FORTY-FIFTH

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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Division of Operations Management

Associate General Counsel
Division of Enforcement Litigation

HAROLD J. DATZ
Associate General Counsel
Division of Advice

ERNEST RUSSELL
Director
Division of Administration

[1] Resigned December 14, 1979
[2] Term expired August 27, 1980
[3] Took office September 17, 1980
[4] Appointed May 28, 1980
[5] Took office May 20, 1980

LETTER OF TRANSMITTAL

NATIONAL LABOR RELATIONS BOARD,
Washington, D.C. August 7, 1981

SIR: As provided in section 3(c) of the Labor Management Relations Act, 1947, I submit herewith the Forty-Fifth Annual Report of the National Labor Relations Board for the fiscal year ended September 30, 1980, and, under separate cover, lists containing the cases heard and decided by the Board during this fiscal year.

Respectfully submitted.

JOHN H. FANNING, *Chairman.*

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

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ERRATA

Notice to Holders of Forty-Fourth Annual Report for Fiscal Year 1979

Tables 3A and 3B and the final page of Table 16 in the Annual Report for fiscal year 1979 contained inadvertent errors. Those pages (270, 272, and 309) as corrected appear at the end of this book.

I

Operations in Fiscal Year 1980

A. Summary

The National Labor Relations Board processed a record number of cases in administering the basic U.S. labor relations law during fiscal 1980.

The total was 57,381 cases received, 4.5 percent more than a year earlier. Fiscal 1980 was the 20th consecutive year of record NLRB caseloads.

An independent Federal agency, the NLRB initiates no cases; it acts upon those brought before it. All proceedings originate with formal filings by the major segment of the public covered by the National Labor Relations Act—men and women workers, labor unions, and private employers who are engaged in interstate commerce.

In using NLRB services at an unprecedented rate in 1980, the public filed 44,063 charges alleging that business firms or labor organizations, or both, committed unfair labor practices, prohibited by the statute, which adversely affected hundreds of thousands of employees. The NLRB during the year also received 12,701 petitions to conduct secret-ballot elections in which workers in appropriate groups select or reject unions to represent them in collective bargaining with their employers. Filings in each category exceeded those of the preceding fiscal year.

The consistent growth of the NLRB caseload is a natural development, keeping pace with a constantly expanding and changing economy. Yet it is also significant to note a similar increase in the number of voluntary adjustments of cases before the NLRB.

During fiscal 1980, records were set at all points along NLRB's case-processing pipeline. After the initial flood of charges and petitions, the flow narrowed because the great majority of the newly filed cases were resolved—and quickly—in NLRB's national network of field offices by dismissals, withdrawals, agreements, and settlements.

Finally came decisions by the five-member Board. In 1980, the Board

decided 1,181 contested unfair labor practice cases, and 676 election cases. This combined total was a Board record—achieved despite the fact that for three-quarters of the year the Board had only four members, and for 6 weeks it had only three.

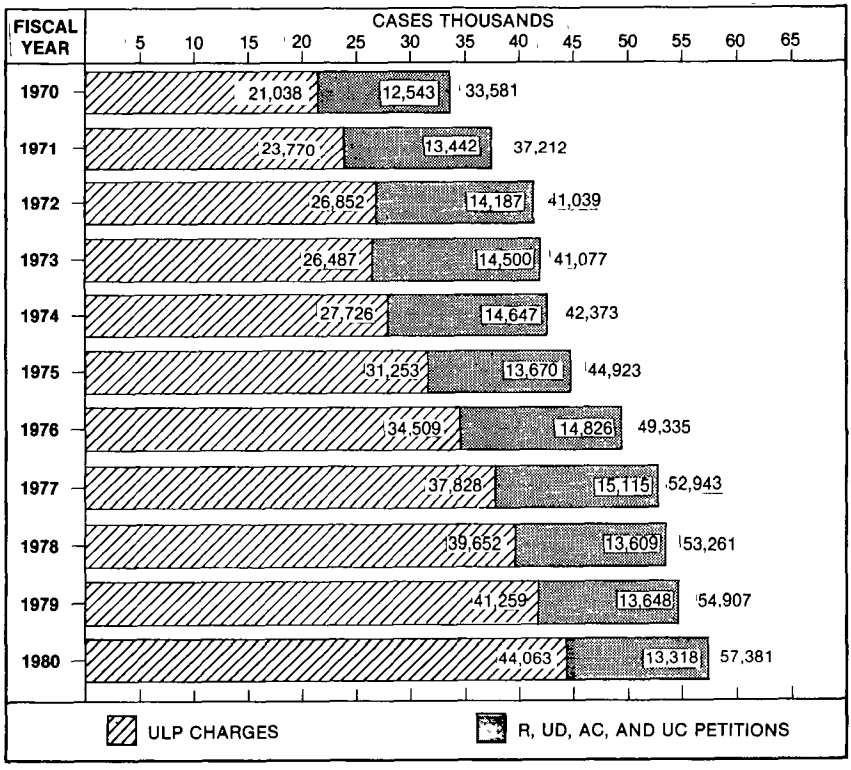
The fiscal year was marked by increased productivity throughout the Agency. Total case workload grew by more than 2 percent, yet full-time, end-of-year staff declined from 3,029 to 2,939. In the decade fiscal 1970 through fiscal 1980, NLRB case intake climbed 71 percent, while employment rose just 34 percent.

John H. Fanning, NLRB Chairman, observed that "over the years we have earned a deserved reputation for efficiency and economy."

At the end of fiscal 1980, the Board was composed of Chairman Fanning and Members Howard Jenkins, Jr., John A. Penello, John C. Truesdale, and Don A. Zimmerman. William A. Lubbers was the General Counsel.

Improving its service to the labor relations public, the NLRB in 1980 opened its 51st field office, a resident office in Des Moines, Iowa, which reports to the regional office in Minneapolis, and established its fourth

CHART NO. 1
CASE INTAKE BY UNFAIR LABOR PRACTICE CHARGES AND REPRESENTATION PETITIONS



office for administrative law judges in Atlanta. Headquarters for the judges, who conduct hearings and issue decisions in unfair labor practice proceedings, is in Washington, D.C., with other judges' offices in San Francisco and New York.

Statistical highlights of NLRB's casehandling activities in fiscal 1980 include:

- The NLRB conducted 8,198 conclusive representation elections among some 458,114 employee voters, with workers choosing labor unions as their bargaining agents in 45.7 percent of the elections.
- Although the Agency closed 55,587 cases, the unprecedented inflow of new cases created a total of 22,118 cases pending in all stages of processing. The closing included 42,047 cases involving unfair labor practice charges and 13,540 cases affecting employee representation.
- Settlements, avoiding formal litigation while achieving the goal of equitable remedies in unfair labor practice situations, numbered 11,721. Only once has this total been exceeded.
- An all-time high of $32,424,132 in reimbursement to employees illegally discharged or otherwise discriminated against in violation of their organizational rights was obtained by the NLRB from employers and unions. The total was for lost earnings, fees, dues, and fines. The NLRB obtained 10,033 offers of job reinstatement, with 8,952 acceptances.
- Acting upon the results of professional staff investigation, which produced a reasonable cause to believe unfair labor practices had been committed, regional offices of the NLRB issued a record 6,230 complaints, setting the cases for hearing.
- NLRB's corps of administrative law judges, with less than authorized strength due to retirements, deaths, and recruitment difficulties, issued 1,273 decisions. Despite the output, proceedings pending hearing at the end of the fiscal year rose to 2,693, the highest level in the Agency's 45-year history.

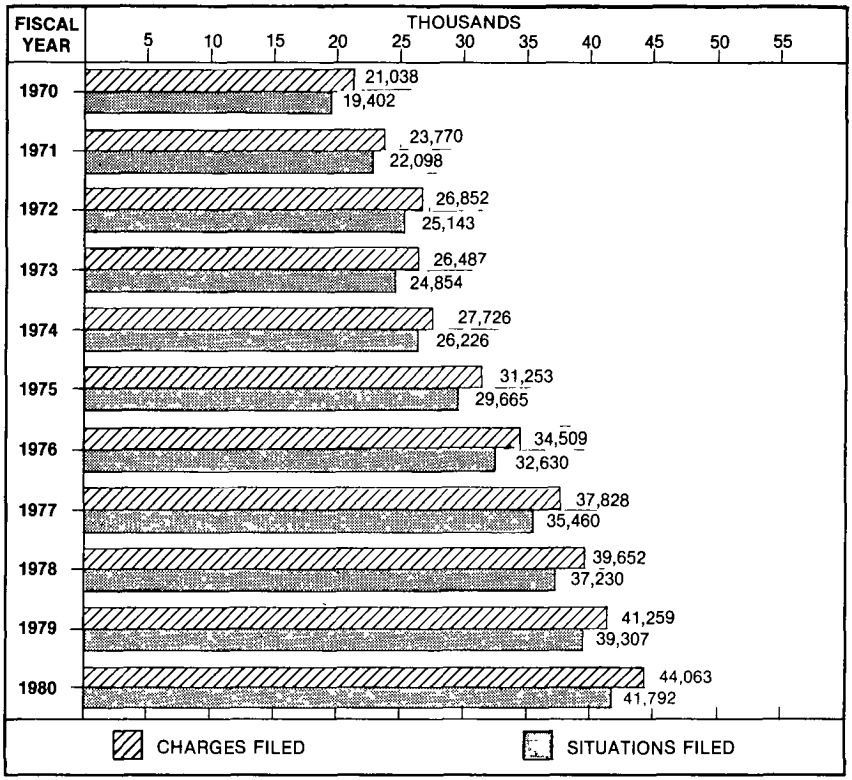
NLRB Administration

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.

The purpose of the Nation's primary labor relations law is to serve the

CHART NO. 2
ULP CASE INTAKE
(Charges and Situations Filed)



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

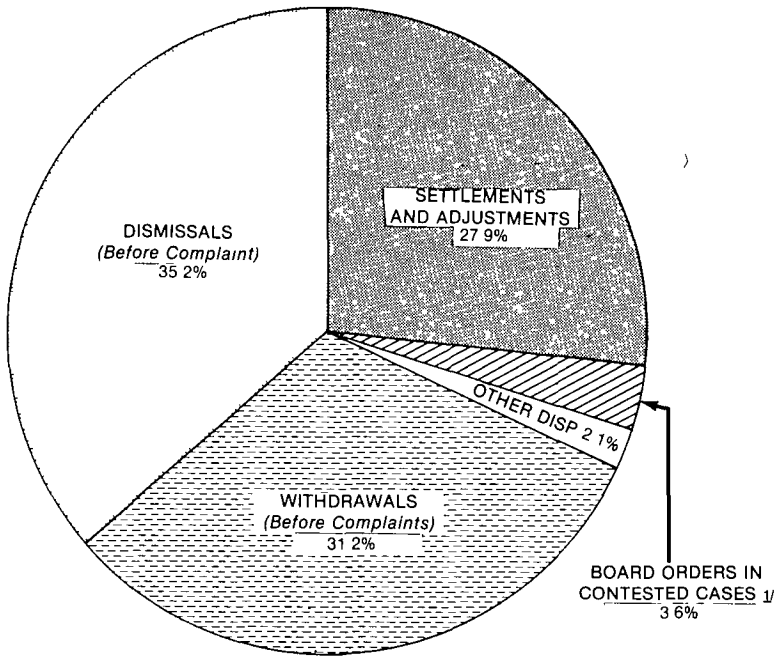
In its statutory assignment, the NLRB has two principal functions: (1) to determine and implement, through secret-ballot elections, the free democratic choice by employees as to whether they wish to be represented by a union in dealing with their employers and, if so, by which union, and (2) to prevent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

The NLRB does not act on its own motion in either function. It processes only those charges of unfair labor practices and petitions for employee elections which are filed in the NLRB's 51 regional, subregional, and resident offices.

The Act's unfair labor practice provisions place certain restrictions on

CHART NO. 3
DISPOSITION PATTERN FOR UNFAIR LABOR PRACTICE CASES
(Based on Cases Closed)

FISCAL YEAR 1980



CONTESTED CASES REACHING BOARD MEMBERS FOR DECISIONS

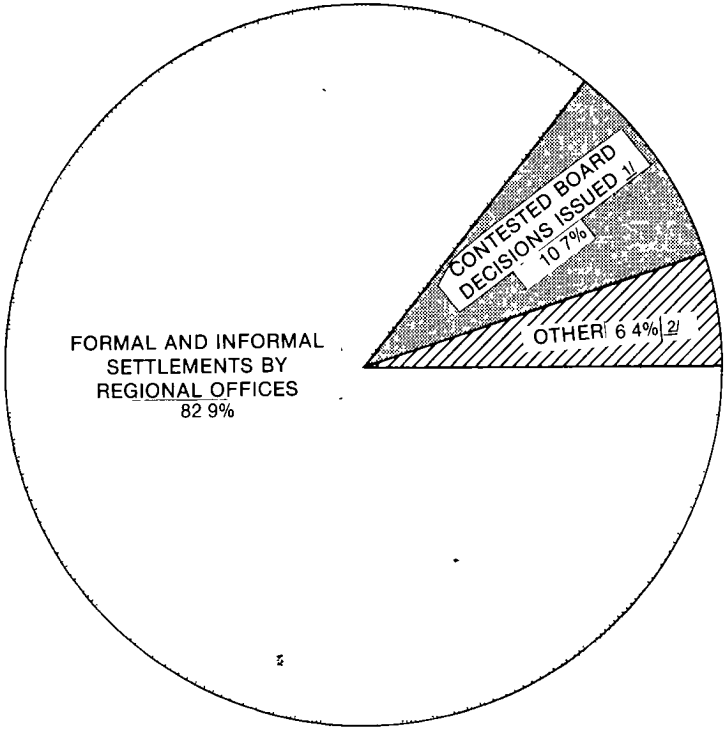
actions of employers and labor organizations in their relations with employees, as well as with each other. Its election provisions provide mechanics for conducting and certifying results of representation elections to determine collective-bargaining wishes of employees, including balloting to determine 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.

CHART NO. 3A
DISPOSITION PATTERN FOR MERITORIOUS UNFAIR LABOR PRACTICE CASES
(Based on Cases Closed)

FISCAL YEAR 1980



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

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

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.

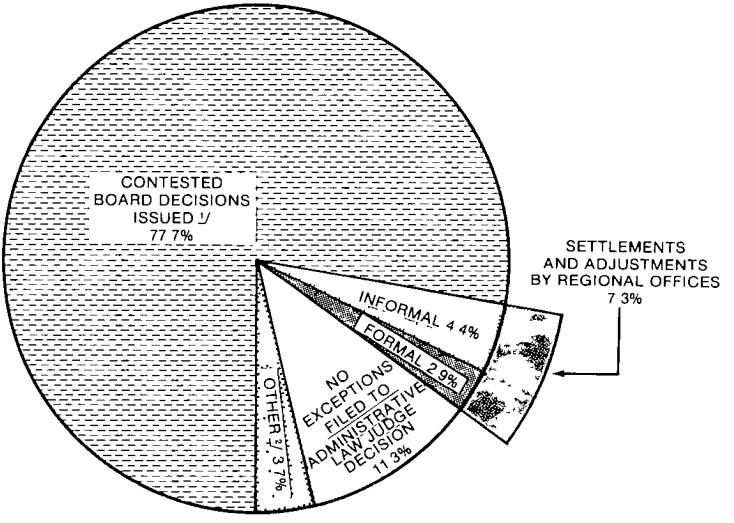
For the conduct of its formal hearings in unfair labor practice cases, the NLRB employs administrative law judges who hear and decide cases. Administrative law judges' decisions may be appealed to the Board by the filing of exceptions. If no exceptions are taken, the administrative law

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.

CHART NO 3B
DISPOSITION PATTERN FOR UNFAIR LABOR PRACTICES CASES AFTER TRIAL
(Based on Cases Closed)

FISCAL YEAR 1980



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

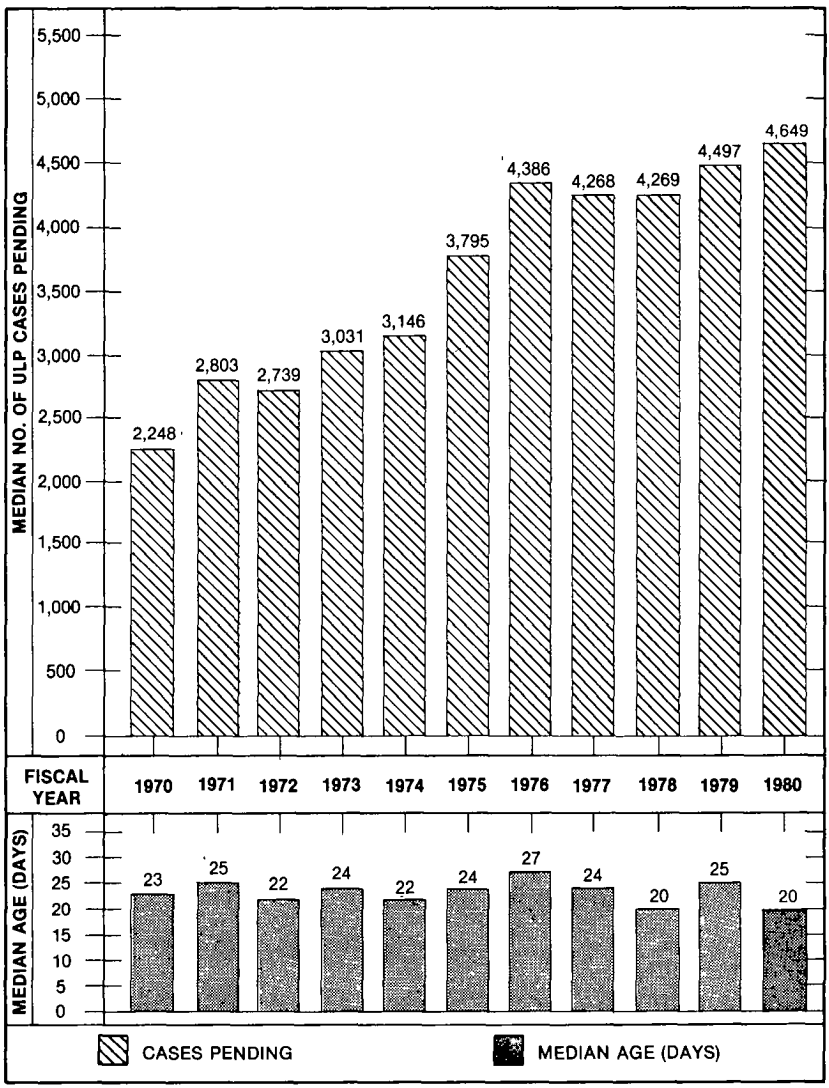
2/ Dismissals, withdrawals, and other dispositions

B. Operational Highlights

1. Unfair Labor Practices

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.

CHART NO. 4
NUMBER AND AGE OF UNFAIR LABOR PRACTICE CASES PENDING
UNDER PRELIMINARY INVESTIGATION, MONTH TO MONTH



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 1980, 44,063 unfair labor practice charges were filed with the NLRB, an increase of 7 percent over the 41,259 filed in fiscal 1979. 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 31,281 cases, an 8-percent increase from the 29,026 of 1979. Charges against unions increased 4 percent to 12,628 from 12,105 in 1979.

There were 154 charges of violation of section 8 (e) of the Act, which bans hot-cargo agreements; 147 against unions, 1 against employers, and 6 against unions and employers jointly. (Tables 1A and 2.)

The overwhelming majority of all charges against employers allege illegal discharge or other discrimination against employees. There were 18,315 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 9,866 charges, or about 32 percent of the total charges. (Table 2.)

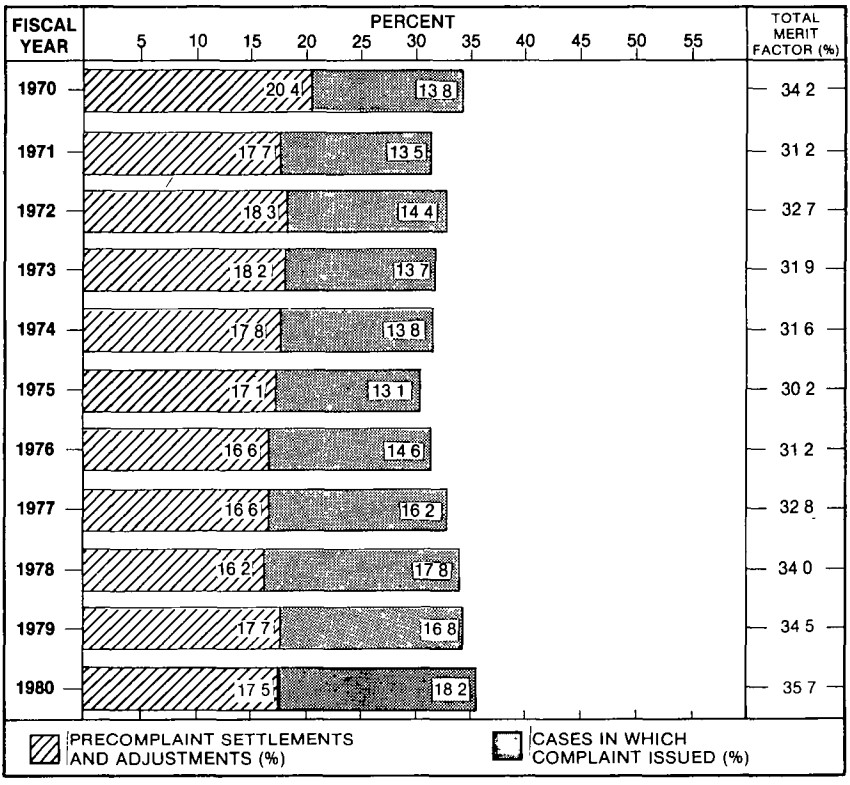
Of charges against unions, there were 8,206 alleging illegal restraint and coercion of employees, about 65 percent, down from the 69 percent in 1979. There were 2,987 charges against unions for illegal secondary boycotts and jurisdictional disputes, 26 percent more than the 2,368 of 1979.

There were 1,690 charges of illegal union discrimination against employees, up from 1,578 in 1979. There were 600 charges that unions picketed illegally for recognition or for organizational purposes, compared with 530 charges in 1979. (Table 2.)

In charges against employers, unions led by filing 58 percent. Unions filed 18,241 charges, individuals filed 12,976, and employers filed 64 charges against other employers.

As to charges against unions, 7,567 were filed by individuals, or 60 percent of the total of 12,628. Employers filed 4,847, and other unions

CHART NO. 5
UNFAIR LABOR PRACTICE MERIT FACTOR



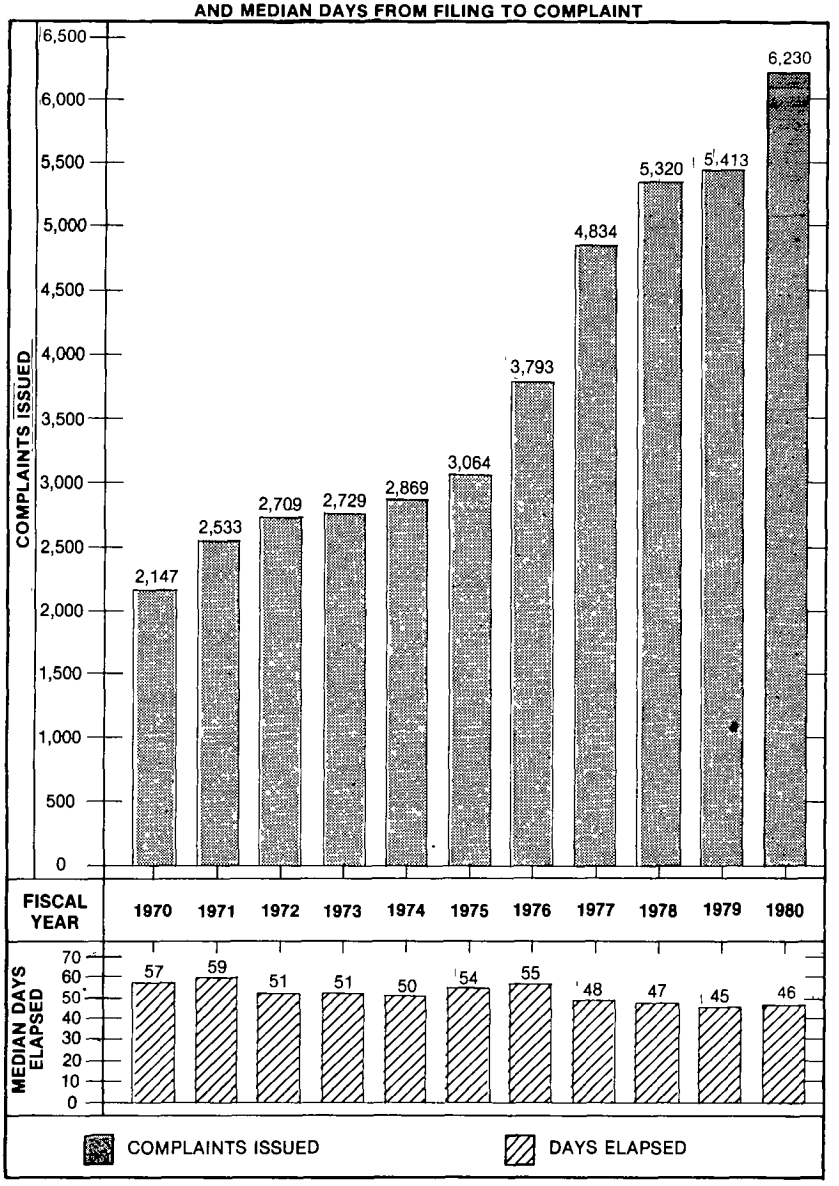
filed the 214 remaining charges.

In fiscal 1980, 42,047 unfair labor practice charges were closed. Some 94 percent were closed by NLRB regional offices, down from the 95 percent in 1979. During the fiscal year, 28 percent of the cases were settled or adjusted before issuance of administrative law judges' decisions, 31 percent by withdrawal before complaint and 35 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 36 percent of the unfair labor practice cases were found to have merit. The merit factor in charges against employers was 39 percent, against unions 28 percent.

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 1980, precomplaint settlements and adjustments were achieved in 7,614 cases, or 17.5 percent of the merit charges. In 1979

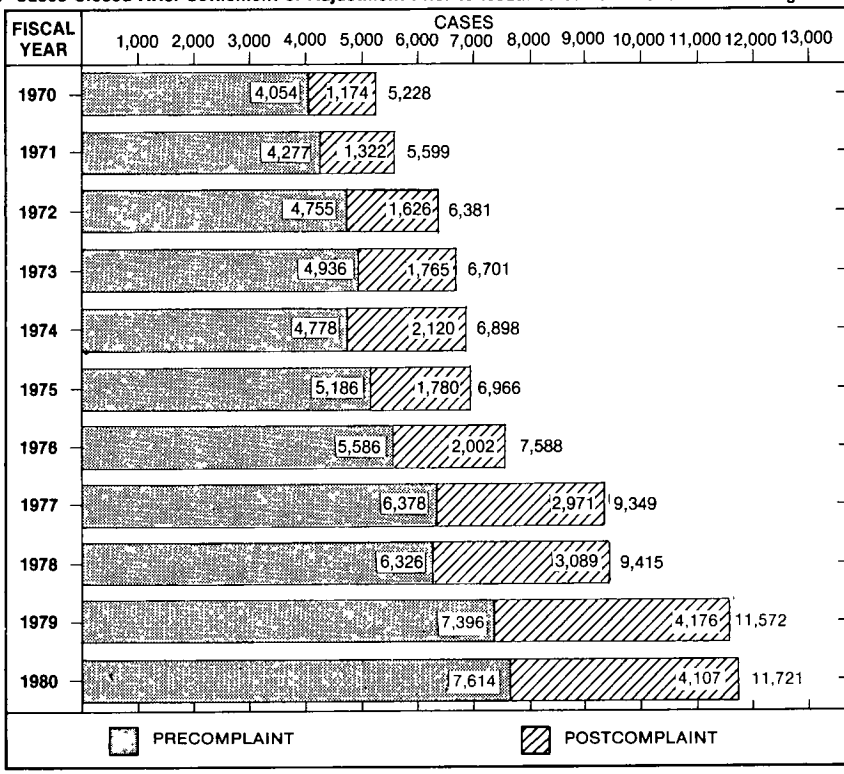
CHART NO. 6
COMPLAINTS ISSUED IN UNFAIR LABOR PRACTICE PROCEEDINGS
AND MEDIAN DAYS FROM FILING TO COMPLAINT



the percentage was 17.7.

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 1980, 6,230 complaints were issued, compared with 5,413 in the preceding fiscal year. (Chart 6.)

CHART NO 7
UNFAIR LABOR PRACTICE CASES SETTLED
ULP Cases Closed After Settlement or Adjustment Prior to Issuance of Administrative Law Judge Decision



Of complaints issued, 84 percent were against employers, 14 percent against unions, and 2 percent against both employers and unions.

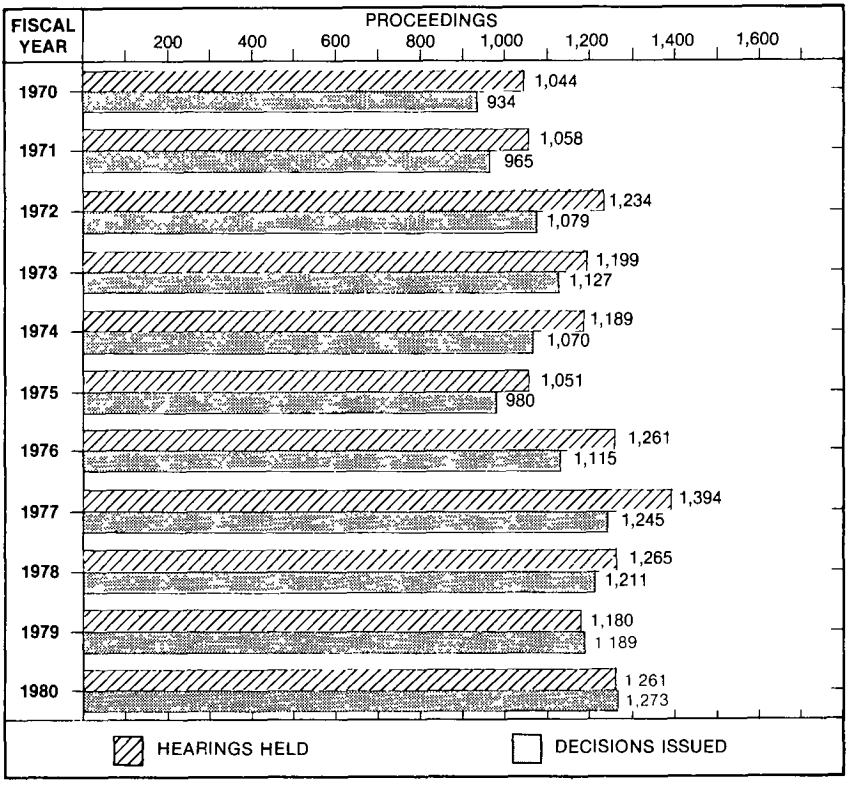
NLRB regional offices processed cases from filing of charges to issuance of complaints in a median of 46 days, compared with 45 days in 1979. The 46 days included 15 days in which parties had the opportunity to adjust charges and remedy violations without resort to formal NLRB processes. (Chart 6.)

Additional settlements occur before, during, and after hearings before administrative law judges. Even so, their hearing and decisional workload is heavy. The judges issued 1,273 decisions in 1,910 cases during 1980. They conducted 1,300 initial hearings, and 27 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 1980, the Board issued 1,181 decisions in unfair labor practice cases contested as to the law on the facts—1,098 initial decisions, 38 backpay decisions, 42 determinations in jurisdictional work dispute

CHART NO. 8
ADMINISTRATIVE LAW JUDGE HEARINGS AND DECISIONS
(Initial, Backpay and Other Supplementals)



cases, and 3 decisions on supplemental matters. Of the 1,098 initial decision cases, 985 involved charges filed against employers, 105 had union respondents, and 8 contained charges against both employers and unions. The Board held that employers violated the statute in 974 cases, while dismissing in their entirety the complaints in the other 11 proceedings. Of the 105 decisions involving charges against unions, the Board found violations in 104 cases, and dismissed the complaint in the other 1. Violations were found by the Board in 7 of the 8 cases against both employers and unions.

For the year, the NLRB awarded backpay to 15,566 workers, amounting to $32.1 million. (Chart 9.) Reimbursement for unlawfully exacted fees, dues, and fines added another $0.3 million. Backpay is lost wages caused by unlawful discharge and other discriminatory actions detrimental to employees, offset by earnings elsewhere after the discrimination. Some 10,033 employees were offered reinstatement, and 89 percent accepted.

Work stoppages ended in 198 of the cases closed in fiscal 1980. Collective bargaining was begun in 2,227 cases. (Table 4.)

At the end of fiscal 1980, there were 18,673 unfair labor practice cases being processed at all stages by the NLRB, compared with 16,657 cases pending at the beginning of the year.

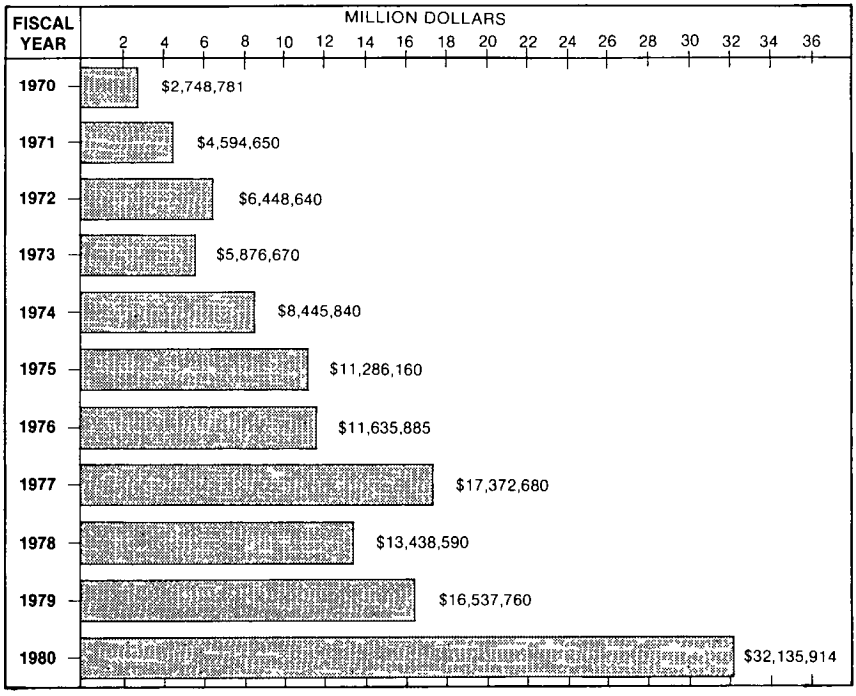
2. Representation Cases

The NLRB received 13,318 representation and related case petitions in fiscal 1980. This compared with 13,648 such petitions a year earlier.

The 1980 total consisted of 10,622 petitions that the NLRB conduct secret-ballot elections where workers select or reject unions to represent them in collective bargaining; 1,778 petitions to decertify existing bargaining agents; 301 deauthorization petitions for referendums on rescinding a union's authority to enter into union-shop contracts; and 545 petitions for unit clarification to determine whether certain classifications of employees should be included in or excluded from existing bargaining units. Additionally, 72 amendment of certification petitions were filed.

During the year, 13,540 representation and related cases were closed, compared with 14,250 in fiscal 1979. Cases closed included 10,827 collec-

CHART NO 9
AMOUNT OF BACKPAY RECEIVED BY DISCRIMINATEES



tive-bargaining election petitions; 1,791 decertification election petitions; 323 requests for deauthorization polls; and 599 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 18.8 percent of representation cases closed by elections, balloting was ordered by NLRB regional directors following hearings on points in issue. In 38 cases, elections were directed by the Board after appeals or transfers of cases from regional offices. (Table 10.) There were 38 cases which resulted in expedited elections pursuant to the Act's 8 (b) (7) (C) provisions pertaining to picketing.

