wanted the information for the purposes of litigation under Title VII of the Civil Rights Act of 1964 and not for the purpose of collective bargaining with the employer.

In *Associated General Contractors of Calif.*,[79] a Board panel, reversing the administrative law judge who had dismissed the complaint in its entirety, found that the employer trade association—acting in its capacity as a multiemployer bargaining representative—violated section 8(a)(5) and (1) of the Act by refusing to furnish certain unions with requested information as to the names of all association employer-members, including the "open-shop" employer-members who, the employer asserted, were not bound by the parties' collective-bargaining agreements. In its defense, the employer argued that it had regularly informed the unions as to any name, address, or business style change effectu-

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[76] In regard to the "survey" allegedly undertaken by the employer to determine whether race or sex discrimination existed at one of its plants, Member Murphy stated that, even had the existence of the survey been established, she would not require the employer to provide the results thereof to the union

[77] 242 NLRB No 115 (Chairman Fanning and Members Penello and Truesdale; Member Murphy dissenting in part)

[78] The union requested, *inter alia*, the following information

(a) the number of male, female, black and Spanish-surnamed employees in each classification in the bargaining unit Please also state the wage rate for each of these classifications

(b) the number of persons hired in each classification during the past 12 months with a break down as to race, sex, and Spanish-surnamed employees showing the sex of all black and Spanish-surnamed male and Spanish-surnamed female employees.

[79] 242 NLRB No 124 (Members Penello, Murphy, and Truesdale).

ated by any employer-member who was bound to the respective labor agreements, although it conceded that no such reports were ever made with respect to any open-shop members who shared elements of common ownership and/or common officers with firms which were admittedly bound to the unions' contracts. The Board panel held that the unions, in order to exercise their statutory responsibility with respect to both contract administration and contract negotiations, were entitled to have equal access to the requested data so that they might intelligently evaluate all the facts. It held that the employer's duty to bargain in good faith obligated it to furnish the requested information to the unions even though it maintained that it had investigated the applicants for its open-shop membership classifications and had ascertained that those admitted to such memberships were not covered by the collective-bargaining agreements. The panel concluded that the information sought by the unions was relevant and necessary to their administration of the contracts between them and the trade association, to the intelligent assessment of the advisability of filing grievances or taking other remedial action, and to the formulation of related collective-bargaining proposals in the then pending negotiations. Finally, the panel held that, as the relevancy of the requested information had been established, it could not make any difference that the unions might have also sought the information in order to facilitate the organizing of nonunion companies.

In *Brazos Electric Power Co-op.*,[80] a Board panel found, contrary to the administrative law judge, that the employer violated section 8(a)(5) and (1) of the Act by refusing to furnish to the union certain information pertaining to a wage increase granted nonbargaining unit employees. In this case, the union had been advised that the employer had recently granted a larger pay increase to nonunit employees than was granted to bargaining unit employees. The panel noted that the primary issue in the case was whether or not the information requested was relevant to any legitimate union need. Upon the facts of the case, the panel concluded that the requested data was relevant to the union's preparation of collective-bargaining proposals for upcoming negotiations. In finding that the wage data concerning the nonunit personnel assumed a probable or potential relevance to the union's statutory responsibility to prepare fully for upcoming negotiations, the panel noted that (1) the established past practice of the employer was to maintain a degree of wage parity

[80] 241 NLRB No 160 (Chairman Fanning and Members Penello and Truesdale).

between nonunit and unit employees of similar skills, (2) the percentage wage increase granted the nonunit employees would be likely viewed by the union as the floor from which it would make demands and below which it would not settle, (3) employee meetings had been scheduled to discuss contract proposals, and (4) written proposals for a new contract were to be submitted within the year.

2. Unilateral Changes in Conditions of Employment

In cases decided this report year, the Board was presented with alleged violations of section 8(a)(5) involving employers' unilateral changes in employees' terms and conditions of employment.

In *Winn-Dixie Stores*,[81] the full Board held that the employer violated section 8(a)(5) and (1) of the Act by unilaterally granting a wage increase to the unit employees over the union's protest, at a time when no impasse in bargaining existed. The employer defended its actions by contending that unilateral changes may be proper if the union is given notice of the changes and an opportunity to discuss them and make counterproposals. Noting its disagreement with the Fifth Circuit Court of Appeals,[82] the Board reiterated its view that, absent extenuating circumstances, an employer must bargain to impasse prior to implementing unilateral changes in working conditions. They stated that bargaining presupposes negotiations—with attendant give and take—between parties carried on in good faith with the intention of reaching agreement through compromise and requires more than going through the motions of proffering a specific bargaining proposal as to one item while others are undecided and merely giving the bargaining agent an opportunity to respond. The Board concluded that the facts in this case demonstrated that, from the time it annouced its proposal for a wage increase, the employer intended to implement that wage increase regardless of whether the union agreed or objected to it. Finding that the union was not so much presented with the opportunity to bargain about the wage increase as it was afforded a chance to give approval to the employer's decision to grant it, the Board held that the employer's conduct did not constitute good-faith bargaining.

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[81] 243 NLRB No. 151.

[82] See, e.g., *Winn-Dixie Stores* v. *N.L.R.B.*, 567 F.2d 1343 (5th Cir. 1978).

In *Mountaineer Excavating Co.*,[83] a Board panel found that the employer's unilaterally implementing various economic benefits for employees violated section 8(a)(5) of the Act. The employer contended that its actions were justified, alleging that it had timely notified the union of what would take place, upon termination of their contract, if the union went on strike;[84] that it was incumbent upon the union to thereafter indicate in some manner that it disapproved thereof and desired to negotiate or bargain with respect thereto; that the union failed to request bargaining; and that, by so failing, the union waived its right to protest the implementation of the changes. The panel noted that where, as in this case, both parties desired to terminate the existing agreement upon its expiration, it was incumbent upon both to take steps to meet at reasonable times and confer on proposed changes. Here, neither party, after an initial exchange of letters, took any steps to put the bargaining process into motion. However, according to the panel, the failure of one of the parties to meet its obligations does not, in and of itself, excuse the other party from complying with its statutory obligations. In this case, the panel found that the facts amply demonstrated that the employer's conduct (with regard to the unilateral changes) was timed and designed to deal directly with the employees and to avoid bargaining with the union. The employer waited until the union was involved with negotiations at the national level that had reached a crisis state[85] and only then did it request negotiations and inform the union that new benefits might be implemented if a strike occurred. Within a week of so informing the union, the employer unilaterally implemented the new benefits. Thus, the panel concluded that the employer did not fulfill its bargaining obligations under section 8(d) of the Act and that the burden to take action did not shift to the union.

3. Multiemployer Bargaining

a. Circumstances Warranting Withdrawal

The Board has long adhered to the basic rules governing withdrawal from multiemployer bargaining associations as set forth

[83] 241 NLRB No. 80 (Chairman Fanning and Members Jenkins and Penello).

[84] In this regard, the employer stated that it intended to implement a new hospitalization plan in the event of a strike because a strike could potentially produce the failure of the union's hospitalization plan.

[85] The employer was not a member of a national multiemployer group that had a collective-bargaining relationship with the union, but it had agreed, in July 1977, to be bound by the terms of the then-existing national agreement.

in *Retail Associates.*[86] Absent mutual consent or unusual circumstances, neither an employer nor a union may withdraw from group bargaining except upon unequivocal written notice prior to the date set by the contract for modification or the agreed-upon date to begin multiemployer negotiations. The Board has since held that these rules are to be applied equally to both employers and unions. With respect to partial withdrawal, a union may, upon timely notice, consent to an individual employer's withdrawal and continue multiemployer bargaining unless the remaining employers exercise, in a timely fashion, their right to withdraw from the fragmented unit. In three cases[87] decided during the report year, the Board reaffirmed the principle that an employee-member of a multiemployer bargaining unit is not privileged to withdraw unilaterally from bargaining solely upon the occurrence of impasse.

In *Bonanno, supra,* while acknowledging that four circuit courts of appeals had rejected its position, the full Board reaffirmed its view that there is nothing so extreme about impasse as to make it an "unusual circumstance" which is destructive of group bargaining. It noted that impasse is only a temporary "deadlock" or "hiatus" in negotiations which in almost all cases is eventually broken, either through a change of mind or the application of economic force. Thus, concluded the Board, there is little warrant for regarding an impasse as a rupture of the bargaining relation which leaves the parties free to go their own ways. Further, it held that it was fulfilling its statutory obligation to promote effective collective bargaining by permitting a union to negotiate, after impasse, true interim agreements with individual members of a multiemployer unit without thereby creating new withdrawal rights in the remaining employers. The Board distinguished between such interim agreements which contemplate adherence to a final unitwide contract and thus are not antithetical to group bargaining, and individual agreements which are clearly inconsistent with, and destructive of, group bargaining. In the latter circumstance, the interim agreement will be found to have fragmented and destroyed the integrity of the bargaining unit, thereby justifying unilateral withdrawal by an employer-member under the "unusual circumstances" exception of *Retail Associates.* However, in the former circumstances, where an interim agreement negotiated during impasse tends to prevent

[86] 120 NLRB 388 (1958).

[87] *Charles D Bonanno Linen Service,* 243 NLRB No. 140, *Marine Machine Works,* 243 NLRB No. 141 (Chairman Fanning and Members Jenkins, Murphy, Penello, and Truesdale), *Birkenwald, d/b/a Birkenwald Distributing Co.,* 243 NLRB No. 155.

fragmentation rather than cause it and tends to facilitate the breaking of impasse, such agreements are calculated to further, not destroy, unit integrity. In those circumstances, the interim agreement cannot constitute an unusual circumstance sufficient to justify unilateral withdrawal by an employer. Further, in *Bonanno,* noting that no interim agreements were made or even attempted, the Board found no reason to allow the employer to withdraw from the multiemployer in untimely fashion,[88] and, therefore, found that the employer violated section 8(a)(5) and (1) of the Act by refusing to execute the multiemployer contract.

In *Olympia Automobile Dealers Assn.,*[89] a Board majority, having recognized the right of a multiemployer group to prevent the untimely withdrawal of any employer-member, reversed earlier precedents and found it clear that, absent unusual circumstances, any untimely attempt by an employer-member to withdraw without the consent of both the union and the multiemployer group would constitute a violation of section 8(a)(5) of the Act as of the time of the withdrawal.[90]

In *Joseph J. Callier, d/b/a Callier's Custom Kitchens,*[91] a Board panel rejected the employer's contention that it was entitled to withdraw from a multiemployer bargaining group because of the union's conduct in negotiating and executing interim agreements with over 40 of the 65 employer-members of the multiemployer group. The panel found that the negotiation and execution of the interim agreements by the union was not tantamount to rejection of bargaining on a multiemployer basis and did not result in the fragmentation of the multiemployer bargaining unit. Citing *Bonanno,* it noted that the interim agreements in question recognized the integrity of the multiemployer bargaining unit and the paramount significance of the group negotiations, and each employer that signed the interim agreement maintained a vested

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[88] In *Marine Machine Works, supra,* Chairman Fanning and Members Jenkins, Penello, and Truesdale, relying on *Bonanno,* found that the employer violated section 8(a)(5) of the Act by unilaterally withdrawing from multiemployer bargaining after negotiations had commenced, while a strike was in progress, and while an impasse in negotiations was in effect, and by its continuing refusal to adhere to the multiemployer contract subsequently reached.

In *Birkenwald, supra,* the full Board, relying on *Bonanno,* found that a bargaining impasse between the union and the employer was not, of itself, sufficient to justify the employer's unilateral withdrawal from the bargaining unit. Member Murphy stated that she was not convinced that the act of untimely withdrawal alone would violate sec. 8(a)(5), that it is the refusal thereafter to be bound by the contract that violates the Act

[89] *Teamsters Union Local No 378, IBEW (Olympia Automobile Dealers Assn.),* 243 NLRB No. 138 (Members Jenkins, Penello, and Truesdale, Chairman Fanning dissenting in pertinent part)

[90] Chairman Fanning adhered to his earlier expressed position that an untimely withdrawal would not, in and of itself, violate sec. 8(a)(5) of the Act and, therefore, he would not overrule the earlier precedents

[91] 243 NLRB No. 143 (Members Jenkins, Penello, and Truesdale).

interest in the outcome of final union-multiemployer group negotiations. Thus, reasoned the panel, as the union sought to conclude interim agreements which contemplated further bargaining for and adherence to a new multiemployer contract, the multiemployer bargaining was not seriously impaired or fragmented. Accordingly, no unusual circumstances—within the meaning of *Retail Associates*—existed by reason of the union's negotiating and executing interim agreements and therefore the employer's untimely withdrawal from the multiemployer group was not excused by the union's conduct; consequently, the employer's subsequent refusal to execute and implement the new multiemployer agreement violated section 8(a)(5) and (1) of the Act.

In three companion cases,[92] the same Board panel, concluding that the union's conduct was not inimical to group bargaining, found that three employers—in the respective cases—had violated section 8(a)(5) and (1) of the Act by their untimely withdrawal from multiemployer bargaining and by their subsequent refusal to execute and abide by the multiemployer collective-bargaining agreement.[93] During bargaining, the union consented to the withdrawal of two other employers (Bermingham & Prosser and Nationwide) from the multiemployer bargaining[94] group of 14 employers. This action had the effect of diminishing employer and employee involvement in the multiemployer unit by 14 percent and 42 percent, respectively. Subsequent to the withdrawal of these two employers, the union entered separate new agreements with each of them. Thereafter, the three employer-members withdrew from multiemployer bargaining and concurrently filed representation petitions alleging doubt as to whether the union represented a majority of their employees. The union refused to consent to the withdrawal of the three employers, and shortly thereafter the union entered a new agreement with the multiemployer group. Rejecting the contention of the employers that the union's conduct—including its consent to the withdrawal of the two other employers and its execution of final, separate agreements with them—had substantially weakened and fragmented the multiemployer bargaining group, the panel viewed the union's and multiemployer group's continued bargaining efforts and suc-

[92] *Graham Paper Co., Div of Jim Walter Paper*, 245 NLRB No. 180 (Chairman Fanning and Members Jenkins and Penello); *Tobey Fine Papers of Kansas City, Div. of Distribix*, 245 NLRB No 181 (Chairman Fanning and Members Jenkins and Penello), *Butler Paper Co., Div of Great Northern Nekoosa Corp*, 245 NLRB No 182 (Chairman Fanning and Members Jenkins and Penello).

[93] Chairman Fanning noted he would not find a violation of sec. 8(a)(5) as of the time of the withdrawal from multiemployer bargaining.

[94] There was no objection from any other employer-member regarding Bermingham & Prosser's and Nationwide's withdrawal from group bargaining.

cessful conclusion as demonstrating that the union's earlier conduct did not manifest a rejection of multiemployer bargaining and did not have a fatal effect on it.

b. Individual Bargaining as Consent to Withdrawal

In *TKB Intl. Corp.*,[95] the company (TKB) assumed control over the business of another company (Hendricks-Miller) by way of a stock transfer. Hendricks-Miller had been part of a multiemployer bargaining group, but, after the stock transfer, the company neither authorized the multiemployer group to represent it in collective bargaining nor did it serve the multiemployer group or the union with any written notice of withdrawal from the multiemployer unit. Although no collective agreement existed at the time when TKB acquired the Hendricks-Miller stock, a Board panel found that TKB—as the purchasing entity—had assumed Hendricks-Miller's membership in the multiemployer unit, much in the same way it assumed the debts, assets, and goodwill of the transferor of the stock.

However, the panel further found that the employer did not violate section 8(a)(5) of the Act by refusing to execute the contract ultimately agreed to by the union and the multiemployer group. Subsequent to impasse in the multiemployer negotiations, the union initiated meetings directly with the employer and, in the view of the panel, both the union and the employer proceeded to act in a manner inconsistent with membership in the multiemployer unit. Specifically, the panel noted that the union proposed to the employer an "Agreement" which significantly differed from its last offer to the multiemployer group. Further, the "Agreement" was found to be a complete document that did not contemplate automatically reverting to the terms and conditions of any as yet unrealized multiemployer agreement. Contrary to the union's contentions, the panel viewed the union's actions to be clearly those of a party engaging in individual bargaining. It considered the union's proposed "Agreement" to have constituted an open invitation for separate negotiation with the employer and concluded that the actions of both the union and the employer were inconsistent with membership in the multiemployer unit. Accordingly, as the union itself took the first steps in effecting a dissolution of the multiemployer relationship, the panel stated that the union could not claim that the employer was still a member of the multiemployer unit.

[95] *TKB Intl Corp. t/a Hendricks-Miller Typographic Co*, 240 NLRB No 114 (Chairman Fanning and Members Penello and Truesdale).

In *Zim's Restaurants*,[96] a Board panel found that the union violated section 8(b)(3) by insisting that the employer execute and abide by a multiemployer agreement. It noted that when an issue arises as to whether a union has consented to an employer's untimely withdrawal from multiemployer bargaining, the totality of the union's conduct must be examined. If that conduct involves a course of affirmative action "clearly antithetical" to the union's claim that the employer has not withdrawn from multiemployer bargaining, the Board will imply union consent to, or acquiescence in, the employer's attempted withdrawal.

In this case, in examining the union's total course of conduct following the employer's submitted withdrawal from multiemployer bargaining, the panel noted that the union willingly participated in separate negotiations with the employer to consider terms and conditions of employment particularly applicable to the employer's operation, requested counterproposals, and at no time during negotiations insisted that the employer be bound by the multiemployer agreement. In these circumstances, the panel found that the union's conduct established that it consented to the employer's withdrawal from multiemployer bargaining and that it acquiesced in the employer's requests to bargain apart from the multiemployer unit.

4. Change of Union Affiliation

In *Amoco Production Co.*,[97] the full Board considered whether an employer is relieved of its obligation to bargain with the union certified to represent its employees following that union's affiliation with another labor organization, if voting on the question of affiliation is limited to union members. A majority of the Board, consisting of Chairman Fanning and Member Murphy, with Member Truesdale concurring, found the members-only affiliation vote to be valid. Accordingly, they adhered to their previous Decision and Order [98] and found that the employer herein violated section 8(a)(5) and (1) by abrogating, after the affiliation vote, its collective-bargaining contract with the union.

In their opinion, Chairman Fanning and Member Murphy stated that the fact that the union merger or affiliation votes were basically internal, organizational matters, coupled with the employees' opportunity to exercise their right to choose whether

[96] *Hotel & Restaurant Employees & Bartenders Union, Local 2 (Zim's Restaurants)*, 240 NLRB No. 80 (Members Jenkins, Murphy, and Truesdale)

[97] 239 NLRB No. 182.

[98] *Amoco Production Co.*, 220 NLRB 861 (1975)

to participate or to refrain from engaging in concerted activity, persuaded them to find that union affiliation votes limited to union members are valid. In their view, affiliation does not directly involve the employment relation, and affiliation vote procedures, including the voting status of nonmembers, are internal union matters in which the Board does not ordinarily intrude, except to determine whether the vote was conducted with adequate due process. While noting that any change in the collective-bargaining representative has the potential to affect the interests of all employees, they do not find the exclusion of nonmembers from an affiliation vote is disqualifying, where nonmembers have not unwillingly been relegated to the status of onlookers because the membership ranks have been closed to them.

In his concurrence, Member Truesdale, in concluding that the affiliation vote was valid, relied solely on the ground that the question of affiliation, i.e., whether an independent local union desires to affiliate with another union, be it another independent or a national union, is a matter of exclusive concern to the union members. In his judgment, so long as the local union has not improperly denied membership to employees, he would find that an affiliation vote is not rendered invalid simply because all employees in the bargaining unit were not eligible to vote thereon. He found it important that all employees in the unit had the same opportunity to become members of the union under the union's normal rules, thereby securing a right to participate in the union's internal affairs.[99]

Member Jenkins, adhering to his dissent in *North Electric Co.*[100] and the majority opinion in *Jasper Seating Co., supra,* found that the affiliation election conducted in this case did not meet the minimum strictures of due process and would dismiss the complaint in its entirety. In his view, just as the unit employees were not required to be union members before participating in the initial selection of their representative which resulted in the Board's certification, they should not be required to join in order to, in effect, decide whether that certification should be amended to reflect a change in the designation of the representative.

Member Penello dissented, adhering to the views expressed in his concurring opinion in *Jasper Seating Co., supra.* He found that the affiliation of an independent local union with an international union is a clear and material alteration in the identity

[99] To the extent *Jasper Seating Co*, 231 NLRB 1025 (1977), was inconsistent with the Board majority's decision in *Amoco*, it was overruled.

[100] 165 NLRB 942 (1967).

of the employee's bargaining representative. In these circumstances, where there has been a substantial change in the identity of the employees' bargaining representative, Member Penello would require that the question concerning representation raised by the change in identity be resolved by a Board-conducted election in which all unit employees would be given the opportunity to vote.

In *Providence Medical Center*,[101] a Board majority, relying on *Amoco Production Co., supra*, affirmed an administrative law judge's finding that an affiliation election was conducted with adequate due process, even though only union members were permitted to vote. Restating that affiliation votes are basically internal union matters into which the Board ordinarily does not intrude, the majority regarded as misplaced the dissents' emphasis on the numbers of nonmembers excluded from participation in the affiliation election. Finding the affiliation election was conducted with adequate due process, the Board majority found that the election produced a lawful successor union with which the employer was obligated to bargain.

Member Jenkins, dissenting in part, found the affiliation vote to be invalid. He stated that he could not agree with the majority that nonmembers may be excluded from participation in privately conducted union affiliation elections without violating the due-process requirements applicable to such elections. He further contended that in no other case, before this one, had the Board upheld a union affiliation election where a majority of unit employees have been precluded from joining the union prior to the election and then excluded from voting due to their nonmembership status.

Member Penello, dissenting in part, adhering to his concurrence in *Jasper Seating Co., supra*, and the principles set forth in *American Bridge Div., U.S. Steel Corp.* v. *N.L.R.B.*[102] He noted that, where an affiliation election did not result in a change in the identity of the employees' bargaining representative, he would sanction the results of a privately conducted affiliation election only if all unit employees were given the chance to participate in the election regardless of union membership. In this case, because it was abundantly clear that only union members were entitled to vote in the affiliation election, Member Penello found that the affiliation vote conducted herein was invalid and that the 8(a)(5) allegation should be dismissed. In disagreeing with the

[101] 243 NLRB No. 61 (Chairman Fanning and Members Murphy and Truesdale, Members Jenkins and Penello separately dissenting in part).

[102] 457 F.2d 660 (3d Cir. 1972).

majority, he also stressed that, as a direct result of the members-only requirement as to the affiliation vote, less than a majority of employees were able to vote in the election and express an opinion.

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 *Kaiser Steel,*[103] the Board majority held that the union did not breach its duty of fair representation and, therefore, did not violate section 8(b)(1)(A) by limiting the distribution of proceeds, arising out of a settlement of grievances for "all monies lost" filed on behalf of all unit employees, to those employees remaining in the unit as of the date of the settlement which was reached 3 years after the grievances were filed. The administrative law judge found that the union had acted arbitrarily by excluding a number of employees who, prior to the date of settlement, had retired, accepted supervisory positions, quit, been transferred out of the unit, or been discharged. Contrary to the administrative law judge, the majority concluded that the union's decision to limit the division of the settlement proceeds to those employees in the unit as of the time of settlement was neither arbitrary nor unreasonable, but rather constituted one of many reasonable, practical administrative determinations, particularly

[103] *United Steel Workers of America, Local 2869 (Kaiser Steel Corp.),* 239 NLRB No 125 (Chairman Fanning and Members Murphy and Truesdale, Members Jenkins and Penello dissenting).

in view of the many problems of computation which precluded a precise determination of the individual losses sustained by the unit employees.

Dissenting Members Jenkins and Penello considered a union's duty of fair representation to extend to all matters occurring while it represented employees, rather than ending as to unresolved matters at the time employees leave a unit. Here, the dissenters observed, the settlement money represented wages lost by the employees wrongfully denied work, and part of it was attributable to wages lost by the excluded employees and was designed to reimburse them. In their view, as the excluded employees were, and are, part of the unit for determining the amount of the settlement, such employees must be similarly treated in the distribution of the moneys collected on the basis of their work as members of the unit. Accordingly, the dissent concluded that the exclusion from the benefits of the settlement of employees who had left the unit involves discrimination based on arbitrary criteria which encourages union membership and thereby restrains and coerces those employees in the exercise of their section 7 rights in violation of section 8(b)(1)(A).

In *U.S. Postal Service*,[104] a Board panel majority affirmed an administrative law judge's finding that the respondent union, American Postal Workers Union, breached its duty of fair representation in violation of section 8(b)(1)(A), by revoking, without valid reason, its assent to an employee reassignment. The employee had obtained from a union official written approval for a 60-day deferral of a new assignment outside his regularly scheduled shifts, after submitting a request therefor on a form which was generally considered sufficient to exonerate the employer from making overtime payments. Subsequently, the employee's temporary assignment was prematurely terminated after another union official advised the employer that the latter would be liable for overtime payments if the employee continued to work in the temporary assignment. The panel majority found that the sole reason for revocation of the employer's earlier assent was the desire, on the part of the second union official, to enforce his personal policy of limiting temporary assignments to 30 days —a policy which had not been adopted by the employer. They stated that although the second union official's views may have been grounded in legitimate union concerns, that fact did not make it any less a personal view nor did it render the imposition of his view any less subjective and arbitrary. Accordingly, the

[104] 240 NLRB No 178 (Members Jenkins and Murphy; Member Truesdale dissenting).

majority found that the employer's action in revoking its prior assent was arbitrary and capricious and, therefore, a breach of its duty of fair representation as established by the Board in *Miranda.*[105]

Member Truesdale, dissenting, would not find that the employer breached its duty of fair representation by withdrawing its prior assent to the employee's temporary assignment outside her regularly scheduled shift. Conceding that the action taken by the second union official, in single-minded pursuit of what he thought was good union policy, resulted in a detriment to the employee involved, Member Truesdale would, nevertheless, find such action did not amount to a breach of the employer's duty of fair representation. In this respect, he stated that "it is not the function of this Agency to remedy mere mistakenness, insensitivity, or even ineptness of union officials where these qualities do not arise for invidious reasons and are not grounded in bad faith."

In *Forsyth Hardwood Co.,*[106] a Board panel, reversing the administrative law judge, found that the respondent union, Teamsters Local 291, did not breach its duty of fair representation in violation of section 8(b)(1)(A) by refusing to process an employee's grievance over his discharge, even though it did find that the union violated section 8(b)(2) by requesting the employee's discharge for dues delinquency, absent an affirmative showing that the union appropriately advised the employee that nonpayment of dues was grounds for the requested discharge. They noted that the union's handling of the proposed grievance was not arbitrary or perfunctory since the facts were already well known to the union representative who, having concluded that under the terms of the collective-bargaining agreement the employee's grievance was without merit, refused to proceed with it. They also observed that there was no evidence of hostility or disparate treatment. Under the circumstances, the panel found no violation of section 8(b)(1)(A).

In reaching this result, however, Member Truesdale relied on the absence of any evidence that the conduct complained of constituted arbitrary action so grounded in bad faith as to constitute a breach of the union's duty of fair representation as set forth in his earlier positions.[107]

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[105] *Miranda Fuel Co*, 140 NLRB 181 (1962).

[106] 243 NLRB No. 150 (Chairman Fanning and Members Penello and Truesdale).

[107] *ITT Arctic Services*, 238 NLRB No. 14, fn. 1 (1978), and *Newport News Shipbldg & Dry Dock Co.*, 236 NLRB 1470, fn 9 (1978).

2. Enforcement of Internal Union Rules

During the fiscal year, the Board had occasion to consider the applicability of section 8(b)(1)(A) as a limitation on union actions and the types of those actions protected by the proviso to that section.

In *Pittsburgh Press Co.*,[108] an employee was fined by the union for violating a union bylaw relating to absenteeism on the job. The respondent union, International Printing & Graphics Communications Union, insisted that he pay the fine, as well as back dues, or he would be removed from a work list furnished to the employer by the union to implement the manning provision of the union-security contract. When the employee refused to pay, the union took the employee's name off the work schedule, leading to his discharge by the employer. A panel majority, observing that this was "a plainly illegal attempt to enforce an internal union regulation by adversely affecting [the employee's] employment status," adopted the administrative law judge's findings that the union violated section 8(b)(1)(A) and (2) as it was entitled only to request the employer to discharge the employee for nonpayment of dues and was not entitled to take action against him other than formally demanding his discharge.

Member Jenkins, dissenting, found that a unique situation existed here. The employer had given the union the responsibility of furnishing the work list—an arrangement not alleged as unlawful—and had ceded to the union the right to control the employment of the unit employees. In these circumstances, since removal from the work list was tantamount to discharge, and since there was nothing illegal in the union's removal of the employee's name from the list because of his failure to pay dues, he found that it was incongruous to require the union to request the employer to discharge the employee. Member Jenkins further noted that because of its responsibility for providing employees and for determining who should be scheduled for work, the union had the right to protect its legitimate interest in seeing that employees scheduled to work did so, for any absenteeism necessitated the payment of overtime. In his opinion, since the fine imposed was a means of discipline, and was clearly proper and reasonable, the union's action in denying the employee work until he paid his absenteeism fine was simply another reasonable and nonprohibited step to correct the employee's absenteeism.

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[108] 241 NLRB No. 99 (Members Penello and Murphy; Member Jenkins dissenting).

In the earlier *Cannery* [109] the Board found that a union violated section 8(b)(1)(A) by charging, trying, and fining a member for giving adverse testimony against another member in an arbitration hearing, in violation of the union's constitution. In so doing, the Board considered the interplay of the proviso to section 8(b)(1)(A) on the one hand, and the Federal labor policy on the other, and concluded that a union's actions must give way to an overriding national labor policy favoring grievance arbitration, for if the parties were permitted to take reprisal action against witnesses in arbitration proceedings, the integrity of the arbitration process would be destroyed and the arbitration clause subverted.

During this fiscal year, the Board had occasion to consider whether the rationale of *Cannery,* which involved a witness' testimony before an arbitrator, adverse to a fellow member, should be extended to a case involving an adverse statement given during the course of a grievance proceeding. In *Transport of N.J.*,[110] the union disciplined one of its members for violating one of its internal rules against injuring the reputation or employment of a fellow member, by giving, during the initial stages of a grievance proceeding, a statement which was later used against the grievant, another union member. The Board panel decided in the affirmative, adopting the administrative law judge's holding that "[e]ach step of the grievance procedure, including arbitration, represents an important part of the same continuous process" and concluding that the union's rule, even assuming that it represented a legitimate union interest in promoting harmony within the ranks,[111] must be subordinated to paramount Federal policy favoring the girevance-arbitration process. Accordingly, the union was found to have violated section 8(b)(1)(A).

Consistent with the proviso to section 8(b)(1)(A), the Board has found not unlawful certain conduct which may arguably restrain or *coerce* employees in the exercise of their section 7 rights, but which fosters legitimate union concerns in the application of rules falling within the proviso. In *Iowa Beef Processors*,[112] a Board panel had to determine the legitimacy of the union's action, under its rules, in threatening to stop, and subsequently stopping, payment of strike benefits to a striking employee-member, if her

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[109] *Cannery Warehousemen, Local 788 (Marston Ball)*, 190 NLRB 24 (1971).

[110] *Amalgamated Transit Union, Div. 825 (Transport of N J)*, 240 NLRB No. 166 (Chairman Fanning and Members Penello and Truesdale).

[111] See, e g , *Local 5795, Communication Workers of America (Western Electric Co)*, 192 NLRB 556 (1971)

[112] *United Food & Commercial Wkrs , Local 222 (Iowa Beef Processors)*, 245 NLRB No. 133 (Members Penello, Murphy, and Truesdale)

nonmember husband continued to cross the union's picket line established at another employer. In making its determination whether the union's action restrained and coerced the nonmember husband in his section 7 right to refrain from striking his employer, the panel had to balance the legitimacy of the union interest at stake; namely, seeing that strike benefits inure to the benefit of those striking employees and their families who are not receiving wages from a collateral source—especially where that income is derived from continued employment with the struck employer—with any coercive impact the union's rule might have had on the nonmember husband. They concluded that any detriment the nonmember may have suffered was secondary and merely incidental to the valid enforcement of a union rule applicable to the employee-member wife. As the rule itself did not contravene any Federal labor policy, the panel found that the union's enforcement thereof did not violate section 8(b)(1)(A) by the conduct here in question.[113]

3. Other Forms of Interference

The Board has long held that discipline imposed by a union against its members for filing or encouraging others to file charges with the Board, refusing to cross an unlawful picket line, or to compel members to participate in conduct violative of the Act or to act in derogation of a collective-bargaining agreement, contravenes national labor policy and for that reason falls outside the immunity afforded by the proviso to section 8(b)(1)(A). During this past year, the Board has had occasion to consider whether a union taking disciplinary action against members, who work during a strike, acts unlawfully if the discipline is contrary to mutually agreed-upon amnesty provisions negotiated in the course of labor disputes.

In *San Jose Hospital,*[114] the union fined and expelled from membership the charging party who refused to answer questions concerning his union conduct during a strike against his employer, although the parties had agreed that no employees would be displaced by either the union or the employer for any action connected with the strike. The charging party had started work the

[113] The panel also found that the union did not breach its duty to fairly represent the employee-member herein as such action did not adversely impact on matters affecting her employment.

[114] *Stationary Engineers, Local 39, Operating Engineers (San Jose Hospital & Health Center),* 240 NLRB No 131 (Chairman Fanning and Members Jenkins, Penello, Murphy, and Truesdale).

day before the amnesty agreement, included in the collective-bargaining agreement, was signed. Noting that the amnesty agreement was a product of the parties' negotiations and that the discipline imposed by the union was in derogation of that agreement, the Board held that the union had acted in contravention of the basic policy of the Act of encouraging the practice and procedure of collective bargaining. It also held that the union's conduct, in derogation of the strike amnesty agreement ran counter to the overriding national policy of favoring the peaceful resolution of labor disputes. Thus, the Board concluded that, notwithstanding the union's assertion that its conduct served its legitimate interest in maintaining union solidarity durng a lawful strike, such interest must give way to the national policy. Accordingly, the Board held that the conduct in question was not protected by the the proviso to section 8(b)(1)(A).[115]

In *Food Employers Council*,[116] a companion case, the Board likewise held that a "two-way" amnesty agreement was binding on the union which had formally sanctioned an economic strike against the same employer by another union and had honored the latter's picket line, even though the union was not a signatory to the agreement that settled the strike. Although the union was obviously not bound by the agreement negotiated by the employer and the other union during strike settlement negotiations, the Board concluded that, as amnesty was an integral part of settlement which permitted over 500 union members to return to work, the union was nevertheless bound by the amnesty provisions of the settlement agreement as a separate or ancillary agreement reached as a result of collective bargaining. The Board based this conclusion upon the following factors: (1) the conduct of the union's representatives at the strike settlement negotiations; (2) the intent of the provision; (3) the union's interest therein; and (4) the employer's compliance with the union's benefit from the aforesaid provisions. Accordingly, the Board citing *San Jose Hospital, supra,* decided that the disciplining of several members of the union for crossing the aforesaid picket line was not protected by the proviso to section 8(b)(1)(A) and, therefore, that the union violated that section by doing so.

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[115] In these circumstances the Board found it unnecessary to pass on the contention that the conduct here in question violated sec. 8(b)(1)(A) as breach of the duty of fair representation.

[116] *Retail Clerks Union Local 1364 (Food Employers Council)*, 240 NLRB No. 132 (Chairman Fanning and Members Jenkins, Penello, Murphy, and Truesdale).

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.

During this report year, the Board considered whether a union violates section 8(b)(1)(B) by disciplining a supervisor-member for performing rank-and-file bargaining unit work during a lawful strike. It has been held that a union does engage in violative conduct if it disciplines a supervisor member for crossing a picket line in order to perform only regular supervisory duties, including the adjustment of grievances. In the *Wash. Post* case,[117] the full Board was confronted with a factual situation falling between these two principles set forth above. In that case, a union disciplined by fining supervisor-members who crossed a picket line to perform both regular supervisory duties as well as a more than minimal amount of rank-and-file work. Members Penello and Truesdale of the Board majority, applying the more than minimal standard, held that discipline in such circumstances would not violate section 8(b)(1)(B), whether or not the rank-and-file work thus performed was in the same or in a different proportion than that performed before the employer-union dispute. In determining that the amount of rank-and-file work herein was more than minimal, they included certain time spent in training employees to operate new equipment, because it included the performance of work which, but for the strike, would have been performed by journeymen and because it was incorporated into a final work product.

Chairman Fanning, concurring with his colleagues in the majority that there was no 8(b)(1)(B) violation, differed with their rationale in the following respect: he would find that the performance of *any* rank-and-file work by the supervisor-member placed subsequent union discipline of the supervisor-member outside the ambit of section 8(b)(1)(B) of the Act.

Member Jenkins, concurring in part and dissenting in part, disagreed with the majority insofar as he would find irrelevant the mere fact that supervisor-members performed more than a minimal amount of rank-and-file work, unless the return to work during a strike involved an increase in their normal share of such

[117] *Columbia Typographical Union No. 101 (Wash Post)*, 242 NLRB No. 135 (Members Penello and Truesdale, Chairman Fanning concurring, Member Jenkins concurring in part and dissenting in part, and Member Murphy concurring in part and dissenting in part).

work. Accordingly, he would have found the union violated section 8(b)(1)(B) of the Act by fining the supervisor-members for crossing the picket line to perform the same duties which they had performed before the strike.

Member Murphy, concurring and dissenting in part, agreed with Member Jenkins and would likewise find no violation unless rank-and-file work performed by supervisor-members increased during a strike. Further, in determining what was rank-and-file work, she would exclude the training of rank-and-file employees to update some new equipment, finding that such training clearly did not have the immediate object of producing a work product, but rather was undertaken to prepare employees to engage in effective production. In this sense, Member Murphy saw training as a supervisory function. Further, the fact that management may at certain times delegate this function to rank-and-file employees did not, in her view, change its essential character or require a finding that, once so delegated, training must remain classified as rank-and-file work even when done by supervisors.

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) of the Act 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.*[118]

[118] 219 NLRB 656 (1975), enfd *sub nom. N L R B* v *Milk Drivers & Dairy Employees, Local 338*, 531 F 2d 1162 (2d Cir. 1976). 41 NLRB Ann Rep 86–88 (1976).

In *A.P.A. Transport Corp.*,[119] the Board considered a contractual provision which required that union stewards be granted superseniority "for all purposes including layoff, rehire, bidding, and job preference." The Board majority—rejecting the employer's and union's contrary contention—held that mere maintenance of a contract clause discriminatory on its face, without evidence of discriminatory enforcement or implementation, was sufficient to justify finding violations of section 8(b)(1)(A) and (2) of the Act. Following the finding in *Dairylea* that a superseniority clause not limited on its face to layoff and recall was presumptively unlawful, the majority concluded that the clause in dispute was presumptively illegal and discriminatory.[120] They then pointed out that where the presumption was applicable, as it was here, the party asserting the legality of the provision then had the burden of rebutting the adverse presumption by establishing that the clause served a legitimate statutory purpose and benefited all of the unit employees and did not merely serve the impermissible aim of giving union stewards special economic or other on-the-job benefits solely because of their union position. As the union offered only conclusionary allegations with respect to the legality of the clause and failed to set forth specific facts to establish justification therefor, the Board majority concluded that the presumption as to the clause's illegality stood unrebutted. However, with respect to the "bidding" provision of the superseniority clause, the majority found that the employer and union had met its *dairylea* burden since the regional director's dismissal letter refusing to issue a complaint with respect to the application of the "bidding" provision, contained factual evidence justifying the provision.

Chairman Fanning and Member Truesdale, dissenting, adhered to the views expressed by then Member Fanning in his *Dairylea* dissent. Further, Chairman Fanning stated that, even if he agreed with the Board majority that superseniority for purposes beyond layoff and recall was presumptively unlawful, he would still find no violation of the Act in this case as the clause, not limited to layoff and recall, had been found by the majority to have been

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[119] 239 NLRB No. 165 (Members Jenkins, Penello, and Murphy; Chairman Fanning and Member Truesdale dissenting).

[120] The members of the Board majority were in agreement that the grant here of superseniority "for all purposes" was presumptively unlawful. However, they differed in their views with respect to the parameters of lawful superseniority provisions. Members Jenkins and Penello would find such clauses presumptively lawful only with regard to layoff and recall, while Member Murphy would find presumptively lawful contract provisions extending to union stewards and officers, whose functions relate in general to furthering the bargaining relationship, superseniority for purposes of "layoff, recall, shift assignment, or retention of the same job or category of job during incumbency in such position."

lawfully exercised and, therefore, the presumption of illegality was no longer applicable.

Member Truesdale, asserting that superseniority provisions serve both the employer's vital interest in efficient contract administration and the union's interest in complying with its legal duty of fair representation which extends to all employees—union members and nonmembers alike—would accord presumptive lawfulness to all negotiated superseniority provisions like those here which fall within a "range of reason and good faith."

In *American Can Co.*,[121] the Board considered the scope of persons who may be lawfully accorded superseniority. In *Dairylea*, the Board majority held that superseniority clauses which operate to keep a union steward on the job are presumptively lawful because the steward's functions benefit all unit employees. In subsequent cases,[122] the Board majority held that union officers may also lawfully be given superseniority because of their important role in contract administration and effective employee representation. In the instant case, two particular union officers—a "trustee" who was responsible for the union's hall and property; and a "guard" who had duties similar to that of a "sergeant-at-arms," exercised rights under a contractual provision which extended superseniority rights to union officers. The Board's aggregate majority for differing reasons, found that the respondent union, Steelworkers, violated section 8(b)(1)(A) and (2) of the Act in its application of the superseniority provision to these two officers. Members Jenkins and Penello would find the superseniority provision unlawful both on its face and in its application as they would not permit union officers to benefit from superseniority except when they also serve as stewards or otherwise engage in contract administration at the place and during the hours of their employment. Member Murphy would find presumptively lawful provisions granting job retention superseniority for both union stewards and officers whose functions relate in general to furthering the bargaining relationship, with the General Counsel having the burden of proving affirmatively that the application of superseniority to particular union officers is invalid. Here, she concluded, the General Counsel established that the duties of the two union officers did not relate to "the general furthering of the bargaining relationship" and were, thereafter, too remote to

[121] 244 NLRB No. 78 (Members Jenkins, Penello, and Murphy; Chairman Fanning and Member Truesdale dissenting).

[122] *United Electrical, Radio & Machine Wkrs., Local 623 (Limpco Mfg.)*, 230 NLRB 406 (1977), enfd. *sub nom. Anna M D'Amico v N L R.B*, 582 F.2d 820 (3d Cir. 1978), *Otis Elevator Co*, 231 NLRB 1128 (1977).

justify superseniority. This shifted to the union the burden of coming forward with evidence that these officers, in fact, performed functions relating to such purpose. Because the union failed to establish such facts, Member Murphy joined Members Jenkins and Penello in finding that the application of the superseniority clause here to the "trustee" and "guard" was violative of the Act.

Chairman Fanning and Member Truesdale, dissenting, would have dismissed the complaint because they disagreed with the restrictions which *Dairylea* placed on superseniority. In their view, superseniority for union stewards and officers did not interfere with, restrain, or coerce employees, but, rather, served to benefit them and did not have any significant impact upon whether or not an employee chose to support a union.

In *Paintsmiths* [123] and *Scott & Duncan,*[124] the Board considered the impact of section 8(b)(1)(A) and (2) upon the enforcement of contractual steward preference clauses under which the respondent unions, Painters and Carpenters, in a hiring hall context, secured the right to designate and dispatch particular persons to serve as job stewards, even though such actions may result in the nonemployment or discharge of other employees. In the majority's views, such enforcement was lawful because it was taken for the purpose of promoting the union's legitimate objective, under the collective-bargaining relationship, of attempting to insure that their contracts would be policed by members more independent of the employers and more disposed to enforce trade rules than would be the case with persons designated from an employer's employee complement. In so finding, the majority adverted to the rationale in *Dairylea* where superseniority clauses which provided for top security to union stewards—limited to layoff and recall rights—served a legitimate statutory purpose.[125] Accordingly, the majority found no violation of the Act. Similarly, in *Ocean Technology,*[126] a panel majority, relying on the decision in *Paintsmith,* found the respondent union, Teamsters Local 959, had not violated section 8(b)(1)(A) and (2) of the Act in its attempt to enforce a steward preference clause which did nothing

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[123] *Dist. Council 2, Painters (Paintsmiths),* 239 NLRB No. 192 (Chairman Fanning and Members Jenkins and Truesdale; Member Penello dissenting).

[124] *United Brothd. of Carpenters & Joiners, Local 49 (Scott & Duncan),* 239 NLRB No. 191 (Chairman Fanning and Members Jenkins and Truesdale, Member Penello dissenting).

[125] In so finding, the Board majority overruled *Local Union 798 of Nassau County, N Y (Nassau Div. of the Master Painters Assn.),* 212 NLRB 615 (1974), insofar as it stood for the proposition that such an objective was presumed to be illegitimate absent a showing of a desire to place a particularly knowledgeable steward on a particularly troublesome jobsite.

[126] *Teamsters Local 959, State of Alaska (Ocean Technology),* 239 NLRB No 193 (Chairman Fanning and Member Jenkins, Member Penello dissenting).

more than grant a union discretion to send a steward to a job in place of another employee who would otherwise have been entitled to the referral. The majority concluded that no presumption of illegality attached and such provisions were valid on their face since, by assuring the presence of a qualified steward on the job, they served the same basic objective as the grants of layoff and recall superseniority which were found to be valid in *Dairylea*. Therefore, the majority held that enforcement of such a clause was lawful, absent a showing, not made here, that the union's actions belied any motivation to assure effective contract administration.

Member Penello, dissenting in each of the above three cases, would find steward preference clauses to be presumptively unlawful as, in his view, they grant a degree of superseniority which is beyond that necessary to encourage the continued presence of a steward on the job. Accordingly, he would find the implementation of preference clauses to be lawful only in those cases where the union has rebutted the adverse presumption by making an affirmative showing that its application of the steward preference clause is necessary to the effective performance of its representative functions. In Member Penello's view, the union in each of the three cases had failed to make such a showing.

2. Hiring Hall Referral Preferences

During the past fiscal year, the Board had occasion to consider several cases which raised issues pertaining to the permissible scope of contract clauses which grant job-referral preference based on an employee's having previously worked for employers signatory to specified collective-bargaining agreements.

In *Constr. Bldg. Materials & Miscellaneous Drivers, Local 83*,[127] the Board considered, under section 8(f) of the Act, the validity of contractual hiring hall provisions in the building and construction industry which granted job-referral priorities to qualified employees for work covered by other agreements, which were executed by the unions and other employers in the unions' area of geographic jurisdiction and which contained the same or similar hiring hall procedures. Following the rationale of *Interstate Electric Co.*,[128] *Mackey Plumbing Co.*,[129] and *Bechtel Power*

[127] *Constr, Bldg Materials & Miscellaneous Drivers, Local No 83 (Various Employers in the Bldg. & Constr Industry)*, 243 NLRB No. 26 (Chairman Fanning and Members Penello, Murphy, and Truesdale, Member Jenkins dissenting)

[128] 227 NLRB 1996 (1977) 42 NLRB Ann Rep. 120–121 (1977).

[129] *Local Union 469, Plumbers (Mackey Plumbing Co.)*, 228 NLRB 298 (1977).

Corp.,[130] the Board majority found such provisions to be lawful, holding that it was consistent with the purposes of section 8(f)(4)—in permitting priority based "upon length of service with such employer"—to construe that section as permitting priority in referral to be based on length of service with an employer signatory to an agreement containing the hiring hall procedure of the agreement pursuant to which the referrals are made. Accordingly, no violation of section 8(b)(1)(A) and (2) was found.

Member Jenkins, dissenting, would have found such hiring hall preference to be unlawful for the reasons expressed in his dissent in *Interstate Electric Co., supra,* where he concluded that granting priorities based not "upon length of service with such employer," but on service under agreements between the parties to the referral procedure, granted preference to employees and applicants because of their prior representation by the union and, therefore, was not sanctioned by section 8(f).