3. Elections

The NLRB conducted 8,198 conclusive representation elections in cases closed in fiscal 1980, compared with the 8,043 such elections a year

CHART NO 10
TIME REQUIRED TO PROCESS REPRESENTATION CASES FROM FILING OF PETITION TO ISSUANCE OF DECISION

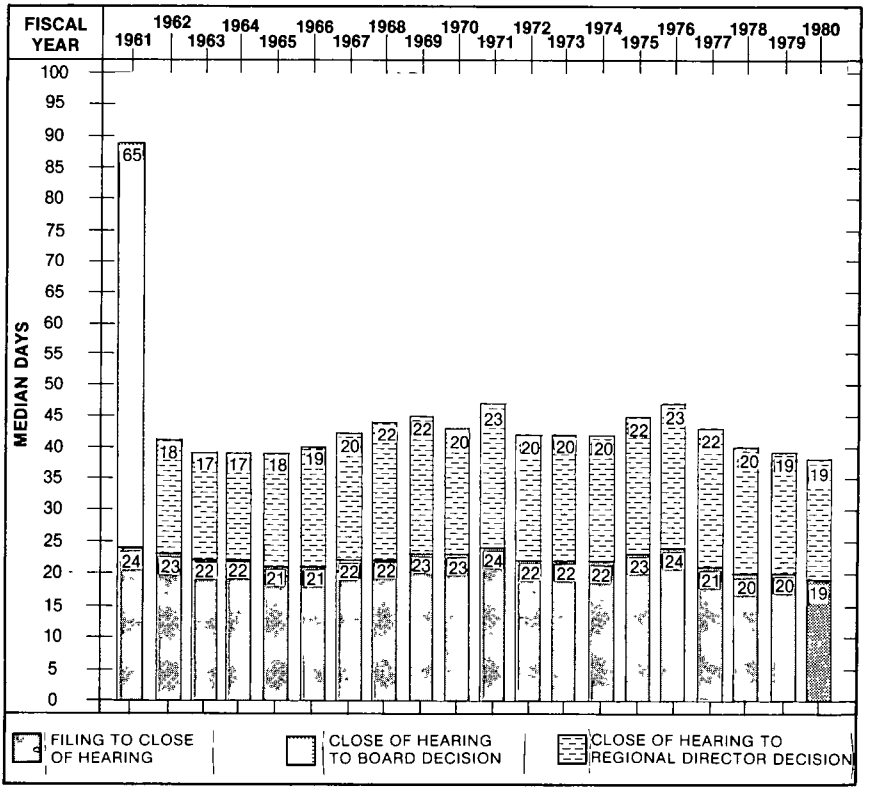
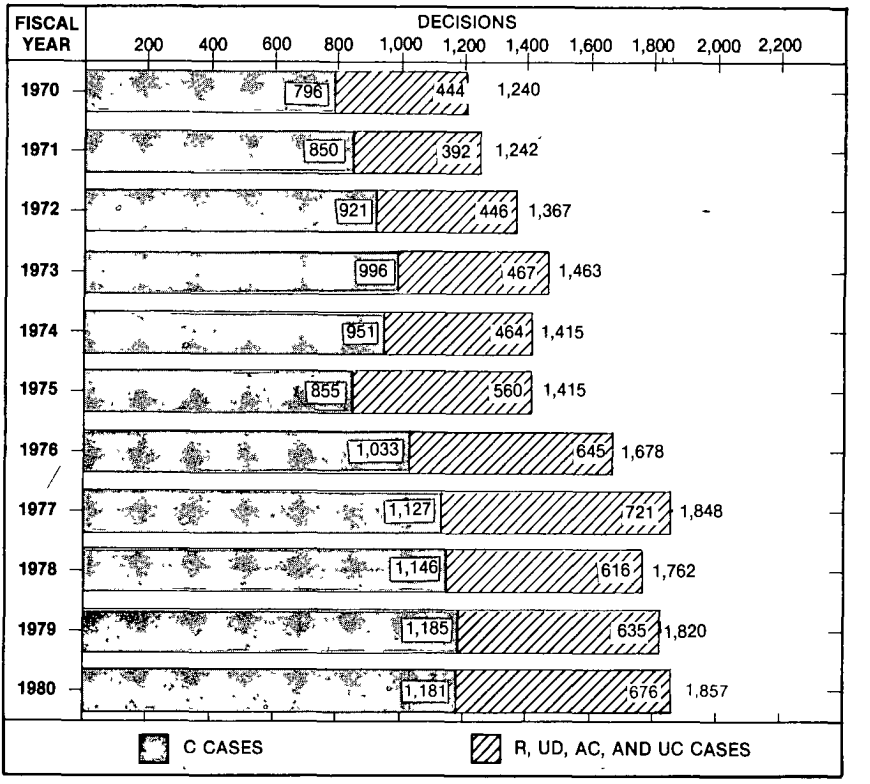


CHART NO. 11
CONTESTED BOARD DECISIONS ISSUED



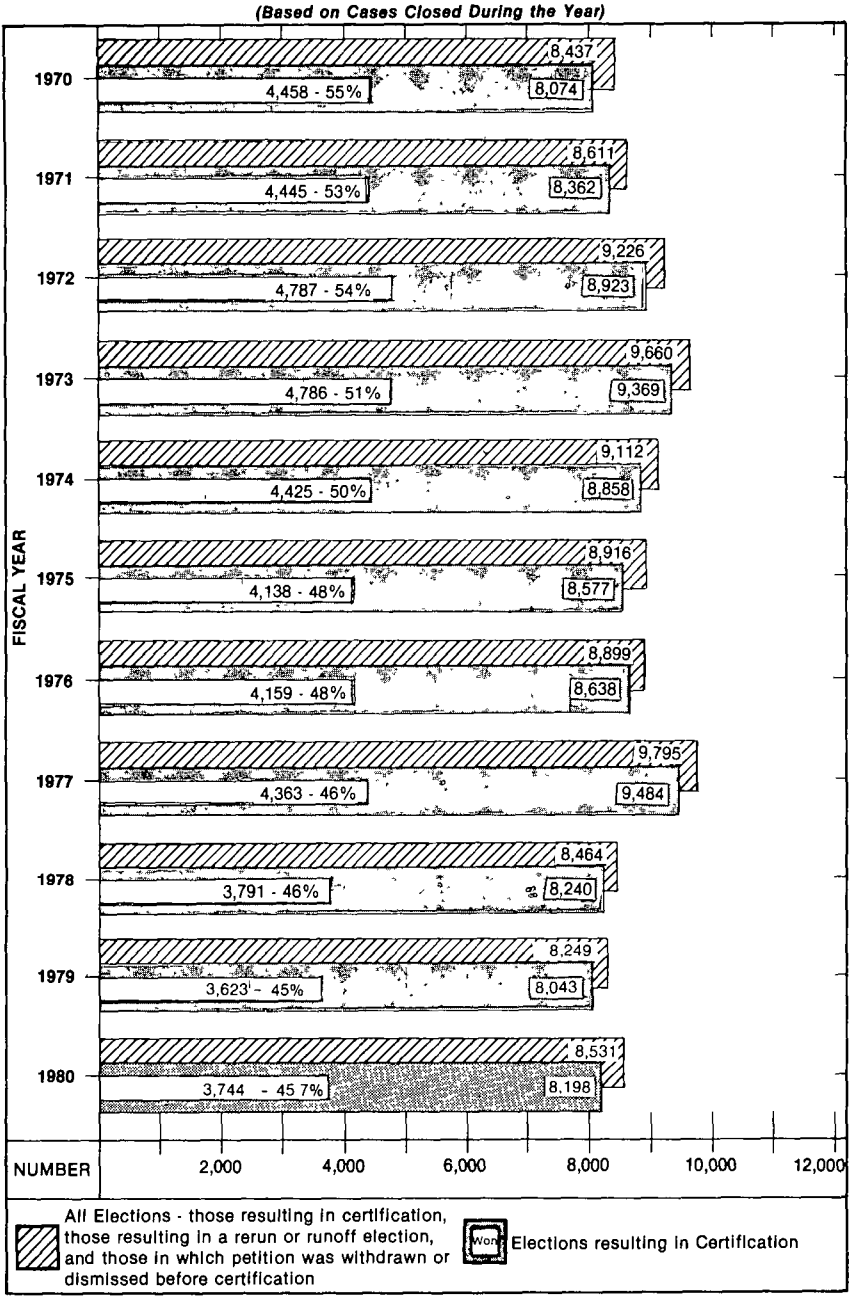
earlier. Of 521,602 employees eligible to vote, 458,114 cast ballots, virtually 9 of every 10 eligible.

Unions won 3,744 representation elections, or 45.7 percent. In winning majority designation, labor organizations earned bargaining rights or continued as employee representatives for 196,515 workers. The employee vote over the course of the year was 218,757 for union representation and 239,357 against.

The representation elections were in two categories—the 7,296 collective-bargaining elections in which workers chose or voted down labor organizations as their bargaining agents, plus the 902 decertification elections determining whether incumbent unions would continue to represent employees.

There were 7,745 select-or-reject-bargaining-rights (one union on ballot) elections, of which unions won 3,403, or 44 percent. In these elections, 173,762 workers voted to have unions as their agents, while 223,110 employees voted for no representation. In appropriate bargaining units of employees, the election results provided union agents for 146,971

CHART NO 12
REPRESENTATION ELECTIONS CONDUCTED
(Based on Cases Closed During the Year)



workers. In NLRB elections, the majority decides the representational status for the entire unit.

There were 435 multiunion elections, in which two or more labor organizations were on the ballot, as well as a choice for no representation. Employees voted to continue or to commence representation by one of the unions in 341 elections, or 75.3 percent.

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 246 elections, or 27 percent, covering 21,532 employees. Unions lost representation rights for 21,249 employees in 656 elections, or 73 percent. Unions won in bargaining units averaging 88 employees, and lost in units averaging 32 employees. (Table 13.)

Besides the conclusive elections, there were 333 inconclusive representation elections during fiscal 1980 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 83 referendums, or 55 percent, while they maintained the right in the other 69 polls which covered 11,012 employees. (Table 12.)

For all types of elections in 1980, the average number of employees voting, per establishment, was 56, compared with 63 in 1979. 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 3,081 decisions concerning allegations of unfair labor practices and questions relating to employee representation. This total compared with the 3,065 decisions rendered during fiscal 1979.

A breakdown of Board decisions follows:

Total Board decisions		3,081
Contested decisions		1,857
Unfair labor practice decisions	1,181	
Initial (includes those based on stipulated record)	1,098	

Supplemental	3	
Backpay	38	
Determinations in jurisdictional disputes	42	
Representation decisions		670
After transfer by regional directors for initial decision	53	
After review of regional director decisions	92	
On objections and/or challenges	525	
Other decisions		6
Clarification of bargaining unit	1	
Amendment to certification	1	
Union-deauthorization	4	
Noncontested decisions		1,224
Unfair labor practice	599	
Representation	617	
Other	8	

Thus, it is apparent that the great majority, 60 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 1980 approximately 11 percent of all meritorious charges and 78 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 2½ times more processing effort than do representation cases.

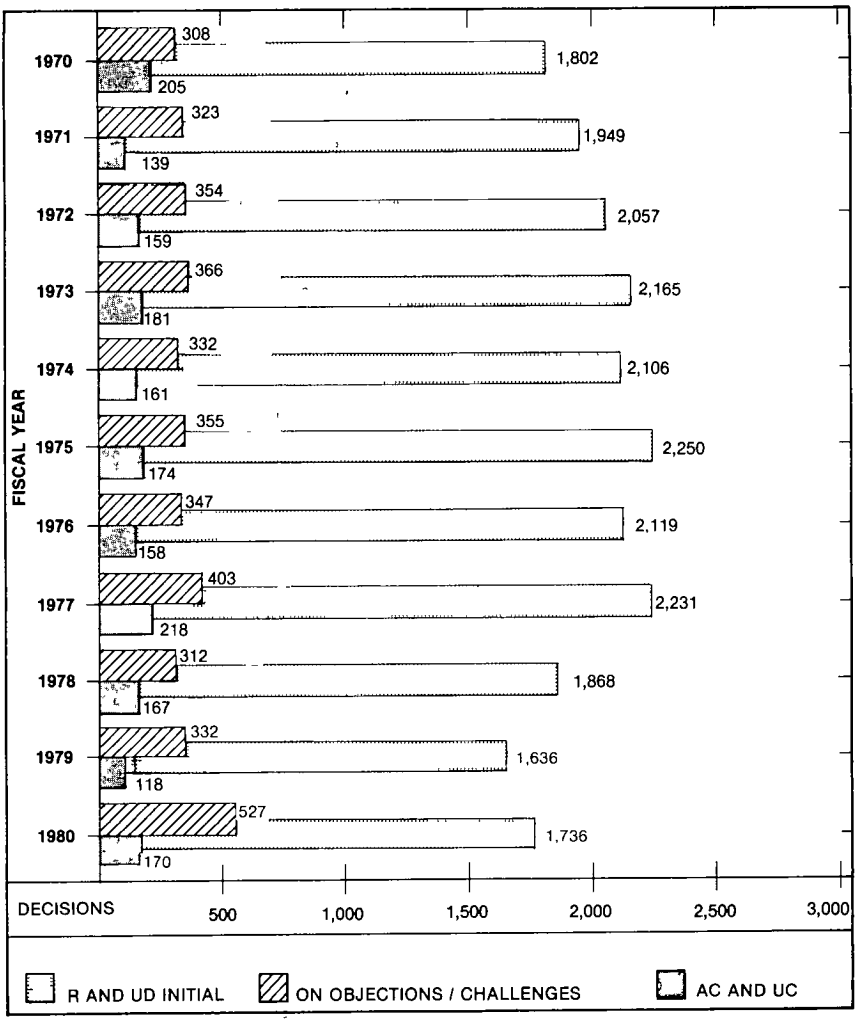
b. Regional Directors

Meeting the challenge of a heavy workload, NLRB regional directors issued 2,433 decisions in fiscal 1980, compared with 2,086 in 1979. (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 1,273 decisions and conducted 1,288 hearings. (Chart 8 and Table 3A.)

CHART NO. 13
REGIONAL DIRECTOR DECISIONS ISSUED IN REPRESENTATION AND RELATED CASES



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 1980, appeals court decisions in NLRB-related cases numbered 449. In these rulings, the NLRB was affirmed in whole or in part in 76 percent.

A breakdown of appeal court rulings in fiscal 1980:

Total NLRB cases ruled on	449
Affirmed in full	291

Affirmed with modification	48
Remanded to NLRB	28
Partially affirmed and partially remanded	3
Set aside	79

In the 29 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 10 cases, in 18 cases the respondents were held in contempt, and in 1 case the petition was denied. (Table 19.)

The U.S. Supreme Court affirmed the Board in one case, set aside the Board's order in one case, and remanded one case to the Board.

The NLRB sought injunctions pursuant to section 10 (j) and 10 (l) in 245 petitions filed with the U.S. district courts, compared with 244 in fiscal 1979. (Table 20.) Injunctions were granted in 104, or 89 percent of the 117 cases litigated to final order.

CHART NO. 14
CASES CLOSED

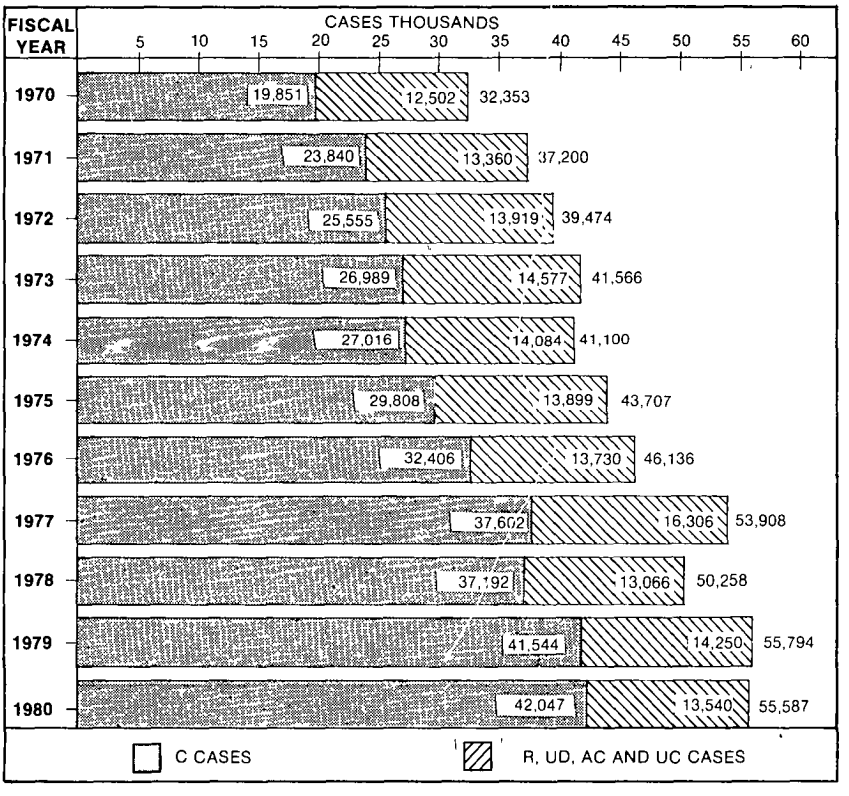
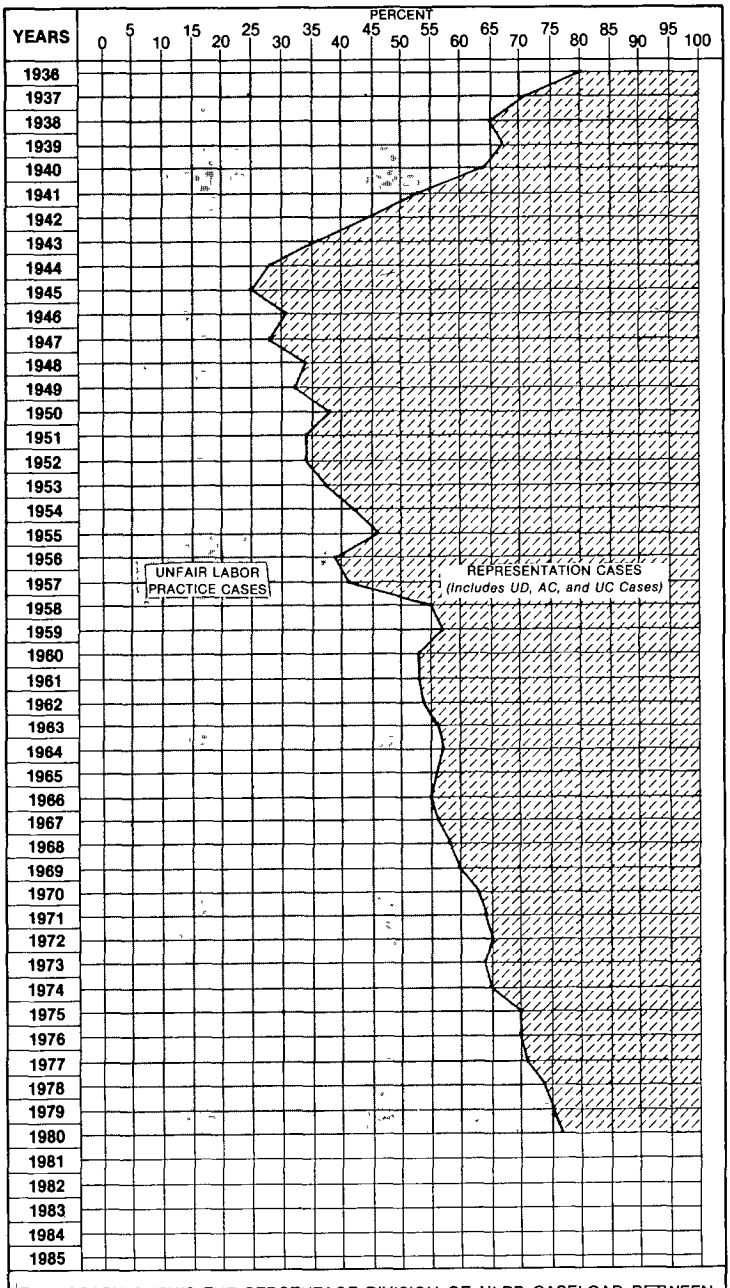


CHART NO 15
COMPARISON OF FILINGS OF UNFAIR LABOR PRACTICE CASES AND REPRESENTATION CASES



THIS GRAPH SHOWS THE PERCENTAGE DIVISION OF NLRB CASELOAD BETWEEN UNFAIR LABOR PRACTICE CASES AND REPRESENTATION CASES DURING THE FISCAL YEARS 1936 - 1980

NLRB injunction activity in district courts in 1980:

Granted	104
Denied	13
Withdrawn	12
Dismissed	11
Settled or placed on courts' inactive lists	111
Awaiting action at end of fiscal year	34

There were 94 additional cases involving miscellaneous litigation decided by appellate and district courts. The NLRB's position was upheld in 87 cases. (Table 21.)

C. Decisional Highlights

In the course of the Board's administration of the Act during fiscal 1980, 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. Test for Causation of Discrimination

The Board in *Wright Line* [1] reconsidered its traditional test of causation for cases involving alleged violations of section 8 (a) (3) of the Act. It adopted a test analogous to that used by the Supreme Court in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1979), which, in the Board's view, would achieve an equitable accommodation of the "legitimate competing interests inherent in dual motivation cases"; namely, the statutory right of employees, on the one hand, "to be free from adverse effects brought about by their participation in protected activities," and, on the other, "the employer's recognized right to enforce rules of its own choosing." The Board announced that it would

> . . . henceforth employ the following causation test in all cases alleging violation of Section 8 (a) (3) or violations of Section 8 (a) (1) turning on

[1] *Wright Line, a Division of Wright Line, Inc* , 251 NLRB No 150, *infra*, p 121

employer motivation. First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivation factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

The Board expressed its expectation that adoption of that test, and abandonment of "in part" and "dominant motive" terminology in such situations, would provide clarification of the Board's decisional processes for those issues.

2. Deference to Arbitration

Concluding that it could "no longer adhere to a doctrine which forces employees in arbitration proceedings to seek simultaneous vindication of private contractual rights and public statutory rights, or risk waiving the latter," the Board held in *Suburban Motor Freight* [2] that it would no longer honor the results of an arbitration proceeding under *Spielberg* [3] unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator. In so holding, the Board expressly overruled *Electronic Reproduction Service Corp.*,[4] upon the basis of its experience under the rule of that decision, which permitted deferral even though the unfair labor practice issue was neither presented nor considered. It concluded that, although that decision encouraged collective-bargaining relationships, it was an impermissible delegation of the Board's exclusive jurisdiction to decide unfair labor practice issues, and in derogation of the statutory rights of the employees affected.

3. Employee Representation at Imposition of Discipline

The circumstances under which employees have a right under *Weingarten* [5] to union representation at meetings with management was clarified by the Board in *Baton Rouge Water Works Company*,[6] where it held that "an employee has no Section 7 right to the presence of his union representative at a meeting with his employer held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision." Although thereby overruling *its* decision in *Certified*

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[2] *Suburban Motor Freight, Inc*, 247 NLRB No 2, *infra*, p 34
[3] *Spielberg Mfg Co*, 112 NLRB 1080 (1955)
[4] 213 NLRB 758 (1974)
[5] *N L R B v Weingarten, Inc*, 420 U S 251 (1975)
[6] 246 NLRB No 161, *infra*, p 88

Grocers [7] to that extent, the Board emphasized the limited scope of its decision by noting that if in such a situation "the employer engages in any conduct beyond merely informing the employee of a previously made disciplinary decision, the full panoply of protection accorded the employee under *Weingarten* may be applicable."

D. Financial Statement

The obligations and expenditures of the National Labor Relations Board for the fiscal year ended September 30, 1980, are as follows:

Personnel compensation	$ 74,719,380
Personnel benefits	7,545,578
Travel and transportation of persons	4,776,919
Transportation of things	202,803
Rent, communications, and utilities	12,864,028
Printing and reproduction	851,869
Other services	5,127,264
Supplies and materials	1,238,351
Equipment	817,101
Insurance claims and indemnities	49,658
Total obligations and expenditures	[8] $108,192,951

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

[8] Includes reimbursable obligations as follows

Personnel compensation	$835

II

Jurisdiction of the Board

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

A. Church-Operated Health Care Institutions

Several cases were decided during this report year wherein the Board asserted jurisdiction over church-operated health care facilities. In *Mid American Health Services*,[6] jurisdiction was asserted over an employer which owned and operated six extended care nursing homes and was solely owned by a regional arm of the Seventh Day Adventist Church.

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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

[6] 247 NLRB No 109 (Chairman Fanning and Members Jenkins, Penello, and Truesdale)

The employer had argued that the Board's assertion of jurisdiction would substantially impair its practice of religion and infringe upon its constitutional rights in contravention of both the establishment and free exercise clauses of the first amendment of the Constitution, as interpreted by the Supreme Court.

The Board first reviewed the Supreme Court decision in *Catholic Bishop of Chicago*,[7] which held that, because the Board's assertion of jurisdiction over church-operated schools raised serious constitutional questions, it was necessary to determine whether the legislative history of the Act manifested a clearly expressed affirmative intention, on the part of the Congress, that the Board assert jurisdiction in such cases. Finding that no such clear expression of legislative intention existed, the Court declined to construe the Act in a manner which would, in turn, necessitate resolution of the serious constitutional questions which an assertion of jurisdiction would otherwise raise.

Applying the Court's approach to the instant case, the Board initially examined the legislative history of the 1974 health care amendments to the Act and concluded that Congress had clearly expressed affirmative intention that the Board assert jurisdiction over health care institutions operated by religious institutions in general and the Seventh Day Adventist Church in particular. In reaching this conclusion, the Board noted that the amendments had removed the preexisting jurisdictional exemption accorded nonprofit hospitals by Section 2 (2) of the Act, and that, throughout the amendment process, the Adventist Church had opposed repeal of the exemption, on grounds which included those constitutional claims advanced herein. The Board also referred to the Senate's rejection of an amendment which would have maintained a jurisdictional exemption for hospitals owned, supported, controlled, or managed by a particular religion or by a particular religious corporation or association.

The Board then considered the employer's contention that an assertion of jurisdiction is nonetheless precluded by the first amendment. While noting that it has ruled on constitutional issues in the context of evaluating the construction and application of the Act, the Board found that there is some question whether it has the authority to rule on the constitutionality of the Act itself. It, therefore, declined to determine the limits of its authority in this area. Instead, it decided to follow the clear legislative mandate that the Board assert jurisdiction over the employer, while pointing out that any final determination concerning the constitutionality of that mandate must come from the Courts, who have unquestioned authority to review legislative enactments in light of constitutional safeguards.

Thereafter, in *Bon Secours Hospital*,[8] the Board panel affirmed a

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[7] *N L R B v Catholic Bishop of Chicago*, 440 U S 490 (1979)

[8] 248 NLRB 115 (Chairman Fanning and Members Penello and Truesdale)

regional director's decision to assert jurisdiction over a church-operated hospital. There, the employer contended that the Board should not assert jurisdiction because there was little factual distinction between the situation in *Catholic Bishop*, involving a Catholic owned and operated secondary school, and that of its Catholic owned and operated hospital. Rejecting the employer's argument, the panel pointed out that, in *Catholic Bishop*, the Supreme Court had acknowledged that the 1974 health care amendments to the Act indicated a clear intent to provide employees of religiously operated hospitals with the Act's protections, and that the legislative history of the amendments, especially the refusal of Congress specifically to exclude religiously affiliated hospitals, distinguished the situation before it from that in *Catholic Bishop*. Finding the same clear Congressional mandate upon which the Board relied to assert jurisdiction over the church-operated nursing homes in *Mid American*, the panel asserted jurisdiction over the employer's hospital.

B. Other Issues

In *Soy City Bus Services, Div. of R. W. Harmon & Sons*,[9] the Board majority asserted jurisdiction over the employer which provided daily schoolbus transportation and related charter services to a public school district as well as general public charter services. In so doing, the majority rejected the employer's argument that, since it received approximately 96 percent of its annual gross revenue for performing schoolbus functions, its operations were essentially local in character and therefore the Board should decline to assert jurisdiction over its operations under the principles set forth in *Lexington Taxi Corp.*,[10] also involving a schoolbus company which derived virtually all of its revenues from the local public school for the transportation of school children.

The majority analyzed the more recent Board decision in *Natl. Transportation Service*,[11] in which the Board, in dealing with whether jurisdiction should be asserted over an employer with close ties to an exempt entity, abandoned the intimate-connection test and established, as the sole appropriate jurisdiction consideration (apart from dollar amount), the degree-of-control test; i.e., whether the employer had sufficient control over bargaining conditions to enable it to bargain effectively. They noted that the Board specifically had indicated there that such test was "by itself" the appropriate standard and that there was considerable precedent for "relying exclusively" on this standard. Thus, even though *Natl. Transportation* did not expressly disavow local-in-character as a

[9] 249 NLRB 1169 (Chairman Fanning and Members Jenkins and Truesdale, Member Penello dissenting)

[10] *Lexington Taxi Corporation—Transportation Management Corp*, 224 NLRB 503 (1976) (then Chairman Murphy and Members Jenkins, Penello, and Walther)

[11] 240 NLRB 565 (1979) (Chairman Fanning and Members Jenkins and Truesdale, Members Penello and Murphy dissenting)

jurisdictional test, the majority found that the Board, in effect, had overruled *Lexington Taxi* and other like cases which applied the local-in-character principle, and concluded that the local-in-character test was no longer a viable standard for jurisdictional purposes. In reaching this conclusion, they noted that educational institutions themselves were no longer considered to have merely a localized impact, and thus the Board regularly asserted jurisdiction over such institutions unless they were a part of a state public school system or otherwise exempt. Consequently, since the Board had rejected the local-in-character principle as applied to educational institutions and did in fact assert jurisdiction over private elementary and high school systems, they found that there did not exist any rational basis for applying local-in-character tests to schoolbus companies.

Dissenting Member Penello, consistent with his dissenting position in *Natl. Transportation Service*, would not have asserted jurisdiction over the employer's schoolbus operation on the ground that it was "so interrelated with the statutorily mandated functions of the government entity as to share its exemptions." He also would not have taken jurisdiction over the employer's charter operation, because the $35,000 per year which it derived therefrom was insufficient to satisfy the Board's jurisdictional standard applicable to transit systems.

In a case of first impression, the Board panel, in *Margate Bridge Co.*,[12] was faced with determining whether to assert jurisdiction over the employer, who operated a privately owned toll bridge which connects the mainland of New Jersey with an island and which produces gross revenues of approximately $1 million per year. The panel determined that the Employer's operation arguably was classified as either a retail enterprise, transit system, public utility, or an essential link in interstate commerce and that, because the employer met the Board's standard for assertion of jurisdiction regardless of which of these tests was used, it was unnecessary to decide which test was controlling.

Finding that the employer's operation was retail in character because the patrons who purchased the right to pass over the bridge did so to satisfy their own personal wants, the Board also noted that the employer's gross annual revenue satisfied the Board's $500,000 monetary jurisdictional test for retail enterprises.[13] Further, the panel concluded that the employer also might properly be considered as meeting the $250,000 gross annual volume of business standard applicable to both transit systems and public utilities, pointing out that the bridge functioned as a state-granted monopoly that regularly supplied the public with a vital service which affected the entire community by enabling persons and freight to move across the water lying between the mainland and the

[12] 247 NLRB No 205 (Chairman Fanning and Members Jenkins and Truesdale)

[13] Member Jenkins did not rely on the discussion of the "retail" standard

Island. It also found that jurisdiction should be asserted because an essential link in interstate commerce was provided by the employer's bridge which served as a key access route for the many out-of-state residents and area residents. Drawing the inference that at least $50,000 of the bridge's gross revenues was earned from tolls charged customers involved in interstate travel, the panel concluded that the employer also met the Board's discretionary standard for the assertion of jurisdiction over essential links in commerce which derived at least $50,000 in annual gross revenues from their interstate operations. Accordingly, jurisdiction over the employer was asserted.

In *Major League Rodeo, and its Constituent Members*,[14] the Board panel considered the question of asserting jurisdiction over the employer, a nonprofit association of professional rodeo teams. Since the parties stipulated that, during the previous fiscal year, each constituent member of the employer made out-of-state purchases of goods and services in excess of $50,000, the panel determined that the Board had statutory jurisdiction over the employer. Additionally, it concluded that assertion of the Board's discretionary jurisdiction over professional team rodeo was also warranted. It pointed out that team rodeo was an interstate enterprise in that games were held in six States so that any labor disputes which might arise would radiate their impact far beyond individual state boundaries, and that, although the employer's gross revenues were $281,000, each constituent member of the league, respectively, made out-of-state purchases in excess of $50,000 annually. Accordingly, in view of the interstate nature of the industry and its impact on commerce, the panel found that it would effectuate the policies of the Act to assert jurisdiction over the employer, which had refused, upon reasonable request of Board agents, to provide information relevant to its jurisdictional determination.

[14] 246 NLRB No 113 (Chairman Fanning and Members Penello and Truesdale)

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 had been had with respect to a dispute over contract terms which was also, arguably, a violation of section 8(a) (5) of the Act. In *GAT*,[7] the Board modified *Collyer* 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.

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

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

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

[4] E g , *Jos Schlitz Brewing Co* , 175 NLRB 141 (1969) The case was dismissed, without retaining jurisdiction pending the outcome of arbitration, by a panel of three members, Members Brown and Zagoria did so because they would defer to arbitration, Member Jenkins would not defer but dismissed on the merits, 34 NLRB Ann Rep 35–36 (1969), *Flintkote Co* , 149 NLRB 1561 (1964), 30 NLRB Ann Rep 38 (1965), *Montgomery Ward & Co* , 137 NLRB 418, 423 (1962), *Consolidated Aircraft Corp* , 47 NLRB 694, 705–707 (1943)

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

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

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

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

A. Deferral to Arbitration Proceeding

In *Suburban Motor Freight*,[9] a Board majority agreed with the administration law judge's refusal to defer to two arbitral decisions and overruled *Electronic Reproduction Service Corp.*[10] which the majority notes had been severely criticized as an unwarranted extension of the *Spielberg* doctrine and an impermissible delegation of the Board's exclusive statutory jurisdiction to decide unfair labor practice issues. In *Electronic Reproduction* a Board majority held that it would, in the absence of "unusual circumstances," defer under *Spielberg* to arbitration awards dealing with discharge or discipline cases even where no indication existed as to whether the arbitrator had considered, or had been presented with, the unfair labor practice issue involved.[11] The majority stated that it can no longer adhere to a doctrine which forces employees in arbitration proceedings to seek simultaneous vindication of private contractual rights and public statutory rights, or risk waiving the latter.[12] Thus, the majority returned to the standard for deferral which existed prior to *Electronic Reproduction*, and specified that they will no longer honor the results of an arbitration proceeding under *Spielberg* unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator. Further, in accord with the rule formerly stated in *Airco Industrial Gases*,[13] the majority will give no deference to an arbitration award which bears no indication that the arbitrator ruled on the statutory issue of discrimination in determining the propriety of an employer's disciplinary actions and in like accord with the corollary rule stated in *Yourga Trucking*,[14] will impose on the party seeking Board deferral to an arbitration award the burden to prove that the issue of discrimination was litigated before the arbitrator.[15]

In his dissent, Member Penello stated that he would adhere to the rule in *Electronic Reproduction* and end the matter by deferring to the results of the arbitration since the original *Spielberg* criteria for deferral have been met. He explained that the procedural rule in *Electronic Reproduction* derived its *raison d'etre* from the principles underlying both *Spielberg* and *Collyer* and that those principles, expressed in the Act and endorsed by the Courts, commit the Board to the purpose of furthering collective bargaining by encouraging parties to resort to contractual

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[9] 247 NLRB No 2 (Chairman Fanning and Member Jenkins and Truesdale, Member Penello dissenting)

[10] 213 NLRB 758 (1974)

[11] It was undisputed that the facts relevant to the deferral issue were undistinguishable from those presented in *Electronic Reproduction* The Administrative Law Judge nonetheless found that the deferral would be inappropriate because recent Board decisions had signaled abandonment of the rule in *Electronic Reproduction*

[12] Member Jenkins would in any event not defer to the decision of an arbitral panel lacking "neutral members"

[13] 195 NLRB 676 (1972)

[14] 197 NLRB 928 (1972)

[15] After refusing to defer to the arbitral process here, the majority affirmed the administrative law judge's recommendation that the complaint be dismissed on the merits

means to resolve industrial disputes peacefully. Member Penello continued by noting that experience prior to the decision in *Electronic Reproduction*, under the Board's practice of not deferring unless the unfair labor practice issue had been presented and considered by the arbitrator, invited parties to withhold evidence of discrimination during arbitration about disciplinary action in order to gain a second opportunity to challenge the same action during an unfair labor practice proceeding. Thus, by returning to the *Airco/Yourga* standard, the majority essayed a decision which flies in the face of Board experience, reintroduces the spectre of unwarranted multiple litigation, and contravenes the statutory purpose of encouraging collective bargaining.

In several cases during the report year, the Board applied the *Suburban Motor Freight* standard of not deferring to the results of an arbitration proceeding under *Spielberg* unless the unfair labor practice issue was "both presented to and considered by the arbitrator."

In *United Parcel Service*,[16] a panel majority found deferral to an arbitration award inappropriate because the union business agent who represented the grievant failed to present evidence on and to advocate the grievant's claim that he was discharged for protected concerted activity of union dissidence. The majority concluded that even though in the grievance the employee contended that he was discharged for his "union activities and involvement in a class action suit," mere presentation of the contention, without more, cannot support deferral.[17]

Noting that, contrary to their dissenting colleague, this case illustrates the wisdom of the policy set forth in *Suburban*, they pointed out that while, in any event, they would not defer to an arbitration award where the litigants chose to reserve the unfair labor practice issue for a different forum, they would be particularly hesitant to do so in a case of this nature where the "choice" of evidence to be presented was made by a union whose interests were not entirely congruent with those of the grievant due to the grievant's dissident union activities.

Member Penello, dissenting, would defer to the arbitration award because it complied with the *Spielberg* standards. Additionally, as set forth in his dissent in *Suburban*, he would adhere to the rule in *Electronic Reproduction*, and, accordingly, would find that no unusual circumstances justify the grievant's failure to introduce evidence of discriminatory discipline during the arbitration proceeding. In this regard Member Penello noted that the grievant and his union representative deliberately chose not to present evidence of alleged discrimination at the arbitration hearing even though at each step of the grievance and

[16] 252 NLRB No 145 (Chairman Fanning and Member Jenkins, Member Penello dissenting)

[17] Member Jenkins also found that the lack of a neutral member on the arbitration panel constitutes an independent reason sufficient to render deferral inappropriate

arbitration proceeding the grievant was given a full opportunity, independent of his representative, to present any evidence supporting his position.

In *Hammerhill Paper Co.*,[18] a panel majority refused to defer to an arbitration award because the arbitrator rejected, not interpreted or misinterpreted, but rejected, material evidence concerning the employer's admitted and unrebutted union-affiliated reason for the grievant's discharge which was admitted in the arbitration proceeding, unchallenged, and formed a primary basis for the grievant's discharge and the alleged unfair labor practices. Additionally, they noted that the arbitrator's remedial award of reinstatement without backpay was incompatible with the Board's established policy and practice of restoring the *status quo ante* wherever possible.[19]

Contrary to the panel majority, Member Penello would defer to the arbitration award because it meets the *Spielberg* standards. In his dissent, he pointed out that the arbitrator had refused to give the steward, as well as the other grievants, backpay because of his misconduct as an employee. He stated his belief that it furthers the purpose of the Act to let the grievance-arbitration forum settle disputes arising during the term of a collectively bargained-for agreement, and that he would generally take a hands-off approach. To Member Penello, this is what the term "deferral" means and what *Spielberg* holds. He criticizes the majority for stretching the term "deferral" to mean something considerably different, asserting that the majority do not "defer" to the process of arbitration but instead either "adopt" or "reject" a particular award.

Member Penello also stated that the majority stretched the meaning of the term "clearly repugnant" to some standard much looser than the narrow scope of review established by that term. He pointed out that the majority incorrectly found that the failure to compensate the discharged employee was contrary to Board law since the Act does not require backpay.

In response, the majority stated that deferral to the arbitration result here would mean the abandonment of the *Spielberg* tests their dissenting colleague extolls, because, in their view, Member Penello's "could have been decided in arbitration" standard for deferral would ultimately lead to deferring in every case where an arbitration clause exists.

In *Bay Shipbldg. Corp.*,[20] a panel majority granted the employer's Motion for Summary Judgment, finding that factual determinations made in the previous arbitration proceeding resolved the pivotal unfair labor

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[18] 252 NLRB No 172 (Chairman Fanning and Member Jenkins, Member Penello dissenting)

[19] On the merits the panel majority agreed with the administrative law judge's finding that the employee's discharge was directly related to his union affiliation and was discriminatory and disparate They gave the usual remedial order of reinstatement and backpay

[20] 251 NLRB No 114 (Members Penello and Truesdale, Member Truesdale concurring, Member Jenkins dissenting)

practice issue of whether the employer's unilateral change of insurance carriers constituted a modification of the contract or was an action permitted by the contract.[21] Although the arbitrator specifically stated that he was not deciding whether the employer violated section 8(a) (5) of the Act, they concluded that he made factual findings in the course of resolving the contractual issue which resolved the unfair labor practice issues. The arbitrator found that the contract permitted the employer to change carriers, a determination he clearly had authority to make. As the action was permitted by the contract, the majority reasoned it was neither a modification of the contract nor a unilateral action in violation of the Act. Thus, the majority agreed with the employer that, although the arbitrator did not address the statutory issue, the Board should defer to the arbitration award because the matter was essentially one of contract interpretation and the award resolved the underlying unfair labor practice issue. Further, the majority found that the arbitration award fully met the *Spielberg* standards for deferral.

In addition to joining Member Penello in the majority decision, Member Truesdale separately concurred and found this case was governed by *Atlantic Steel Co.*[22] Member Truesdale pointed out, citing *Atlantic Steel*, that the Board generally has not required an arbitrator to pass on the unfair labor practice issue directly, but only to consider all evidence relevant to the unfair labor practice in reaching a decision and that the arbitrator's findings were "both complete and comprehensive and factually parallel to the unfair labor practice question." Finding that there was a parallelism between the contractual issues and statutory issues, Member Truesdale concluded that the instant case did not present a *Suburban Motor Freight* issue because the arbitrator was presented with evidence relevant to the statutory claim which was explicitly resolved when he decided the contractual issue.

In his dissent Member Jenkins stated that deferral to the arbitrator's award here was inappropriate because the arbitrator did not address the unfair labor practice issue and because his award was contrary to Board precedent. He argued that the majority's decision was directly at odds with the standard announced in *Suburban, supra*, that the issue "was both presented to and considered by the arbitrator," because, here, the arbitrator stated that the statutory issue was not properly before him, and, hence, did not consider it. Addressing Member Truesdale's concurrence, Member Jenkins stated that nowhere in *Suburban* did the majority indicate that the standard that the issue "was both presented to and considered by the arbitrator" would be relaxed where such issues "are parallel."

Member Jenkins also pointed out that the arbitrator's decision did not

[21] The change did not result in any diminution of insurance benefits, but did result in lower premiums to employees

[22] 245 NLRB No 107 (1979)

comport with Board decisions to the extent it turned on his apparent finding of an implied waiver of the Union's right to bargain over the identity of the insurance carrier, a mandatory subject of bargaining, and that the Board looks to see whether the waiver was explicit and will not imply such a waiver. Further, as regards the second issue of whether there was a unilateral change of benefits, he still would not defer to the arbitration because he found that the arbitrator did not consider all relevant evidence in determining whether an unlawful unilateral change in benefits had occurred.

Responding to their dissenting colleague, Members Penello and Truesdale concluded that the award was not contrary to Board cases holding that it is unlawful to unilaterally modify insurance benefits since the arbitrator found the change here to be permitted contractually and, thus, the modification of insurance benefits was not unilateral. Further, they stated that this was not a waiver case because the facts showed that the parties bargained over insurance benefits and the matter was covered by the contract, citing the statement from *Elizabethtown Water Co.*, 234 NLRB 318, 320 (1978), upon which, they assert, the dissent erroneously relied that "An employer must bargain . . . in regard to a mandatory subject of bargaining *not specifically covered in the contract* or unequivocally waived by the union." (Emphasis supplied.)

Contrary to an administrative law judge's dismissal on the merits, a panel majority deferred to an arbitration committee's decision in *Chemical Leaman Tank Lines*.[23] The committee had upheld the grievant's discharge for refusing to work, rejecting his claim on the facts presented that, under the collective-bargaining agreement, his refusal to work was proper because of unsafe equipment. Deferring for reasons set forth in their separate opinions in *Atlantic Steel*:[24] Member Penello relied on his strict adherence to *Spielberg* deferral standards, while Member Truesdale relied on the facts that the arbitration award here contained completed factual findings on the safety issue, and that there was the necessary parallelism between the contractual and statutory issues. In addition, in response to the dissent's reliance on *Suburban*, Member Penello noted that he dissented in that case, while Member Truesdale found deferral here to be consistent with *Suburban* because, by virtue of the factual findings and the virtually identical nature of the contractual and legal issues, the award did indicate the arbitrator's resolution of the unfair labor practice issue. However, Member Truesdale also pointed out that, under *Suburban*, the Board will not defer where the evidence relevant to the unfair labor practice had been withheld from the arbitration proceeding, which was not the situation presented here.

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[23] 251 NLRB No 146 (Members Penello and Truesdale, Member Jenkins dissenting)

[24] See 44 NLRB Ann Rep 43-44 (1979) for a discussion of *Atlantic Steel Co* , 245 NLRB No 107 (1979)

In his dissent, Member Jenkins disagreed with the majority's deferral, stating, in agreement with the administrative law judge, that the unfair labor practice issue was not presented to or considered by the committee. The issue before the committee was whether the grievant's contention that his equipment did not meet the objective safety standard specified in the contract, while the unfair labor practice issue was whether the employee was engaged in protected concerted activity by protesting unsafe working conditions. Noting that in *Raytheon Co.*,[25] the Board added to the *Spielberg* deferral standards a fourth requirement that "the arbitrator consider and rule upon the unfair labor practice issue," Member Jenkins found that deferral was inappropriate and that the majority decision effectively overruled the more recent decision in *Suburban*. Additionally, he found deferral inappropriate under the *Atlantic Steel* standard that the arbitrator's findings be "complete and comprehensive and factually parallel to the unfair labor practice question" because the joint committee here made no findings, as the committee's decision merely reviewed the parties' contentions and, without resolving the inherent conflicts, upheld the grievant's discharge. Finally, Member Jenkins also would not defer because the committee lacked neutral members.

In two cases during the report year, the Board explored the confines of Spielberg's third requirement for deferral and decided whether an arbitration award was clearly repugnant to the purposes and policies of the Act.

In *Babcock & Wilcox Co.*,[26] a panel majority agreed with the administrative law judge's conclusion that an arbitration award was clearly repugnant to the purposes and policies of the Act, and, therefore, refused to defer to the award. The arbitrator upheld the discharge of the union president following an unauthorized wildcat strike on two grounds. The first was his inability or failure to stop the strike, even though he had tried to persuade the strike leader to call it off and all of the union officials had declared the strike illegal and unauthorized and had requested the members to return to work. Although the employer did not rely on this ground before the Board, the majority pointed out that reliance on this ground was a direct repudiation of the principle in *Gould Corp.*[27] that union officials may be disciplined on the same basis as other employees for participating in unlawful strikes, but not for their failure to satisfy an affirmative duty to attempt to stop the strike.

The arbitrator's second ground was the union president's "adoption" or "open support" of the strike. The panel majority noted that nothing in the arbitration decision indicated the evidentiary basis for those characteri-

[25] 140 NLRB 883 (1963)

[26] 249 NLRB 739 (Chairman Fanning and Member Jenkins, Member Penello dissenting)

[27] 237 NLRB 881 (1978)

zations except for his participation as spokesman for the union in legal proceedings arising from the strike. They further stated that the arbitrator's conclusion that the employee was one of the most prominent strike activists was not based on any substantial evidence that his actual participation was at all comparable to the activities of the other discharged employees. In the absence of substantial evidence to support the arbitrator's finding in this regard, the majority concluded that it was not Board policy to defer as the arbitrator's award was repugnant to the purposes and policies of the Act.

Member Penello dissenting, disagreed that the arbitration award was clearly repugnant to the purposes and policies of the Act, but, rather, believed the award was in accord with the *Spielberg* principles and would defer to it. He was of the opinion that there was a reasonable evidentiary basis for concluding that the discharged union president adopted and openly supported the strike relying on the following four factors: (1) tacit approval was shown by the employee's failed attempt to get others back to work; (2) support of the strike was shown by the fact that at a union meeting, over which he presided, the strike was blamed on the plant manager's "harassing and intimidating practices"; (3) the employee was the union spokesman at an injunction hearing at which the entire emphasis was on trying to continue the strike; and (4) finally, his filing safety complaints with OSHA showed adoption of the purported aim of the strike, which involved safety matters. Member Penello therefore asserted that the majority, in viewing these factors differently than the arbitrator, substituted its judgment for the arbitrator's, an action contrary to the principles of *Spielberg* deferral.

Member Penello further asserted that because the employee was discharged for committing acts in support of the unlawful strike rather than for failing to act to stop the strike, *Gould* was inapposite. In his view, *Gould* does not prohibit an employer from considering whether an employee who engages in an unlawful strike is a union official. In any event, acknowledging that he dissented in *Gould*, Member Penello believed that the principles set forth by the Third Circuit's reversal of that case would justify the union president's discharge here solely for failing to stop the strike.

Chairman Fanning and Member Jenkins responded that the Third Circuit's decision in *Gould* did not control this case because the court relied on an express contractual duty, not present here, undertaken by union officers to take positive steps to terminate illegal work stoppages.

In *American Bakeries Co.*,[29] a case involving the discharge of two union stewards who assumed a leadership role in an unauthorized work stoppage that contravened the applicable collective-bargaining agreement, a Board panel majority reversed the administrative law judge and

[28] *Gould* v *N L R B* , 612 F 2d 728 (3d Cir 1979)

[29] 249 NLRB 1249 (Members Penello and Truesdale, Member Jenkins dissenting)

deferred to an arbitration award. Pursuant to the collective-bargaining agreement, the six employees who were involved in the work stoppage remained on the job until the arbitrator's decision issued. The employer would have discharged all six employees, but abided by the arbitrator's finding that only the two stewards who assumed a role of leadership should be discharged and the others reprimanded. The majority rejected the administrative law judge's two contentions that (1) *Spielberg* was inapplicable since the award merely constituted a "license" to the employer to take certain disciplinary action, rather than an "adjudication" of discipline action already taken, and (2) even if *Spielberg* did apply to the unique disciplinary procedure, deferral was inappropriate because the award discriminated against two shop stewards alleged to have engaged in the same activity as others whom the arbitrator treated with less severity, contrary to established Board law. With respect to the first contention, the majority saw little, if any, distinction between the unique disciplinary procedure in the instant case and a typical disciplinary procedure which would justify a different application of *Spielberg*. With respect to the second contention, the majority stated that, although there was a distinct difference of opinon among the present Board members as to a union steward's responsibilities in the face of an unauthorized, illegal work stoppage, it was undisputed Board law that union stewards may be singled out for additional discipline where it is clear, as the arbitrator found here, that the stewards instigated or led an unauthorized illegal work stoppage. They considered the administrative law judge's contrary factual findings to be the sort of differing inferences which did not warrant a *de novo* review of the evidence. The majority then concluded that the policies of the Act would be effectuated by giving conclusive effect to the arbitration award, and on that basis dismissed the unfair labor practice complaint.

Member Jenkins, dissenting, agreed with the administrative law judge that deferral was inappropriate here since the *Spielberg* doctrine was designed for the usual arbitral situation where the arbitrator reviews a disciplinary action already taken. Further, even if *Spielberg* were applicable, a point Member Jenkins did not concede, he found deferral inappropriate since the award ran afoul of the requirement that it not be repugnant to the purposes and policies of the Act. Thus, he agreed with the administrative law judge's finding that the disparity of treatment accorded the stewards constituted an unfair labor practice since their behavior was indistinguishable from that of the four rank-and-file employees who received only a reprimand. Member Jenkins also agreed with the administrative law judge that the facts did not show that the stewards had a leadership role in the work stoppage, and, accordingly, he would not defer to the arbitration award and would find the discharges violative of the Act.

B. Deferral to Settlement Agreements

The effect of settlement agreements upon unfair labor practice proceedings was considered by the Board in two cases during the report year.

In *Ace Beverage Co.*[30] a Board panel granted a charging party's motion for clarification of and/or determination of compliance with the Board's prior Decision and Order in this proceeding.[31] In the prior Decision and Order, the Board granted the usual reinstatement and backpay order to remedy the discriminatory demotion of the charging party from a route supervisor to a route salesman because he refused to agree to work in the event of a strike. Following his demotion, the charging party had participated in a lawful strike that ended with a strike settlement agreement which provided that the employer would be required to reinstate the strikers only if the union won the pending decertification election. The union lost the decertification election. In its Decision and Order, the Board made no comment on the settlement when it adopted the administrative law judge's recommendation of reinstatement and backpay. Thereafter, the Board's regional compliance officer informed the employer that under the terms of that agreement the union had waived the rights of the charging party to be reinstated as a route salesman, the position he held at the time of the strike. Accordingly, the compliance officer determined that the backpay required by the Board's prior decision would be calculated as the difference between what the charging party would have earned as a route supervisor and as a route salesman had he returned to the employer after the strike. The charging party objected to the backpay formula determination of the compliance officer which the General Counsel sustained on appeal and filed the instant motion, contending that the formula was based on a theory inconsistent with the reinstatement and backpay remedies ordered by the Board.

The panel first considered the employer's contention that the General Counsel's authority and discretion in compliance matters is analogous to the statutory delegation to the General Counsel of "final authority" to issue complaints. Noting that in compliance matters the General Counsel does not act on his own initiative as he does in issuing complaints, but as the Board's agent in effectuating the remedy ordered, the panel rejected this contention and found no jurisdictional bar to review the General Counsel's action in the compliance stage of the proceeding.

The panel found that the backpay formula, proposed by the General Counsel and the employer, failed to comport with the prior remedial order, under which the charging party was entitled to reinstatement to his predemotion position of route supervisor and to backpay commencing

[30] 250 NLRB No 66 (Chairman Fanning and Members Jenkins and Penello)
[31] 233 NLRB 1269 (1977)

on the date he was unlawfully demoted. It agreed with the charging party that the strike settlement agreement did not constitute a valid waiver of his backpay rights, noting that the settlement agreement was a private one which bore no relationship to the employer's unfair labor practices regarding the charging party, who was not a party or privy to the agreement. The panel also rejected both the employer's and the General Counsel's argument that the charging party's participation in the strike as a route salesman was an intervening event that made the agreement applicable to him. It pointed out that the argument ignored the fact that it was the charging party's unlawful demotion which cast him in the role of a route salesman, and that the charging party's status as a discriminatee under the Act bestowed upon him rights which set his situation apart from that of other striking employees. Finding that the proposed backpay formula, to the extent premised on the settlement agreement, was defective and must be rejected, the panel ordered that the record in this proceeding be reopened, and the case be remanded for issuance of a backpay specification as provided by the Board's Rules and Regulations.[32]

In *Roadway Express*,[33] a Board majority found, contrary to the administrative law judge, that a private precharge grievance settlement agreement between the charging party and the employer providing for reinstatement without backpay did not bar prosecution of the alleged unlawful discharge herein. Members Jenkins and Murphy pointed out that it is well established that the Board's authority to adjudicate unfair labor practice charges is not, under Section 10(a) of the Act, affected by any private agreement which may be reached by parties to a dispute which is the subject of that charge. They rejected the administrative law judge's reliance on *Central Cartage Company*,[34] in which the Board declined to disturb a settlement agreement. In *Central Cartage*, no issue was raised concerning the grievance settlement agreement by any of the parties thereto. In *Roadway Express*, however, both the charging party and the General Counsel contended that the issue of backpay was not resolved by the settlement agreement. Thus, the charging party testified that he "was not sure what understanding" had been reached and it was not until he returned to work that he was informed that he would not be receiving backpay. Accordingly, Members Jenkins and Murphy found it would not effectuate the policies of the Act to defer to the settlement agreement, and remanded the case to the administrative law judge for a decision on the merits.

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[32] The panel found no need to consider the charging party's contention that the General Counsel and the employer were foreclosed from asserting that the strike settlement agreement affected the employer's backpay liability because they did not raise it prior to the compliance stage

[33] 246 NLRB No 28 (Members Jenkins and Murphy, Member Truesdale concurring, Chairman Fanning and Member Penello separately dissenting)

[34] 206 NLRB 337 (1973)

Member Truesdale concurred in the decision that deferral to the settlement agreement was inappropriate because, on the facts of this case, he could not find that the charging party voluntarily and unequivocally waived his right to file a charge with the Board as a condition of the settlement. He relied on *Coca-Cola Bottling Co. of Los Angeles*,[35] in concluding that the Board should not defer in situations involving grievance settlements, short of arbitration, absent substantial evidence of a voluntary and unequivocal waiver of an employee's right to process his complaint before the Board.

Chairman Fanning, dissenting, would defer to the settlement, noting that the charging party had authorized a union official to settle his grievance,[36] that he returned to work after being informed of the settlement, and that the facts warranted the conclusion that he was fully aware of its provisions. Chairman Fanning also pointed out that different considerations would be involved had a charge been filed before the settlement.

Member Penello also dissented and would defer to the settlement because he believed that deferral to grievance settlements will enhance the practice of collective bargaining by encouraging parties to settle their disputes rather than to litigate their differences. He would apply to grievance settlements the tests for deferral to arbitration awards that are set forth in *Spielberg Manufacturing Company*.[37] Applying these tests here, he found deferral appropriate because the proceedings were fair and regular, all parties agreed to be bound, and the result was not clearly repugnant to the policies and purposes of the Act.

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[35] 243 NLRB No 89 (1979)

[36] The charging party was pursuing contractually established grievance and arbitration provisions before the settlement was agreed to

[37] 112 NLRB 1080 (1955) Member Penello also stated that the principles of deferral in *Spielberg* and in *Collyer Insulated Wire, A Gulf and Western Systems Co* , 192 NLRB 837 (1971), apply equally, if not more so, to grievance settlements

IV

Board Procedure

A. Unfair Labor Practice Procedure

During the report year, the Board majority, in *Southeastern Envelope Co.*,[1] a backpay proceeding, adopted an administrative law judge's finding that Diversified Assembly was the *alter ego* of Southeastern Expandvelope and as such shared with joint respondents Southeastern Expandvelope and Southeastern Envelope the obligation to provide the discriminatees with backpay. The majority rejected Diversified's position based on the Board's precedent in *Rose Knitting* [2] that it could not properly be held liable for backpay in view of the General Counsel's failure, despite his awareness of its existence and relationship to Envelope and Expandvelope, to name it as a party in the underlying unfair labor practice proceeding. In doing so, they expressly reaffirmed adherence to the long-established principles of derivative liability set forth in *Coast Delivery Service*,[3] while overruling the rationale and results reached in *Rose Knitting* to the extent inconsistent with *Coast Delivery*. Contrary to their dissenting colleague, the majority believed that permitting the General Counsel to litigate issues of derivative liability in a compliance proceeding, even when those issues could have been pleaded and litigated in the original unfair labor practice proceeding, will better insure effectuation of the remedial purposes and policies of the Act without denying procedural fairness to any party alleged to be derivatively liable. They pointed out that Diversified had been found liable only after it received full notice and fair opportunity to litigate at the compliance hearing the question of its status as Expandvelope's *alter ego*. In the majority's view, once found to be Expandvelope's *alter ego*, Diversified could not complain that it should have had notice of an opportunity to defend itself against the underlying unfair labor practice charges. Since the interest of *alter egos* are by definition identical, the majority concluded that the *alter ego* finding in the compliance proceeding conclusively established that Diversified did receive adequate notice, was present at the hearing, and did defend itself through the representation of Expandvelope in the earlier case.

[1] *Southeastern Envelope Co & Southeastern Expandvelope (Diversified Assembly)*, 246 NLRB No 63 (Chairman Fanning and Members Jenkins, Penello, and Truesdale, Member Murphy dissenting)

[2] *Rose Knitting Mills, & Boclaire Fashions*, 237 NLRB 1382 (1978) (Chairman Fanning and Members Penello and Truesdale)

[3] 198 NLRB 1026, 1027 (1972) (Members Fanning, Kennedy, and Penello)

In her dissent, Member Murphy criticized the majority's failure to present any rationale for deviating from the Board's position in *Rose Knitting* that a joint employer or *alter ego* not named as a respondent in the underlying unfair labor practice case—even though the General Counsel was aware of the relationship—may not subsequently be held accountable in a backpay proceeding. She pointed out that, as in *Rose Knitting*, Diversified's *alter ego* relationship with Expandvelope was in existence at the time of the unfair labor practice case and was known of by the General Counsel, but Diversified was not alleged or named as a respondent in that proceeding. Thus, in her view, the assessment of backpay against Diversified was akin to making a finding that Diversified committed an unfair labor practice without affording Diversified adequate notice and opportunity to defend itself. Finally, Member Murphy concluded that the majority's finding of backpay liability against Diversified was contrary to the policies of the Board and was an obvious denial of due process.

B. Representation Procedure

In *Auto Chevrolet*,[4] the Board majority affirmed a regional director's recommendation granting the employer's motion to reject the petitioning union's timely filed election objections because the union had failed to serve immediately a copy of such objections on the employer in accordance with section 102.69 (a) of the Board's Rules and Regulations. The employer's counsel was served with the objections 11 days after the filing. In its exceptions to the Board, the Union had argued that (1) the employer learned of the objections from the regional office 3 days after they had been filed and, thus, could have called the union if it had not received a copy, and (2) a union representative personally took a copy of the objections to the employer after being notified that the employer was alleging that the objections had not been served. Assuming, *arguendo*, the truth of these allegations, the majority nevertheless found, quoting *Alfred Nickles Bakery*,[5] that the union had established neither "an honest attempt to substantially comply" with the service requirement nor "a valid and compelling reason why compliance was not possible." They therefore concluded that the Union had not justified its failure to comply with the requirements of section 102.69 (a) of the Board's Rules.

The majority disputed their dissenting colleague's contention that the Board's Rules should be changed so as to provide that regional offices would serve copies of objections because this procedure is followed for service of charges in unfair labor practice proceedings under section 102.14 of the Board's Rules. They maintained that a reading of this

[4] 249 NLRB 529 (Chairman Fanning and Members Jenkins and Penello, Member Truesdale dissenting)
[5] 209 NLRB 1058, 1059 (1974) (Chairman Miller and Members Fanning and Jenkins)

section in its entirety demonstrated that service of charges by regional directors was a courtesy only, and did not diminish the responsibility of charging parties to insure that service is accomplished. The majority further noted that, although the Rules acknowledge, but do not require, service by the regional directors of charges, no similar provision is included in the sections of the Rules which specify the procedures to be followed in filing answers to complaints, motions, exceptions, or briefs in unfair labor practice proceedings; or petitions, motions, briefs, requests for review, or exceptions in representation cases. Since it was thus clear that the regional directors do not have any responsibility for serving other parties' documents in any of the Board's proceedings, the majority perceived no compelling reason to carve out an exception to the general practice by imposing on regional directors the obligation to serve copies of objections.

Finally, the majority disagreed with the dissent's reliance on *Certain-Teed Products Corporation*,[6] in finding that the regional director erred in failing to investigate the objections because there was no showing that the employer was prejudiced by the late service on it. In doing so, they pointed out that the Board had emphasized in *Alfred Nickles* that "[its] decision in *Certain-Teed* does not stand for the proposition that the time requirements in our Rules and Regulations will be ignored on the singular ground that a party has not produced any evidence that it was prejudiced by another party's failure to comply with those requirements."[7]

Dissenting Member Truesdale concluded that this case should be controlled by the rationale of cases like *Certain-Teed*, in which the Board concluded that timely objections should not be routinely rejected without considering their merits, merely because of delay in service "unless some prejudice be shown." Accordingly, in the absence of any such showing of prejudice to the employer, he would have remanded the proceeding to the regional director for consideration of the objections on the merits. Although Member Truesdale considered the *Certain-Teed* rationale preferable to that of *Alfred Nickles*, he concluded that neither approach was or could be entirely satisfactory in deciding such issues. He believed that the solution to this problem was clear and could be accomplished, not through further litigation on this essentially sterile point, but through a simple change in the Board's Rules and Regulations which would provide that the regional offices, as a matter of courtesy, routinely serve objections on all other parties to the proceeding. He pointed out that such a procedure, as established by Section 102.14 of the Board's Rules, was currently being followed with respect to service of unfair labor practice charges.

Member Truesdale stated that the majority missed the point by rejecting his rule-change proposal, not on its merits, but, rather, because

[6] 173 NLRB 229 (1968) (then Chairman McCulloch and Members Fanning, Jenkins, Brown, and Zagoria)
[7] 209 NLRB 1058 at 1059

regional directors purportedly have responsibility for serving Board documents, but not parties' documents. He argued that it was the service of objections, not other documents, that have created a problem of longstanding for the Agency. While recognizing that service of charges and representation petitions is undertaken only as a "courtesy" to the parties and not as an obligation, Member Truesdale further argued that such service has become so firmly imbedded in agency practice and procedure that the distinction has been lost. Finally, he contended that charges and petitions are "Board documents" only in the sense that they are usually filed on forms provided by the Agency.

Following the holding of *Auto Chevrolet*, the Board panels rejected election objections for similar reasons in *Platt Bros.*,[8] *St. Johns Smithtown Episcopal Hospital*,[9] and *High Standard*,[10] where, under different fact patterns, a party's timely objections were rejected because of the failure to comply with the immediate service requirement of Section 102.69(a) of the Board's Rules and Regulations. Member Truesdale basically adhered to the position he expressed in *Auto Chevrolet* while dissenting in *Platt Brothers* and *St. Johns Smithtown Episcopal Hospital*.

[8] 250 NLRB No 49 (Chairman Fanning and Member Penello, Member Truesdale dissenting)
[9] 250 NLRB No 77 (Members Jenkins and Penello, Member Truesdale dissenting)
[10] 252 NLRB No 64 (Chairman Fanning and Members Jenkins and Penello)

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 Labor Organization

Several cases decided by the Board in this report year concerned application of the Board's holding in *Sierra Vista Hospital*,[1] which set forth its policy regarding conflict of interest issues raised by the active participation of supervisors in the affairs of a union. In *Baptist Hospitals, d/b/a Western Baptist Hospital*,[2] the Board rejected the employer's con-

[1] 241 NLRB No 107 (1979) (Chairman Fanning and Members Jenkins, Penello, and Murphy, Member Truesdale dissenting)

[2] 246 NLRB No 25 (Chairman Fanning and Members Jenkins, Penello, and Murphy, Member Truesdale concurring)

tention that the participation of its supervisors as well as supervisors of its competitor in the petitioning Kentucky Nurses Association (KNA) warranted dismissal of the election petition because the KNA was not qualified to represent the employer's registered nurses. Pointing to a heavy burden imposed upon an employer to adduce probative evidence demonstrating that supervisory participation in a labor organization's internal affairs "presents a clear and present danger of interference with the bargaining process," thus disqualifying that labor organization from bargaining, the Board majority held that, although some officers and directors of the KNA and its constituent District 5 were supervisors, the employer failed to sustain its burden in this case. In so doing, the Board majority noted that none of KNA's supervisors were employed by the employer or its alleged "competitor" and that nothing in KNA's structure allowed for district officers and directors to interfere with the collective-bargaining process of a local unit.

In answer to the employer's contention that, in the future, KNA could be controlled by supervisors, the Board majority further found that KNA had taken precautionary steps to insure that the collective-bargaining process was insulated at all levels from supervisory participation or influence, by providing in the KNA bylaws, that its economic and general welfare commission, the only committee responsible for developing collective-bargaining policy, was to be comprised of nonsupervisory nurses. Although this commission's staff negotiator might provide suggestions during the course of negotiations, the final determination of the contents of a contract proposal presented to a unit was to be made solely by the local negotiating team. Finally, the majority noted that the local units ratified agreements without any interference or veto by KNA.

Concurring in the result that there was no impediment to processing KNA's election petition, Member Truesdale believed that it was unnecessary and unfortunate to inquire into KNA's operations for the reasons set forth in his partial dissent in *Sierra Vista*. He found that, although participation of the employer's own supervisors may in fact be perceived as a conflict in the supervisors' loyalties, it is a conflict which may operate to the detriment of the employees, not to the detriment of the employer. In his view, an employer concerned that its supervisors are not "loyal" has a remedy within its control, and Board intervention is unwarranted. He further found that, if employees themselves regard supervisor participation as compromising KNA's ability to represent them with single-minded loyalty, they may either reject the KNA or file 8(a) (1) and (2) charges against the employer. To delay the representation proceeding by inquiring on the employer's behalf into internal operations was, in his view, at odds with the principle that an employer may not bring 8(a) (2) charges against itself and with the Board policy precluding litigation of unfair labor practices in representation proceedings. Finally,

Member Truesdale found unwarranted the majority's inquiry into the role of supervisors of other employers in KNA's operations. In his opinion, absent an allegation that KNA or its agents had financial or other business interests which competed with those of the employer, thus raising an issue of economic conflict of interest litigable under the *Bausch & Lomb* doctrine,[3] the Board need not inquire into the identity and roles of supervisors of other employers in KNA's internal operations. Accordingly, he concluded that the majority's "detailed investigation and analysis of the internal operations of a statutory labor organization has served only to delay and impede the employees' right to choose a bargaining representative."

Similarly, in the *Sidney Farber Cancer Institute*,[4] a Board panel, in the light of *Sierra Vista, supra*, rejected the employer's contention that the petitioning Massachusetts Nurses Association (MNA), comprised of constituent Association or districts, was not a proper bargaining representative under the Act since a number of the officers and directors of the MNA and its constituent District No. 5 which had jurisdiction of the employer, were supervisors. Noting that the heavy burden of establishing the existence of a conflict interfering with the collective-bargaining process rests with an employer, the panel concluded that the employer had not met its burden in this case. In so doing, it relied on the fact that (1) no supervisor employed by the employer was an officer or director of MNA, nor was otherwise claimed to hold a position of authority in MNA;[5] (2) although several officers and directors of MNA and District No. 5 were supervisors of other employers, the employer offered no evidence of any connection between itself and those employers which might in any way impinge on its employees' right to a bargaining representative whose undivided concern was for their interests; and (3) MNA had taken numerous precautionary measures to insulate the collective-bargaining process from supervisory participation or influence by excluding supervisory nurses from membership in the local chapter, which possessed the sole authority to make decisions regarding their own bargaining affairs. Finally, with respect to the employer's assertion that the various powers of the MNA's board of directors concerning appointments, approval, and fiscal control amounted to supervisory domination, the panel found these functions of organizational oversight to be both remote and speculative in relation to the local chapter's bargaining activities.

However, in *Exeter Hospital*,[6] the petitioner, a labor organization, consisting exclusively of employees of the employer, was not affiliated

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[3] *Bausch & Lomb Optical Co*., 108 NLRB 1555 (1954)

[4] 247 NLRB No. 1 (Chairman Fanning and Members Jenkins and Penello)

[5] The panel also rejected the employer's assertion that MNA should be disqualified from representing its employees because its own supervisors may hold office of positions of authority in MNA at some future time, as "entirely too speculative to warrant disqualification of MNA."

[6] 248 NLRB 377 (Chairman Fanning and Members Jenkins and Penello)

with any large association. Its leadership was composed of a chairperson, who was the sole officer, along with representatives of each shift and from a separate facility. Charge nurses, a classification found to be supervisory, were permitted to assume leadership positions and the chairperson and several shift representatives were in fact charge nurses. A Board panel, applying the *Sierra Vista* analysis, unanimously held that the Petitioner was not qualified to represent the employer's employees for collective-bargaining purposes, finding that, by occupying the important office of chairperson and by serving as shift representatives, supervisors were clearly in a position to play a crucial role in the union's internal affairs. It concluded that permitting the petitioner to represent the employees would jeopardize both the employees' right to a bargaining representative exclusively concerned with their interests and the employer's right to loyalty from its own supervisors. The panel pointed out that, unlike the situation in *Baptist Hospitals, d/b/a Western Baptist Hospital, supra*, and *Lancaster Osteopathic Hospital Assn.*,[7] there was no evidence that the petitioner in this case had ever taken steps to insulate the collective-bargaining process from supervisory participation or influence. Finally, the panel noted that the result reached was consistent with the established Board policy, reiterated in *Bausch & Lomb, supra*, that no matter how strongly employees might desire otherwise, supervisors should not be permitted to represent employees for collective-bargaining purposes in order to draw a "clear line of demarcation" between supervisory representatives of management and employees because of the possible conflicts of allegiance.

B. Status as Employees

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).

Several cases decided by the Board this year concerned whether certain classifications of individuals were employees or independent contractors.

In *Air Transit*,[8] the Board, applying the common law agency test,[9]

[7] 246 NLRB No 96 (1979)

[8] 248 NLRB 1302 (Chairman Fanning and Members Jenkins and Truesdale, Member Penello dissenting)

[9] In *N L R B v United Ins Co*, 390 U S 254, 256 (1968), the Supreme Court stated that the Board should apply the common law agency test in distinguishing an employee from an independent contractor Accordingly, the Board has consistently applied the common law test of the right to control where one for whom services are to be performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment On the other hand, where control is reserved only as to the result sought, the relationship is that of an independent contractor

engaged in an exhaustive analysis of the relationship between the employer and "owner-operator" cab drivers providing taxicab services for the employer at an airport, and a majority concluded that the drivers at issue were employees and not independent contractors. In so doing, the majority found the relationship between the employer and the drivers here to be analogous in several important respects to the insurance agents in *United Ins.*, where the Supreme Court affirmed the Board's finding that the insurance agents were employees and not independent contractors. The majority found that: (1) the drivers' taxicab service was essential to the employer's operation; (2) the employer did not require any prior training or experience; (3) the drivers did business in the employer's name, with virtually all their fares derived from the employer's taxistand, and the employer's managerial personnel were present at the taxistand to assist and control the drivers' activities; (4) the drivers' employment appeared permanent and continued as long as their performance was satisfactory, with the employer retaining an absolute and unilateral control over this determination; and (5) although the drivers were not required to account for their revenues as were the agents in *United Ins.*, the employer exercised financial control by unilaterally determining stand and subleasing fees, controlling the fare structure and assignment of all passengers, and, most importantly, collecting its weekly stand and subleasing fees prior to the start of the workweek; and (6) the employer retained the right to impose and/or change unilaterally any or all of its drivers' working conditions, such as workhours, personal appearance, and discipline, evidencing a right to control the manner and means in which services were to be provided.[10]

In addition to the above, the majority found that several other factors supported its conclusion that the drivers were employees and not independent contractors. First, the majority noted that the employer exercised discipline over its drivers in the form of warnings, suspensions, and discharges for, *inter alia*, violating its dress code, fighting with passengers, overcharging, failing to file accident reports, and arguing with its management personnel. Second, the employer exercised control over the drivers entrepreneurial opportunities by establishing the fare structure, setting taxistand and subleasing fees, restricting the geographical locations in which the drivers could operate, and other restrictions which

[10] In this regard, the majority disagreed with the court of appeals statement in *Local 777, Democratic Union Organizing Committee, Seafarers Intl Union of North America [Yellow Cab Co & Checker Tax Co]*, 603 F 2d 862 (D C Cir 1978), rehearing denied 603 F 2d 891, that unilateral revision of terms and conditions is evidence of superior bargaining power, but not of a company's power to establish contract terms controlling the manner and means in which drivers go about providing taxi service Rather, the majority agreed with the view expressed by the Supreme Court in *United Ins* that the right unilaterally to promulgate and change terms and conditions of employment is itself evidence of an employee-employer relationship The majority also disagreed with the court of appeals' criticism of the Board's reliance on the factors of the relationship of the workers' work to the employer's business and of the length of the workers' employment, as indicative of employee-employer relationships, noting that the Supreme Court in *United Ins* also found the factors to be determinative of employee status

indicated an employee-employer relationship and not an arm's-length relationship between two business entities. Third, the employer regulated the amount of liability insurance carried by the drivers and required them to report all accidents. The majority reasoned that, if the drivers were indeed independent contractors, such matters would be of no concern to the employer. Fourth, the employer effectively controlled the drivers' right to sublease or sell their taxicabs by retaining the absolute right to cancel or refuse to permit a driver to use its taxistand. Lastly, the employer's Federal Aviation Administration (FAA) contract explicitly prohibited it from assigning its exclusive right to pick up passengers and the employer never told the drivers that their relationship was based on a franchise or that they were independent contractors. Furthermore, the employer required the drivers to comply only with those portions of the FAA contract that it deemed should be enforced.

Finally, the majority noted that there existed several factors which, taken in isolation, would indicate an independent-contractor status of the drivers, such as the fact that they were obliged to provide and maintain their own vehicles through lease or ownership, did not have payroll deductions or receive fringe benefits, and were not accountable to the employer for a percentage of their fares. However, they concluded that these factors were on balance outweighed by the factors demonstrating employee status and, accordingly, directed an election in a unit of the employer's regular and part-time taxicab drivers.

Member Penello, dissenting, observed that the record in this case clearly showed that the employer, which neither owned nor leased taxicabs, was concerned only with the end of fulfilling its FAA contractual obligation to provide sufficient cabs to service the airport and that the drivers themselves possessed "virtually unfettered discretion" in deciding the manner and means by which they conducted their businesses. He found that the drivers had a substantial investment in purchasing their own vehicles and that the independent, entrepreneurial character of the drivers' operations was most clearly reflected in the financial relationship between the drivers and the employer. He noted that, in essence, the drivers rented the right to pick up passengers at the airport for a flat fee. They received no salary, nor did they work for a percentage or commission. Instead, their income was derived from profits realized after paying the substantial operating expenses incurred in operating their cabs. In addition, the drivers set their own hours of work and their economic self-reliance was underlined by their inability to receive any of the fringe benefits associated with employment.

Member Penello found that the absence of control by the employer over the drivers was further exemplified by the employer's failure to maintain personnel files on the drivers, conduct physical exams, enforce a dress code, require maintenance of "trip sheets" or other records, or inspect the

cabs for safety. Although the employer enforced general operating regulations and prohibited conduct which might jeopardize its agreement with the FAA, in his view this represented "only the most nominal restrictions on the drivers."

In addition, Member Penello was of the view that the majority's reliance on *United Ins., supra*, did not withstand close examination. He noted that in *United* the debit agents found to be employees were closely supervised, participated in fringe benefits, were paid a percentage of the premiums collected, were required to file weekly reports, and were evaluated on the basis of their production, with substandard performance resulting in discharge. In his view, the majority emphasized several factual similarities of secondary significance between *United* and this case and downplayed or disregarded the vital distinctions separating the two situations. Thus, for example, the majority emphasized that the agents in *United* and the drivers here performed functions essential to the company's operations, a factor which the court of appeals in *Yellow Cab, supra*, found "does not stamp as employees those who would otherwise be independent contractors." Member Penello also disagreed with the majority's finding that the employer exerted "financial control" over the drivers by setting stand and subleasing fees and controlling fare structure, pointing out that, in *Yellow Cab*, the court held that the relative economic power of the contracting parties has nothing to do with the common law test of agency.

Finally, in Member Penello's opinion, the facts in this case were substantially weaker for finding that the drivers were employees than even those in *Yellow Cab*, which both he and the court of appeals found insufficient to evidence an employment relationship. Rather, he found that the record in this case showed the drivers to be "classic small entrepreneurs, not servants of another entity." Accordingly, he would have dismissed the petition.

In *Mitchell Bros. Truck Lines*,[11] a Board panel held that certain "owner-operators" were employees and, therefore, properly included in a unit of truckdrivers employed by the employer. The panel pointed out that the determination of whether an individual is an employee or an independent contractor depends on whether the employer entity reserves the right to control the manner and means by which the result is accomplished. In this regard, they found that the nature of the relationship between the owner-operators and the employer here was one largely dictated by a "complex matrix" of Federal and state regulations covering every aspect of the employment relationship, including qualifications for drivers (both at the hiring stage and during the employment relationship), leasing agreements, safety and operational standards for vehicles,

[11] 249 NLRB 476 (Chairman Fanning and Members Jenkins and Truesdale)

and restrictions on how and where the vehicles may be operated. Although the employer did not give warnings or suspensions to the owner-operators, it did disqualify drivers and terminate their services for violation of certain rules, such as carrying unauthorized passengers or driving in excess of the number of hours permitted by law. The panel found that the extensive Federal and state regulation has effectively obviated the need for common carriers to establish their own personnel policies or operational standards and, by enforcing these rules, the employer necessarily exercises extensive control over the drivers' daily operations. It found that the employer not only dictated substantive requirements for new hires but also enforced a number of requirements which severely limited the owner-operator's freedom to control his financial investment, his hours of employment, and the manner in which he operated his truck. In fact, the employer acted as the employer of the drivers. Relying on *Robbins Motor Transportation*,[12] the panel held that "it matters not whether the controls placed on the drivers emanate from the [employer] independently, or whether these controls are imposed on the [employer] which in turn, imposes them on the drivers. Either way, these controls define the carrier's employment relationship with its drivers."