In *American Barge Lines,*[131] a Board panel considered the allegation that the union's exclusive hiring hall arrangement—in the context of collective-bargaining agreements containing 30-day union-security clauses—unlawfully encouraged union membership in violation of section 8(b)(1)(A) and (2) of the Act by granting employees job-referral seniority on the basis of accumulating a minimum of 90 days' work experience per year in the employ of signatory employers only. Contrary to the administrative law judge, the panel found that a *prima facie* case of discrimination in hiring referrals was established by the General Counsel's evidence that the union's implementation of its hiring hall referral system in strict adherence to the contractually specified seniority preferences and in tandem with the agreements' union-security requirements, unlawfully favored jobseekers who were union members over nonmembers and also required the signatory employers to discriminate with respect to hiring. The panel also noted that the union, in this connection, actively suggested to employees seeking higher seniority status that they should apply for union membership. Further, the panel held that—the *prima facie* case having been established—specific examples of discrimination were not required for the finding of a violation, and that, as the burden of negating the *prima facie* case fell on the union as sole custodian of the hiring hall records,

[130] 229 NLRB 613 (1977).

[131] *Seafarers' Intl. Union (American Barge Lines),* 244 NLRB No 99 (Chairman Fanning and Members Jenkins and Penello).

its failure to negate the *prima facie* case here created an adverse inference that any evidence adduced would not be favorable to its case. Accordingly, the panel concluded that the union's hiring hall procedures did, in fact, cause employers to discriminate unlawfully with respect to hires and to illegally prefer union members over nonmembers in violation of the Act.

3. Enforcement of Dues-Checkoff Authorizations

During the report year, the Board decided several cases dealing with the legality of union actions taken with respect to the enforcement of contractual dues-checkoff provisions.

In *Frito-Lay*,[132] a Board panel considered the allegation that the respondent union, Amalgamated Meatcutters & Butcher Workmen, violated section 8(b)(1)(A) and (2) of the Act, by insisting that an employer continue to deduct union dues from the pay of employees who resigned from the union and who attempted to revoke their checkoff authorizations during the hiatus period between the expiration of one collective-bargaining agreement and the execution of another. The affected employees had not complied with the applicable contract provision—under which checkoff authorizations could be revoked only during the 10-to-20 day period immediately preceding either the termination of the contract or the anniversary date of the authorization. The panel majority dismissed the complaint, holding that the union was justified in considering the employees' authorizations to have remained valid, despite the attempted revocations, because those employees had voluntarily executed authorizations which expressly contemplated the possibility of periods when no contract would be in effect and provided for specific escape periods within which to effectuate revocations. The employees having failed to comply therewith, the authorizations were deemed to have remained in effect and, accordingly, the union's refusal to honor the revocations was not unlawful. In so finding, the panel majority rejected the contention that section 302(c)(4) of the Act rendered such authorizations revocable at will when the collective-bargaining agreement expired, holding that the checkoff limitations in section 302 were not intended to create a new unfair labor practice. Moreover, even assuming *arguendo* that section 302(c)(4) was relevant to the issues herein, the majority could not find support for their dissenting colleague's position that the

[132] 243 NLRB No. 16 (Chairman Fanning and Member Jenkins; Member Murphy dissenting).

section rendered checkoff authorizations in this case revocable at will, in the absence of a current collective-bargaining contract.

Member Murphy, dissenting, would find the union's conduct unlawful as, in her view, section 302(c)(4) provides on its face and clearly mandates that dues-checkoff authorizations are revocable by employees after the contract has terminated. As the affected employees executed their revocations at such time, the failure to honor them unlawfully compelled the employees to submit to a checkoff they no longer authorized. Member Murphy would find that, in failing to honor the revocations, the union violated section 8(b)(1)(A) and (2) of the Act.[133] Contrary to her colleagues' argument, she pointed out that he was not contending that section 302 of the Act created a new unfair labor practice, but only that the plain reading of section 302(c)(4) and of prior cases of the Board supports the conclusion that such authorizations are legally terminable at will in the absence of a collective-bargaining agreement and here they were effectively terminated and thus the continued checkoff was unlawful.

In *Campbell Industries*,[134] a Board panel majority found that the union violated section 8(b)(1)(A) of the Act when, during the period between collective bargaining agreements, it caused dues to be withheld from the wages of employees who had effectively resigned from the union, but, who had not canceled their outstanding checkoff authorizations. In so finding, the panel majority held that in light of the language of the authorizations—"in consideration of the benefits received and to be received by me as a result of my membership in the Union"—effective resignation from the union also revoked the checkoff authorization by operation of law.

Member Murphy, dissenting, found that the checkoff authorizations remained in full force at all material times and, therefore, the union's attempt to enforce such dues assignment was not unlawful. In her view, membership resignations do not automatically cancel related checkoff authorizations and the particular language of the authorizations here, on which the panel majority relied, added nothing to the legal significance of the authorization forms and was merely an introductory phrase having no implications with respect to the continued efficacy, or to the need for cancellation, of the authorizations. Accordingly, Member Mur-

[133] Member Murphy stated that the majority's position in *Frito-Lay* seemed to her to be on essential points directly in conflict with the majority's decision in *Campbell Industries, infra*

[134] *San Diego County Dist Council of Carpenters (Campbell Industries)*, 243 NLRB No. 17 (Chairman Fanning and Member Jenkins, Member Murphy dissenting).

phy would not find that the union's attempt to force compliance with the disputed authorizations violated section 8(b)(1)(A).

In *AMCAR Div., ACF Industries,*[135] a Board panel affirmed an administrative law judge's finding that the respondent union, Brotherhood of Railway Carmen, violated section 8(b)(1)(A) of the Act when it required an employer to deduct special assessments from the wages due employees who had executed authorization cards which clearly provided only for the checkoff of an "initial fee and monthly dues lawfully levied by (the) Union"—thereby indicating that the cards were not intended to embrace the checkoff of assessments. Although the collective-bargaining agreement provided for the deduction of assessments, the administrative law judge noted that, as employees could not be compelled to use a checkoff to pay dues under a valid union-security contract, *a fortiori* they cannot be compelled to do so for union assessments, the nonpayment of which cannot affect their jobs. Absent checkoff authorization for assessments, the administrative law judge found that the union's conduct requiring such deductions by the employer violated section 8(b)(1)(A).

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.

In *Hour Publishing,*[136] a Board panel, adopting an administrative law judge's decision, found that the union violated section 8(b)(3) by amending its bylaws to provide for the concellation of overtime, thus unilaterally changing the terms and conditions of employment set forth in its current collective-bargaining agreement with the employer. That agreement provided that: "The Employer will have the right to require that employees work such reasonable amounts of overtime as may be necessary to meet production requirements."

The administrative law judge found that the union unilaterally brought about changes in the contractual overtime provision which affected the work schedule, the persons to be employed,

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[135] 245 NLRB No 53 (Chairman Fanning and Members Penello and Truesdale).

[136] *Norwalk Typographical Union No 529 (Hour Publishing Co.)*, 241 NLRB No. 41 (Members Penello, Murphy, and Truesdale)

and the earnings of unit members and supervision, none of which had been accepted by the employer, and that by this action during the term of the current agreement the union sought to secure, without bargaining, what it had not sought to do during the most recent contract negotiations. Therefore, the administrative law judge held that the union's unilateral implementation of its overtime cancellation rule constituted a change in terms and conditions of employment sufficient to require the employer's agreement as a prerequisite to its continued imposition, thereby violating section 8(b)(3) of the Act.[137]

In *Active Enterprises*,[138] a panel majority, reversing an administrative law judge, found that the union violated section 8(b)(3) by demanding the merger of two historically separate bargaining units over the objections of the employers. In this case, the employers were parties to an "inside contract" between an employer-association and the union, covering employees performing both commercial and residential electrical work. Thereafter, the association and the union executed a separate contract covering only employees performing residential electrical work. The panel majority found that the parties thereby "voluntarily and mutually" created two distinct appropriate units of commercial and residential electricians. After the employers notified the union, in timely fashion, that they were terminating the residential agreement upon its expiration, the union demanded that the employers abide by the terms of the "inside agreement," which had not expired, and refused to bargain individually for a new residential agreement, but agreed to negotiate a successor "inside agreement" with each of them. In the meantime, the union filed charges under the grievance and arbitration machinery of the "inside agreement," alleging that the employers had failed to pay the wage rates and fringe benefits as required by the aforesaid agreement.

The panel majority held that in these circumstances the union could not lawfully insist that the residential and commercial units be combined under the terms and conditions of the "inside agreement," without the consent of the employers. Reiterating the

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[137] In the absence of exceptions, Member Penello adopted, *pro forma*, the administrative law judge's decision declining to defer the controversy herein to the parties' grievance and arbitration procedure. See the dissenting opinion in *General American Transportation Corp.*, 228 NLRB 808 (1977).

[138] *Local Union 823, IBEW (Active Enterprises)*, 242 NLRB No 41 (Members Jenkins and Penello; Chairman Fanning dissenting in part).

holding in *Phelps Dodge Corp.*,[139] the panel majority observed that:

> [T]he integrity of a *bargaining unit, whether established* by certification or *by voluntary agreement of the parties,* cannot . . . be unilaterally attacked. The conduct of negotiations on a basis broader than the established bargaining unit is nonmandatory, and the Respondents' insistence that the Charging Party engage in such bargaining was violative of the Act. [Emphasis supplied.]

Accordingly, the panel majority held that the union violated section 8(b)(3) by demanding, not merely that negotiations be conducted on a broader basis than the established units, but by insisting that the terms and conditions of employment governing employees in one unit immediately be applied to electricians working in the other unit, and, further, by invoking the grievance and arbitration machinery of its inside agreement to achieve that end.[140]

Chairman Fanning, dissenting with respect to the finding of an 8(b)(3) violation, would not find that separate and distinct units for bargaining existed in this case. In his view, there had never been a bargaining unit covering only residential employees, but, rather, from the beginning, a single unit covering any and all employees who performed electrical work. The dissent observed that, because there was one agreement, equally applicable to both commercial and residential work, employers subject thereto considered themselves disadvantaged with respect to securing residential contracts, and appealed to the union for a "break." The "break" they sought was a separate agreement covering residential work, setting forth employment conditions different from those found in the existing "inside agreement" and, therefore, likely to improve the covered employers' chances of bidding successfully. Chairman Fanning pointed out that the "break" thereafter granted by the union did not take the form of individual contracts, but was a multiemployer contract covering only residential work, and, therefore, did not survive beyond its stated term. He saw an obvious distinction between contractual units and bargaining units and, having due regard for the

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[139] *G. B. Curry, President, IUOE, Local 428 (Phelps Dodge Corp.)*, 184 NLRB 976, 977 (1970), enforcement denied on other grounds 459 F.2d 374 (3d Cir. 1972), ptn. for modification of opinion granted 470 F.2d 722 (3d Cir 1972).

[140] The panel majority also observed that the union was, of course, free at any time to disclaim interest in representing the residential employees in this case, although not privileged to insist on their inclusion in another unit.

entire history of the bargaining relationship in this case, he, therefore, saw little justification for concluding that the "break" was mutually intended to create separate bargaining units, (BSM) as opposed to contractual units. Like the administrative law judge, Chairman Fanning would treat the residential contract as no more than a supplement to the broader "inside agreement" and not as establishing a separate unit for bargaining beyond the term of the residential agreement. Accordingly, he would not find the 8(b)(3) violation.

I. Prohibited Strikes and Boycotts

The statutory prohibitions against certain types of strikes and boycotts are contained in section 8(b)(4) of the Act. Clause (i) of that section forbids unions to strike, or to induce or encourage strikes or work stoppages by any 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. Common Situs Picketing

In one case involving picketing at a common situs location, where business was carried on by both the primary employer and neutral employers, a Board panel had the occasion to determine whether a union engaged in permissible conduct by publicizing its labor dispute with the primary on property owned by a neutral. In *Seattle-First Natl. Bank*,[141] the neutral employer owned a 50-story office building, which was occupied by it and other tenants, including the primary employer herein, a restaurant on the 46th floor. In support of its contract demands against the primary employer, the union struck and stationed pickets on the public sidewalks at every entrance to and exit from the building. In addition, it assigned one or two of its members to distribute leaflets in the foyer of the 46th floor which was under the exclusive control of the employer. The employer thereupon informed the leafleteers on the 46th floor that they were trespass-

[141] 243 NLRB No. 145 (Chairman Fanning and Members Jenkins and Murphy).

ing, demanded that they leave the building, and threatened them with arrest if they failed to do so.

Thus, the panel was required to reconcile the section 7 rights of employees engaged in protected activity and the property rights of the neutral employer "with as little destruction of one as is consistent with the maintenance of the other." [142] Applying the balancing test used in *Scott Hudgens*,[143] involving an analogous situation, the panel found that restricting the strike-related activity to the public sidewalks would excessively hinder the union's efforts to communicate a meaningful message to its intended audience and, therefore, its presence in the foyer on the 46th floor of the building was essential to the preservation of employees' statutory rights. Accordingly, finding that the property rights of the neutral must yield to the right of the union to publicize its dispute with the primary, the panel held that the employer violated section 8(a)(1) by threatening to cause the arrest of those engaged in the activity here in question.

During 1978, the Board had found that a picketing union's good-faith but mistaken belief that a primary employer was present at a picketed site was not a defense to an allegation of a violation of section 8(b)(4)(ii)(B).[144] Applying that precedent similarly in *Graybar Electric*,[145] a Board panel, reversing an administrative law judge, held that the union's lack of knowledge that neutral employees were present at the picketed site was not a defense to the allegation that such picketing violated section 8(b)(4)(ii)(B), notwithstanding that lack of knowledge could be attributed to a secretive agreement between the neutral and primary employers providing for the neutral to perform the work the primary employer had contracted to do for the charging party, another neutral employer.

2. Reserved Gate Picketing

Consistent with the Supreme Court's opinions in *General Electric* and *Carrier*,[146] the Board and the courts have held that the picketing of gates at the premises of a struck manufacturer, al-

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[142] *N L R B* v *Babcock & Wilcox Co*, 351 U S. 105, 112 (1956).

[143] 230 NLRB 414 (1977).

[144] *Natl. Assn. of Broadcast Employees & Technicians, Local 31 (CBS)*, 237 NLRB No. 222 (1978).

[145] *General Truck Drivers, Local 85, Teamsters (Graybar Electric Co)*, 243 NLRB No. 94 (Members Penello, Murphy, and Truesdale).

[146] *Local 761, I U.E. (General Electric Co)* v *N.L R B*, 366 U S. 667 (1961); *United Steelworkers (Carrier Corp)* v *N L.R B*, 376 U S 492 (1964).

though reserved for use by employees of neutral employers, was permissible when the employees using them were performing work related to the normal work of the struck manufacturer. However, the Board has not applied this "work-related" test in determining the legality of jobsite picketing at gates reserved for neutral subcontractors when such picketing was in furtherance of a primary dispute with a general contractor in the construction industry. Rather, in *Markwell & Hartz*,[147] a divided Board held that the legality of such picketing must be resolved in light of the *Moore Dry Dock standards*,[148] traditionally applied by the Board in determining whether picketing at a common situs is protected primary activity. In the Board's view, it was precisely the claim, "that the *close* working relations of various building construction contractors on a common situs involved them in a common undertaking which destroyed the neutrality and thus the immunity of secondary employers and employees to appeals," which had been rejected by the Supreme Court in *Denver Bldg. & Constr. Trades Council*,[149] an early case involving construction of the secondary boycott provisions of the statute. In addition, the more recent Supreme Court decisions in *General Electric* and *Carrier* were not viewed by the Board majority as evidencing an intent to effect a reversal or revision of the *Denver Building* rule which has "been long understood by the parties to labor-management relations and by the Congress."

Then Member Fanning and Member Jenkins, dissenting in *Markwell & Hartz, supra,* viewed the Supreme Court decisions in *General Electric* and *Carrier* as establishing rules of general applicability which should be applied in all cases to determine whether the appeals to the secondary employees were permissible primary activity. Thus, they considered those principles equally applicable to the construction industry and, applying them, concluded that the work of the employees of the subcontractors was related to the normal work of the general contractor, so that the *Moore Dry Dock* standards were fully met and the picketing was permissible.

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

[148] *Sailors' Union of the Pacific (Moore Dry Dock Co)*, 92 NLRB 547 (1950). Specifically, the Board held that picketing of premises occupied by neutral employers is lawful if the following conditions are met: (a) the picketing is strictly limited to times when the situs of the dispute is located on the neutral employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the situs; and (d) the picketing discloses clearly that the dispute is with the primary employer

[149] *N L R B* v. *Denver Bldg & Constr. Trades Council* [*Gould & Preisner*], 341 U S. 675 (1951).

During this fiscal year, the Board again had the opportunity in *Malek Constr. Co.*,[150] to consider the foregoing principles in a case where the union, involved in a primary labor dispute with a general contractor who was engaged in the development and retail sale of homes, picketed both gates at the general contractor's jobsite, including one gate reserved for employees of the subcontractors. A Board majority, adhering to the holding in *Markwell & Hartz*, found that the union violated section 8(b)(4)(i) and (ii)(B) by picketing at the gate reserved for the neutral subcontractors.

Chairman Fanning and Member Jenkins, dissenting, adhered to their view that *General Electric* and *Carrier, supra*, required the Board to apply the "related work" tests to "separate gate" picketing on a common construction situs. The dissenters continued to maintain that those tests were intended by the Supreme Court to apply to all industries, including the construction industry, and would enable the Board to distinguish between primary picketing protected by the proviso to section 8(b)(4)(B) and secondary picketing proscribed by that section. Applying the tests to the instant case, Chairman Fanning and Member Jenkins would find that the work of the employees of the independent subcontractors was closely related to the general contractor's "normal operations," and that, therefore, the installation of a separate gate for the employees of the neutral subcontractors could not be used to bar appeals by the union to observe the picket line. In their view, such appeals were primary and protected by the proviso.

Although employers on a common situs may reserve separate gates to insulate neutral employers and their employees and suppliers from disputes not their own, once the neutrality of a gate has been breached, that gate is subject to lawful picketing.[151]

The Board had the occasion to apply the foregoing principles during this fiscal year in *Hoff Electric Co.*[152] A panel majority following *Linbeck, supra*, found that the general contractor at a home construction site breached the neutrality of a reserved gate by using the gate to deliver electrical fixtures for installation by a struck electrical contractor and concluded, therefore, that the union could lawfully picket that gate. The majority observed that

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[150] *Sacramento Area Dist. Council of Carpenters (Malek Constr. Co.)*, 244 NLRB No. 139 (Members Penello, Murphy, and Truesdale, Chairman Fanning and Member Jenkins dissenting).

[151] *Intl Union of Operating Engineers, Local 450 (Linbeck Constr. Corp.)*, 219 NLRB 997 (1975).

[152] *Local 323, IBEW (J. F. Hoff Electric Co.)*, 241 NLRB No. 98 (Members Jenkins and Truesdale; Member Murphy dissenting).

the Fifth Circuit, enforcing the Board's Order in *Linbeck*, stated that "any gate used to deliver materials *essential* to the primary employer's normal operations is subject to lawful picketing." (Emphasis supplied by the majority.)[153]

Member Murphy, dissenting, would not find that the neutrality of the reserved neutral gate was breached in this case. She distinguished this case from *Linbeck* on the basis of what she observed to be sharp, relevant differences between the basic nature and use of the materials delivered through the neutral gates. Specifically, she noted that in *Linbeck* crushed stone was to be used by the struck primary paving subcontractor in its construction and paving work and thus was converted into a final product, so that the delivery of the stone constituted delivery of supplies for use by the primary employer. On the other hand, in the instant case, the "materials" used were electrical fixtures which were purchased, delivered to, received, owned, and stored by the neutral project owner itself, and not by the struck primary electrical subcontractor. In Member Murphy's view, the electrical fixtures, unlike installation materials, were not essential to the primary subcontractor's normal installation operations. The dissent concluded that the delivery of the fixtures to the neutral project owner did not constitute the delivery of supplies to the struck primary subcontractor; the neutrality of the reserve gate was therefore not breached; and the union was thus not privileged to picket at the aforesaid gate.

3. Consumer Boycotts

The second proviso to section 8(b)(4) exempts from the section's prohibitions, under certain specified conditions, truthful publicity, other than picketing, to the extent that a product produced by an employer with whom a labor organization has a primary dispute is distributed by another employer.[154] The intent of this publicity proviso has been held to permit a consumer boycott by publicity other than picketing of a neutral employer's

[153] 550 F 2d 311, 318 (1977).

[154] The second proviso reads:

> That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution . . .

entire business and not merely a boycott of the product involved in the primary dispute.

In determining the scope of protection afforded by this proviso, the Board earlier was faced with the task of statutory construction revolving around the meaning of the words: "products," "produced," and "distributed" as used in the proviso. In *Lohman Sales*,[155] the Board held that a primary employer wholesaler who distributed products to a retail customer "produces" such products within the intendment of the proviso, thus immunizing the handbilling of the neutral retailer by the union in support of its dispute with the wholesaler. Thereafter, in *Middle South Broadcasting*,[156] the Board held that a radio station, with whom a union had a primary dispute, became one of the producers of the products sold by its client, a neutral retail distributor, by adding its labor when it advertised the products of its neutral client. Thus, "do not patronize" appeals urging a consumer boycott of the neutral distributorship were immunized by the proviso.

During this report year, in *Pet*,[157] the Board had the occasion to consider whether the proviso similarly immunized the union's appeal calling for a total consumer boycott of all products sold by the subsidiaries and divisions of Pet, a "large, diversified, billion-dollar conglomerate enterprise with plants and retail stores located throughout the United States." The union had a primary labor dispute with a wholly owned subsidiary manufacturer of Pet.

Noting that diversified corporations, by their very nature, are composed of operations which provide support for and contribute to one another, and that the struck manufacturer was clearly a major part of the Pet enterprise, the Board concluded that, as a result of the diversified corporate relationships, the struck manufacturer was a "producer" of the products of Pet at Pet's other subsidiaries and divisions in the sense that "producer" is used in the proviso. Accordingly, the Board unanimously found that the union's handbilling and other nonpicketing publicity urging a total consumer boycott of said products and services was protected by the second proviso to section 8(b)(4).[158]

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[155] *Intl. Brothd of Teamsters, Local 537 (Lohman Sales Co.)*, 132 NLRB 901 (1961)

[156] *Local 662, Radio & Television Engineers (Middle South Broadcasting)*, 133 NLRB 1698, 1705 (1961).

[157] *United Steelworkers of America (Pet)*, 244 NLRB No. 6 (Chairman Fanning and Members Jenkins, Penello, Murphy, and Truesdale).

[158] In these circumstances, the Board found it unnecessary to determine whether the Union's appeals were in fact directed against "neutrals," as alleged.

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 that (1) there is reasonable cause to believe that the union charged with having violated section 8(b)(4)(D) of the Act 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) a dispute within the meaning of section 10(k) currently exists.

In *Ritchey Trucking*,[159] a Board majority, concluding that the parties had agreed upon a method for the voluntary adjustment of the dispute, quashed a 10(k) notice of hearing. In this case, all parties to the dispute were contractually bound to the grievance and arbitration provisions of a collective-bargaining agreement between an international union and a multiemployer association.

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[159] *United Mine Wkrs. Local 1269 (Ritchey Trucking)*, 241 NLRB No. 16 (Chairman Fanning and Members Penello, Murphy, and Truesdale, Member Jenkins dissenting).

The parties were two competing locals, affiliates of the same international; the association member-mine operator, who reassigned the work in question to its employees pursuant to a bilateral arbitration award; and the charging party-subcontractors, whose employees originally performed the disputed work. In finding an agreed-upon method in the parties' contractual arrangement, the Board majority found it immaterial that neither the local which represented employees of the subcontractors nor the subcontractors were invited to participate, either as parties or as witnesses, in the two-party arbitration proceeding. The majority observed that all parties signatory to the agreement had seen fit to agree to a system of arbitration whereby only two parties may represent a grievance in one proceeding, but all were nonetheless affected by any decision rendered. Further, the majority held that the *Spielberg* [160] deferral criteria were inapplicable to their assessment of a jurisdictional dispute settlement mechanism because section 10(k) provided that the existence of an agreed-upon method deprived the Board of jurisdiction to determine the dispute. The majority noted that this was in direct contrast to the *Spielberg* situation where the Board, in its discretion, declines to exercise its jurisdiction and defers to an arbitration decision. Finally, the majority distinguished this case from the Supreme Court's decision in *Plasterers Local Union 79*,[161] where the settlement method at issue was a private union agreement that excluded the employer who was being picketed to force reassignment of work. Here, the majority noted that (1) all parties involved in the dispute had agreed to be bound by the method of dispute adjustment which was invoked; (2) the two subcontractors did not have the opportunity to present their positions because the union representing their employees had declined to pursue the parties' agreed-upon method to its conclusion, or engage in activity charged as a violation of section 8(b)(4)(D) of the Act; and (3) similarly, neither have those subcontractors been subjected to any activity charged as a violation of section 8(b)(4)(D) of the Act.

Member Jenkins, dissenting, viewed the method for dispute resolution to which his colleagues in the majority deferred, as defective beyond cure. In this respect, he observed that the only recourse open to the parties excluded from the two-party arbitration procedure was for the excluded union to initiate a grievance-arbitration proceeding of its own and, thereafter, should

[160] *Spielberg Mfg. Co*, 112 NLRB 1080 (1955).
[161] *N.L.R.B. v Plasterers Local Union 79 [Texas State Tile]*, 404 U.S. 116 (1971).

the two awards conflict, to submit the controversy to a final contractual arbitral authority, apparently without further hearing, for final disposition. Accordingly, the dissent noted that there was no way an opposing party could participate in the same proceeding and adduce the evidence and pursue arguments it deemed necessary to contest or refute the opposing claims and thereby to confront the real adversary. Member Jenkins, applying *Plasterers'*, would have found the grievance-arbitration system herein defective as none of the employers, whom sections 10(k) and 8(b)(4)(D) of the Act were designed to protect, could activate the grievance process, but, instead, had to rely on the unions to do so, remaining helpless if they did not. In these circumstances, and finding also that the majority had denigrated the Board's *Spielberg* deferral standards under which an award would not be "fair and regular" where a party had been barred from the gievance procedure underlying the award, the dissent concluded that there existed no agreed-upon method within the meaning of the Act for resolution of the instant dispute and, therefore, the dispute should have been determined on its merits.

In *General Motors*,[162] a panel majority decided a dispute on the merits, finding that there was, in fact, no agreed-upon method for its voluntary settlement. The controversy arose in this case when employees of a charging party manufacturer struck in support of their demands that certain work be assigned to them. Theretofore the work in question had been performed by employees of a subcontractor under contract to the charging party's carriers. Not named as a party to the proceeding was the subcontractor. The panel majority rejected the contention of the dissent that all necessary parties to the dispute were not then before the Board because the charging party, possessing the proprietary power to nullify the subcontractor's contract with the carriers by its ability to prohibit the subcontractor from performing the work in question on its premises, exerted sufficient control over the work in dispute for it to be considered the employer for the purposes of the 10(k) proceeding. Furthermore, the majority held that, even if they were to accept the finding of their dissenting colleague that the charging party lacked the authority to effect an assignment of the work in dispute, they would nevertheless find that the charging party had raised a cognizable jurisdictional dispute under the rationale set forth in the Board's recent decision in *Cargo Handlers*,[163] where the Board held that

[162] *Intl Union, United Automobile Wkrs. (General Motors Corp)*, 239 NLRB No. 29 (Members Jenkins and Murphy, Member Truesdale dissenting).

[163] *Intl Longshoremen's Assn , Local 1911 (Cargo Handlers)*, 236 NLRB 1439 (1978).

the term "employer" in section 8(b)(4)(D) applied not only to employers whose work was in dispute, but to any employer against whom a union engaged in unlawful strike activity. As the majority found that the charging party, at the very least, fell within the latter category, they concluded that it was entitled to the protection of section 8(b)(4)(D) and, accordingly, determined the dispute before them.

Member Truesdale, dissenting, would quash the notice of hearing because he did not view the dispute as one cognizable under section 10(k) of the Act, and because the subcontractor, whose employees were then performing the work in question, was not named in, or served with, the notice of 10(k) hearing, and did not participate in the proceeding. He noted first that the employees who performed the disputed work were subject to the exclusive control of the subcontractor and further that, as the carrier, not the charging party, subcontracted the work in dispute, he would not find that the charging party had even indirect control over such work by virtue of its authority to cancel any agreement with the subcontractor. Thus, concluding that the manufacturer had no authority over the work in dispute and was powerless to assign or reassign employees to perform such work, the dissent, while suggesting that the picketing in support of the work assignment demand might well have been unlawful under some other section of the Act, would not find that reasonable cause existed to believe that section 8(b)(4)(D) of the Act had been violated.

Further, Member Truesdale concluded that, even assuming that section 8(b)(4)(D) prohibited a union from exerting secondary pressure on one employer for the purpose of forcing another employer to assign work from one group of employees to another, he would not find that all necessary parties to a determination of this dispute were before the Board, since the subcontractor was not a party to the proceeding. Accordingly, he would quash the notice of hearing for this additional reason.

K. Recognitional Picketing

Section 8(b)(7) of the Act makes it an unfair labor practice for a labor organization which is not the certified employee representative to picket or threaten to picket for an object of recognition or organization in the situations delineated in subparagraphs (A), (B), and (C). Such picketing is prohibited: (a) where another union is lawfully recognized by the employer and

a question concerning representation may not be appropriately raised under section 9(c); (b) where a valid election has been held within the preceding 12 months; or (c) where no petition for a Board election has been filed "within a reasonable period of time not to exceed thirty days from the commencement of such picketing."

Two of the significant cases decided during the past fiscal year involved violations of section 8(b)(7)(C) of the Act by a union which admitted both guards and nonguard employees to membership and, therefore, under section 9(b)(3) of the Act could not be certified by the Board as the exclusive bargaining representative for units of guards. In one, *Certain Teed Corp.*,[164] the Board was again confronted with the question as to whether a threat to picket, in addition to actual picketing, is likewise encompassed within the proscription of section 8(b)(7)(C). In that case, a Board majority adopted an administrative law judge's decision which, citing *A-1 Security Service*,[165] held that the union, which admits into membership employees other than guards, violated section 8(b)(7)(C) of the Act by threatening to picket an employer with the object of forcing or requiring that employer to recognize the union as the exclusive bargaining representative of its guard employees when it could not be certified under section 9(b)(3).

Chairman Fanning dissented. He would not find that section 8(b)(7)(C) prohibits threats by a union to picket an employer with the object proscribed therein, based on his dissenting opinion in *A-1 Security Service*. Neither would he find that that section bars a nonguard union from engaging in any picketing to gain recognition and bargaining for a unit of guards, for the reasons set forth in his dissenting opinion in *Wells Fargo*.[166]

Member Murphy, likewise relying on her dissent in *A-1 Security Service*, would not find threats to be violative of section 8(b)(7)(C) of the Act. Further, for the reasons set forth in her dissent in *Rainey's Security Agency*,[167] *infra*, Member Murphy would not find that the employees in this case were guards within the meaning of section 9(b)(3) of the Act and, accordingly, that the

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[164] *General Service Employees Union Local 73 (Certain Teed Corp.)*, 240 NLRB No. 55 (Members Jenkins, Penello, and Truesdale, Chairman Fanning dissenting and Member Murphy dissenting, in relevant part).

[165] *General Service Employees Union Local 73 (A-1 Security Service Co.)*, 224 NLRB 435 (1977), 41 NLRB Ann. Rep. 126 (1976).

[166] *Drivers, Chauffeurs, Warehousemen & Hlprs., Local 71 (Wells Fargo Armored Service Corp.)*, 221 NLRB 1240 (1975); 41 NLRB Ann Rep. 127 (1976).

[167] *General Service Employees Union Local 73 (Mack Leonard d/b/a Rainey's Security Agency)*, 239 NLRB No. 155 (Members Jenkins and Truesdale, Member Murphy dissenting).

union objective in this case was not one prescribed by section 8(b) (7) (C).

In *Rainey's Security Agency,* a Board panel majority similarly adopted an administrative law judge's finding that the union violated section 8(b) (7) (C) of the Act, by threatening to picket and by picketing an employer to compel the latter to recognize it as the collective-bargaining representative of the employer's guard employees, because the union had not been and could not be certified as representative of such employees by virtue of section 9(b) (3), as it admits to membership employees other than guards. In agreement with the administrative law judge, the majority also found that the union violated section 8(b) (7) (A) because the employer had lawfully recognized another labor organization and a question concerning representation could not appropriately be raised. In this respect, the administrative law judge had concluded that, as section 8(b) (7) (C) granted no exemption to the unions threats or picketing for a proscribed object because it was not certifiable, section 8(b) (7) (A) likewise intended no such exemption.

Member Murphy, dissenting, would not find the union to have violated either section 8(b) (7) (A) or 8(b) (7) (C) of the Act. In this respect, she disagreed with her colleagues' conclusion, which she deemed pivotal to their finding that the union acted unlawfully, that the employees in this case are guards within the meaning of section 9(b) (3) of the Act. In her view, the term "guards" as used in that section refers only to an employer's own plant protection employees and was never intended to encompass employees of a separate contractor providing security services to customer employers. Consequently, the dissent would not find the union disqualified from filing a valid petition to be certified as collective-bargaining representative of the employees in this case under section 9 of the Act. Thus, absent an allegation that the union picketed for more than 30 days without the filing of such a petition—the only conduct Member Murphy found prohibited by section 8(b) (7) (C)[168]—the dissent found no basis for concluding that the union violated that section.

As Member Murphy would not find the union precluded by section 9(b) (3) from raising a question concerning representation, she found it necessary to consider whether it nevertheless violated section 8(b) (7) (A) of the Act because the employer's collective-bargaining agreement with another union barred the raising of

[168] Member Murphy does not find threats to picket to constitute a violation within the meaning of sec. 8(b) (7) (C).

such a question in this case. Finding that the agreement would not bar an election because it contained a provision "which clearly and unequivocally went beyond the limited form of union-security permitted by section 8(a)(3) of the Act and concluding that a question concerning representation could have been raised when the union threatened to picket and picketed, Member Murphy found no basis for concluding that the union violated section 8(b)(7)(A) of the Act.

L. 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 Mfrs. Assn.* v. *N.L.R.B.*[169] 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 *Marriott In-Flite Services,*[170] a majority of the Board concluded that section 8(e) of the Act was intended to outlaw hot-

[169] 386 U.S. 612 (1967); 32 NLRB Ann. Rep. 139 (1967).

[170] *Intl. Assn. of Machinists (Marriott In-Flite Services),* 197 NLRB 232 (1972), enfd. 491 F.2d 367 (9th Cir. 1974).

cargo agreements obtained by statutory labor organizations from "persons" as defined by section 2(1) of the Act, as well as from statutory employers. During the report year, a majority of the Board overruled *Marriott In-Flite Services* in *N.Y. Electrical Contractors Assn.*,[171] and held that section 8(e) applied only to agreements between statutory labor organizations and statutory employers and accordingly found that section 8(e) did not apply to the agreement the union sought to obtain from Facilities Development Corporation (FDC) since FDC, as a facility of the State of New York, was not a statutory employer.[172]

The majority first stated that the literal language of section 8(e) clearly limited its application to agreements between statutory labor organizations and employers, noting in this regard, that the section uses the terms "labor organization," "employers," and "person," which are defined in section 2(5), (2), and (1), respectively. In their view, if section 8(e) is construed in accord with definitions, it limits the finding of an unfair labor practice to agreements between "labor organizations" and "employers," as there is no mention of agreements between "labor organizations" and "persons." Indeed, the term "person" is mentioned solely in connection with the *object* of the agreement obtained from an "employer." Thus, in the majority's view, a construction which makes the terms "employer" and "person" interchangeable runs contrary to the express language of section 8(e) as well as to the definitional scheme of the Act. The majority further stated that the express language of section 8(b)(4) of the Act also indicates that the 1959 amendments to the Taft-Hartley Act were not intended to give a broader reach to the term "employer" than that given in section 2(2). Finally, going beyond the express language of the statute, the majority concluded that the legislative history of section 8(e) and of the 1959 amendments to the secondary boycott provisions of the Taft-Hartley Act demonstrated that Congress intended the term "employer" to be used in the statutory sense.

Dissenting Members Jenkins and Penello indicated they would adhere to *Marriott In-Flite Services* for the reasons set forth therein and, accordingly, would have proceeded to determine the case on the merits instead of dismissing it on jurisdictional grounds.

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[171] *Local 3, IBEW (N.Y. Electrical Contractors Assn.)*, 244 NLRB No. 46 (Chairman Fanning and Members Murphy and Truesdale, Members Jenkins and Penello dissenting).

[172] The Board, therefore, dismissed the alleged violation of section 8(b)(4)(i) and (ii)(A) of the Act.

In *Woelke & Romero Framing*,[173] a full Board considered to what extent, if any, the Supreme Court's decision in *Connell*[174] narrowed the scope of the construction industry proviso to section 8(e) of the Act, as it previously had been interpreted by the Board and the courts.[175]

The General Counsel and the charging party contended in *Woelke & Romero* that the union's proposed subcontracting provisions[176] were secondary union signatory clauses and, as such, were presumptively unlawful unless privileged by the construction industry proviso to section 8(e). They further argued that the clauses were not privileged by the proviso because they did not comport with the Supreme Court's interpretation of that proviso in *Connell*. Accordingly, it was alleged that by picketing to get the charging party to agree to these clauses, the unions violated section 8(b)(4)(i) and (ii)(A) of the Act.

After finding that the clauses were neither primary work-preservation nor area standards clauses, but were indeed secondary in their thrust, the Board concluded that they were, nevertheless, protected by the construction industry proviso. In so con-

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[173] *Carpenters Local No. 944 (Woelke & Romero Framing)*, 239 NLRB No. 40.

[174] *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975), holding that in the absence of a collective-bargaining relationship between *Connell* and Local 100, the proviso did not immunize Local 100's subcontracting agreement from Federal antitrust laws.

[175] The relevant facts in *Connell*, an antitrust action, were as follows: Local 100 picketed certain general contractors including Connell, for the sole purpose of compelling such contractors to agree that, in letting subcontracts for the performance of mechanical work, they would deal only with firms that were parties to that union's current collective-bargaining agreement. The avowed purpose of this contract was to assist Local 100 in its efforts to organize the mechanical subcontractors in the area. Local 100 had no contract with Connell, Connell employed no workers of the type whom Local 100 exists to represent, and, significantly, Local 100 expressly disclaimed any interest in representing Connell's employees. Local 100 did not seek a complete bargaining contract with Connell, but only a subcontracting agreement. Connell succumbed to the picketing and, thereafter, filed suit in a Federal district court to annul the resulting agreement as an illegal restraint on competition under the Sherman Act. Local 100 defended on the ground that the subcontracting agreement was protected by the construction industry proviso to sec. 8(e) of the Act. Connell, on the other hand, argued that, despite the unqualified language of the proviso, Congress intended only to allow subcontracting agreements within the context of a collective-bargaining relationship, that is, Congress did not intend to permit a union to approach a "stranger" contractor and obtain a binding agreement not to deal with nonunion subcontractors for the purpose of organizing such nonunion subcontractors from the "top down."

[176] The proposed subcontracting provisions were similar to those previously included in the earlier Master Labor Agreement (MLA) with the unions and their international. In substance, they provided that neither a contractor nor any of its subcontractors would subcontract any work to be done at the site of construction of a building or structure except to a party to a current labor agreement with the appropriate union or with a signatory to the MLA. The provision further set forth that a contractor and its subcontractors would not subcontract any jobsite work except to a contractor whose employees on that job are members of a bona fide labor organization, and whose labor costs on such job are not less than those covered by the MLA, including the fringe benefits provided therein. Finally, the provisions provided that if a contractor or subcontractor subcontracted jobsite work covered under the jurisdiction of the unions' international, a written contract shall provide for the observance and compliance by its subcontractors with the full terms of the MLA.

cluding, the Board noted that it had, with court approval, "construed the construction industry proviso literally to protect 'any agreement' between qualified parties which limits subcontracting of work to be performed at the site of construction to employers who are signatory to a specific union agreement or to an agreement with the 'appropriate union' (meaning, generally, an affiliate of a building and construction trades council.)"

The Board then considered the general counsel's contention that *Connell* limited its previously broad interpretation of the proviso. The Board rejected that contention and stated that the specific question before the Court in *Connell* was whether the existence of a collective-bargaining relationship constituted a prerequisite to, or a limitation on, the applicability of the construction industry proviso to clauses restricting the subcontracting of work on a construction site. The Board noted that although the Court identified certain policies underlying the enactment of the proviso which were relevant to determining its applicability to subcontracting clauses disputed between parties who did not have a collective-bargaining relationship, it concluded that the *Connell* clause was not related to these policies; and that, in this regard, the Court noted that Local 100 did not claim to be protecting Connell's employees from having to work alongside nonunion workers and was not seeking to organize any nonunion subcontractors on the jobsite it picketed; instead, Local 100 admittedly sought the subcontracting agreement solely as a means of pressuring mechanical subcontractors in the area to recognize it as the representatives of their employees. Thus, the Board observed that the Court found that extending the protection of the proviso to the clause sought in *Connell* would undermine one of the major aims of the 1959 Act, which was to limit "top-down" organizing campaigns in which unions used economic weapons to force recognition from an employer regardless of the wishes of its employees.

Contrary to the contentions of the General Counsel and the charging party, the Board found nothing in its analysis of *Connell* which compelled a narrower interpretation of the proviso than that which had previously been assigned to it. As construed by the Board, the "bottom line" of the Court's opinion was that the construction industry proviso permitted subcontracting clauses such as those in *Woelke & Romero* in the context of a collective-bargaining relationship, and possibly even without such a relationship if the clauses are aimed at avoiding the *Denver Building Trades* [177] problem. Accordingly, as the union proposed

[177] *N.L.R.B.* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951).

contract provisions were advanced in the context of a collective-bargaining relationship between the union and the charging party, the Board found the clauses privileged and, therefore, dismissed the complaint to the extent that it alleged the union's violated section 8(b)(4)(i) and (ii)(A) of the Act by picketing in support of the subcontracting proposals.

A full Board found in *Utilities Services Engineering*,[178] that the union council's proposed agreement, which governed the subcontracting of construction jobsite work,[179] violated section 8(e) of the Act, since it did not arise in the context of a collective-bargaining relationship nor was it directed toward any of the policies which might warrant the protection of the proviso, even in the absence of a collective-bargaining relationship.[180] At the time material, Utilities was performing electrical maintenance work at a jobsite. The employees of Utilities were not represented by any labor organization, and Utilities never had a collective-bargaining agreement with the union. In addition, Utilities did not subcontract any work at the jobsite in question. Utilities received a letter from the union stating that it was engaged in a program to eliminate substandard wages in the area and requesting Utilities to sign an agreement governing the subcontracting of work. After Utilities failed to respond, the union commenced picketing the jobsite.

Applying *Connell, supra,* as it had been construed in *Woelke & Romero Framing, supra,* the Board concluded that as the union sought the subcontracting clause outside of a collective-bargaining relationship it lost the protection of the proviso, unless possibly the clause was addressed to problems posed by the common situs relationship on a particular jobsite or to the reduction of friction between union and nonunion employees at the jobsite. The Board found that the clause did not address such concerns, however, since it did not restrict the subcontracting of other types of work at the jobsite, nor did it apply only to jobsites where the union's members were working, and thus allowed the

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[178] *Colorado Bldg. & Constr. Trades Council (Utilities Services Engineering)*, 239 NLRB No. 41.

[179] The proposed agreement provided that the contract shall govern construction site work and shall be limited to work which is not customarily performed by employees of the contractor. It also provided that the contractor had an obligation to include in every subcontract for work governed under the agreement a provision requiring the payment of prevailing rates of wages for such work Finally, the agreement set forth that it "is understood and agreed by the parties that the Council is not the collective bargaining representative of any employee or employees, or to supersede any collective bargaining contract presently or hereafter, in effect, or to derogate in any way from the authority of any collective bargaining representative of employees of the Contractor or the sub-contractor."

[180] The Board concluded that by picketing to obtain the unlawful contract clauses the union violated sec. 8(b)(4)(ii)(A) of the Act.

possibility of union and nonunion employees working side by side at a jobsite.[181] Finally, the Board noted that, as in *Connell*, the union did not seek the clause to organize the nonunion subcontractor on the project it picketed since no subcontracting was done at the jobsite. Thus the Board reasoned that, as in *Connell*, "the effect of the instant clause is to place too great an organizational weapon in the hands of the union by allowing it to compel any general contractor to agree to bring economic pressure on any nonunion subcontractor provided the agreement covers work to be performed at any construction jobsite."

In *Pacific Northwest*,[182] the Board concluded that the subcontracting clause,[183] contained in the then existing agreement between the union and the Associated General Contractors (AGC), although secondary, was privileged by the construction industry proviso to section 8(e) for the reasons expressed in *Woelke & Romero, supra*. A majority of the Board found, however, that since the subcontracting provision could be enforced by "self help" measures it was violative of section 8(e). In so finding, the Board majority noted that "[a]lthough Congress, by its enactment of the proviso to section 8(e), made lawful certain secondary clauses in the construction industry, it nevertheless made clear that such agreements could not be enforced by the threats, restraint, or coercion prohibited by section 8(b)(4)." The majority concluded that this reflected the sense of Congress that, although such agreements could be lawful, the existing law with respect to the nonjudicial enforcement of secondary clauses should not be altered. The majority then noted that the Board had held, with court approval, that clauses which purport to authorize a union to employ economic action to enforce secondary subcontracting provisions will serve to remove the protections the clause would otherwise enjoy under the proviso.[184]

After examining the relevant language in the parties' contract, the majority rejected the union's argument that a violation of section 8(e) was avoided because the union had not reserved the

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[181] The Board expressly left open the question of what type of clause would address these concerns and whether it would be authorized by the proviso if it were sought outside the context of a collective-bargaining relationship.

[182] *Intl. Union of Operating Engineers, Local 701 (Pacific Northwest Chapter of the Associated Bldrs.)*, 239 NLRB No. 43 (Members Jenkins, Penello, Murphy, and Truesdale; Chairman Fanning dissenting in part).

[183] The clause provided, in essence, that employers signatory to the agreement would not subcontract any jurisdictionally relevant work to any subcontractor who did not have an existing labor agreement with the union.

[184] *Muskegon Bricklayers Union 5, Bricklayers, Masons, & Plasterers Intl. Union of America (Greater Muskegon General Contractors Assn.)*, 152 NLRB 360 (1965), enfd. 378 F.2d 859 (6th Cir. 1967), *Ets-Hokin Corp*, 154 NLRB 839 (1965), enfd. *sub nom. N.L.R.B. v. IBEW, and its Local 769*, 405 F.2d 159 (9th Cir. 1968).

use of economic force with respect to the subcontracting clause *per se,* but had reserved the right to take self-help as it related to the grievance-arbitration provision. In this connection, the majority noted that the grievance-arbitration provision was simply an agreed-upon method for the resolution of disputes arising under specific provisions of the contract. As such, it was necessarily connected to the contract provisions which are the source of the disputes submitted for resolution. Thus, the majority reasoned that the immediate object of the self-help clause (the grievance procedure) did not obscure the underlying dispute which gave rise to a claim of liability (in this case, the enforcement of a secondary clause). In the majority's view, such a result removed the subcontracting provisions from the protection it would otherwise enjoy and, accordingly, they found that it was violative of section 8(e).[185]

In his partial dissent, Chairman Fanning disagreed with the majority's finding that the subcontracting clause was outside the protection of the proviso because of the self-enforcement provision for the reasons stated in his dissenting opinion in *Greater Muskegon General Contractors Assn., supra.*[186]

Finally, in *Donald Schriver,*[187] the Board considered what type of a collective-bargaining relationship was sufficient under *Connell,* as construed in *Woelke & Romero, supra,* to invoke application of proviso protection to subcontracting agreements which were plainly "union signatory" clauses having a secondary thrust.

The facts revealed that in 1972 Schriver entered into an agreement with the Trades Council which incorporated by reference the Master Labor Agreement (MLA) with various employer associations. The agreement contained provisions restricting subcontracting and automatically renewing itself from year to year in the absence of a notice to terminate. After signing the agreement, Schriver did not require the subcontractors on its jobsites to be union subcontractors. In 1975, when the unions demanded

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[185] Member Murphy emphasized that all five Board members agree that the actual use of economic action to enforce a clause prohibited by the construction industry proviso to sec. 8(e) violated the Act.