The panel further found that, apart from the pervasive scheme of governmental regulation, several other factors supported the conclusion that the owner-operators were in fact employees. First, the drivers were not involved in an occupation distinct from the employer. Indeed, their work was not merely part of the employer's regular business, but rather, was the employer's business. Second, although drivers operated under a 30-day lease, it was automatically renewable unless canceled. Thus, in effect, the duration of employment was indefinite. Third, "trip leasing" and "interlining"[13] were infrequent and the employer required the owner-operator to obtain its permission to do so, although permission was not specifically required by law. Fourth, although the drivers were not subject to daily observation because they were constantly on the road, the panel noted that where the nature of a person's work required little supervision, there was no need for actual control and, in any event, the drivers here were supervised through preventive measures, including physical exams and periodic inspection of their vehicles, trip reports, and settlement statements.

Finally, the panel considered the factors of entrepreneurial control or risk. With respect to entrepreneurial freedom, the panel noted that, although the drivers, *inter alia*, purchased and privately financed their own trucks, paid for repairs, maintenance, and insurance, were paid a

[12] 225 NLRB 761 (1975)

[13] A "trip lease" is an agreement between two certificated motor carriers under which a motor carrier with empty equipment and no ICC authority for a given geographical area places its equipment in the possession of another motor carrier with ICC authority in the same geographical area An "interline" agreement is a contract between two certificated motor carriers to cover transportation requiring the joiner of operating authorities of the two nonrelated carriers because neither carrier's authority in and of itself is extensive enough to complete the haul

percentage of revenues rather than a salary or benefits, and could refuse to haul if they wished, there were a number of ways in which entrepreneurial freedom and risk was substantially minimized. It pointed out that the type of equipment purchased was controlled by Federal regulation, and that the employer had unilaterally established the percentage rate for earnings which the drivers must accept. Moreover, while a driver was entitled to refuse a haul, he could not haul for someone else, since he worked exclusively for the employer. Finally, the panel found it most important that, with respect to risk, the employer, like the employer in *Robbins, supra*, assumed many responsibilities for the owner-operators which minimized this entrepreneurial risk, such as assuming the risk of nonpayment by customers, providing fleetwide insurance, providing credit cards and discount gasoline, and handling bookkeeping without charge. It found that, unlike independent businessmen, the drivers depended on the employer for these services in order to operate and, similarly, the employer depended totally on the drivers to perform its business. The panel concluded that this interdependence belied an independent contractor relationship and supported the finding that the drivers were employees within the meaning of section 3(2).

Similarly, in *Liquid Transporters*,[14] a Board panel held that, although certain owner-operators and drivers for these multiple owner-operators exercised some freedom over their operation in relation to the employer, the employer exercised a considerable degree of control sufficient to warrant the conclusion that these individuals were employees and not independent contractors. In so doing, the panel relied on several significant factors: (1) the employer's preemployment procedures and rules were applied to all its drivers, whether owner-operator or otherwise, and all drivers were subject to discipline for infractions of these rules; (2) Federal and state regulations necessitated extensive employer control over the owner-operators and drivers for owner-operators; (3) the employer had exclusive possession, control, and use of the owner-operators' leased equipment; (4) although owner-operators worked under a 30-day lease, it was automatically renewable and, in effect, the duration of employment was indefinite; (5) all drivers worked, under a uniform set of rules, virtually exclusively for the employer who imposed discipline for infractions of the rules; (6) a single seniority list and dispatch procedure was used for all drivers; (7) all drivers had access to the same grievance procedure; and (8) the employer assumed certain responsibilities for these individuals which minimized their entrepreneurial risk, such as providing liability and cargo insurance. From the foregoing, the panel concluded that there was no material difference between this case and the Board's recent decisions, like *Mitchell Bros., supra*, in which it was found that similar individuals were employees and not independent contractors within the meaning of the Act.

[14] 250 NLRB No 163 (Chairman Fanning and Members Jenkins and Truesdale)

C. Existence of Question Concerning Representation

In *Anheuser-Busch*,[15] the petitioning Millwrights Union and an Independent intervenor sought a unit of maintenance employees at the employer's Houston brewery. Prior to 1974, the employees in the requested unit had at various times been represented by several unions. In 1974, Teamsters Local 919 defeated the then incumbent independent union and was certified by the Board. In 1975, Local 919 was authorized by its members to permit the Brewery and Soft Drink Workers Conference, with which it was affiliated, to negotiate a master agreement with the employer covering a multiplant unit consisting of six of the employer's breweries including the Houston brewery. During an interruption in negotiations in early 1976, the Millwrights filed a representation petition and were defeated in a Board-conducted election by Local 919 which remained the certified bargaining representative. Thereafter a master agreement was reached between the employer and the Conference, an agreement which recognized the Conference and its affiliated unions, including Local 919, as the "sole and exclusive bargaining agent" of the employer's employees at the six breweries.

The employer, the Conference, and Local 919 contended that the single location maintenance unit sought was inappropriate since it had been effectively merged into a multiplant unit in 1976 by virtue of the master agreement. A Board panel unanimously agreed. Noting that parties to a collective-bargaining relationship may by contract, bargaining history, and course of conduct merge existing certified units into a multiplant unit, thereby destroying the separate identify of the individual units, the panel held that such a merger had been effected in this case. The panel found that the 1976 master agreement by its terms provided for joint representation on a multiplant basis. In addition, substantial changes from prior practices in the manner of bargaining between Local 919 and the employer had in fact occurred since the 1976 agreement was consummated: (1) Conference officials and management from the employer's corporate headquarters had acted as chief negotiators for the parties; (2) the master agreement had covered such substantive terms as seniority, union security, work hours, overtime, and transfers, with local supplemental agreements subject to approval by the Conference and the employer's corporate labor relations representative; and (3) appeal to a multiplant grievance committee had been part of the grievance procedure. The panel noted that the Board has frequently held that bargaining of this type, which obliterates previously existing single-plant units based on Board certification, is a permissible avenue for the course of labor-management relations. It further found that inclusion in the multiplant unit was a major issue in the 1976 election campaign and thus the

[15] 246 NLRB No 3 (Members Penello, Murphy, and Truesdale)

Houston employees had sufficient notice that continued representation by Local 919 would entail a merger with a multiplant unit. Finally, the panel noted that bargaining on a multiplant basis had occurred for 2-½ years and that the Board has long held that multiplant bargaining history, in excess of 1 year, may be sufficient to preclude the establishment of a single-plant unit. Accordingly, the petition was dismissed because a separate unit limited to the maintenance employees at the employer's Houston plant was inappropriate.

In *Plumbing Distributors* [16] a Board panel reversed the regional director and unanimously held that the truckdriver and warehouse employees at a warehouse facility recently established by the employer at Fremont, California, were not accretions to the separate truckdriver and warehouse units represented by two Teamsters locals at the employer's Union City facility. The regional director had found that the employees at the new facility were accretions based on common ownership, control of labor relations, and integration of operation between the two facilities, coupled with the similarity of skills, job classifications, and duties. In finding that the employees at the newly established warehouse facility constituted a separate appropriate unit, the panel pointed out that (1) the facilities were 5 miles apart; (2) the employees at the warehouse performed no work previously performed at any of the employer's other facilities; (3) although the same individual ultimately controlled labor relations at all facilities, the warehouse employees had separate day-to-day supervision; (4) there was no job interchange and little contact; and (5) the warehouse employees received different wages and benefiits than those at Union City. The panel also rejected the locals' contention that their contracts covered the new warehouse and required a finding of accretion since, *inter alia*, neither contract explicitly grants recognition to the locals for any new operations established within their territorial jurisdiction and, in any event, the Fremont facility was a new operation and such a contract clause would be valid only when a majority of the affected employees desires representation. Accordingly, the petition was dismissed because a claim of accretion does not raise a question concerning representation within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

In *Mass. Electric Co.*,[17] the employer consolidated a part of its operations, which had included its service and distribution facilities in Malden, Lynn, and Beverly, Massachusetts, into its service center in Malden. Four different unions represented the employees affected by the consolidation in four different bargaining units. One union represented the transmission and distribution employees (T & D), store department employees, and meter readers at the Malden Service Center; another

[16] 248 NLRB 413 (Chairman Fanning and Members Jenkins and Truesdale)
[17] 248 NLRB 155 (Chairman Fanning and Members Penello and Truesdale)

union represented the customer service department employees and a messenger in the offices services department also at the Malden Service Center location; a third union represented an overall unit of meter readers, T & D, stores department, and customer service department employees at the two service centers in Lynn and a fourth union represented a unit similar to the Lynn unit at the employer's Beverly, Salem, and Gloucester facilities. The employer filed three petitions with respect to the employees affected by the consolidation, including a unit clarification petition asserting that the merger effectively obliterated any separate identity among the former four bargaining units.

A Board panel unanimously held that a question concerning representation was presented by the petitions and directed elections in the two appropriate units at the Malden service center. In this regard, it found appropriate separate units of T & D stores department employees and of customer service department employees, with the meter readers to vote a *Globe*-type ballot [18] choosing either unit. The panel noted that, under normal accretion principles, when employees are transferred from an employer's facility where operations have ceased and are joined with similarly situated employees covered by a collective-bargaining agreement at another facility, they will be considered an accretion to that contract unit if the functions and classifications of the transferred employees remain essentially unchanged. However, the panel found that, although the employees that have been transferred are performing functions similar to those performed prior to the merger, they had been represented previously by labor organizations different from those representing the Malden employees, were covered under different collective-bargaining agreements, and continue to be the subject of competing representational claims at the merged location. It held that, in these circumstances, statutory policies will not be effectuated by applying ordinary accretion principles and imposing a bargaining agent on either unit of the newly integrated operations, noting that none of the unions involved represented such an overwhelming majority of the employees in either of the units to warrant a conclusion that no question concerning representation existed. Finally, the panel rejected the claim that separate representation could continue at the merged location, since the employees in the units found appropriate continued to be the subject of competing representational claims. Accordingly, the panel directed elections in the two units found appropriate.

[18] *Globe Machine & Stamping Co*, 3 NLRB 294 (1937)

D. Bar to the Conduct of an Election

1. Separation of Combined Unit

In *American Recreation Centers, d/b/a Mel's Bowl*,[19] the employer had operated a bar and restaurant in conjunction with its bowling alley, and its bar and restaurant employees were covered in a single unit under a multiemployer restaurant association agreement with the union. Thereafter, the employer leased its restaurant to an unrelated corporate party, who shortly thereafter signed the same restaurant association agreement. A majority of a Board panel held that the union had acquiesced in a *de facto* separation of the bar and restaurant employees by entering into a contract with the restaurant lessee and administering it separately from its agreement with the employer. Thereafter, the instant decertification petition involving the bar employees was filed. They found that the original unit had been effectively severed and that as the employer's bar employees constituted the recognized unit, it was appropriate for the purposes of a decertification election. In so doing, the majority pointed out that: (1) the transaction was at arm's length, to a totally separate corporation; (2) the bar and restaurant were operated as independent businesses, with the restaurant lessee handling its own hiring, supervision, discipline, wages, work hours, and grievances; (3) when the lessee signed the restaurant association agreement, it became directly responsible for the terms and conditions of the agreement with respect to the restaurant employees;[20] and (4) the union, to a significant extent, had separately administered its contracts with the two businesses, as evidenced by its direct dealing with the restaurant concerning health and welfare payment and dues delinquencies. Accordingly, the panel majority concluded that, by reason of the separate contract, its enforcement, and the relinquishment of virtually all control by the employer over the restaurant, the restaurant employees had been severed for representation purposes from the original unit of the employer's employees, leaving the bar employees as the recognized unit for decertification purposes.

Chairman Fanning, dissenting, found that the "great importance" attached by the majority to the separate signing of the association contract and the fact that the union thereafter dealt directly with the restaurant "sublessee" concerning delinquencies in fringe benefit payments, ignored the industry contract provision that, where a bar licensee leases

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[19] 250 NLRB No 142 (Members Penello and Truesdale, Chairman Fanning dissenting)

[20] In this regard, the majority rejected the union's claim that, by virtue of the contract clause which provided that a bar licensee (the employer) is liable for contractual benefits for employees of any food concessionaire to whom a lease is granted, its contract with the lessee here was merely intended as "added protection" for the union The majority found that this provision merely made the employer a guarantor and should not be construed as to render a nullity the separate contract between the union and the lessee

the food concession to another person, the licensee was responsible for all the terms and conditions of the contract for employees hired by that other person.[21] He further noted the contract provision that the agreement was "equally effective under any subcontract."

He also disputed the majority's conclusion that the bar and restaurant were operated as "independent businesses" after the sublease was executed. Chairman Fanning pointed out that the sublease contained important restrictions which, *inter alia*, required the employer's consent as to changes in working hours and gave the employer the option of requiring all personnel on the premises to "join or belong to the appropriate union." He also noted that the bar and restaurant employees continued to work in close proximity with the same supervision as before.

Finally, Chairman Fanning found *Clohecy Collision*,[22] cited by the majority to support its conclusion, "a completely distinguishable case," pointing out that in *Clohecy*, the parties ignored the Board certification of a single unit covering two locations and, instead, negotiated separately and that the Union acquiesced in the separate bargaining with unit employees taking part in bargaining only for the unit at their individual work location. These negotiations resulted in separate contracts, each individually tailored to the location involved. He found no parallel between the facts in *Clohecy* and the present case and was "not prepared to amend the Board's rule concerning the appropriate unit for decertification by subscribing to *de facto* recognition when the facts do not justify it." Accordingly, he would have dismissed the petition.

2. Adequacy of Contract Terms

In *Stur-Dee Health Products & Biorganic Brands*,[23] the employer and the union had executed a contract which renewed and extended an earlier collective-bargaining agreement except as to the economic terms, which the parties agreed to submit to interest arbitration. The agreement also contained provisions for, *inter alia*, grievance and arbitration, vacations and holidays, work hours, union security, sick and maternity leave, seniority, and a no-strike agreement. Several days after agreement was reached, a petition to represent the employees of the employer was filed by another union. The regional director, relying on the precedent in *Herlin Press*,[24] found that the agreement did not constitute a bar to the petition, as the employer and intervenor contended, since the provision to arbitrate economic terms rendered it fatally defective for contract-bar purposes.

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[21] He found that labeling the employer as merely a "guarantor" of compliance with the industry contract did not detract from the continued viability of the bar and restaurant unit

[22] 176 NLRB 616 (1969)

[23] 248 NLRB 1100 (Chairman Fanning and Members Penello and Truesdale)

[24] 177 NLRB 40 (1969)

In a Decision on Review, a Board panel unanimously reversed the regional director and dismissed the petition. Quoting *Spartan Aircraft Co.*,[25] and *Appalachian Shale Products Co.*,[26] it pointed out that, to be a bar. "a contract must be so complete as to substantially stabilize labor relations between the parties and should 'chart with adequate precision the course of the bargaining relationship [so that] the parties can look to the actual terms and conditions of the contract for guidance in their day-to-day problems.' " The panel noted that, although an agreement limited only to wages and fringe benefits or one that has been substantially abandoned or altered will not constitute a bar to a petition, "the Board has never held that the failure of a contract to contain or delineate every possible provision which could appear in a collective bargaining agreement negates the bar quality of such a contract." Relying on *Spartan Aircraft*, *supra*, and *Levi Strauss & Co.*,[27] it found that, since the contract contained substantial terms and conditions of employment as well as a definite and readily ascertainable method for determining economic terms, it provided a sufficient degree of stability and contained the requisite terms contemplated by the Act.[28] Accordingly, the panel concluded that the agreement constituted a bar to the petition.

In *Gaylord Broadcasting Co. d/b/a Television Station WVTV*,[29] the employer and the union had been engaged in negotiations for over a year and, by the final bargaining session, had reached agreement on numerous provisions including, *inter alia*, provisions with respect to recognition, duration, pay rates, work hours, grievances procedure, seniority, no-strike/no-lockout, and a management-rights clause. At the employer's suggestion, the parties initialed and dated each of the 39 pages of the contract provisions. On the following day, the bargaining unit ratified the agreement and the union notified the employer of this fact. In two subsequent meetings, the parties discovered that certain agreed-upon provisions had been omitted from the initialed agreement and these provisions were added. Thereafter, the employer immediately commenced to implement the agreement. However, the parties subsequently negotiated concerning a change in the vacation provision and agreement was reached on new language. Finally, a date was scheduled for formal execution of the contract, some 10 months after the original initialing, but the union representative was unable to attend due to illness. A decertification petition was filed the following day.

[25] 98 NLRB 73, 74–75 (1952)

[26] 121 NLRB 1160, 1163 (1958)

[27] 218 NLRB 625 (1975)

[28] The panel distinguished *Herlin Press*, noting that in *Herlin* the parties had merely extended indefinitely an agreement pending new negotiations Thus, there existed no written, signed contract which could act as a bar and the extension of indefinite duration was not a bar It further noted that in *Herlin* the Board had rejected the parties' argument that an agreement to arbitrate a new contract constituted a bar because *all* the provisions of the new agreement were subject to arbitration In in the instant case, the parties incorporated the previous contractual terms and conditions into a new agreement and expressly limited the scope of binding arbitration to those economic terms which had been agreed upon

[29] 250 NLRB No 58 (Chairman Fanning and Member Truesdale, Member Penello dissenting)

A majority of a Board panel found that the initialed agreement constituted a signed contract covering substantial terms and conditions of employment and thus was a bar to the decertification petition. Noting the requirement of *Appalachian Shale Products Co., supra*, that to bar an election an agreement must be signed by both parties, they held that the initialing of the agreement by the employer and the union, thereby clearly identifying themselves as parties to the contract and signifying their agreement to its terms, constituted a sufficient signature for contract-bar purposes. The majority, in response to Member Penello's dissent, found that the signing of an informal agreement covering substantial terms and conditions of employment is sufficient for contract-bar purposes even though it is contemplated that formal execution will take place at a later date. Moreover, they noted that, since the signing of a contract with an initial is no less certain an event than signing with full signature, contrary to the dissent, the finding in this case does not "muddy" the circumstances for determining contract bar.

Finally, the majority found that the minor variations between the initialed agreement and the final document were due in part to inadvertence and formal amendment which did not, in any event, indicate that the initialed agreement lacked finality or that its terms were insufficient to govern the parties' relationship. Accordingly, the majority concluded that as the initialed agreement represented the final agreement of the parties setting forth substantial terms and conditions of employment sufficient to stabilize the bargaining relationship, it constituted an effective collective-bargaining agreement barring the decertification petition.

Member Penello, dissenting, would have found that the initialing of the agreement insufficient under *Appalachian Shale, supra*, to bar the decertification petition. In his view, the majority's finding was both inconsistent with the letter and purpose of *Appalachian Shale* and "demonstrably wrong as a matter of fact." Noting the Board's language in *Lane Construction Corp.*[30] that to constitute a bar to an election a contract must be "fully executed, signed and dated prior to the filing of the petition," Member Penello found that there was no question that the parties here did not intend the initialing of the agreement to constitute signing and execution of the contract because, after various revisions, the parties scheduled the actual signing at a later date. In his opinion, the parties viewed the initialing of a "tentative agreement" and the signing of the collective-bargaining agreement as separate and distinct acts. Thus, he found no realistic basis for the majority's conclusionary observation that the initialing constituted a sufficient signature for contract-bar purposes.

In Member Penello's opinion, more important than the lack of factual support for the majority's decision is the "undesirable precedent set by

[30] 222 NLRB 1224 (1976)

the majority, which charts a return to the confusion of the pre-*Appalachian Shale* era." Instead of a direct and simple requirement that to bar a petition a contract be signed by all parties, in his view the Board now has a rule which "says that whatever a Board majority happens to regard as a 'sufficient signature' will serve that purpose." Member Penello found that this approach will result in uncertainty among employees, entirely unnecessary litigation, and holds out the prospect of employers and incumbent unions raising all sorts of unsigned agreements as contract bars in order to delay or defeat the exercise of employee rights.

In *Schaetzel Trucking*,[31] a decertification petition was filed requesting an election in a unit consisting of all the employer's drivers. In 1970, the employer and the union had signed a National Master Freight Agreement (NMFA) covering the unit employees. The agreement provided, *inter alia*, that "the Associations and employers, parties to this agreement, acknowledge that they constitute a single National Multi-employer collective bargaining unit" and that the "parties further agree to participate in joint negotiations of any modification or renewal of this [agreement] and to remain a part of the multi-employer, multi-union bargaining unit." In 1976, the employer joined a statewide dairy employer association, called the Wisconsin Milk Transport Council (WMTC), and agreed to be bound by the terms of any agreement between this association and the union. Thereafter, the union and the association entered into an agreement called the Wisconsin Supplemental Agreement (WSA), effective through March 31, 1979, which, *inter alia*, expressly adopted the terms of the 1976–79 NMFA.

In early December 1978, the union sent letters to signatory employers and employer associations to the then-current NMFA notifying them that negotiations for a successor agreement would begin with a December 14 meeting. The employer denied ever receiving such a letter and there was no evidence that representatives of the WMTC received the letter or attended either the December 14 meeting or one held on January 23, 1979. In any event, by letter dated January 23, 1979, the employer informed the union that it was withdrawing from "any and all multiemployer units . . . to which it may belong . . . including, but not limited to" the WMTC. The letter also expressed the employer's willingness to bargain with the union on an individual basis. In subsequent correspondence, the employer's counsel repeatedly informed the union that he represented all past members of WMTC, who were now members of a new association, and that this association was authorized to negotiate with the union for all members but on an individual basis.

[31] 250 NLRB No 44 (Chairman Fanning and Members Penello and Truesdale, Member Jenkins dissenting)

On the basis of the foregoing facts, a majority of the Board found the requested unit appropriate and directed an election. They rejected the union's contention that the employer was part of a multiemployer bargaining unit and that its attempted withdrawal was untimely because negotiations for a successor agreement had already begun. Initially, the majority found that, although the employer signed the NMFA in 1970, it did not become a member of any employer group whose representatives were involved in the negotiations of that agreement or of successor agreements. They noted that adoption of an area contract in itself was insufficient to make an employer part of a multiemployer unit,[32] even when the contract contains a "one unit" clause similar to the one in the NMFA.[33] Thus, absent a showing either that the employer or its authorized representatives participated in subsequent NMFA negotiations or in some other manner indicated an unequivocal intention to pursue a group course of action with regard to labor relations, the employer was not barred from insisting on individual bargaining. In this regard, the majority found that the employer did not participate in national or regional bargaining [34] with the union. They further found that WMTC had merely negotiated modifications to the already negotiated 1976 NMFA and that, consistent with the WMTC's lack of participation in national and regional negotiations, it was not listed as a party to the applicable agreements. Thus, the majority concluded that neither the employer nor its only authorized bargaining representative had engaged in national or regional bargaining.

With respect to whether the employer had expressed an intention to pursue group action, the majority found that, on the contrary, the employer's actions in giving notice of its intention to pursue a separate course well in advance of the March 31 expiration of the NMFA, combined with its subsequent conduct consistent with this expressed intention, "clearly indicated an unequivocal intention not to become part of any multiemployer unit."

Finally, the Board majority found that, whether or not the employer was part of a state multiemployer unit through its membership in WMTC, no new negotiations for a successor contract to the WSA had begun at the time the employer withdrew from that association and, thus, it timely withdrew from the WMTC unit.

Member Jenkins, dissenting, noted that the employer both signed an NMFA which included the single bargaining unit language and, as a member of the WMTC, later agreed to be bound by the Wisconsin Supplemental Agreement (WSA), which expressly adopted the terms of

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[32] Citing *Earl Gordon, d/b/a Gordon Electric Co* , 123 NLRB 862 (1959)

[33] Citing *Ruan Transport Corp* , 234 NLRB 241 (1978)

[34] The union had also contended that the employer was part of a regional multiemployer group under the Central States Area Iron and Steel and Special Commodity Rider (CSIS) The majority found no evidence to indicate that negotiations for a new CSIS had commenced at the time the employer sought to withdraw its authorization from WMTC

the NMFA without modifying the bargaining unit language. Accordingly, he would have found that the employer had aligned itself with group rather than individual action and was part of the NMFA bargaining unit.[35] Inasmuch as the employer failed to give timely notice of its withdrawal from the NMFA bargaining unit, Member Jenkins would have dismissed the petition.

E. Unit Differentiations

1. Health Care Institution Unit

In *Newton-Wellesley Hospital*,[36] the Board had occasion to consider the appropriateness of a unit of all registered nurses at the employer's hospital in light of the Ninth Circuit's decision in *St. Francis Hospital of Linwood*.[37] In *St. Francis*, the Board denied review of a regional director's decision which found appropriate a unit of registered nurses, despite the fact that the hearing officer had excluded the employer's evidence in support of a unit of all professionals. In a subsequent summary judgment case,[38] the Board noted that, by denying review, it had implicitly found that the employer's proffered evidence was irrelevant.

In denying enforcement to the Board's bargaining order, the court held, *inter alia*, that the Board's decision in *Methodist Hospital of Sacramento*,[39] and *Mercy Hospitals of Sacramento*,[40] upon which the regional director had relied, had improperly established an irrebutable presumption in favor of certain units and that such *per se* rule was unjustified. The court found that, to the extent that such a rule precluded an employer from presenting evidence of the inappropriateness of a registered nurses unit, its application raised questions of fairness and ran afoul of the congressional admonition against proliferation of bargaining units in the health care industry.

The Board unanimously concluded that, to the extent that its decision in *St. Francis* may be read to establish such an irrebuttable presumption, without regard to particular circumstances it should be disavowed. It noted that such a *per se* approach to unit determinations is inconsistent with the Board's 9(b) responsibility to decide "in each case" whether the requested unit is appropriate and might also result in the Board's giving insufficient attention to Congress' admonition with respect to proliferation of bargaining units in the health care industry.

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[35] Citing his dissenting opinion in *Ruan Transport Corp*, *supra*.

[36] 250 NLRB No 86 (Chairman Fanning and Members Jenkins, Penello, and Truesdale)

[37] 601 F 2d 404 (9th Cir 1979), denying enforcement of 232 NLRB 32 (1977)

[38] 232 NLRB 32 (1977)

[39] 223 NLRB 1509 (1976)

[40] 217 NLRB 765 (1975), enforcement denied on other grounds 589 F 2d 968 (9th Cir 1978), cert denied 440 U S 910 (1979)

The Board then addressed the issue of the circumstances, if any, under which a separate unit of registered nurses may be found appropriate. Noting that the court's decision in *St. Francis* urged that the Board's traditional community-of-interest analysis as applied in other industries is "not entirely controlling" in the health care industry, and substituted a "disparity of interest" test, the Board noted that the court's disagreement with the Board's approach "may be largely semantic." It pointed out that its inquiry into the issue of appropriate units, even in the nonhealth care industries, never addresses, solely and in isolation, the issue of community of interest, since numerous groups of employees may be said to have interests "in common." Rather, the inquiry necessarily encompasses a further determination as to whether the interests of the group sought are "sufficiently distinct" from those of other employees to warrant a separate unit. The Board suggested that the court's test of "disparity of interests" is, in practice, already encompassed in the Board's community of interest analysis.

The Board further found that the legislative history of the health care amendments clearly does not require the Board to forego a consideration of the community of interest among employees in the health care industry. At the same time, it recognized that such an evaluation must accommodate the admonition to avoid the proliferation of bargaining units and observed that such an accommodation is reflected from the number of situations in the health care field where the Board refused to approve units that in any other context would amount to appropriate units.[41]

On the issue of registered nurses units, the Board unanimously reaffirmed its opinion first expressed in *Mercy Hospitals*, *supra*, that, giving full and due regard to the legislative history of the health care amendments, registered nurses can, and in this case did, possess such a community of interest as to make their separate representation appropriate.[42] In finding that such a registered nurses unit appropriate in this case, the Board relied on the fact that (1) the vast majority of nurses were administratively separated in a nursing division as required by state law and were subject to common supervision; (2) they have close and continuous contact with one another, with less frequent contact with most other professionals; (3) they had similar education, training, and experience and must possess the same license; (4) unlike more specialized professionals, they had the opportunity to and in fact did transfer and interchange throughout the various units of the hospital; and (5) their patient care responsibility and contact was unique compared to other professionals.

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[41] The Board reviewed several decisions which it considered illustrative of this fact E g , *St Catherine's Hospital of Dominican Sisters of Kenosha Wisconsin*, 217 NLRB 787 (1975), *Levine Hospital of Haywood*, 219 NLRB 327 (1975), *Kaiser Foundation Hospitals*, 219 NLRB 325 (1975), *Duke University*, 217 NLRB 799 (1975)

[42] Member Penello emphasized that, in agreeing with his colleagues, he believes that registered nurses can, and in this case did, possess an "exceptionally high degree of community of interests" and, therefore, meet the standard for separate representation which he believes is required by the legislative history of the health care amendments

Additionally, for the unit determination, the Board noted that the petitioning union in this case represents units consisting solely of registered nurses at 43 other health care institutions in Massachusetts. Finally, the Board found that, although unit size is not a controlling factor in unit determinations, the fact that the unit found appropriate includes approximately three-fourths of the employer's professional employees, coupled with the Board's precedent of refusing separate representation for any of the other groups of professionals at the hospital at issue,[43] insures that collective bargaining among professionals will occur in a maximum of two substantial in-size units, thereby serving the congressional admonition against unit proliferation.[44]

2. Separate Unit Inappropriate

In *Clinton Corn Processing Co., a Div. of Standard Brands*,[45] the petitioning union sought a unit composed of certain boiler operators and water and waste treatment operators at the employer's corn syrup and byproducts plant, but excluding other process control technicians, quality control employees, and service and maintenance employees. A Board panel unanimously held, however, that the employer's corn milling operation was a highly integrated production process which involved substantial functional and operational integration among employees sharing a community of interest of such a magnitude as to preclude the separate unit requested. In so doing, it found, *inter alia*, that the training, work schedules, and functions of those employees in the unit sought did not differ substantially or materially from the training, work schedules, and functions of many of the process control technicians the petitioner wished to exclude from the unit. The panel further found that a substantial amount of functional interchange and cross-training existed among all employees and that all employees shared the same wage schedule, seniority, benefits, personnel policies, and transfer and training opportunities. Accordingly, the panel concluded that only an overall unit was appropriate.

In *Proctor & Gamble Paper Products Co., a Div. of Proctor & Gamble Co.*,[46] a majority of a Board panel held that a requested craft unit of the employer's electrical support technicians or, alternatively, all technicians performing electrical maintenance work, did not constitute an appropriate unit. With respect to the electrical support technicians, they found

[43] These groups included, *inter alia*, social workers, medical technologists, respiratory and physical therapists, pharmacists, psychologists, and mental health counselors

[44] The Board noted that, with respect to the nurses serving as instructors in the school of nursing, it was arguable that, but for the legislative history, a separate unit of these nurses would be appropriate However, the Board found the congressional admonition precluded such a result and found these employees to be more properly included in the nurses unit

[45] 251 NLRB No 133 (Chairman Fanning and Members Jenkins and Truesdale)

[46] 251 NLRB No 77 (Members Jenkins and Penello, Chairman Fanning dissenting)

that, although these employees were the most highly skilled electricians at the plant, performed electrical work almost exclusively, and were separately supervised, the 200 other technicians sought to be excluded also performed a substantial amount of electrical work. The majority further found that the support technicians were neither licensed nor required to be journeymen and that, since over one-half of the electrical work performed by the electrical technicians was done as part of a "team effort" with other technicians, they performed as part of a team effort and not as separate craftsmen.

In addition, the panel majority found that the petitioning union's alternative unit request of all electrical maintenance technicians was also inappropriate since, except for the electrical support technicians, the other technicians who comprised this group spent only a small portion of their time performing electrical work. They concluded that these technicians appeared even less than the support technicians to constitute true craft electricians. In addition, the majority found the unit inappropriate since the maintenance technicians did not constitute a readily identifiable group of employees separate and distinct from the other technicians. Accordingly, the union's petition was dismissed.

Chairman Fanning, dissenting, would have found a unit of all electrical support technicians an appropriate craft unit for the reasons set forth in the regional director's decision, which emphasized the lack of bargaining history in a plantwide unit at this facility; the union's specialized experience representing maintenance electricians; the fact that the electrical support technicians were highly skilled electricians and exercised substantial independent judgment in the performance of their work; the fact that they were given training in electrical work and used tools of the trade not used by other employees; and the fact that they were primarily supervised within their own craft lines.

F. Conduct of Election

Section 9(c) (1) of the Act provides that where a question concerning representation is found to exist pursuant to the filing of a petition, the Board shall resolve it through a secret-ballot election. The election details are left to the Board. Such matters as voting eligibility, timing of elections, and standards of election conduct are subject to rules laid down by the Board in its Rules and Regulations and in its decisions. Elections are conducted in accordance with strict standards designed to insure that the participating employees have an opportunity to register a free and untrammeled choice in the selection of a bargaining representative. Any party to an election who believes that the standards have not been met may file timely objections to the election with the regional director under whose supervision it was held. The regional director may either make an

administrative investigation of the objections or hold a formal hearing to develop a record as the basis for a decision, as the situation warrants. If the election was held pursuant to a consent election agreement authorizing a determination by the regional director, he will then issue a final decision.[47] If the election was held pursuant to a consent agreement authorizing a determination by the Board, the regional director will issue a report on objections which is subject to exceptions by the parties and decision by the Board.[48] However, if the election was originally directed by the Board,[49] the regional director may either (1) make a report on the objections, subject to exceptions, with the decision to be made by the Board, or (2) issue a decision, which is then subject to limited review by the Board.[50]

Several cases decided by the Board in this report year concerned the adequacy of an employer's posting of the Board's official notices of election. In *Kane Industries, a Div. of Chromalloy American Corp.*,[51] the employer, due to a loss of business, closed its plant and laid off all its employees shortly before a scheduled election. On the same day, the Board's regional office mailed notices of election to the employer, which were immediately posted in conspicuous places. However, since the plant was closed when the notices were received, the employees' first and only opportunity to read the notices was on the day of the election. Nevertheless, through handbills and campaign literature distributed by the petitioning union and the employer, the employees were apprised of the date, time, and place of the election and the fact that it would be conducted by secret ballot. Approximately 95 percent of the eligible voters voted in the election. A Board majority refused to accept the regional director's recommendation to set aside the election. Members Penello and Murphy noted that it was undisputed that the employer complied with the regional office's posting instructions and there was no evidence that employees were unaware of or misunderstood their rights or were prevented from voting by the fact that they did not seek the notices until the day of the election. In their view, the fact that approximately 95 percent of the eligible voters voted indicated that the employees were well aware of the time, place, and date of the election. In addition, they noted the lack of bad faith on the employer's part in the manner in which the notices were posted. Finally, Member Penello also pointed out that the result was consistent with his dissenting opinion in *Kilgore Corp.*,[52] where he disagreed with the majority's finding that the employees there were not provided with sufficient opportunity to read the election notices. While

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

[48] Rules and Regulations, secs 102 62(b) and 102 69(c)

[49] Rules and Regulations, secs 102 62 and 102 67

[50] Rules and Regulations, sec 102 69(c) and (a)

[51] 246 NLRB No 111 (Members Penello and Murphy, Member Jenkins concurring; Chairman Fanning and Member Truesdale dissenting)

[52] 203 NLRB 118 (1973), enforcement denied 510 F 2d 1165 (6th Cir 1975)

Member Murphy indicated that she would have overruled *Kilgore*, she stated that the Board, pursuant to its rulemaking authority, should adopt an explicit requirement that election notices be posted at least 2 full working days prior to the election.

Member Jenkins, concurring in the result, found *Kilgore* distinguishable in that, unlike the employer in *Kilgore*, the employer in this case did what the Board agent told it to do and did it promptly and properly. He noted that the employer did not interfere with the employees' right to information but instead made additional efforts to see that they got the election information. Member Jenkins concluded that since the impact of the late posting was plainly not attributable to any impropriety by the employer or to any departure from Board rules and standards governing elections, the election should not be set aside.

Chairman Fanning, dissenting, would have set aside the election. He found that, since the notice of election contains information concerning employee rights under the Act, election procedures, unit description, and eligibility rules, it is important that employees have sufficient time in advance of the election to read and discuss the matters contained therein. He found that the employees in this case had no such opportunity. Pointing out that in *Kilgore*, nearly 100 percent of the eligible voters cast ballots but the election was nevertheless set aside, Chairman Fanning found that the Board majority, by placing reliance on the fact that 95 percent of the eligible voters voted, was *sub silentio* overruling *Kilgore*. He also noted that the Employer's good faith or lack thereof should not be an issue in these cases.

Member Truesdale, dissenting, stated that in the absence of an appropriate rule specifying the time and place for posting, he would adhere to *Kilgore* and look to the facts of each case. He found that, in view of the size of the unit (approximately 117) and the fact that the employees had no opportunity to view the notice other than the very day of the election, the voters were not afforded a sufficient opportunity to read and discuss the material contained in it. Therefore, he would set the election aside.

In *Printhouse Co.*,[53] a Board majority held that the employer's failure to post the Board's official notice of election until 2 days prior to the date of the election did not warrant setting the election aside. Member Penello, relying on his dissent in *Kilgore*, found that, since all eligible unit employees except one who was hospitalized voted, and there was no evidence that employees were unaware of or misunderstood their rights or the procedures involved in the election, the timing of the posting was not such that it warranted setting aside the election.

Member Murphy would have overruled *Kilgore* but agreed that the facts did not warrant setting aside the election, particularly relying on the fact that virtually all of the eligible voters in fact voted. In addition,

[53] 246 NLRB No 112 (Members Penello, Murphy, and Truesdale, Chairman Fanning and Member Jenkins dissenting)

she would have had the Board explicitly require that, in the future, election notices be posted in appropriate places at least 2 full working days prior to the election, and that an employer's failure to timely post the notices would *prima facie* be considered objectionable and warrant setting the election aside unless, as in the present case, virtually all of the eligible employees in fact voted and no basis existed for concluding that the employees as a group did not comprehend the time, place, procedures, and purpose of the election.

Member Truesdale, in the absence of an appropriate Board rule specifying the time and place of official election notice posting, would continue to adhere to the principles established in *Kilgore* and would look to the facts of each case to determine whether the employees had sufficient opportunity to be informed of the details of the election, and their rights under the Act, and to discuss the issues of the election. He concluded that the posting in this case was sufficient to achieve these ends, noting particularly the small size of the unit involved, the undisputed conspicuous nature of the notice posting, and the fact that all but one eligible employee, who was hospitalized, voted in the election. Member Truesdale found the case distinguishable from *Kilgore*, *Congoleum Industries*,[54] and *Singer Co.*,[55] noting that in those cases the units were considerably larger and noting further that, in *Singer Co.*, the official notice had not been posted at all in one of the employer's facilities.

Chairman Fanning dissented for the reasons set forth in his dissent in *Kane Industries* [56] and considered the Board's holding a departure from the holdings in *Kilgore* and its successor cases. In his view, posting of the notices 2 days before the election, as the employer did here, could not adequately satisfy the stated purpose of the notice posting.

Member Jenkins, dissenting, found *Kilgore* controlling and would have set aside the election because the employer did not post the election notices properly.

Finally, in *Associated Air Freight*,[57] a panel majority set aside an election when the employer failed to post the Board's official notice of election until approximately 2 days before the election. In so doing, the majority of Chairman Fanning and Member Jenkins noted that Board precedent was not changed by *Printhouse*, where the Board majority refused to set aside an election despite an allegation of late posting since Member Truesdale in that case indicated his adherence to the principles established in *Kilgore*. They further found *Printhouse* distinguishable and thus not controlling, because the employees in this case could not have been reasonably afforded an opportunity to review the notice prior to election day in view of their various difficult work schedules.

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[54] 227 NLRB 108 (1976)

[55] 238 NLRB 264 (1978)

[56] 246 NLRB No 11 See discussion, *supra* at p 71

[57] 247 NLRB No 158 (Chairman Fanning and Member Jenkins, Member Penello dissenting)

Member Penello, dissenting, relied on his dissent in *Kilgore*. Noting that it is the burden of the party filing an objection to establish that the conduct objected to affected the election, he found that there was no evidence that employees were unaware of or misunderstood their rights or that any employees were foreclosed from voting because they were unaware of the date, time, and place of the election. He found no essential difference between the facts of this case and those in *Printhouse* and, accordingly, would not have set the election aside.

In *Flo-Tronic Metal Mfg.*,[58] a number of the employer's employees in the unit were Spanish and understood no English. Although the parties had agreed that bilingual notices would be posted, due to an error the notices posted contained a Spanish translation only as to the unit description, the place, date, and time of the election, and the sample ballot. A Board panel held that the election should be set aside, noting that the Board's official election notice contained important information concerning employees' rights, the purpose of which is to alert them as to their rights under the Act and to warn unions and management alike against conduct impeding a free and fair election and that this information was only in English. For those employees who understood no English, the posting of this notice, the panel found, was essentially the equivalent of posting a partial notice with important statements left out. Accordingly, the panel concluded that the failure to include a full statement of rights of employees in both English and Spanish as agreed to by the parties constituted interference with the election which required it be set aside.[59]

In *Natl. Medical Hospital of Compton, d/b/a Dominguez Valley Hospital*,[60] the employer, on the day of the election, made periodic announcements of the polling hours over its public address system one of which incorrectly stated the polls would close at 4:30 p.m. rather than 4 p.m. A few minutes later, the correct time was announced, although without reference to the previous incorrect announcement. Five or six voters who appeared at the polls after 4 p.m. were permitted to cast challenged ballots. However, there was also evidence that at least one eligible voter—and possibly another—appeared after the polls were officially closed at 4:15 and was not permitted to vote under challenge. In all, 47 eligible voters did not vote in the election. A majority of a Board panel, reversing the acting regional director, refused to set aside the election. They found "unduly speculative" the acting regional director's conclusion that the incorrect announcement, combined with the Board

[58] 251 NLRB No 205 (Chairman Fanning and Members Penello and Truesdale)

[59] In so doing, Chairman Fanning and Member Truesdale found this case distinguishable from the situation in *Norwestern Products*, 226 NLRB 653 (1976), because the parties agreed to an English notice and the use of English could not have had an adverse impact on the election Member Penello, who dissented in *Norwestern*, found no significant distinctions between these cases since in both cases the failure to assure foreign language speaking employees the opportunity to make an informed choice interfered with the election

[60] 251 NLRB No 119 (Members Jenkins and Penello, Member Truesdale dissenting in part)

agents' conduct in not permitting one or two employees to vote, resulted in uncertainties compromising the integrity of the election process. Noting that there was no evidence that the 47 unaccounted-for voters were misled by the one incorrect announcement, the majority concluded that it would be unreasonable to find that the inadvertent and minimal deviation in the instant case of one incorrect announcement, weighed against numerous correct announcements and posted notices, would so confuse voters as to prevent them from attempting to vote if they so intended, or from seeking clarification as to the correct closing time. Accordingly, the panel majority concluded that, absent a reasonable basis for believing that a significant number of the approximately 47 eligible employees who did not cast ballots were misled or confused by one incorrect announcement, the election should not be set aside. In so concluding, the majority distinguished *Bonita Ribbon Mills & Brewton Weaving Co.*, 87 NLRB 1115 (1949), upon which their dissenting colleague relied, where the polls were closed early contrary to Board rules.

Member Truesdale, dissenting, noted that one employee recalled hearing the election announcements over the public address system. He found that, in view of the fact that 1 and possibly 2 of the 47 eligible voters who attempted to vote after 4 p.m. heard the incorrect announcement, it appeared neither unreasonable nor unduly speculative to conclude that other eligible employees who did not cast ballots were similarly confused by the incorrect announcement. Member Truesdale would have found that where, as here, it was clear that the votes of the employees possibly disinfranchised by the irregularity were sufficient in number to affect the outcome, "it seems obvious that the atmosphere in which the election was conducted raises sufficient doubts as to the validity of the results as to require that the election be set aside and a new election directed."

In *Affiliated Midwest Hospital, d/b/a Riveredge Hospital*,[61] decertification petitions were filed in three separate units. The parties thereafter entered into Stipulations for Certification Upon Consent Election which, however, did not contain formal descriptions of the bargaining units. Instead, the stipulations incorporated by reference lists containing the names of eligible employees and their specific job classifications in each of the units involved—lists commonly referred to as *Norris-Thermador* lists.[62] The parties stipulated that these lists expressly resolved "any and all issues of eligibility." Prior to the election, the employer notified the regional office that the unit descriptions in the notice of elections did not conform to the agreed-upon job descriptions, but no changes were made. The union prevailed in two of the three decertification elections. Based on the employer's objections to two elections that the notice of election caused employee confusion, the regional director

[61] 251 NLRB No 29 (Chairman Fanning and Members Penello and Truesdale)
[62] 119 NLRB 1301 (1958)

recommended that approval of the stipulations be revoked and the three elections be set aside. In so doing, he found, *inter alia*, that the *Norris-Thermador* lists were inadequate substitutes for an agreed-upon description of the appropriate units because they are concerned only with the issue of voter eligibility and do not define the appropriate units. Contrary to the recommendation, a Board panel unanimously held that in this case the *Norris-Thermador* lists, in addition to delineating the identity of the employees eligible to vote, reflected the parties' unit agreements while defining what those units were. The panel also stated that "[w]e basically have no quarrel with the Regional Director's observation that consent election agreements should set forth the unit and should not be approved if they do not do so but where, as here, the agreements have been approved and elections conducted we will look to the circumstances to see if the intent or agreement of the parties as to the unit's composition can be ascertained; and only if after such consideration and the issue still is in doubt, will we declare the agreement defective and the election a nullity." Concluding that in this case the parties had indicated that by the *Norris-Thermador* lists they had agreed upon the units and their composition and had consented to hold elections in the three recognized bargaining units, the panel remanded the case to the regional director for disposition of the employer's and the union's objections.

G. Objections to Conduct Affecting the Election

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

1. Threats Constituting Unfair Labor Practice

In *Caron Intl.*,[63] a majority of the Board adopted an administrative law judge's conclusion that the employer's threat to discharge an employee for his union activity, although a violation of section 8(a) (1) of the Act,

[63] 246 NLRB No 179 (Chairman Fanning and Members Penello and Murphy, Members Jenkins and Truesdale dissenting in part)

did not under the circumstances warrant setting aside the election. They noted that in determining whether certain employer misconduct is *de minimis* with respect to its affecting the results of an election, the Board takes into consideration the number of violations, their severity, the extent of dissemination, the size of the unit, and other relevant factors. The majority found that (1) the conduct complained of in this case was isolated, directed toward a single employee in a unit of approximately 850 employed at 5 different locations at the close of an extensive campaign devoid of any other unfair labor practices; (2) no other employee was present to hear the threat, nor was there evidence that the remarks were overheard or disseminated to any other employees; and (3) the employee involved thereafter sought and received assurances that he could be discharged only for poor job performance. They concluded that under these circumstances the unfair labor practice conduct was too minimal to have interfered with the conduct of a free and fair election.

In response to their dissenting colleagues, the majority emphasized that this conclusion did not result in "the exception swallowing the rule" of *Dal-Tex Optical Co.*,[64] but was instead an application of the limited exception set forth in *Super Thrift Markets, t/a Enola Super Thrift*,[65] with respect to violations from which "it is virtually impossible to conclude that they would have affected the results of the election." They were of the view that the dissent appeared to have confused the *Dal-Tex* point that conduct violative of section 8(a) (1) was *a fortiori* objectionable with evaluation of whether the conduct has affected the results of the election, and, that in so doing, their dissenting colleagues would in effect transform the "*a fortiori*" language of *Dal-Tex* into a *per se* approach and set aside any election where section 8(a)(1) conduct occurred in the critical period.

Members Jenkins and Truesdale, dissenting, would have set aside the election. Noting that a threat to discharge a leading union supporter was "coercion of a most serious nature," they found that, contrary to Board precedent, the majority improperly presumed that this threat was not disseminated to other employees. In their view, the thrust of the *Dal-Tex* decision "was that any Section 8(a) (1) conduct during the critical period results, *'a fortiori'* in substantial interference with an election . . . because the test of conduct which may interfere with the 'laboratory conditions' for an election is considerably more restrictive than the test of conduct which amounts to" a violation of section 8(a)(1).[66] Members Jenkins and Truesdale viewed the majority's position as resulting in the exception of *Super Thrift* swallowing the rule of *Dal-Tex* and considered it an unwarranted and dangerous departure from Board precedent. Finally, they submitted that the majority's incomplete and out-of-context

[64] 137 NLRB 1782 (1962)

[65] 233 NLRB 409 (1977)

[66] *Dal-Tex Optical Co , supra* at 1786–87

quotation of *Dal-Tex* that the Board will "set aside an election where we find that the employer's conduct has resulted in substantial interference with the election" did not support the majority's position. This language referred to employer statements of position which, although protected by section 8(c) from an unfair labor practice finding, would nonetheless be grounds for setting aside an election if found to have resulted in substantial interference with the election. Accordingly, considering the quotation completely irrelevant where, as in the present case, no section 8(c) issue was presented and an 8(a) (1) unfair labor practice was serious and clearly made out, Members Jenkins and Truesdale concluded that the election should be set aside and a second one directed.

Similarly, in *Thermo King Corp.*,[67] a majority of a Board panel held that a statement by one of the employer's foremen to an employee that he would be cutting his own throat if he voted for the union did not warrant setting aside the election. Chairman Fanning, while concluding that the statement was violative of section 8(a)(1), found that single violation insufficient to warrant an inference that it affected the election results. Member Penello found that, although the conduct in question "may have been in contravention of the statute as interpreted by this Board, it was, in the total circumstances of this case, so isolated and insignificant" that he would not use it as a basis for finding a violation, issuing a remedial order, or directing a second election.

In his dissent Member Jenkins agreed with Chairman Fanning that the employer violated section 8(a)(1) but, unlike his colleagues, found that this substantive violation justified setting aside the election citing his dissenting opinion in *Caron Intl., supra*.

2. Misrepresentation of Board Actions

In *Kinney Shoe Corp.*,[68] a majority of a Board panel, adopting the regional director's recommendation, held that certain mischaracterizations made by the petitioning union concerning an informal settlement agreement between the employer and the Board, warranted setting aside a second election. The parties had stipulated to set aside the first election and the employer, prior to the second election and in connection with an 8(a)(1) charge arising out of the first election campaign, had entered into an informal settlement containing a nonadmission clause. In letters and leaflets to employees during the second election campaign, the union stated that (1) "trying to save face," the employer voluntarily agreed both to post a notice "of the Ceased [sic] and Desist Order" and have a second election; (2) "based on these charges and objections, the Government issued a complaint against Kinney's and scheduled a hearing"; and (3) the

[67] 247 NLRB No 48 (Chairman Fanning and Member Penello, Member Jenkins dissenting in part)
[68] 251 NLRB No 78 (Chairman Fanning and Member Jenkins, Member Truesdale dissenting)

"*National Labor Relations Board* ruled that a new election must be held because of your Company's actions." In fact, no complaint was issued, no findings on the merits of the allegations were made by the Board, and no cease-and-desist order was ever issued. The panel majority found that a misrepresentation of this sort was not a misrepresentation of the actions of any party, but, rather, a misrepresentation of the actions of the Board. They reasoned that, once either party has called the Board's actions into question, the only credible response can come from the Board; yet the Board cannot intervene during an election campaign to set the record straight. Accordingly, the majority concluded that a substantial mischaracterization or misuse of a Board document for partisan purposes was a serious misrepresentation which warranted setting the election aside and directing a third one.

Member Truesdale, dissenting, would have overruled the employer's objections. He found this situation was distinguishable from those in which a party had altered a Board document for partisan election purposes [69] suggesting that the Board endorsed a particular change. Rather, it was a situation involving one party's assertion that the Board had found that the other party has committed an unfair labor practice when in fact the Board had not. He reasoned that, although the Board has a responsibility to conduct elections in an atmosphere which, insofar as possible, permits employees to make a free and unfettered choice, this was not to say that the rationale applied in altered document cases should be extended, as here, to the point where the Board adopts a virtual *per se* rule in this area. In Member Truesdale's view, labeling the Union's statement as a mischaracterization of the legal effects of an informal settlement was, in reality, another way of saying that the statements were a material misrepresentation of fact and, as such, should be evaluated against the standards of *Hollywood Ceramics* [70] and *General Knit*.[71] Finally, Member Truesdale disagreed with the Board's holding in *Formco*,[72] upon which the regional director had relied that misrepresentations of this sort were "not amenable to credible or effective response" and found no reason to apply a higher standard to misrepresentations of this kind. He would overrule *Formco*. In his view, the Board was "not the sole repository of truth for the facts in such matters," and there was no reason why the parties could not set the record straight. He found that in this case the employer had no less than 15 days to respond to the union's statement.

In *Allis-Chalmers Corp.*,[73] the petitioning union circulated a leaflet to employees prior to the election concerning an unfair labor practice com-

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[69] Citing *Allied Electric Products*, 109 NLRB 1270 (1954), *Mallory Capacitor Co., a Div of P R Mallory & Co.*, 161 NLRB 1510 (1966)

[70] *Hollywood Ceramics Co.*, 140 NLRB 221 (1962)

[71] *General Knit of Calif.*, 239 NLRB 619 (1978)

[72] 233 NLRB 61 (1977)

[73] 252 NLRB No. 112 (Chairman Fanning and Member Penello, Member Jenkins dissenting)

plaint pending against the employer in connection with the discharge of one of its employees. The leaflet, which was captioned "Company Found Guilty of Wrongful Firing," also stated that "[t]he NLBR [sic] has recommended that Randy Cook [the employee] be put back to work with full back pay." The union won the election and the employer filed objections alleging, *inter alia*, that the statements constituted material misrepresentations concerning the Board's proceeding. The Board adopted the regional director's recommendation that the employer's objection be overruled and certified the union. Thereafter, the case, which was based on the employer's refusal to bargain with the certified union, was remanded by the Fifth Circuit Court of Appeals for clarification of the Board's decision to certify the union in light of *Formco, supra*.

A majority of a Board panel reaffirmed the Board's finding that the Union had not engaged in objectionable conduct affecting the validity of the election. It noted that *Formco* did not establish a *per se* rule for such conduct, but reaffirmed a purpose to protect the Board machinery and documents from abuse and that an election would be set aside when the conduct constituted a "substantial mischaracterization or misuse" of the Board's processes with a potential of placing its neutrality in question. Chairman Fanning found that the union's statements did not constitute a "substantial mischaracterization of the pending unfair labor practice proceeding," reasoning that, although the caption of the leaflet was erroneous, the reference to recommended backpay and reinstatement was "substantially correct" as the complaint, in effect, recommended that the Board order this remedy. Moreover, Chairman Fanning found that the union's statement was part of a campaign leaflet and did not imply that the Board endorsed its partisan position.

Member Penello, noting that he did not participate in *Formco*, and does not adhere thereto, found it unnecessary to decide whether *Formco* could be distinguished. Rather, he relied on his dissenting opinion in *Dubie-Clark Co.*,[74] which involved a statement that the employer had violated the Act when he had not. He pointed out that, as in *Dubie-Clark*, there was no alteration of a Board document, but rather the statement appeared in a campaign leaflet which the employees were "fully capable of identifying and evaluating." Under these circumstances, he concluded that the union's conduct did not interfere with the election.

Member Jenkins, dissenting, found that the leaflet "headline" amounted to a substantial mischaracterization of the Board's proceeding, since it stated that the employer had been found guilty of misconduct when no formal determination had been made. In his view, the union thus interjected into the campaign supposed Board determinations adverse to the employer and, in so doing, placed the Board's neutrality in question. He found that *Formco* involved similar misstatements reasonably

[74] 206 NLRB 217 (1974)

calculated to mislead employees into thinking the Board had judged the employer to have committed unfair labor practices and, thus, concluded that the facts herein fell squarely within the principle of *Formco*. Accordingly, he would have set aside the election.

3. Other Objectionable Conduct

In *Moody Nursing Home*,[75] the employer, on the day of the election, did not follow its normal practice of distributing paychecks at the end of each shift. Instead, shortly before the polls opened and throughout the course of the election, the employees were instructed to pick up their paychecks before voting and were not permitted to vote until they did so. A Board panel unanimously held that, although the employer may accelerate distribution of paychecks to coincide with the start of an election, it did not follow that the employer may condition the right to vote upon an employee first securing his paycheck. Finding that the employees were given to understand that, rather than having an absolute section 7 right to cast their votes for or against union representation, their franchise depended on the sufferance of the employer, the panel concluded that such interference with the employees' expression of free choice warranted setting aside the election.

In *Woodland Molded Plastics Corp.*,[76] a majority of a Board panel held that it was objectionable for the employer to surveil the employees' union activities and to convey the impression that they were being watched. On two occasions, an employer official stood outside its premises, in full view, for 10 to 15 minutes watching the union's nonemployee organizers hand out literature and talk to employees on public property. The majority rejected the employer's contention that union organizers had previously been seen on its property and the sole reason for the observations was to insure that they remained off its property. They found that, although the employer had a legitimate right to keep the union organizers off its property, it offered no plausible explanation as to why it was necessary for its official to prolong his observation and remain outside in full view once he had determined that the union organizers were not on company property as had been reported. The majority found that, under these circumstances, "we can only conclude that [his] purpose . . . was to effectively survey the union activities of the employees and to convey to said employees the impression that they were being watched."

Member Truesdale, dissenting, found that the employer's assertion that the sole reason for observing the activities was to insure that the union organizers remained off company property was both plausible and

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[75] 251 NLRB No 22 (Members Jenkins and Truesdale, Member Penello dissenting in part as to other objectionable conduct)

[76] 250 NLRB No 20 (Chairman Fanning and Member Jenkins, Member Truesdale dissenting)

supported by the record. He noted that the union admitted to having periodically conducted their campaign on the employer's property and, in his view, the union, having chosen to engage in organizational activity at the employer's premises, should have no cause to complain that the employer observed this activity. Noting the absence of any claim that notes were made or photographs taken of this activity, Member Truesdale stated that he was unable to conclude that, merely because the organizers were not on the employer's property during the limited time they were observed, the conduct thereby became unlawful.[77]

In *Cumberland Nursing & Convalescent Center*,[78] a Board panel unanimously held that the employer's objection concerning alleged union electioneering proscribed by *Milchem* [79] did not raise substantial and material issues requiring a hearing. The panel held that the *Milchem* standard, although "strict," was never intended to be transformed into a *per se* rule requiring a hearing in all cases. Rather, the panel held that the party asserting objectionable conduct of the kind proscribed must present a *prima facie* case so as to warrant hearing on this issue and that it was not enough merely to imply or suggest that some form of prohibited conduct has occurred. In the case before it, the panel found that there was no evidence that the union's representative engaged in sustained conversation with employees waiting to vote or that he engaged in electioneering at the polling place. Rather, it was apparent that any remarks made by the union's representative occurred outside the polling area and possibly prior to the opening of the polls. The panel found the employer's evidence incomplete and confusing. Accordingly, it concluded that, even assuming the truth of the employer's assertions, the conduct alleged failed to establish a *prima facie* case of objectionable conduct on the part of the union.

H. State Regulation of Deauthorization Matters

In *Asamera Oil (U.S.)*,[80] a union, which had been certified by the Board, filed a petition pursuant to the Colorado Peace Act (CPA) for "approval of an all-union [union security] agreement election." In the state-conducted election, the employees voted for an all-union agreement, and the State certified that an all-union agreement was, therefore, permissible. Thereafter, the union and the employer executed such an agreement. Approximately 7 months after the election, an employee filed

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[77] Member Truesdale found the situations in *Ravenswood Electronics Corp*, 232 NLRB 609 (1977), and *Shrewsbury Nursing Home*, 227 NLRB 47 (1976), on which the panel majority relied, to be clearly distinguishable from the present case

[78] 248 NLRB 322 (Chairman Fanning and Members Jenkins and Penello)

[79] 170 NLRB 362 (1968)

[80] 251 NLRB No 85 (Member Jenkins and Truesdale, Chairman Fanning concurring)

a deauthorization (UD) petition with the Board seeking recission of the union-security agreement.

A Board panel unanimously held that the petition should be dismissed. Members Jenkins and Truesdale, relying on section 9(e) (2) of the Act,[81] found that it was intended to preclude the holding of a deauthorization election sooner than 12 months after a valid union authorization election and concluded that the UD petition, having been prematurely filed, was barred by the Colorado State union authorization election held 7 months before and, therefore, should be dismissed.[82]

Chairman Fanning, concurring, would also dismiss the petition, though on different grounds. He observed that the 1951 amendment to section 9 (e) (1), which eliminated the requirement of a Board-conducted union-shop authorization poll before a union shop legally could be created, "necessarily left its mark on the scope of the Section 9(e) (2) proscription." Accordingly, in his view, *Gilchrist* could not now be relied on to support the proposition that section 9(e)(2) bars a deauthorization election if, within the preceding 12 months, a state has conducted an election of a type not provided for in the Act. Rather, Chairman Fanning construed section 9(e) (2) to proscribe the holding of two section 9(e) (1) deauthorization elections, either by a state or the Board, in the same year and, thus, section 9(e) (2) did not operate as a bar to the UD petition in this case. However, he agreed that the petition should be dismissed. In his view, the Colorado regulatory scheme with respect to union shops was a "reasonable exercise" of the State's section 14(b) license to regulate union-security agreements. He reasoned that, although the statute's time limitations on union-shop deauthorization petitions exceeded those established by the Board,[83] they were part and parcel of the restrictive regulation of union shops Colorado also had enacted; they did not attempt to negate Federal policy authorizing challenges to union security; and, to the extent they permitted such challenges (but only at a later date than Federal law would require) "they do not involve a subject matter which rises to the level of a Federal labor policy, at least one sufficient to justify upsetting Colorado's regulatory scheme." Accordingly, he concluded that the employee petitioner should be left to the forum in which the right to vote on union security was given originally and, on that basis, the petition should be dismissed.

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[81] Sec 9 (e) of the Act provides

(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a)(3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held

[82] Citing *Gilchrist Timber Co* , 76 NLRB 1233, 1234 (1948)

[83] Chairman Fanning noted that, unlike the Act, the Colorado statute requires that a petition to rescind the union-shop authorization may be filed only "between one hundred twenty and one hundred five days prior to the expiration of the collective bargaining agreement or prior to the triennial anniversary of the date of such agreement "

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. Threats to Employees

In *W. F. Hall Printing Co.*,[2] a Board panel found that the Respondent threatened and coerced its employees in violation of Section 8(a)(1) of the Act, by distributing to the employees a letter which stated in pertinent part, "If anyone should come to you and ask you to sign a union

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

[2] 250 NLRB No 122 (Members Jenkins, Penello and Truesdale)

authorization card, I am asking you to refuse to sign it. If any employee should harass you or try to pressure you into signing a card, feel free to report it to your Foreman and they will take immediate action to stop the threats and harassment." Finding the quoted language of the employer's letter substantially similar to the language found unlawful in *Colony Printing & Labeling*,[3] the panel held that the letter was violative of the Act inasmuch as it had the dual effect of (1) encouraging employees to report to the employer the identity of card solicitors who acted in any way subjectively offensive to the solicited employee; and (2) simultaneously discouraging the protected organizational activity of the card solicitors. In so holding, the panel rejected the employer's contention that the letter did not affirmatively attempt to persuade employees to identify union adherents because the employer merely advised employees that it would protect those persons who sought to report " 'threats or harassment'—conduct which is not protected by the Act."

In *J. H. Block & Co.*,[4] an administrative law judge found that an employer did not act unlawfully by posting, shortly after the Union began its organizational campaign, a notice to employees which provided, *inter alia*, that if any employee in the plant was put under pressure to join the union, the employee should inform the employer who would see that such conduct was stopped. In so finding, he relied on reports received from two employees prior to posting the notice concerning threats of violence by the union's organizing committee against an employee for protesting solicitation of authorization cards during working hours and concerning rumors circulating that employees would be fired by the employer if they signed cards and joined the Union, and that they would be fired by the union if they voted against it.

Concluding that neither instance of reported conduct involved pressure on employees to join the union, the Board panel found, contrary to the administrative law judge, that, in any event, the employer's broadly worded notice had the potential dual effect of encouraging employees to report to the employer the identity of card solicitors who approached employees "in a manner subjectively offensive to the solicited employees, and of correspondingly discharging card solicitors in their protected organizational activities." Accordingly, the panel found the instruction to the employees unlawful as violative of section 8(a)(1) of the Act.

Similarly, *Colony Printing & Labeling*,[5] presented the Board with the issue of whether certain statements made by the employer in a letter to its employees constituted illegal threats or free speech protected by the first amendment to the United States Constitution, and by sections 8(c)

[3] 249 NLRB 223 (Chairman Fanning and Members Penello and Truesdale) The letter in that case stated, "If anyone tries to cause you trouble at your work, or puts you under any kind of pressure to join a union, you should let the company know of it immediately, and we will promptly stop this illegal and immoral practice " (249 NLRB at 225)

[4] 247 NLRB No 41 (Members Jenkins, Penello, and Truesdale)

[5] 249 NLRB 223

and 9(a) of the Act. The letter provided, *inter alia*, that employees would lose their right to talk to the employer if they signed union authorization cards. The employer argued it truthfully informed the employees that, if they chose the union to represent them, the employer would be required by section 9(a) to deal only with the union. Disagreeing with the employer's free speech arguments, the Board panel found the employer's reliance on section 9(a) misplaced. The panel noted the provisos to that section, which grant employees the right to present grievances to their employer and have their grievances adjusted, without the intervention of the bargaining representative, as long as such adjustment is not inconsistent with the terms of a prevailing collective-bargaining agreement, and the representative is afforded an opportunity to be present at the grievance adjustment. Hence, the panel concluded that, contrary to the employer's claim, it was not the "truth" that, when an employee signs a union authorization card (as the letter stated), or even when a union is chosen as bargaining representative, the employees give up their right to talk to the employers. Accordingly, the panel found these misstatements of the law constituted threats to curtail employee rights and discontinue employee benefits in reprisal against a choice by its employees to be represented by a union and that these misstatements violated section 8(a)(1) of the Act.

2. Union 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* [6]—the Supreme Court upheld the Board's determination that section 7 of the Act gives an employee the right to insist on the presence of his union representative at an investigatory interview which he reasonably believes will result in disciplinary action. The Court concluded that the Board's holding "is a permissible construction of 'concerted activities . . . for mutual aid or protection' by the agency charged by Congress with enforcement of the Act . . . ."

[6] *N L R B* v *Weingarten*, 240 U S 251, *Intl Ladies' Garment Workers' Union, Upper South Dept , AFL–CIO* v *Quality Mfg Co* , 420 U S 276

During the report year, the Board had occasion to apply the principles set forth in *Weingarten* and *Quality* in a number of cases. The full Board issued a significant decision in *Baton Rouge Water Works Co.*,[7] where it considered the issue of when and to what type of interviews *Weingarten* rights are applicable. The stipulated facts in that case concerned the discharge of a probationary employee in the employer's general office department who, under the collective-bargaining agreement between the employer and the union, was probationary for the first 120 days of employment. The agreement provided that the probationary employees were not entitled to the protections of the agreement and also contained a *Weingarten*-type provision.

According to the stipulation, shortly before the employee's probationary period was over, the employer decided to discharge her because she was not "working out." Three days later, she was called into an office and discharged. When she protested that the discharge was unfair, she requested, but was denied, union representation because of the employer's belief that the collective-bargaining agreement did not cover probationary employees. A discussion of the reasons for her discharge ensued before the employee left.

In the course of their determination herein, the Board majority decided to overrule the earlier Board decision in *Certified Grocers* which was denied enforcement by the U.S. Court of Appeals for the Ninth Circuit [8] because they concluded that it was wrongly decided on the facts and because they agreed that *Weingarten* did not require of a right of representation when the purpose of the interview was merely to inform the employee that he was being disciplined. The majority summarized their current position as follows:

> [A]s long as the employer has reached a final, binding decision to impose certain discipline on the employee prior to the interview . . . no Section 7 right to union representation exists under *Weingarten* when the employer meets with the employee simply to inform him of, or impose, that previously determined discipline. To the extent that the Board has in the past distinguished between investigatory and disciplinary interviews, in light of *Weingarten* and our instant holding, we no longer believe such a distinction to be workable or desirable. It was this distinction which *Certified Grocers* abandoned, and to that extent we still believe the decision was correct. Thus, the full purview of protections accorded employees under *Weingarten* apply to both "investigatory" and "disciplinary" interviews, save only those conducted for the exclusive purposes of notifying an employee of previously determined disciplinary action.

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[7] 246 NLRB No 161 (Members Jenkins and Truesdale, Member Murphy concurring, Chairman Fanning and Member Penello dissenting)

[8] 227 NLRB 1211 (1977), enforcement denied 587 F 2d 449 (9th Cir 1978)

The Board majority specifically noted that it was *not* holding that there was no right to the presence of a union representative at any disciplinary interview and emphasized that an employee may be entitled to the full panoply of *Weingarten* protection where the employer goes beyond informing the employee of a previously made disciplinary decision. However, they distinguished those situations where, at the employee's behest, the employer engages in conversation with the employee concerning the reasons for the disciplinary action, to which the *Weingarten* protections will not apply.

Applying the above principles to the stipulated facts herein, the majority found that, inasmuch as the employer had reached its decision to discharge the employee 3 days before she was told of that determination in a meeting called solely for that purpose, and its decision was based on facts and evidence obtained prior to that meeting, no *Weingarten* rights attached. This was so notwithstanding the fact that the employee chose to continue the meeting to obtain an explanation for the reasons for her discharge. Accordingly, the majority found no violation of section 8(a)(1) of the Act and concluded that the fact that the employee in question was probationary at the time of the incident had no bearing on its decision and, therefore, it was unnecessary to decide whether the contract provision purporting to waive a probationary employee's *Weingarten* rights was effective.

To conclude otherwise and to continue to apply the holding of *Certified Grocers*, the majority observed, would mean that an employer faced with the possibility that explaining its acts to an employee may result in unfair labor practice proceedings, would likely choose the safer alternative of a return to the "pink slip," a result which would not serve the objectives of enlightened labor relations policies.

While she agreed with the majority on the basic distinction as to when a *Weingarten* right existed, Member Murphy filed a separate concurring opinion to end confusion by defining more precisely what was an interview to which an employee's right to representation attached and what was not. In her opinion, a "correct reading" of *Weingarten* required the Board to distinguish between investigatory interviews and disciplinary actions in determining whether an employee has a right to representation when asked to appear before management. She defined an investigatory interview as an interview intended to gather facts upon which to make a subsequent decision concerning adverse action or one conducted to gather facts or to get an admission from an employee to support a previously made decision. A conference called to apprise an employee of adverse action would not be an investigatory interview. Member Murphy would find that the right to the presence of a representative would attach in any interview where information is sought from the employee, whether called investigatory or disciplinary. She proposed to distinguish

between interviews to secure information and action to impose discipline and, in her view, this distinction comported with the Supreme Court's observation in *Weingarten* that the function of a representative at an investigatory interview was to assist the employee, clarify the facts, or suggest others who may have knowledge of the facts.

Applying this approach Member Murphy concluded that the employee in the instant case was not entitled to representation as the decision with regard to her discharge was made prior to the meeting where the disciplinary action was announced and the employer did not seek to elicit information from the employee to support the decision. Accordingly, she found that the employer's denial of union representation to the employee did not violate the Act.

Chairman Fanning, separately dissenting, disagreed with the majority that employers would be encouraged to return to the use of the "pink slip" with respect to discharges unless the case was dismissed and further challenged the majority's conclusion that a binding decision to discharge the employee had been made before the interview and that the meeting was held solely to inform the employee of it. In his opinion this analysis was erroneous because it assessed the situation as if the employee had not been denied the representation she requested when in fact the employer had converted the meeting from one in which a discharge determination was to be made into a discussion of the employee's work record.

He also expressed concern because there was no certainty that an interview to announce discipline already decided upon would not, as it proceeded, take on the character of an investigation as was done here when there was a discussion of the employee's work record. Chairman Fanning characterized the standard adopted by the majority as "totally unrealistic," since, by placing great emphasis on the decision to discharge having been made in advance of the interview, the majority ignored the fact that the employer controls the asserted decision to discharge as well as its timing. In his view, an employer could discuss with the employee the decision to discharge after denying the employee's request for representation, and, if it did so, the employee's *Weingarten* rights have been violated. Accordingly, he would have found the employee herein had a right to a representative since the employer had discussed the employee's work record after announcing its decision to discharge.

The majority, Chairman Fanning concluded, had also restricted the statutory right recognized in *Weingarten* and abdicated responsibility by relegating determinations of a statutory right to the grievance procedure. By its reliance upon the grievance procedure as the "proper forum," they overlooked the statement in *Weingarten* that, if representation is deferred until an employee files a formal grievance, the value of representation is diminished.

Member Penello also dissenting stated that, contrary to the majority, he would have found an 8(a)(1) violation based on the employer's denial

of the employee's right for union representation at a *disciplinary* interview and compelling her to attend the interview without her union representative, since an employee has a section 7 right to union representation at a disciplinary interview. In his opinion, that right was well established by Board law prior to *Weingarten*, where the Supreme Court, by granting an employee a section 7 right to request the presence of a union representative at an investigatory interview, merely extended the preexisting right of an employee to request the presence of his union representative at a disciplinary interview. Hence, it was Member Penello's view that the majority opinion, in effect, took away from employees a section 7 right which existed prior to *Weingarten*, and upon which the latter case was founded.

From his review of Board case law,[9] Member Penello concluded that, prior to 1972, the Board restricted an employee's section 7 right to request the presence of his union representative to disciplinary interviews and had refused to extend the right to representation to investigatory interviews, until *Quality Mfg. Co.*,[10] in which the Board was presented with a situation where an employee was disciplined *because* he refused to participate in an investigatory interview with his employer in the absence of a union representative. The Board majority found a violation in *Quality* notwithstanding the fact that the interview was investigatory on the theory that an employee's section 7 rights would be undermined if he could only request union representation under penalty of disciplinary action. Subsequently, *Quality* was extended in *Mobil Oil Corp.*,[11] when the Board majority held that the right of an employee to request the presence of his union representative adhered to an *investigatory* interview, if the employee reasonably feared that disciplinary action would result from such interview. Member Penello concluded that the Board extended to investigatory interviews the same right to request representation it afforded employees at disciplinary interviews, thereby seemingly abandoning any attempt to distinguish between the two types of interviews and relying instead on the employee's reasonable fear that an interview might result in disciplinary action.

Although the Supreme Court in *Weingarten* focused solely on the right to request a union representative at an *investigatory* meeting, in Member Penello's view, the court, by affirming the Board's conclusions in *Quality* and *Mobil*, adopted the Board's rationale when it did not eliminate the

[9] Member Penello noted that the Board had first distinguished between investigatory and disciplinary interviews in *Texaco, Producing Div* , 168 NLRB 361 (1967), enforcement denied 408 F 2d 142 (5th Cir 1969), where a violation of the Act was found because an employee was compelled to attend a disciplinary interview without a representative According to him, *Texaco* defined an investigatory interview as one where the employer merely seeks facts and information with no contemplation of disciplinary action, while a disciplinary interview was one where the employer possesses the facts and information and intends to invoke discipline

[10] 195 NLRB 197 (1972) (former Chairman Miller and then Member Fanning and Member Jenkins, former Member Kennedy, dissenting)

[11] 196 NLRB 1052 (1972) (former Chairman Miller) and then Member Fanning and Member Jenkins, former Member Kennedy dissenting)

extant section 7 right to request a union representative at a disciplinary interview. He found therefore that the majority's reliance on *Weingarten* to deny a section 7 right which formed the basis of that decision was not only misplaced, but also a legal impossibility. He was equally unpersuaded by the majority's secondary rationale that by extending *Weingarten* to strictly disciplinary interviews industrial strife would be fostered, inasmuch as permitting an employee to have a union representative present at a disciplinary interview would promote peaceful labor/management relations. In conclusion, Member Penello noted that any possible harm to labor/management relations caused by a return to the "pink slip" would be far outweighed by the practical advantages to be gained by the majority of employers who adhere to *Weingarten.*

In *Southwestern Bell Telephone Co.*,[12] the Board adopted an administrative law judge's findings that the employer did not violate section 8(a)(1) of the Act when it conducted disciplinary interviews with two employees without union representation. In one interview, a supervisor told an employee that a warning was to be placed in his personal file due to the employee's low productivity, while in the second interview another supervisor read to the second employee from a warning form which had been prepared prior to the meeting, a copy of which was given to the employee. In both cases the supervisors had advised the employees to obtain union representation for the interviews; but the employees, being unable to obtain the representation of a designated union steward, had fellow employees attend as their representatives. The administrative law judge in dismissing the 8(a)(1) allegations, reasoned that neither employee adequately conveyed to management any objection to having an employee rather than a union steward serve as his representative.

The Board, in adopting the dismissal, referred to *Baton Rouge Water Works Co.*[13] which held that an employee does not have a section 7 right to union representation at a meeting with his employer held solely for the purpose of informing the employee of, and acting on a previously made disciplinary decision. As it was clear that the interviews in the instant case were to inform the employees of previously made disciplinary decisions, the employer did not violate section 8(a)(1) of the Act. In a separate footnote, Chairman Fanning and Member Penello who dissented in *Baton Rouge, supra*, indicated that in agreeing that the employer had not unlawfully denied union representation, they would adopt in full the administrative law judge's rulings, findings, and conclusions.

In *Southwestern Bell Telephone Co.*,[14] the Board held that the employer violated section 8(a)(1) of the Act by requiring a union representative representing an employee at a disciplinary interview to

[12] 251 NLRB No 62 (Chairman Fanning and Members Jenkins, Penello, and Truesdale)
[13] 246 NLRB No 161
[14] 251 NLRB No 61 (Chairman Fanning and Members Jenkins, Penello, and Truesdale)

remain silent. The employee was questioned at a meeting with his supervisors and the employer's security supervisor, about some stolen company property. When asked about his specific role in the theft, the employee requested the presence of his union steward. The steward was called in and informed of the allegations against the employee. The security supervisor then told the steward that "he did not want him [the steward] to say anything." The meeting then proceeded. The security supervisor told the employee that if he did not confess to the theft he would be arrested. The employee confessed to the theft and other thefts and signed a written confession. After the confession was signed, the steward was asked if he had anything to say.

By requiring the union steward to remain silent throughout the interview, the Board, in agreement with the administrative law judge, found that the employer reduced the employee's right under *Weingarten* to the mere *presence* of a union representative rather than the *assistance* of a representative during the interview. The Board also agreed with the administrative law judge in the rejection of the employer's contention that it had the right to demand that the statutory representative remain silent during the interview. In the Board's view, *Weingarten* was intended to balance an employer's right to investigate its employees' conduct through personal interviews and the role the statutory representative plays who is present at such interviews. From its reading of *Weingarten*, it was clear to the Board that the role of the statutory representative at an investigatory interview is to provide assistance and counsel to the employee being interrogated. However, mindful that the Supreme Court cautioned that the statutory representative's presence should not reduce the interview to an adversary contest or collective-bargaining confrontation, the Board noted that an employer had the right to regulate the role of the statutory representative to a reasonable prevention of such contest or confrontation with the statutory representative.