[186] In his dissent in *Greater Muskegon,* then Member Fanning argued that it is erroneous to equate the right to call a strike with the actual strike itself, since it is the strike and not the right to call one which is the attempt at enforcement. Although he agreed that the existence of such a clause would not constitute a defense to the application of sec. 8(b)(4) to such a strike, he contended that this does not mean that the construction industry proviso does not apply to a self-enforcement clause or that a union cannot strike an employer to obtain acceptance of such a clause.

[187] *Los Angeles Bldg. & Constr. Trades Council & Local 1497, Carpenters (Donald Schriver),* 239 NLRB No. 42 (Members Jenkins, Penello, and Truesdale; Chairman Fanning and Member Murphy dissenting in part)

that Schriver reaffirm the contract by signing the then current 1974 MLA, Schriver refused. Schriver however, did not repudiate his bargaining relationship with the unions, but rather attempted to negotiate different terms. The unions threatened to picket and to file a lawsuit to enforce the agreement, but they did neither. On the basis of these facts, the Board found that Schriver had an ongoing collective-bargaining relationship with the unions and that the subcontracting provisions were sought in the context of this relationship.

In the case of Charging Party Topaz, no preexisting bargaining relationship existed when the unions demanded that Topaz sign the 1974 MLA and picketed the jobsite in support of their contract demands. In the Board's view, however, it was clear that the subcontracting provisions involved were sought in contemplation of a complete bargaining relationship on behalf of Topaz' employees. Thus, the Board found a clear distinction between the union-employer relationship that existed in these cases and that which existed in *Connell.* In *Connell,* the Board noted that the union had no past relationship with the employer, did not seek to establish one, sought an agreement dealing exclusively with the subject of subcontracting, and specifically disavowed any intent to seek recognition by *Connell.* Accordingly, the Board found that the subcontracting provision herein arose within the context of a collective-bargaining relationship as that phrase is used in *Connell* and further found that, although in neither *Schriver* nor *Topaz* was the collective-bargaining relationship one in which the unions involved represented a majority of the unit employees, the contracts with Schriver and the proposed contract with Topaz were lawful by reason of section 8(f) of the Act.[188]

The Board noted that, in interpreting both the construction industry proviso and section 8(b)(4)(A) in the past, it had made no distinction between agreements with a minority union permitted by section 8(f) and agreements with a majority union having representative status under section 9(a), and stated that it saw nothing in the *Connell* decision that required such a distinction. In arriving at this determination, the Board stated that in *Connell* there was no existing collective-bargaining relationship, nor was one sought and, therefore, the Court did not address the question of what type of a collective-bargaining relationship would or would not be sufficient to invoke application

[188] In essence, sec. 8(f) exempts contracts with minority unions in the construction industry from the unfair labor practice prohibitions of Sec. 8(a) and (b) of the Act.

of proviso protection to a subcontracting agreement. Thus, in the absence of statutory language or Supreme Court precedent, the Board saw no reason to construe the construction industry proviso to include the requirement that an agreement protected by the proviso be with a majority union representative. It found that such a construction was not warranted to prevent the use of 8(f) contracts as organizational "weapons," since the statute provides other safeguards against abuse of employee organizational rights by such contracts.[189] Accordingly, the Board concluded that the subcontracting agreements involved were protected by the construction industry proviso, notwithstanding the *Connell* decision.

A majority of the Board went on to find, however, that the contract contained a broad "self help" clause [190] which applied to union action with respect to employer failure to comply with grievance-arbitration decisions on any grievable subject, including the subcontracting restrictions in issue. Interpreting section 306 as sanctioning economic action to enforce the subcontracting restrictions and noting that secondary agreements, privileged by the proviso to section 8(e), may not be enforced by coercion, the majority concluded that the subcontracting clause was violative of section 8(e) by reason of the self-enforcement provision.[191] Accordingly, they found that by threatening to picket Schriver to require it to reaffirm an unlawful agreement violative of section 8(e), the unions violated section 8(b)(4)(ii)(A), and by picketing Topaz to require it to enter into such agreement prohibited by section 8(e), the unions violated section 8(b)(4)(i) and (ii)(A).

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[189] In this connection, the Board noted that sec 8(f) provides that a contract with a minority union shall not be a bar to a representation petition, sec. 8(b)(7)(C) has been construed to limit picketing for recognition in the context of an 8(f) contract in *N L R B.* v. *Local 103, Iron Wkrs. (Higdon Contracting Co.)*, 434 U.S. 335 (1973), and sec. 8(b)(4)(B) serves to prohibit picketing to enforce an 8(f) contract which incorporates a secondary subcontracting agreement.

[190] Art III of the agreement covered strikes, lockouts, and jurisdictional disputes. Sec. 306 of that agreement provided "Nothing contained in this Agreement, or any part thereof, shall affect or apply to the Union in any action it may take against any Contractor or subcontractor who has failed, neglected, or refused to comply with or execute any settlement or decision reached at any step of the grievance procedure or through Arbitration under the terms of Article V hereof."

[191] In Member Murphy's view, the self-help clause was ambiguous, unlike the clause in *Pacific Northwest, supra* She noted that it is a well-settled principle that if a contract clause can be construed two ways—one lawful and one unlawful—it is given the benefit of the doubt and construed to be lawful. *General Teamsters, Chauffeurs, Warehousemen & Helpers, Local 982 Associated Owner-Operators*, 181 NLRB 515 (1970). Accordingly, she would have found the clause lawful. Chairman Fanning also dissented from the majority's finding. In doing so, he relied on his previously stated position that the mere existence of self-enforcement features does not make the construction industry proviso inapplicable to the contract *Muskegon, supra* Moreover, wholly apart from his disagreement with the majority's general position that the proviso does not protect contracts with self-enforcement features, he did not consider the provision of section 306 stated above to constitute self-help measures.

M. Prehire Agreements

Section 8(f) allows prehire agreements in the construction industry by permitting an employer "engaged primarily in the building and construction industry" to enter into a collective-bargaining agreement covering employees "engaged (or who, upon their employment, will be engaged)" in that industry. Such an agreement may be entered into only with a labor organization "of which building and construction employees are members," but is valid notwithstanding that the majority status of the union has not been established, or that union membership is required after the seventh day of employment, or that the union is required to be informed of employment opportunities and has opportunity for referral, or that it provides for priority in employment based on specified objective criteria. Such an agreement is not, however, a bar to a petition filed pursuant to section 9(c) or (e).

In the report year, the Board had occasion to consider the applicability of a prehire union-security agreement to a substantial number of employees formerly employed by another employer and formerly represented by another union. In *IBEC Housing Corp.*,[192] a Board panel held, contrary to the administrative law judge, that the union and employer, parties to a prehire agreement lawful under section 8(f), did not violate the Act by requiring a group of employees, upon being hired, to become members of the union pursuant to the union-security provision. The employer, a general construction contractor, hired the 220 to 230 employees involved to continue to work in the same classification, under the same supervision, and to perform the same operations as they had when employed by a bankrupt subcontractor whose subcontract was terminated by the employer. At that time, approximately 10 to 12 of the employer's employees were covered by the parties' agreement. While employed by the subcontractor, these newly hired employees were represented by the charging party, another union, in an appropriate unit. Finding it immaterial that the union had not demonstrated that it was selected as the representative by the newly hired employees, the panel held that, absent a showing that the employer was a successor to the bankrupt subcontractor, not contended in this case, the employer was under no obligation either to recognize the charging party or to refrain from recognizing the union with whom it had a valid prehire agreement as the exclusive representative of the

[192] 245 NLRB No 165 (Chairman Fanning and Members Jenkins and Penello).

employer's employees. Accordingly, the panel decided that employer did not violate the Act by requiring the former subcontractor's employees to become members of the union.

N. Picketing of Health Care Institutions

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

In *St. Joseph Hospital*,[193] the union picketed one of two entrances to a hospital facility with signs stating that the reason for the picketing was an unspecified dispute between it and the hospital but it did not give the 10 days' written notice, required by section 8(g), to the hospital and to the Federal Mediation and Conciliation Service (FMCS). The union thereafter advised the hospital that the sole and limited purpose and objective of the picketing was "to advertise to the employees of [the hospital] assigned to perform paint work that the [h]ospital is not a signatory to a collective bargaining agreement covering such work." The work in question involved interior and exterior painting of a building used exclusively as an administrative center, with one exception not relevant here. The entrance picketed was the closest in proximity to the administration building and was used by the painting employees who were working thereon. However, that entrance, which was also used for delivery of all supplies, both medical and construction, likewise provided access to

[193] *Orange Belt Dist. Council of Painters No. 48 (St. Joseph Hospital)*, 243 NLRB No. 113 (Chairman Fanning and Members Penello, Murphy, and Truesdale, Member Jenkins concurring).

the rear of the main hospital building and its loading dock. The general public used primarily the other entrance which was located in front of the hospital.

In concluding that the notice provisions of section 8(g) were applicable in the circumstances of this case, and, therefore, that the union violated that section by picketing without first giving the required notices, the Board found that the picketing in question was precisely the type of activity which poses a serious threat to the continued provision of health care services at the picketed hospital, and was intended to be proscribed both by the literal language of section 8(g) and the underlying congressional intent. In so finding, the Board rejected the union's contention that this section was intended to control only work stoppages which derive from contractual disputes, as, in the Board's view, the legislative history expressly indicated that such activity is to be regulated by section 8(g) whether or not it is related to bargaining, and, moreover, even in instances where it would constitute "stranger picketing." The Board also rejected the contention that an actual showing of disruption of health care services is necessary before a violation can be found, as the 10-day notice period was designed to prevent disruptions of health care services not only when they actually occur, but also when they may possibly occur. Further, the Board stated that, as the picketing was aimed directly against the hospital, no argument could be made that the hospital was a neutral employer or that the picketing was in a location, such as a reserved gate, which would have isolated it from the hospital's patient care activities. Further, the Board noted that, while the underlying dispute concerned work being done on the hospital's administrative services building and that such work was performed by hospital employee-painters not traditionally engaged in providing health care services, the picketing in no way limited the dispute to such circumstances. In any event, the Board found no support in the legislative history of section 8(g) for the argument that that section was intended to be applicable only to disputes involving employees performing direct "patient related" functions. Finally, a Board majority rejected the argument that the picketing involved herein was protected informational picketing since, even assuming that the picketing was informational, section 8(g) specifies an independent unfair labor practice, and does not contain a proviso protecting informational picketing. Accordingly, a violation of section 8(g) was found against the union for picketing without giving the required notices.

Member Jenkins concurred in finding a violation in this case. However, unlike his colleagues in the majority, he did not consider irrelevant the union's contention that its picketing of a hospital was outside the scope of section 8(g) where such picketing constituted lawful informational picketing which did not interfere with the hospital's operations. In this case, however, Member Jenkins would find that the conduct in question was not purely informational picketing directed to the public and posing no threat to the disruption of the hospital's patient care function because its message was directed to the hospital employees and not to the public.

In *Bio-Medical Applications*,[194] the administrative law judge dismissed the complaint against the employer alleging discharge of strikers in violation of the Act. Mindful of the congressional admonition to apply "the rule of reason," the Board found that the union's conduct both with respect to the initial 10-day notice of the intent to strike on the morning of a specific day, and the postponement of the commencement of the strike, was not in derogation of section 8(g) and, therefore, found that the strikers did not thereby lose their protected status as employees under the Act.[195] Accordingly, the case was remanded to the administrative law judge for a supplemental decision.

In this case, the union sent 10-day notices by certified mail to both the FMCS and the employer, a health care institution as defined in section 2(14) of the Act. The FMCS received its notice in a timely fashion, but the employer did not receive its notice until a month after the strike began. However, 10 days before the scheduled strike, the FMCS telephoned the employer about the union's intent to strike. Thereafter, but prior to the strike, the parties met at the request of the FMCS but, because they were unable to resolve their differences, the employer made preparations for the impending strike. On the afternoon of the day the strike was scheduled to begin, the employer received a telegram from the union stating that the strike would commence the next day. A week after the strike began, the union telegraphed the employer that the strikers were unconditionally offering to return to work and, on the same day, 10 striking

[194] *Bio-Medical Applications of New Orleans, d/b/a Greater New Orleans Artificial Kidney Center*, 240 NLRB No. 39 (Chairman Fanning and Members Penello, Murphy, and Truesdale)

[195] In relevant part sec. 8(g) reads:

> (g) 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 . . . . The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

employees unsuccessfully sought reinstatement at the employer's facility.

Although finding that the union did not comply with the literal terms of section 8(g) in that the employer did not receive written notice of the union's intent to strike until after the strike began, the Board nevertheless found that the union was in substantial compliance with the section's requirements. Thus, the Board noted that the union gave the required notice to the FMCS and unsuccessfully attempted through reasonable means, namely, certified mail, to give the employer the required written notice. In these circumstances, the Board found it inequitable to hold the union responsible for the untimely service of the employer's notice, when no reason for the delay could be attributed to it and when the employer made no mention of its not having received such notice at the negotiation meeting with the union and the FMCS, which it knew was held because of the union's notice of intent to strike. The Board also found that, in any event, the Respondent had 10 days' actual notice of the union's intent to strike as it had been so advised by the FMCS telephone call, and, as a consequence, had the opportunity to, and in fact did, make arrangements to insure continued patient care without interruption during the strike and without jeopardy to the patients' health. Noting that Congress, in passing the health care amendments, was greatly concerned with the need for sufficient notice of any strike or picketing to allow for appropriate arrangements to be made for the continuance of patient care in the event of a work stoppage, the Board concluded that such congressional concern was satisfied in that the employer received 10 days' notice, albeit oral rather than written, and was thus able to provide for the continuity of patient care deemed essential by Congress.

The Board also dealt with the contention that the union, in extending the date for the commencement of the strike, evidenced a lack of concern for section 8(g) by failing to comply with the last sentence of that section which reads, "The notice, once given, may be extended by the written agreement of both parties." In this respect, the Board, disagreeing with the administrative law judge, observed that the cited language does not expressly provide that a written agreement of the parties is the exclusive manner of extending an initial strike date. The Board concluded that such a restrictive interpretation is clearly contrary to the expressed intent of Congress as revealed in the legislative history of section 8(g). Rather, the Board noted that Congress specifically approved

a union's extension of the time set forth in the initial 10-day notice for the commencement of a strike by unilateral notification to the employer, at least in circumstances in which the postponement of the strike is between 12 and 72 hours of the time set forth in that initial notice and where there is at least 12 hours' advance notice given to the employer of the postponement. Accordingly, the Board found that the manner in which the union postponed the commencement of its strike, in this case, was in accord with section 8(g).

In *Federal Hill Nursing Center*,[196] a Board panel made it clear that Congress did not intend unilateral extensions by a union to be open ended, but, rather, indicated that any unilateral extension beyond a period of 72 hours would be deemed unreasonable. The panel drew attention to the further caveat that, even within the 72-hour period, a union should give a health care facility at least 12 hours' notice of the actual time that the strike or picketing will commence. Thus, in this case, the Board found that the notification requirements of section 8(g) were not satisfied by the union where the latter, without giving any notice of delay in the start of picketing, and in the absence of any agreement between the parties regarding the delay, commenced actual picketing 80½ hours after the time stated in the union's initial notice. Accordingly, the union was found to have violated section 8(g) of the Act.

O. Remedial Order Provisions

1. Appropriateness of Broad Orders

In *Hickmott Foods*,[197] the unanimous Board decided that henceforth a broad, "in any other manner," cease-and-desist order would be warranted only when a respondent was shown to have a proclivity to violate the Act, or had engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights. They noted that, relying on *N.L.R.B.* v. *Entwistle Mfg.*,[198] the Board, until this case, had regularly included the broad order provision as a remedy whenever respondents were found to have committed viola-

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[196] *Dist. 1199-E, Natl Union of Hospital & Health Care Employees (Federal Hill Nursing Center)*, 243 NLRB No. 6 (Chairman Fanning and Members Penello and Murphy).

[197] 242 NLRB No 177 (Chairman Fanning and Members Jenkins, Penello, Murphy, and Truesdale)

[198] 120 F 2d 532 (4th Cir 1941), enfg 23 NLRB 1058 (1940).

tions which went "to the very heart of the Act," and had routinely considered discharging or causing the discharge of an employee in violation of section 8(a)(3) or 8(b)(2) to be such a violation. However, the Board stated that it had carefully reconsidered that policy and had concluded that automatic adoption of broad orders in every discharge case was not warranted, but that rather a narrow order, responsive to the particular actions of a violator of the Act, would usually be more appropriate.

In their opinion, the issuance of the narrow, "in any like or related manner," order would not frustrate effective enforcement of the Board's remedial orders, nor would it provide less effective protection of rights under the Act. The Board noted that if there was a repetition of 8(a)(3) or 8(b)(2) conduct—or, indeed, 8(a)(1) discharges—such would certainly be within the scope of the narrow order, and could thus form a basis for a contempt citation. They pointed out, however, that a broader order might be warranted if it was shown that a respondent committed a single discriminatory discharge and it was also shown that the respondent, either previous to or concurrently with that discharge, engaged in other severe misconduct. Thus, repeat offenders and egregious violators of the Act would be subject to the traditional Board remedy for conduct which required broad injunctive relief. In the instant case, the Board concluded that the broad injunctive order issued against the union and employer was not warranted since only a single discriminatory discharge was found.

2. Appropriateness of Bargaining Orders

Two cases during the report year considered the issue of whether the Board has the authority to issue a *Gissel*[199] bargaining order to remedy an employer's unfair labor practices where there was no evidence in the record to establish that the union had previously enjoyed majority support among the unit employees. In the lead case, *United Dairy Farmers Cooperative Assn.*,[200] Members Murphy and Truesdale found that the Board's remedial authority under section 10(c) of the Act "may well encompass the authority to issue a bargaining order in the absence of a prior showing of majority support." Notwithstanding their finding that

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

[200] 242 NLRB No. 179 (Members Murphy and Truesdale; Chairman Fanning and Member Jenkins concurring in part and dissenting in part; Member Penello concurring in part and dissenting in part separately).

the employer's unfair labor practices were "outrageous" and "pervasive," Members Murphy and Truesdale declined to enter a bargaining order.

In their discussion of the Board's authority, Members Murphy and Truesdale noted that the Supreme Court in *Gissel* cited the Fourth Circuit's decision in *N.L.R.B.* v. *S. S. Logan Packing Co.*,[201] where that court had concluded that a bargaining order might constitute an appropriate remedy for employer unfair labor practices, without need of inquiry into majority status on the basis of cards or otherwise, in "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices. In their opinion, that the Board might also have the remedial authority to impose a bargaining order in the absence of a prior showing of majority support by the union was further indicated by the Board's special responsibility to devise suitable remedies to effectuate the Act's policies and the broad discretion, vital to the administration of that responsibility, which the Act accords.

In a lengthy dissent on this issue, Chairman Fanning and Member Jenkins concluded without qualification that the Board does have the authority to issue a nonmajority bargaining order, and should exercise it in this case. They observed that the Fifth Circuit, in *J. P. Stevens & Co., Gulistan Div.* v. *N.L.R.B.*,[202] and the Third Circuit in *N.L.R.B.* v. *Armcor Industries*,[203] also indicated that, under certain circumstances, the Board has the authority to issue a bargaining order without a showing of prior majority support.

Member Penello dissented only from this portion of the decision, as the Board has no power to issue a bargaining order in derogation of the fundamental principle of majority rule. In his dissent extensively analyzing pertinent Board and judicial precedents, the Act, and its legislative history, he concluded that holdings of the Supreme Court, the plain words of the statute, and its legislative history confirmed the correctness of the Board's prior practice of refusing to issue a bargaining order where there was no evidence that the union ever enjoyed majority status, and established that the Board's remedial authority is limited by the majority rule doctrine.

Although two members of the Board indicated that the Board may have the authority to issue a bargaining order in the absence of a prior showing of majority support for the union, while

[201] 386 F 2d 562 (4th Cir. 1967)
[202] 441 F.2d 514 (5th Cir. 1971).
[203] 535 F.2d 239 (3d Cir. 1976).

two other members flatly concluded that the Board did have such authority, a different majority held that, in the exercise of the Board's discretion, such a remedy should not be granted here. Members Murphy and Truesdale, with Member Penello concurring in the result, noted that where an employer's unfair labor practices occur during the course of a union organizational campaign, the Board has sought to balance the policy on the one hand, in favor of enabling employees freely to exercise the right to choose whether they desired to be represented by the union via an election, against, on the other hand, the damage to the election process caused by the employer's unfair labor practices. Where a majority of the employees had indicated their support for the union by signing authorization cards, and an employer's unfair labor practices have precluded the holding of a fair election, the Board has traditionally balanced their interests in favor of the issuance of a bargaining order as the remedy best suited to restoring the *status quo ante* consistent with the policies of the Act. However, in their opinion, a different question arises where the union had never obtained a showing of majority support and an employer's unfair labor practices precluded the holding of a fair election. They stated that the imposition of a bargaining order in such cases does not restore the *status quo ante*, i.e., an expression of majority support for the union, because there was no majority support and no assurance that a majority of employees would have supported the union had the employer refrained from engaging in unfair labor practices. In their view, a bargaining order in these circumstances would present a substantial risk of imposing a union on nonconsenting employees, and could only be justified if it served a substantial remedial interest.

Members Murphy and Truesdale stated that while it was true that the employer's unfair labor practices in violation of section 8(a)(1) and (3) precluded the holding of an unencumbered election, they were persuaded that, in the absence of a prior showing by the union of majority support at some point in the proceeding, it was less destructive of the Act's purposes to provide a secret-ballot election whereby the employees were enabled to exercise their choice for or against union representation than it was to risk negating that choice altogether by imposing a bargaining representative on employees without some history of majority support for the union. In these circumstances, and in the exercise of their discretion under the Act, they declined to issue a bargaining order in this case. As noted above, Member Penello concurred in this holding on the ground that the Board lacked au-

thority to enter a bargaining order in the absence of a prior showing that the union enjoyed majority status.

Chairman Fanning and Member Jenkins dissented, stating that, while they shared their colleagues' concern for the possibility that a majority of employees may not, in fact, desire the bargaining representative, in balancing competing policy considerations under the Act, the Board, with approval of the courts, had frequently issued bargaining orders with no greater assurance of the sentiment of an uncoerced majority than in the present case. In their view, where the employer's unlawful conduct, as in the present case, rendered impossible ascertainment of the majority's views, the likelihood of frustrating the majority's wishes was as great from denial of a bargaining order as from granting one. They stated that the same policy considerations which justify a bargaining order to remedy egregious and extensive unfair labor practices which have had a chilling effect on union support in cases of a prior card majority also support a bargaining order in other comparable situations. Chairman Fanning and Member Jenkins concluded that the Act did not require that a union, in order to obtain bargaining rights, prove conclusively, or even minimally, that it had majority support. They stated that where there was no evidence indicating where majority support probably lay because the employer's egregious misconduct had shut it off, it became imperative that the Board provide some remedy to protect the employees' right to the choice which the employer had unlawfully eliminated. Where the union had, despite the employer's egregious misconduct, nonetheless achieved substantial support, they would find the issuance of a bargaining order appropriate since there was a good probability that, had employee choice been allowed to emerge, it would have favored the union. Otherwise, in their view the employer's flagrant and widespread unfair labor practices which denied employees a free election would go unremedied and the employer would have achieved its unlawful objectives.

In *Haddon House,*[204] a Board majority of Members Murphy and Truesdale, with Member Penello concurring, refused, for the reasons expressed in the majority and concurring opinions in *United Dairy, supra,* to adopt the administrative law judge's recommendation of a bargaining order remedy for the employer's unfair labor practices in violation of section 8(a)(3) and (1) where he

[204] *Haddon House Food Products and Flavor Delight,* 242 NLRB No. 180 (Members Murphy and Truesdale; Chairman Fanning and Member Jenkins concurring in part and dissenting in part; Member Penello concurring in part and dissenting in part separately).

found that the union could not demonstrate majority status prior to its demand for recognition and the employer's refusal. Rather, and as in *United Dairy,* they ordered the Respondent to take certain additional remedial action, which they stated was designed to dissipate as much as possible the lingering atmosphere of fear created by Respondent's unlawful conduct and to ensure that if the question of union representation was placed before employees in the future, they would be able to voice a free choice.[205] For the reasons set forth in their separate opinion in *United Dairy,* Chairman Fanning and Member Jenkins dissented from the majority's refusal to grant the bargaining order remedy but agreed with the additional remedial action ordered by the majority. Noting that the employer by its unlawful actions effectively and quickly rid itself of practically all the union supporters, who constituted nearly a majority of the unit, they stated that a greater, more sweeping invasion of employee rights could hardly be achieved, short of firing a majority of the unit. Chairman Fanning and Member Jenkins observed that, if a majority of the unit had supported the union and were fired for that reason, the issue of majority would not have arisen because the union had enjoyed majority support. Thus, they stated that the outrageous and pervasive violations here presented as extreme an example of misconduct (except for violence) as could possibly occur, and that if the *Gissel* principle were not applied here, it would never be applied.

In *Rapid Mfg. Co.,*[206] a Board panel found that the administrative law judge correctly concluded that under *Gissel Packing Co., supra,* the Board may order the employer to recognize and bargain with the union because of the severity and impact of the employer's preelection misconduct. The union had secured authorization cards for a majority of the unit employees and when the employer failed to respond to its request for bargaining, consented to an election, which it lost. The preelection misconduct consisted of numerous violations of section 8(a)(1), including the coercive interrogation of employees; threatening to close the plant, move it, and impose more onerous working conditions if the employees chose the union as their representative; creating the impression of surveillance; and offering and granting employees benefits to induce them to vote against the union. Reason-

[205] Member Murphy disagreed with one aspect of the additional remedies, i.e., insofar as they provided that the union be afforded equal access to nonwork areas of the plant, to bulletin boards, and to address employees.

[206] 239 NLRB No. 62 (Chairman Fanning and Members Jenkins and Murphy).

ing that the employer's unfair labor practices were serious in nature, the administrative law judge had concluded that its refusal to recognize and bargain with the union violated section 8(a)(5) and (1) and, after applying the *Gissel* test, he recommended that the election be set aside and that the employer be ordered to recognize and bargain with the union. While agreeing that a bargaining order should issue, the panel noted, however, that the administrative law judge's conclusion "was based exclusively on the Respondent's threat to close the plant if the Union won the election." The panel deemed it appropriate to base the Order on all the employer's actions which violated section 7 rights.

In evaluating the employer's conduct, the panel applied the standard enunciated by the Supreme Court in *Gissel* to determine whether the employer's conduct had "the tendency to undermine [the union's] majority strength" and to "impede the election processes" [207] and held that the Respondent's conduct did have that tendency. The panel then noted that under *Gissel* it must also determine whether "the possibility of erasing the effects of past practices and of ensuring . . . a fair rerun . . . by the use of traditional remedies, though present, is slight and [whether] employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." [208] The panel also observed that *Gissel* stated emphatically that if the Board's answer was in the affirmative, a bargaining order "should issue." [209] After balancing all of the competing considerations outlined above, and including the Board's stated preference for relying on the results of its own elections rather than on cards, the panel was convinced that the possibility of conducting a fair and meaningful rerun election was slight at best, and that employee sentiment, once expressed through authorization cards, would, on balance, be far better protected by a bargaining order than by any possible combination of the Board's traditional remedies. Accordingly, the panel approved and adopted the administrative law judge's recommended Order requiring the employer to recognize and bargain with the union.

[207] Quoting 395 U.S. at 614
[208] Quoting 395 U.S. at 614–615.
[209] Quoting 395 U.S. at 615

3. Corporatewide Remedies

Two cases during the report year presented the Board with the issue of whether its standard remedies were sufficient to remedy fully an employer's repetitive and flagrant violations of the Act. In *Florida Steel Corp.*,[210] the Board panel noted that the employer had a history of engaging in repetitive and flagrant violations of of the Act, and, therefore, decided to grant the union's request for extraordinary remedies in order to fully remedy the employer's rejection of the principles of collective bargaining as evidenced by its patterns of unlawful conduct. After reviewing the numerous cases involving the employer, the Board stated that it was clear that the employer had used unlawful means to oppose employee organizational activity at four of its plants, and having failed in its efforts to stifle employee free choice at the Croft and Indiantown plants where the union won elections, the employer made the union's victory a hollow one by refusing to bargain. Stating that the additional violation found in this case was yet another step in what could only be characterized as a corporate campaign to chill employee organizational activity throughout its facilities through unlawful conduct, the panel found that it was essential to grant the union's request for extraordinary remedies in order to counteract the effects of "this campaign of lawlessness." Accordingly, the Board ordered that, in addition to its standard remedies for the violation found, the employer was to read and post the remedial notice in each of its plants, include it in appropriate company publications, and mail it to each and every employee throughout its corporate facilities. Additionally, because of the employer's history of interference with employee rights during organizational campaigns and even after the employees had selected a union to represent them, the panel ordered the employer to (1) afford the union the right, at any of the employer's plants, if a Board election was scheduled within the next 2 years in which the union was a participant, to deliver a 30-minute speech to employees on working time; and (2) for 2 years after entry of the Board's order, afford equal time for the union to respond to any address made by the employer to employees on the question of union representation. The panel concluded that these remedies would reassure the employer's employees at all plants that, should they choose union representation, their choice

[210] 242 NLRB No. 195 (Chairman Fanning and Members Murphy and Truesdale).

would not be frustrated due to the employer's unlawful rejection of the principles of collective bargaining.[211]

In *Florida Steel Corp.*[212] a different Board panel ordered the Respondent to take again the same remedial action as was ordered in the *Florida Steel* case discussed above. The panel noted that this case was a continuation of the "rejection of the principles of collective bargaining" found in the previous case, and concluded that extra remedial relief was necessitated by the employer's proclivity to disregard the statutory rights of its employees and their chosen bargaining representative. Also, in view of the employer's proclivity to violate the Act, the panel included a broad "any other manner" cease-and-desist order rather than the narrow "like or related" order recommended by the administrative law judge.

4. Litigation and Bargaining Expenses

In *J. P. Stevens & Co.*,[213] a unanimous four-member Board adopted the administrative law judge's recommendation that the union be required to reimburse the union and the Board for their litigation expenses, and reimburse the union for its expenses in attempting to negotiate a collective-bargaining agreement. The administrative law judge, after analyzing the Board's First and Second Supplemental Decisions in *Heck's*,[214] and its Supplemental Decision in *Tiidee Products*,[215] stated that there were two persuasive arguments for the award of litigation costs in this case. First, in his view, the defenses raised by the union did not constitute "debatable" issues within the contemplation of *Tiidee*, and, unlike *Heck's*, there were no significant factual controversies here. Secondly, he stated that the Board's adherence in *Heck's* to the "general and well-established principle that litigation expenses are ordinarily not recoverable" indicated that the Board was inclined to apply to its remedies in this area the distillate

[211] Member Murphy did not agree with her colleagues that equal access to the employees on company time was an appropriate remedy for the Board to provide here. In her view, by doing so her colleagues were forcing the employer not only to support the union's campaign, but also were raising serious questions as to the validity of any election by limiting equal access only to the union.

The majority noted, however, that their colleague had agreed to give equal access to the employer's bulletin boards on a companywide basis in an earlier case (*Florida Steel Corp.*, 233 NLRB 74, fn. 4 (1977)), and that they did not need to consider at this time the hypothetical situation of limiting access to the union during an election in which another union sought to participate.

[212] 244 NLRB No. 61 (Chairman Fanning and Members Jenkins and Truesdale).

[213] 239 NLRB No. 95 (Chairman Fanning and Members Jenkins, Murphy, and Truesdale).

[214] 191 NLRB 886 (1971) (*Heck's II*), and 215 NLRB 765 (1974) (*Heck's III*).

[215] 194 NLRB 1234 (1972).

of judicial experience, and that it was well settled that courts may award litigation costs against disputants who have engaged in deliberate misconduct,[216] reflecting a "willful and persistent 'defiance of the law.' "[217] Since there was no doubt that the employer had, with "bad faith," displayed the requisite "willful and persistent defiance of the law"; since that conduct fell within established exceptions to the counsel fee rule in American jurisprudence; and since the Board indicated in *Heck's III* that it would consider the adoption of new standards in this area based on "the degree of repetition of misconduct," the administrative law judge recommended that the employer be required to reimburse the Board and the union for their expenses incurred in the investigation, preparation, presentation, and conduct of this case. With regard to his recommendation that the employer be ordered to reimburse the union for its expenses incurred in attempting to negotiate a collective-bargaining agreement, he found precedent for such an award in *M.F.A. Milling Co.*,[218] where the Board ordered reimbursement for wages lost by employee members of the union negotiating committee. He reasoned that, by logical extension of that case, any dues payments made by union members here were sacrificed when their negotiators sat at the bargaining table for many months without the slightest chance of seeing a return on the money of the employees. In any event, the administrative law judge stated, the moneys wasted by the union in bargaining were a direct and proximate product of the employer's willful defiance of its statutory obligation. Accordingly, as these losses flowed from the default, he concluded that compensation therefor would simply restore the *status quo ante*.

5. Other Provisions

In *Abilities & Goodwill*,[219] the Board majority overruled precedent and announced that, henceforth, for purposes of computing the employer's backpay liability, they would treat unlawfully discharged strikers in the same manner that they treat other employees who were discriminatorily discharged. Thus, they would no longer require discriminatorily discharged strikers to request

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[216] Citing *Hall* v *Cole*, 412 U.S. 1, 5 (1973); *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 258 (1975), and cases cited therein.

[217] Citing *Vaughan* v. *Atkinson*, 369 U.S. 527, 531 (1962), and *Brewer* v. *School Board of the City of Norfolk*, 456 F.2d 943, 949 (4th Cir. 1972).

[218] 170 NLRB 1079 (1968).

[219] 241 NLRB No. 5 (Chairman Fanning and Members Jenkins and Truesdale; Members Penello and Murphy dissenting).

reinstatement in order to activate the employer's backpay obligation. Framing the issue as whether an unlawfully discharged striker, unlike an unlawfully discharged employee, must unconditionally request reinstatement in order to trigger an employer's backpay obligation, the Board majority believed that the equities and policies of the Act compelled a negative answer. They reasoned that a discriminatorily discharged employee was entitled to reinstatement and backpay from the date of the employer's unlawful action and that there was no requirement that such employee first request reinstatement, as any such request would in all likelihood fall on deaf ears and the Board did not require a person to perform a futile act. This rationale was, in their opinion, equally applicable to employees who were unlawfully discharged while engaged in a lawful strike, as a discharged striker was a discharged employee and was entitled to be treated as such, for there was nothing peculiar to a strike which justifies dissimilar treatment. Accordingly, they held that a discharged striker was entitled to backpay from the date of discharge until the date he or she was offered reinstatement.

The majority noted that, presumably, the dissent's position was founded on the premise that backpay awards were generally inappropriate for periods during which employees voluntarily withheld their labor, with which premise they agreed. Thus, they stated, when discharged strikers withheld their services after the date of the unlawful discharge, one could not really be certain whether their continuing refusal to work was voluntary, i.e., as a result of the strike, or whether the reason for not making application for reinstatement was that the employer, by discharging the employees, had unmistakenly impressed on them the futility of making such an application. However, because the uncertainty was caused by the employer's unlawful conduct, the majority would not indulge in the presumption that the discharge itself played no part in keeping the employees out of work. Rather, it seemed to them more equitable to resolve the ambiguity against the wrongdoer and presume, absent indications to the contrary, that the discharged strikers would have made the necessary application were it not for the fact that the discharge itself seemingly made application a futility. Additionally, the majority noted that even if the employer failed to offer reinstatement it remained free to seek to reduce backpay by presenting evidence that the employees would have refused such an offer if made, or that they failed to make a diligent effort to mitigate the backpay obligation by seeking interim employment elsewhere.

In their dissent, Members Penello and Murphy reasoned that the use of an eligibility formula for unlawfully discharged strikers, different from that used for unlawfully discharged employees, is wholly equitable, consistent with the purposes of the Act, and illustrative of the Board's judicially approved propensity for tailoring make-whole relief to fit the specific circumstances of an unfair labor practice. This difference, in their view, recognizes the fundamental economic distinction between working and striking employees at the instant disciplinary action was taken against them. Thus, they stated, employees who were on strike at the time of their discriminatory discharge were voluntarily withholding services from their employer and were not entitled to compensation. In their opinion, any subsequent loss of wages could not *conclusively* be attributed to the employee's discharge until the employees indicated their willingness to abandon the strike. The dissenters concluded that they could not subscribe to the majority's "ill-considered" overruling of the Board's longstanding backpay eligibility formula for unlawfully discharged striking employees. In their view, that formula was more practical, more logical, and more consonant with the Board's make-whole remedial purpose than the formula adopted by the majority. Thus, they stated that they would continue to adhere to the view that employees who were unlawfully discharged while on strike must indicate abandonment of the strike and a willingness to return to work, unless it would be futile to make such a showing, in order to establish their eligibility for backpay.

On remand from a circuit court [220] in *Drug Package Co.*,[221] the unanimous Board concluded that under the "particular and unusual set of facts" present, it would order the employer to reinstate certain economic strikers. Cautioning that the facts of this case were viewed as *sui generis* and that they were not modifying the existing rights to reinstatement of economic strikers as set forth in *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*,[222] the Board found that in this particular factual situation the relationship of a reinstatement order to furthering the purposes of the Act was clear. It noted that in denying enforcement of the 8(a)(5) provisions of the Board's order to the extent that it required that the strikers be reinstated as unfair labor practice strikers, the court considered it inequitable for the Board to apply its deci-

[220] *Drug Package* v *N L R B*, 570 F 2d 1340 (8th Cir. 1978), enfg. in part 228 NLRB 108 (1977).

[221] 241 NLRB No 44 (Chairman Fanning and Members Jenkins, Penello, Murphy, and Truesdale).

[222] 304 U S 333 (1938).

sion in *Trading Port*,[223] which had not issued as of the time of the employer's conduct, rather than to apply the then controlling law of *Steel-Fab*, 212 NLRB 363 (1974), under which the employer was aware of the possibility that the Board would find an 8(a)(1) violation and order a prospective bargaining order as relief. However, the court left to the Board "the question whether the Company should be required to reinstate the strikers upon application, without backpay, in order to make the bargaining order a full and complete remedy."

The Board noted in this case that the relationship of a reinstatement order to furthering the purposes of the Act was clear. Here, they observed that, upon the advent of the union, the employer engaged in extensive conduct which tended to thwart employee organizational rights so that a bargaining order, based on authorization cards, had been adopted as a suitable remedy for the unfair labor practices. They stated that the purpose of the bargaining order was to prevent the employer from benefiting from its unlawful conduct and to reestablish, as nearly as possible, conditions as they had existed before the employer's antiunion campaign, and that the bargaining order was unlikely to achieve this purpose without the related reinstatement order. Thus, in the Board's view the results which customarily might be anticipated from a bargaining order remedy would not ensue in this case because of the changed composition of the bargaining unit. In these circumstances, it noted that most of the union adherents participated in the strike and were no longer employed by the employer, and that the unit was made up substantially of strike replacements: employees who rejected the Union during its organizational campaign, and employees who originally signed authorization cards for the Union, but did not go on strike. The Board concluded that without an order reinstating the strikers, the Union's preunfair labor practice majority support could not be approximated and meaningful bargaining ensued.

In ordering this "admittedly unusual remedy," the Board stressed that it had been particularly mindful of the court's own admonition on remand that the bargaining order here "could well be a hollow remedy if the employees represented by the Union are the replacements hired during the strike, not the employees who originally supported the Union." On balance, the Board believed that while the court concluded that the employer could rely on *Steel-Fab* in its original refusal to rehire the

[223] 219 NLRB 298 (1975).
[224] 212 NLRB 363 (1974).

strikers, those employees struck here under pre-*Steel-Fab* law should not be entirely penalized by changes in Board decisional law. Accordingly it concluded, after considering the shift of Board law from *United Packing Co. of Iowa* [225] to *Steel-Fab* to *Trading Port,* that the burden placed on the employer was not an unfair one and accommodated the interests of all parties involved. The Board further concluded, consistent with the court's suggestion, that it would not include with the reinstatement order a backpay for the period before this order when the strikers, as permanently replaced economic strikers, were not entitled to reinstatement.

[225] 187 NLRB 878 (1971).

VII

Supreme Court Litigation

During the fiscal year 1979, the Supreme Court decided four cases in which the Board was a party. The Board also participated as *amicus curiae* in one other case.

A. Union's Right To Receive Test Batteries, Answer Sheets, and Individual Scores of Employees for Use in Grievance Proceedings

Detroit Edison Co.[1] involved the question whether the Board abused its remedial authority by ordering an employer to turn over directly to the union representing its employees test questions and answer sheets from psychological aptitude tests administered to applicants for promotion to a more complex job, and by ordering the employer to give to the union the employees' test scores. In this case, the union filed grievances on behalf of employees who had not been considered for promotion because they had not scored above the employer-established cutoff score on the aptitude tests. Contending that the tests may have been unfair, the union asked the employer for the test battery, the answer sheets, and the scores linked to names of those who took the tests. The employer refused to provide the tests and answer sheets, contending that complete confidentiality was necessary to protect the integrity of the tests, and further refused to release individual employee scores unless the affected employees agreed to such release. The Board, applying the principle that section 8(a)(5) requires employers to provide relevant information needed by a union for the proper performance of its duties,[2] found the employer's refusal violative of the Act. It ordered the employer to turn the requested materials over to the union, with the proviso that the union not "copy the tests, or otherwise use

[1] *Detroit Edison Co.* v. *N.L.R.B.*, 440 U.S. 301, reversing 560 F.2d 722 (6th Cir. 1977), enfg. 218 NLRB 1024 (1975).

[2] See *N.L.R.B.* v *Acme Industrial Co.*, 385 U.S. 432 (1967).

them, for the purpose of disclosing the tests or the questions to employees who have in the past, or who may in the future take these tests, or to anyone . . . who may advise the employees of the contents of the tests," and that the union return all copies of the tests to the employer following adjudication of the grievances.[3]

The Supreme Court[4] held that the Board's remedy did "not adequately protect the security of the tests," since it was not clear that the contempt sanction or the possibility of unfair labor practice proceedings would be an effective deterrent or remedy against the union if it ignored the restrictions of the Board's order. 440 U.S. at 315. Moreover, the Court declared that the union "clearly would not be accountable in either contempt or unfair labor practice proceedings for the most realistic vice inherent in the Board's remedy—the danger of inadvertent leaks." *Id.* at 316. Thus, the Court held "that the Board abused its discretion in ordering the Company to turn over the test battery and answer sheets directly to the union." *Id.* at 316–317.

Concerning the linkage of test scores with employee names, the Court further ruled that, in the circumstances of this case, the employer's offer to release such information only upon approval of the individual test-takers "satisfied its statutory obligations under § 8(a)(5)." For, the information was extremely sensitive and nothing in the record suggested that the employer's promise of confidentiality made to the employees prior to the bringing of the grievance was given "in order to further parochial concerns or to frustrate subsequent union attempts to process employee grievances." *Id.* at 317–319.

The dissenting Justices concluded that the Board properly balanced the conflicting needs of the union and the employer, stating that the "Court is ill-equipped to fault the Board on a matter so plainly summoning the Board's keen familiarity with industrial behavior." *Id.* at 324.

B. Coverage of the Act Over Parochial Schools

In *Catholic Bishop of Chicago*,[5] the Supreme Court[6] ruled that the Board had no power to require church-operated high schools

[3] The Board rejected the proposal of the administrative law judge (accepted by the employer) that the test questions and the answer sheets be given to a union-selected professional psychologist, who would maintain custody of the materials.

[4] Justice Stewart delivered the opinion of the Court Justice White, joined by Justices Brennan and Marshall, dissented Justice Stevens dissented in part and concurred in part

[5] *N L R B* v. *Catholic Bishop of Chicago*, 440 U S. 490, affg on other grounds 559 F.2d 1112 (7th Cir. 1978), denying enforcement to 224 NLRB 1221 (1976) and 224 NLRB 1226 (1976).

[6] Chief Justice Burger delivered the opinion of the Court. Justice Brennan, joined by Justices White, Marshall, and Blackmun, dissented

to bargain with a union representing the schools' lay teachers. The Court, concluding that assertion of Board jurisdiction over such teachers would raise "serious First Amendment questions" (440 U.S. at 500), looked to see whether there was a "clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act." *Id.* at 504. Finding no such "clear expression," the Court declined "to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." *Id.* at 507.

The dissenting Justices declared that the Court's construction was "plainly wrong in light of the Act's language, its legislative history, and [the] Court's precedents." In their view, therefore, a proper disposition of the case required reaching the constitutional issue.

C. In-Plant Cafeteria and Vending Machine Prices as Mandatory Subjects for Bargaining

Ford Motor Co.[7] presented the question whether in-plant cafeteria and vending machine prices are mandatory subjects of bargaining. The employer had for many years provided cafeteria and vending machine services for its employees through an independent caterer; the employer retained the right, under its agreement with the caterer, to review and approve the quality, quantity, and price of the food served. Although the employer and the union had negotiated about some aspects of the food services, and their collective-bargaining agreements covered those aspects, the employer refused to bargain over prices. The Board found the employer's refusal violative of section 8(a)(5) of the Act, reaffirming its position that cafeteria and vending machine prices are mandatory subjects of bargaining. In so doing, the Board declined to follow previous contrary decisions of the First, Fourth, and Seventh Circuits.[8]

The Supreme Court[9] unanimously upheld the enforcement of the Board's order. Finding that the legislative history of the 1947 Taft-Hartley amendments shows "that Congress made a con-

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[7] *Ford Motor Co. (Chicago Stamping Plant)* v. *N.L.R.B.*, 441 U.S. 488, affg. 571 F.2d 993 (7th Cir. 1978), enfg. 230 NLRB 716 (1977).

[8] *Package Machinery Co.* v. *N.L.R.B.*, 457 F.2d 936 (1st Cir. 1972); *Westinghouse Electric Corp.* v. *N.L.R.B.*, 387 F.2d 542 (4th Cir. 1967), *McCall Corp.* v. *N.L.R.B.*, 432 F.2d 187 (4th Cir. 1970), *N.L.R.B.* v. *Ladish Co.*, 538 F.2d 1267 (7th Cir. 1976).

[9] Justice White delivered the opinion of the Court. Justices Powell and Blackmun filed concurring opinions.

scious decision to continue its delegation to the Board of the primary responsibility of marking out the scope of the statutory language and of the statutory duty to bargain," the Court concluded that, "[w]ith all due respect to the Courts of Appeals that have held otherwise, . . . the Board's consistent view that in-plant food prices and services are mandatory bargaining subjects is not an unreasonable or unprincipled construction of the statute and . . . it should be accepted and enforced." 441 U.S. at 497. The Court explained:

> . . . that the availability of food during working hours and the conditions under which it is to be consumed are matters of deep concern to workers, and one need not strain to consider them to be among those "conditions" of employment that should be subject to the mutual duty to bargain. By the same token, where the employer has chosen, apparently in his own interest, to make available a system of in-plant feeding facilities for his employees, the prices at which food is offered and other aspects of this service may reasonably be considered among those subjects about which management and union must bargain. [*Id.* at 498.]

The Court further noted that the Board's determination "serve[d] the ends of the National Labor Relations Act," since "substantial disputes can arise over the pricing of in-plant supplied food and beverages. National labor policy contemplates that areas of common dispute between employers and employees be funneled into collective bargaining." *Id.* at 499.

D. Hospital No-Solicitation Rules

Baptist Hospital [10] involved the validity of a hospital rule which prohibited employee solicitation at all times "in any area of the Hospital which is accessible to or utilized by the public," including lobbies, gift shop, cafeteria, and entrances on the first floor, as well as the corridors, sitting rooms, and public restrooms on the other floors. The Board found this rule to be violative of section 8(a)(1), concluding that the evidence presented at the hearing by the hospital was insufficient to rebut the presumption, first announced in *St. John's Hospital & School of Nursing,*[11]

[10] *N.L.R.B.* v *Baptist Hospital,* 99 S.Ct. 2598, affg in part and remanding in part 576 F.2d 107 (6th Cir. 1978), denying enforcement in part and remanding in part 223 NLRB 344 (1976).

[11] 222 NLRB 1150 (1976), enforcement granted in part and denied in part 557 F.2d 1368 (10th Cir. 1977).

that a ban on employee solicitation time in nonimmediate patient care areas is invalid absent a showing that such activity is likely to disrupt patient care or disturb patients. The Sixth Circuit denied enforcement of the Board's order,[12] holding that the hospital had presented sufficient evidence of the ill effects of solicitation on patient care to justify the broad prohibition of solicitation.

The Supreme Court, following its earlier decision in *Beth Israel Hospital* v. *N.L.R.B.*, 437 U.S. 483 (1978),[13] unanimously reversed the Sixth Circuit's holding insofar as it related to application of the no-solicitation rule to the first floor areas, but sustained it with respect to the corridors and sitting rooms above the first floor.[14] The Court found that, with regard to the first floor areas of the hospital, the Board's holding "that there was no demonstrated likelihood that solicitation . . . would disrupt patient care or disturb patients . . . has substantial evidentiary support in the record." 99 S.Ct. at 2604. On the other hand, the Court agreed with the court of appeals that "with respect to the corridors and sitting rooms on patients' floors . . . there was no substantial evidence of record to support the Board's holding that the Hospital had failed to justify its ban on solicitation in these areas." *Id.* at 2605.

The Court thus rejected the court of appeals' underlying view "that the Board's presumption [of invalidity of no-solicitation rules in nonimmediate patient care areas] is irrational in all respects," explaining that "experience in cases such as *Beth Israel* and the present one makes clear that solicitation in at least some of the public areas of hospitals often will not adversely affect patient care or disturb patients." 99 S.Ct. at 2606. However, the Court went on to note that "[t]he evidence of record in this case and other similar cases does . . . cast serious doubt on a presumption as to hospitals so sweeping that it embraces solicitations in the corridors and sitting rooms on floors occupied by patients." *Ibid.*[15]

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[12] 576 F 2d 107 (6th Cir 1978).

[13] In *Beth Israel*, the Court sustained the validity of the Board's *St John's* presumption as applied to a hospital cafeteria used primarily by employees.

[14] Justice Powell delivered the opinion of the Court Justices Blackmun, Chief Justice Burger, and Justice Brennan filed concurring opinions.

[15] Subsequently, the Court granted the hospital's petition for certiorari in *Natl. Jewish Hospital & Research Center* v. *N L.R B*, 593 F.2d 911 (10th Cir.), enfg. 226 NLRB 1241 (1976), and remanding the case for reconsideration in light of *Baptist Hospital* In *Natl. Jewish*, the court of appeals, relying on *Beth Israel*, *supra*, had enforced a Board order declaring unlawful a broad no-solicitation rule on the ground that the hospital had not submitted sufficient evidence to rebut the *St. John's* presumption of invalidity.

E. State Authority To Grant Unemployment Compensation Benefits to Strikers

New York Telephone [16] presented the question whether national labor policy preempts the authority of States to grant unemployment benefits to strikers. Under New York law, strikers are entitled to unemployment benefits after an 8-week waiting period. In this case, the employer was confronted with a 7-month strike, during the last 5 months of which its striking employees received state benefits financed partly by employer contributions. The employer filed suit in Federal district court requesting injunctive and monetary relief, on the ground that the state law authorizing payment of benefits to strikers conflicted with Federal labor law. The district court granted the requested relief, holding that, since the existence of benefits is a substantial factor in employees' decisions to remain on strike, the state law conflicted "with the policy of free collective bargaining established in the federal laws and is therefore invalid under the Supremacy Clause." The Second Circuit reversed, finding that, while the policies of the National Labor Relations Act (NLRA) and the Social Security Act (SSA) (which sets Federal standards for state unemployment compensation programs) conflict, the legislative histories of the two statutes indicated that Congress had decided to tolerate the conflict.

The Supreme Court [17] affirmed the Second Circuit's dismissal of the employer's suit, agreeing with the basic position taken by the Board as *amicus curiae*. Although the Court majority split on the question whether general preemption principles were applicable here,[18] the six Justices comprising the majority all agreed that the legislative histories of the NLRB and the SSA taken together demonstrated that Congress intended to allow the States to decide for themselves whether to grant unemployment benefits to strikers. 99 S.Ct. at 1341, 1344, 1347. Thus, Justice Stevens

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[16] *New York Telephone Co* v *New York State Department of Labor*, 440 U.S. 519 (1979), affg. 566 F 2d 388 (2d Cir. 1977), reversing 434 F Supp. 810 (D C N Y 1977).

[17] Justice Stevens filed an opinion for the Court, joined by Justices White and Rehnquist. Justices Brennan and Blackmun filed concurring opinions. Justice Powell, joined by Chief Justice Burger and Justice Stewart, dissented.

[18] Justice Stevens, joined by Justices White and Rehnquist, found that the *Garmon* preemption doctrine (see *Diego Bldg. Trades Council* v *Garmon*, 359 U S. 236 (1959)) was inapplicable because the New York statute should be treated "with the same deference that we have afforded analogous state laws of general applicability that protect interests 'deeply rooted in local feeling and responsibility.'" 440 U S. at 541. On the other hand, Justice Brennan was unwilling to base his conclusion on such an analysis (*id* at 546–547), and Justice Blackmun, joined by Justice Marshall, specifically rejected that analysis in the situation here (*id.* at 547–549).

noted that New York granted such benefits prior to the passage of the NLRA and SSA in 1935; the NLRA and SSA were considered simultaneously and were both sponsored by Senator Wagner of New York; the Senate report on the SSA favorably cited the New York system as one that would qualify for Federal funds under SSA; and proposals, both in 1935 and thereafter, to amend the SSA to prohibit States from authorizing benefits to strikers were unsuccessful (*id* at 540–545). Justice Stevens concluded (*id.* at 546):

> In an area in which Congress had decided to tolerate a substantial measure of diversity, the fact that the implementation of this general state policy affects the relative strength of the antagonists in a bargaining dispute is not a sufficient reason for concluding that Congress intended to pre-empt that exercise of state power.

VIII

Enforcement Litigation

A. Board Jurisdiction

1. Employees Under the Act

Two cases dealt with the application of the Act to two separate categories of employees—illegal aliens in one case and, in the other, nonprofit hospital workers who went on strike before the 1974 enactment of the health care amendments to the Act. In the first,[1] the Ninth Circuit joined the Seventh [2] in approving the Board's long-established interpretation of the definition of "employee" in section 2(3) of the Act to include illegal aliens. It noted that, although the Immigration and Naturalization Act makes it a felony to "harbor" an alien, it provides that employment shall not constitute harboring. The court reasoned that to hold the NLRA inapplicable to illegal aliens would not only encourage the hiring of such aliens to circumvent the labor laws but also provide more work for such aliens and encourage violations of the immigration laws. Accordingly, the court found the Board's interpretation "best furthers the policies underlying the immigration laws." [3]

In the second case,[4] the court held that hospital employees who struck before the effective date of the 1974 health care amendments to the Act and were actually discharged before that date could not be included within the definition of "employee" in section 2(3) of the Act for the purpose of reinstatement after the amendments took effect. The court concluded that Board and court precedents and the policies of the Act and the amendments "establish that a discharge which does not violate the Act when effected, terminates the employee status of a striker, as well as

[1] *N L R B.* v *Apollo Tire Co*, 604 F 2d 1180.

[2] *N L R B* v. *Sure-Tan*, 583 F.2d 355.

[3] The court also held that reinstatement of the employees here could not be held to conflict with the California statute forbidding the employment of such aliens in view of the uncertain status of the state law because of its possible conflict with the Federal immigration statute.

[4] *Woodlawn Hospital* v. *N L R B.*, 596 F.2d 1330 (7th Cir.).

that of any other employee." Applying the reasoning of *Fansteel*,[5] the court held that, absent a specific statutory provision, employees who engage in conduct unprotected by the Act do not automatically lose their employee status and the concomitant protection of the Act. Rather, they lose this status and protection only if the employer actually discharges them for such conduct. As to the applicability of the prestrike notice requirements for strikes at health care institutions of the Act, as amended, the court deferred to the Board's conclusion that the notice requirements were wholly prospective and applied only to strikes begun after the effective date of the amendments. The court also accepted the Board's application to the undischarged preamendment strikers of the *Fleetwood*[6] presumption that a refusal to reinstate strikers violates the Act unless the employer can show legitimate and substantial business justifications.

2. Jurisdictional Standards

In *Tropicana*[7] the Board established a policy for dealing with employers who decline to provide information with respect to the effect of their operations on interstate commerce. Under this policy the Board does not apply its self-imposed jurisdictional standards; rather, it requires the General Counsel to establish only that the respondent is engaged in interstate commerce to a degree sufficient to establish statutory jurisdiction. A recent case[8] raised a novel contention with respect to the application of this policy. Alexander, who operated an X-rated motion picture theater, declined to provide commerce information, because it might be used in a potential prosecution for interstate transportation of obscene matter.[9] In defending against the unfair labor practice complaint, the employer's sole contention was that applying the *Tropicana* policy in these circumstances would inflict a substantial penalty because he chose to exercise his fifth amendment rights. In rejecting this argument, the Fifth Circuit noted that the Board asserted jurisdiction pursuant to an established policy which is totally unrelated to the fifth amendment privilege against compulsory self-incrimination; rather the policy was adopted to conserve Board resources and to avoid delay. Accord-

[5] *N L R B* v. *Fansteel Corp*, 306 U.S. 240 (1939).
[6] *N L R B* v. *Fleetwood Trailer Co*, 389 U S. 375 (1967).
[7] *Tropicana Products*, 122 NLRB 121 (1958).
[8] *N L.R.B.* v. *Edward Alexander, d/b/a Strand Theatre, K.I M.Y.B A Corp*, 595 F.2d 454 (5th Cir).
[9] See 18 U.S C. §§ 1462 and 1465.

ingly, the Board's applying this uniform policy, while avoiding any inferences drawn from the exercise of this privilege, did not violate the employer's constitutional rights.

B. Board Procedure

1. Settlements

Two cases in the courts of appeals this year concern the effect of the withdrawal of unfair labor practice charges with administrative approval. In *Gulf States Mfrs.* v. *N.L.R.B.*,[10] the Fifth Circuit, in banc,[11] held that the regional director had, in effect, approved a settlement stipulation under which the employer and the union agreed that the employer's objections to the election and the union's unfair labor practice charges against the employer would be withdrawn "with prejudice," that the union would be certified as the bargaining agent and good-faith bargaining would commence, and that the stipulation would serve as a joint request to the regional director for withdrawal of the objections and charges "with prejudice." Although the regional director had not signed the settlement stipulation, he had notified the parties that he had "approved the Withdrawal Requests submitted in this matter," after the settlement stipulation had been filed with him.

The court recognized that the parties' agreement, the joint request for withdrawal with prejudice, and the regional director's response, taken together, were something less than an informal administratively approved settlement. However, the court held that they were "closer to that than anything else." [12] The court pointed out that the regional director could have told the parties to proceed with an informal settlement, in accordance with the Board's procedures,[13] or he could have declined to permit the withdrawal of objections and charges so long as the stipulation provided that the withdrawals would be "with prejudice." Since the regional director did neither of these things but notified the parties, without reservation, that he had approved their "Withdrawal Requests," the courts held that he had acquiesced in the "with prejudice" provision of their agreement.

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[10] 598 F.2d 896

[11] Judges Fay and Gee concurring specially, Judge Clark concurring specially in part and dissenting in part, and Judges Vance and Rubin dissenting

[12] 598 F.2d at 900.

[13] 29 CFR Sec. 101.7.

The settlement agreement, of course, did not bar the regional director from issuing a complaint when the union filed new charges against the employer or from proceeding on the old charges if the new unfair labor practices justified setting aside the settlement agreement. But the court found that substantial evidence did not support the complaint allegation that the employer had failed to bargain in good faith with the union. Although the court affirmed the Board's findings that the employer had engaged in certain other postsettlement unfair labor practices, it held that these practices did not defeat the purpose of the settlement agreement and did not frustrate, impede, or have any substantial relationship to it. In these circumstances, the court held that the Board could not set aside the settlement agreement and resurrect the presettlement, previously withdrawn charges.

In *N.L.R.B.* v. *All Brand Printing Corp.*,[14] the Second Circuit also held that the agency, in effect, had approved a settlement agreement of the parties by approving the withdrawal of an unfair labor practice charge. The union had agreed with an employer in Chapter 11 bankruptcy proceedings to withdraw its 8(a)(5) charge before the Board in return for the employer's promise that it would commence bargaining with the union 60 days after an arrangement with the employer's creditors was confirmed by the bankruptcy court. Pursuant to the agreement, the union's attorney appeared at the unfair labor practice hearing and requested permission to withdraw the union's charge. Counsel for the General Counsel stated that the General Counsel approved the withdrawal request and that there was no objection to the complaint's being dismissed. After hearing the terms of the settlement agreement, the administrative law judge approved the union's request to withdraw its charge and dismissed the complaint.

The union filed new charges 4 years later, and a complaint issued alleging that the employer had refused to bargain in good faith, following the bankruptcy court's confirmation of an arrangement with the employer's creditors. The employer sought to defend on the ground that it had a good-faith doubt of the union's majority. But the Board held that the union's majority status could not be challenged until there had been a reasonable period of bargaining in accordance with the settlement agreement. In upholding the Board's position, the Second Circuit rejected the employer's contention that no bargaining obligation was imposed by the settlement agreement because it had not been

[14] 594 F 2d 926.

approved by the Board, pursuant to its formal settlement procedures.[15] Pointing to the role of the administrative law judge and representatives of the General Counsel in approving withdrawal of the charges and dismissal of the complaint, the court concluded that the formalities and extent of agency involvement here were sufficient to justify giving the settlement agreement binding effect and that the settlement manifested an administrative determination that some remedial action was necessary to safeguard the public interest. Although agreeing with the Seventh Circuit [16] that such settlements should be subjected to closer scrutiny than formal Board-approved settlements, to determine the intended scope of the bargaining provision, the court found that the employer's promise to bargain was the *quid pro quo* for the union's withdrawal of its charge and that the parties intended the duty to bargain contained in the agreement to continue for a reasonable period, in conformity with Board standards, even if the union lost its majority support. Finally, the court held that the length of time between the union's certification and the commencement of the employer's bargaining obligation under the settlement agreement did not make the bargaining provision unenforceable as contrary to public policy and that the Board's 3-year contract-bar rule was inapplicable to the settlement agreement.

Two cases decided this year involve formal Board settlements. In one,[17] the Eighth Circuit denied enforcement of a Board consent order because, in its view, the stipulation was tainted by allegations that the respondent employer's attorney had been bypassed in securing the employer's agreement to the stipulation and the Board failed to present adequate evidence to remove that taint. In another case,[18] the Fourth Circuit held that a respondent in an unfair labor practice case, who joins the General Counsel in executing a formal settlement stipulation to avoid litigation of the charge, has no right to withdraw unilaterally from that stipulation prior to its approval by the Board. The court further rejected the employer's defenses that it had suffered a hardship caused by undue delay in Board approval of the stipulation and that in a subsequent case the Board was litigating issues supposedly settled by the stipulation. Holding that there was no undue delay or hardship to the employer justifying withdrawal from the stipulation and that the employer's objections to the scope of

[15] 29 CFR Sec 101.9(b)(1)
[16] *N.L.R.B.* v. *Vantran Electric Corp.*, 580 F.2d 921, 924–925 (1978).
[17] *N.L.R.B.* v *Autotronics*, 596 F 2d 322.
[18] *George Banta Co* v. *N.L.R.B.*, 604 F 2d 830.

the subsequent litigation should be raised in that proceeding, the court enforced the Board's order.

2. Admissibility of Evidence

In *Carpenter Sprinkler Corp.* v. *N.L.R.B.*,[19] the Second Circuit affirmed the Board's ruling that a surreptitious tape recording of a telephone conversation between a union representative and a company president was inadmissible in Board proceedings. The company president had recorded the conversation without the union's knowledge. After the union representative testified at the hearing to one version of the conversation, the company offered the tape recording on cross-examination to impeach the witness. The Board, reversing the administrative law judge, found the tape inadmissible for policy reasons, concluding that allowing such evidence would inhibit parties' willingness to express themselves fully and would thus impair the collective-bargaining process. The court observed that, even though such recording might have been admissible in a Federal district court, the Board is not required to observe automatically all district court rules of evidence. The court further observed that labor relations negotiations are a "delicate matter," that the Board had specifically referred to "significant problems" which might result from allowing such tape recordings into evidence, and held that the Board did not abuse its discretion in ruling that secretly recorded conversations were inadmissible in Board proceedings.

C. Representation Issues

1. Alleged Discrimination by Petitioning Union

In *Bell & Howell Co.* v. *N.L.R.B.*,[20] the District of Columbia Circuit approved the Board's policy, first announced in *Handy Andy*,[21] that it would no longer consider allegations of invidious discrimination in membership policies as a reason for refusing to certify a union as collective-bargaining representative. Following the union's election victory in a unit of stationary engineers, Bell & Howell moved to disqualify the union from certification based on allegations that the union discriminated against women in its membership policies. The Board overruled this motion,

[19] 605 F.2d 60.
[20] 598 F.2d 136, cert denied 99 S.Ct. 2885.
[21] 228 NLRB 447 (1977), overruling *Bekins Moving & Storage Co.*, 211 NLRB 138 (1974).

certified the union, and ultimately ordered Bell & Howell to bargain. The court enforced the Board's bargaining order, holding, in disagreement with an earlier decision by the Eighth Circuit,[22] that neither the Act nor the U.S. Constitution requires the Board to deny certification to a union which has engaged in discrimination.

The court agreed that both the purposes of the Act and the policy against invidious discrimination in employment would best be served by litigating issues of union discrimination in duty of fair representation proceedings under section 8(b) of the Act, rather than in the context of a representation proceeding. Denial of certification would frustrate the collective-bargaining rights of the employees in the new bargaining unit who have chosen the union as their representative, would do nothing to compensate the victims of the union's discriminatory behavior elsewhere, and would be an ineffective deterrent for those unions which are able to establish collective-bargaining relationships without resorting to the Board's processes. Permitting employers to litigate allegations of union discrimination would seriously delay certification, contrary to the policies of the Act, even in those cases in which the allegations prove groundless, and would require the Board to substantially duplicate the functions of the Equal Employment Opportunity Commission. In contrast, litigation of these issues in 8(b) unfair labor practice proceedings would neither delay the certification process nor encourage employers to raise the issue as a pretext to avoid or delay collective bargaining. In addition, unfair labor practice proceedings would permit the Board to tailor remedies to make the victims of discrimination whole and would provide an effective sanction even for those unions which establish collective-bargaining relationships without the Board's assistance.

Finally, the court held that the Board's policy of certifying a union without regard to whether the union has engaged in discrimination does not contravene the fifth amendment, because certification carries with it the legally enforceable duty to represent fairly all employees in the bargaining unit without invidious discrimination. Accordingly, since certification actually imposes additional remedies for any discrimination the union might commit in the exercise of its statutory powers as exclusive bargaining representative, the Board's policy cannot be said to either authorize or encourage unions to discriminate in violation of constitutional requirements.

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[22] *N.L.R.B.* v. *Mansion House Center Management Corp.*, 473 F.2d 471 (1973).

2. Health Care Unit Issues

The legislative history of the 1974 amendment to the Act, which extends coverage of the Act to nonprofit hospitals, reveals that Congress expected the Board to prevent undue proliferation of bargaining units at health care facilities. In four cases this past fiscal year, the courts reviewed contentions that the Board was disregarding the congressional admonition against undue proliferation of bargaining units at health care facilities. The Sixth Circuit in *Bay Medical Center* v. *N.L.R.B.*,[23] after noting the Board's policy of including licensed practical nurses in units of technical employees, found that the Board did not disregard the congressional admonition against undue proliferation when it certified a unit of technical employees which did not include licensed practical nurses because a segment of those nurses had a history of separate representation by another labor organization. Then in *N.L.R.B.* v. *Sweetwater Hospital Assn.*,[24] the Sixth Circuit, relying on *Bay Medical,* found that the Board properly weighed the congressional admonition against undue proliferation in certifying a unit of technical employees, including licensed practical nurses, because these employees showed a community of interests separate and distinct from the service and maintenance employees sought to be included by the hospital. The court in dictum noted that the Board's decision would result in two bargaining units for all nonprofessional employees at a health care facility—a service and maintenance unit and a technical unit—which would not cause an undue proliferation of units. However, when the Board certified a separate maintenance and engineering unit, which did not include service employees because of this unit's separate and distinct community of interests, the Second Circuit in *N.L.R.B.* v. *Mercy Hospital Assn.*[25] held that reliance on traditional community of interest considerations did not satisfy the congressional admonition against undue proliferation. The court, in rejecting the Board's reasoning in *Allegheny General Hospital,*[26] held that Congress intended to protect health care facilities against not only "the egregious unit proliferation of the construction trades but that less extreme unit fragmentation arising from application of usual industrial unit criteria . . . ." [27] While not holding that a separate maintenance unit

[23] 588 F.2d 1174.
[24] 602 F.2d 454.
[25] 606 F.2d 22 (2d Cir.), Board's ptn. for cert. pending
[26] 239 NLRB No. 104, enforcement denied 102 LRRM 2784 (3d Cir).
[27] 606 F.2d at 27.

could never be appropriate, the court remanded the case to the Board for an independent evaluation of the factors at this particular hospital and how the Board's unit determination implements the congressional admonition against undue proliferation. Although the court in *Mercy* neither identified what considerations it expected the Board to weigh nor stated the circumstances in which community of interest could override concern about undue proliferation, the Ninth Circuit in *N.L.R.B.* v. *St. Francis Hospital of Lynwood*[28] expressed its views on these issues. In concluding that the Board improperly certified a separate unit of registered nurses, the court noted initially that Congress encouraged the Board to find broad not narrow units appropriate at health care facilities. The court therefore concluded that the community of interest standard adopted by the Board in *Mercy Hospitals of Sacramento*,[29] as a means of preventing undue proliferation was not entirely controlling as a means of determining appropriate bargaining units at health care facilities. Instead, the congressional admonition required the Board to consider not only the similarities among employees in the same job classification but also whether there was such a disparity of interests among employee classifications to prevent a combination of groups of employees into a single broader unit thereby minimizing unit proliferation. Only by focusing on the disparity of interests between employee groups at a health care facility, which would inhibit fair representation of employee interest, could the Board, in the Ninth Circuit's view, balance the congressional admonition against undue unit proliferation and the employees' right to union representation.

3. Objections to Conduct of Election

In *Fenway Cambridge Motor Hotel*[30] there was disputed testimony that the Board agent conducting the election had pointed to the "Yes" box on the ballot and instructed a voter to place his mark there. The Board refused to set aside the election or direct a hearing on the ground that the alleged instruction did not affect the voter's ballot and was not overheard by any other voter. The court held that the Board erred in "applying only an 'impact' standard to determine whether the elective process was contaminated," noting that the proper test, as set forth in *Athbro Pre-*

[28] 601 F.2d 404.

[29] 217 NLRB 765, 766–767 (1975), see also *Allegheny General Hospital, supra.*

[30] *N L.R.B.* v. *Fenway Cambridge Motor Hotel d/b/a Howard Johnson's Motor Lodge,* 601 F 2d 33 (1st Cir).

cision Engineering Corp.[31] is "whether the alleged misconduct 'tends to destroy confidence in the Board's election process' or 'could reasonably be interpreted as impugning the election standards' sought to be maintained." The court went on to find, however, that the Board had not abused its discretion in overruling the objection and could reasonably decide that, under the *Athbro* test, the Board's neutrality had not been compromised by the alleged instructions, which were limited to one voter and immediately retracted.

In *N.L.R.B.* v. *Computer Sciences Corp.*,[32] the eligibility of three voters was challenged by the company. The Board agent questioned each voter regarding his job duties and, after determining that they were eligible to vote, permitted each of them to vote an unchallenged ballot. The company filed objections, contending that since the regional director and the Board will determine the eligibility of challenged voters only if those voters use challenged ballots, the Board agent's refusal to permit the use of challenged ballots denied the company its right to a hearing on the merits of the challenges. Rejecting this contention, the court noted that the Board agent is not required to issue a challenged ballot if, on facts known to him, the challenge is without merit.[33] The court further noted that the Board agent's decision, like other alleged election irregularities, can be challenged by a party on its merits, with the burden on the objecting party to produce evidence that a challenged ballot was erroneously denied. Since the company simply asserted that this agent erred in not requiring the use of challenged ballots and failed to assert or provide evidence that the voters in question were ineligible, it cannot complain that it was denied a hearing.

In *Newport News Shipbldg. & Drydock Co.*,[34] there was evidence that a stack of blank ballots was found in one voting booth; that blank ballots were found in trash receptacles outside the polling place after the election; and that the Board could not account for all the ballots. Noting that such conditions indicate the opportunity for and the possibility of the fraudulent practice of "chain voting," [35] the court remanded the case to the Board

[31] 166 NLRB 966 (1967).

[32] 589 F.2d 232 (5th Cir.).

[33] *Farmers Union Creamery Assn.*, 122 NLRB 151, 152 (1958)

[34] *Newport News Shipbldg. & Drydock Co.* v. *N.L.R.B.*, 602 F.2d 73 (4th Cir.).

[35] By "chain voting," a voter secretes a ballot upon his person without having placed it in the ballot box and takes it from the voting room to a place where it is marked by someone, who, in turn, gives the ballot to the second person in the chain who then goes into the polling room, picks up a blank ballot, goes to the polling booth, deposits the ballot marked outside the polling room, and secretes the blank ballot on his person and by this means takes the blank ballot from the voting room. This is repeated again and again until all of those voters who take part in the "chain voting" have voted. *Farrell-Cheek Steel Co.*, 115 NLRB 926, 927 (1956).

"for the limited purpose of conducting a hearing to consider whether there is a reasonable likelihood that the election was corrupted by chain voting."

D. Unfair Labor Practices

1. Employer Interference with Employee Rights

a. Union Representation at Disciplinary Interviews

Several court decisions during the year addressed the so-called *Weingarten* right—that is, the right of an employee to have a union representative present during an investigative interview with management if the employee reasonably believes that the interview might result in the imposition of discipline.[36] In one case,[37] the Ninth Circuit, citing its decision last year in *Alfred M. Lewis* v. *N.L.R.B.*,[38] held that an employee does not have a right to have a union representative present if the purpose of the meeting with management is "not to elicit damaging facts from [the employee] to further support the decision to discipline," or to "hear [the employee's] side of the story with a view toward withholding [discipline]," but is "simply to inform the employee that he is being disciplined." The court agreed that the employee involved had "reasonably feared that he would be disciplined [by the plant manager]," and that he had made a timely request for his shop steward. The court concluded, however, that since the employee was not interrogated by the plant manager during the interview and because "no 'discussion or consultation' [with the employee] occurred or was even contemplated," no *Weingarten* right arose when the employee was summoned to the manager's office. In the court's view, the "decision to discipline was already final," and the "purpose of the meeting was to 'deliver the warning notice,' not investigate."

In *AAA Equipment*,[39] the Eighth Circuit disagreed with a Board finding that in the circumstances presented the employee reasonably feared that discipline would result if he submitted to questioning. Two supervisors had approached the employee in the parking lot and had attempted to find out why the employee had been absent earlier in the week. The employee had refused to talk to them without his union representatives being present. The em-

[36] See *N L R B.* v. *J Weingarten*, 420 U S. 251 (1975).
[37] *N.L R B.* v. *Certified Grocers of Calif.*, 587 F 2d 449.
[38] 587 F.2d 403 (1978).
[39] *AAA Equipment Service Co.* v *N L R B*, 598 F.2d 1142.

ployee was fired when he walked away to get his union steward. Agreeing with the administrative law judge that the employee could not reasonably have feared discipline, the court pointed to the fact that the employee "admitted that at all times he felt he had done nothing for which discipline was permitted under the [existing collective-bargaining] contract." The court observed that while it "was the policy of the Company to ask for the reason [for an employee's absence], . . . the request alone does not reasonably imply possible disciplinary action in the circumstances of this case." Accordingly, the court found that what the administrative law judge had characterized as a "chance encounter on the parking lot" did not give rise to a *Weingarten* right.

In *Newton Sheet Metal* v. *N.L.R.B.*,[40] however, the same panel that decided *AAA Equipment* had no difficulty finding a *Weingarten* violation. There the employee, under investigation by the employer for having improperly delivered a load of insulation materials to a jobsite, was summoned to the company president's office and given the choice of continuing in his present job, but performing it properly, taking a demotion, or quitting. The employee was given until the following morning to decide. When he was summoned to meet with the president the following day to tell him what he had decided, the employee insisted on union representation at the meeting. The court agreed with the Board both that the proposed interview was investigatory in nature and that the employee reasonably feared discipline.

b. Interference with Board Proceedings

Since *Clyde Taylor*[41] the Board has held that an employer's simply filing a civil suit against an employee is not an unfair labor practice. Nevertheless the Board has held that an exception exists where a civil suit is brought to further an unlawful objective.[42] In *Power Systems*[43] the Seventh Circuit reviewed the Board's application of this principle to a civil suit for damages brought against Sanford, a former employee who had filed unfair labor practice charges against Power Systems alleging a discriminatory discharge. The Board found a violation of section 8(a)(1) of the Act, because the suit was filed to penalize the employee for filing a charge *and* the company had no reasonable basis for

[40] 598 F.2d 478 (8th Cir.).

[41] *Clyde Taylor Co*, 127 NLRB 103 (1960).

[42] See, for example, *United Stanford Employees, Local 680 (Leland Junior University)*, 232 NLRB 326, 330–331 (1977).

[43] *Power Systems* v. *N L R B.*, 601 F.2d 936.

concluding that the charge was filed "maliciously and without probable cause." In so finding the Board noted that prior to the lawsuit the employee had filed only the one charge with the Board against the company and that, while the instant charge was dismissed, the regional director noted that the employee had served as union steward on the company's job and that there was difficulty in differentiating between Sanford's activities which were found unprotected and activities which would have been protected under the Act. In disagreeing with the Board as to the existence of a "reasonable basis" for the company's action, the court noted that, 2 years after the region dismissed the unfair labor practice charge, Sanford filed a charge with OSHA based on the same incidents relied on in the earlier charge filed with the Board. The court relied primarily, however, on the fact that because of a number of unfounded charges filed by Sanford against other employers, the regional office had instituted a "special procedure" for handling his charges, declining to travel to investigate them until Sanford personally appeared at the regional office to provide an affidavit in support of his allegations. In the court's view, these factors afforded a "reasonable basis" for the company's action.

The Court of Appeals for the District of Columbia refused to enforce the order in *E. H. Limited d/b/a Earringhouse Imports,*[44] where the Board held that an employer violated section 8(a) (4) and (1) of the Act by discharging 13 employees because they attended a Board preelection hearing during working hours.[45] As the basis for its decision, the Board explained that an employee has a right to attend a Board hearing which affects him, during working hours, unless the employer can show substantial valid business reasons justifying a requirement that the employee stay on the job. The court, stressing that "working time is for work," noted that the employees had left their jobs to attend the hearing after being specifically denied permission to do so by a supervisor, who had also authorized them to select one of their members to attend the hearing as their representative. The court also relied on the fact that the employees had not been subpenaed, that there was no express showing that their presence at the hearing was necessary, and that, since their action resulted in only three employees being left to do the work of their department, the employer was forced to shut down production during their absence, with ensuing economic loss.

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[44] 227 NLRB 1107 (1977).

[45] *Service Employees Intl Union, Local 250, AFL-CIO (E. H. Limited d/b/a Earringhouse Imports)* v. *N L.R.B* , 600 F.2d 930

2. Employer Discriminating Against Employees

a. Employer's Motivation for Discharge

As noted last year,[46] the First Circuit in recent years has held that a Board finding of discriminatory discharge will be sustained only where the evidence shows that union animus was the dominant motive rather than simply a factor in the decision. In a group of four cases consolidated for decisional purposes under the name of the first case, *N.L.R.B.* v. *Eastern Smelting & Refining Corp.*,[47] the court this year took the occasion to restate its views in the matter. The court held that the Board in most instances was required to make an "affirmative showing" of improper motivation, but, even where the Board makes such a showing, an employer showing of a "good reason for the discharge" will be sufficient to overcome the Board's case unless the Board can make a further showing that the discharge would not have occurred "but for" the improper motive. In support of its position, the court relies on two decisions of the Supreme Court in non-Board cases, *Mt. Healthy City Board of Educ.* v. *Doyle*,[48] and *Givhan* v. *Western Line Consol. School Dist.*[49] Applying these principles to the four cases before it, the court affirmed the Board in three but refused enforcement in the fourth on the ground that the Board had failed to sustain its burden of affirmatively showing improper motivation.

b. Employer's Treatment of Strikers

In two cases decided during the year, the courts sustained the Board's conclusion that employer conduct which was discriminatory on its face and adversely affected employees in the exercise of their right to strike violated the Act. In *Rubatex Corp.*,[50] the Fourth Circuit enforced the Board's finding that the grant of a special poststrike bonus to union members who chose not to strike unlawfully interfered with the right of those and other employees to strike in the future. The company's 830 production and maintenance unit employees struck on August 31 when negotiations for a new contract reached an impasse, but the company continued its operations throughout the strike with the aid of

[46] 43 NLRB Ann Rep. 178 (1978).
[47] 598 F.2d 666.
[48] 429 U.S. 274 (1977).
[49] 47 L.W 4102.
[50] *N L.R B.* v. *Rubatex Corp.*, 601 F.2d 147.

supervisory personnel, nonunion employees, and 13 union members who chose to work. The strike ended on October 25 and, a month later, the company paid a $100 bonus to all employees who worked during the strike, including the 13 union members as well as 244 nonunion or supervisory employees. No payments were made to the 817 union employees who participated in the strike. In an earlier decision,[51] the Board had applied the rationale of *Erie Resistor*[52] to such poststrike payments to nonstriking union employees and had found a violation because such payments, by distinguishing solely on the basis of who engaged in protected, concerted activity and who did not, created a divisive wedge in the work force and demonstrated for the future the special rewards which lie in store for employees who choose to refrain from protected strike activity. The Fourth Circuit in *Rubatex,* applying *Aero-Motive,* rejected the company's claim that the payments were justified by its need to continue operations because they were not announced until after the strike and, thus, "were clearly not designed to satisfy any antecedent promises to the non-striking employees or to obtain sufficient workmen to operate the . . . plant."

In *Westinghouse Electric,*[53] the Seventh Circuit sustained the Board's finding of a violation where some employees who did not meet the conditions of eligibility specified in the bargaining agreement received vacation benefits while other employees who also did not meet eligibility conditions but who had engaged in protected concerted strike activity were denied such benefits. The parties' agreement permitted the company to schedule a plant shutdown during the calendar year and required all employees entitled to vacation with pay to take 1 week concurrently with the shutdown. All employees who qualified for vacation with pay were required to satisfy two other contractual eligibility requirements to receive vacation with pay: to be on the active roll as of the time of the vacation and to have completed at least 30 days' continuous employment at the close of business on the last worked day immediately preceding the time of starting the vacation. Employees engaged in a work stoppage were not considered to be on the active roll.

The plant shutdown was scheduled to begin on Monday, June 27, and continue through Friday, July 1. All bargaining unit employees began a lawful strike on June 12, which lasted until July 5. During the strike, the company informed the employees

[51] *Aero-Motive Mfg. Co*, 195 NLRB 790 (1972), enfd 475 F.2d 27 (6th Cir 1973).
[52] *N.L.R.B* v *Erie Resistor Corp*, 373 U.S. 221 (1963).
[53] *N.L.R.B.* v *Westinghouse Electric Corp*, 603 F 2d 610.

that unless they returned to work by Friday, June 24, the last workday before the scheduled shutdown, they would be ineligible for their scheduled 1-week vacation pay. The 40 employees who returned to work by June 24 were paid on that date for the vacation shutdown; all employees who remained on strike were not paid their vacation pay on June 24, but, instead, at a later time in the year when the plant was in operation, took a vacation and were paid for the vacation. However, these employees lost 1 week's wages.

The company claimed that it was doing nothing more than complying with the terms of the contract—that is, on the one hand, employees who were on strike on June 24 were not on the active roll, and, on the other, it properly waived the requirement of at least 30 days' continuous employment before the start of vacation. The court, in agreement with the Board, rejected this justification, finding that the 40 employees who returned to work were not eligible for the vacation pay they received. "The forty employees were not on the active roll of the company during the time they were on strike and their return on Friday [June 24] simply does not qualify them as having been continuously employed for thirty days continuously immediately preceding the time of starting their vacation." Since the effect of the company's deviation from the contractual requirement for continuous work was to deny strikers vacation benefits while granting such benefits to strikers who returned before the end of the strike, the court sustained the Board's conclusion that the "company's conduct was 'inherently destructive' of important employee rights and that the proof of an antiunion motivation was not required."

3. Employer's Refusal to Honor Checkoff

In *Albert Van Luit*,[54] the Ninth Circuit affirmed the Board's finding that an employer violated section 8(a)(1), (3), and (5) of the Act by soliciting and honoring revocations of employees' union dues-checkoff authorizations, and by failing to remit to the union checkoff moneys it did collect, after employees had voted to rescind the union's authority to maintain a union-security clause but while the union's election objections were still pending. The court approved the Board's characterization of the rule of *Lyons Apparel*,[55] that a union cannot require a new employee to join and pay initiation fees and dues during the period between an

[54] *N.L.R.B.* v. *Albert Van Luit & Co.*, 597 F 2d 681.
[55] 218 NLRB 1172 (1975).

affirmative deauthorization vote and the certification of the results of the election, as a "narrow exception" to the "general rule" that an affirmative deauthorization vote becomes effective only upon certification.

4. Employer Bargaining Obligation

a. Obligation To Bargain Before Making Unilateral Changes

In *Metromedia,*[56] the Eighth Circuit sustained the Board's conclusion that the company breached its bargaining obligation under section 8(a)(5) of the Act by unilaterally deciding to award exclusive jurisdiction over the operation of "minicams" to one union without notifying and bargaining in good faith with the other. One union (IATSE) represented all "news department motion picture cameramen"—those employees who used portable film cameras to cover news events for the news department of the company's television station—and another union (IBEW) represented all engineering employees at the station, including those who traditionally operated large studio television cameras but never performed newsgathering functions. The company decided to acquire minicams—lightweight portable television cameras—primarily to cover news events. It proposed to both unions that it be free to assign employees from all departments and all bargaining units to use the minicams. While IATSE was considering that proposal, the company submitted it to IBEW, which adamantly refused to agree on the ground that minicam work belonged exclusively to its members under the jurisdictional clause in its contract.

Without notifying IATSE of IBEW's opposition to the company's initial proposal to both unions, the company agreed with IBEW to assign exclusive jurisdiction of the minicams to a newly created, IBEW-represented job classification of "news engineers." When negotiations with IATSE resumed, the company presented that union with the *fait accompli* of IBEW's exclusive jurisdiction over minicams and refused to negotiate with IATSE over any minicam work. Recognizing that minicams are a technological innovation with the potential to affect profoundly the work of the motion picture cameramen and that the impact of technological innovation on the bargaining unit is a mandatory subject of bargaining, the court agreed with the Board that the company not only was obligated to bargain in good faith with

[56] *Metromedia, KMBC-TV* v. *N L R.B* , 586 F 2d 1182.

IATSE over the introduction and use of minicams, but also "did not have the right to enter unilaterally into an exclusive agreement with one union without notifying and bargaining in good faith with the other." The Board's order would have restored the status quo and directed the company to bargain in good faith. In the court's view, this remedy was inadequate because "minicam work was essentially new work and could not be controlled either by jurisdictional language or by a unit certification preexisting the contemplation of minicams." Accordingly, the court remanded the case to the Board for consideration of "the propriety of existing bargaining units in view of the use of minicams for purposes previously performed by motion picture cameras."

b. Violations of Duty To Bargain by Insisting on Changes in Scope of Unit

In *White-Westinghouse Corp.*,[57] the District of Columbia Circuit enforced the Board's order requiring a successor employer who had purchased a five-plant appliance division from Westinghouse to bargain on a multiplant rather than single-plant basis. Prior to acquisition the five plants had been part of 42 separately certified units which the international union and Westinghouse had bargained for on a multiplant basis at the national level. Before finalizing the five-plant transfer, White-Westinghouse agreed to adopt virtually all provisions of the existing national agreement, thereafter administered it for the following year, and then insisted to impasse on single-plant bargaining. The court affirmed the Board's finding that White-Westinghouse took over the five plants with no significant change in the employing industry, especially since employees were not notified of the ownership transfer until 4 days after the sale. The court further affirmed the Board's finding that the previous negotiations between the union and Westinghouse had effectively merged the 42 separately certified units into a single, multiplant bargaining entity. The court rejected the argument that the diminution in size of the multiplant unit from 42 units to five plants was a change sufficient to defeat successorship obligations, holding that absent a challenge to the union's majority status, the only proper inquiry was whether the five plants remained an appropriate bargaining unit. Stressing its limited power to review Board unit determinations, the court upheld the Board's determination that

[57] *Intl. Union of Electrical, Radio & Machine Wkrs. [White-Westinghouse Corp.] v. N.L.R.B.*, 604 F.2d 689.

the employees in the five plants had a sufficient community of interests to constitute an appropriate multiplant unit, and found that White-Westinghouse had violated section 8(a)(5) and (1) by insisting to impasse on single-plant bargaining.

In *Newport News Shipbldg.*,[58] the Fourth Circuit enforced the Board's finding that the employer had violated its bargaining obligation by insisting to impasse on a change in the scope of the bargaining unit previously certified by the Board. After a hearing on the union's petition, the parties entered into a stipulation for certification upon consent election, the election was held, and the union was certified as bargaining representative of employees in the stipulated unit. During contract negotiations, the company proffered a unit definition at variance with the Board's certification and conditioned further bargaining on the Union's acceptance of this term. The court held that the description of the bargaining unit was not a mandatory subject of bargaining, and that substantial evidence supported the Board's determination that the company insisted on a variation in the scope of the unit, in violation of section 8(a)(5) and (1).

c. Mandatory Subjects of Bargaining

Section 8(d) of the Act requires bargaining about "wages, hours, and other terms and conditions of employment." Two cases during the year involved questions as to what constitutes "terms and conditions of employment" which are mandatory subjects of bargaining. In one,[59] the Seventh Circuit upheld the Board's conclusion that the identity of the administrator of a company's hospital, medical, and surgical benefits program was a mandatory subject of bargaining, and that the company therefore violated the Act by changing administrators during the term of its contract with the union without the union's consent. The new administrator processed claims and answered requests for information more quickly than the old one. However, its usual and customary fee allowances for certain types of operations were different, and its procedure for filing surgical claims required more effort and paperwork than that of the old administrator. Also, the new administrator, unlike the old one, did not provide a labor consultant to assist employees with claims, and the old administrator's conversion plan, which enabled employees who terminated

[58] *Newport News Shipbldg. & Dry Dock Co* v *N L R B.*, 602 F.2d 73.

[59] *Keystone Steel & Wire, Div of Keystone Consolidated Industries* v. *N L R B.*, 606 F.2d 171.

their employment to continue their insurance coverage, cost more than the new administrator's plan, but provided greater coverage. The court noted that it had followed a case-by-case approach in determining what was a mandatory subject of bargaining, and that it was well settled that insurance benefits for active employees were a mandatory subject. It concluded that, in this case, the change in administrators had a material and significant impact on terms and conditions of employment, since it affected the amount of benefits received by the employees. This was sufficient to make the change in administrators a mandatory subject of bargaining. In light of the Supreme Court's recent decision in *Ford Motor Co.*,[60] the court was of the view that it was not necessary to show that the change in administrators vitally affected terms and conditions of employment, as no third-party interest was directly implicated by the change, which involved an aspect of the relationship between the employer and its employees. However, the court indicated that, even if the "vitally affects" test were applicable, it would still find the change in administrators to be a mandatory subject of bargaining.[61]

In another case,[62] the Fifth Circuit sustained the Board's finding that the payment of employee members of a union's bargaining committee for time spent in negotiating a new contract was a mandatory subject of bargaining, so that the company violated section 8(a)(5) and (1) of the Act by unilaterally discontinuing such payments in violation of the existing contract. Stressing the deference to which the Board's interpretation of the Act is entitled, the court noted that matters which benefited all members of the bargaining unit by encouraging the collective-bargaining process had previously been treated as mandatory subjects of bargaining. In particular, the payment of wages to employee representatives for time spent in presenting grievances during working time had been held a mandatory subject of bargaining. The court agreed with the Board that an employee's involvement in contract negotiations was similar to his involvement in the presentation of grievances. In one case, the employee was benefiting all unit employees by implementing a contractual term or condition of employment; in the other case,

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[60] *Ford Motor Co* v *N.L.R.B.*, 441 U.S. 488, discussed supra at pp. 189–190.

[61] The court declined to enforce the Board's order that the old administrator be restored, finding that the order was unnecessarily disruptive, since the change in administrators was part of a nationwide effort to centralize the administration of about 30 employee benefit plans and thereby cut costs, and the old administrator was concededly incapable of administering all 30 plans. Accordingly, the court remanded the case to the Board for adoption of an appropriate, more limited, remedy.

[62] *Axelson, Subsidiary of U.S.A. Industries* v. *N.L.R.B.*, 599 F.2d 91 (5th Cir.).

he was benefiting all unit employees by attempting to improve contractual terms or conditions of employment. Here, the evidence clearly showed that the past practice of the parties was to negotiate during working time and to pay the employee members of the union's negotiating committee for the time they missed from their work shift. The court agreed with the Board that, if the employer were permitted unilaterally to change this practice, the effectiveness of the collective-bargaining process would be greatly diminished by discouraging seasoned and well-qualified union representatives from participating in collective bargaining; they would be reluctant to continue to serve on the negotiating committee if they had to negotiate only on nonworking time or lose their production pay. Accordingly, the court concluded that the Board's finding that such payments were a mandatory subject of bargaining was legally defensible and factually acceptable, and therefore entitled to affirmance. The court pointed out that this did not mean that all employers must reimburse unit employees for time spent in negotiations, but only that they must bargain on the subject.

5. Union Interference With Employee Rights

In *Machinists Local 1327*,[63] the union constitution provided that resignation could not relieve a member of the obligation to honor a picket line where the resignation occurred immediately before or during a strike. Relying on the provision, the union imposed fines on employees who resigned from membership and then returned to work during a strike. The Board held that the constitutional provision did not restrict the employees' right to resign, but rather sought only to regulate postresignation conduct and was therefore unlawful under the Supreme Court's decisions in *Granite State* [64] and in *Booster Lodge* [65] proscribing union discipline for postresignation conduct. A majority of a Ninth Circuit panel reversed the Board, holding that the provision was a restriction on the right to resign rather than on post-resignation conduct. The court then remanded the case to the Board to determine whether the provision—when viewed as a restriction on resignation—was valid.[66]

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[63] *N.L.R.B.* v. *Machinists Local 1327* [*Dalmo Victor*], 102 LRRM 2583 (9th Cir.).

[64] *N.L.R.B.* v. *Granite State Jt. Bd.*, 409 U.S. 213 (1972).

[65] *Booster Lodge No. 405, Intl. Assn. of Machinists* v. *N.L.R.B.*, 412 U.S. 84 (1973).

[66] The issue of what, if any, restrictions on the right to resign from union membership are lawful had been expressly reserved by the Supreme Court in *Granite State* and *Booster Lodge* and by the Board in the instant case.

In *Robertson*,[67] the Tenth Circuit reversed the Board's finding that section 8(f)(4) allowed employers and unions to grant referral preference based on prior employment with nonunit employers covered by the bargaining agreement. The court noted that the terms of section 8(f)(4) allowed "an employer" to give referral preference for service with "such employer." The court then reasoned that the Board's decision—which allowed preference for service with nonunit employers who had merely executed letters of assent or who were subject to the local contract under terms of national agreement—would effectively substitute the plural "employers" and "such employers" for the singular "employer" and "such employer" in the language of section 8(f)(4). The court also noted legislative history indicating that Congress intended in enacting section 8(f)(4) to allow preference based on "seniority." Finally, the court indicated that granting referral preference based on employment with other employers under a union contract would encourage employees to select union representation and would penalize employees who chose to reject union representation, thereby coercing employees in the exercise of their statutory rights.