In *Texaco*,[15] an employee who failed to observe a safety rule was called to an interview where he was represented by his union steward. The employer limited the steward's role to that of a silent observer and warned him that if he attempted to speak at the interview he would be asked to leave. The employee's supervisor then criticized him for failing to comply with the employer's procedure, and obtained an admission from the employee that he had failed to follow accepted safety regulations. In a second incident in the same case, the employer called a meeting to impose a 3-day suspension on an employee. The employee requested union representation. The employer agreed but imposed the condition that the representative not actively participate in the meeting. At the meeting the supervisor handed the employee the suspension letter and told him that he was suspended.

[15] 251 NLRB No 63 (Members Jenkins and Truesdale, Chairman Fanning and Member Penello, concurring)

With respect to the first interview, Members Jenkins and Truesdale, writing for the majority, found that, because the employer went beyond the act of imposing discipline and secured an admission of possible misconduct, an act which indicated that the employer was continuing its investigation of the incident, the interview was the type contemplated by *Weingarten*, and warranted the presence of the employee's union representative. On the authority of *Southwestern Bell Telephone Co.*, 251 NLRB No. 61, they concluded that by requiring the union representative to remain silent during the interview, thereby circumscribing the representative's role to that of a passive observer, the employer violated section 8(a)(1) of the Act.

As to the second interview, Members Jenkins and Truesdale declined to find a *Weingarten* violation in the demand for the silence of the representative. They reasoned that the "simple, ministerial act" of imposing discipline on the employee was determined in a final and binding manner prior to the meeting and that the employer, by handing the suspension letter to the employee, did not cross the line between an investigatory interview and one called to impose discipline. Hence, the majority concluded that, as the employer was not statutorily obligated to furnish the employee with representation at the interview, it was irrelevant that the employer effectively muted the union representative's role at the interview.

Chairman Fanning and Member Penello concurred in the result reached by their colleagues, but disagreed with parts of the supporting rationale. They disagreed with the substantive distinction drawn by the majority between *investigatory* and *disciplinary* interviews regarding an employee's right to the presence of his union representative and, relying on their respective dissents in *Baton Rouge Water Works Co.*, 246 NLRB No. 161, they would find that an employee is entitled to union representation upon request at both disciplinary and investigatory interviews.

Chairman Fanning and Member Penello also relied on *Southwestern Bell Telephone Co., supra*, and agreed with the majority that the employer violated section 8(a)(1) of the Act by circumscribing the role of the representative at the first interview.

With respect to the second interview, which the majority characterized as "disciplinary" within the meaning of *Baton Rouge, supra*, to which no *Weingarten* protections attached, Chairman Fanning and Member Penello disagreed with the rationale since they do not subscribe to such distinction. Analogizing the interview to the situation presented in *Amoco Oil Co.*, 238 NLRB 551 (1978), where, as here, the employee did not engage in any form of dialogue or interchange which could be termed an interview, they found that there was no contravention of the requirements of *Weingarten* because there was no interview and that, therefore,

there was no violation of the Act by placing the condition of silence on the employee's representative herein.

Illinois Bell Telephone Co.,[16] presented the issue of whether an employee was entitled to have as her representative at an interview an employee who had no official union status. A Board panel concluded, in agreement with the administrative law judge, that under *Weingarten*, she was so entitled.

The facts in *Illinois Bell* revealed that the employer, acting on a tip, investigated allegations that certain operator employees had improperly adjusted telephone bills from a state prison. The employer conducted interviews which, the panel found, were of the type an employee could reasonably believe would result in discipline. At the beginning of her interview the employee requested a representative as, prior to her interview, her union steward instructed her not to go to the interview alone and that any union member could be her representative at such an interview. The employer refused to hold the interview with an employee as representative, but indicated that it would continue the interview with the employee's union steward or with the employee alone. As the union steward was unavailable, the interview continued with no representation for the employee. During the interview, the employee admitted orally and in writing that she had adjusted certain calls improperly, and, based on this information, the employer immediately suspended her and subsequently discharged her.

In finding a *Weingarten* violation, the panel reasoned that an employee's right to a representative is grounded in section 7 of the Act, without reference to whether the employees have a majority bargaining representative. While recognizing that there may be times when individual section 7 interests must yield to the collective decision of one's fellow employees, as determined by the majority bargaining representative, the panel found no conflict between the employees' section 7 right to a representative and the union's status as the exclusive bargaining representative since (1) no officially designated steward was available at the time of the interview; (2) the steward told her before the interview that she could select any union member to represent her; (3) the employer made no attempt to locate a steward and did not offer to delay the interview; and (4) the parties had not negotiated a conflicting procedure for investigatory interviews. Accordingly, the panel thus concluded that the employee, upon request, had the right to the presence of a fellow employee at her interview, even though the employee had no official union status and that the employer's denial of that request violated section 8(a)(1) of the Act. Member Jenkins concurred, but would also have ordered the employer to reinstate the employee with backpay.

[16] 251 NLRB No 128 (Chairman Fanning and Member Truesdale, Member Jenkins concurring)

In *Roadway Express*,[17] after an employee threatened to harm physically a supervisor on the loading dock, the supervisor requested that the employee accompany him to an office. The employee refused, stating that he would do so when his union steward could be present. The employer knew that the steward was not scheduled to arrive for another 4 hours. After refusing a second request to go to the office, the employee was then asked to leave the premises, and, subsequently, was suspended and given a written warning for disobeying orders.

The Board majority reversed the administrative law judge's finding that the employer violated section 8(a)(1) of the Act by suspending the employee for exercising his *Weingarten* rights. They found that even though a similarly situated employee could have held a reasonable belief that the proposed interview would result in disciplinary action, an employer did not have to assure an employee that his union representative would be present for the interview to induce an employee to leave the dock area. The majority noted that the varying alternatives involved in *Weingarten* did not readily lend themselves to discussions on the plant floor, particularly where there may be a disturbance in progress. The majority rejected the assumption of the dissent that because the employer did not summarily and immediately discipline the employee in the dock area, it evidenced an intention to engage the employee in a *Weingarten* interview. As the employer could have had many reasons for summoning the employee away from the dock area, they would not attempt to probe the employer's motives.

While the employee properly invoked his *Weingarten* rights, when initially asked to accompany his supervisor to the office, his refusal to leave the dock area, "clearly undermined employer's right to maintain discipline and order," and subjected him to whatever sanctions the employer deemed appropriate to impose. The majority reasoned that their interpretation of *Weingarten* had to be tempered by a sense of industrial reality to avoid interference with legitimate employer prerogatives. Hence, *Weingarten* rights mature at the commencement of an interview, whether on the production floor or in a supervisor's office. Where as in the instant case, the employer requested the employee to leave the production area and go to another location where further discussion was contemplated, the employee acted at his peril by declining to do so. Accordingly, the majority dismissed the 8(a)(1) charges against the employer.

Chairman Fanning and Member Jenkins dissented contending that the employer ignored the employee's valid request for union representation instead of responding to it in the three ways open to an employer as set forth in *General Electric Co.*[18] Under *General Electric*, an employer has

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[17] 246 NLRB No 180 (Member Penello and former Member Murphy and Member Truesdale, Chairman Fanning and Member Jenkins, dissenting)

[18] 240 NLRB 479 (1979) (Chairman Fanning and Members Penello and Truesdale)

the burden to either (1) grant the request; (2) stop the interview; or (3) offer the employee the choice of continuing the interview unaccompanied by a union representative, or having no interview at all. Moreover, the dissenters found that because the employer did not merely seek to remove the employee from the dock, but intended to talk to him, it clearly intended this talk to be a *Weingarten* interview.

The dissenters were unpersuaded by the majority's view that an employee acts at his peril, if after his employer rejects his *Weingarten* request, he refuses to accompany the employer to another location away from the production area. They asserted that the majority's "legitimate employer prerogative" argument was not based on any principle that the employee must leave because he had already engaged in disruptive activity, but instead was premised on an avoidance of discussion which need not be disruptive, and which need go no further than informing the employee of the alternatives available to him under *General Electric, supra*. To the dissenters, the majority requires the employee to perform a futile act in order to preserve his right to assistance and such a holding, it was clear to them, undercuts the protections of *Weingarten*.

In *U.S. Postal Service*,[19] a Board panel, in agreement with the administrative law judge, held that the employer's "fitness for duty" examinations [20] were not part of a disciplinary procedure and were not within the scope of *Weingarten*. It noted that (1) the examinations did not meet the tests or the rationale underlying such tests in the *Weingarten* line of cases, which envision a confrontation between an employer and an employee; (2) there was no evidence that questions of an evidentiary nature were in fact asked at these examinations; and (3) the employer had no source other than the exam by which to obtain the personal medical information concerning the employees. Accordingly, the Board panel ordered dismissal of the complaint alleging that the employer violated section 8(a)(1) of the Act by denying employees' requests for union representation at the examinations.

In *Kraft Foods*,[21] the Board unanimously found that the employer violated section 8(a)(1) of the Act by ignoring an employee's request to have his union representative present at an investigatory interview which he reasonably believed might result in his discipline. However, a Board majority found inappropriate the administrative law judge's remedy of reinstatement with backpay and expungement of the discharge from its records. In so doing, they set forth the analysis to be used when determining the remedy for a *Weingarten* violation. The majority held

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[19] 252 NLRB No 14 (Chairman Fanning and Members Jenkings and Penello)

[20] The "fitness for duty" examinations were prompted by various personnel problems, such as excessive absenteeism because of alleged illness or injury, and it was possible that the examinations might lead to recommendations respecting employees' future work assignments

[21] 251 NLRB No 6 (Chairman Fanning and Members Penello and Truesdale, Member Jenkins dissenting in part)

that first the Board must determine whether the General Counsel has made a *prima facie* showing that a make-whole remedy, such as reinstatement, backpay, and expungement of disciplinary records is warranted by proving that the employer conducted an investigatory interview in violation of *Weingarten* and that the employee whose rights were violated was subsequently disciplined for the conduct which was the subject of the unlawful interview. The burden then shifts to the employer who, in order to negate the *prima facie* showing of the appropriateness of a make-whole remedy, must demonstrate that its decision to discipline the employee was not based on information obtained at the unlawful interview. Where the employer meets this burden, a make-whole remedy will not be ordered; instead, a traditional cease-and-desist order will be provided to remedy the 8(a)(1) violation.

Applying that analysis to the instant case, the majority found the cease-and-desist remedy appropriate, inasmuch as the employer met its burden by negating the General Counsel's *prima facie* showing of the appropriateness of a make-whole remedy. The employer produced evidence to show that the employee was disciplined (i.e., discharged for fighting), based on, *inter alia*, eyewitness accounts of the fight by other employees. Hence, the majority concluded that the information obtained from the discharged employee during the interview—the situs of the forklift collision and the fight—played no part in the employer's decision to discipline the employee.

Member Jenkins, dissenting, viewed the facts in a different light and asserted that the Board majority should have provided a make-whole remedy in the instant case. In considering the majority's analysis for a *Weingarten* remedy, he presumed that the rationale underlying the majority decision was an attempt to "conform" Board orders to section 10(c) of the Act, which provides, *inter alia*, that the Board shall not order reinstatement and backpay to an individual who has been suspended or discharged for cause. While he emphasized that he did not advocate ignoring section 10(c) of the Act, Member Jenkins noted that once an employer has disciplined an employee for conduct which was the subject of an unlawful *Weingarten* interview, it is virtually impossible to determine whether the disciplinary decision was based on "information" obtained at the unlawful interview. Even if the employee remains silent at the unlawful interview, Member Jenkins charged, the discipline imposed may be affected by his demeanor or his "refusal to cooperate" without representation and therefore the employer then is placed in a position of not only proving that there was "cause" for discipline based on "information" gathered independently of the unlawful interview, but of also proving that the severity of the discipline imposed was not affected by the employee's statements or demeanor at the unlawful interview. In his opinion, the proof of the latter would force the employer into such difficul-

ties of proof which would almost always result in a finding that the employer had not met its burden. To Member Jenkins, the only situation where an employer could prove that it did not rely on "information" obtained at an unlawful interview is the one where a final, binding decision to discipline is made prior to the interview.

In *Ohio Masonic Home*,[22] a Board panel found that the employer violated section 8(a)(1) of the Act when it refused an employee's request for representation at an interview where the employee was questioned about complaints regarding her work and suspended, only after she explained the circumstances of the complaints. It reasoned that this case did not fall within the narrow rule of *Baton Rouge, supra*, where the Board held that no section 7 right to union representation exists under *Weingarten* when the employer meets with the employee simply to inform him of, or impose, that previously determined discipline. However, the panel applied the analysis of *Kraft Foods, supra*, where, after the General Counsel shows that an employer has conducted an unlawful *Weingarten* interview and thereafter disciplines the employee, the burden of going forward with the evidence shifts to the employer to show that its decision to discipline was not based on information obtained at the unlawful interview. The panel concluded that the employer had not met its burden here because the employee was not suspended until after her explanation of the complaints at the interview and that the decision to suspend her was based, at least in part, on information obtained at the unlawful interview. In these circumstances, a make-whole remedy was found to be appropriate. Member Jenkins who dissented in *Kraft Foods, supra*, found it unnecessary to distinguish that case.

In *Coyne Cylinder Co.*,[23] a supervisor asked an employee to accompany him to a meeting with the employer's manager where he was confronted with the accusation that he had been seen smoking pot. The employee denied the accusations and asked for an opportunity to produce witnesses who could show that he had not done so, but the manager denied the employee's request to present witnesses, and continued to insist that the employee had smoked pot. The employee then requested a union representative for the remainder of the interview. The manager denied the request and then gave the employee the address of a drug rehabilitation center, and asked him to wait outside while the manager and supervisor discussed the matter. After the discussion, the employee was summoned back into the room, where it was announced that the employee was terminated.

A Board panel found that the interview was investigatory in nature

[22] 251 NLRB No 59 (Chairman Fanning and Members Jenkins and Truesdale)
[23] 251 NLRB No 198 (Chairman Fanning and Members Penello and Truesdale)

involving the possibility of discipline and that, by requesting union representation during the interview, the employee was exercising his section 7 rights. Accordingly, by denying such request, the employer violated section 8(a)(1) of the Act. While the panel found the interview to be unlawful, it disagreed with the administrative law judge's recommendation that a make-whole remedy should have been ordered. It found that, in discharging the employee, the employer relied solely on information obtained *prior to the unlawful interview*, rather than anything obtained during the unlawful interview and that the General Counsel did not contend that the employee's discharge resulted from information obtained during the meeting. Accordingly, on authority of *Kraft Foods, supra*, the panel ordered a cease-and-desist order to remedy the 8(a)(1) violation.

3. Forms of Employee Activity Not Protected

a. Enforcement of a Contract Right

In *Colonial Stores* [24] an employee with her husband, a nonemployee, circulated a petition to the union among employees complaining that the employer was not complying with certain provisions in the contract between the union and the employer. As a result of the petition, the employer met with the union and agreed to create three new jobs which resulted in the reduction of the employee's hours. Thereafter, in a meeting with the employee, two supervisors, the union business agent, and steward the employer warned the employee that she would be discharged for any further disruptive activities by herself or her husband regarding the employer's store. After the employer failed to implement a grievance settlement in a dispute over hours initiated by the employee, her husband drove to the employer's parking lot on two occasions with signs on his car stating that the employer had no regard for its employees' rights. The day after this incident the employee was discharged.

The panel majority reversed the administrative law judge's decision to defer to the arbitrator's finding that the employee was discharged for cause, because the award was repugnant to the purposes and policies of the Act. They concluded that what the arbitrator found to be "cause" under the contract was, in fact, the grievant's protected concerted activity. The majority interpreted the arbitrator's award to mean that the employer had cause to discharge the employee because she was engaged in mere self-help activity to gain more hours of employment for herself. However, they found that her efforts including the circulation of the petition, while correctly characterized as self-help, were also related to

[24] 248 NLRB 1187 (Chairman Fanning and Member Truesdale, Member Penello, dissenting)

the working conditions of other employees, noting that it was well settled that an employee is engaged in protected concerted activity when he questions possible violations by his employer of the terms of a collective-bargaining agreement.[25] Similarly, the majority also found that the parking lot protest, involving the employer's failure to comply with a grievance settlement, was a matter of concern to unit employees, and hence was protected concerted activity. They noted that such a protest was concerted regardless of whether it was pursued by an individual or by a group of employees, and that unless it was undertaken for an unlawful purpose or in an unlawful manner, it was protected under section 7 of the Act. Since the protest was not undertaken for an unlawful purpose, it was found to be protected and the employer's discharge of the employee violated section 8(a)(1) of the Act.

Member Penello dissented. Although he agreed that deferral to the arbitrator's award in the instant case was inappropriate as being clearly repugnant to the Act, he disagreed with the majority's conclusion that the employee was discharged for engaging in protected activity. Instead, he would have found that the employer lawfully discharged the employee and would have dismissed the complaint on its merits. Member Penello reasoned that the petitioning, although generally concerted and protected activity, was not protected when the petition was circulated to employees on worktime in the selling area of the employer's store. It was in this context that the employer warned her that her job would be in jeopardy if she continued her disruptive activity. Accordingly, Member Penello concluded that the employee was discharged because she subsequently engaged in further disruptive and unprotected activity. In his view, the picketing by the employee's husband, as her surrogate, was an attempt to circumvent the exclusive bargaining authority of the union, went beyond the presentation of a grievance, and contravened the no-strike provision of the collective-bargaining agreement, and for these reasons was removed from the Act's protection. In these circumstances, Member Penello concluded that the employer discharged the employee, not because she continued to engage in self-help activity, but because the manner of the activity was disruptive and unprotected.

b. Concerted Nature of Activity

In *Hotel & Restaurant Employees & Bartenders Union, Local 28*,[26] a Board panel found that the union violated section 8 (a) (1) of the Act by discharging an employee for engaging in protected concerted activity.

The employee, a female business agent, filed a complaint with the California Fair Employment Practices Commission (FEPC). Thereafter,

[25] Citing *Interboro Contractors*, 157 NLRB 1295 (1966), enfd 388 F 2d 495 (2d Cir 1967)

[26] 252 NLRB No 158 (Chairman Fanning and Members Jenkins and Penello)

at a meeting called by the union, she announced that she should be paid as much as the male business agents. Other union members agreed with her statement at the meeting. The panel affirmed the administrative law judge's finding that the employee was engaged in protected concerted activity even though she acted alone in filing the FEPC complaint. By so finding, the Board panel reaffirmed the decision in *Alleluia Cushion Co.*, 221 NLRB 999 (1975). However, contrary to the administrative law judge, the panel found that she did not act alone at the meeting, noting that other union members joined with her and protested that it was unlawful for the employer to pay her less than men. Finding the situation analogous to that in *KPRS Broadcasting Corp.*, 181 NLRB 535 (1970), the panel found that the employee's statement and expression of support from other union members constituted protected union activity. As the issue of sex discrimination in wages was clearly a matter affecting all employees, and was thus an issue of common concern to all employees, the panel therefore concluded that it was unnecessary to apply the *Alleluia* precedent to the circumstances of the meeting.

Member Penello separately agreed that the employer violated section 8(a)(1) of the Act by discharging the employee, basing his finding solely on the employee's actions at the meeting wherein she openly protested her lower rate of pay and was joined in her protest by her fellow employees.

In *Anco Insulations*,[27] a Board panel found that a discharged employee was not engaged in protected concerted activity when he picketed an entrance gate at a construction site where the employer was a subcontractor, after he had been lawfully discharged for being out of his work area without authorization. He had left his work area at the request of the union to investigate the type of work being performed in the furnaces because it may have involved a possible jurisdictional dispute. Following his discharge, he picketed an entrance gate of the entire jobsite with a sign stating that the subcontractor was unfair. As a result of his actions, fellow workers of the employer and employees of other employers using that gate stayed off the job. When the union later referred the employee to another subcontractor at the same jobsite where he had previously picketed, the general contractor prevented his entering the site because of his earlier picketing activity.

The panel agreed with the administrative law judge that the discharge by his employer, the subcontractor, was lawful because the employee was in another work area without authorization and concluded that the fact that the employee was engaged in union business at the time of his discharge played no part in his discharge. The panel disagreed, however, with the administrative law judge's finding that the general contractor who refused to admit the employee to the construction site violated

[27] 247 NLRB No 81 (Chairman Fanning and Members Penello and Truesdale)

the Act. Contrary to the administrative law judge, it found that the employee's picketing was not protected concerted activity, but rather was individual activity, noting that the employee picketed on his own, without support from fellow workers, without union approval, without seeking to employ the contractual grievance procedure, and without regard to the nonstrike provision of the bargaining agreement. The panel noted that while individual activity may be concerted if it directly involves furtherance of the rights of fellow employees, the employee in question picketed to protest his discharge, not to protest safety matters or other working conditions. At most, in the panel's view, the picketing was indirectly related to safety matters although the employee believed that his earlier safety complaint played a part in the discharge, pointing out that the employee made no effort to communicate this belief to other employees. Concluding that the employee sought something for himself only and that his picketing did not directly relate to matters of mutual concern, the panel found that the indirect relationship of the employee's picketing to the working conditions of other employees was too remote to convert his personal protest into concerted activity. Accordingly, the panel found that the employee's picketing was not concerted activity, was therefore not protected by the Act, and was a legal bar to his employment at the construction site.

In *Natl. Wax Co.*,[28] a panel held that an employee's repeated efforts to obtain a merit wage increase did not constitute protected concerted activity, and that the employer's discharge of the employee for harassing it by renewing his request for a raise was lawful. The panel observed that the particular employee's complaint was an individual one; his request to secure the raise was not predicated on a collective-bargaining agreement, and was begun without support from fellow workers; and there was no evidence that he sought to communicate with or involve others in his efforts. It pointed out that since activity to be protected under the Act must be concerted citing *Anco, supra*, the panel noted that ostensible individual activity may constitute concerted activity if it directly involves furtherance of rights which inure to the benefit of fellow employees and that any indirect relationship to the rights of other employees is too remote to turn a personal protest into a concerted one. It found that the employee was not protesting the operation or effects of employer's method of granting merit wage increases and that the evidence failed to show that his individual actions directly involved the furtherance of any right which would inure to the benefit of any other employees. Accordingly, the panel concluded that the employee's attempt to secure a merit wage increase for himself did not constitute protected concerted activity.

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[28] 251 NLRB No 147 (Chairman Fanning and Members Jenkins and Truesdale)

c. No Insubordination and Disparagement

In *U.S. Postal Service*,[29] two employees met with two supervisors in a conference room where grievance meetings were regularly held to discuss a possible grievance. After a heated discussion one of the supervisors ordered the employees back to work stating that they would discuss the issue when everyone had calmed down. The employees followed the two supervisors back to the workroom floor while continuing to discuss their grievance. When they reached the timeclock, one supervisor announced that he was giving the employees a direct order to go back to work immediately. After a moment's hesitation and before the supervisor had the opportunity to repeat his order, the two complied with it. The employer issued each of the employees warning letters indicating that they had been insubordinate; that they had used loud, abusive, and profane language; and that they had failed to return to work when asked to do so.

The majority adopted the administrative law judge's finding that the employer violated section 8(a) (1) of the Act by issuing warning letters to the two employees in connection with the grievance. They reasoned that to permit the employer to bifurcate the employees' conduct "would enable an employer by its whim to define the nature of protected activity." Moreover, the majority noted that some latitude must be afforded participants in grievance meetings and that while employees could lose the Act's protection by engaging in conduct which is opprobrious or extreme, there was no such conduct in the instant case. Moreover, they observed that the employer had not contended, and the record did not show, that the employee's conduct had any impact on the work of other employees or otherwise had consequential disruptive effects. Accordingly, the majority found no reason to strip the employees of the protections afforded them under the Act.

Member Penello dissented as he would have found that the employer did not violate section 8(a)(1) or (3) of the Act by issuing warning letters to employees for their insubordinate conduct in ignoring direct orders to return to work at the conclusion of a grievance meeting. He agreed with the majority that, during the grievance meeting, the two employees were essentially insulated from discipline for insubordinate statements made to management officials, inasmuch as this constituted protected collective-bargaining activity, unless their activity was opprobrious or extreme. However, contrary to the majority, he would have found that the employees were asked by their supervisors to return to work two, if not three, times and that they defied these direct orders to return to work at the end of the grievance meeting. Member Penello would have found that the conduct of the two employees after leaving the conference room

[29] 251 NLRB No 33 (Members Jenkins and Truesdale, Member Penello dissenting)

was so opprobrious or extreme as to render it unprotected for, in his view, they engaged in overt acts beyond insubordination, by defying the supervisor's order to return to to work. Further, he found it significant that their second refusal to return to work occurred in the production area during worktime when other employees were likely to be present, reasoning that the employees' overt acts of defiance would have clearly tended to undermine the employer's right to maintain order. Accordingly, he would have found that their failure to return to work when ordered was not protected even though they continued to discuss the grievance, and that therefore the employer did not violate section 8(a)(1) or (3) of the Act by disciplining them.

In *U.S. Postal Service*,[30] a Board panel held that the employer violated section 8(a)(1) of the Act by issuing a warning letter to a union steward for his conduct during a grievance meeting and by disciplining him for refusing to leave the meeting. The grievance meeting was held in a supervisor's office with the grievant, the union steward, and the supervisor present. During the discussion at the meeting, a dispute arose between the steward and the supervisor who threatened to take disciplinary action against the steward and requested him to leave. The steward left after another supervisor asked him to leave. Subsequently, the steward received an official letter of warning for his conduct during the meeting.

The panel adopted the administrative law judge's findings that the steward, being involved in processing a grievance, was engaged in protected activity within the meaning of section 7 of the Act and that the supervisor's threat to the employee during the meeting infringed on his protected rights, and was therefore a violation of section 8(a)(1) of the Act. Further, the administrative law judge found, and the panel agreed, that as the steward was fully prepared to present the grievance, his refusal to leave the supervisor's office when asked to do so was not unreasonable under the circumstances, and did not justify the employer's disciplinary action against him. In so concluding, the panel majority found that the employer's reliance on *U.S. Postal Service* [31] was misplaced because there, unlike the present case, the threat of disciplinary action for refusal to return to work came after the steward's presentation of the employee's grievance was finished. Member Penello found it unnecessary to distinguish that case because he had not dismissed the complaint therein on the merits but rather on the sound principles set forth in *American Federation of Musicians, Local 76, AFL–CIO (Jimmy Wakely Show)*, 212 NLRB 620 (1973).

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[30] 250 NLRB No 156 (Chairman Fanning and Members Jenkins and Penello)

[31] 242 NLRB 228 (1979)

In *Alfa Leisure*,[32] an employee who represented the union at collective-bargaining negotiations was discharged for using abusive language at the end of the meeting, when the employer's attorney told the employee that he had been informed that the employer had threatened employees if they did not support the union. The employee responded in a vulgar and abusive manner for which he was subsequently discharged. The panel majority agreed with the administrative law judge's finding that the employer was not motivated by union animus in discharging the employee and that the employee was terminated because of his rude conduct to the employer's attorney. However, they did not accept the judge's conclusion that the termination was lawful under the Act as, in their opinion, the employee's conduct, which may have constituted grounds for discharge under other circumstances, was protected because of the nature and circumstances of the meeting where the conduct occurred. While noting that the discharged employee had been disciplined on other occasions, they also pointed out that the employee was a representative at bargaining negotiations, who was entitled to deal with management representatives as an equal and to express his views openly. The fact that his manner and behavior did not comport with the employer's standards or propriety, the majority observed, was not sufficient to subject the employee to discipline in his employment relationship when he appeared as an employee representative at negotiations. In their view, the majority concluded that the employee's response to the accusations by the employer's attorney occurred in the context of bargaining and that by discharging him, for conduct "traditionally occurring in a collective-bargaining setting," the employer violated section 8(a)(1) of the Act.

Member Truesdale, dissenting, would not have found a violation with respect to the employee's discharge for insubordination. In his view, the majority glossed over the fact that the incident which triggered the exchange between the employee and the attorney was unrelated to bargaining or to the employee's status as a representative for the union. Like the administrative law judge, Member Truesdale would have found that the employee's conduct was literally the "straw that broke the camel's back," and that it would not have mattered if the conduct had occurred before, during, or after the negotiation meeting. He reasoned that it was immaterial that the conduct occurred at a negotiation session, since the majority's emphasis on this fact stretched the concept of protected activity "beyond the breaking point" and that merely because the activity between the employee and the employer's attorney occurred in *proximity* to a bargaining session, this should not insulate the employee from the consequences of his long-term unsatisfactory conduct.

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[32] 250 NLRB No 88 (Chairman Fanning and Member Jenkins, Member Truesdale concurring in part and dissenting in part)

d. Internal Union Affairs

In *Louisiana Council No. 17, AFSCME, AFL–CIO*,[33] the Council, a labor organization and the umbrella organization for 69 local unions affiliated with AFSCME, announced new policies designed to prohibit its employees from seeking the aid of the state AFL–CIO in resolving their problems with the Council. Subsequently, the Council's administrator discharged an employee, a field staff representative. The union representing the Council's field staff representatives announced that it would hold a meeting in the state AFL–CIO building to discuss the discharge. Warning another field staff representative that the meeting would not be taken lightly, the Council's administrator announced that he was calling a meeting of all the staff to warn them that they "would be in trouble" if they attended the meeting at the AFL–CIO office. Three employees and the discharged employee attended the meeting at the AFL–CIO and drafted a resolution calling for the reinstatement of the discharged employee. The next day the administrator suspended for 1 week the employees who attended the union meeting as a direct contravention of his stated policy. In reaction to the suspension, the four employees scheduled a meeting 2 days later with an attorney to devise a strategy to air their grievances with the Council. The administrator, who apparently was aware of the meeting, sent a mailgram to all employees advising them not to leave their assigned areas without his express approval.

A Board panel agreed with the administrative law judge that the Council violated section 8(a)(3) of the Act by suspending employees for attending a union meeting. However, unlike the administrative law judge, who relied on the Supreme Court's decision in *Burnup & Sims*,[34] to reject the Council's good-faith defense that the suspensions were justified because they violated its policy and gave the appearance of disloyalty, the panel found that precedent was not relevant here inasmuch as the Council was well aware that the meeting was to address the employee's discharge—a purpose clearly within the zone of activity protected by the Act. In addition, the Council's unlawful motivation for the suspensions was demonstrated by the attempt, immediately following the suspensions, to prevent the employees from meeting with their attorney for the purpose of addressing the Council's actions. Further, the panel reasoned that, even assuming *arguendo* that the Council had a legitimate objective for curbing contacts by its employees with the state AFL–CIO, that objective could not be used as a basis for interfering with its employees' protected activity even when employees "engage in conduct offensive to or at variance with a valid employer policy." So long as the concerted activity is not unlawful, violent, in breach of contract, or

[33] 250 NLRB No 72 (Chairman Fanning and Members Penello and Truesdale)
[34] 379 U S 21 (1964)

disloyal, employees engaged in such concerted activity generally do not lose the Act's protections simply because their activity contravenes an employer's rules or policies. The panel specifically rejected the Council's argument that where employees are "disciplined" for alleged unprotected participation in internal union politics, the Board as a matter of policy should decline jurisdiction.

In *Welfare & Pension Funds*,[35] a Board panel agreed with an administrative law judge that a union president, trustee of the Fund, violated section 8(a)(1) of the Act in the discharge of the assistant administrator of the Fund in retaliation for activities he performed in his capacity as secretary/treasurer of the union by, *inter alia*, (1) referring members to jobs in a manner that accorded preference to those longest laid off; (2) seeking reelection as secretary/treasurer of the union; (3) assisting another individual to set aside an election because of irregularities; (4) providing information about union finances; (5) advocating that the union actively press employers to abide by the terms of the contract between the union and the Association and to make the required payments into the pension funds for covered employees; and (6) supporting certain claimants' efforts to obtain benefits from the funds. Reasoning that the Board has held that such intraunion activity is within the protection of section 7 of the Act, the panel agreed with the administrative law judge's conclusion that the Fund violated section 8(a)(1) of the Act by discharging the employee for engaging in such activity.

e. Appeal to Third Parties

In *Allied Aviation Service Co. of N.J.*,[36] a Board panel considered the issue of whether an employee's sending two letters to customers of the employer concerning safety procedures constituted concerted protected activity. The employer refueled and maintained commercial aircraft at an airport.

The employee, as shop steward, sent two letters to two customers of the employer—the airport general manager and the station manager of the airlines—informing them that the employer disregarded safety procedures in refueling planes, and asking them to express their opinion to the employer's management. Respondent suspended and subsequently discharged the employee for sending the letters. The employee had previously filed two grievances but did not raise with management the safety issues set forth in the two subsequent letters, although he could have.

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[35] *Welfare & Pension Funds, Blasters, Drillrunners & Miners Union Local 29*, 251 NLRB No 165 (Chairman Fanning and Members Jenkins and Truesdale).

[36] 248 NLRB 229 (Members Jenkins, Penello, and Truesdale)

The panel disagreed with the administrative law judge's findings that such activity was unprotected under the Act because (1) it did not bear a good-faith relationship to a truthfully publicized ongoing labor dispute; (2) it was an attack on the quality of the employer's services and constituted a breach of employer-employee confidence; and (3) it tended to be so disruptive of the employer-employee relationship as to contravene the very purpose of the Act. In finding that the employer violated section 8(a)(1) of the Act by the suspensions and discharge, the Board panel noted that the Board had held in previous cases that an employee may properly engage in communication with a third party to obtain assistance in circumstances where the communication is related to a legitimate, ongoing labor dispute between the employer and the employee and where the communication is not a disparagement or vilification of the employer's product or reputation. Although it observed that the employee in seeking outside assistance chose to emphasize the safety aspects of two disputes and recognized that the ongoing grievance disputes had not arisen strictly on safety grounds, the panel concluded that the letters to the third person requesting assistance of third parties were related to the ongoing disputes.

With respect to whether the letters were unprotected because they disparaged the employer's reputation or service, the panel distinguished between disparagement and the airing of a highly sensitive issue, and noted that the Board had previously held that in the absence of a malicious motive an employee's right to appeal to the public is not dependent on the employer's sensitivity to a choice of a forum.[37] Although the panel concluded that the letters raised delicate issues that the employer may have preferred not to be public, it further found that there was nothing in the letters which rose to the level of public disparagement that would render the employee's otherwise protected activity unprotected. Hence, the panel found that the employee's discharge was violative of section 8(a)(1) of the Act.

4. Discharge of Supervisors

In *Downslope Industries & Greenbrier Industries*,[38] the employer hired a plant manager who made verbal and physical sexual advances toward a number of female employees and their supervisor. After the employees complained of the harassment, the supervisor reported the incidents to the plant manager's superior, Lane, who failed to take any action against the plant manager. Subsequently, the employees met with their supervisor and told her that they did not wish to work with the plant

[37] *Richboro Community Mental Health Council*, 242 NLRB 1267 (1979)

[38] 246 NLRB No 132 (Chairman Fanning and Member Jenkins, Member Truesdale, concurring, Former Member Murphy concurring in part and dissenting in part)

manager because of the sexual harassment. They refused to work until they talked with Lane about the plant manager's conduct. At that time, the plant manager appeared and inquired why the employees were not working. The supervisor told him that it was due to his sexual advances. A heated discussion ensued during which the plant manager denied the accusations of the employees and of the supervisor who subsequently struck him. Hearing the commotion, Lane inquired what was going on. When several employees attempted to tell him about the advances of the plant manager and their unwillingness to work with him, Lane refused to listen but told them to work with the plant manager or "hit the clock." Thereafter, he told the supervisor that she no longer worked for the employer and should leave.

In considering whether the supervisor's discharge was unlawful, the majority stated the general principle that, although supervisors are not generally accorded protection under the Act, the Board and the courts have long held that discrimination directed against a supervisor constitutes a violation where it infringes on the statutory rights of employees. They noted that Lane terminated the supervisor without reason, that he knew nothing of the supervisor's behavior and that he took immediate steps to terminate everyone connected with the protest against the plant manager, thereby ridding itself of all employees who engaged in such protected activity. Concluding that the employer's actions in discharging the employees were motivated by a desire to discourage protected concerted activity among its employees in general and noting that the supervisor's discharge was contemporaneous with those discharges and was in reprisal for her participation in and support of the employees' protest, the majority found that the supervisor's discharge was an integral part of the employer's overall plan to discourage employees from engaging in protected activity, and was therefore also unlawful. In so finding, they concluded that the Board's *Fairview Nursing Home* decision (202 NLRB 318) was controlling. Accordingly, the majority found that the supervisor's discharge violated section 8(a)(1) of the Act.

Member Truesdale concurring, agreed that the supervisor's discharge violated the Act but for different reasons. Thus, he would find that the discharge of a supervisor violates the Act where it is part of a scheme to interfere directly with the protected rights of the employees, or where a supervisor is discharged for engaging in conduct intended to protect employees from interference and discrimination. Although Member Truesdale accepted Member Murphy's statement of appropriate principles to be applied to discharges of supervisors as expressed in her dissenting opinions herein and in *Nevis Industries, d/b/a Fresno Townehouse*, 246 NLRB No. 167, he disagreed, however, with her assessment that the facts of the instant case did not bring it within these principles. Accordingly, he concurred in the majority's conclusion that the employer violated the Act.

Member Murphy concurring in part and dissenting in part found that the majority was taking the untenable position that anytime a supervisor is fired in close proximity with unlawfully discharged employees, the supervisor's discharge is also protected and thereby was improvidently extending the protection of section 7 to the concerted and union activities of supervisors. She asserted that the supervisor's conduct was one of pressing the employees' "economic" complaint, which was also her own, on management, noting that there was no evidence that the supervisor was in any way protecting employees from any conduct by the employer which would be unlawful under the Act. Member Murphy argued that the majority's contention that the supervisor was discharged for engaging in protected acts on behalf of employees was belied by the fact that the supervisor was not even aware of the employees' discharges until after they occurred and there was no evidence that she protested the discharges or her discharge was related to the employees' discharges. She would have found the discharge of a supervisor violative of the Act only where such discharge was a means to facilitate a direct violation of employee statutory rights and not, as here, where the impact on employee rights was only a spillover effect from the action taken against a supervisor.

In *Nevis Industries, d/b/a Fresno Townehouse*,[39] the Board considered whether the employer violated section 8(a)(1) and (3) of the Act by discharging and refusing to rehire a supervisor. Before the employer, a successor employer, assumed control of the hotel facility, on April 11, it decided that the hotel should be a nonunion shop. Accordingly, on April 8, the employer called a meeting of all department heads at which it read an open letter to employees informing them of their terminations at midnight, 2 days later. On April 10, the employer held another meeting with all department heads, but *not* including the chief engineer, the supervisor involved herein, at which the employer reiterated its position that the hotel was no longer going to be "union" and that it intended to terminate the entire engineering crew. Thereafter, the employer terminated the entire engineering crew, including the chief engineer who was told again that the employer intended to operate nonunion.