6. Union Obligation To Bargain

a. Obligation To Bargain Before Making Unilateral Change

In *System Council T-6*,[68] the First Circuit affirmed the Board's conclusion that the union violated its duty to bargain collectively under section 8(b)(3) and (d) of the Act by adopting, without notifying or bargaining with the company, a union rule prohibiting union members from accepting temporary assignments to supervisory positions. For many years, the company's practice had been to assign bargaining unit employees on a voluntary basis to first-level supervisory positions to fill temporary personnel needs. The collective-bargaining agreement in effect at the time the union instituted the rule contained a "management rights" clause giving the company the "exclusive right . . . to assign and direct the work force" and a seniority clause excluding any time spent in excess of 90 days "on any temporary management assignment" from the computation of bargaining unit seniority. The Board found a "firm (if implied) contractual acknowledge-

[67] *Paul H Robertson* v. *N.L R B*, 597 F 2d 1331.

[68] *N.L R.B.* v. *System Council T-6, IBEW* [*New England Telephone & Telegraph Co*], 599 F.2d 5.

ment [by the union of the company's] right to appoint bargaining unit employees to temporary supervisory positions" which the union could not, without violating the Act, unilaterally alter. The First Circuit approved the Board's construction of the contract and rejected the union's contention that it nevertheless had a corresponding right to prohibit its members, from time to time, from accepting such assignments. The court explained that the union's construction of the contract "would smack of the mother who told her daughter she could go out to swim—but not to go near the water" and would be "an unreasonable restriction on the company's acknowledged right" since most of its 30,000 bargaining unit employees were union members.

b. Mandatory Subjects of Bargaining

A union may take economic action, such as a strike, in support of its bargaining demands only where a mandatory subject of bargaining is involved. Normally such subjects are limited to the terms and working conditions of employees in the bargaining unit. However, matters involving persons outside the bargaining unit may also become mandatory subjects of bargaining where these matters "vitally affect" the working conditions of bargaining unit employees.[69] In one such case,[70] the Ninth Circuit reviewed the Board's finding that fringe benefit contributions made by supervisors to pooled trust funds were mandatory subjects of bargaining and that the union could threaten to strike to compel payment of delinquent contributions owed on behalf of supervisory personnel. The pooled trust funds involved in the case were established to provide fringe benefits for employees in the construction industry who worked from job to job, often for different employers. Employees of all employers were covered by a single benefit trust fund. Supervisors were permitted to participate in the fringe benefit program, and fringe benefit contributions from both employees and supervisors were placed in common funds from which benefits were paid. Under these circumstances, the Board concluded that the delinquent contributions by supervisors constituted an "economic detriment" to the trust funds which, in turn, adversely affected the trust funds' ability to continue to provide fringe benefits to the covered employees. Thus, the union's economic action "was to protect the trust funds

[69] *Allied Chemical & Alkali Wkrs. of America, Local 1* v *Pittsburgh Plate Glass Co*, 404 U.S 157, 179 (1971).

[70] *Maas & Feduska* v. *N.L R B*, 87 LC ¶ 11,615.

from liability for benefits without adequate contributions" thereby "conserving . . . benefits for unit employees." On review, the court agreed with the Board that the fact that the contributions were owed by supervisors, rather than bargaining unit employees, was not controlling. However, reversing the Board, the court concluded that the facts of the case did not establish a sufficient connection between the delinquencies and the welfare of unit employees. Relying on the Supreme Court's decision in *Pittsburgh Plate Glass*,[71] holding that pension benefits for retired employees were not mandatory subjects of bargaining, the court concluded that the Board "as it did in *Pittsburgh Plate Glass* . . . neglected to give the phrase 'vitally affected' its ordinary meaning and failed to support that phrase's application in the circumstances present in this case." Absent such a factual development, the proven delinquencies could not be said to "vitally affect the terms and conditions of employment of bargaining-unit members." Noting that supervisors' fringe benefits were concededly nonmandatory subjects of bargaining, the court reasoned that the delinquencies here affected only the trust funds "because the Union had permitted certain supervisors to participate in the fund." Such an agreement, however, did not make the contribution delinquencies mandatory subjects. The court concluded that, to hold that the violation of an agreement on a permissive subject was a mandatory subject, "would be to erase the distinction between mandatory and permissive bargaining subjects in a significant number of cases." A concurring opinion emphasized that the record did not show "that the inadequacy of the Company's contributions substantially affected the pooled trust funds" and that "having failed to disclose the extent of trust fund depletion attributable to contribution deficiencies on behalf of supervisory personnel, the Board has not demonstrated that the inadequacy of those contributions 'vitally affected' employee interests."

c. Duty to Furnish Information

In *Local 13, Detroit Newspaper*[72] the District of Columbia Circuit affirmed a Board decision finding that the union violated section 8(b)(3) of the Act by failing and refusing to supply the employer—a newspaper publisher—with requested information necessary to the bargaining process. During negotiations between

[71] 404 U.S. 157 (1971).

[72] *Local 13, Detroit Newspaper Printing & Graphic Communications Union [Oakland Press] v. N.L.R.B.*, 598 F.2d 267

the parties, the union rejected an employer proposal designed to cut overtime cost by having the union guarantee the availability of substitute workers at straight time rather than overtime rates. The employer then requested that the union supply it with information relating to the availability of substitute straight time workers in the union's jurisdiction. The union refused to provide this information. The court noted that a union's duty to bargain under sections 8(b)(3) of the Act parallels an employer's duty to bargain under section 8(a)(5) of the Act, and, accordingly, a union is obliged to furnish an employer with relevant bargaining information—information enabling it to discuss bargainable issues. The court pointed out that the standards for assessing the relevancy of requested information to a bargainable issue is a liberal one and that the duty to disclose will always depend on the circumstances of the particular case. Here, the court found that the information on referral procedures and the availability of straight time workers, which is in the sole custody of the union, is relevant to the "hotly contested" bargaining issue. Moreover, simply because the union did not claim an inability to supply straight time workers does not mean that availability problems are nonexistent, and, therefore, rejected the union's reliance on *Truitt Mfg. Co.*[73] The court concluded that the union's refusal to supply the company with the data requested precluded intelligent evaluation by the employer of its own proposals as well as the union's position.

7. Union's Duty of Fair Representation

In *Branch 6000, Letter Carriers,*[74] the District of Columbia Circuit upheld the Board's finding an 8(b)(1)(A) violation where the unit bargaining representative restricted to members only the right to choose between the employer's two proposals for assigning vacations to unit employees. Thus, the employer agreed in advance to abide by the employees' choice between "fixed" or "rotating" days off. The union directed its stewards to conduct referenda at each affected postal station to determine which proposal the union would adopt. At one station, nonmembers were not permitted to participate in the referendum, and one nonmember filed a charge, complaining that his exclusion

[73] *N.L.R.B.* v *Truitt Mfg Co*, 351 U.S. 149 In *Truitt*, the Supreme Court held that an employer who claimed financial inability to pay must give the union sufficient information to substantiate its claim.

[74] *Branch 6000, Natl Assn. of Letter Carriers* v *N L R B*, 595 F.2d 808.

constituted a breach of the union's duty of fair representation. The court held that the duty of fair representation required the union to decide which proposal to adopt on the basis of the interests of all members of the unit and that the duty was breached where the union's choice was dictated by a referendum among some employees, since there was no showing that the voters were not "motivated solely by their own personal considerations," rather than the interests of all employees, nor a showing that the members-only referendum had "appropriate safeguards" insuring "some consideration of the interests of all employees."

8. Secondary Boycotts and Strikes

In *Allied Concrete* [75] the Ninth Circuit disagreed with the Board's conclusion that picketing "between the headlights" of the primary employer's concrete delivery trucks was lawful. Shortly after the collective-bargaining agreement between Allied and the Teamsters expired, Allied's president arranged for the designation of gates at the jobsite, one reserved for employees, the other two for all others. The same day Allied delivered a letter to the Teamsters, advising of the arrangement and requesting that picketing be confined to the Allied reserved gate. The next day, five pickets followed an Allied truck through the reserved gate to the poursite, where they picketed the truck with signs reading "Picket-Teamsters Local 83 on Strike Against Allied Concrete." In response all the employees walked off the job. The Board found that the picketing met the common situs picketing standards set forth in *Moore Dry Dock.*[76] In so finding the Board relied on its decision in *Schultz,*[77] that ambulatory picketing "between the headlights" of a primary's delivery trucks at pickup and delivery sites was lawful primary activity. In the court's view, *Schultz* was inapplicable, because the reserved gate provided a reasonable opportunity to reach the primary employees without unnecessarily involving the neutral employees.

In a case [78] decided by the District of Columbia Circuit in banc, the union, which was the certified bargaining representative of certain employees of Safeco Title Insurance Company, called a strike following an impasse in negotiations for an initial contract. In addition to picketing Safeco's office, striking employees

[75] *Allied Concrete* v. *N L.R B*, 607 F 2d 827.

[76] *Sailors' Union of the Pacific, AFL (Moore Dry Dock Co)*, 92 NLRB 547, 549 (1950).

[77] *IBEW, Local 807 (Schultz Refrigerated Services)*, 87 NLRB 502 (1949).

[78] *Retail Store Employees Union, Local 1001, Retail Clerks Intl Assn, AFL-CIO [Safeco Title Ins. Co.]* v. *N.L R.B*, 600 F 2d 280.

also engaged in picketing and handbilling outside the offices of five land title companies, 90 percent of whose business was selling company insurance policies. The signs carried by the strikers stated "Safeco Nonunion Does Not Employ Members Of Or Have Contract With Retail Store Employees Local 1001." The strikers also distributed handbills to the general public requesting policyholders to support the strike by canceling their insurance policies with Safeco. The union's activities at the land title companies did not cause any work stoppages or interfere with deliveries.

The Board concluded that the land title companies were neutrals in the dispute between Safeco and the union, rather than "allies" of Safeco. The Board then considered the applicability of *Tree Fruits*,[79] which involved picketing of grocery stores that sold apples supplied by Washington State packers with which the union had a primary dispute. The pickets confined their efforts to urging a boycott of the apples. The Supreme Court ruled that section 8(b) (4) (ii) (B) permits a union to engage in consumer picketing at the site of a secondary employer "directed only at the struck product," but outlaws "a union appeal to the public at the secondary site not to trade at all with the secondary employer." Relying on its decision in *Dow Chemical*,[80] which involved a similar situation, the Board concluded that, although the union's secondary-site picketing was limited to the employer's products, it violated section 8(b) (4) (ii) (B) because it was "reasonably calculated to induce customers not to patronize the neutral parties at all." Since almost the entire business of the companies was devoted to the sale of company insurance policies, the picketing, if successful, "would predictably involve a virtually complete boycott of the land title companies. . . . The land title companies, powerless to resolve the dispute, would be forced to cease doing business with Safeco or go out of business."

The court of appeals, sitting in banc and dividing 5 to 4, denied enforcement of the Board's order. The court upheld the Board's finding that the land title companies were neutrals in the union's dispute with the employer. Following its earlier decision in *Dow Chemical*,[81] however, the court held that, because the picketing was limited to the struck product, the foreseeable economic con-

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[79] *N.L.R.B.* v *Fruit & Vegetable Packers, Local 760*, 377 U.S. 58 (1964).

[80] *Local 14055, United Steelworkers of America, AFL-CIO (Dow Chemical)*, 211 NLRB 649 (1974).

[81] *Local 14055, United Steelworkers of America [Dow Chemical]* v. *N.L.R.B.*, 524 F.2d 853 (D.C. Cir. 1975), denying enforcement of 211 NLRB 649 (1974); judgment vacated and remanded for reconsideration in light of intervening circumstances 429 U.S. 807 (1976); complaint dismissed because of mootness 299 NLRB 302 (1977).

sequences to the neutrals were not a sufficient basis for finding that the picketing "threaten[ed], coerce[d], or restrain[ed]" the neutrals within the meaning of section 8(b)(4)(ii)(B) of the Act. The dissenting judges agreed with the Board that *Tree Fruits* does not protect picketing of a neutral retailer where the intended or foreseeable effect of the picketing is to persuade the retailer's customers to cease dealing with it altogether.

In another case [82] involving the holding in *Tree Fruits* the Third Circuit, reversing the Board, found that the union's picketing was unlawful. The picketing here, which protested the wages paid by K & K Construction as a carpentry subcontractor on homes offered by Panther Valley, took place at the development's main gate, as well as a nearby shopping center where Panther Valley had its sales office. The court regarded the case as falling under a recognized exception to *Tree Fruits*, that a boycott is unlawful where the struck product is so merged into the seller's total business as to be indistinguishable. In rejecting the Board's view that the special circumstances of the construction industry rendered the application of this doctrine inappropriate, the court noted that Congress had given special treatment to the construction industry whenever it was thought appropriate, giving as an example the prehire agreements made lawful by section 8(f). Accordingly, if such special treatment is to be given to picketing under these circumstances, it should, in the court's view, come from Congress.

9. Recognitional Picketing

The legality of picketing under section 8(b)(7) of the Act frequently depends on whether an object of the picketing is recognitional—that is, whether the union's objective is properly characterized as confined to some other, more limited, goal. In one case [83] the union sought to bring this conduct within one well-recognized category of such picketing, "area standards," where the union seeks, not to obtain recognition as bargaining representative of the unit employees, but simply to advise the public that the employer is undermining the union's standards for minimum wages and economic benefits. In this case the union had sought a prehire collective-bargaining agreement from R P & M Electric in August 1974 and had been rebuffed. In August 1976 the union wrote the company requesting that it provide its employees the "minimum standards of wages, hours and working

[82] *K & K Constr. Co.* v *N L R B*, 592 F.2d 228

[83] *N L.R.B.* v. *IBEW, Local 265* [*R P & M Electric*], 604 F 2d 1091 (8th Cir.).

conditions" established by the union. The letter offered to provide a statement of its minimum standards, stating that a request for such standards would be followed by a meeting at which the parties would seek "mutual agreement concerning the Union's requests." The court agreed with the Board that "the Union's letter casts its language in broad, sweeping terms" and that its plain import was to have the Company comport its terms and conditions of employment to those negotiated with other contractors in the area. In another case [84] the Auto Workers had represented the mechanics employed at a Pontiac dealership in Buffalo, New York, when the employer terminated that operation and transferred its business to a Pontiac dealership which it purchased in Tonawanda, New York. The company discharged all the mechanics who had been working at the Buffalo dealership and retailed all the mechanics who had been working at the Tonawanda location and who were represented by the Machinists. The court agreed with the Board that picketing at Tonawanda to obtain preferential hiring there for the Buffalo mechanics as openings appeared would not have constituted a recognitional objective. In the court's view, however, the record as a whole required a finding that Auto Workers later abandoned this limited goal and sought immediate, mass reinstatement of the Buffalo mechanics with attendant recognition of the Auto Workers.

E. Remedial Order Provisions

1. Bargaining Order Remedies

Two courts rejected employer contentions that delay and substantial employee turnover occurring after an administrative law judge's decision undermined the validity of bargaining orders. In *Bandag*,[85] the Fifth Circuit upheld the Board's refusal to reopen the record to adduce evidence on employee turnover. The panel majority, referring to *Vermont Yankee Nuclear Power Corp.*,[86] affirmed its reluctance to interfere with the Board's usual procedure of reviewing the record developed before an administrative law judge in much the same way as an appellate court reviews a trial court proceeding. On the merits, the court held that employee turnover is relevant to the issues of whether a fair election could be held and of whether employee sentiment could best be effectuated by a bargaining order. However, it found ade-

[84] *Don Davis Pontiac* v *N L R B.*, 594 F.2d 327 (2d Cir.).
[85] *Bandag* v. *N L.R.B.*, 583 F 2d 765.
[86] *Vermont Yankee Nuclear Power Corp* v. *Natl Resources Defense Council*, 435 U.S. 519.

quate evidence to sustain the Board's finding that a fair election could not be held regardless of employee turnover. It commented: "Practices may live on in the lore of the shop and continue to repress employee sentiment long after most, or even all, original participants have departed." On the issue of effectuating employee sentiments, the panel majority interpreted its *American Cable I* decision [87] to require a Board finding that employee sentiments can best be protected "in the long run" by a bargaining order rather than a determination that an actual majority of the present work force favors the union. The court noted that the employees could later seek a decertification election should they be dissatisfied with the union. In *Glomac Plastics,*[88] the Second Circuit also referred to this opportunity available to the employees when rejecting the employer's contention that the Board was imposing an unwanted bargaining representative on reluctant employees. In that case the Board had concluded that the employer had violated section 8(a)(5) by not bargaining in good faith and had issued its bargaining order some 4½ years after the date of the administrative law judge's recommended order and 6 years after certification. The court disposed of the employer's claim that the Board should have considered employee turnover by noting that the employer had not presented any evidence to the Board nor even moved to reopen the record to adduce such evidence. However, the court was more disturbed with the long delay attributable to "unexplained inaction by the Board." While it felt bound to uphold the bargaining order under its in banc decision in *Patent Trader* [89] because of the "egregious delay." it remanded the case to the Board to consider whether the bargaining order was still appropriate. On remand, the Board found that a bargaining order was appropriate even if the employer could prove substantial employee turnover and abandonment of the unit by the union. Given that finding, the court upheld the Board's refusal to grant an employer motion to reopen the record on remand and enforced the bargaining order.

2. Reinstatement of Discharged Employees

In *Potter Electric*[90] the Eighth Circuit, having found that the employer violated section 8(a)(1) of the Act by refusing two

[87] *N.L.R.B.* v. *American Cable Systems,* 414 F.2d 661 (5th Cir. 1969), cert. denied 400 U.S. 957.

[88] 600 F.2d 3, enfd. after remand Dockets 78-4046 and 78-4058.

[89] *N.L.R.B.* v. *Patent Trades,* 415 F.2d 190, 197 (2d Cir. 1969), affd. as modified 426 F.2d 791 (1970) (in banc).

[90] *N.L.R.B.* v. *Potter Electric Signal Co.,* 600 F.2d 120.

employees' requests for union representation at interviews which resulted in their discharges, declined to enforce the Board's order requiring reinstatement, backpay, and expunging disciplinary notices. The court disagreed with the Board's conclusion that the illegal interviews played a substantial role in the ultimate discharge of the employees and, accordingly, that restoration of the status quo required rescission of the disciplinary action. Initially the court noted that neither employee had been discharged because she had asserted a section 7 right to union representation, but that each had been discharged for "obvious personal misconduct"—participation in an altercation which halted production on the line. Noting that the 8(a)(1) violation was merely "incidental" to the investigation which preceded the firing, the court found that the discharges stemmed not from the illegal interviews, but from the employees' own misconduct. In these circumstances, the court concluded that the Board's reinstatement and backpay order was barred by that portion of section 10(c) which provides that "no order of the Board shall require the reinstatement of or the payment of backpay to employees discharged for cause."[91]

3. Responsibility of Successor

In *Fabsteel Co.*,[92] the Fifth Circuit sustained a Board holding that an employer who purchased only one of a seller's seven plants nonetheless became a "successor" employer obligated both to remedy unfair labor practices violative of section 8(a)(3) of the Act, which the seller had committed, and to bargain with the union for the employees employed in the single plant. The court found that the buyer's obligation to remedy the unfair labor practices of the seller was fully supported by the Supreme Court's ruling in *Golden State Bottling Co.*[93] and rejected a claim that the seller's willingness to remedy in part its unfair labor practices relieved the buyer of its responsibility to remedy the parts unremedied. The court further found that the buyer succeeded to the seller's obligation to recognize and bargain with the union even though the union had originally been certified in a multiplant bargaining unit consisting of all seven of the seller's

[91] The court cited *Fibreboard Paper Products* v *N L R B*, 374 U S 203 (1964), in support of its conclusion. In the court's view, sec. 10(c) of the Act, as construed by the Supreme Court in *Fibreboard*, was designed to preclude the Board from reinstating an individual discharged for personal misconduct

[92] *N L R B* v *Fabsteel Co of La*, 587 F 2d 689, cert denied 99 S Ct. 2887.

[93] *Golden State Bottling Co.* v *N L R B*, 414 U S 168 (1973).

plants. The court held that the diminution in the size of the unit from seven plants to one did not constitute such a fundamental change in the nature of the unit as to make inapplicable the principles governing the bargaining obligations of "successor" employers set out in *Burns Intl. Security Services.*[94] In this respect the court noted that both units were independently appropriate. The court also held that on the facts shown the buyer could not have had a good-faith doubt of the union's majority status.

4. Retention of Jurisdiction

In another case[95] the court rejected the Board's retaining jurisdiction to reconsider a dismissal under *Darlington*[96] in the event the closed facility is later reopened.[97] The court in *Duncan* noted that the Board had found the company's closing of one of its facilities in retaliation against its employees' for their union activity was "permanent" and that there was no 8(a)(3) violation in that closing under the *Darlington* criteria. The court then quoted section 10(c) of the Act, which provides that, where no unfair labor practices are found, "the Board shall state its findings of fact and issue an order dismissing the said complaint." In the court's view, "[t]he Board's retention of jurisdiction despite a finding that the employer has behaved lawfully is plainly contrary to this statutory requirement." Moreover, by "reserving the right to reopen proceedings against the company without issuing a new complaint," the Board's retention of jurisdiction ran afoul of section 10(b) of the Act. The court acknowledged the Board's power to fashion remedies but, noting the absence of any finding of unfair labor practice in the closing, held that such power "does not extend to a broad supervisory authority to police conduct of law-abiding employers without regard for the procedures specifically and carefully detailed in § 10."

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[94] *N L R.B* v. *Burns Intl Security Services*, 406 U.S. 272 (1972).

[95] *Bruce Duncan Co* v. *N L R B.*, 590 F.2d 1304 (4th Cir.).

[96] *Textile Wkrs. of America* v. *Darlington Mfg. Co*, 380 U.S. 263 (1965).

[97] See *Motor Repair*, 168 NLRB 1082, 1084 (1968); *A C. Rochat Co*, 163 NLRB 421, 423 (1967).

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 1979, the Board filed 72 petitions for temporary relief under the discretionary provisions of section 10(j): 67 against employers and 5 against unions. Of this number, together with petitions pending in court at the beginning of this report period, injunctions were granted by the courts in 20 cases and denied in 10. Of the remaining cases, 2 were settled prior to court action, 6 were withdrawn, 7 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 19 cases and against labor organizations in 1 case. The cases against employers variously involved alleged interference with organizational activity, bad-faith bargaining, minority union recognition, and interference with access to Board processes. The case against the union involved its refusal to furnish the employer with information concerning its contracts with other employers.

In *Fuchs* v. *Hood Industries*,[2] the First Circuit reviewed a district court's order staying all proceedings on a 10(j) petition pending an administrative law judge's decision on the merits of the underlying unfair labor practice case.[3] While recognizing that

[1] See table 20 at p. 313, *infra*.

[2] 590 F.2d 395 (1st Cir.)

[3] The Board had indicated that it would not object to a stay pending completion of the upcoming hearing before an administrative law judge and the submission of the record to the district court as the record in the 10(j) proceeding.

"a stay of an action pending the outcome of agency proceedings for the purpose of achieving economy of litigation is, as a general rule, not an appealable final order," the appellate court held that "a limited review of the stay order is appropriate to determine whether it so exceeds the bounds of discretion that relief by mandamus may be justified . . . ." The court then observed that the "injunctive relief provided for in section 10(j) is interlocutory in nature and is designed to fill the considerable gap between the filing of a complaint by the Board and issuance of its final decision, in those cases in which considerable harm may occur in the interim." Without regard to the merits of the Board's petition, the court concluded that the lower court's refusal to hear and consider the petition until after the administrative law judge rendered his decision was tantamount to a summary denial of any relief for "a significant portion of the time during which temporary relief, in the appropriate case, was designed to be in effect." This, the court held, would frustrate the intent of Congress in enacting section 10(j). Accordingly, the court vacated the stay and remanded the case "for prompt determination of the § 10(j) petition."

The issue of the appropriateness of a bargaining order in favor of a nonincumbent union as interim relief, where an employer has responded to the union's successful organizing campaign with massive unfair labor practices effectively dissipating the union's majority status, continues to produce sharply conflicting decisions among the courts.[4]

In *Levine* v. *C & W Mining Co.*,[5] the district court found reasonable cause to believe that a union had obtained the support of a majority of the employees in a unit of truckdrivers before the employer engaged in a series of substantial violations of the Act, including threats of business closure, coercive interrogations, threats of discharge, promises and grant of benefits, threats to sell its trucks and the sale of trucks, direct dealing with the employees, solicitation of grievances, and the formation and domination of an employee committee to supplant the union. Observing that these unfair labor practices broke the union's strike

[4] Only two circuit courts have considered the issue The Fifth Circuit has held that such relief is not appropriate in 10(j) cases because, in its view, the bargaining order alters, rather than maintains the status quo. *Boire* v. *Pilot Freight Carriers*, 515 F.2d 1185 (1975). The Second Circuit has endorsed such interim relief in appropriate circumstances based on its view that "the status quo which deserves protection under § 10(j) is not the illegal status quo which has come into being as a result of the unfair labor practices being litigated. . . . [but that which] existed before the onset of unfair labor practices." *Seeler* v. *Trading Port*, 517 F 2d 33 (1975).

[5] 465 F Supp. 690 (D C. Ohio), appeal pending (6th Cir.).

and dissipated the union's majority within 1 week of the union's demand for recognition, and noting that the employer was actively seeking to sell the remainder of its trucks, the court concluded that, in addition to a cease-and-desist order, a preliminary bargaining order was required to restore the status quo as it existed prior to the start of the unfair labor practices. The court also enjoined the employer from advertising for sale and selling its trucks absent the union's agreement. Similarly, in *Gottfried* v. *Mayco Plastics,*[6] the court granted an interim bargaining order in favor of a union which had recently lost a Board-conducted election. The union's objections to the election were consolidated for hearing with complaints alleging employer unfair labor practices. Before the district court, the parties stipulated that the union had possessed a card majority and that there was reasonable cause to believe that the employer had engaged in threats, discipline, promises of benefits, interrogation, and surveillance, and had discharged a substantial portion of the unit employees because of their support of the union. The court found that, in the circumstances, a bargaining order was "necessary to return the parties to [the] status quo . . . which existed on November 9, 1978, when a majority of the employees chose the union as their collective bargaining representative."

On the other hand, in *Wilson* v. *Hart Ski Mfg. Co.,*[7] *Eisenberg* v. *S.E. Nichols,*[8] and *Taylor* v. *Circo Resorts, d/b/a Circus Circus,*[9] preliminary bargaining orders were denied despite findings that reasonable cause existed to believe that the employers had engaged in serious violations of the Act. In *Hart Ski,* the court, citing the Fifth Circuit's *Pilot Freight* decision, concluded that a bargaining order would "go far beyond maintaining the status quo." In *S.E. Nichols,* the court ruled that there was no showing "that conditions preclude a fair election, especially in view of the cease and desist order [granted herein]." And, in *Circus Circus,* while voicing the view that an interim bargaining order would otherwise be fully warranted, the court concluded that since the appropriateness of the bargaining unit was disputed by the employer, and the Board had not yet resolved the issue, a bargaining order would not be proper.

In two cases involving civil contempt of 10(j) orders, compensatory damages were awarded to the charging parties for losses

[6] 472 F.Supp. 1161 (D.C. Mich.), appeal pending (6th Cir.).
[7] Docket 3-79-314 (D C. Minn), appeal pending (8th Cir.).
[8] Docket 78-2613 (D C. N.J.).
[9] 99 LRRM 3446 (D.C. Nev), appeal dismissed as moot upon issuance of Board order (9th Cir).

they sustained as a result of the respondents' noncompliance with the outstanding injunctions. In *Levine* v. *Fry Foods*,[10] district court granted the charging party union the costs it incurred in assisting in the investigation and prosecution of the civil contempt action. And, in *Humphrey* v. *Southside Electric Cooperative*,[11] the charging party union was awarded both those costs and the salaries, costs, and expenses it incurred in preparing for and attending bargaining sessions found to have been conducted in bad faith by the employer in violation of the 10(j) order.

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 "substan-

[10] Docket C-77-304 (D C Ohio), appeal pending (6th Cir.)

[11] Docket CA-78-0466-R (D.C. Va.), appeal pending (4th Cir.)

[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.

tial 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.

In this report period, the Board filed 182 petitions for injunctions under section 10(l). Of the total caseload, comprised of this number together with 31 cases pending at the beginning of the period, 62 cases were settled, 9 dismissed, 13 continued in an inactive status, 12 withdrawn, and 12 pending court action at the close of the report year.[15] During this period, 105 petitions went to final order, the courts granting injunctions in 100 cases and denying them in 5 cases. Injunctions were issued in 65 cases involving secondary boycott action proscribed by section 8(b)(4)(B), as well as violations of section 8(b)(4)(A) which proscribes certain conduct to obtain hot cargo agreements barred by section 8(e). Injunctions were granted in 11 cases involving jurisdictional disputes in violation of section 8(b)(4)(D). Injunctions were issued in 16 cases to proscribe alleged recognitional or organizational picketing in violations of section 8(b)(7). The remaining 8 cases in which injunctions were granted arose out of charges involving violations of section 8(e).

Of the 5 cases in which injunctions were denied, 4 involved secondary picketing activity by labor organizations and 1 involved implementation of illegal hot cargo clauses.

In *Solien* v. *United Steelworkers of America* [*Hussman Refrigerator Co.*],[16] the Eighth Circuit reversed a district court's dismissal of a 10(l) petition which sought to enjoin the union's newspaper advertisements and handbills calling for a complete consumer boycott of all products and businesses of a large, conglomerate enterprise in support of the union's primary strike against a single, wholly owned subsidiary of the parent corporation. The district court had denied the petition based on its conclusion that, in the absence of any handbilling at any facility of the parent, there was no evidence of restraint or coercion of the parent corporation and no evidence that the union had as its object forcing or requiring any persons to cease doing business with the struck employer.[17] The court of appeals recognized that "the conduct of the union cannot readily be characterized as being or as not being a 'secondary boycott' generally prohibited by § 8(a)(4)(ii)(B) but perhaps protected by the 'publicity' proviso of the Act or by the first amendment to the Constitution,"

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[15] See table 20 at p 313, *infra*

[16] 593 F 2d 82 (8th Cir.), cert. denied 100 S Ct 54.

[17] 449 F.Supp. 580 (D C Mo. 1978), 43 NLRB Ann Rep. 208 (1978).

and confessed that it "might have little difficulty" in sustaining the lower court's denial of injunctive relief "were this an ordinary civil case." However, the court observed that 10(l) proceedings are not ordinary civil cases, and that "the discretion of a district court in determining whether an injunction should issue a § 10(l) case is a limited one." Hence, the court ruled that "in holding that the conduct in question did not violate the Act and in denying the injunction on the basis of that holding the trial judge exceeded permissible limits of district court inquiry under § 10(l)." Applying the appropriate standard to the facts at issue, the court concluded that, although the union's "publicity proviso" and first amendment claims were "not insubstantial," nevertheless there was reasonable cause to believe that a violation of the Act had occurred. Accordingly, the court reversed the judgment below and remanded the case to the district court for issuance of an injunction if the existing circumstances warranted it.

Hendrix v. *Intl. Union of Operating Engineers, Local 571 [J. E. D. Constr. Co.]*,[18] also presented a difficult legal issue in the context of a 10(l) proceeding. There, against a history of disagreement between a union and an employer about the work assignment of the forklift operations, the union picketed the employer allegedly to protest the employer's substandard wages. A charge was filed alleging that the union's picketing had at least an object of forcing the employer to assign the disputed work to its members. However, the events evidencing the dispute and the union's demands for the work all occurred more than 6 months before the picketing began and the charge was filed. The court of appeals agreed with the district court that only if evidence of the acts occurring outside the 6-month period was considered, was there reasonable cause to believe that the picketing was for an unlawful purpose. The court noted that in *Local Lodge 1242, Intl. Assn. of Machinists, AFL–CIO [Bryan Mfg. Co.]* v. *N.L.R.B.*, 362 U.S. 411 (1960), the Supreme Court left open the question whether section 10(b) of the Act, which limits complaints to violations which occurred within 6 months of the filing of the change, bars the consideration of events transpiring outside the 10(b) period when, although the elements of the violation occurred within 6 months of the charge, the merit of the charge is shown largely by reliance on the earlier events. The court also noted that the two circuit courts which have considered

[18] 592 F.2d 437 (8th Cir.).

the issue have reached contrary results.[19] Observing that in a 10(l) proceeding the Board's legal theory of violation need only be "substantial and non-frivolous, albeit novel and untested," and recognizing "the need to allow the Board the initial opportunity to apply its expertise to the issues in this case," the court concurred in the district court's finding of reasonable cause to believe the union had violated the Act, and affirmed the issuance of a preliminary injunction.

In *Union de Tronquistas de Puerto Rico, Local 901*,[20] the First Circuit also affirmed a 10(l) injunction in an unusual case. There a trucking employer ceased participating in the affairs of a multiemployer association during the term of the association's contract with a union representing the drivers employed by the association members. However, the employer never formally notified either the association or the union of its withdrawal from the association. Prior to the commencement of negotiations for a new agreement, the association joined with several other employer associations in the formation of a federation to act as an umbrella organization in bargaining with the union. Members of the association were requested to sign new authorizations in favor of the federation. The federation then negotiated a new, 3-year agreement with the union. The employer did not execute an authorization for the federation; nor did it ratify or comply with the federation's contract. The union did not protest the employer's action until 4 days before the expiration of the contract, when it sought to require the employer to execute a stipulation by which he would agree to comply with the terms of the existing agreement and consent to a 1-year extension of the agreement, as modified. In support of these demands the union temporarily interrupted the employer's operations and warned him that there would be "trouble" if he failed to sign. The employer accepted, but did not sign, the stipulation; there were no further confrontations with the union. On these facts, the court of appeals affirmed the district court's finding of reasonable cause to believe the union had unlawfully coerced the employer to force him to join the association, in violation of section 8(b)(4)(A) of the Act. While recognizing that the employer had not given the union the timely notice of his withdrawal from the association, which would have permitted his withdrawal without the union's consent,

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[19] In *Sheet Metal Wkrs Intl. Assn* v *N L R B*, 293 F 2d 141 (1961), the District of Columbia Circuit permitted consideration of pre-10(b) events, while in *N L R B.* v. *McMillan Ring Free Oil Co*, 394 F.2d 26 (1968), the Ninth Circuit barred their consideration

[20] *Union de Tronquistas de Puerto Rico, Local 901* [*Jaime Andino Maldonado*] v *Arlook*, 586 F 2d 872 (1st Cir).

the court found "not insubstantial" the regional director's argument that the union had acquiesced in the employer's untimely withdrawal by its inaction for the duration of the federation's argument. The court also agreed that the employer's execution of the stipulation arguably would either effect his reinstatement in the association or force him to act as if he were a member. Observing that the union's threat of "trouble" remained "outstanding and unretracted," and that, absent injunctive relief, renewed pressures on the employer may have forced him to accede to the union's demand "before completion of the Board's review," the court held that the preliminary injunction was warranted "to preserve the status quo so that the Board's ultimate decision will not be rendered moot by intervening events."

X

Contempt Litigation

During fiscal 1979, petitions for adjudication in contempt for noncompliance with decrees enforcing Board orders were filed in 38 cases, 37 seeking civil contempt and one criminal contempt.[1] As to the civil petitions, two were granted and civil contempt adjudicated,[2] while seven were discontinued upon full compliance.[3] In another case, the Board's petition was denied without prejudice, upon respondent's promise to enter into full compliance.[4] In 16 cases, the courts referred the issues to special masters for trials and recommendations: 2 to U.S. district court judges; [5] 2 to a circuit court judge; [6] 7 to U.S. magistrates; [7] and 5 to other

[1] *In Re Mich State Bldg & Constr. Trades Council, AFL-CIO & Eugene Tolot*, in criminal contempt of the provisions enjoining picket line violence of the judgment of May 13, 1975, and the civil contempt adjudication of Apr 22, 1977, in No. 75-1453 (6th Cir).

[2] *N L R.B.* v *Mich State Bldg. & Constr. Trades Council, AFL-CIO*, including *Southwestern Mich Bldg & Constr Trades Council & James W Rudicil*, in civil contempt of the 8(b) (1) (A) provisions of the judgment of May 13, 1975, in No 75-1453 (6th Cir.), contempt adjudicated May 9, 1979, *N L R B* v *Top Security Patrol*, contempt order of Sept. 20, 1979, finding respondent in civil contempt of the backpay provisions of the judgment of Jan. 11, 1979, in No 78-1537 (6th Cir)

[3] *N L R B* v. *Amoco Chemical Corp* , by order of Aug 9, 1979, in civil contempt of the notice-posting provisions of 529 F 2d 427 (5th Cir), *Richard T. Furtney & Naomi Furtney d/b/a Mr F's Beef & Bourbon*, in further civil contempt of the bargaining contempt adjudication of Aug. 29, 1977, in No. 74-2018 (6th Cir) See 42 NLRB Ann. Rep 195 (1977), *N L R B.* v *Dan Lipman, d/b/a Ascot Nursing Center*, by order of Aug 24, 1979, upon full payment of the backpay under the judgment of Sept 25, 1978, in No. 78-1975 (7th Cir); *United Brothd. of Carpenters & Joiners of America, Local 112, AFL-CIO* v *N L R B.*, by order of June 18, 1979, in civil contempt of the 8(b) (2) provisions of 574 F 2d 457 (9th Cir); *N L.R B.* v. *Calif. Inspection Rating Bureau*, by order of July 11, 1979, in civil contempt of 591 F.2d 56 (9th Cir), *N L.R B.* v. *Intl Longshoremen's & Warehousemen's Union, Local 13*, by order of July 3, 1979, in civil contempt of the hiring hall provisions of the judgment of Aug. 28, 1978, in No 77-2313 (9th Cir.) (see 581 F 2d 1321), *N L R B.* v *Pioneer Inn Associates d/b/a Pioneer Inn*, by order of Apr. 19, 1979, in civil contempt of the bargaining provisions of 578 F 2d 835 (9th Cir.).

[4] *N L R B.* v. *Fabsteel Co. of La* , by order of July 11, 1979, upon reinstatement of unfair labor practice strikers pursuant to 587 F 2d 689 (5th Cir)

[5] To USDJ Palmieri in *N L R B* v. *Local 282, Intl Brothd. of Teamsters*, for increase of fines for violation of 428 F.2d 994 (2d Cir. 1970), to USDJ Thornton in *N L R B.* v. *Northgate Cinema & Wyandotte Theatres*, in civil contempt of the reinstatement provisions of the judgment of Nov. 9, 1978, in No. 78-1433 (6th Cir.).

[6] To Senior Circuit Court Judge Maris, in *N L R B* v *Jorgensen's Inn*, in civil contempt of the reinstatement provisions of 588 F.2d 822 (3d Cir); and in *N L.R B* v *Milford Manor*, in civil contempt of the reinstatement provisions of the judgment of Nov 15, 1978, in No 78-1248 (3d Cir.)

[7] *N L R B* v *Local 32B-32J, Service Employees Intl. Union, AFL-CIO*, in civil contempt of the secondary boycott provisions of the judgment of Oct. 17, 1978, in No 78-4166 (2d Cir.); *N L R B.* v *Midot Management Corp. & Klein's Park Manor*, in civil contempt of the rein-

experienced triers.[8] Seven cases are awaiting referral to a special master.[9] The remaining four cases are before the courts in various stages of litigation: two await the issuance of an order to show cause,[10] one is awaiting disposition of the Board's motion for summary adjudication,[11] and one is awaiting disposition on respondent's default.[12]

Twenty-seven cases which were commenced prior to fiscal 1979 were disposed of during the period. In 13 of these, civil contempt was adjudicated;[13] in 1, in addition to adjudicating civil

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statement provisions of the judgment of Sept. 14, 1978, in No. 78-4132 (2d Cir); *N.L.R.B.* v. *Milbin Printing*, in civil contempt of the bargaining provisions of the judgment of May 15, 1978, in No. 78-4013 (2d Cir), *N.L.R.B.* v. *Vanguard Oil & Service & Vanco Heating, Plumbing, & Welding Co*, in civil contempt of the 8(a)(3) provisions of the judgments of Feb. 23, 1976, in No. 75-4114 and June 16, 1977, in No. 77-4222 (2d Cir); *N.L.R.B.* v. *Lloyd Well d/b/a Pere Marquette Park Lodge*, in civil contempt of the reinstatement provisions of the judgment of Feb. 14, 1979, in No. 78-2468 (7th Cir), *N.L.R.B.* v *MFY Industries, d/b/a Oertel's*, in civil contempt of the reinstatement provisions of 573 F.2d 673 (10th Cir.); *N.L.R.B.* v *Blevins Popcorn Co*, in civil contempt of the bargaining provisions of the judgment of May 4, 1977, and the contempt order of Sept. 16, 1977, in No. 75-1748 (D.C. Cir). (See 43 NLRB Ann. Rep. 214 (1977).)

[8] *N.L.R.B.* v *Union de Tronquistas de Puerto Rico*, in further civil contempt of the 8(b)(1)(A) provisions of the judgment of Feb. 15, 1972, in No. 71-1371 (1st Cir.) (see also, 41 NLRB Ann. Rep. 179 at fn. 13 (1975)), *N.L.R.B.* v *Florida Steel Corp.*, in civil contempt of 534 F.2d 1405, 536 F.2d 1385, 552 F.2d 368 (5th Cir), *N.L.R.B.* v *A. W. Thompson*, in civil contempt of the bargaining provisions of 449 F.2d 1333 and 525 F.2d 870 (5th Cir), *N.L.R.B.* v *Intl. Brothd. of Teamsters, Local 70*, in civil contempt of the hiring hall provisions of 580 F.2d 1053 (1978) and the judgment of Feb. 10, 1972, in No. 71-2716 (9th Cir.); *N.L.R.B. Timberland Packing Corp*, in civil contempt of the bargaining provisions of 550 F.2d 500 (9th Cir. 1977)

[9] *N.L.R.B.* v. *J. & M. Gonzalez Painting Co*, in civil contempt of the backpay provisions of the judgment of Mar. 8, 1979, in No. 79-4055 (2d Cir); *N.L.R.B.* v *Delta Metal Crafters Corp*, in civil contempt of the reinstatement provisions of the judgment of Feb. 25, 1977, in No. 79-1942 (3d Cir.); *N.L.R.B.* v *Fairview Nursing Home*, in civil contempt of the backpay provisions of the judgment of Feb. 28, 1979, in No. 79-1245 (5th Cir) (see 486 F.2d 1400 (1974), cert. denied 419 U.S. 827), *N.L.R.B.* v *Leslie Metal Arts Co*, in civil contempt of the 8(a)(1) provisions of 472 F.2d 584 (1973) and 509 F.2d 811 (1975) (6th Cir.); *N.L.R.B.* v. *Gyuro Grading Co*, in civil contempt of the bargaining provisions of the judgment of May 23, 1978, in No. 78-1432 (7th Cir), *N.L.R.B.* v *Amado Electric*, in civil contempt of the bargaining provisions of the judgment of Mar. 30, 1979, in No. 78-3537 (9th Cir.); *N.L.R.B.* v. *Orange County Dist. Council of Carpenters, AFL-CIO*, in civil contempt of the secondary boycott provisions of the judgment of Mar. 27, 1978, in No. 77-3836 (9th Cir).

[10] *N.L.R.B.* v *Intl. Assn. of Bridge, Structural, & Ornamental Ironworkers, Locals 45 and 378*, in civil contempt of the hiring hall provisions of the judgment of Oct. 2, 1978, in Nos. 78-1085, 1086, 1435, 1572 (3d Cir.); *N.L.R.B.* v *Local 1996, Intl. Brothd. of Painters, AFL-CIO*, in civil contempt of the secondary boycott provisions of the judgments of Sept. 26, 1974 (No. 74-2058) and Dec. 10, 1976 (No. 76-2563) (6th Cir.).

[11] *N.L.R.B.* v *Goodsell & Vocke*, in civil contempt of the bargaining provisions of 559 F.2d 1141 (9th Cir. 1977).

[12] *N.L.R.B.* v *R.M.M.*, in civil contempt of the reinstatement provisions of the judgment of Apr. 11, 1979, in No. 79-1556 (5th Cir.).

[13] *N.L.R.B.* v. *Newton-New Haven Co*, civil contempt order of June 18, 1979 (101 LRRM 2917, 2922), upon the bargaining provisions of the judgment of Dec. 23, 1974, 506 F.2d 1035 (2d Cir.); *N.L.R.B.* v *Ariga Textile Corp*, civil contempt order of June 11, 1979, upon the posting and reinstatement provisions of the judgment of Apr. 20, 1976, in No. 76-4268 (5th Cir), *N.L.R.B.* v *Gerstenlager Co*, 594 F.2d 1089 (1979), in civil contempt of 487 F.2d 1332 (6th Cir. 1973), *N.L.R.B.* v *S.E. Nichols of Ohio*, civil contempt order of Feb. 8, 1979, in No. 72-1493, upon the judgment of 472 F.2d 1228 (6th Cir. 1972), *N.L.R.B.* v *United Steelworkers of America, Local 8220*, civil contempt order of June 29, 1979, in No. 78-1216, upon the unlawful picketing provisions of the judgment of June 8, 1978, in No. 78-1216 (6th Cir), *N.L.R.B.* v *Eugenio Borges d/b/a Super Giant Foods*, civil contempt order of July 24, 1979, in No. 78-1287, upon the reinstatement provisions of the judgment of Apr. 18, 1978 (7th Cir),

contempt for a second time, the court imposed the prospective fine which had been assessed in the earlier adjudication; [14] 4 were discontinued upon full compliance; [15] 5 were disposed of by orders calling for full compliance; [16] and 2 were completed upon compliance in the face of writs of body attachment which had been issued.[17] In two cases the Boards petitions were denied.[18]

Three noteworthy refusal-to-bargain cases were decided during the reporting period In two—*N.L.R.B.* v. *Alterman Transport Lines* and *N.L.R.B.* v. *Crockett-Bradley* [19]—the Fifth Circuit rejected the report and recommendations of its special master. In *Alterman,* the court, noting that the "clearly erroneous" standard for reviewing a master's findings does not apply to findings

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N L R B v. *Intl. Union of Elevator Constructors, Local 3,* civil contempt order of Mar 19, 1979, upon the judgment of Mar 16, 1978, in No. 78-1156 (8th Cir), *N L R B* v. *Alterman Transport Lines,* 587 F 2d 212, in civil contempt of 465 F 2d 950 (reversing the special master) (5th Cir.); *N L R B* v *Intl Longshoremen's & Warehousemen's Union, Local 9,* civil contempt order of Aug. 6, 1979, upon the backpay provisions of the judgment of June 16, 1978, in No 78-1888 (9th Cir.), *N L R B* v. *Rabco Metal Products,* civil contempt order of Sept 4, 1979, upon the bargaining and reinstatement provisions of the judgment of Feb 17, 1978, in Nos 76-1304, 3132 (9th Cir.), *N L R B* v. *Sequoia Dist. Council of Carpenters,* contempt order of Oct 4, 1978, in No. 73-3365, in civil contempt of 499 F 2d 129 (9th Cir 1974); *N L R B* v. *Ship Scalers & Painters' Union, Local 56, I L W U ,* civil contempt order of Sept 20, 1978, upon the judgments of July 25, 1969 (No 20,259) and May 26, 1970 (No. 25,821) (9th Cir), *N L.R.B* v. *Teamsters Local 85,* civil contempt order of May 21, 1979, upon the secondary boycott provisions of the judgments in 454 F.2d 875 (1972) and 448 F.2d 789 (1972) (9th Cir).

[14] *N L R B* v. *Teamsters Local No 327,* civil contempt order of Jan. 18, 1979, assessing compliance fine of $37,000 for violation of the earlier civil contempt adjudication of Nov. 18, 1974, in No 19,947 (6th Cir)

[15] *Bagel Bakers Council of Greater N.Y.* v. *N L R B ,* order of Aug. 13, 1979, upon full compliance with 555 F 2d 304 (2d Cir. 1977), *N L R B.* v. *M D I Trucking Corp. & Drivers Lease Corp ,* order of Aug. 13, 1977 (No. 78-2066), upon full compliance with the backpay provisions of the judgment of April 24, 1975, in No 77-1187 (3d Cir), *N L R B* v. *United Brothd of Carpenters & Joiners, Local Union No 112, AFL-CIO,* order of June 18, 1979, upon full compliance with the judgment of Mar. 8, 1978, 574 F 2d 457 (9th Cir.), *N L R B* v. *I B E.W , Local 1547,* order of Feb. 12, 1979, upon full compliance with the judgment of Dec 23, 1977, in No 76-1758 (D C. Cir)

[16] *N L R B* v *Mich State Constr Co ,* order of Mar 30, 1979, for compliance with the make-whole provisions of 510 F.2d 966 (4th Cir. 1975); *N.L R B.* v. *Fort Lock Corp ,* order of June 21, 1979, for compliance with the judgment of Dec 29, 1975, in No 75-1223 (7th Cir), *N.L R B.* v *Suburban Yellow Taxi Co ,* order of Jan. 23, 1979, requiring compliance and backpay payments pursuant to the judgment of Jan 26, 1977, in No 77-1024 (8th Cir), *N L R B.* v *Ingber & Notrica d/b/a Klapp's Packinghouse Market,* order of June 15, 1979, ordering a successor to comply with the judgment of Nov. 10, 1977, in No 77-3013 (9th Cir); *N L R B* v. *Pioneer Inn Associates d/b/a Pioneer Inn,* order of Apr 18, 1979, implementing the bargaining provisions of 578 F 2d 835 (9th Cir)

[17] *N L R B* v. *Newspaper & Mail Deliverers' Union of N Y & Vicinity,* to compel payment of compliance fine of $37,900 in civil contempt of the judgments of Mar. 15, 1972, in Nos 71-1379, *et al.* (2d Cir.), *N L.R B.* v *McCorvey Sheetmetal Works,* to compel compliance with the posting provisions of the civil contempt adjudication of Nov 21, 1977, in No. 77-3099 (5th Cir)

[18] *Torrington Co* v. *N L R B ,* order of Apr. 3, 1979, denying Board's petition to hold employer in civil contempt of 545 F 2d 840 (2d Cir. 1977); *N L R B* v *Crockett-Bradley,* 598 F.2d 971, denying the Board's petition to hold the employer in civil contempt of the bargaining provisions of the judgment in 523 F 2d 449 (5th Cir).

[19] *N L R B* v *Alterman Transport Lines,* 587 F 2d 212, in civil contempt of bargaining provision of 465 F 2d 950, *N L R B* v *Crockett-Bradley,* 598 F 2d 971, dismissing contempt petition alleging violation of the bargaining provision of 523 F 2d 449

based on an erroneous view of the law, concluded that the master had placed unwarranted reliance on the company president's reservation of his right of ratification and on the tentative nature of agreements reached between the negotiators. While such agreements are not necessarily binding, the court observed, the reopening of the agreements gave rise to the inference that the employer was seeking to avoid any agreement, and that the exercise of the reserved right of ratification was only a device to camouflage that intention. In *Crockett-Bradley,* the court, while acknowledging the applicability of the clearly erroneous standard, rejected its master's recommendation, and concluded that it was improper for him to base his determination of contempt on whether the company's position was "inherently unreasonable, unfair, impracticable or unsound." Where, in the court's view, the parties were still at the "proposal stage" of bargaining, and the parties appeared to be making limited progress on some proposals at a time when the union broke off negotiations, it would be premature to conclude, on the basis of bargaining proposals alone, that the company had engaged in surface bargaining.

In the third bargaining case, *N.L.R.B.* v. *Newton-New Haven Co.*,[20] the court affirmed the master's finding sustaining the Board's contention that the company had bargained in bad faith, where the evidence showed that the company had entered into a scheme prior to the commencement of bargaining to defeat the union through surveillance, discharge of union adherents, and by taking predictably unacceptable positions. As a remedy therefor the court ordered, *inter alia,* that the company reimburse the union for its bargaining costs.

[20] See fn 13, *supra*

XI

Special and Miscellaneous Litigation

A. Court Jurisdiction to Enjoin Board Action

In *N.L.R.B.* v. *Interstate Dress Carriers*,[1] the Third Circuit reversed and vacated in part and remanded in part the district court's decision enjoining the Board from opening or counting ballots in a representation proceeding, and ordering discovery of facts bearing on the validity of that proceeding. In the district court the Board had applied, pursuant to section 11(2) of the Act, for an order requiring the company to obey a *subpoena duces tecum* for production of an "*Excelsior* list." The company filed an answer and counterclaim and motion for a temporary restraining order to enjoin the election in the representation proceeding. Subsequently the petitioning union and the incumbent union intervened and the incumbent union joined the company's request for preliminary relief. The Board moved to dismiss the company's counterclaim for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. The district court issued an order denying the company's motion for a preliminary injunction restraining the Board from conducting the election but enjoined the Board from opening or counting the ballots in that election until further order of the court. The court also reserved judgment on the Board's application for enforcement of its subpena; denied without prejudice the Board's motion to dismiss the company's counterclaim for lack of subject matter jurisdiction; and permitted discovery as to facts bearing on the jurisdiction of the court to enjoin the Board proceeding as prayed for in the counterclaim. Pending appeal, the Third Circuit stayed all discovery.

On appeal the Third Circuit held that the district court's impounding order was a preliminary injunction appealable under 28 U.S.C. § 1291(a)(1). It further held that if subject matter jurisdiction was entirely lacking in the district court or the pleadings disclosed no claim upon which relief could be granted,

[1] 610 F.2d 299 (3d Cir.).

the discovery order, which would ordinarily be interlocutory and nonappealable, would fall along with the rest. On the merits the court found that the company's counterclaim presented subject matter within the exclusive jurisdiction of the Board and the courts of appeals under section 10 of the Act and did not state a claim upon which the district court could grant relief. The court further held that, since the incumbent union's counterclaim was not filed until after the district court issued its injunction, it could not have been a basis of jurisdiction for the injunction, and the court therefore declined to reach the issue of whether the allegations contained therein would fit into a limited exception to the general rule of nonreviewability of representation cases by district courts.

Regarding the Board's application for enforcement of its subpena, the court found that the company's affirmative defenses did not sustain the district court's injunction or discovery order. The court held that it is ordinarily sufficient for the Board to show that the subpena is for subject matter relevant to an inquiry within its statutory mandate. It also stated, however, that, where the defendant in the subpena enforcement proceeding has articulated sufficient allegations to put in issue the legitimacy of the agency's purpose in issuing the subpena, a hearing may be appropriate. The court further pointed out that this is a heavy burden on the party seeking to quash. It must be shown that the subpena is intended solely to serve purposes outside the purview of the agency's jurisdiction. Further the defendant must put in issue not simply the good faith of the particular agent who managed the proceeding but the good faith of the agency seeking enforcement. And, the court held that, if these threshold requirements are not satisfied, the district court should, in an section 11(2) enforcement case, act summarily.

In the instant case, the court found that the company's allegations of procedural irregularities in the Board's proceeding and questions of labor organization status were within the jurisdiction of the Board and courts of appeals and, therefore, legally insufficient as defenses to summary enforcement of the subpena. Moreover, the court found that allegations that the Board may have cooperated with the Department of Justice in scheduling its representation hearings so as not to interfere with an ongoing criminal investigation of the company did not sustain a charge that the challenged subpena was issued in bad faith and for the purpose of gathering information for the Justice Department in its criminal prosecution. Thus, the court concluded that, when the district court issued its injunction, there was nothing before it

justifying its doing so based on the theory that the company may have had a valid defense to the subpena enforcement proceeding. Accordingly, the court reversed and vacated the injunction and remanded the case to the district court for a decision based on the present state of the pleadings.

On remand [2] the district court dismissed the company's counterclaim and found the issue of subpena enforcement moot because the Board had already obtained the *Excelsior* list under seal for the limited purpose of the election and the election had been held and the ballots counted. The incumbent union's later filed counterclaim was similarly dismissed. The district court found it premature under the doctrine of exhaustion of administrative remedies, since the Board proceeding had not yet been terminated and it was unclear whether there might be 10(e) or 10(f) review in the court of appeals in which the union could intervene. At the same time the district court noted that there should not be any discovery in this civil proceeding prior to the termination of the Board or criminal proceedings, since this would give the incumbent union greater discovery than Congress and the courts had determined it should have in either of the other two forums. Finally, the district court found that the allegations raised by the incumbent union's counterclaim, that is, improper professional conduct by persons connected with the Department of Justice criminal investigation and prosecution, could be raised in other forums.

In two cases, courts held that they lacked subject matter jurisdiction to review the Board's application of the "blocking charge" rule. In each case, the regional director dismissed an employee decertification petition while unfair labor practice complaints were pending before an administrative law judge. In the first of the cases, *Carol Estes* v. *N.L.R.B.*,[3] the court declined the invitation to exercise jurisdiction on the bases of two Fifth Circuit decisions,[4] noting that these had been distinguished as "rare cases" in subsequent decisions of that court [5] which the instant case more closely resembled. In the second case, *Gene Patterson* v. *N.L.R.B.*,[6] the court held that the facts did not justify an exception to the principle of nonreviewability. Both courts noted

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[2] Docket 79-481 (D C N J , September 17 and October 22, 1979).

[3] Docket 78-4068 (D C Kans.)

[4] *Algie V Surratt* v. *N L R B* , 463 F 2d 378 (1972); *Neil Templeton* v. *Dixie Color Printing Co* , 444 F 2d 1064 (1971)

[5] *Michael Bishop* v *N.L R B* , 502 F.2d 1024 (1974), *N.L R B* v *Big Three Industries*, 497 F 2d 43 (1974)

[6] Docket 78-74-Civ-8 (D C N C).

that the Board had not acted mechanistically in applying the rule nor allowed the pending unfair labor practice charges to be dormant following dismissal of the petition.

In *Chicago Truck Drivers, Helpers & Warehouse Wkrs. Union (Independent)* v. *N.L.R.B.*,[7] the court affirmed a district court's decision [8] dismissing for lack of jurisdiction a *Leedom* v. *Kyne* [9] suit brought by the union. The union had sought to represent certain truckdriving employees of Federal Express Corporation, a chartered air carrier operating a parcel delivery service. Relying, in part, on *Holston Land Co.*,[10] the Board's regional office dismissed the union's representation petition on the ground that the National Mediation Board (NMB) had determined that Federal Express was a carrier subject to the jurisdiction of the NMB under the Railway Labor Act (RLA) and that the evidence showed that the truckdriving employees in question were engaged in work integrally related to such air carrier operations. Before the court, the union relied heavily on language in section 1 of the RLA (45 U.S.C. § 151 (and see also §§ 181, 182)), excepting "trucking service" from the description of carrier company activities subject to the RLA. The court emphasized that *Leedom* v. *Kyne* and its progeny permit judicial review only when the Board acts in excess of its statutory powers and contrary to a specific statutory prohibition or directive. The court rejected the view that *Boire* v. *Greyhound Corp.*[11] implicitly approved *Leedom* v. *Kyne* review if the "sole disputed issue was a legal one." Accordingly, the court held that jurisdiction is not available solely because the Board has interpreted or applied another statute incorrectly or otherwise made an error of law in a certification proceeding; rather, jurisdiction lies only if there has been a violation of a clear and specific statutory directive. The court noted that there was precedent supportive of the Board's position that the "trucking services" exception in the RLA refers only to trucking activities independent of an employer's carrier operations and that, where such activities are integrally related, the employers and affected drivers are subject to the RLA, not the Act. Despite finding the union's counterarguments, based on the RLA's legislative history, "somewhat persuasive," the court determined that it was nevertheless unable to conclude that the

[7] 599 F.2d 816 (7th Cir.).
[8] 416 F.Supp. 1258 (D.C. Ill 1978).
[9] 358 U.S. 184 (1958).
[10] 221 NLRB 249 (1975).
[11] 376 U.S. 473 (1964).

Board "disregarded a clear, specific statutory directive" when it had found the employees covered by the RLA, and accordingly the court concluded that the district court properly dismissed the suit for lack of jurisdiction.

B. Litigation Involving the Freedom of Information Act

In *Martins Ferry Hospital Assn.* v. *N.L.R.B.*,[12] the district court held that authorization cards were exempt from disclosure under Exemptions 7(A) and 6. Mentioning the Supreme Court's approval of the Board's discovery practices and its concern about disclosing an employee's identity to his employer, the district court found the reasoning of *Robbins Tire* [13] to be controlling. It noted that, while the cards were initially submitted to the Board for a purpose only indirectly related to law enforcement, circumstances had operated to make them relevant to a subsequent unfair labor practice proceeding. With respect to Exemption 6, the district court relied on the reasoning in *Masonic Homes.*[14]

In *Quickie Mfg. Corp.* v. *N.L.R.B.*,[15] the district court held that Form 4069 was exempt from disclosure under Exemption 5. Citing *Sears*,[16] the court held that Form 4069 constituted intra-agency predecisional advice to the regional director and therefore fell within the executive privilege component of Exemption 5. The court therefore respectfully disagreed with the Fifth Circuit's decision in *Pacific Molasses Co.*[17] It indicated that it would not have upheld the Board's nondisclosure of Form 4069 under either Exemption 7(A) or Exemption 4. It also rejected the Board's contention that the plaintiff was required to seek an appeal of the regional director's decision before instituting its suit in the district court; administrative appeal, it stated, would be futile.

In *Clements Wire & Mfg. Co.* v. *N.L.R.B.*,[18] the Fifth Circuit vacated a preliminary injunction enjoining the Board from further processing a pending representation case until the district court determined whether the plaintiff was entitled to the Board's

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[12] Docket C-2-78-529 (D C. Ohio).
[13] *N L R B* v *Robbins Tire & Rubber Co*, 437 U S. 214 (1978).
[14] *Committee on Masonic Homes* v *N L R B*, 556 F.2d 214 (3d Cir. 1977).
[15] Docket 78-3012 (D C N.J).
[16] *N.L R B* v *Sears, Roebuck & Co*, 421 U S 132 (1975).
[17] *Pacific Molasses Co* v *N L R B*, 577 F 2d 1172 (1978).
[18] 589 F 2d 894 (5th Cir).

affidavits compiled during the representation case investigation. The court held that, in light of the Supreme Court's decision in *N.L.R.B.* v. *Robbins Tire & Rubber Co.*[19] that witness' statements in pending unfair labor practice proceedings are exempt from disclosure by Exemption 7(A), the plaintiff in *Clements Wire* would not succeed on the merits of its FOIA action. The court stated that, as in *Robbins Tire,* the requested affidavits related to an "imminent adjudicatory proceeding," and thus implicitly held that *Robbins Tire* applied not only to unfair labor practice proceedings but also to affidavits compiled in and related to pending representation proceedings.

In *Nemacolin Mines Corp.* v. *N.L.R.B.*,[20] the district court held that an employee affidavit contained in a file of a closed unfair labor practice case was not exempt from disclosure under the FOIA. The court concluded that Exemption 7(A) did not apply because, "where the administrative agency has no intention to use statements in later enforcement proceedings, there are no 'enforcement proceedings' which disclosure could disrupt." Although the court observed that disclosure may interfere with future Board proceedings, it concluded that the statutory term "enforcement proceedings" refers only to "the proceedings for which the investigation was conducted." The court also held that the affiant was not a "confidential source" within the meaning of Exemption 7(D). The court stated that, since the affiant was told that the statement would be kept confidential unless the affiant was called to testify at a hearing, the confidentiality was "conditional" and therefore did not create "a justifiable expectation of confidentiality after the close of enforcement proceedings." The court rejected the argument that such conditional confidentiality was sufficient under Exemption 7(D) because otherwise the Board could not give any assurance of confidentiality without deciding at the outset of an investigation which affiants would be called at the hearing. The court observed that "a different question would be presented" if the Board did not grant confidentiality to all affiants but only to reluctant witnesses who requested it. Finally, the court noted that its decision was influenced by the fact that an affiant, like a Board witness, is protected from employer retaliation by section 8(a)(4) of the Act.

In *Polynesian Cultural Center* v. *N.L.R.B.*,[21] the Ninth Circuit reversed a district court order—issued prior to the Supreme

[19] 437 U.S. 214 (1978)
[20] 467 F.Supp. 521 (D C Pa)
[21] 582 F 2d 467 (9th Cir).

Court's decision in *N.L.R.B.* v. *Robbins Tire & Rubber Co.*[22]—requiring the Board to disclose under the FOIA an affidavit of a potential witness in a pending unfair labor practice hearing. The court held that under *Robbins Tire* the affidavit was exempt from disclosure even though it was in a "technically 'closed' " file because it was relevant to a related ongoing proceeding. The court also reversed the district court's award of attorney's fees to the FOIA plaintiff. The plaintiff argued that it had "substantially prevailed" because the district court's order had caused the Board to call the affiant to testify at the unfair labor practice hearing and then disclose the affidavit for use in cross-examination. The court stated that even accepting this contention, attorney's fees were improper because (1) the Government's withholding of the records had a reasonable basis in law and indeed was correct; (2) the plaintiff's interest in the records was wholly commercial; and (3) disclosure was unlikely to result in substantial public benefit.

C. Other Forms of Litigation

In *N.L.R.B.* v. *Valley West Welding Co.*,[23] the Sixth Circuit declined to enforce the General Counsel's subpenas for financial records. During the unfair labor practice hearing, the company had moved to revoke the subpenas, arguing that the records sought were confidential. When counsel for the General Counsel declined to accept responsibility for assuring the confidentiality of the subpenaed documents, the administrative law judge decided that he would personally assume responsibility for maintaining the confidentiality of the documents. Accordingly, he denied the petition to revoke, ordered the company to release the documents in the administrative law judge's custody, and ordered that counsel for the General Counsel would be permitted to inspect the documents only in the administrative law judge's presence and would not be permitted to copy them. The company refused to comply, contending that counsel for the General Counsel's earlier request that the administrative law judge revoke a similar order with respect to another company's records indicated that he could be expected to disregard the administrative law judge's order to respect the confidentiality of the company's records.

The district court[24] agreed with the company's argument and refused to enforce the subpenas, even though it found the docu-

[22] 437 U S. 214 (1978).
[23] Dockets 78-1379 and 78-1381 (6th Cir)
[24] 99 LRRM 3480 (D C.Tenn. 1978).

ments to be relevant to the unfair labor practice case. The Sixth Circuit affirmed, holding that it was an abuse of discretion for the Board to seek enforcement of the subpena when it was inferrable that counsel for the General Counsel would not obey a protective order. Judge Keith dissented, reasoning that the administrative law judge's decision to accept personal responsibility for assuring that the documents remained confidential rendered the attitude of counsel for the General Counsel irrelevant. Judge Keith concluded that the administrative law judge's decision that the subpenas should be enforced with his modifications was not an abuse of discretion. Accordingly, Judge Keith would have reversed the district court's decision and ordered the subpenas enforced.

In *Angle* v. *Rodgers*,[25] an employer filed suit against a discriminatee for malicious prosecution. The defendant employee was found to have been unlawfully discharged in an unfair labor practice case, and then found to have been inadequately reinstated and then unlawfully discharged in a subsequent contempt proceeding. The plaintiff-employer's action was based, in part, on the court of appeals' finding that the employee had attempted to fabricate certain evidence in the contempt proceeding. The defendant employee filed a charge alleging that the employer violated section 8(a)(1) and (4) of the Act by initiating the malicious prosecution suit, and impleaded the Board in the court action as a third-party defendant. The Board moved to dismiss the entire action or, in the alternative, to stay the proceeding pending the determination of the unfair labor practice case. The United States District Court for the District of Kansas refused to dismiss the main action, but granted the Board relief on the alternate theory that the proceeding should be stayed pending the resolution of the unfair labor practice case. The court viewed this conclusion as being mandated by the Supreme Court's decision in *Sears, Roebuck & Co.*,[26] which the district court viewed as standing for the proposition that when the Board's processes are invoked court jurisdiction is preempted pending the determination in the unfair labor practice proceeding. (*Id.* at 209; Justice Blackmun concurring.)[27]

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[25] Unreported decision, D C. Kans

[26] 436 U S 180 (1978).

[27] The Board subsequently found that the plaintiff-employer's suit was brought in retaliation for the discriminatee's filing of charges and giving testimony and evidence and was therefore violative of sec. 8(a)(1) and (4). *George A. Angle*, 242 NLRB No. 112. The employer's petition for review and the Board's cross-application for enforcement are pending before the U S Court of Appeals for the Tenth Circuit (Docket 79-1548)

The case of *In re W. T. Grant Co.*[28] presents the issue of whether *Shopmen's Local 455* v. *Kevin Steel Products*[29] authorizes a debtor in possession to abrogate the terms of a collective-bargaining agreement, prior to obtaining judicial approval to reject the agreement, which in this case was neither sought nor obtained. Debtor-in-possession W. T. Grant had discharged numerous employees during an unsuccessful Chapter XI proceeding under circumstances entitling them to severance pay under various collective-bargaining agreements. Nevertheless, the debtor-in-possession refused to make the severance payments. After the Chapter XI arrangement failed, the trustee in bankruptcy contended that since the debtor-in-possession had never formally adopted the collective-bargaining agreements it was not bound by them; and, therefore, the refusal to pay severance benefits was not a breach of any agreement during the administration. The district court rejected this argument, holding that the employees were entitled to their severance pay benefits, and that these benefits were entitled to priority as a cost and expense of the administration.[30]

In *Irving, G. C.* v. *Anthony Di Lapi, et al.*,[31] the Second Circuit affirmed in part, modified in part, and vacated in part the decision of the district court[32] holding John S. Irving, General Counsel for the National Labor Relations Board in civil and criminal contempt. The district court had issued the contempt orders because the General Counsel had refused to comply with the court's order requiring disclosure of certain employee union authorization cards which had been submitted to the Board's regional office in Newark, New Jersey, in connection with a Board representation proceeding. The district court had ordered the cards disclosed on the ground that they were relevant to a criminal proceeding pending before it,[33] in which the defendants are charged with conspiring to obstruct that representation proceeding. The General Counsel declined to comply with the district court's disclosure order on the ground that it was necessary to maintain the cards' confidentiality in order to ensure a fair, uncoerced secret-ballot election and that the cards were, therefore, privileged. Rejecting the General Counsel's arguments, the district court imposed a criminal contempt fine of $10,000 and a civil contempt penalty of

[28] 102 LRRM 2850 (D.C.N.Y.).
[29] 519 F 2d 698 (2d Cir. 1975).
[30] 102 LRRM at 2853–54.
[31] 600 F.2d 1027 (2d Cir.), as modified Docket 79–3070, November 9, 1979.
[32] 100 LRRM 2610 (D.C.N.Y).
[33] *U S.* v *Di Lapi*, Docket 79–1003.

$1,000 a day, pending compliance, for refusal to obey his disclosure order. The orders were stayed pending appeal.

On appeal, the Second Circuit held that the district court had properly balanced the interests of the defendants and of the Board in determining that some disclosure of the cards was warranted. However, the court held that the public interest in maintaining the confidentiality of the cards required that the district court's order be modified so that the cards be disclosed only to the defendants' attorneys, and not to the defendants. Accordingly, the court of appeals held that the criminal contempt order should be vacated because such an order is appropriate only where it has been shown that the contemnor has intentionally obstructed the administration of justice, and that test was not met by the General Counsel's conduct in this case. Nonetheless, the court held that the district court would not abuse its discretion in holding the General Counsel in contempt should the General Counsel fail to comply with the disclosure order as modified.

INDEX OF CASES DISCUSSED

APPENDIX

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 results 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 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 original ballot which received the highest and the next highest number of votes.

Election, Stipulated

An election held by the regional director pursuant to an agreement signed by all the parties concerned. The agreement provides for the waiving of hearing and the establishment of the appropriate unit by mutual consent. Postelection rulings are made by the Board.

Eligible Voters

Employees within an appropriate bargaining unit who were employed as of a fixed date prior to an election, or are otherwise qualified to vote under the Board's eligibility rules.

Fees, Dues, and Fines

The collection by a union or an employer of dues, fines, and referral fees from employees may be found to be an unfair labor practice under section 8(b) (1)(A) or (2) or 8(a) (1) and (2) or (3), where, for instance such moneys were collected pursuant to an illegal hiring hall arrangement, or an invalid or unlawfully applied union-security agreement; where dues were deducted from employees' pay without their authorization; or, in the case of fines, where such fines restrained or coerced employees in the exercise of their rights. The remedy for such unfair labor practices usually requires the 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

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.

Table 1.—Total Cases Received, Closed, and Pending, Fiscal Year 1979[1]

	Total	Identification of filing party					
		AFL-CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
	All cases						
Pending October 1, 1978	21,211	8,190	2,418	788	766	6,871	2,178
Received fiscal 1979	54,907	18,135	6,389	1 526	1,521	21 934	5,402
On docket fiscal 1979	76,118	26,325	8,807	2,314	2,287	28,805	7,580
Closed fiscal 1979	55,794	18,139	6,482	1 554	1,580	22 417	5 622
Pending September 30, 1979	20,324	8,186	2, 325	760	707	6, 388	1,958
	Unfair labor practice cases[2]						
Pending October 1, 1978	16,942	6,107	1,512	562	517	6, 362	1,882
Received fiscal 1979	41,259	12,134	3,154	943	757	19 781	4,490
On docket fiscal 1979	58,201	18,241	4,666	1,505	1 274	26 143	6,372
Closed fiscal 1979	41,544	11 819	3 135	945	786	20,219	4,640
Pending September 30, 1979	16,657	6,422	1,531	560	488	5,924	1 732
	Representation cases[3]						
Pending October 1, 1978	4,024	2 020	898	221	233	408	244
Received fiscal 1979	12,905	5,819	3,198	568	733	1,808	779
On docket fiscal 1979	16,929	7,839	4,096	789	966	2,216	1,023
Closed fiscal 1979	13,465	6,129	3,309	593	750	1,853	831
Pending September 30, 1979	3,464	1,710	787	196	216	363	192
	Union-shop deauthorization cases						
Pending October 1, 1978	96	----	----	----	----	96	----
Received fiscal 1979	330	----	----	----	----	330	----
On docket fiscal 1979	426	----	----	----	----	426	----
Closed fiscal 1979	328	----	----	----	----	328	----
Pending September 30, 1979	98	----	----	----	----	98	----
	Amendment of certification cases						
Pending October 1, 1978	32	21	1	2	2	1	5
Received fiscal 1979	64	35	4	3	11	2	9
On docket fiscal 1979	96	56	5	5	13	3	14
Closed fiscal 1979	81	43	4	5	12	3	14
Pending September 30, 1979	15	13	1	0	1	0	0
	Unit clarification cases						
Pending October 1, 1978	117	42	7	3	14	4	47
Received fiscal 1979	349	147	33	12	20	13	124
On docket fiscal 1979	466	189	40	15	34	17	171
Closed fiscal 1979	376	148	34	11	32	14	137
Pending September 30, 1979	90	41	6	4	2	3	34

[1] See Glossary for definitions of terms Advisory Opinion (AO) cases not included See table 22
[2] See table 1A for totals by types of cases
[3] See table 1B for totals by types of cases

Table 1A.—Unfair Labor Practice Cases Received, Closed, and Pending, Fiscal Year 1979[1]

	Total	Identification of filing party					
		AFL-CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
	CA cases						
Pending October 1, 1978	12,957	6,066	1,504	551	422	4,377	37
Received fiscal 1979	29,026	12,036	3,144	912	688	12,156	90
On docket fiscal 1979	41,983	18,102	4,648	1,463	1,110	16,533	127
Closed fiscal 1979	28,770	11,714	3,125	910	691	12,240	90
Pending September 30, 1979	13,213	6,388	1,523	553	419	4,293	37
	CB cases						
Pending October 1, 1978	2,695	30	7	6	17	1,952	683
Received fiscal 1979	9,157	79	9	3	34	7,487	1,545
On docket fiscal 1979	11,852	109	16	9	51	9,439	2,228
Closed fiscal 1979	9,510	79	9	3	38	7,843	1,538
Pending September 30, 1979	2,342	30	7	6	13	1,596	690
	CC cases						
Pending October 1, 1978	784	2	1	2	44	23	712
Received fiscal 1979	1,947	10	1	15	16	93	1,812
On docket fiscal 1979	2,731	12	2	17	60	116	2,524
Closed fiscal 1979	2,001	11	1	16	31	87	1,855
Pending September 30, 1979	730	1	1	1	29	29	699
	CD cases						
Pending October 1, 1978	170	8	0	2	1	1	158
Received fiscal 1979	421	4	0	1	8	12	396
On docket fiscal 1979	591	12	0	3	9	13	554
Closed fiscal 1979	484	11	0	3	9	11	450
Pending September 30, 1979	107	1	0	0	0	2	104
	CE cases						
Pending October 1, 1978	154	1	0	0	32	6	115
Received fiscal 1979	128	3	0	0	6	3	116
On docket fiscal 1979	282	4	0	0	38	9	231
Closed fiscal 1979	159	3	0	0	12	6	138
Pending September 30, 197	123	1	0	0	26	3	93
	CG cases						
Pending October 1, 1978	27	0	0	0	0	1	26
Received fiscal 1979	50	1	0	0	0	0	49
On docket fiscal 1979	77	1	0	0	0	1	75
Closed fiscal 1979	44	0	0	0	0	1	43
Pending September 30, 1979	33	1	1	0	0	0	32
	CP cases						
Pending October 1, 1978	155	0	0	1	1	2	151
Received fiscal 1979	530	1	0	12	5	30	482
On docket fiscal 1979	685	1	0	13	6	32	633
Closed fiscal 1979	576	1	0	13	5	31	526
Pending September 30, 1979	109	0	0	0	1	1	107

[1] See Glossary for definitions of terms

Table 1B.—Representation Cases Received, Closed, and Pending, Fiscal Year 1979[1]

	Total	Identification of filing party					
		AFL-CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
	RC cases						
Pending October 1, 1978	3,383	2,020	898	221	231	13	----
Received fiscal 1979	10,333	5,809	3,195	568	726	35	----
On docket fiscal 1979	13,716	7,829	4,093	789	957	48	----
Closed fiscal 1979	10,796	6,122	3,306	593	743	32	----
Pending September 30, 1979	2,920	1,707	787	196	214	16	----
	RM cases						
Pending October 1, 1978	244	----	----	----	----	----	244
Received fiscal 1979	779	----	----	----	----	----	779
On docket fiscal 1979	1,023	----	----	----	----	----	1,023
Closed fiscal 1979	831	----	----	----	----	----	831
Pending September 30, 1979	192	----	----	----	----	----	192
	RD cases						
Pending October 1, 1978	397	0	0	0	2	395	----
Received fiscal 1979	1,793	10	3	0	7	1,773	----
On docket fiscal 1979	2,190	10	3	0	9	2,168	----
Closed fiscal 1979	1,838	7	3	0	7	1,821	----
Pending September 30, 1979	352	3	0	0	2	347	----

[1] See Glossary for definitions of terms

Table 2.—Types of Unfair Labor Practices Alleged, Fiscal Year 1979

	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	29,026	100 0
8(a)(1)	5,193	17 9
8(a)(1)(2)	364	1 3
8(a)(1)(3)	13,496	46 6
8(a)(1)(4)	245	0 8
8(a)(1)(5)	5,866	20 2
8(a)(1)(2)(3)	260	0 9
8(a)(1)(2)(4)	8	0 0
8(a)(1)(2)(5)	113	0 4
8(a)(1)(3)(4)	680	2 3
8(a)(1)(3)(5)	2,509	8 6
8(a)(1)(4)(5)	14	0 0
8(a)(1)(2)(3)(4)	26	0 1
8(a)(1)(2)(3)(5)	142	0 5
8(a)(1)(2)(4)(5)	3	0 0
8(a)(1)(3)(4)(5)	74	0 3
8(a)(1)(2)(3)(4)(5)	33	0 1
Recapitulation[1]		
8(a)(1)[2]	29,026	100 0
8(a)(2)	949	3 3
8(a)(3)	17,220	59 3
8(a)(4)	1,083	3 7
8(a)(5)	8,754	30 2
B Charges filed against unions under sec 8(b)		
Subsections of sec 8(b) Total cases	12,055	100 0
8(b)(1)	6,729	56 1
8(b)(2)	189	1 6
8(b)(3)	559	4 6
8(b)(4)	2,368	19 6
8(b)(5)	14	0 1
8(b)(6)	18	0 1
8(b)(7)	530	4 4
8(b)(1)(2)	1,302	10 8
8(b)(1)(3)	232	1 9
8(b)(1)(5)	11	0 1
8(b)(1)(6)	8	0 1
8(b)(2)(3)	6	0 0
8(b)(3)(5)	1	0 0
8(b)(3)(6)	4	0 0
8(b)(1)(2)(3)	63	0 5
8(b)(1)(2)(5)	15	0 1
8(b)(1)(2)(6)	2	0 0
8(b)(1)(3)(5)	3	0 0
8(b)(1)(2)(3)(5)	1	0 0
Recapitulation[1]		
8(b)(1)	8,366	69 4
8(b)(2)	1,578	13 1
8(b)(3)	869	7 2
8(b)(4)	2,368	19 6
8(b)(5)	45	0 4
8(b)(6)	32	0 3
8(b)(7)	530	4 4
B1 Analysis of 8(b)(4)		
Total cases 8(b)(4)	2,368	100 0
8(b)(4)(A)	126	5 3
8(b)(4)(B)	1,734	73 3
8(b)(4)(C)	10	0 4
8(b)(4)(D)	421	17 8
8(b)(4)(A)(B)	72	3 0
8(b)(4)(B)(C)	4	0 2
8(b)(4)(A)(B)(C)	1	0 0
Recapitulation[1]		
8(b)(4)(A)	199	8 4
8(b)(4)(B)	1,811	76 5
8(b)(4)(C)	15	0 6
8(b)(4)(D)	421	17 8
B2 Analysis of 8(b)(7)		
Total cases 8(b)(7)	530	100 0
8(b)(7)(A)	119	22 5
8(b)(7)(B)	33	6 2
8(b)(7)(C)	370	69 8
8(b)(7)(A)(B)	2	0 4
8(b)(7)(A)(C)	5	0 9
8(b)(7)(A)(B)(C)	1	0 2
Recapitulation[1]		
8(b)(7)(A)	127	24 0
8(b)(7)(B)	36	6 8
8(b)(7)(C)	376	70 9

[1] A single case may include allegations of violation 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 2.—Types of Unfair Labor Practices Alleged, Fiscal Year 1979—Contd.

	Number of cases showing specific allegations	Percent of total cases
C Charges filed under sec 8(e)		
Total cases 8(e)	128	100 0
Against unions alone	113	88 2
Against employers alone	2	1 6
Against unions and employers	13	10 2
D Charges filed under sec 8(g)		
Total cases 8(g)	50	100 0

Table 3A.—Formal Actions Taken in Unfair Labor Practice Cases, Fiscal Year 1979[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 G combinations
						Jurisdictional disputes	Unfair labor practices						
10(k) notices of hearings issued	81	71				71							
Complaints issued	6,986	5,413	4,496	424	182		14	19	5	45	112	80	36
Backpay specifications issued	11	9	9	0	0		0	0	0	0	0	0	0
Hearings completed, total	1,640	1,209	970	94	23	29	2	7	1	7	28	37	11
Initial ULP hearings	1,593	1,179	943	93	23	29	2	7	1	7	27	36	11
Backpay hearings	39	23	21	0	0		0	0	0	0	1	1	0
Other hearings	8	7	6	1	0		0	0	0	0	0	0	0
Decisions by administrative law judges, total	1,376	941	755	74	21		2	4	0	5	17	53	10
Initial ULP decisions	1,353	921	738	72	21		2	4	0	5	17	52	10
Backpay decisions	23	20	17	2	0		0	0	0	0	0	1	0
Supplemental decisions	0	0	0	0	0		0	0	0	0	0	0	0
Decisions and orders by the Board, total	2,120	1,696	1,338	124	65	39	6	9	1	16	27	31	40
Upon consent of parties													
Initial decisions	240	173	107	21	33		0	1	0	4	1	1	5
Supplemental decisions	0	0	0	0	0		0	0	0	0	0	0	0
Adopting administrative law judges' decisions (no exceptions filed)													
Initial ULP decisions	390	334	279	27	6		1	2	0	4	3	10	2
Backpay decisions	4	4	3	0	0		0	0	0	0	1	0	0
Contested													
Initial ULP decisions	1,384	1,105	881	72	25	39	3	4	1	7	21	19	29
Decisions based on stipulated record	37	30	20	2	1		0	2	0	1	0	0	4
Supplemental ULP decisions	5	4	4	0	0		0	0	0	0	0	0	0
Backpay decisions	60	50	44	2	0		2	0	0	0	1	1	0

[1] See Glossary for definitions of terms

Table 3B.—Formal Actions Taken in Representation and Union Deauthorization Cases, Fiscal Year 1979[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	2,292	2,164	1,914	70	180	8
Initial hearings	2,039	1,912	1,683	60	169	7
Hearings on objections and/or challenges	253	252	231	10	11	1
Decisions issued, total	1,992	1,779	1,570	51	158	4
By regional directors	1,815	1,632	1,429	48	155	4
Elections directed	1,606	1,446	1,270	40	136	1
Dismissals on record	209	186	159	8	19	3
By Board	177	147	141	3	3	0
Transferred by regional directors for initial decision	57	47	45	1	1	0
Elections directed	43	42	40	1	1	0
Dismissals on record	14	5	5	0	0	0
Review of regional directors' decisions						
Requests for review received	630	556	501	17	38	1
Withdrawn before request ruled upon	2	2	1	0	1	0
Board action on request ruled upon, total	548	479	434	13	32	1
Granted	68	55	48	1	6	0
Denied	474	420	383	11	26	1
Remanded	6	4	3	1	0	0
Withdrawn after request granted, before Board review	0	0	0	0	0	0
Board decision after review, total	120	100	96	2	2	0
Regional directors' decision						
Affirmed	50	40	40	0	0	0
Modified	34	24	24	0	0	0
Reversed	36	36	32	2	2	0
Outcome						
Election directed	83	78	76	1	1	0
Dismissals on record	37	22	20	1	1	0

[1] See Glossary for definitions of terms

Table 3B.—Formal Actions Taken in Representation and Union Deauthorization Cases, Fiscal Year 1979[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	1,608	1,539	1,382	61	96	12
By regional directors	330	325	285	28	12	7
By Board	1,278	1,214	1,097	33	84	5
In stipulated elections	1,237	1,174	1,055	33	86	5
No exceptions to regional directors' reports	755	729	636	25	68	5
Exceptions to regional directors' reports	473	436	412	8	16	0
In directed elections (after transfer by regional director)	50	49	49	0	0	0
Review of Regional directors' supplemental decisions						
Request for review received	45	45	41	0	4	0
Withdrawn before request ruled upon	0	0	0	0	0	0
Board action on request ruled upon, total	29	29	26	0	3	0
Granted	3	3	2	0	1	0
Denied	26	26	24	0	2	0
Remanded	0	0	0	0	0	0
Withdrawn after request granted, before Board review	0	0	0	0	0	0
Board decision after review, total	0	0	0	0	0	0
Regional directors' decisions						
Affirmed	0	0	0	0	0	0
Modified	0	0	0	0	0	0
Reversed	0	0	0	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 1979[1]

Types of formal actions taken	Cases in which formal actions taken	Formal actions taken by type of case	
		AC	UC
Hearings completed	118	9	78
Decision issued after hearing	125	5	78
By regional directors	122	4	76
By Board	3	1	2
Transferred by regional directors for initial decision	1	0	1
Review of regional directors' decisions			
Requests for review received	15	3	11
Withdrawn before request ruled upon	0	0	0
Board action on requests ruled upon, total	15	3	11
Granted	4	1	3
Denied	11	2	8
Remanded	0	0	0
Withdrawn after request granted, before Board review	0	0	0
Board decision after review, total	2	1	1
Regional directors' decisions			
Affirmed	1	1	0
Modified	0	0	0
Reversed	1	0	1

[1]See Glossary for definitions of terms

Table 4.—Remedial Actions Taken in Unfair Labor Practice Cases Closed, Fiscal Year 1979[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]13,032	----------	----------	----------	----------	----------	----------	----------	----------	----------	----------	----------	----------
Notice posted	5,244	4,112	3,043	112	16	577	364	1,132	818	81	0	134	99
Recognition or other assistance withdrawn	67	67	47	11	0	3	6	----------	----------	----------	----------	----------	----------
Employer-dominated union disestablished	20	20	19	1	0	0	0	----------	----------	----------	----------	----------	----------
Employees offered reinstatement	2,543	2,543	1,803	87	10	390	253	----------	----------	----------	----------	----------	----------
Employees placed on preferential hiring list	690	690	428	30	3	143	86	----------	----------	----------	----------	----------	----------
Hiring hall rights restored	151	----------	----------	----------	----------	----------	----------	151	76	16	0	29	30
Objections to employment withdrawn	159	----------	----------	----------	----------	----------	----------	159	80	14	0	33	32
Picketing ended	615	----------	----------	----------	----------	----------	----------	615	557	32	0	14	12
Work stoppage ended	148	----------	----------	----------	----------	----------	----------	148	143	0	0	4	1
Collective bargaining begun	2,374	2,216	1,922	35	3	138	118	158	152	2	0	2	2
Backpay distributed	3,137	2,908	2,292	69	7	325	215	229	135	19	0	38	37
Reimbursement of fees, dues, and fines	127	74	67	0	0	3	4	53	39	0	0	9	5
Other conditions of employment improved	3,778	2,620	2,603	1	0	10	6	1,158	1,156	0	0	2	0
Other remedies	2	2	2	0	0	0	0	0	0	0	0	0	0

B By number of employees affected													
Employees offered reinstatement, total	5,837	5,837	5,167	81	4	228	357						
Accepted	3,817	3,817	3,435	49	2	125	206						
Declined	2,020	2,020	1,732	32	2	103	151						
Employees placed on preferential hiring list	1,393	1,393	1,324	0	0	11	58						
Hiring hall rights restored	5,028							5,028	21	5,002	0	1	4
Objections to employment withdrawn	63							63	46	4	0	8	5
Employees receiving backpay													
From either employer or union	14,593	14,320	11,089	268	5	1,297	1,661	273	171	65	0	27	10
From both employer and union	34	34	2	0	0	32	0	34	2	0	0	32	0
Employees reimbursed for fees, dues, and fines													
From either employer or union	1,726	683	683	0	0	0	0	1,043	1,041	0	0	2	0
From both employer and union	22	22	0	0	0	10	12	22	0	0	0	10	12
C By amounts of monetary recovery, total	17,724,850	16,652,390	11,152,910	354,710	24,530	2,119,160	3,001,080	1,072,460	833,010	33,850	0	98,310	107,290
Backpay (includes all monetary payments except fees, dues, and fines)	16,537,760	16,239,450	10,766,610	354,710	24,530	2,112,630	2,980,970	298,310	105,980	33,850	0	54,380	104,100
Reimbursement of fees, and fines	1,187,090	412,940	386,300	0	0	6,530	20,110	774,150	727,030	0	0	43,930	3,190

[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 1979[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	2,461	1,765	1,267	447	31	8	1	0	11	655	543	33	79	17	10	14
Tobacco manufacturers	31	21	10	9	0	2	0	0	0	10	9	0	1	0	0	0
Textile mill products	506	394	327	57	5	0	0	0	5	111	95	3	13	0	0	1
Apparel and other finished products made from fabric and similar materials	708	554	431	109	5	0	0	0	9	152	127	10	15	2	0	0
Lumber and wood products (except furniture)	731	479	384	77	13	1	2	0	2	243	197	10	36	6	0	3
Furniture and fixtures	651	491	403	84	0	1	0	0	3	152	122	11	19	6	0	2
Paper and allied products	813	637	464	138	32	2	0	0	1	161	132	2	27	3	3	9
Printing, publishing, and allied products	1,346	921	688	203	18	11	0	0	1	394	290	21	83	5	1	25
Chemicals and allied products	1,168	840	612	176	38	8	0	0	6	312	266	7	39	4	2	10
Petroleum refining and related industries	329	226	163	44	11	4	3	0	1	96	73	3	20	1	0	6
Rubber and miscellaneous plastic products	986	718	580	125	12	0	0	0	1	257	219	7	31	5	4	2
Leather and leather products	278	212	168	44	0	0	0	0	0	61	55	2	4	4	1	0
Stone, clay, glass, and concrete products	1,132	880	612	205	40	7	4	0	12	239	191	13	35	5	0	8
Primary metal industries	1,696	1,364	939	396	20	5	0	0	4	315	273	10	32	10	0	7
Fabricated metal products (except machinery and transportation equipment)	2,198	1,647	1,198	394	34	13	0	0	8	521	441	23	57	18	0	12
Machinery (except electrical)	2,089	1,546	1,133	382	16	8	0	0	7	507	436	30	41	16	3	17
Electrical and electronic machinery, equipment, and supplies	1,743	1,332	1,029	289	9	3	0	0	2	390	335	6	49	7	5	9
Aircraft and parts	334	298	196	97	4	1	0	0	0	32	27	1	4	1	0	3
Ship and boat building and repairing	875	824	748	66	3	4	1	0	2	46	36	4	6	1	1	3
Automotive and other transportation equipment	1,622	1,408	954	426	24	1	1	0	2	205	172	4	29	2	0	7
Measuring, analyzing, and controlling instruments, photographic, medical, and optical goods, watches and clocks	380	273	219	45	6	3	0	0	0	101	82	4	15	3	1	2
Miscellaneous manufacturing industries	1,931	1,577	929	561	54	12	9	0	12	337	274	11	52	10	2	5
Manufacturing	24,008	18,407	13,454	4,374	375	94	21	0	89	5,297	4,395	215	687	126	33	145
Metal mining	107	90	72	15	3	0	0	0	0	15	14	1	0	0	0	2
Coal mining	426	351	276	63	7	1	0	0	4	71	61	2	8	0	1	3
Oil and gas extraction	72	63	48	15	0	0	0	0	0	9	6	2	1	0	0	0
Mining and quarrying of nonmetallic minerals (except fuels)	135	87	65	16	4	0	0	0	2	46	40	2	4	0	0	2

Mining	740	591	461	109	14	1	0	0	6	141	121	7	13	0	1	7
Construction	4,797	4,236	1,599	1,072	1,011	241	59	0	254	546	365	140	41	4	0	11
Wholesale trade	2,643	1,703	1,310	322	44	7	1	0	19	891	650	63	178	27	1	21
Retail trade	5,189	3,534	2,738	611	85	5	13	0	82	1,558	1,088	152	318	70	1	26
Finance, insurance, and real estate	815	558	434	90	19	5	6	0	4	246	219	5	22	4	1	6
U S Postal Service	1,330	1,325	1,022	302	0	0	0	0	1	4	4	0	0	0	1	0
Local and suburban transit and interurban highway passenger transportation	634	495	392	91	7	2	1	0	2	136	121	6	9	2	0	1
Motor freight transportation and warehousing	3,990	2,983	2,154	641	145	15	5	0	23	972	762	52	158	16	4	15
Water transportation	377	345	167	139	24	8	5	0	2	25	22	0	3	6	0	1
Other transportation	354	252	168	55	21	0	2	0	6	101	88	3	10	1	0	0
Communication	1,119	770	589	167	10	4	0	0	0	321	276	9	36	10	6	12
Electric, gas, and sanitary services	878	636	473	129	26	6	1	0	1	222	177	11	34	3	2	15
Transportation, communication, and other utilities	7,352	5,481	3,943	1,222	233	35	14	0	34	1,777	1,446	81	250	38	12	44
Hotels, rooming houses, camps, and other lodging places	902	696	512	150	20	4	2	0	8	190	157	14	19	11	1	4
Personal services	335	221	177	38	3	0	1	0	2	108	82	10	16	4	0	2
Automotive repair, services, and garages	478	241	183	38	12	1	0	0	7	225	189	5	31	7	1	4
Motion pictures	342	294	168	100	15	7	0	0	4	43	36	6	1	1	0	4
Amusement and recreation services (except motion pictures)	354	249	143	62	36	1	4	0	3	103	68	13	22	1	0	1
Health services	2,753	1,743	1,411	258	19	3	1	50	1	947	796	46	105	18	6	39
Educational services	434	249	213	33	3	0	0	0	0	171	156	0	15	2	0	12
Membership organizations	318	258	182	66	8	0	1	0	1	48	39	3	6	1	0	11
Business services	1,644	1,165	811	274	49	14	4	0	13	454	388	14	52	15	2	8
Miscellaneous repair services	127	88	72	14	0	1	0	0	1	39	31	3	5	0	0	0
Legal services	67	38	37	1	0	0	0	0	0	26	24	0	2	0	1	2
Museums, art galleries, and botanical and zoological gardens	13	9	7	2	0	0	0	0	0	4	4	0	0	0	0	0
Social services	160	98	91	7	0	0	0	0	0	57	49	1	7	1	2	2
Miscellaneous service	50	33	26	4	1	2	0	0	0	16	13	1	2	0	1	0
Services	7,977	5,382	4,033	1,047	166	33	13	50	40	2,431	2,032	116	283	61	14	89
Public administration	56	42	32	8	0	0	1	0	1	14	13	0	1	0	0	0
Total, all industrial groups	54,907	41,259	29,026	9,157	1,947	421	128	50	530	12,905	10,333	779	1,793	330	64	349