From these facts, the majority concluded that the supervisor's termination was considerably more than simply contemporaneous with the terminations of other union members, but rather that it was an integral part of the employer's scheme to rid the engineering department of any and all union adherents. Accordingly, agreeing with the administrative law judge that the employer's actions in refusing to hire or retain the supervisor also constituted "an integral part of the [employer's] attempt to stifle unionism among its employees," they found the supervisor's

[39] 246 NLRB No 167 (Chairman Fanning and Member Jenkins, Member Penello concurring; Former Member Murphy dissenting in part and concurring in part, Member Truesdale concurring in part and dissenting in part)

discharge violative of section 8(a)(1) of the Act and ordered that he, as well as the other employees, be reinstated with backpay. In so doing, the majority rejected the contention of their dissenting colleagues that the statute, and particularly section 2(3) which excludes supervisors from the definition of employees, precludes a finding of a violation, noting numerous Board precedents to the contrary.

Member Penello concurring agreed with the majority that the refusal to hire or retain the supervisor violated section 8(a)(1) of the Act and that reinstatement with backpay was the necessary remedy to offset fully the coercive effects of the employer's total course of conduct. He noted that the Board recognized a critical distinction between a supervisor disciplined because of personal involvement in union or concerted activity and a supervisor disciplined as part of an unlawful scheme or pattern of conduct aimed at stifling employees' section 7 rights. He reasoned that when an employer engages in a widespread pattern of misconduct against employees and supervisors, an employer makes it impossible for its employees to perceive the distinction between its right to prohibit supervisors from engaging in union or concerted activity and its obligation to permit employees to freely exercise their section 7 rights. Thus, in the context of widespread misconduct, as here, the coercive effect on employees as a result of action taken against a supervisor is not merely an unavoidable consequence of the discharge of an unprotected individual, but the coercive effect, in such circumstances, is the same as that arising from the action against the employees.

Member Murphy dissented in part and concurred in part. She concurred with respect to the majority's finding that the employer's treatment of the employees violated the Act, but dissented from the finding that the denial of employment to the supervisor violated the Act. In essence, she found that the employer's refusal to hire the supervisor was not an integral part of a scheme of conduct designed to facilitate a direct violation of employees' statutory rights. In her view, the two actions were separate and independent incidents inasmuch as, in denying the supervisor employment, none of the employees was directly interfered with, restrained, or coerced in his statutory rights. While noting that in her *Downslope Industries*, dissent, *supra*, she had acknowledged that supervisory discharges have a "spillover" effect, i.e., a tendency to discourage similar employee activity, she asserted that this effect alone would not be enough to find a supervisory discharge unlawful. As the majority, in her opinion, grossly misapplied the "integral part of a pattern of conduct" test, she would have found the supervisor's discharge herein not violative of the Act.

Member Truesdale, concurring in part and dissenting in part, disagreed with the majority that the employer's refusal to rehire or retain the discharged supervisor was a violation of the Act. He noted his

agreement with Member Murphy's statement of the appropriate principles to be applied in cases of supervisory discharges, in her dissents herein and in *Downslope Industries*, *supra*. He also expressed concern that the "integral part of a pattern of conduct" test not be construed in an overly broad manner in light of the statutory exclusion of supervisors from the protections of the Act. Therefore, Member Truesdale would find that the finding of an 8(a)(1) violation or the providing of a reinstatement remedy based on a supervisory discharge was properly limited, generally to situations in which the discharge is part of a scheme to interfere directly with the protected rights of employees, or where the supervisor is discharged for engaging in conduct intended to protect employees from interference and discrimination. In his view, the employer, in the instant case, did little more than decline to hire the supervisor because of his membership in the union—an action that occurred after the employees had been informed that they would not be hired and that did not interfere with the employees' section 7 rights. Accordingly, he would have found no violation based on the employer's subsequent refusal to hire or retain the supervisor, or would not order his reinstatement.

In *Stop & Go Foods*,[40] a Board panel held that the discharge of a supervisor for failing to meet his management responsibilities by striking and picketing was not a violation of section 8(a)(1) of the Act. The supervisor joined employees in protesting the employer's failure to repair air-conditioning equipment in a timely fashion. The supervisor had made several requests to management on behalf of the employees to have the system repaired, but to no avail. When the temperatures in the employer's facility reached 110 degrees, certain employees refused to work until repairs were made and actually picketed the employer's premises. The picketing ceased when repair trucks arrived. Management rehired all employees involved in the incident, but refused to rehire the supervisor.

The administrative law judge found that the supervisor's discharge violated section 8(a)(1) of the Act, since in his view the supervisor's suspension and discharge tended to lead employees reasonably to fear that the employer would punish them for like conduct and did not reassure them otherwise. The panel, however, reversed the administrative law judge's finding, noting that there were instances where the Board had found supervisory discharges to be violative of the Act—cases where the discharge was otherwise shown to be an integral part of a pattern of conduct aimed at penalizing employees for their union or concerted activities or was an important element in the employer's strategy to get rid of the union. The rationale underlying such cases is that the employer's conduct is aimed at the employees rather than punishing the supervisor for being disloyal and engaging in union or concerted activity. The panel

[40] 246 NLRB No 170 (Chairman Fanning and Members Penello and Murphy)

further noted that when an employer has engaged in a widespread pattern of misconduct in order to stifle employees' exercise of their section 7 rights, reinstatement of the discharged supervisor may be necessary to fully offset the coercive effects of the employer's total course of conduct. Here, however, the panel found that the supervisor was discharged solely for siding with the employees in their dispute with the employer. Observing that there was no evidence that the employer engaged in a pattern of conduct aimed at penalizing the employees for engaging in the strike, and finding an absence of evidence that the supervisor's discharge was an integral part of a pattern of conduct aimed at penalizing or coercing employees in their section 7 rights, the panel declined to find an 8(a)(1) violation and dismissed the complaint in its entirety.

The panel further observed that the Board has never held that the discharge of a supervisor for engaging in concerted activities *per se* violates the Act merely because the discharge may have had an incidental effect on the employees, citing, e.g., *Sibilio's Golden Grill*, 227 NLRB 1688 (1977). In a separate footnote, Member Penello noted that he relied on *Sibilio's*, *supra*, and other cases in which he did not participate, but on which the panel relied, only to support the view that an incidental effect on employees of a supervisor's discharge is not alone sufficient to warrant finding an 8(a)(1) violation.

In *DRW Corp. d/b/a Bros. Three Cabinets*,[41] a panel majority found that the employer violated section 8(a)(1) of the Act by discharging a supervisor who took a leading role in the union's organizational campaign. After laying off the supervisor shortly after the beginning of the organizational drive, the employer announced to its employees that the supervisor was fired for being a union instigator, that the plant would be closed if the employees chose the union as their bargaining agent, and that the employees would be discharged if they supported the union.

In finding the violation of Section 8(a)(1) in the discharge of the supervisor, the majority recognized that it is an employer's prerogative to discourage union or concerted activities by supervisors, who are not *per se* protected by the Act. Thus, when an employer has discharged or otherwise disciplined a supervisor out of a legitimate desire to assure the loyalty of its management personnel and its action was "reasonably adapted" to the legitimate end, such conduct does not violate section 8(a)(1). In those circumstances, the mere fact that employees, as an incidental effect, may fear the same fate is insufficient to transform the conduct into a violation of the Act. However, they found that it was a different matter when an employer engages in a widespread pattern of misconduct against employees and supervisors alike. They reasoned that under those circumstances, the evidence may warrant a finding that the employer's conduct as a whole, including the action taken against the supervisor, was

[41] 248 NLRB 828 (Members Jenkins and Penello, Member Truesdale concurring in part and dissenting in part)

motivated by a desire to discourage union activities among its employees in general and may be characterized as a "pattern on conduct" aimed at coercing employees in the exercise of their section 7 rights. By such acts the employer has intentionally created an atmosphere of coercion in which its employees cannot be expected to distinguish between the employer's right to prohibit union activity among supervisors and their own right to engage freely in such activity. Thus, the coercive effect on employees resulting from the action taken against a supervisor cannot be viewed as unavoidable and "incidental" to the discharge of the unprotected individual and restoration of the *status quo ante*, including reinstatement of the supervisors, is necessary to fully dissipate this coercive effect.

In the instant case, the majority found that the supervisor's discharge was motivated by its desire to discourage union activity among its employees generally, and was part of a pattern designed to achieve that end. The panel cited with approval the panel decision in *Nevis Industries*, *supra*, for the proposition that reinstatement of a discharged supervisor to the *status quo ante* was necessary to remedy the employer's unfair labor practices.

Moreover, the panel majority disputed the dissent's statement that the Board had failed to articulate clear guidelines respecting when supervisory participation in protected union or concerted activities, along with that of rank-and-file employees, was protected. They pointed out that the Board had never held that supervisory participation in concerted or union activity was protected as a general proposition, and that reinstatement of supervisors was ordered only when, and precisely because, the employer's action was found to have been motivated, not by the supervisor's own activity, but by a desire to stifle the employees' section 7 rights.

Member Truesdale concurring in part and dissenting in part disagreed with the majority that the employer had violated the Act by discharging the supervisor. He agreed that, in certain instances, the discharge of a supervisor may violate section 8 (a) (1) of the Act because it interferes with and requires vindication of employees' section 7 rights. Member Truesdale expressed reservations, however, with respect to the category of supervisory discharge cases labeled "integral part" or "conduit" line of cases, where the discharge of a supervisor is "an integral part of a pattern of conduct aimed at penalizing employees for their union activities" and therefore unlawful. He noted that in these cases (1) the supervisors were generally union activists seeking to organize the rank-and-file employees; and (2) the general principles, as applied by the Board, resulted in cases where similar factual settings have resulted in decisions which are difficult to reconcile. After reviewing numerous precedents in this area, Member Truesdale noted that the "integral part" or "conduit" line of cases produced decisions which are confusing and inconsistent with no

clear guidelines articulated as to when supervisory participation in protected union or concerted activity along with the rank-and-file was or was not protected. He attributed the confusion to the *sui generis* status of the decision in *Pioneer Drilling Co.*, 162 NLRB 918 (1967), enfd. in pertinent part 391 F.2d 961–963 (10th Cir. 1968), where the Board found that the discharge of the supervisor was a pretext to disguise the employer's efforts to rid itself of union adherents in general. In his view, the Board erred by making a "quantum leap from a unique factual situation in [*Pioneer, supra*] to a general proposition that supervisors who make common cause with rank-and-file employees and are recipients of the same treatment meted out to employees share the protections of the Act extended to employees." Finally, Member Truesdale faulted the Board for making motivation the touchstone of supervisory discharge cases as "it is wrong as a matter of policy and law and can only add chaos to confusion." In his view, motivation is irrelevant for this purpose as supervisors have no protected right to engage in union activity because they are expressly excluded from the Act. Accordingly, he would have found no violation in the instant case.

In *Sheraton Puerto Rico Corp. d/b/a Puerto Rico Sheraton Hotel*,[42] a letter signed by the employer's supervisory personnel and other employees complaining about a general manager's operation of one of its hotels was sent to the employer's president. The general manager discharged all supervisory personnel who signed the letter and subsequently sent a letter to "all employees" informing them that a similar penalty would be imposed on "all employees" if there were more letter writing. The Board majority, in agreement with the administrative law judge, found that the letter was legitimate concerted activity by employees for mutual aid and protection within the meaning of section 7 of the Act and that the discharge of supervisory/managerial employees was an 8(a)(1) violation because of the natural tendency of these discharges to discourage *employees* from exercising their section 7 rights. With respect to the letter sent by the employer's general manager to "all employees," they found that the employer's action was an independent action reminding the employees of what happened to the supervisors and threatening the employees with respect to their section 7 rights. The majority also concluded that this approach was not dependent on the employer's state of mind and that, contrary to their dissenting colleague, it could not be viewed as conferring on supervisors rights under the Act intended only for employees.

In his dissent Member Truesdale disagreed with the majority's finding of an 8(a)(1) violation by the discharge of conceded supervisors or managerial employees for the reasons more fully set forth in his partial dissent in *Bros. Three Cabinets*, 248 NLRB 828. He reasoned that,

[42] 248 NLRB 867 (Chairman Fanning and Member Jenkins, Member Truesdale dissenting in part)

although supervisors were excluded from coverage under the 1947 amendments to the Act, in certain instances, none of which he found in the instant case, a discharge of a supervisor may violate section 8(a)(1) of the Act. However, in those limited instances, the protection afforded supervisors stems not from any specific statutory provisions for supervisors, but rather from the need to protect employees in the exercise of their section 7 rights. The majority's premise that supervisors or managerial employees who join rank-and-file employees in otherwise protected activity are themselves subject to the same treatment as are employees, Member Truesdale contended, was erroneous. In his view, employees, not supervisors, are protected against discharge for engaging in union or concerted activity and it makes no difference that supervisors engage in such activity alone or in concert with employees inasmuch as they are not covered under the Act.

5. Discipline of Strikers

In *Irvin H. Whitehouse & Sons Co.*,[43] an administrative law judge found no *quid pro quo* present upon which to predicate an implied no-strike clause in a contract having an arbitration provision and, thus, determined that the employer had unlawfully discharged two employees while they were engaged in a protected strike to protest safety conditions on the jobsite. This finding was based on his reasoning that the Joint Local Trade Board's remedial authority, when acting as an arbitration Board, was restricted under the collective-bargaining agreement to fines and liquidated damages. Therefore, he found that the Trade Board did not have the power to correct unsafe working conditions which constitutes the necessary consideration for implying a no-strike obligation.

In adopting these findings, the panel majority determined that the presumption of arbitrability as to safety disputes, as established by the Supreme Court in *Gateway Coal*,[44] had been successfully rebutted for the reason advanced by the administrative law judge. They pointed out that the occupational safety clause in the parties' collective-bargaining agreement neither directly stated nor implied that the parties shall submit safety disputes to final and binding arbitration and, unlike several other clauses which provided for specific remedies, that clause was silent on remedial measures for violations. In the majority's view, these matters raised precisely a question contemplated by the Supreme Court in *Lucas Flour*,[45] in which the Court specifically left open the scope of an implied no-strike clause where, as here, the parties have a general commitment to submit disputes to binding arbitration but doubt exists as

[43] 252 NLRB No 140 (Chairman Fanning and Member Jenkins, Member Penello dissenting)
[44] *Gateway Coal Co* v *United Mine Workers of America*, 414 U S 368 (1974)
[45] *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America* v *Lucas Flour Co* , 369 U S 95 (1962)

to whether a particular type of dispute has been made arbitrable. Their doubt as to the parties' intentions with respect to the arbitration of safety grievances focused on the fact that the contract's remedial provision did not extend to such grievances and that no safety grievance ever resolved short of arbitration involved the correction of unsafe working conditions. Member Jenkins noted that he would not imply a no-strike clause for the additional reason that the contract did not expressly impose a duty on any party to submit grievances to the Trade Board and, thus, resort to arbitration was permissive rather than mandatory as required by *Lucas Flour*.

Dissenting Member Penello, finding that the contractual arbitration clause did give rise to an implied no-strike obligation, would have concluded that the Respondent did not violate the Act when it discharged the strikers. Based on the Court's holdings in *Gateway Coal* and *Lucas Flour*, he found that an implied no-strike obligation had been created because the union did not expressly disavow any intention to create such a duty not to strike in agreeing to final and binding arbitration of disputes. Member Penello noted that the contract gave the Trade Board the authority to adjust any dispute that arose, specifically mentioned the protection of employee safety as one of its purposes, and expressly provided for final and binding arbitration. In his view, the contractual language was broad enough on its face to cover such a dispute over working conditions, particularly in light of the strong presumption of arbitrability which applies. Member Penello also noted that, despite his colleagues' "doubt" as to whether safety disputes between the parties were covered by the arbitration provisions of the contract, the parties apparently believed that safety disputes were arbitrable under the contract since they actually submitted the dispute to the Trade Board. Furthermore, in determining whether the contract gave rise to a no-strike obligation, Member Penello was reluctant to interfere with the parties judgment or to deprive them of the flexibility necessary for effective collective bargaining where they have agreed to substantial penalties as remedies for violations of their agreement. Accordingly, as long as the contract contemplated some method for enforcing its provisions in a final and binding manner, he would not inquire into the adequacy of the specific remedies provided for in the arbitration provisions of the contract in deciding whether or not to imply a no-strike agreement.

In *Caterpillar Tractor Co.*,[46] the panel majority found that the employer's unilateral modification of the transfer request system, indefinitely suspending downgrade transfers for which approximately 280 requests had been made, constituted a serious unfair labor practice, and that the resulting strike was protected concerted activity under the

[46] 250 NLRB No 89 (Chairman Fanning and Member Jenkins, Member Penello dissenting)

Board's ruling in *Dow Chemical Co.*[47] For the reasons separately stated in *Dow Chemical*, the majority would find the strike protected regardless of the seriousness of the employer's unlawful conduct. Having found the strike activities to be protected under the Act, the majority then concluded that the employer's conduct in disciplining certain employees who struck in protest of the unilateral change violated section 8 (a) (3) of the Act. In his dissent, Member Penello stated that he would have deferred to the parties' grievance and arbitration procedures for the reasons stated in *Roy Robinson, d/b/a Roy Robinson Chevrolet*,[48] and his dissenting opinion in *General American Transportation Corp.*[49]

6. Other Forms of Interference

In *Cook Paint & Varnish Co.*,[50] the Board panel concluded that the employer violated section 8(a)(1) of the Act by threatening employees with suspension and/or discharge if they refused to respond to questions relating to a grievance proceeding which was scheduled for arbitration. In so holding, it distinguished cases [51] where the Board previously had found that an employer could lawfully seek to compel its employees to submit to questioning concerning employee misconduct when the employer's inquiry was still in the investigatory process pursuant to which it was determined that the discipline of an employee was justified. Chairman Fanning and Member Penello concluded that once the grievance machinery was activated, and the dispute was to be submitted to arbitration, an employer's conduct in questioning its employees moves into the arena of seeking to vindicate its disciplinary decision and of discovering the union's arbitration position, and moves away from the legitimate concern of maintaining an orderly business operation. In this situation, they found that the delicate balance of the employees' right to make common cause with their fellow employees against the need for an employer to maintain the orderly conduct of its business must be struck in favor of the employees and that the Board's decision in *Pacific Southwest Airlines*,[52] did not preclude this finding. The Board there applied *Spielberg Mfg. Co.*[53] in deferring to an arbitrator's award which provided that an employer was acting within its rights by disciplining employees who refused to submit to questioning concerning a matter which was to be the subject of a grievance arbitration.

While agreeing with the result reached by his colleagues, concurring

[47] 244 NLRB No 129 (1979)
[48] 228 NLRB 828 (1977)
[49] 228 NLRB 808 (1977)
[50] 246 NLRB No 104 (Chairman Fanning and Member Penello, Member Truesdale concurring)
[51] *Service Technology Corp , a Subsidiary of LTV Aerospace Corp* , 196 NLRB 845 (1972), *Primadonna Hotel, d/b/a Primadonna Club*, 165 NLRB 111 (1967)
[52] 242 NLRB 1169 (1979) (Chairman Fanning and Members Penello and Truesdale)
[53] 112 NLRB 1080 (1955)

Member Truesdale criticized their establishment of a blanket rule that an employer may not, under any circumstances, threaten to discipline, or discipline, an employee for refusing to participate in an interview concerning a work-related incident once the employer has disciplined the participants in the incident and the grievance machinery has been invoked. Instead, he believed that the Board should review these cases on an individual basis, balancing the interest of the employer in conducting the interview against the employee's right to make common cause with his fellow employees. Applying the balancing test here, Member Truesdale would find a violation since the employer was not legitimately concerned with preparing its case or exploring settlement of the grievance, but rather was seeking to undermine the union's position at arbitration. He further found that, under the same test, *Pacific Southwest* was distinguishable. He pointed out that in that case, unlike the instant case, there was an arbitrator's finding that the employer sought the employee interviews because it was considering asking the employees to testify as employer witnesses, and because, depending on what the employees said, there was a possibility of settlement before arbitration.

In *Bechtel Power Corp.*,[54] a Board panel held that the employer violated section 8(a)(1) of the Act by advising its general foreman that company policy required the presence of company counsel whenever a supervisor gave testimony or evidence to a government agency. In the instant case, the foreman who had been laid off filed a charge with the Board alleging that both the employer and union violated his right to be referred through the union hall on a nondiscriminatory basis—a right afforded all rank-and-file employees. When the foreman returned to work, he was told about the company policy. The panel found that to permit an employer, in these circumstances, to prohibit a supervisor from providing information to a Board agent, unless in the presence of company counsel, would have direct and adverse impact on rank-and-file employee rights. Accordingly, it concluded that the employer violated section 8(a)(1) by so advising the supervisor. In reaching this conclusion, the panel found it unnecessary to rely on the administrative law judge's citation to *General Services*,[55] for the broad proposition that a supervisor has a statutorily protected right to file unfair labor practice charges and to give evidence to support those charges free from employer interference or coercion or to adopt such a blanket rationale.

Concurring Member Jenkins stated that he would have adopted the administrative law judge's decision in its entirety. In his view, the administrative law judge's reliance on *General Services* was proper to support the conclusion that inasmuch as a supervisor has a statutorily protected right to file an unfair labor practice charge free from employer

[54] 248 NLRB 1257 (Members Penello and Truesdale, Member Jenkins concurring)

[55] 229 NLRB 940 (1977) (Chairman Fanning and Members Jenkins and Murphy, Members Penello and Walther dissenting)

interference or coercion, it must follow that the supervisor has a similar right to support those charges by the giving of evidence free from interference or coercion.

B. Employer Discrimination in Conditions of Employment

1. Proof of Discriminatory Motivation

In *Wright Line, a Div. of Wright Line*,[56] the Board formally set forth a test of causation, based on an analysis akin to that used by the Supreme Court in *Mt. Healthy* [57] for all cases alleging violations of section 8(a)(3) or violations of section 8(a)(1) turning on employer motivation. In adopting what it referred to as the *Mt. Healthy* test, the Board stated that it first shall require the General Counsel to make a *prima facie* showing sufficient to support the inference that an employee's protected conduct was a motivating factor in the employer's disciplinary action. Once this is established, the burden will then shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

After discussing the distinction between pretext and dual motive, the "in part" test, and the advent of the "dominant motive" test and the law of the courts, the Board examined the *Mt. Healthy* case, where an untenured teacher had brought suit against the school board, alleging that it had wrongfully refused to renew his contract. The district court found that of the two reasons cited by the school board for its action, one involved unprotected conduct while the second was clearly protected by the first and fourteenth amendments. The district court reasoned that since protected activity had played a substantial part in the school board's decision, its refusal to renew the contract was improper and the teacher was, therefore, entitled to reinstatement and backpay. After the court of appeals affirmed, *per curiam*, the Supreme Court reversed, in a unanimous opinion, rejecting the lower court's application of such a limited "in part" test and ruling that the school board must be given an opportunity to establish that its decision not to renew would have been the same if the protected activity had not occurred. Thus, in the Board's view, the Court established the two-part test, described above, to be applied in a dual-motivation context.

The Board concluded that *Mt. Healthy* represents a rejection of the "in part" test which stops with the establishment of a *prima facie* case or a consideration of an improper motive. It also found that the "dominant motive" test fared no better because *Mt. Healthy* shifted the burden of

[56] 251 NLRB No 150 (Chairman Fanning and Members Penello and Truesdale, Member Jenkins concurring)
[57] *Mt Healthy City School Dist Bd of Education* v *Doyle*, 429 U S 274 (1977)

proof to different parties. Under the "dominant motive" test, the General Counsel not only has to establish a *prima facie* showing of unlawful motive, but he is also required to rebut the employer's asserted defense by demonstrating that the discharge would not have taken place in the absence of the employees' protected activities. However, under *Mt. Healthy*, after the General Council establishes a *prima facie* case of employer reliance on protected activity, the burden shifts to the employer to demonstrate that the decision would have been the same in the absence of protected activity. In the Board's view, this distinction is a crucial one since the decision as to who bears this burden can be determinative.

After considering the legislative history of the Act and the Supreme Court's decision in *Great Dane*,[58] the Board concluded that the shifting burden process in *Mt. Healthy* was consistent with the process envisioned by Congress and the Supreme Court to resolve discrimination cases. Further, it pointed out that, although not couched in the language of *Mt. Healthy*, this is the same process that the Board has sought to use in analyzing such issues. Thus, the Board's decisional process traditionally has involved, first, an inquiry as to whether protected activities played a role in the employer's action and, if so, a subsequent inquiry as to whether any legitimate business reason asserted by the employer is sufficiently proven to be the cause of the discipline to negate the General Counsel's showing of prohibited motivation.

Perhaps most important for its purposes is the fact that the *Mt. Healthy* procedure accommodates the legitimate competing interests inherent in dual-motivation cases, while at the same time serving to effectuate the policies and objectives of section 8(a)(3) of the Act. Under this test, the aggrieved employee is afforded protection since he or she is only required initially to show that protected activities played a role in the employer's decision, while the employer is provided with a formal framework within which to establish that the discipline or other action would have occurred absent the employee's protected activities. Further, the Board found it to be of substantial importance that its explication of this test of causation will serve to alleviate the confusion which now exists at various levels of the decisional process by providing litigants and the decisionmaking bodies with a uniform test to be applied in 8(a)(3) cases. Finally, the Board recognized that inherent in the adoption of the *Mt. Healthy* test is its recognition of the advantage of clearing the air by abandoning the "in part" language in expressing its conclusion as to whether the Act was violated without repudiating the well-established principles and concepts which have been applied in the past.

In applying the *Mt. Healthy* test to the facts in the instant case, the Board found that the General Council had made a *prima facie* showing

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

that the employee's union activity was a motivating factor in the employer's decision to discharge him, and that the employer failed to demonstrate that it would have taken the same action against the employee in the absence of his engaging in union activities. For these reasons they agreed with the administrative law judge's finding that the employer violated section 8 (a) (3) of the Act.

Concurring Member Jenkins was willing to apply the shifting burden-of-proof standard his colleagues adopted in this case. Although finding that this standard may suffice for most cases, he stated that there may remain a residue, perhaps small, of cases of mixed motive or cause, where the purposes are so interlocked that it is not possible to point to one of them as "the" cause. Where the evidence does not permit the isolation of a single event or motive as the cause of the discharge, Member Jenkins concluded that the unlawful motive must be deemed to be part of the cause of discharge, and the discharge is unlawful. In his view, it is fair that the party who created this situation, in which isolation of a single cause is impossible, bear the burden created by the venture into an area prohibited by the Act. Member Jenkins therefore found that the "in part" standard as distinguished from the "but for" and "dominant motive" tests is the only criterion which will effectuate the purposes of the statute. Noting that the legislative history shows plainly that Congress itself struck this balance, he read *Mr. Healthy* as also in effect adopting this standard. His only reservation now is the way in which the shifting burden-of-proof standard may be applied to prevent unlawful conduct. If experience shows it to be inadequate in application, he believed that modification may be required.

2. Discipline of Union Stewards

In *Rogate Industries*,[60] the Board plurality, reversing an administrative law judge's decision, found that the employer did not violate the Act when it discharged five union officials following their participation in an unprotected strike.[61] Inasmuch as there was no doubt that the five discharged officials took part in the strike, the plurality concluded that they, like other employees, were subject to discharge for this unprotected activity in violation of the no-strike clause. In so holding, Members Penello and Truesdale pointed out that it is well established that an employer faced with an unprotected strike in the face of a no-strike clause need not discharge or otherwise discipline all employees who participate. Furthermore, they would not consider indicative of unlawful intent the

[60] 246 NLRB No 143 (Members Penello and Truesdale, Member Murphy concurring, Chairman Fanning and Member Jenkins dissenting)

[61] The employer also terminated three other employees

employer's postdischarge statements that these employees were terminated because of their activities as union officials. In their view, those statements merely pointed out that, despite the contractual no-strike clause, these union officials had acted in derogation of the contract in joining the strike. In any event, as noted in their dissents in *Gould Corp.*, 237 NLRB 881, they would overrule *Precision Castings* [62] on which the administrative law judge relied in finding no violation.

While agreeing with her colleagues' finding, concurring Member Murphy stated that she would have reached this result based on her view that the decision to discharge these individuals resulted from their strike activity and not their union status, and that the Board's holdings in *Precision Castings*, *supra*, and *Gould*, *supra*, to the effect that unprotected strikers may not be singled out for discipline because of their status as union officials, did not apply in the circumstances of this case. In reaching this conclusion, Member Murphy relied on the administrative law judge's finding that "[n]o other strikers who were not discharged were shown on the record, and to Respondent's knowledge, to have had a greater involvement in the strike than [the five union officials]." In these circumstances, and in view of the fact that the employer also discharged three striking employees who were not union officials, she concluded that the preponderance of the evidence established that the alleged discriminatees were in roles of strike leadership and were not selected for discipline solely because of their status as union officials. Finally, Member Murphy found that while the employer's postdischarge statements as to the officials' union status may be evidence of unlawful motivation, the statements did not establish that the employer was motivated in discharging them solely by the officials' union status.

Contrary to the plurality's view, dissenting Chairman Fanning and Member Jenkins concluded that the employer's relation of its disciplinary action to the union status of the discharged officials was not only the clearest kind of admission of the impetus for that action, but also itself violated the Act's prohibition against interference with, or restraint or coercion of, employees' right to assist a labor organization as union officials. Further, the dissent concluded that the contract did not even purport to place any extra burden on union officials to refrain from strike activity let alone give the employer free rein to engage in self-help on a discriminatory basis. Even assuming a labor organization has the power to waive such an important individual employee right, Chairman Fanning and Member Jenkins found no trace of that clear and unambiguous language which has consistently been required.

In *Bethlehem Steel Corp.*[63] the employer had suspended a department committeeman for 10 days because he had participated, as an elected

[62] *Precision Castings Co., Div. of Aurora Corp*, 233 NLRB 183 (1977).

[63] 252 NLRB No. 138 (Chairman Fanning and Member Jenkins, Member Penello dissenting).

union official, in the unprotected strike, while it gave all other striking employees involved a suspension of only 5 days. The panel majority adopted the administrative law judge's finding, based on the *Precision Castings* precedent, *supra*, that the employer violated section 8(a)(3) of the Act by imposing a penalty of more than 5 days' suspension on the union official who should have been subject to the same discipline as the other striking employees. As he still adheres to his analysis of the law as set forth in his dissent in *Gould*, *supra*, and his concurring opinion in *Midwest Precision Castings Co.*,[64] dissenting Member Penello would have dismissed the complaint in its entirety. Concluding that an employer could lawfully hold a union official to a higher standard because of his responsibilities under the contract, he would continue to find that an employer can lawfully discipline a union official more harshly than other employees for participating in an unprotected strike, because the official has thereby failed to fulfill his contractual responsibility to take affirmative action to bring such a strike to an end.

In *Metropolitan Edison Co.*,[65] the panel majority adopted an administrative law judge's finding, based on *Precision Castings*, *supra*, that the employer's discipline of two union officials, to the extent that it exceeded the discipline given to rank-and-file employees who refused to cross the picket line during an unprotected strike, constituted discrimination based on their holding of union office in violation of section 8(a)(3) of the Act. The majority argued that, by allowing the employer to discriminate against union officers who fail to perform their duties according to the employer's standards, their dissenting colleague would create an anomaly which would have the effect of discouraging employees from being active in their union. Thus, in the majority's view, their colleague's position was at odds with the intent and meaning of section 8(a)(3) of the Act.

Dissenting Member Penello would have found that the employer did not violate the Act by disciplining the union officials more severely than other employees who participated in the unprotected sympathy strike, since they had a duty as union officers to enforce the contractual no-strike provision. As he emphasized in his dissenting opinion, *Gould*, *supra*, and in his concurring opinion in *Midwest Precision*, *supra*, Member Penello's view is that a union official who acquires a battery of "benefits and protections" because of his position with the union must also be held accountable to fulfill certain "duties and responsibilities" inherent in that position of authority, and that the foremost among those "duties and responsibilities" is the enforcement of a no-strike clause in a collective-bargaining agreement.

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[64] 244 NLRB No 63 (1979) (Members Jenkins and Murphy, Chairman Fanning and Members Penello and Truesdale concurring in separate opinions)

[65] 252 NLRB No 147 (Chairman Fanning and Member Jenkins, Member Penello dissenting)

While noting that the union officials here made good-faith efforts to remove the picket line which was the cause of the work stoppage, Member Penello nevertheless found that these actions were inconsistent with their refusal to abide by the contract and cross the picket line to go to work. He concluded that, in light of this inconsistency, the union officials' conduct effectively demonstrated tacit approval of the employees' refusal to cross the picket line and undermined the union's contractual no-strike commitment.

In *Intl. Wire Products Co., a Div. of Carlisle Corp.*,[66] the Board panel, reversing an administrative law judge's decision, concluded that the employer lawfully discharged the union local president for instructing another employee to slow down production in violation of the contract's no-strike agreement. Although noting that the employer had complaints concerning its attempts to work with the employee when he was a shop steward, the panel nonetheless found that the record was devoid of even a hint that, until the work slowdown incident, the employer was giving any consideration whatsoever to discharging the union official as a response to his union activities. The panel then concluded that the union official's statements to the other employee concerning the slowdown were not protected as there is a great difference between concern about the workload and, as in this case, admonitions against operating more machines, a direct violation of the collective-bargaining agreement. In the former circumstance, employees are merely discussing a matter of mutual concern with a fellow employee, that is, how much each employee is required to do; while, in the latter situation, an employee is being encouraged to engage in unprotected activity. Member Penello again emphasized that he adhered to the views expressed in his concurring opinion in *Midwest* and his dissenting opinion in *Gould*, that an employer can lawfully hold a union steward to a higher standard of conduct than other employees because of his contractual responsibilities.

3. Loss of Benefits for Strikers

In *E. L. Wiegand Div., Emerson Electric Co.*,[67] the Board majority adopted an administrative law judge's conclusion that the employer violated section 8(a)(1) and (3) of the Act by terminating sick and accident benefits to employees who were physically unable to work, because other employees actively employed at the employer's facility went out on strike. In support of this conclusion, the majority emphasized the fact that the employer's declaration that these benefits would not be paid to employees who would otherwise receive them came at a time when a

[66] 248 NLRB 1121 (Members Jenkins, Penello, and Truesdale)

[67] 246 NLRB No. 162 (Chairman Fanning and Member Truesdale, Member Jenkins dissenting in part, Member Penello dissenting)

strike at its facility was imminent, but before there was any showing of how widespread the strike would be, and before the employer was aware that any of the employees who were unable to work ratified or actively supported the strike. They noted that the benefits were terminated when the strike began despite the union's protest that the physically unable employees were not participants. Accordingly, the majority concluded that the employer's announcement of the termination of these benefits was intended to coerce and restrain the protected union activity with respect to the strike, by imposing a sanction against certain union employees if others in the unit engaged in strike activity.

The majority rejected the rationale in and overruled *Southwestern Electric Power Co.*,[68] where the Board held that an employer may reasonably belive that employees on sick leave before a strike support it solely on the basis that the strike is effective and the employees are union members, concluding that an employer may not rely on such speculative grounds to justify the termination of existing disability benefits to employees who accrued them as a result of past work performed. While holding that an employer may no longer require its disabled employees to disavow strike action during their sick leave in order to receive disability benefits, the majority further stated that any employee, disabled or sound, who affirmatively demonstrates his support for the strike by picketing or otherwise showing public support for the strike, has enmeshed himself in the ongoing strike activity to such an extent as to terminate his right to continued disability benefits. Accordingly, the majority determined that for an employer to be justified in terminating any disability benefits to employees who are unable to work at the start of a strike, it must show that it has acquired information which indicates that the employee whose benefits are to be terminated has affirmatively acted to show public support for the strike.

While he agrees with the majority's finding of a violation in this case and their decision that *Southwestern Electric Power Co.* should be overruled, Member Jenkins, dissenting in part, would not find that the presence of disabled employees on the picket line is sufficient to establish that they are strikers voluntarily withholding their services or should be treated as such, as this choice was never open to them. Further, he concluded that whatever validity there is in cutting off disability benefits at the time the disabled employee publicly supports a strike vanishes here because of the employer's prior commission of an unfair labor practice aimed specifically against these employees on disability at the start of the strike. Although noting that public participation in a strike may express the employee's complete solidarity with those who have voluntarily chosen to strike, Member Jenkins was of the view that a more likely explanation is that his strike participation was a protest over the specific unlawful

[68] 216 NLRB 522 (1975) (Members Kennedy and Penello, then Acting Chairman Fanning dissenting in part)

withdrawal of benefits then due him and was unrelated to the economic motives of the other striking employees. He acknowledged that a disabled employee who appeared on the picket line may have been guided by other considerations, but nonetheless found that further speculation as to the disabled employee's actual motivation for any general strike activity is unwarranted.

Dissenting in a separate opinion, Member Penello would have found that the position advanced by the Board majority in *Southwestern Electric Power Co.*, in which he participated, presents a correct analysis of the issues involved in determining the legality of the termination of disability benefits during strikes. Accordingly, he would not overrule that decision and wold dismiss the complaint in this case.

In *Freezer Queen Foods*,[69] an administrative law judge determined that the employer violated section 8(a)(1) and (3) of the Act by recalling striking probationary employees as new hires upon termination of the strike. In adopting this finding, the Board panel concluded that the administrative law judge had been correct insofar as he found that the employer's actions coerced and discriminated against striking probationary employees by causing them to forfeit their probationary days earned prior to the strike. It also stated, however, that the administrative law judge did not apply the further test set forth in *Great Dane*,[70] requiring that the Board consider whether the employer has proffered "a substantial and legitimate business end" as justification for its actions. In this regard, the employer had asserted that, because of the parties' interpretation of the contract as requiring 60 consecutive days' probation beginning with the date of hire, it was not possible to achieve its purpose by tolling the probationary period for the duration of the strike and it had no other alternative under the contract. The employer noted, in support of this contention, that the union had never objected to the assignment of new hire dates in the past. In concluding that the employer's asserted justification was insufficient to meet the requirements of *Great Dane*, the panel relied on the employer's failure to offer any evidence that this practice was consented to by the union to the exclusion of all other possible extracontractual practices and, additionally, pointed out that that the employer gave no reason why its assignment of new hire dates served a purpose which could not have been served equally well by tolling the probationary period. Accordingly, the panel concluded that the employer had not established that its policy, as opposed to other less destructive policies which would have achieved the same end of allowing observations of new employees for a substantial uninterrupted period of time, served any legitimate or substantial business or economic purpose.

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[69] 249 NLRB 330 (Members Jenkins, Penello, and Truesdale)

[70] *N L R B* v. *Great Dane Trailers*, 388 U S 26, 34 (1967)

In *Vesuvius Crucible Co.*,[71] the Board panel considered the issue of whether the employer had unlawfully denied accrued vacation benefits to striking employees accrued under the collective-bargaining contract for work done by them prior to the start of an economic strike on November 1, 1976. The administrative law judge had dismissed the complaint, finding that no vacation benefits accrued in 1976 because the parties' contract, which expressly limited vacation benefits to its term, expired on October 31, 1976, before the end of the 1976 calendar year and before the employees were scheduled to take their earned vacation the following year. In reversing this conclusion, the majority stated that the administrative law judge had missed the point since the strikers were seeking vacation benefits only for work performed during the term of the contract. In the majority's view, the fact that no contract providing for vacation benefits existed in November and December 1976 was of no moment since the strikers did not need to work and accrue benefits in those 2 months in order to earn a right to receive a share of vacation benefits for work already performed in the first 10 months of the year. They therefore concluded that those vacation benefits which had accrued under the contract remained vested even after the agreement terminated. It was the majority's belief that to find otherwise would ignore the salient fact that even after a contract expires, provisions providing for accrued benefits and the manner in which they are computed, continue to live on and govern by operation of law. Accordingly, since the strikers worked from January to October in 1976 and in so doing accrued a right to a deferred payment of vacation benefits based on their 1976 earnings, the majority found that the employer, in violation of section 8(a)(3) and (1) of the Act, had unlawfully penalized the strikers for exercising their protected right to strike by refusing to grant their benefits in 1977 because the employees struck rather than worked that year. The majority thus found that the employer had violated section 8(a)(3) and (1) of the Act.