[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 1979[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	225	161	125	23	10	1	0	0	2	61	56	0	5	1	0	2
New Hampshire	100	61	43	12	3	1	0	0	2	37	33	2	2	1	1	0
Vermont	66	40	35	5	0	0	0	0	0	23	16	0	7	0	0	3
Massachusetts	1,786	1,366	999	263	69	26	3	1	5	393	339	15	39	11	0	16
Rhode Island	252	186	150	23	10	1	0	0	2	63	56	3	4	1	0	2
Connecticut	729	529	380	113	21	11	0	1	3	193	164	9	20	1	0	6
New England	3,158	2,343	1,732	439	113	40	3	2	14	770	664	29	77	15	1	29
New York	5,247	4,003	2,386	1,303	161	52	17	10	74	1,181	1,016	61	104	32	4	27
New Jersey	1,940	1,380	951	331	51	24	2	1	20	534	436	25	73	11	8	7
Pennsylvania	3,191	2,387	1,648	548	127	29	9	2	24	758	644	24	90	19	3	24
Middle Atlantic	10,378	7,770	4,985	2,182	339	105	28	13	118	2,473	2,096	110	267	62	15	58
Ohio	3,306	2,480	1,820	506	114	7	6	0	27	768	643	28	97	27	7	24
Indiana	2,334	1,918	1,403	473	24	9	4	1	4	385	325	11	49	19	0	12
Illinois	3,516	2,771	1,837	748	112	26	4	6	38	701	539	48	114	27	3	14
Michigan	2,513	1,852	1,393	357	74	21	0	2	5	618	507	22	89	13	5	25
Wisconsin	1,007	716	551	142	17	3	0	0	3	267	207	10	50	9	0	15
East North Central	12,676	9,737	7,004	2,226	341	66	14	9	77	2,739	2,221	119	399	95	15	90
Iowa	375	226	160	36	15	10	0	0	5	145	121	6	18	0	1	3
Minnesota	645	362	249	52	42	7	0	1	11	267	199	30	38	8	0	8
Missouri	2,421	2,022	1,322	491	141	33	3	0	32	379	333	10	36	10	0	10
North Dakota	69	35	27	4	1	0	0	0	3	34	21	6	7	0	0	0
South Dakota	64	27	24	2	1	0	0	0	0	36	23	3	10	1	0	0
Nebraska	208	148	118	24	4	1	0	0	1	58	48	4	6	0	2	0
Kansas	279	196	158	34	2	1	0	0	1	79	62	3	14	0	0	4
West North Central	4,061	3,016	2,058	643	206	52	3	1	53	998	807	62	129	19	3	25
Delaware	102	84	61	14	6	2	0	0	1	18	15	2	1	0	0	0
Maryland	853	646	413	192	28	5	4	1	3	195	165	5	25	3	0	9
District of Columbia	287	217	164	44	6	0	0	1	2	64	54	5	5	1	2	3
Virginia	1,267	1,111	998	97	14	1	0	0	1	153	140	1	12	1	1	1
West Virginia	515	431	287	114	17	9	0	0	4	83	65	3	15	1	0	0
North Carolina	769	613	539	70	4	0	0	0	0	149	126	6	17	1	2	4

South Carolina	328	253	219	27	5	0	0	0	2	71	64	1	6	0	1	3
Georgia	1,041	815	646	135	22	5	3	0	4	221	181	5	35	2	0	3
Florida	1,021	793	570	164	34	8	2	0	15	221	182	14	25	0	1	6
South Atlantic	6,183	4,963	3,897	857	136	30	9	2	32	1,175	992	42	141	9	7	29
Kentucky	802	631	465	124	22	6	2	0	12	162	131	9	22	5	0	4
Tennessee	1,095	829	608	161	47	6	1	0	6	259	223	7	29	0	1	6
Alabama	580	420	322	82	6	2	0	0	8	155	136	4	15	0	0	5
Mississippi	329	236	211	23	1	0	0	0	1	88	71	1	16	0	3	2
East South Central	2,806	2,116	1,606	390	76	14	3	0	27	664	561	21	82	5	4	17
Arkansas	319	243	197	38	5	2	0	0	1	74	61	2	11	0	0	2
Louisiana	438	316	220	81	12	2	0	0	1	119	97	5	17	1	1	1
Oklahoma	376	258	209	41	7	0	0	0	1	107	91	4	12	5	0	6
Texas	1,584	1,248	927	278	30	8	2	0	3	320	248	17	55	3	1	12
West South Central	2,717	2,065	1,553	438	54	12	2	0	6	620	497	28	95	9	2	21
Montana	298	192	150	26	10	2	0	0	4	100	62	12	26	3	1	2
Idaho	179	113	98	9	2	4	0	0	0	58	46	5	7	6	0	2
Wyoming	98	70	55	13	0	2	0	0	0	28	25	1	2	0	0	0
Colorado	562	420	309	87	15	3	0	3	3	140	115	3	22	1	0	1
New Mexico	264	194	139	48	4	1	0	1	1	67	57	1	9	0	0	3
Arizona	629	496	347	124	11	5	0	6	3	130	100	9	21	0	0	3
Utah	135	82	67	9	5	0	1	0	0	49	43	0	6	0	0	4
Nevada	387	310	197	77	25	0	1	0	10	76	63	6	7	0	0	1
Mountain	2,552	1,877	1,362	393	72	17	2	10	21	648	511	37	100	10	1	16
Washington	1,354	874	587	179	78	16	5	0	9	445	291	43	111	20	1	14
Oregon	549	315	189	54	50	7	2	9	4	217	119	30	68	8	1	8
California	7,428	5,535	3,611	1,195	451	57	56	4	161	1,779	1,260	243	276	62	13	39
Alaska	402	293	179	91	16	4	0	0	3	104	69	9	26	5	0	0
Hawaii	199	104	74	21	6	1	0	0	2	90	75	4	11	2	0	3
Guam	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Pacific	9,932	7,121	4,640	1,540	601	85	63	13	179	2,635	1,814	329	492	97	15	64
Puerto Rico	390	227	173	43	7	0	1	0	3	154	142	1	11	8	1	0
Virgin Islands	54	24	16	6	2	0	0	0	0	29	28	1	0	1	0	0
Outlying areas	444	251	189	49	9	0	1	0	3	183	170	2	11	9	1	0
Total, all States and areas	54,907	41,259	29,026	9,157	1,947	421	128	50	530	12,905	10,333	779	1,793	330	64	349

[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 1979[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	729	529	380	113	21	11	0	1	3	193	164	9	20	1	0	6
Maine	225	161	125	23	10	1	0	0	2	61	56	0	5	1	0	2
Massachusetts	1,786	1,366	999	263	69	26	3	1	5	393	339	15	39	11	0	16
New Hampshire	100	61	43	12	3	1	0	0	2	37	33	2	2	1	1	0
Rhode Island	252	186	150	23	10	1	0	0	2	63	56	3	4	1	0	2
Vermont	66	40	35	5	0	0	0	0	0	23	16	0	7	0	0	3
Region I	3,158	2,343	1,732	439	113	40	3	2	14	770	664	29	77	15	1	29
Delaware	102	84	61	14	6	2	0	0	1	18	15	2	1	0	0	0
New Jersey	1,940	1,380	951	331	51	24	2	1	20	534	436	25	73	11	8	7
New York	5,247	4,003	2,386	1,303	161	52	17	10	74	1,181	1,016	61	104	32	4	27
Puerto Rico	390	227	173	43	7	0	1	0	3	154	142	1	11	8	1	0
Virgin Islands	54	24	16	6	2	0	0	0	0	29	28	1	0	1	0	0
Region II	7,733	5,718	3,587	1,697	227	78	20	11	98	1,916	1,637	90	189	52	13	34
District of Columbia	287	217	164	44	6	0	0	1	2	64	54	5	5	1	2	3
Maryland	853	646	413	192	28	5	4	1	3	195	165	5	25	3	0	9
Pennsylvania	3,191	2,387	1,648	548	127	29	9	2	24	758	644	24	90	19	3	24
Virginia	1,267	1,111	998	97	14	1	0	0	1	153	140	1	12	1	1	1
West Virginia	515	431	287	114	17	9	0	0	4	83	65	3	15	1	0	0
Region III	6,113	4,792	3,510	995	192	44	13	4	34	1,253	1,068	38	147	25	6	37
Alabama	580	420	322	82	6	2	0	0	8	155	136	4	15	0	0	5
Florida	1,021	793	570	164	34	8	2	0	15	221	182	14	25	0	1	6
Georgia	1,041	815	646	135	22	5	3	0	4	221	181	5	35	2	0	3
Kentucky	802	631	465	124	22	6	2	0	12	162	131	9	22	5	0	4
Mississippi	329	236	211	23	1	0	0	0	1	88	71	1	16	0	3	2
North Carolina	769	613	539	70	4	0	0	0	0	149	126	6	17	1	2	4
South Carolina	328	253	219	27	5	0	0	0	2	71	64	1	6	0	1	3
Tennessee	1,095	829	608	161	47	6	1	0	6	259	223	7	29	0	1	6
Region IV	5,965	4,590	3,580	786	141	27	8	0	48	1,326	1,114	47	165	8	8	33

Illinois	3,516	2,771	1,837	748	112	26	4	6	38	701	539	48	114	27	3	14
Indiana	2,334	1,918	1,403	473	24	9	4	1	4	385	325	11	49	19	0	12
Michigan	2,513	1,852	1,393	357	74	21	0	2	5	618	507	22	89	13	5	25
Minnesota	645	362	249	52	42	7	0	1	11	267	199	30	38	8	0	8
Ohio	3,306	2,480	1,820	506	114	7	6	0	27	768	643	28	97	27	7	24
Wisconsin	1,007	716	551	142	17	3	0	0	3	267	207	10	50	9	0	15
Region V	13,321	10,099	7,253	2,278	383	73	14	10	88	3,006	2,420	149	437	103	15	98
Arkansas	319	243	197	38	5	2	0	0	1	74	61	2	11	0	0	2
Louisiana	438	316	220	81	12	2	0	0	1	119	97	5	17	1	1	1
New Mexico	264	194	139	48	4	1	0	1	1	67	57	1	9	0	0	3
Oklahoma	376	258	209	41	7	0	0	0	1	107	91	4	12	5	0	6
Texas	1,584	1,248	927	278	30	8	2	0	3	320	248	17	55	3	1	12
Region VI	2,981	2,259	1,692	486	58	13	2	1	7	687	554	29	104	9	2	24
Iowa	375	226	160	36	15	10	0	0	5	145	121	6	18	0	1	3
Kansas	279	196	158	34	2	1	0	0	1	79	62	3	14	0	0	4
Missouri	2,421	2,022	1,322	491	141	33	3	0	32	379	333	10	36	10	0	10
Nebraska	208	148	118	24	4	1	0	0	1	58	48	4	6	0	2	0
Region VII	3,283	2,592	1,758	585	162	45	3	0	39	661	564	23	74	10	3	17
Colorado	562	420	309	87	15	3	0	3	3	140	115	3	22	1	0	1
Montana	298	192	150	26	10	2	0	0	4	100	62	12	26	3	1	2
North Dakota	69	35	27	4	1	0	0	0	3	34	21	6	7	0	0	0
South Dakota	64	27	24	2	1	0	0	0	0	36	23	3	10	1	0	0
Utah	135	82	67	9	5	0	1	0	0	49	43	0	6	0	0	4
Wyoming	98	70	55	13	0	2	0	0	0	28	25	1	2	0	0	0
Region VIII	1,226	826	632	141	32	7	1	3	10	387	289	25	73	5	1	7
Arizona	629	496	347	124	11	5	0	6	3	130	100	9	21	0	0	3
California	7,428	5,535	3,611	1,195	451	57	56	4	161	1,779	1,260	243	276	62	13	39
Hawaii	199	104	74	21	6	1	0	0	2	90	75	4	11	2	0	3
Guam	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Nevada	387	310	197	77	25	0	1	0	10	76	63	6	7	0	0	1
Region IX	8,643	6,445	4,229	1,417	493	63	57	10	176	2,075	1,498	262	315	64	13	46
Alaska	402	293	179	91	16	4	0	0	3	104	69	9	26	5	0	0
Idaho	179	113	98	9	2	4	0	0	0	58	46	5	7	6	0	2
Oregon	549	315	189	54	50	7	2	9	4	217	119	30	68	8	1	8
Washington	1,354	874	587	179	78	16	5	0	9	445	291	43	111	20	1	14
Region X	2,484	1,595	1,053	333	146	31	7	9	16	824	525	87	212	39	2	24
Total, all Federal regions	54,907	41,259	29,026	9,157	1,947	421	128	50	530	12,905	10,333	779	1,793	330	64	349

[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 1979[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	41,544	100 0	0 0	28,770	100 0	9,510	100 0	2,001	100 0	484	100 0	159	100 0	44	100 0	576	100 0
Agreement of the parties	11,359	27 3	100 0	8,606	29 9	1,614	17 0	890	44 5	8	1 7	36	22 6	25	56 8	180	31 3
Informal settlement	11,129	26 8	98 0	8,464	29 4	1,577	16 6	854	42 7	4	0 8	31	19 5	24	54 5	175	30 4
Before issuance of complaint	7,183	17 3	63 2	5,145	17 9	1,177	12 4	693	34 6	(2)	-------	22	13 8	20	45 5	126	21 9
After issuance of complaint, before opening of hearing	3,742	9 0	32 9	3,138	10 9	380	4 0	158	7 9	4	0 8	9	5 7	4	9 1	49	8 5
After hearing opened, before issuance of administrative law judge's decision	204	0 5	1 8	181	0 6	20	0 2	3	0 1	0	-------	0	-------	0	-------	0	-------
Formal settlement	230	0 6	2 0	142	0 5	37	0 4	36	1 8	4	0 8	5	3 1	1	2 3	5	0 9
After issuance of complaint, before opening of hearing	136	0 3	1 2	64	0 2	25	0 3	33	1 6	4	0 8	5	3 1	0	-------	5	0 9
Stipulated decision	33	0 1	0 3	17	0 1	3	0 0	12	0 6	0	-------	1	0 6	0	-------	0	-------
Consent decree	103	0 2	0 9	47	0 2	22	0 2	21	1 0	4	0 8	4	2 5	0	-------	5	0 9
After hearing opened	94	0 2	0 8	78	0 3	12	0 1	3	0 1	0	-------	0	-------	1	2 3	0	-------
Stipulated decision	20	0 0	0 2	19	0 1	1	0 0	0	-------	0	-------	0	-------	0	-------	0	-------
Consent decree	74	0 2	0 7	59	0 2	11	0 1	3	0 1	0	-------	0	-------	1	2 3	0	-------
Compliance with	1,465	3 5	100 0	1,196	4 2	178	1 9	54	2 7	10	2 1	10	6 3	7	15 9	10	1 7
Administrative law judge's decision	19	0 0	1 3	19	0 1	0	-------	0	-------	0	-------	0	-------	0	-------	0	-------
Board decision	872	2 1	59 5	716	2 5	103	1 1	25	1 2	6	1 2	8	5 0	5	11 4	9	1 6

Adopting administrative law judge's decision (no exceptions filed)	100	0 2	6 8	84	0 3	12	0 1	2	0 1	0	------	1	0 6	1	2 3	0	------
Contested	772	1 9	52 7	632	2 2	91	1 0	23	1 1	6	1 2	7	4 4	4	9 1	9	1 6
Circuit court of appeals decree	567	1 4	38 7	454	1 6	75	7 8	29	1 4	4	0 8	2	1 3	2	4 5	1	0 2
Supreme Court action	7	0 0	0 5	7	0 0	0	------	0	------	0	------	0	------	0	------	0	------
Withdrawal	12,917	31 1	100 0	8,799	30 6	3,142	33 0	691	34 5	(2)	------	58	36 5	6	13 6	221	38 4
Before issuance of complaint	12,479	30 0	96 6	8,442	29 3	3,093	32 5	671	33 5	0	------	52	32 7	5	11 4	216	37 5
After issuance of complaint, before opening of hearing	382	0 9	3 0	308	1 1	44	0 5	91	0 9	0	------	6	3 8	1	2 3	4	0 7
After hearing opened, before administrative law judge's decision	39	0 1	0 3	36	0 1	2	0 0	1	0 0	0	------	0	------	0	------	0	------
After administrative law judge's decision, before Board decision	10	0 0	0 1	6	0 0	3	0 0	0	------	0	------	0	------	0	------	1	0 2
After Board or court decision	7	0 0	0 1	7	0 0	0	------	0	------	0	------	0	------	0	------	0	------
Dismissal	15,343	36 9	100 0	10,169	35 3	4,576	48 1	366	18 3	6	1 2	55	34 6	6	13 6	165	28 6
Before issuance of complaint	14,595	35 1	95 1	9,575	33 3	4,461	46 9	347	17 3	(2)	------	46	28 9	6	13 6	160	27 8
After issuance of complaint, before opening of hearing	296	0 7	1 9	238	0 8	42	0 4	10	0 5	1	0 2	4	2 5	0	------	1	0 2
After hearing opened, before administrative law judge's decision	12	0 0	0 1	10	0 0	2	0 0	0	------	0	------	0	------	0	------	0	------
By administrative law judge's decision	10	0 0	0 1	9	0 0	1	0 0	0	------	0	------	0	------	0	------	0	------
By Board decision	380	0 9	2 5	298	1 0	63	0 7	8	0 4	3	0 6	4	2 5	0	------	4	0 7
Adopting administrative law judge's decision (no exceptions filed)	105	0 3	0 7	91	0 3	10	0 1	2	0 1	0	------	1	0 6	0	------	1	0 2
Contested	275	0 7	1 8	207	0 7	53	0 6	6	0 3	3	0 6	3	1 9	0	------	3	0 5
By circuit court of appeals decree	48	0 1	0 3	39	0 1	7	0 1	1	0 0	0	------	1	0 6	0	------	0	------
By Supreme Court action	2	0 0	0 0	0	------	0	------	0	------	2	0 4	0	------	0	------	0	------
10(k) actions (see table 7A for details of dispositions)	460	1 1	0 0	0	------	0	------	0	------	460	95 0	0	------	0	------	0	------
Otherwise (compliance with order of administrative law judge or Board not achieved—firm went out of business)	0	------	0 0	0	------	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 1979 [1]

Method and stage of disposition	Number of cases	Percent of total closed
Total number of cases closed before issuance of complaint	460	100 0
Agreement of the parties—informal settlement	192	41 7
Before 10(k) notice	154	33 5
After 10(k) notice, before opening of 10(k) hearing	36	7 8
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	2	0 4
Compliance with Board decision and determination of dispute	16	3 5
Withdrawal	168	36 5
Before 10(k) notice	150	32 6
After 10(k) notice, before opening of 10(k) hearing	16	3 5
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	1	0 2
After Board decision and determination of dispute	1	0 2
Dismissal	84	18 3
Before 10(k) notice	63	13 8
After 10(k) notice, before opening of 10(k) hearing	11	2 4
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	2	0 4
By Board decision and determination of dispute	8	1 7

[1] See Glossary for definitions of terms

Table 8.—Disposition by Stage of Unfair Labor Practice Cases Closed, Fiscal Year 1979[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	41,544	100 0	28,770	100 0	9,510	100 0	2,001	100 0	484	100 0	159	100 0	44	100 0	576	100 0
Before issuance of complaint	34,717	83 6	23,162	80 6	8,731	91 8	1,711	85 6	460	95 0	120	75 4	31	70 4	502	87 1
After issuance of complaint, before opening of hearing	4,556	11 0	3,748	13 0	491	5 2	220	11 0	9	1 9	24	15 1	5	11 4	59	10 2
After hearing opened, before issuance of administrative law judge's decision	349	0 8	305	1 1	36	0 4	7	0 3	0	-------	0	-------	1	2 3	0	-------
After administrative law judge's decision, before issuance of Board decision	39	0 1	34	0 1	4	0 0	0	-------	0	-------	0	-------	0	-------	1	0 2
After Board order adopting administrative law judge's decision in absence of exceptions	205	0 5	175	0 6	22	0 2	4	0 2	0	-------	2	1 3	1	2 3	1	0 2
After Board decision, before circuit court decree	1,054	2 5	846	2 9	144	1 5	29	1 4	9	1 9	10	6 3	4	9 1	12	2 1
After circuit court decree, before Supreme Court action	615	1 5	493	1 7	82	0 9	30	1 5	4	0 8	3	1 9	2	4 5	1	0 2
After Supreme Court action	9	0 0	7	0 0	0	-------	0	-------	2	0 4	0	-------	0	-------	0	-------

[1] See Glossary for definitions of terms

Table 9.—Disposition by Stage of Representation and Union Deauthorization Cases Closed, Fiscal Year 1979[1]

Stage of disposition	All R cases		RC cases		RM cases		RD cases		UD cases	
	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed
Total number of cases closed	13,465	100 0	10,796	100 0	831	100 0	1,838	100 0	328	100 0
Before issuance of notice of hearing	4,267	31 7	2,747	25 4	506	60 9	1,014	55 2	228	69 6
After issuance of notice before close of hearing	6,890	51 2	6,057	56 1	221	26 6	612	33 3	29	8 8
After hearing closed before issuance of decision	203	1 4	153	1 4	26	3 1	24	1 3	0	0
After issuance of regional director's decision	2,043	15 2	1,784	16 5	73	8 8	186	10 1	71	21 6
After issuance of Board decision	62	5	55	6	5	6	2	1	0	0

[1] See Glossary for definitions of terms

Table 10.—Analysis of Methods of Disposition of Representation and Union Deauthorization Cases Closed, Fiscal Year 1979[1]

Method and stage of disposition	All R cases		RC cases		RM cases		RD cases		UD cases	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total, all	13,465	100 0	10,796	100 0	831	100 0	1,838	100 0	328	100 0
Certification issued, total	8,642	64 2	7,481	69 3	320	38 5	841	45 8	184	56 1
After										
Consent election	506	3 8	400	3 7	25	3 0	81	4 4	15	4 6
Before notice of hearing	237	1 8	181	1 7	9	1 1	47	2 6	14	4 3
After notice of hearing, before hearing closed	264	2 0	216	2 0	14	1 7	34	1 8	1	3
After hearing closed, before decision	5	0	3	0	2	2	0	0	0	0
Stipulated election	6,536	48 5	5,689	52 7	213	25 6	634	34 5	101	30 8
Before notice of hearing	1,882	14 0	1,478	13 7	114	13 7	290	15 8	85	25 9
After notice of hearing, before hearing closed	4,618	34 2	4,178	38 7	99	11 9	341	18 5	16	4 9
After hearing closed, before decision	36	3	33	3	0	0	3	2	0	0
Expedited election	37	3	3	0	34	4 1	0	0	0	0
Regional director directed election	1,518	11 3	1,348	12 5	45	5 4	125	6 8	68	20 7
Board directed election	45	3	41	4	3	4	1	1	0	0
By withdrawal, total	3,638	27 0	2,720	25 2	309	37 2	609	33 1	106	32 3
Before notice of hearing	1,512	11 2	901	8 3	215	25 9	396	21 5	96	29 3
After notice of hearing, before hearings closed	1,825	13 5	1,559	14 5	83	10 0	183	10 0	10	3 0
After hearing closed, before decision	67	5	54	5	4	5	9	5	0	0
After regional director's decision and direction of election	227	1 7	199	1 8	7	8	21	1 1	0	0
After Board decision and direction of election	7	1	7	1	0	0	0	0	0	0
By dismissal, total	1,185	8 8	595	5 5	202	24 3	388	21 1	38	11 6
Before notice of hearing	614	4 6	185	1 6	148	17 9	281	15 2	33	10 1
After notice of hearing, before hearing closed	181	1 3	103	1 0	24	2 9	54	2 9	2	6
After hearing closed, before decision	82	6	63	6	7	8	12	7	0	0
By regional director's decision	298	2 2	237	2 2	21	2 5	40	2 2	3	9
By Board decision	10	1	7	1	2	2	1	1	0	0

[1] See Glossary for definitions of terms

Table 10A. — Analysis of Methods of Disposition of Amendment of Certification and Unit Clarification Cases Closed, Fiscal Year 1979

	AC	UC
Total, all	81	376
Certification amended or unit clarified	13	50
Before hearing	1	0
By regional director's decision	1	0
By Board decision	0	0
After hearing	12	50
By regional director's decision	12	48
By Board decision	0	2
Dismissed	35	140
Before hearing	16	22
By regional director's decision	16	22
By Board decision	0	0
After hearing	19	118
By regional director's decision	19	117
By Board decision	0	1
Withdrawn	33	186
Before hearing	32	179
After hearing	1	7

Table 11.—Types of Elections Resulting in Certification in Cases Closed, Fiscal Year 1979[1]

Type of case	Total	Type of election				
		Consent	Stipulated	Board-directed	Region director-directed	Expedited elections under 8(b) (7) (C)
All types, total						
Elections	8,177	498	6,152	49	1,451	27
Eligible voters	583,644	13,511	455,223	4,787	109,369	754
Valid votes	510,969	11,612	401,989	3,604	93,159	605
RC cases						
Elections	7,026	381	5,348	40	1,255	2
Eligible voters	528,798	10,675	418,483	4,484	95,115	41
Valid votes	465,183	9,208	371,343	3,417	81,186	29
RM cases						
Elections	240	20	163	3	29	25
Eligible voters	9,606	355	4,951	223	3,364	713
Valid votes	7,383	288	3,704	116	2,699	576
RD cases						
Elections	777	82	582	1	112	0
Eligible voters	39,538	2,037	28,441	29	9,031	0
Valid votes	33,474	1,727	24,131	24	7,592	0
UD cases						
Elections	134	15	59	5	55	----
Eligible voters	5,702	444	3,348	51	1,859	----
Valid votes	4,929	389	2,811	47	1,682	----

[1] See Glossary for definitions of terms

Table 11A. — Analysis of Elections Conducted in Representation Cases Closed, Fiscal Year 1979

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	8,249	23	183	8,043	7,214	21	167	7,026	247	1	6	240	788	1	10	777
Rerun required			142				129				5				8	
Runoff required			41				38				1				2	
Consent elections	490	0	7	483	387	0	6	381	20	0	0	20	83	0	1	82
Rerun required			6				6				0				0	
Runoff required			1				0				0				1	

Stipulated elections	6,236	17	128	6,093	5,478	15	115	5,348	170	1	6	163	590	1	7	582
Rerun required			97				86				5				6	
Runoff required			31				29				1				1	
Regional director-directed	1,449	6	45	1,396	1,304	6	43	1,255	29	0	0	29	114	0	2	112
Rerun required			37				35				0				2	
Runoff required			8				8				0				0	
Board-directed	47	0	3	44	43	0	3	40	3	0	0	3	1	0	0	1
Rerun required			2				2				0				0	
Runoff required			1				1				0				0	
Expedited—sec 8(b)(7)(C)	27	0	0	27	2	0	0	2	25	0	0	25	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 1979

	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	8,249	720	8 5	148	1 8	107	1 3	827	9 8	255	3 0
By type of case											
In RC cases	7,214	651	9 0	138	1 9	95	1 3	746	10 3	233	3 2
In RM cases	247	21	8 5	2	0 8	2	0 8	23	9 3	4	1 7
In RD cases	788	48	6 1	8	1 0	10	1 3	58	7 4	18	2 3
By type of election											
Consent elections	490	22	4 5	7	1 4	1	0 2	23	4 7	8	1 6
Stipulated elections	6,236	499	8 0	137	2 2	85	1 4	584	9 4	222	3 6
Expedited elections	27	3	11 1	0	----	0	----	3	11 1	0	----
Regional director-directed elections	1,449	191	13 2	0	----	20	1 4	211	14 6	20	1 4
Board-directed elections	47	5	10 6	4	8 5	1	2 1	6	12 8	5	10 6

[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 1979[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	990	100 0	415	41 9	551	55 7	24	2 4
By type of case								
RC cases	902	100 0	394	43 7	491	54 4	17	1 9
RM cases	24	100 0	4	16 7	17	70 8	3	12 5
RD cases	64	100 0	17	26 6	43	67 1	4	6 3
By type of election								
Consent elections	28	100 0	8	28 6	17	60 7	3	10 7
Stipulated elections	696	100 0	286	41 1	394	56 6	16	2 3
Expedited elections	3	100 0	0	-------	3	100 0	0	-------
Regional director-directed elections	256	100 0	115	44 9	136	53 1	5	2 0
Board-directed elections	7	100 0	6	85 7	1	14 3	0	-------

[1] See Glossary for definitions of terms
[2] Objections filed by more than one party in the same cases are counted as one

Table 11D.—Disposition of Objections in Representation Cases Closed, Fiscal Year 1979[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	990	163	827	683	82 6	144	17 4
By type of case							
RC cases	902	156	746	612	82 0	134	18 0
RM cases	24	1	23	21	91 3	2	8 7
RD cases	64	6	58	50	86 2	8	13 8
By type of election							
Consent elections	28	5	23	21	91 3	2	8 7
Stipulated elections	696	112	584	470	80 5	114	19 5
Expedited elections	3	0	3	3	100 0	0	0 0
Regional director-directed elections	256	45	211	183	86 7	28	13 3
Board-directed elections	7	1	6	6	100 0	0	0 0

[1] See Glossary for definitions of terms
[2] See table 11E for rerun elections held after objections were sustained In two elections in which objections were sustained, the cases were subsequently withdrawn Therefore, in these cases no rerun elections were conducted

Table 11E.—Results of Rerun Elections Held in Representation Cases Closed, Fiscal Year 1979[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	85	100 0	27	31 8	58	68 2	9	11 0
By type of case								
RC cases	75	100 0	22	29 3	53	70 7	9	12 5
RM cases	2	100 0	2	100 0	0	--------	0	--------
RD cases	8	100 0	3	37 5	5	62 5	0	--------
By type of election								
Consent elections	2	100 0	1	50 0	1	50 0	0	--------
Stipulated elections	59	100 0	21	35 6	38	64 4	7	12 5
Expedited elections	0	--------	0	--------	0	--------	0	--------
Regional director-directed elections	24	100 0	5	20 8	19	79 2	2	8 3
Board-directed elections	0	--------	0	--------	0	--------	0	--------

[1] See Glossary for definitions of terms

[2] Includes only final rerun elections, i e , those resulting in certification Excluded from the table are 57 rerun elections which were conducted and subsequently set aside pursuant to sustained objections The 57 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 1979

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	134	92	68 7	42	31 3	5,702	3,025	53 1	2,677	46 9	4,929	86 4	2,557	44 8
AFL-CIO unions	90	62	68 9	28	31 1	4,219	2,102	49 8	2,117	50 2	3,660	86 8	1,744	41 3
Teamsters	36	26	72 2	10	27 8	1,183	847	71 6	336	28 4	988	83 5	742	62 7
Other national unions	4	2	50 0	2	50 0	158	65	41 1	93	58 9	150	94 9	61	38 6
Other local unions	4	2	50 0	2	50 0	142	11	7 7	131	92 3	131	92 3	10	7 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 1979[1]

Participating unions	Total elections[2]	Elections won by unions						Elections in which no representative chosen	Employees eligible to vote						In elections where no representative chosen
		Percent won	Total won	AFL-CIO unions	Teamsters	Other national unions	Other local unions		Total	In elections won	In units won by			Other local unions	
											AFL-CIO unions	Teamsters	Other national unions		
	A All representation elections														
AFL-CIO	4,445	42 6	1,894	1,894				2,551	325,673	93,459	93,459				232,214
Teamsters	2,415	41 3	997		997			1,418	88,735	25,910		25,910			62,825
Other national unions	442	51 4	227			227		215	60,148	19,460			19,460		40,688
Other local unions	347	57 3	199				199	148	23,712	10,818				10,818	12,894
1-union elections	7,649	43 4	3,317	1,894	997	227	199	4,332	498,268	149,647	93,459	25,910	19,460	10,818	348,621
AFL-CIO v AFL-CIO	85	62 4	53	53				32	11,603	4,937	4,937				6,666
AFL-CIO v Teamsters	79	78 5	62	23	39			17	5,441	4,601	1,611	2,990			840
AFL-CIO v national	34	67 6	23	12		11		11	8,295	3,752	1,582		2,170		4,543
AFL-CIO v local	111	87 4	97	47			50	14	22,264	20,608	12,563			8,045	1,656
Teamsters v national	9	55 6	5		3	2		4	1,158	527		270	257		631
Teamsters v local	30	86 7	26		13		13	4	3,960	1,860		1,320		540	2,100
Teamsters v Teamsters	4	75 0	3		3			1	118	115		115			3
National v local	8	87 5	7			1	6	1	658	613			40	573	45
National v national	1	0 0	0			0		1	55	0			0		55
Local v local	14	100 0	14				14	0	1,137	1,137				1,137	0
2-union elections	375	77 3	290	135	58	14	83	85	54,689	38,150	20,693	4,695	2,467	10,295	16,539
AFL-CIO v. AFL-CIO v AFL-CIO	1	100 0	1	1				0	15	15	15				0
AFL-CIO v AFL-CIO v Teamsters	2	50 0	1	1	0			1	524	39	39	0			485
AFL-CIO v AFL-CIO v national	1	100 0	1	1		0		0	9	9	9		0		0
AFL-CIO v AFL-CIO v local	3	100 0	3	3			0	0	3,558	3,558	3,558			0	0
AFL-CIO v Teamsters v national	3	66 7	2	0	0	2		1	335	262	0	0	262		73
AFL-CIO v Teamsters v local	2	100 0	2	0	1		1	0	132	132	0	103		29	0
AFL-CIO v national v local	1	0 0	0	0		0	0	1	197	0	0		0	0	197
AFL-CIO v local v local	2	100 0	2	1			1	0	19,383	19,383	19,000			383	0
Teamsters v national v local	1	100 0	1		0	1	0	0	305	305		0	305	0	0
AFL-CIO v AFL-CIO v AFL-CIO v AFL-CIO	1	100 0	1	1				0	63	63	63				0
AFL-CIO v Teamsters v national v local	1	100 0	1	0	0	1	0	0	380	380	0	0	380	0	0
Local v local v local	1	100 0	1				1	0	84	84				84	0

3 (or more)-union elections	19	84 2	16	8	1	4	3	3	24,985	24,230	22,684	103	947	496	755
Total representation elections	8,043	45 0	3,623	2,037	1,056	245	285	4,420	577,942	212,027	136,836	30,708	22,874	21,609	365,915
	B Elections in RC cases														
AFL-CIO	3,848	45 5	1,750	1,750	-------	-------	-------	2,098	293,761	81,336	81,336	-------	-------	-------	212,425
Teamsters	2,098	45 0	945	-------	945	-------	-------	1,153	82,130	24,558	-------	24,558	-------	-------	57,572
Other national unions	400	51 8	207	-------	-------	207	-------	193	55,502	17,528	-------	-------	17,528	-------	37,974
Other local unions	326	58 3	190	-------	-------	-------	190	136	22,886	10,192	-------	-------	-------	10,192	12,694
1-union elections	6,672	46 3	3,092	1,750	945	207	190	3,580	454,279	133,614	81,336	24,558	17,528	10,192	320,665
AFL-CIO v AFL-CIO	81	63 0	51	51	-------	-------	-------	30	10,865	4,215	4,215	-------	-------	-------	6,650
AFL-CIO v Teamsters	71	76 1	54	20	34	-------	-------	17	4,149	3,309	1,140	2,269	-------	-------	840
AFL-CIO v national	33	66 7	22	11	-------	11	-------	11	7,127	3,127	957	-------	2,170	-------	4,543
AFL-CIO v local	96	86 5	83	44	-------	-------	39	13	20,797	19,155	11,977	-------	-------	7,178	1,642
Teamsters v national	9	55 6	5	-------	3	2	-------	4	1,158	527	-------	270	257	-------	631
Teamsters v local	25	88 0	22	-------	11	-------	11	3	3,620	1,541	-------	1,133	-------	408	2,079
Teamsters v Teamsters	2	100 0	2	-------	2	-------	-------	0	61	61	-------	61	-------	-------	0
National v local	6	83 3	5	-------	-------	1	4	1	482	437	-------	-------	40	397	45
National v national	1	0 0	0	-------	-------	0	-------	1	55	0	-------	-------	0	-------	55
Local v local	14	100 0	14	-------	-------	-------	14	0	1,137	1,137	-------	-------	-------	1,137	0
2-union elections	338	76 3	258	126	50	14	68	80	49,994	33,509	18,289	3,633	2,467	9,120	16,485
AFL-CIO v AFL-CIO v AFL-CIO	1	100 0	1	1	-------	-------	-------	0	15	15	15	-------	-------	-------	0
AFL-CIO v AFL-CIO v Teamsters	1	0 0	0	0	0	-------	-------	1	485	0	0	0	-------	-------	485
AFL-CIO v AFL-CIO v national	1	100 0	1	1	-------	0	-------	0	9	9	9	-------	0	-------	0
AFL-CIO v AFL-CIO v local	3	100 0	3	3	-------	-------	0	0	3,558	3,558	3,558	-------	-------	0	0
AFL-CIO v Teamsters v national	2	50 0	1	0	0	1	-------	1	219	146	0	0	146	-------	73
AFL-CIO v Teamsters v local	2	100 0	2	0	1	-------	1	0	132	132	0	103	-------	29	0
AFL-CIO v national v local	1	0 0	0	0	-------	0	0	1	197	0	0	-------	0	0	197
AFL-CIO v local v local	2	100 0	2	1	-------	-------	1	0	19,383	19,383	19,000	-------	-------	383	0
AFL-CIO v AFL-CIO v AFL-CIO v AFL-CIO	1	100 0	1	1	-------	-------	-------	0	63	63	63	-------	-------	-------	0
AFL-CIO v Teamsters v national v local	1	100 0	1	0	0	1	0	0	380	380	0	0	380	0	0
Local v local v local	1	100 0	1	-------	-------	-------	1	0	84	84	-------	-------	-------	84	0
3 (or more)-union elections	16	81 3	13	7	1	2	3	3	24,525	23,770	22,645	103	526	496	755
Total RC elections	7,026	47 9	3,363	1,883	996	223	261	3,663	528,798	190,893	122,270	28,294	20,521	19,808	337,905

Table 13.—Final Outcome of Representation Elections in Cases Closed, Fiscal Year 1979[1]—Continued

Participating unions	Total elections[2]	Elections won by unions						Elections in which no representative chosen	Employees eligible to vote						In elections where no representative chosen
		Percent won	Total won	AFL-CIO unions	Teamsters	Other national unions	Other local unions		Total	In elections won	In units won by			Other local unions	
											AFL-CIO unions	Teamsters	Other national unions		
	C Elections in RM cases														
AFL-CIO	150	24 7	37	37				113	6,170	1,654	1,654				4,516
Teamsters	73	27 4	20		20			53	1,279	421		421			858
Other national unions	6	16 7	1			1		5	543	13			13		530
Other local unions	5	40 0	2				2	3	49	31				31	18
1-union elections	234	25 6	60	37	20	1	2	174	8,041	2,119	1,654	421	13	31	5,922
AFL-CIO v AFL-CIO	2	100 0	2	2				0	722	722	722				0
AFL-CIO v Teamsters	2	100 0	2	1	1			0	622	622	5	617			0
AFL-CIO v local	1	100 0	1	0			1	0	51	51	0			51	0
National v local	1	100 0	1			0	1	0	170	170			0	170	0
2-union elections	6	100 0	6	3	1	0	2	0	1,565	1,565	727	617	0	221	0
Total RM elections	240	27 5	66	40	21	1	4	174	9,606	3,684	2,381	1,038	13	252	5,922

	D Elections in RD cases														
AFL-CIO	447	23 9	107	107	-------	-------	-------	340	25,742	10,469	10,469	-------	-------	-------	15,273
Teamsters	244	13 1	32	-------	32	-------	-------	212	5,326	931	-------	931	-------	-------	4,395
Other national unions	36	52 8	19	-------	-------	19	-------	17	4,103	1,919	-------	-------	1,919	-------	2,184
Other local unions	16	43 8	7	-------	-------	-------	7	9	777	595	-------	-------	-------	595	182
1-union elections	743	22 2	165	107	32	19	7	578	35,948	13,914	10,469	931	1,919	595	22,034
AFL-CIO v AFL-CIO	2	0 0	0	0	-------	-------	-------	2	16	0	0	-------	-------	-------	16
AFL-CIO v Teamsters	6	100 0	6	2	4	-------	-------	0	670	670	466	204	-------	-------	0
AFL-CIO v national	1	100 0	1	1	-------	0	-------	0	625	625	625	-------	0	-------	0
AFL-CIO v local	14	92 9	13	3	-------	-------	10	1	1,416	1,402	586	-------	-------	816	14
Teamsters v local	5	80 0	4	-------	2	-------	2	1	340	319	-------	187	-------	132	21
Teamsters v Teamsters	2	50 0	1	-------	1	-------	-------	1	57	54	-------	54	-------	-------	3
National v local	1	100 0	1	-------	-------	0	1	0	6	6	-------	-------	0	6	0
2-union elections	31	83 9	26	6	7	0	13	5	3,130	3,076	1,677	445	0	954	54
AFL-CIO v AFL-CIO v Teamsters	1	100 0	1	1	0	-------	-------	0	39	39	39	0	-------	-------	0
AFL-CIO v Teamsters v national	1	100 0	1	0	0	1	-------	0	116	116	0	0	116	-------	0
Teamsters v national v local	1	100 0	1	-------	0	1	0	0	305	305	-------	0	305	0	0
3 (or more)-union elections	3	100 0	3	1	0	2	0	0	460	460	39	0	421	0	0
Total RD elections	777	25 0	194	114	39	21	20	583	39,538	17,450	12,185	1,376	2,340	1,549	22,088

[1] See Glossary for definitions of terms

[2] Includes each unit in which a choice as to collective-bargaining agent was made, for example, there may have been more than one election in a single case, or several cases may have been involved in one election unit

Table 14.—Valid Votes Cast in Representation Elections, by Final Results of Election, in Cases Closed, Fiscal Year 1979[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	286,993	53,109	53,109				27,486	71,094	71,094				135,304
Teamsters	79,462	15,500		15,500			7,233	18,707		18,707			38,022
Other national unions	52,616	11,366			11,366		5,956	13,412			13,412		21,882
Other local unions	19,377	6,000				6,000	2,630	3,163				3,163	7,584
1-union elections	438,448	85,975	53,109	15,500	11,366	6,000	43,305	106,376	71,094	18,707	13,412	3,163	202,792
AFL-CIO v AFL-CIO	9,759	3,418	3,418				394	2,077	2,077				3,870
AFL-CIO v Teamsters	4,384	3,235	1,223	2,012			402	250	117	133			497
AFL-CIO v national	7,140	2,669	1,366		1,303		325	1,470	234		1,236		2,676
AFL-CIO v local	18,379	14,908	7,629			7,279	2,166	629	252			377	676
Teamsters v national	949	373		138	235		86	130		26	104		360
Teamsters v local	3,670	1,597		1,007		590	57	915		898		17	1,101
Teamsters v Teamsters	82	77		77			2	1		1			2
National v local	555	502			108	394	9	11			0	11	33
National v national	51	0			0		0	20			20		31
Local v local	826	744				744	82	0				0	0
2-union elections	45,795	27,523	13,636	3,234	1,646	9,007	3,523	5,503	2,680	1,058	1,360	405	9,246
AFL-CIO v AFL-CIO v AFL-CIO	13	13	13				0	0	0				0
AFL-CIO v AFL-CIO v Teamsters	467	31	28	3			0	166	166	0			270
AFL-CIO v AFL-CIO v national	9	9	9		0		0	0	0		0		0
AFL-CIO v AFL-CIO v local	2,762	2,736	1,795			941	26	0	0			0	0
AFL-CIO v Teamsters v national	273	164	3	41	120		44	11	7	0	4		54
AFL-CIO v. Teamsters v local	111	111	7	81		23	0	0	0	0		0	0
AFL-CIO v national v local	184	0	0		0	0	0	75	5		70	0	109
AFL-CIO v local v local	17,280	17,053	9,097			7,956	227	0	0			0	0
Teamsters v national v. local	234	234		2	221	11	0	0		0	0	0	0
AFL-CIO v AFL-CIO v AFL-CIO v AFL-CIO	57	41	41				16	0	0				0
AFL-CIO v Teamsters v national v local	350	347	140	0	205	2	3	0	0	0	0	0	0
Local v local v local	57	56				56	1	0				0	0

3 (or more)-union elections	21,797	20,795	11,133	127	546	8,989	317	252	178	0	74	0	433
Total representation elections	506,040	134,293	77,878	18,861	13,558	23,996	47,145	112,131	73,952	19,765	14,846	3,568	212,471
	B Elections in RC cases												
AFL-CIO	260,043	46,415	46,415				23,777	66,004	66,004				123,847
Teamsters	73,803	14,741		14,741			6,807	17,700		17,700			34,555
Other national unions	48,935	10,180			10,180		5,556	12,736			12,736		20,463
Other local unions	18,667	5,635				5,635	2,459	3,135				3,135	7,438
1-union elections	401,448	76,971	46,415	14,741	10,180	5,635	38,599	99,575	66,004	17,700	12,736	3,135	186,303
AFL-CIO v AFL-CIO	9,223	2,901	2,901				390	2,072	2,072				3,860
AFL-CIO v Teamsters	3,575	2,502	966	1,536			326	250	117	133			497
AFL-CIO v national	6,654	2,191	947		1,244		317	1,470	234		1,236		2,676
AFL-CIO v local	17,186	13,906	7,244			6,662	1,984	629	252			377	667
Teamsters v national	949	373		138	235		86	130		26	104		360
Teamsters v local	3,359	1,315		873		442	48	907		891		16	1,089
Teamsters v Teamsters	39	37		37			2	0		0			0
National v Teamsters	439	386			108	278	9	11			0	11	33
National v national	51	0			0		0	20			20		31
Local v local	826	744				744	82	0				0	0
2-union elections	42,301	24,355	12,058	2,584	1,587	8,126	3,244	5,489	2,675	1,050	1,360	404	9,213
AFL-CIO v AFL-CIO v AFL-CIO	13	13	13				0	0	0				0
AFL-CIO v AFL-CIO v Teamsters	436	0	0	0			0	166	166	0			270
AFL-CIO v AFL-CIO v national	9	9	9		0		0	0	0		0		0
AFL-CIO v AFL-CIO v local	2,762	2,736	1,795			941	26	0	0			0	0
AFL-CIO v Teamsters v national	175	67	3	0	64		43	11	7	0	4		54
AFL-CIO v Teamsters v local	111	111	7	81		23	0	0	0	0		0	0
AFL-CIO v. national v local	184	0	0		0	0	0	75	5		70	0	109
AFL-CIO v local v local	17,280	17,053	9,097			7,956	227	0	0			0	0
AFL-CIO v AFL-CIO v AFL-CIO v. AFL-CIO	57	41	41				16	0	0				0
AFL-CIO v Teamsters v national v local	350	347	140	0	205	2	3	0	0	0	0	0	0
Local v local v local	57	56				56	1	0				0	0
3 (or more)-union elections	21,434	20,433	11,105	81	269	8,978	316	252	178	0	74	0	433
Total RC elections	465,183	121,759	69,578	17,406	12,036	22,739	42,159	105,316	68,857	18,750	14,170	3,539	195,949

Table 14.—Valid Votes Cast in Representation Elections, by Final Results of Election, in Cases Closed, Fiscal Year 1979 [1]—Continued

Participating unions	Total valid votes cast	Valid votes cast in elections won						Valid votes cast in elections lost					
		Votes for unions					Total votes for no union	Votes for unions					Total votes for no union
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions	
	C Elections in RM cases												
AFL-CIO	5,048	842	842				442	985	985				2,779
Teamsters	1,058	246		246			94	168		168			550
Other national unions	333	10			10		2	20			20		301
Other local unions	35	21				21	1	2				2	11
1-union elections	6,474	1,119	842	246	10	21	539	1,175	985	168	20	2	3,641
AFL-CIO v AFL-CIO	521	517	517				4	0	0				0
AFL-CIO v Teamsters	242	238	28	210			4	0	0	0			0
AFL-CIO v local	36	36	3			33	0	0	0			0	0
National v local	110	110			0	110	0	0			0	0	0
2-union elections	909	909	548	210	0	143	8	0	0	0	0	0	0
Total RM elections	7,383	2,020	1,390	456	10	164	547	1,175	985	168	20	2	3,641

	D Elections in RD cases												
AFL-CIO	21,902	5,852	5,852				3,267	4,105	4,105				8,678
Teamsters	4,601	513		513			332	839		839			2,917
Other national unions	3,348	1,176			1,176		398	656			656		1,118
Other local unions	675	344				344	170	26				26	135
1-union elections	30,526	7,885	5,852	513	1,176	344	4,167	5,626	4,105	839	656	26	12,848
AFL-CIO v AFL-CIO	15	0	0				0	5	5				10
AFL-CIO v Teamsters	567	495	229	266			72	0	0	0			0
AFL-CIO v national	486	478	419		59		8	0	0		0		0
AFL-CIO v local	1,157	966	382			584	182	0	0			0	9
Teamsters v local	311	282		134		148	9	8		7		1	12
Teamsters v Teamsters	43	40		40			0	1		1			2
National v local	6	6			0	6	0	0			0	0	0
2-union elections	2,585	2,267	1,030	440	59	738	271	14	5	8	0	1	33
AFL-CIO v AFL-CIO v Teamsters	31	31	28	3			0	0	0	0			0
AFL-CIO v Teamsters v national	98	97	0	41	56		1	0	0	0	0		0
Teamsters v national v local	234	234		2	221	11	0	0		0	0	0	0
3 (or more)-union elections	363	362	28	46	277	11	1	0	0	0	0	0	0
Total RD elections	33,474	10,514	6,910	999	1,512	1,093	4,439	5,640	4,110	847	656	27	12,881

[1] See Glossary for definitions of terms

Table 15A.—Geographic Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1979

Division and State[1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		
Maine	53	23	13	8	0	2	30	4,176	3,870	1,558	1,249	245	0	64	2,312	627
New Hampshire	21	11	7	4	0	0	10	1,133	1,032	486	412	74	0	0	546	471
Vermont	13	3	2	1	0	0	10	1,485	1,364	567	513	54	0	0	797	175
Massachusetts	241	91	50	28	4	9	150	19,438	17,252	8,141	4,226	2,433	645	837	9,111	6,344
Rhode Island	38	24	15	4	1	4	14	2,514	2,226	1,189	1,035	73	25	56	1,037	1,261
Connecticut	103	44	21	9	4	10	59	7,039	6,409	2,745	1,549	242	504	450	3,664	1,579
New England	469	196	108	54	9	25	273	35,785	32,153	14,686	8,984	3,121	1,174	1,407	17,467	10,457
New York	574	324	165	75	23	61	250	31,604	25,222	13,677	8,851	1,709	915	2,202	11,545	16,955
New Jersey	296	130	62	33	8	27	166	15,082	13,071	6,556	3,450	1,098	906	1,102	6,515	5,887
Pennsylvania	536	216	112	79	7	18	320	30,682	27,656	11,405	6,687	2,322	1,266	1,130	16,251	7,151
Middle Atlantic	1,406	670	339	187	38	106	736	77,368	65,949	31,638	18,988	5,129	3,087	4,434	34,311	29,993
Ohio	579	252	145	74	23	10	327	39,814	36,046	16,211	9,498	2,365	3,601	747	19,835	10,676
Indiana	238	101	63	29	8	1	137	21,793	19,272	8,468	5,898	695	1,835	40	10,804	5,372
Illinois	419	185	91	58	17	19	234	29,332	25,527	12,990	6,349	2,373	2,021	2,247	12,537	13,274
Michigan	447	207	91	51	50	15	240	25,466	21,810	10,206	3,979	1,211	4,108	908	11,604	7,959
Wisconsin	167	77	50	21	3	3	90	11,674	9,999	4,131	2,950	435	335	411	5,868	2,917
East North Central	1,850	822	440	233	101	48	1,028	128,079	112,654	52,006	28,674	7,079	11,900	4,353	60,648	40,198
Iowa	60	23	11	9	0	3	37	1,991	1,845	805	604	87	81	33	1,040	595
Minnesota	183	83	45	33	5	0	100	9,912	8,274	3,742	2,493	790	447	12	4,532	3,451
Missouri	204	94	47	36	8	3	110	11,265	10,172	4,941	2,948	1,219	495	279	5,231	4,682
North Dakota	13	5	3	2	0	0	8	339	301	109	17	92	0	0	192	50
South Dakota	10	4	3	1	0	0	6	613	589	345	294	51	0	0	244	420
Nebraska	40	22	15	7	0	0	18	1,594	1,396	844	654	173	0	17	552	1,133
Kansas	82	34	22	6	4	2	48	5,021	4,244	2,284	1,512	167	560	45	1,960	2,304
West North Central	592	265	146	94	17	8	327	30,735	26,821	13,070	8,522	2,579	1,583	386	13,751	12,635
Delaware	7	6	3	1	1	1	1	194	177	104	63	17	12	12	73	144
Maryland	158	66	33	26	2	5	92	18,277	15,897	7,891	6,069	809	47	966	8,006	7,368
District of Columbia	30	17	13	3	0	1	13	4,942	3,974	3,343	2,268	49	0	1,026	631	3,979

Virginia	101	56	42	11	1	2	45	29,253	25,903	21,312	13,063	369	93	7,787	4,591	24,310
West Virginia	51	28	16	5	5	2	23	3,186	2,894	1,406	997	236	67	106	1,488	1,265
North Carolina	110	42	25	14	2	1	68	13,619	12,289	5,443	4,116	1,147	73	107	6,846	2,820
South Carolina	43	17	13	3	1	0	26	4,611	4,254	1,752	1,608	105	39	0	2,502	792
Georgia	189	63	43	16	3	1	126	25,425	22,985	9,449	6,258	2,497	681	13	13,536	3,676
Florida	161	68	43	19	4	2	93	10,434	9,076	4,352	2,699	1,282	266	105	4,724	3,611
South Atlantic	850	363	231	98	19	15	487	109,941	97,449	55,052	37,141	6,511	1,278	10,122	42,397	47,983
Kentucky	117	45	22	16	4	3	72	9,493	8,613	3,773	1,986	452	928	407	4,840	2,856
Tennessee	176	72	43	27	1	1	104	20,734	18,893	9,016	5,720	2,307	640	349	9,877	7,198
Alabama	93	52	38	11	3	0	41	10,190	9,216	4,230	3,887	177	166	0	4,986	3,918
Mississippi	57	25	14	6	3	2	32	7,269	6,683	2,814	2,341	153	201	119	3,869	2,005
East South Central	443	194	117	60	11	6	249	47,686	43,405	19,833	13,934	3,089	1,935	875	23,572	15,977
Arkansas	49	22	12	8	2	0	27	4,164	3,789	1,316	791	246	279	0	2,473	692
Louisiana	88	36	25	6	3	2	52	6,586	6,009	2,429	1,775	261	189	204	3,580	1,695
Oklahoma	78	31	20	9	1	1	47	10,540	9,559	4,633	2,799	163	1,596	75	4,926	3,635
Texas	212	97	61	31	2	3	115	19,401	16,897	7,827	5,765	1,488	476	98	9,070	7,174
West South Central	427	186	118	54	8	6	241	40,691	36,254	16,205	11,130	2,158	2,540	377	20,049	13,196
Montana	46	21	15	6	0	0	25	779	702	331	268	63	0	0	371	328
Idaho	34	15	8	7	0	0	19	1,083	942	390	161	229	0	0	552	445
Wyoming	10	5	4	0	1	0	5	446	398	194	165	17	12	0	204	371
Colorado	106	59	43	6	4	6	47	8,559	7,473	2,969	2,362	143	257	207	4,504	2,210
New Mexico	34	18	16	2	0	0	16	1,809	1,579	878	779	99	0	0	701	972
Arizona	92	35	23	11	1	0	57	5,403	4,721	2,123	1,317	643	113	50	2,598	1,205
Utah	34	22	13	9	0	0	12	1,375	1,172	617	422	187	8	0	555	1,069
Nevada	41	24	13	8	1	2	17	1,190	1,024	559	174	235	95	55	465	658
Mountain	397	199	135	49	7	8	198	20,644	18,011	8,061	5,648	1,616	485	312	9,950	7,258
Washington	275	129	81	41	3	4	146	8,461	7,264	2,988	1,950	830	49	159	4,276	2,497
Oregon	126	43	23	16	1	3	83	5,724	4,803	1,962	1,375	447	89	51	2,841	1,441
California	1,024	457	248	157	23	29	567	59,026	49,316	24,191	13,411	5,720	3,737	1,323	25,125	23,406
Alaska	25	13	8	2	2	1	12	895	655	273	101	60	26	86	382	357
Hawaii	51	23	12	5	5	1	28	1,976	1,611	849	178	136	513	22	762	910
Guam	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Pacific	1,501	665	372	221	34	38	836	76,082	63,649	30,363	17,015	7,193	4,414	1,641	33,386	28,611
Puerto Rico	86	49	20	4	1	24	37	10,031	9,037	5,109	1,344	114	8	3,643	3,928	5,019
Virgin Islands	22	14	11	2	0	1	8	900	658	501	450	37	0	14	157	700
Outlying Areas	108	63	31	6	1	25	45	10,931	9,695	5,610	1,794	151	8	3,657	4,085	5,719
Total, all States and areas	8,043	3,623	2,037	1,056	245	285	4,420	577,942	506,040	246,424	151,830	38,626	28,404	27,564	259,616	212,027

[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 1979

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	103	44	21	9	4	10	59	7,039	6,409	2,745	1,549	242	504	450	3,664	1,579
Maine	53	23	13	8	0	2	30	4,176	3,870	1,558	1,249	245	0	64	2,312	627
Massachusetts	241	91	50	28	4	9	150	19,438	17,252	8,141	4,226	2,433	645	837	9,111	6,344
New Hampshire	21	11	7	4	0	0	10	1,133	1,032	486	412	74	0	0	546	471
Rhode Island	38	24	15	4	1	4	14	2,514	2,226	1,189	1,035	73	25	56	1,037	1,261
Vermont	13	3	2	1	0	0	10	1,485	1,364	567	513	54	0	0	797	175
Region I	469	196	108	54	9	25	273	35,785	32,153	14,686	8,984	3,121	1,174	1,407	17,467	10,457
Delaware	7	6	3	1	1	1	1	194	177	104	63	17	12	12	73	144
New Jersey	296	130	62	33	8	27	166	15,082	13,071	6,556	3,450	1,098	906	1,102	6,515	5,887
New York	574	324	165	75	23	61	250	31,604	25,222	13,677	8,851	1,709	915	2,202	11,545	16,955
Puerto Rico	86	49	20	4	1	24	37	10,031	9,037	5,109	1,344	114	8	3,643	3,928	5,019
Virgin Islands	22	14	11	2	0	1	8	900	658	501	450	37	0	14	157	700
Region II	985	523	261	115	33	114	462	57,811	48,165	25,947	14,158	2,975	1,841	6,973	22,218	28,705
District of Columbia	30	17	13	3	0	1	13	4,942	3,974	3,343	2,268	49	0	1,026	631	3,979
Maryland	158	66	33	26	2	5	92	18,277	15,897	7,891	6,069	809	47	966	8,006	7,386
Pennsylvania	536	216	112	79	7	18	320	30,682	27,656	11,405	6,687	2,322	1,266	1,130	16,251	7,151
Virginia	101	56	42	11	1	2	45	29,253	25,903	21,312	13,063	369	93	7,787	4,591	24,310
West Virginia	51	28	16	5	5	2	23	3,186	2,894	1,406	997	236	67	106	1,488	1,265
Region III	876	383	216	124	15	28	493	86,340	76,324	45,357	29,084	3,785	1,473	11,015	30,967	44,091
Alabama	93	52	38	11	3	0	41	10,190	9,216	4,230	3,887	177	166	0	4,986	3,918
Florida	161	68	43	19	4	2	93	10,434	9,076	4,352	2,699	1,282	266	105	4,724	3,611
Georgia	189	63	43	16	3	1	126	25,425	22,985	9,449	6,258	2,497	681	13	13,536	3,676
Kentucky	117	45	22	16	4	3	72	9,493	8,613	3,773	1,986	452	928	407	4,840	2,856
Mississippi	57	25	14	6	3	2	32	7,269	6,683	2,814	2,341	153	201	119	3,869	2,005
North Carolina	110	42	25	14	2	1	68	13,619	12,289	5,443	4,116	1,147	73	107	6,846	2,820
South Carolina	43	17	13	3	1	0	26	4,611	4,254	1,752	1,608	105	39	0	2,502	792
Tennessee	176	72	43	27	1	1	104	20,734	18,893	9,016	5,720	2,307	640	349	9,877	7,198
Region IV	946	384	241	112	21	10	562	101,775	92,009	40,829	28,615	8,120	2,994	1,100	51,180	26,876

Illinois	419	185	91	58	17	19	234	29,332	25,527	12,990	6,349	2,373	2,021	2,247	12,537	13,274
Indiana	238	101	63	29	8	1	137	21,793	19,272	8,468	5,898	695	1,835	40	10,804	5,372
Michigan	447	207	91	51	50	15	240	25,466	21,810	10,206	3,979	1,211	4,108	908	11,604	7,959
Minnesota	183	83	45	33	5	0	100	9,912	8,274	3,742	2,493	790	447	12	4,532	3,451
Ohio	579	252	145	74	23	10	327	39,814	36,046	16,211	9,498	2,365	3,601	747	19,835	10,676
Wisconsin	167	77	50	21	3	3	90	11,674	9,999	4,131	2,950	435	335	411	5,868	2,917
Region V	2,033	905	485	266	106	48	1,128	137,991	120,928	55,748	31,167	7,869	12,347	4,365	65,180	43,649
Arkansas	49	22	12	8	2	0	27	4,164	3,789	1,316	791	246	279	0	2,473	692
Louisiana	88	36	25	6	3	2	52	6,586	6,009	2,429	1,775	261	189	204	3,580	1,695
New Mexico	34	18	16	2	0	0	16	1,809	1,579	878	779	99	0	0	701	972
Oklahoma	78	31	20	9	1	1	47	10,540	9,559	4,633	2,799	163	1,596	75	4,926	3,635
Texas	212	97	61	31	2	3	115	19,401	16,897	7,827	5,765	1,488	476	98	9,070	7,174
Region VI	461	204	134	56	8	6	257	42,500	37,833	17,083	11,909	2,257	2,540	377	20,750	14,168
Iowa	60	23	11	9	0	3	37	1,991	1,845	805	604	87	81	33	1,040	595
Kansas	82	34	22	6	4	2	48	5,021	4,244	2,284	1,512	167	560	45	1,960	2,304
Missouri	204	94	47	36	8	3	110	11,265	10,172	4,941	2,948	1,219	495	279	5,231	4,682
Nebraska	40	22	15	7	0	0	18	1,594	1,396	844	654	173	0	17	552	1,133
Region VII	386	173	95	58	12	8	213	19,871	17,657	8,874	5,718	1,646	1,136	374	8,783	8,714
Colorado	106	59	43	6	4	6	47	8,559	7,473	2,969	2,362	143	257	207	4,504	2,210
Montana	46	21	15	6	0	0	25	779	702	331	268	63	0	0	371	328
North Dakota	13	5	3	2	0	0	8	339	301	109	17	92	0	0	192	50
South Dakota	10	4	3	1	0	0	6	613	589	345	294	51	0	0	244	420
Utah	34	22	13	9	0	0	12	1,375	1,172	617	422	187	8	0	555	1,069
Wyoming	10	5	4	0	1	0	5	446	398	194	165	17	12	0	204	371
Region VIII	219	116	81	24	5	6	103	12,111	10,635	4,565	3,528	553	277	207	6,070	4,448
Arizona	92	35	23	11	1	0	57	5,403	4,721	2,123	1,317	643	113	50	2,598	1,205
California	1,024	457	248	157	23	29	567	59,026	49,316	24,191	13,411	5,720	3,737	1,323	25,125	23,406
Hawaii	51	23	12	5	5	1	28	1,976	1,611	849	178	136	513	22	762	910
Guam	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Nevada	41	24	13	8	1	2	17	1,190	1,024	559	174	235	95	55	465	658
Region IX	1,208	539	296	181	30	32	669	67,595	56,672	27,722	15,080	6,734	4,458	1,450	28,950	26,179
Alaska	25	13	8	2	2	1	12	895	655	273	101	60	26	86	382	357
Idaho	34	15	8	7	0	0	19	1,083	942	390	161	229	0	0	552	445
Oregon	126	43	23	16	1	3	83	5,724	4,803	1,962	1,375	447	89	51	2,841	1,441
Washington	275	129	81	41	3	4	146	8,461	7,264	2,988	1,950	830	49	159	4,276	2,497
Region X	460	200	120	66	6	8	260	16,163	13,664	5,613	3,587	1,566	164	296	8,051	4,740
Total, all Federal regions	8,043	3,623	2,037	1,056	245	285	4,420	577,942	506,040	246,424	151,830	38,626	28,404	27,564	259,616	212,027

[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 1979

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	428	187	88	84	2	13	241	32,925	29,018	14,414	6,866	3,698	515	3,335	14,604	12,265
Tobacco manufacturers	4	1	1	0	0	0	3	482	453	194	192	2	0	0	259	35
Textile mill products	82	32	22	6	3	1	50	16,512	15,118	6,986	4,812	1,938	185	51	8,132	5,168
Apparel and other finished products made from fabrics and similar materials	92	32	28	3	0	1	60	12,354	11,096	4,627	4,224	123	192	88	6,469	2,841
Lumber and wood products (except furniture)	187	74	52	18	1	3	113	12,422	10,959	4,687	3,867	396	230	194	6,272	3,347
Furniture and fixtures	92	41	32	6	0	3	51	10,322	9,297	4,309	3,249	581	157	322	4,988	2,733
Paper and allied products	109	42	27	10	4	1	67	6,555	6,084	2,618	1,730	641	239	8	3,466	1,767
Printing, publishing, and allied industries	263	90	75	11	2	2	173	12,888	11,716	5,080	4,234	648	129	69	6,636	3,269
Chemicals and allied products	201	72	35	28	2	7	129	21,476	18,196	7,836	3,659	1,137	2,425	615	10,360	4,281
Petroleum refining and related industries	66	33	16	14	1	2	33	5,400	4,813	2,417	1,783	377	6	251	2,396	3,423
Rubber and miscellaneous plastics products	198	85	48	20	13	4	113	17,248	15,728	7,299	5,265	587	1,311	136	8,429	6,398
Leather and leather products	36	12	4	7	0	1	24	7,587	6,481	3,279	1,758	1,440	3	78	3,202	3,507
Stone, clay, glass, and concrete products	158	76	39	29	3	5	82	8,097	7,264	3,447	1,949	743	569	186	3,817	3,032
Primary metal industries	234	104	67	17	12	8	130	20,117	18,331	8,930	6,848	691	729	662	9,401	6,938
Fabricated metal products (except machinery and transportation equipment)	367	153	101	34	14	4	214	26,339	23,861	10,136	6,839	1,717	1,325	255	13,725	7,059
Machinery (except electrical)	376	135	75	24	30	6	241	43,131	38,978	17,300	9,691	2,114	4,487	1,008	21,678	11,516
Electrical and electronic machinery, equipment, and supplies	250	102	60	18	18	6	148	40,547	36,246	15,678	10,433	1,920	2,944	381	20,568	9,059
Aircraft and parts	154	69	28	11	26	4	85	21,629	19,424	9,486	3,668	667	5,073	78	9,938	8,327
Ship and boat building and repairing	29	11	6	2	0	3	18	20,995	18,716	17,478	9,507	109	49	7,813	1,238	19,487
Automotive and other transportation equipment	32	18	8	3	4	3	14	3,208	2,820	1,770	580	75	432	683	1,050	2,041
Measuring, analyzing, and controlling instruments, photographic, medical, and optical goods, watches and clocks	68	28	14	6	5	3	40	6,125	5,563	2,599	1,662	94	717	126	2,964	1,464
Miscellaneous manufacturing industries	243	95	53	29	6	7	148	21,540	18,381	8,199	5,115	1,363	1,332	389	10,182	7,897
Manufacturing	3,669	1,492	879	380	146	87	2,177	367,899	328,543	158,769	97,931	21,061	23,049	16,728	169,774	125,854
Metal mining	11	7	5	0	2	0	4	795	660	373	273	0	100	0	287	696
Coal mining	42	22	5	2	13	2	20	2,506	2,194	1,112	247	117	469	279	1,082	1,128
Crude petroleum and natural gas production	5	2	2	0	0	0	3	156	142	54	40	14	0	0	88	29

Mining and quarrying of nonmetallic minerals (except fuels)	32	12	5	6	0	1	20	826	733	318	127	174	0	17	415	237
Mining	90	43	17	8	15	3	47	4,283	3,729	1,857	687	305	569	296	1,872	2,090
Construction	238	122	97	15	4	6	116	5,760	4,993	2,523	2,125	253	68	77	2,470	3,027
Wholesale trade	614	270	89	159	11	11	344	18,105	16,041	7,523	3,333	3,631	249	310	8,518	6,687
Retail trade	877	361	230	96	14	21	516	42,728	35,525	16,351	10,521	3,069	1,725	1,036	19,174	14,964
Finance, insurance, and real estate																
U S Postal Service	139	63	48	9	2	4	76	9,827	8,890	3,653	2,957	435	106	155	5,237	1,711
Local and suburban transit and interurban highway passenger transportation	4	4	4	0	0	0	0	312	269	231	179	0	0	52	38	312
Transportation services	63	38	18	14	0	6	25	4,453	3,286	1,847	1,170	454	0	223	1,439	3,060
Water transportation	550	265	33	212	10	10	285	14,642	12,955	6,014	878	4,233	679	224	6,941	5,581
Pipe lines (except natural gas)	14	8	4	2	2	0	6	220	191	113	54	26	29	4	78	114
Motor freight transportation and warehousing	48	26	6	19	0	1	22	2,028	1,800	975	454	442	0	79	825	1,211
Communication	208	120	104	4	2	10	88	7,217	6,000	3,512	3,124	45	72	271	2,488	4,320
Electric, gas, and sanitary services	147	75	45	27	0	3	72	10,042	8,620	5,469	3,716	474	123	1,156	3,151	5,444
Transportation, communication, and other utilities	1,030	532	210	278	14	30	498	38,602	32,852	17,930	9,396	5,674	903	1,957	14,922	19,730
Hotels, rooming houses, camps, and other lodging places	93	42	32	5	3	2	51	4,952	3,952	1,648	1,297	156	73	122	2,304	1,412
Personal services	62	30	15	12	0	3	32	1,357	1,212	645	260	256	81	48	567	548
Automotive repair, services, and garages	140	60	18	37	3	2	80	3,745	3,283	1,488	748	636	47	57	1,795	996
Motion pictures	14	11	9	0	0	2	3	281	209	159	73	0	0	86	50	236
Amusement and recreation services (except motion pictures)	50	20	16	1	1	2	30	2,005	1,704	677	537	82	7	51	1,027	332
Health services	528	280	204	16	21	39	248	47,937	40,482	19,803	15,035	1,169	1,128	2,471	20,679	17,035
Educational services	100	65	33	5	1	26	35	10,133	8,324	4,593	2,011	220	20	2,342	3,731	7,651
Membership organizations	31	19	13	0	0	6	12	697	636	349	260	2	0	87	287	422
Business services	256	134	78	27	8	21	122	12,333	9,466	4,830	2,839	627	360	1,004	4,636	5,517
Miscellaneous repair services	33	17	9	6	1	1	16	845	707	323	147	161	7	8	384	314
Museums, art galleries, botanical and zoological gardens	2	2	1	0	1	0	0	37	35	24	12	0	12	0	11	37
Legal services	22	20	5	0	0	15	2	810	659	530	82	0	0	448	129	735
Social services	30	23	21	0	0	2	7	1,281	1,082	735	585	8	0	142	347	937
Miscellaneous services	12	6	5	0	0	1	6	1,707	1,234	703	668	2	0	33	531	1,198
Services	1,373	729	459	109	39	122	644	88,120	72,985	36,507	24,554	3,319	1,735	6,899	36,478	37,370
Public administration	9	7	4	2	0	1	2	2,306	2,213	1,080	147	879	0	54	1,133	282
Total, all industrial groups	8,043	3,623	2,037	1,056	245	285	4,420	577,942	506,040	246,424	151,830	38,626	28,404	27,564	259,616	212,027

[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 1979[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	538,404	7,266	100 0		1,923	100 0	1,017	100 0	224	100 0	265	100 0	3,837	100 0
Under 10	9,304	1,629	22 4	22 4	483	25 1	381	37 3	30	13 7	53	19 8	682	17 8
10 to 19	21,091	1,507	20 7	43 1	414	21 5	287	28 2	34	15 2	46	17 4	726	18 9
20 to 29	22,236	922	12 7	55 8	258	13 4	123	12 1	28	12 5	38	14 3	475	12 4
30 to 39	19,517	568	7 8	63 6	165	8 6	63	6 2	19	8 5	15	5 7	306	8 0
40 to 49	18,525	421	5 8	69 4	112	5 8	39	3 8	15	6 7	20	7 5	235	6 1
50 to 59	17,138	315	4 3	73 7	89	4 6	17	1 7	18	8 0	22	8 3	169	4 4
60 to 69	18,228	284	3 9	77 6	81	4 2	27	2 7	13	5 8	12	4 5	151	3 9
70 to 79	14,189	192	2 6	80 2	40	2 1	14	1 4	4	1 8	7	2 6	127	3 3
80 to 89	13,351	159	2 2	82 4	47	2 4	11	1 1	8	3 6	7	2 6	86	2 2
90 to 99	10,094	107	1 5	83 9	28	1 5	9	0 9	5	2 2	3	1 1	62	1 6
100 to 109	10,430	100	1 4	85 3	20	1 0	8	0 8	6	2 7	2	0 8	64	1 7
110 to 119	11,314	99	1 4	86 7	19	1 0	4	0 4	3	1 3	1	0 4	72	1 9
120 to 129	9,240	74	1 0	87 7	20	1 0	3	0 3	2	0 9	6	2 3	43	1 1
130 to 139	7,921	59	0 8	88 5	13	0 7	4	0 4	1	0 4	5	1 9	36	0 9
140 to 149	9,099	63	0 9	89 4	11	0 6	2	0 2	5	2 2	4	1 5	41	1 1
150 to 159	7,819	51	0 7	90 1	14	0 7	1	0 1	3	1 3	1	0 4	32	0 8
160 to 169	9,003	55	0 8	90 9	8	0 4	4	0 4	2	0 9	2	0 8	39	1 0
170 to 179	8,169	47	0 6	91 5	4	0 2	2	0 2	1	0 4	2	0 8	38	1 0
180 to 189	7,355	40	0 6	92 1	6	0 3	0	----	2	0 9	1	0 4	31	0 8
190 to 199	6,646	34	0 5	92 6	5	0 3	2	0 2	1	0 4	0	----	26	0 7
200 to 299	54,677	224	3 1	95 7	41	2 1	6	0 6	10	4 5	8	3 0	159	4 1
300 to 399	36,847	108	1 5	97 2	21	1 1	4	0 4	6	2 7	4	1 5	73	1 9
400 to 499	25,877	59	0 8	98 0	4	0 2	1	0 1	3	1 3	2	0 8	49	1 3
500 to 599	25,023	46	0 6	98 6	5	0 3	2	0 2	2	0 9	0	----	37	1 0
600 to 799	26,936	39	0 5	99 1	4	0 2	2	0 2	1	0 4	1	0 4	31	0 8
800 to 999	18,989	21	0 3	99 4	1	0 1	0	----	0	----	1	0 4	19	0 5
1,000 to 1,999	40,013	29	0 4	99 8	6	0 3	1	0 1	1	0 4	1	0 4	20	0 5
2,000 to 2,999	21,499	9	0 1	99 9	1	0 1	0	----	1	0 4	1	0 4	6	0 2
3,000 to 9,999	37,874	5	0 1	100 0	3	0 2	0	----	0	----	0	----	2	0 1

	B Decertification elections (RD)													
Total RD elections [1]	39,538	777	100 0	----------	114	100 0	39	100 0	21	100 0	20	100 0	583	100 0
Under 10	1,400	244	31 4	31 4	13	11 4	13	33 3	1	4 8	1	5 0	216	37 1
10 to 19	2,109	151	19 4	50 8	23	20 0	7	17 9	1	4 8	2	10 0	118	20 2
20 to 29	2,501	105	13 5	64 3	16	14 0	5	12 8	1	4 8	2	10 0	81	13 9
30 to 39	2,056	60	7 7	72 0	12	10 5	2	5 1	3	14 0	2	10 0	41	7 0
40 to 49	1,686	38	4 9	76 9	5	4 4	3	7 7	0	----------	1	5 0	29	5 0
50 to 59	1,832	34	4 4	81 3	8	7 0	1	2 6	1	4 8	2	10 0	22	3 8
60 to 69	1,226	19	2 4	83 7	4	3 5	3	7 7	0	----------	1	5 0	11	1 9
70 to 79	1,257	17	2 2	85 9	3	2 6	2	5 1	2	9 5	1	5 0	9	1 5
80 to 89	1,351	16	2 1	88 0	5	4 4	0	----------	2	9 5	2	10 0	7	1 2
90 to 99	672	7	0 9	88 9	0	----------	0	----------	1	4 8	0	----------	6	1 0
100 to 109	723	7	0 9	89 8	1	0 9	0	----------	1	4 8	1	5 0	4	0 7
110 to 119	446	4	0 5	90 3	2	1 8	0	----------	1	4 8	0	----------	1	0 2
120 to 129	495	4	0 5	90 8	1	0 9	1	2 6	0	----------	2	10 0	0	----------
130 to 139	1,187	9	1 2	92 0	2	1 8	0	----------	1	4 8	0	----------	6	1 0
140 to 149	574	4	0 5	92 5	2	1 8	0	----------	1	4 8	1	5 0	0	----------
150 to 159	314	2	0 3	92 8	0	----------	1	2 6	1	4 8	0	----------	0	----------
160 to 169	824	5	0 6	93 4	0	----------	0	----------	0	----------	0	----------	5	0 9
170 to 199	2,549	14	1 8	95 2	5	4 4	0	----------	0	----------	1	5 0	8	1 4
200 to 299	4,013	17	2 2	97 4	4	3 5	1	2 6	2	9 5	1	5 0	9	1 5
300 to 499	4,697	13	1 7	99 1	5	4 4	0	----------	2	9 5	0	----------	6	1 0
500 to 799	2,802	4	0 5	99 6	1	0 9	0	----------	0	----------	0	----------	3	0 5
800 and over	4,824	3	0 4	100 0	2	1 8	0	----------	0	----------	0	----------	1	0 2

[1] See Glossary for definitions of terms

Table 18.—Distribution of Unfair Labor Practice Situations Received, by Number of Employees in Establishments, Fiscal Year 1979[1]

Size of establishment (number of employees)	Total number of situations	Total		Type of situations																	
				CA		CB		CC		CD		CE		CG		CP		CA-CB combinations		Other C combinations	
		Percent of all situations	Cumulative percent of all situations	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]37,497	100 0	-----	26,006	100 0	6,666	100 0	1,536	100 0	313	100 0	93	100 0	7	100 0	435	100 0	1,876	100 0	565	100 0
Under 10	10,225	27 3	27 3	6,450	25 1	2,044	30 5	657	42 9	126	40 2	57	61 1	3	42 8	202	46 4	469	25 1	217	38 3
10–19	2,812	7 5	34 8	2,124	8 2	315	4 7	152	9 9	34	10 9	5	5 4	1	14 3	64	14 7	75	4 0	42	7 4
20–29	2,303	6 1	40 9	1,749	6 7	257	3 9	120	7 8	21	6 7	5	5 4	0	-----	36	8 3	79	4 2	36	6 4
30–39	1,645	4 4	45 3	1,198	4 6	242	3 6	75	4 9	10	3 2	3	3 2	0	-----	29	6 7	62	3 3	26	4 6
40–49	1,248	3 3	48 6	933	3 6	179	2 7	43	2 8	9	2 9	1	1 1	0	-----	17	3 9	51	2 7	15	2 7
50–59	1,305	3 5	52 1	976	3 8	179	2 7	39	2 5	12	3 8	1	1 1	0	-----	16	3 7	62	3 3	20	3 5
60–69	915	2 4	54 5	703	2 7	126	1 9	22	1 4	10	3 2	1	1 1	0	-----	12	2 8	27	1 4	14	2 5
70–79	759	2 0	56 5	594	2 3	98	1 5	15	1 0	3	1 0	0	-----	0	-----	3	0 7	34	1 8	12	2 1
80–89	565	1 5	58 0	455	1 7	64	1 0	9	0 6	3	1 0	1	1 1	1	14 3	3	0 7	20	1 1	9	1 6
90–99	353	0 9	58 9	265	1 0	62	0 9	6	0 4	0	-----	1	1 1	0	-----	2	0 5	13	0 7	4	0 7
100–109	1,424	3 8	62 7	918	3 5	301	4 5	76	4 9	11	3 5	2	2 2	0	-----	6	1 4	88	4 7	22	3 9
110–119	260	0 7	63 4	212	0 8	33	0 5	3	0 2	1	0 3	0	-----	0	-----	2	0 5	8	0 4	1	0 2
120–129	473	1 3	64 7	360	1 4	72	1 1	14	0 9	1	0 3	0	-----	0	-----	2	0 5	19	1 0	5	0 9
130–139	226	0 6	65 3	189	0 7	19	0 3	6	0 4	0	-----	0	-----	0	-----	0	-----	10	0 5	2	0 4
140–149	188	0 5	65 8	145	0 6	22	0 3	6	0 4	3	1 0	0	-----	0	-----	1	0 2	7	0 4	4	0 7
150–159	729	1 9	67 7	527	2 0	126	1 9	7	0 5	4	1 3	0	-----	0	-----	1	0 2	57	3 0	7	1 2
160–169	179	0 5	68 2	140	0 5	25	0 4	6	0 4	1	0 3	0	-----	0	-----	0	-----	4	0 2	3	0 5
170–179	221	0 6	68 8	176	0 7	27	0 4	4	0 3	0	-----	0	-----	0	-----	1	0 2	12	0 6	1	0 2
180–189	152	0 4	69 2	124	0 5	18	0 3	2	0 1	0	-----	0	-----	0	-----	0	-----	4	0 2	4	0 7
190–199	53	0 1	69 3	39	0 1	10	0 2	0	-----	1	0 3	0	-----	0	-----	0	-----	1	0 1	2	0 4
200–299	2,089	5 6	74 9	1,489	5 7	409	6 1	45	2 9	5	1 6	4	4 3	0	-----	8	1 8	113	6 0	16	2 8
300–399	1,387	3 7	78 6	932	3 6	290	4 4	42	2 7	9	2 9	4	4 3	0	-----	4	0 9	93	5 0	13	2 3
400–499	823	2 2	80 8	572	2 2	166	2 5	20	1 3	5	1 6	0	-----	0	-----	1	0 2	48	2 6	11	1 9
500–599	764	2 0	82 8	505	1 9	183	2 7	17	1 1	1	0 3	0	-----	0	-----	3	0 7	51	2 7	4	0 7
600–699	473	1 3	84 1	346	1 3	79	1 2	6	0 4	1	0 3	0	-----	0	-----	1	0 2	34	1 8	6	1 1
700–799	308	0 8	84 9	212	0 8	58	0 9	8	0 5	2	0 6	0	-----	0	-----	1	0 2	26	1 4	1	0 2
800–899	296	0 8	85 7	205	0 8	63	0 9	5	0 3	3	1 0	0	-----	1	14 3	0	-----	19	1 0	0	-----
900–999	221	0 6	86 3	122	0 5	53	0 8	21	1 4	4	1 3	0	-----	0	-----	2	0 5	13	0 7	6	1 1
1,000–1,999	1,585	4 2	90 5	1,001	3 8	411	6 2	42	2 7	10	3 2	3	3 2	0	-----	7	1 6	92	4 9	19	3 4
2,000–2,999	1,010	2 7	93 2	684	2 6	200	3 0	5	0 3	7	2 2	1	1 1	1	14 3	7	1 6	92	4 9	13	2 3
3,000–3,999	473	1 3	94 5	279	1 1	123	1 8	8	0 5	4	1 3	0	-----	0	-----	0	-----	55	2 9	4	0 7
4,000–4,999	243	0 6	95 1	141	0 5	69	1 0	6	0 4	1	0 3	0	-----	0	-----	0	-----	24	1 3	2	0 4
5,000–5,999	699	1 9	97 0	401	1 5	193	2 9	21	1 4	7	2 2	1	1 1	0	-----	0	-----	64	3 4	12	2 1
Above 9,999	1,091	3 0	100 0	840	3 2	150	2 3	28	1 8	4	1 3	3	3 2	0	-----	4	0 9	50	2 7	12	2 1

[1] See Glossary for definitions of terms

[2] Based on revised situation count which absorbs companion cases, cross-filing, and multiple filings as compared to situations shown in Charts 1 and 2 of Chapter 1, which are based on single and multiple filings of same type of case

Table 19.—Litigation for Enforcement and/or Review of Board Orders, Fiscal Year 1979 and Cumulative Totals, Fiscal Years 1936–1979

	Fiscal year 1979									July 5, 1935–Sept 30, 1979	
	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	398	352	40	2	4	----------	----------	----------	----------	----------	----------
On petitions for review and/or enforcement	361	328	27	2	4	100 0	100 0	100 0	100 0	7,217	100 0
Board orders affirmed in full	233	212	20	1	0	64 6	74 1	50 0	----------	4,579	63 4
Board orders affirmed with modification	35	32	2	1	0	9 8	7 4	50 0	----------	1,147	15 9
Remanded to Board	20	16	1	0	3	4 9	3 7	----------	75 0	316	4 4
Board orders partially affirmed and partially remanded	11	11	0	0	0	3 4	----------	----------	----------	117	1 6
Board orders set aside	62	57	4	0	1	17 3	14 8	----------	25 0	1,058	14 7
On petitions for contempt	37	24	13	0	0	100 0	100 0	----------	----------	----------	----------
Compliance after filing of petition, before court order	18	13	5	0	0	54 2	38 5	----------	----------	----------	----------
Court orders holding respondent in contempt	16	8	8	0	0	33 3	61 5	----------	----------	----------	----------
Court orders denying petition	3	3	0	0	0	12 5	----------	----------	----------	----------	----------
Proceedings decided by U S Supreme Court[3]	4	4	0	0	0	100 0	----------	----------	----------	226	100 0
Board orders affirmed in full	1	1	0	0	0	25 0	----------	----------	----------	136	60 2
Board orders affirmed with modification	1	1	0	0	0	25 0	----------	----------	----------	17	7 5
Board orders set aside	2	2	0	0	0	50 0	----------	----------	----------	36	16 0
Remanded to Board	0	0	0	0	0	----------	----------	----------	----------	18	8 0
Remanded to court of appeals	0	0	0	0	0	----------	----------	----------	----------	16	7 1
Board's request for remand or modification of enforcement order denied	0	0	0	0	0	----------	----------	----------	----------	1	0 4
Contempt cases remanded to court of appeals	0	0	0	0	0	----------	----------	----------	----------	1	0 4
Contempt cases enforced	0	0	0	0	0	----------	----------	----------	----------	1	0 4

[1] "Proceedings" are comparable to "cases" reported in annual reports prior to fiscal 1964 This term more accurately describes the data inasmuch as a single "proceeding" often includes more than one "case " See Glossary for definition 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 appeared *amicus* in *New York Telephone Co* v *New York State Department of Labor*, 440 U S 519 (1979) In that case, the Supreme Court held, in accord with the Board's position, that a state statute providing for the payment of unemployment benefits to strikers was not in conflict with the NLRA

Table 19A.—Proceedings Decided by Circuit Courts of Appeals on Petitions for Enforcement and/or Review of Board Orders, Fiscal Year 1979 Compared With 5-Year Cumulative Totals, Fiscal Years 1974 Through 1978[1]

Circuit courts of appeals (headquarters)	Total fiscal year 1979	Total fiscal years 1974–1978	Affirmed in full				Modified				Remanded in full				Affirmed in part and remanded in part				Set aside			
			Fiscal Year 1979		Cumulative fiscal years 1974–1978		Fiscal Year 1979		Cumulative fiscal years 1974–1978		Fiscal Year 1979		Cumulative fiscal years 1974–1978		Fiscal Year 1979		Cumulative fiscal years 1974–1978		Fiscal Year 1979		Cumulative fiscal years 1974–1978	
			Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total all circuits	361	1,458	233	64.6	1,033	70 9	35	9 7	155	10 6	20	5 5	63	4 3	11	3 0	29	2 0	62	17 2	178	12 2
1 Boston, Mass	23	67	14	60 9	48	71 6	1	4 4	12	17 9	0	------	3	4 5	3	13 0	0	------	5	21 7	4	6 0
2 New York, N Y	29	120	13	44 8	88	73 3	5	17 2	12	10 0	3	10 4	5	4 2	2	6 9	2	1 7	6	20 7	13	10 8
3. Philadelphia, Pa.	26	119	22	84 6	85	71 4	1	3 9	10	8 4	0	------	8	6 7	0	------	1	0 8	3	11 5	15	12 7
4 Richmond, Va	28	92	21	75 0	60	65 2	1	3 6	18	19 6	4	14 3	5	5 4	0	------	0	------	2	7 1	9	9 8
5 New Orleans, La	56	211	31	55 3	161	76 4	10	17 9	22	10 4	3	5 3	3	1 4	2	3 6	3	1 4	10	17 9	22	10 4
6 Cincinnati, Ohio	27	181	17	63 0	126	69 6	0	------	15	8 3	1	3 7	9	5 0	1	3 7	3	1 6	8	29 6	28	15 5
7 Chicago, Ill	32	163	19	59.4	110	67 5	5	15 6	20	12 3	4	12 5	5	3 1	0	------	1	0 6	4	12 5	27	16 5
8 St Louis, Mo	30	104	21	70 0	65	62 5	4	13 3	19	18 3	0	------	0	------	0	------	4	3 8	5	16 7	16	15 4
9 San Francisco, Calif	70	240	53	75 7	171	71 3	3	4 3	19	7 9	2	2 9	11	4 6	0	------	7	2 9	12	17 1	32	13 3
10 Denver, Colo	19	50	9	47 4	37	74 0	2	10 5	4	8 0	2	10 5	1	2 0	2	10 5	0	------	4	21 1	8	16 0
Washington, D.C	21	111	13	61 8	82	73 9	3	14 3	4	3 6	1	4 8	13	11 7	1	4 8	8	7 2	3	14 3	4	3 6

[1] Percentages are computed horizontally by current fiscal year and total fiscal years

Table 20.—Injunction Litigation Under Section 10(j)and 10(l), Fiscal Year 1979

	Total proceedings	Injunction proceedings		Total dispositions	Disposition of injunctions						Pending in district court Sept 30, 1979
		Pending in district court Oct 1, 1979	Filed in district court fiscal year 1979		Granted	Denied	Settled	Withdrawn	Dismissed	Inactive	
Under Sec 10(e) Total	7	2	5	7	5	1	1	0	0	0	0
Under Sec 10(j) Total	73	11	62	65	20	10	24	6	4	1	8
8(a)(1)	2	0	2	2	1	0	1	0	0	0	0
8(a)(1)(2)	5	1	4	5	0	1	3	0	1	0	0
8(a)(1)(3)	7	0	7	6	3	0	0	3	0	0	1
8(a)(1)(4)	3	0	3	3	1	1	0	0	0	1	0
8(a)(1)(5)	14	4	10	14	3	3	5	2	1	0	0
8(a)(1)(2)(3)	2	0	2	2	2	0	0	0	0	0	0
8(a)(1)(2)(3), 8(b)(1)(2)	3	1	2	3	1	1	1	0	0	0	0
8(a)(1)(3)(4)	4	1	3	4	1	0	3	0	0	0	0
8(a)(1)(3)(5)	21	2	19	15	5	2	8	0	0	0	6
8(a)(1)(2)(3)(5)	3	0	3	3	1	2	0	0	0	0	0
8(a)(1)(3)(4)(5)	2	1	1	2	1	0	0	1	0	0	0
8(a)(1)(2)(3)(4)(5)	2	0	2	2	0	0	1	0	1	0	0
8(b)(1)	2	1	1	1	0	0	1	0	0	0	1
8(b)(1)(2)	1	0	1	1	1	0	0	0	0	0	0
8(b)(1)(3)	2	0	2	2	0	0	1	0	1	0	0
Under Sec 10(l) Total	213	31	182	181	90	5	52	12	9	13	32
8(b)(4)(A)	4	1	3	2	1	0	0	0	0	1	2
8(b)(4)(A)(B)	4	2	2	2	2	0	0	0	0	0	2
8(b)(4)(A)(C)	1	0	1	1	1	0	0	0	0	0	0
8(b)(4)(A), 8(e)	1	1	0	0	0	0	0	0	0	0	1
8(b)(4)(B)	107	10	97	100	48	4	30	5	7	6	7
8(b)(4)(B)(D)	4	0	4	4	0	0	4	0	0	0	0
8(b)(4)(B), 7(A)	2	0	2	2	1	0	1	0	0	0	0
8(b)(4)(B), 7(B)	0	0	0	0	0	0	0	0	0	0	0
8(b)(4)(B), 7(C)	1	0	1	1	1	0	0	0	0	0	0
8(b)(4)(B), 8(e)	1	0	1	1	1	0	0	0	0	0	0
8(b)(4)(B)(D), 8(e)	0	0	0	0	0	0	0	0	0	0	0
8(b)(4)(D)	35	7	28	27	11	0	9	5	0	2	8
8(b)(7)(A)	8	0	8	6	2	0	2	0	2	0	2
8(b)(7)(B)	6	1	5	5	2	0	0	0	0	3	1
8(b)(7)(C)	28	8	20	20	12	0	6	1	0	1	8
8(e)	11	1	10	10	8	1	0	1	0	0	1

Table 21.—Miscellaneous Litigation Involving NLRB; Outcome of Proceedings in Which Court Decision Issued in Fiscal Year 1979

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	78	72	6	23	21	2	55	51	4
NLRB-initiated actions or interventions	33	31	2	4	2	2	29	29	0
To enforce subpena	3	2	1	3	2	1	0	0	0
To restrain dissipation of assets by respondent	0	0	0	0	0	0	0	0	0
To defend Board's jurisdiction	1	0	1	1	0	1	0	0	0
To dissolve bankruptcy stay	29	29	0	0	0	0	29	29	0
Action by other parties	45	41	4	19	19	0	26	22	4
To restrain NLRB from	13	12	1	3	3	0	10	9	1
Proceeding in R case	7	7	0	2	2	0	5	5	0
Proceeding in unfair labor practice case	6	5	1	1	1	0	5	4	1
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	22	19	3	6	6	0	16	13	3
Issue complaint	6	6	0	2	2	0	4	4	0
Seek injunction	0	0	0	0	0	0	0	0	0
Take action in R case	0	0	0	0	0	0	0	0	0
Comply with Freedom of Information Act	16	13	3	4	4	0	12	9	3
Other	0	0	0	0	0	0	0	0	0
Other	10	10	0	10	10	0	0	0	0

Table 22.—Advisory Opinion Cases Received, Closed, and Pending, Fiscal Year 1979[1]

	Total	Number of Cases			
		Identification of Petitioner			
		Employer	Union	Courts	State Boards
Pending October 1, 1978	1	0	1	0	0
Received fiscal 1979	5	5	0	0	0
On docket fiscal 1979	6	5	1	0	0
Closed fiscal 1979	5	4	1	0	0
Pending Sept 30, 1979	1	1	0	0	0

[1] See Glossary for definitions of terms

Table 22A.—Disposition of Advisory Opinion Cases, Fiscal Year 1979[1]

Action taken	Total Cases closed
	5
Board would assert jurisdiction	2
Board would not assert jurisdiction	2
Unresolved because of insufficient evidence submitted	0
Dismissed	0
Withdrawn	1

[1] See Glossary for definitions of terms

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