Dissenting Member Penello would have honored the contractual commitment of the parties and deferred to the grievance-arbitration procedure. He believed that the resolution of this dispute, which turned on an interpretation of the contract, is a matter that is best left to the arbitral forum.

4. Strike Waiver

In *American Cyanamid Co.*,[72] the Board panel held, contrary to an administrative law judge, that six union negotiating committeemen had engaged in an unprotected sympathy strike in violation of the collective-bargaining agreement and, thus, the discipline they received for this

[71] 252 NLRB No 179 (Chairman Fanning and Member Jenkins, Member Penello dissenting)
[72] 246 NLRB No 17 (Chairman Fanning and Member Jenkins, Member Penello concurring)

conduct did not violate the Act. Based on its reading of the parties' contract, the panel found that the contractual structure suggested that, unlike the usual case, the broad no-strike provisions were not the *quid pro quo* for the employer's agreement to arbitrate disputes, but were an independent undertaking by the union in return for the employer's no-lockout pledge. The parties' subsequent bargaining history regarding sympathy strikes lent support for this view. The panel noted that the union had never questioned its no-strike obligation when the employer repeatedly reminded union negotiators during bargaining sessions of the unit employees' obligation to work in the event of a strike by another group of the employer's employees. Furthermore, when such a strike did occur, the union's business manager agreed with the employer's contention that the unit employees' refusal to work violated the contract. Accordingly, the panel found that the overall history of the parties' conduct with respect to the no-strike provisions, including their actions at the time of the alleged discriminatees' refusal to work, pointed unequivocally to a conscious waiver of the right to engage in sympathy strikes during the contract period.

In his concurring opinion, Member Penello stated that he agreed with the result reached by his colleagues, but did so for the reasons stated in his separate opinion in *Davis-McKee*,[73] where he stated that unrestricted no-strike clauses in labor contracts should be read to forbid sympathy strikes as well as direct strikes, unless extrinsic evidence should indicate that the parties intended otherwise. He found that the substantial amount of extrinsic evidence referred to by his colleagues was consistent with the terms of the no-strike clause and that the contract's no-strike provision waived the statutory rights of the employees to participate in a sympathy strike.

In *Amcar Div., ACF Industries*,[74] an administrative law judge found that the union had waived the right of the unit employees to engage in sympathy strikes or to honor the picket lines of other unions establishing picket lines at the employer's plant and dismissed the complaint alleging that the employer violated section 8(a)(3) and (1) of the Act by taking certain disciplinary action against employees who refused to cross the picket lines. He further found that, assuming *arguendo* the union did not waive these rights, the allegations of the complaint alleging discriminatory action should still be dismissed on the ground that the employer had no knowledge or reason to believe that any alleged discriminatee was engaged in concerted activity protected by the Act.

The panel majority reversed these findings. They were unable to agree that the evidence unequivocally showed that the union waived the unit

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[73] *Intl Union of Operating Engineers, Local Union 18, AFL-CIO (Davis-McKee)*, 238 NLRB 652 (1978) (Chairman Fanning and Members Jenkins, Murphy, and Truesdale, Member Penello concurring in the result)

[74] 247 NLRB No 138 (Chairman Fanning and Member Jenkins, Member Truesdale dissenting)

employees' statutory right to engage in sympathy strikes or to refuse to cross other unions' picket lines. Their review of the parties' bargaining history showed that prior to the initial contract, which contained the no-strike clause, there was no understanding, or even discussion, about the no-strike clause's application to such strikes. The majority further determined that what evidence there was available concerning the parties' intentions during subsequent collective-bargaining agreements indicated that the union understood the no-strike clause as not covering sympathy strikes and that the employer adopted a contrary policy. Finding that there was no waiver of the employees' right to engage in a sympathy strike or to refuse to cross picket lines of another union, the majority determined that the employer had violated the Act by its disciplinary action taken against the employees, and rejected the administrative law judge's conclusion that there was insufficient evidence to establish that the employer had no knowledge that they were engaging in a refusal to cross the picket line.

Dissenting Member Truesdale would have adopted the administrative law judge's finding that the union waived unit employees' right to engage in a sympathy strike. However, in doing so, he did not rely on the administrative law judge's alternative theory for dismissal, to wit, that the employer's conduct in terminating certain individuals was privileged so long as the employer lacked actual knowledge that those individuals were sympathy strikers.

5. Refusal To Transfer

In *Lee Norse Co., a Subsidiary of Ingersoll Rand Co.*,[75] the panel majority adopted, *inter alia*, an administrative law judge's finding that the employer did not unlawfully refuse to transfer unit employees to its new location because the General Counsel had failed to prove that the employer's decision to relocate was discriminatorily motivated or that the employer had unlawfully refused to bargain with the union about the relocation and its effects. Their dissenting colleague did not disagree with these findings, but instead, advanced two new theories of disparate treatment to support a finding of a violation. The majority noted that these theories were not argued by the General Counsel nor were they litigated, and the employer was not afforded an opportunity to defend against them. In these circumstances, the majority concluded that it was not for the Board to devise a theory which would lead to the finding of a violation sought by the General Counsel because to do so, and to presume illegality of motive for the selection without litigation of the matter, would be a gross denial of the employer's right of due process. In response

[75] 247 NLRB No 98 (Members Penello and Truesdale, Member Jenkins dissenting)

to their colleague, the majority also pointed out that the record contained no evidence concerning the reason for the different treatment and that absent evidence of illegality, it is presumed that the action was taken for lawful reasons. They further disagreed with the dissent that, on the facts, the difference accorded unit employees *vis a vis* their nonunit coworkers was *per se* violative of section 8(a) (3), finding no support for a theory which holds that unit employees, whose working conditions are governed by a collective-bargaining agreement, must particularly be accorded the same benefits that nonunion employees enjoy.

In view of the employer's refusal to transfer the unit employees to the new locations, while at the same time offering to transfer and in fact transferring most nonunit employees in the affected departments, and in the absence of any lawful justification for its actions, dissenting Member Jenkins concluded that the employer plainly was motivated by a desire to avoid dealing with the union as the representative of the unit employees at its new facility. In his view, treating union members worse, or nonunion employees better, because of their membership or nonmembership in the union is the definition of discrimination. Moreover, even in the absence of a finding that the employer's disparate treatment of the unionized employees *vis-a-vis* the unrepresented employees was motivated by antiunion considerations, Member Jenkins would find the failure to transfer the unit employees to be inherently destructive of their section 7 rights and thus violative of the Act without need for proof of an underlying improper motive. Further, he disputed the majority's contention that this issue cannot be considered because the General Counsel "did not even claim" it as a violation, pointing out that under any theory of pleading the General Counsel here met the requirements of alleging both discrimination and the facts which establish the discrimination. Accordingly, Member Jenkins would have ordered the employer to offer immediate reinstatement and transfer to the new facility to those employees it would have offered to transfer but for its discriminatory conduct.

C. Employer Discrimination for Recourse to Board Process

In *Hi-Craft Clothing Co.*,[76] the panel majority agreed with an administrative law judge that the policy favoring free access to the Board's procedures required finding that the employer violated section 8(a)(4) of the Act by discharging an admitted supervisor for asserting that he intended to go to the Board for assistance in his bonus dispute. They found the principles enunciated in *General Services*,[77] to be applicable in this case, particularly the notion that "if the Board is to perform its

[76] 251 NLRB No. 173 (Chairman Fanning and Member Jenkins, Member Truesdale dissenting)
[77] 229 NLRB 940, 941 (1977)

statutory function of remedying unfair labor practices its procedures must be kept open to individuals who wish to initiate unfair labor practice proceedings, and protection must be accorded to individuals who participate in such proceedings." Therefore, the majority concluded that an employer must refrain from discriminating against an individual for indicating an intent to go to the Board since it is the Board's function, and not the employer's, to decide whether the individual is covered by the Act and whether his claim has merit.

While agreeing with the majority that the Board should do all that it can to see that employers and unions do not impede access to the Board, dissenting Member Truesdale concluded that "access to the Board is not an incantation that can somehow transform a supervisor into an employee and confer statutory rights upon a class of individuals that Congress has expressly excluded from the Act's coverage." While noting his belief that *General Services*, *supra*, was wrongly decided and that he would not adhere to it, he also found that case distinguishable from the instant case since here the supervisor's activity was strictly on his own behalf and occurred in a context where there was no union or concerted activity among rank-and-file employees. In these circumstances, Member Truesdale found no reason to believe that the instant supervisor's discharge, as a result of filing a charge, interfered with the exercise of the employees' section 7 rights, nor could he reasonably have concluded that the employer's actions would deter rank-and-file employees from seeking the Board's assistance. Accordingly, Member Truesdale stated that he would have dismissed the complaint in its entirety.

D. Bargaining Obligation

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

1. Obligations as Joint Employer

During the report year, the Board considered various situations in which one employer was alleged to share the bargaining obligation of another, related employer.

A Board panel considered, for the second time, *A–1 Fire Protection & Corcoran Automatic Sprinklers*,[78] decided earlier by a different panel,[79]

[78] 250 NLRB No 34 (Chairman Fanning and Members Jenkins and Penello, Chairman Fanning dissenting)
[79] 233 NLRB 38 (1977) (Members Jenkins, Penello, and Murphy)

and remanded to the Board by the United States Court of Appeals for the District of Columbia Circuit.[80] In its original decision, the Board had held that a single employer in the construction industry having two separate companies and operations, one union and one nonunion—a so-called double-breasted operation—lawfully refused to extend the terms of the collective-bargaining agreement in effect in the unionized operation to the nonunion operation and its employees. The panel had found that the union acquiesced in the establishment of a double-breasted operation by agreeing to the collective-bargaining agreement, limited to the unionized operation, with full knowledge of the existence of the nonunion operation. On review, the court remanded the case on the issue of the proper legal standard to be applied in determining whether the union, upon signing the agreement for the unionized operation, relinquished its right to claim that the agreement applied to the employees of the nonunion operation and directed the Board to explain its failure to discuss or apply the "clear and unmistakable waiver" standard which the Board and the courts had applied in other circumstances to determine whether parties to collective-bargaining relationships have relinquished statutory rights.

On remand, the Board panel held that the "clear and unmistakable waiver" standard, traditionally applied, for example, where an established collective-bargaining representative is asserted to have waived some aspect of its right to bargain or some other statutory rights, did not apply to the situation presented in this case. Here, the panel held, unlike cases where a union has established its right to represent a unit of employees, the union did not have a statutory right to represent the unit of nonunion operation employees and that, therefore, there was no right which could have been waived, clearly and unmistakably, or otherwise. The panel reasoned that the dispute between the parties involved the scope of the bargaining unit covered by the employer's voluntary recognition and by its collective-bargaining agreement with the union, that this dispute did not involve a mandatory subject of bargaining and that the union's desire to represent those nonunion employees did not rise to any statutory rights other than under sections 8(a)(5) and 8(d).

The panel then considered resolution of the dispute as to the scope of the unit. In so doing, it referred to the consistent policy of the Board to accept, and not to disturb, voluntary agreements between the parties relating to unit scope and to the fact that single employers in the construction industry may appropriately have separate union and nonunion operations. Then, considering the union's knowing acquiescence in existing conditions as an expression of its voluntary agreement to those conditions, the panel majority concluded that there had been a voluntary agreement on unit scope excluding the nonunion employees from the unit.

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[80] *Road Sprinkler Fitters Local Union No 669, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO* v *N L R B* , 600 F 2d 918 (1979)

Accordingly, and since the employer did not engage in deception or transfer work obtained by the unionized company to the nonunion company, the panel reaffirmed the earlier decision that the employer did not violate section 8(a)(5) of the Act by refusing to extend the collective-bargaining agreement with the union to the nonunion company.

Chairman Fanning, who did not participate in the Board's original decision, dissented. He agreed that the "clear and unmistakable waiver" standard was inapplicable here. However, on his view of the facts, he was of the opinion that the union, while consenting to a double-breasted operation, did not knowingly acquiesce to the one it got because the employer had concealed the manner in which the double-breasted operation was to be utilized. Therefore, unlike the panel majority, he would have found the precedent in *Burgess Constr.*[81] controlling, and would therefore have extended coverage of the collective-bargaining agreement to include the nonunion employees and would have found an 8(a)(5) violation

In *G & M Lath & Plaster Co.*,[82] a Board panel considered the responsibility of an individual supplier whose business name was used by another employer in an attempt to avoid its bargaining obligation to the union and held that he was not personally liable for the unfair labor practices committed by that unionized employer. When the unionized employer could neither complete an existing contract nor pay the individual employer, Nichols, for the materials supplied, an agreement was reached under which McCaslin, the principal of the unionized employer, would complete the job as a supervisor in the name of a second company owned by Nichols who would be paid directly for materials he had furnished the job. McCaslin informed Nichols that the job would be finished with nonunion labor. After that job was completed, McCaslin continued to operate under the aegis of Nichols' second company, but Nichols had no connection with McCaslin's operation and received no income from it. Finding that McCaslin had operated unlawfully under the Nichols' company name as a disguised continuance of the unionized employer for the purpose of evading the unionized employer's obligations to the union, the administrative law judge concluded that Nichols should be personally liable for the unfair labor practices found because it would be unjust to permit Nichols to benefit from the arrangement by which the debt to his company was paid, and at the same time to avoid any responsibility for aiding the scheme of McCaslin and his unionized operation. The Board, in reversing, held that the General Counsel had failed to prove by a preponderance of the evidence that Nichols permitted McCaslin to use his company name in order to avoid obligations to the union and that, as Nichols entered into the arrangement solely to protect his own company's

[81] *Don Burgess Constr Corp d/b/a Burgess Constr* , 227 NLRB 765 (1977), enfd 596 F 2d 378 (9th Cir 1979)
[82] 252 NLRB No 137 (Chairman Fanning and Members Jenkins and Penello)

financial status and was not involved in any way with McCaslin's operation in the name of Nichols' second company, he was not personally liable for the unfair labor practices committed.

2. 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 and a bargaining representative to bargain in good faith has been interpreted to include the duty to supply information which is "relevant and necessary" to the intelligent performance of the collective-bargaining duty in contract administration functions. The scope of this obligation was considered by the Board this past year in a number of cases.

One of this year's cases, *Natl. Union of Hospital & Health Care Employees*,[83] presented the Board with the question of a respondent union's responsibility to make reasonable efforts to obtain information in the possession of an employee-benefit trust fund requested by an employer with which the union was engaged in collective bargaining. The trust fund, as required by section 302(c)(5) of the Act, was administered by representatives of the union and of participating employers, respectively, each bloc having an equal number of votes. However, the fund's executive director was also the union's national executive vice president, and the chairman of the fund's board of trustees was the union's national president. During contract negotiations which included the subject of the employer's contribution rate to the fund, the employer requested from the fund certain contribution-related information of other participating employers, agreeing to accept coded identification numbers in lieu of the other employers' names, and offering to defray all costs incurred in providing the information. The executive director rejected the employer's request on the ground that the information was confidential and that refusing to furnish it was within his broad authority. The employer then pursued the matter through the union asking it to instruct the fund to furnish the information. The union's response was that the employer should address the request to the fund's board of trustees. When the employer did so, however, the board split evenly along employer-union lines and the request was denied.

The Board found that the information requested was relevant and necessary to enable the employer to perform its collective-bargaining function; that the executive director had no legitimate business justification for refusing to furnish it; that his responses were not made in good faith; and that, in refusing the employer's request, the executive director

[83] *Natl Union of Hospital & Health Care Employees, Div of RWDSU, AFL-CIO (Sinai Hospital of Balto)*, 248 NLRB 631 (Chairman Fanning and Members Jenkins, Penello, and Truesdale)

was not acting solely in his fiduciary capacity as a trustee, in the interest of the employee participants, but rather was acting to support the interests of the union. Noting the dual capacities of both the executive director and the chairman of the board of trustees, the Board concluded that their actions were inimical to the interests of the fund's beneficiaries in that they undermined the good-faith bargaining on which the employer contributions providing the benefits depend. Since the union had it within its power to compel the providing of the requested information, the Board held that the union thereby violated its affirmative obligation to make reasonable efforts to obtain it, to investigate reasonable alternative means for obtaining it, or to truthfully explain or document the reasons for its unavailability and thus violated section 8(b)(3) of the Act. Accordingly, the Board found it appropriate to require the union to take the minimal action of formally requesting from the fund the information sought.

The confidentiality of the information requested was decisive in *Johns-Manville Sales Corp.*[84] There, the union requested the employer to furnish the names of employees whose medical files the employer had "red-tagged" because its doctors had diagnosed the employees as being partially disabled by a lung disease. The union's request was based on an expressed desire to develop a total health program for employees and, more specifically, to permit it to prepare contract proposals designed to protect "red-tagged" employees and to administer and police any agreement reached. Subsequent to the request, the parties reached an agreement which gave "red-tagged" employees certain additional seniority rights. The employer resisted the union's request for the employees' names, questioning the relevance of the information and contending that the names constituted privileged confidential medical records. The administrative law judge rejected these defenses, finding that the identity of the "red-tagged" employees was relevant information essential to the union's effective administration and policing of the special contractual provision, that the names were not the equivalent of medical records, and that the employer had not shown that it would suffer any harm from revealing the names.

A Board panel reversed, holding that the administrative law judge had erred in treating the issues presented as simply (1) the existence of a legitimate claim of relevance; and (2) an "all or nothing" question of confidentiality. Rather, where, as here, there was substance to the position taken by both parties, the Board is required to balance the union's need for the information against any legitimate assertion of confidentiality.[85] Although the information sought here might be relevant, and there might be some advantage in having the identities of the

[84] 252 NLRB No 56 (Chairman Fanning and Members Jenkins and Penello)

[85] See *Detroit Edison Co* v *N L R B* , 440 U S 301, 314–320 (1979)

employees involved, the panel found that the union could adequately fulfill its duty to protect the interests of "red-tagged" employees by informing all employees of their rights should they become "red-tagged" and of the union's readiness to assist them in applying and enforcing their rights. On the other hand, while the employer's assertion of confidentiality was also subject to scrutiny, and it was arguable that it had not treated the employees' identity in a strictly confidential manner, the Board concluded that there existed a legitimate aura of confidentiality with regard to the identities of those individuals diagnosed as having a certain medical disorder, and that the employer had asserted the privilege, on their behalf, in good faith. In these circumstances, the Board found that, on balance, the employer did not violate Section 8(a)(5) in refusing the Union's request.

3. 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.

A Board panel held, in *Arizona Electric Power Cooperative*,[86] that the employer acted unlawfully in unilaterally withdrawing recognition from a union as the collective-bargaining representative of an acknowledged supervisor who was included in the bargaining unit by agreement of the parties. For a period of approximately 10 years, the supervisor was included in a previously certified unit pursuant to the terms of successive collective-bargaining agreements. During midterm negotiations of the most recent contract, however, the employer withdrew recognition from the union as to the supervisor. Although the Board could not have certified a unit which included a statutory supervisor, the panel decided that the Board may appropriately issue a bargaining order covering a unit which it could not have initially certified but concerning which the parties have knowingly and voluntarily bargained. In so deciding, the panel noted that since the Board does not entertain midterm clarification petitions during the life of a contract to clarify a unit to exclude alleged supervisors from a voluntarily established unit, it would have been anomalous to permit the employer to engage in the far more disruptive practice of unilaterally modifying the scope of a unit during the life of a contract covering the unit. The Board pointed out, however, that the employer's duty to bargain concerning the supervisor would not extend beyond the expiration of the current contract unless the parties voluntarily agree at that time to include him in the unit.

In *C. F. Martin & Co.*,[87] employees in a recently certified unit engaged

[86] 250 NLRB No 110 (Members Jenkins, Penello, and Truesdale)
[87] 252 NLRB No 167 (Chairman Fanning and Members Jenkins and Penello)

in an economic strike for some months. The employer unilaterally and without notice to the union applied its vacation pay system so as to prorate the strikers' accrued vacation pay downward to reflect that portion of the year in which they were on strike. Although the evidence was insufficient to show that this application of the vacation pay system was discriminatory, a Board panel found, relying on earlier similar precedents,[88] that the employer's conduct was unlawful since the effect was to deny the strikers' vested benefits as a *consequence* of their having engaged in a lawful strike. Accordingly, it concluded that by thus withholding accrued vacation benefits without notifying or bargaining with the certified union, the employer violated Section 8(a)(5).

In *Henry Vogt Machine Co.*,[89] a Board panel majority, contrary to the administrative law judge, found that the employer had made an unlawful unilateral change when it withdrew cafeteria privileges from a group of unrepresented laboratory employees who voted to be represented by the union and to become a part of the production and maintenance employees unit already represented by the union. Unlike the administrative law judge, the panel majority concluded that the union had not waived its right to bargain over cafeteria privileges by failing to raise the issue during contract negotiations. Although some of the laboratory employees had expressed to the union their fears that the employer would take such action, the employer did not announce its intention to bar these employees from the cafeteria until after negotiations were completed and just 2 days before the vote to ratify the agreement. In the panel majority's view, the union's decision to await the employer's actions rather than to act on the employees' conjectures and speculations was entirely reasonable especially since during the bargaining the employer gave no indication that it intended to terminate the privileges. Therefore, the union's failure to raise the issue was not tantamount to clear and unequivocal, conscious relinquishment of the right to bargain about the cafeteria privilege. Accordingly, the majority found that the employer violated section 8(a)(5) by such unilateral action.

Member Penello dissented, relying on the principles set forth in the dissent in *Federal-Mogul Corp., Bower Roller Bearing Div.*[90] He therefore found that the employer lawfully withdrew the cafeteria privileges of the laboratory employees because, after the election, the working conditions of the established unit automatically and equally applied to all unit employees, including the newly added laboratory employees, and exclusion from the cafeteria was one of the working conditions of the existing unit. Moreover, he concluded that the union acquiesced in the change by its failure to request bargaining after being notified by the employer that the loss of privileges was imminent.

[88] *Knuth Bros*, 229 NLRB 1204 (1977), and *Thorwin Mfg Co*, 243 NLRB No 118 (1979)
[89] 251 NLRB No 40 (Members Jenkins and Truesdale, Member Penello dissenting)
[90] 209 NLRB 343 (1974)

4. Subject Matter of Bargaining

The Board had occasion during the past year to examine certain matters to determine whether or not they constituted mandatory subjects of bargaining.

A Board panel reconsidered *Brockway Motor Trucks, Div. of Mack Trucks*,[91] in light of a denial of enforcement by the United States Court of Appeals for the Third Circuit.[92] On a stipulated record, the Board had held originally that the employer had an obligation to bargain over an economically motivated partial closing, since the decision to close was a mandatory subject of bargaining.[93] While the court agreed that such a closing may constitute a mandatory subject of bargaining, it declined to adopt what it regarded as the Board's *per se* rule and held that there is an initial presumption requiring bargaining, but that the facts must be evaluated and the conflicting interests of the employer and union must be balanced in each case to determine whether a duty to bargain should be imposed. The court declined to enforce, but without prejudice to the Board's right to commence additional proceedings to supplement the record as to the precise nature of the economic basis for the employer's decision to close.

The newly developed record showed that the employer, a truck manufacturer, had begun in 1968 to decrease, for efficiency reasons, its reliance on company-owned branches, utilizing instead more privately owned distributorships to service and deliver the vehicles. In 1975, the employer decided to reduce the number of company-owned branches from 17 to 8 by the end of 1976, and in 1976 the Philadelphia branch, which assertedly was losing more money than any of the remaining branches, was selected for closing. The employer closed the branch approximately 2 months after unsuccessful contract negotiations with the Union had ended and the employees had gone on strike. The employer neither consulted the union nor gave it any advance notice of the closing. Some time after closing this branch, the employer itself was completely liquidated. Observing that the final liquidation was not contemplated when the employer closed the Philadelphia branch and that the employer's ultimate demise might, in hindsight, seem to support the view that bargaining over the closing would have been a futility and therefore unnecessary, the panel did not find these subsequent events to be relevant to the closing issue. It concluded that, without being clairvoyant, it could not know that negotiations over the economic problems the employer faced would have been pointless and noted that there was no showing that the employer's economic straits were such that it needed to take immediate action, or that bargaining would have jeopardized any negotiations with a potential

[91] 251 NLRB No 23 (Chairman Fanning and Members Jenkins and Truesdale)
[92] 582 F.2d 720 (1978)
[93] 230 NLRB 1002 (1977)

purchaser. The panel also noted that the minimal burden that a duty to bargain places on an employer does not impinge on its freedom to manage its business, as bargaining over a partial closing simply requires the employer to discuss the matter at the bargaining table, and may even benefit it by obviating the need to close. Accordingly, applying the court's analysis, the panel reaffirmed its earlier decision and concluded that the Respondent violated section 8(a)(5) by refusing to bargain over its decision to close.

In two significant cases this year, the Board considered whether subjects over which unions applied economic pressure against employers were mandatory subjects of bargaining. *Intl. Paper Co.*[94] brought to the Board the question of whether, in States having "right-to-work laws" (prohibiting compulsory union membership or monetary contribution), a "representation fee" for nonmembers, less than dues for members, was a mandatory subject of bargaining. Claiming that they were required by the Act as the exclusive bargaining representative fairly to represent all employees in an established bargaining unit including nonmembers, the unions argued that they could not afford the cost of representing nonmembers without their financial contribution. After analyzing the legislative history and pertinent Supreme Court decisions [95] involving section 14(b) of the Act, the administrative law judge concluded that section 14(b) granted the States the power of enact legislation concerning the breadth of compulsory unionism and permitted them to outlaw compulsory financial contributions as well as compulsory membership. The administrative law judge noted that, if the unions could not afford to carry out their legal responsibilities, they could disclaim any interest in representing the unit employees. Accordingly, the administrative law judge found the "representation fee" clause was a nonmandatory subject of bargaining and that the unions violated section 8(b)(3) of the Act by insisting on its inclusion in an agreement. The Board panel affirmed the administrative law judge's findings and conclusions and adopted his recommended Order.

Maas & Feduska [96] involved an extension of a union's economic pressure to enforce an employer's obligation with respect to contributions to an employee benefit fund—an obligation contested by the employer. There had been a dispute over the union's attempt to enforce, by economic action, its claim concerning alleged delinquencies in trust fund payments for nonunit executives. A Board panel agreed with the administrative law judge that the union was lawfully attempting to exert

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[94] *Intl Union of the United Assn of Journeyman & Apprentices of the Plumbing & Pipefitting Industry, Locals 141, etc (Intl Paper Co , Southern Kraft Div)*, 252 NLRB No 181 (Chairman Fanning and Members Jenkins and Penello)

[95] *Retail Clerks Intl Assn , Local 1625* v *Alberta Schermerhorn*, 373 U S 746 (1963), *N L R B* v *General Motors Corp* , 373 U S 734 (1963)

[96] *Intl Union of Operating Engineers, Local 12 (Maas & Feduska)*, 246 NLRB No 81 (Chairman Fanning and Members Jenkins and Murphy)

pressure relating to a mandatory subject of bargaining—the integrity of the fund for the benefit of the employees.[97] However, when the employer sought review of this Board's decision in the United States Court of Appeals, the union demanded that the employer withdraw its petition for review and directed its members to strike in support of that demand. Noting that a decision to maintain a lawsuit was not a mandatory subject of bargaining and that it was unlawful to use economic coercion to force agreement on a nonmandatory subject, a Board panel concluded that, as the employer had the right to file a petition for review, the union's use of economic coercion to force withdrawal of the petition violated section 8(b)(3). The panel observed that it was not passing on any right the union might have to use economic pressure to obtain trust fund contributions which was the subject of the earlier proceeding, but rather was concerned with an entirely different issue concerning the union's use of economic coercion to force the withdrawal of the petition for review which is a nonmandatory subject.

5. Bargaining at New Location

In *Westwood Import Co.*,[98] the employer moved its facility from one location, where it had a collective-bargaining agreement with the union, to another. Of 18 employees employed at the new location, 15 had transferred from the old location. Nevertheless, the employer refused to recognize the union as the representative of the employees at the new location or to comply with the terms of the existing collective-bargaining agreement. A Board panel, in adopting the administrative law judge's finding of a violation of section 8(a)(5), held that the employer was obliged to bargain and to honor the existing agreement. Before the Board the employer had defended on the ground that the administrative law judge had erred in finding that a conclusive presumption of the union's majority status existed because the union no longer had majority support and the employer had a good-faith doubt as to such support. The panel noted that an employer may not normally refuse to continue dealing with a union during the period in which their contract is a bar for purpose of Board representation proceedings. Accordingly, it concluded that as the contract was a bar because the employer's operation remained substantially the same after the relocation, and a substantial percentage of the employees transferred to the new facility, the administrative law judge was correct in his application of contract-bar principles. The panel also held that the employer was not entitled to assert that it had a good-faith doubt of the union's majority status because that status was normally rebuttable only after the expiration of a collective-bargaining agreement.

Natl. Car Rental System [99] presented a somewhat different question

[97] 234 NLRB 1256 (1978)

[98] 251 NLRB No 162 (Chairman Fanning and Members Jenkins and Truesdale).

[99] 252 NLRB No 27 (Chairman Fanning and Member Jenkins, Member Penello dissenting in part)

arising from a change in locations. The employer had planned to open a satellite facility to handle some of the business of the facility where the union represented a unit of employees. The business of the represented facility would thereby have been reduced slightly. Ultimately, however, economic considerations dictated that the represented facility be sold in part and the remainder of the equipment transferred to what was to have been the satellite facility. The employer failed to inform the union of the decision to make these changes, although they were to result in the loss of the unit employees' jobs. Instead, the employer told the employees their jobs were secure, and, when the sale and transfer were imminent, it informed them that they would be terminated. Then, the employer notified the union and, when the union protested, the employer's representative stated that the matter was out of his hands.

A Board panel held that the employer had no obligation to bargain over the original decision to create a satellite facility, as it was far from clear that such action would have entailed the elimination of unit jobs. A panel majority (Members Jenkins and Penello), also held that the employer was not required to bargain over the decision to sell the bulk of its bargaining unit business and cease operations at the old location, since such decision was essentially financial and managerial in nature, involving a significant investment or withdrawal of capital.[100] However, anther panel majority, (Chairman Fanning and Member Jenkins), reversing the administrative law judge, found that the employer violated section 8(a)(5) by failing to notify the union until the changes were imminent and in effect a *fait accompli*, so that the union had no meaningful opportunity to request bargaining over the effects of the move. Member Penello, who dissented in part, agreed with the administrative law judge that the union had waived its right to bargain over the effects of the move, noting that the administrative law judge found that the employer had given the union prior notice of the move on two occasions, and, although the union protested the action, it made no request to bargain.

6. Withdrawal of Recognition From Incumbent Union

Under the Board's *Celanese* rule there is rebuttable presumption that a union's majority continues after the first year of certification.[101] An employer which withdraws recognition from an incumbent union, either certified more than a year or voluntarily recognized, may rebut the presumption by an affirmative showing either that it had a reasonable basis for doubting the union's continued majority, on which it relied in

[100] The majority agreed that the administrative law judge had correctly relied on the Board's precedent in *General Motors Corp , GMC Truck & Coach Div* , 191 NLRB 951 (1971), enfd *sub nom Intl Union, United Automobile, Aerospace & Agricultural Implement Workers of America* v *N L R B* , 470 F 2d 422 (D C Cir. 1972) Chairman Fanning disagreed citing his dissenting opinion in *General Motors* which, moreover, he did not consider to be controlling herein

[101] *Celanese Corp of America*, 95 NLRB 664 (1951)

good faith, or that the union did not represent a majority at the time the employer refused to bargain. However, the issue may not be raised by an employer in the context of illegal antiunion activity, or other activity aimed at creating disaffection from the union or indicating that it was seeking to gain time to undermine the union.

In *Upper Miss. Towing Corp.*,[102] a Board panel majority, in agreement with the administrative law judge, held that the employer had a reasonable doubt, based on sufficient objective considerations, of the incumbent union's continuing majority status, after the union's representative told the employer's attorney that the union could not win an election over a rival union, unless it could develop and implement a revised employee health insurance plan. Contrary to their dissenting colleague, the majority found that these statements to the employer's attorney clearly stated the union's estimate that it lacked employee support and they were hardly "vague" statements indicating "relative weakness." Thereafter, the employer unilaterally announced a new health insurance plan prior to informing the union of its reasonable doubts of the union's continued majority status. The majority held that the employer could validly raise the reasonable doubt defense against refusal-to-bargain allegations which were premised on unilateral changes in terms or conditions of employment, where the objective considerations upon which the employer's doubt was based was known to the employer at the time of the unilateral changes, regardless of whether the unilateral action was taken before or after it actually notified the union of its doubt of the union's continued majority status. Accordingly, they dismissed the complaint in its entirety.

Member Jenkins, dissenting, found no objective basis for finding that the employer had a reasonable doubt of the union's majority status in (1) vague statements regarding the union's relative weakness; (2) the filing of a petition by a rival union which claimed a majority; and (3) the numerous employee complaints about the union's health plan. Accordingly, he concluded that the employer did not have a reasonable doubt as to the union's majority status when it unilaterally implemented a new health and retirement plan.

During this year the Board, in *Pennco*,[103] *sua sponte*, reconsidered and reaffirmed its earlier decision.[104] There, in support of its withdrawal of recognition, the employer contended that it had sufficient objective evidence to establish a good-faith doubt of the incumbent union's continued majority status because, during an economic strike, the number of employees—strike replacements and new employees—who crossed the union's picket line exceeded the number of employees on strike and they

[102] 246 NLRB No 41 (Members Murphy and Truesdale, Member Jenkins dissenting)
[103] 250 NLRB No 93 (Chairman Fanning and Members Jenkins, Penello, and Truesdale)
[104] 242 NLRB 467 (1979)

should be presumed *not* to support the union. However, it rejected this argument since this evidence had not rebutted the continuing presumption of the union's majority status, a corollary of which is that, absent evidence to the contrary, new employees are presumed to support the incumbent union in the same ratio as those they replace. The Board held that the presumption of majority status applies as a matter of law and it was incumbent upon the employer to rebut it even, and perhaps especially, in the event of a strike. It noted that it had held, with court approval, that an employee's return to work during a strike, or a new employee's willingness to take a job as a strike replacement does not provide a reasonable basis for presuming that he has rejected the union as his bargaining representative, since he may have been compelled to do so for financial reasons or because he disapproved of the particular strike. In the absence of any other probative evidence that those who crossed the picket line did not support the union, the Board concluded that the employer failed to meet its burden of establishing a good-faith doubt based on objective considerations when it withdrew recognition from the union.

7. Other Issues

During the report year, the Board continued to define the circumstances under which an employer will be found to be a successor employer and in which a successor employer will be required to bargain in light of the Supreme Court's decision in *N.L.R.B.* v. *Burns Intl. Security Services*.[105] In *Saks & Co. d/b/a Saks Fifth Ave.*,[106] some alterations employees of a Gimbels department store had performed work exclusively for the employer, another department store, which was commonly owned with Gimbels and which leased space in Gimbels' building. These employees were represented by a union as part of multiemployer bargaining unit of the alterations employees. When the employer decided to move to its own building, a block away, and cease using the services of Gimbels' alterations employees, Gimbels requested that the employer consider hiring them, expressing concern about Gimbels' liability for severance pay under the union contract. The employer interviewed all the Gimbels employees who had performed the employer's alterations at the Gimbels store, and hired 16 out of 18 of them, putting them to work 3 days after Gimbels laid them off. The alterations workroom at the new store was staffed initially by these 16 employees plus five fitters who had been employed by the employer at the old store, and two new employees. The old employees performed essentially the same work as before. Although there was no immediate change in the weekly wage of the

[105] 206 U S 272 (1972)

[106] 247 NLRB No 128 (Chairman Fanning and Member Jenkins, Member Truesdale dissenting in part)

employees hired, there were changes unilaterally made in working conditions and fringe benefits. The stipulations of facts contained nothing to indicate that the employer conditioned the hiring of the former Gimbels employees on their acceptance of new terms and conditions of employment.

A Board panel, based on a stipulation of facts, unanimously held that substantial continuity of the employing industry, the keystone in determining successorship, was established here because the work done, the work force, and the method of producing the service rendered, remained substantially unchanged, there was no contention that the customers had changed, the new store was only a block from the former location, and the hiatus in starting the new operation was brief. Accordingly, it found that the employer was a successor employer to that portion of Gimbels' business in which employees of Gimbels performed alterations for the employer. A majority of the panel also held that the employer, as a successor, was not free unilaterally to set the initial terms and conditions of employment of the alterations employees at its new store without bargaining with the union, which had requested bargaining. They noted that a successor employer has the duty to consult with the bargaining representative before setting terms when it is perfectly clear that the new employer plans to retain all of the employees in the unit. The panel majority found here that the circumstances of the employer's interview and hire of the Gimbels employees, and the absence of any indication that it conditioned employment of these employees on their acceptance of any particular terms and conditions of employment, showed that it intended to retain all the alterations employees who had been doing its work.[107]

Member Truesdale dissented because, in his view, no obligation to bargain attaches until the successor employer has hired a majority of his work force from among the predessor's employees and therefore a successor is free to set initial terms and conditions of employment. He concluded that the General Counsel had not established that the employer intended to retain all of the old employees, since it merely invited them to apply for positions; and the parties' stipulation was silent as to whether the employees limited its search to employees of its predecessor. Further, he concluded that the employer was not shown to have led employees to believe that they would be employed under the same conditions. He agreed with the majority, however, that, as a successor, the employer was obligated to recognize and bargain with the union once the employer had hired a majority of its employees from the Gimbels' work force.

FitzSimmons Mfg. Co.[108] presented an interesting question regarding the duty of one party to a collective-bargaining relationship to deal with

[107] The employer hired all but 2 of the 18 employees The stipulation contained no explanation for this
[108] 251 NLRB No 53 (Members Jenkins and Penello, Member Truesdale dissenting)

the particular individual the other party has chosen as its representative for bargaining and negotiation. However, where the presence of a particular representative in negotiations makes collective bargaining impossible or futile, a party's right to choose its representative is limited and the other party is relieved of its duty to deal with that particular representative.

From the stipulated facts, it appeared that an individual union representative had physically assaulted the employer's corporate personnel director during a grievance meeting, in the presence of the employee bargaining committee, and had followed up the assault with an invitation to step outside to continue the altercation. The panel majority considered the union representative's conduct to have been unprovoked, and concluded that his conduct weakened the fabric of the bargaining relationship and engendered such ill will as to legally entitle the employer to refuse to meet with him although it agreed to and did meet with other union representatives. Finding that the representative's conduct was sufficiently egregious to make bargaining impossible, the panel majority held that the employer did not violate its duty to bargain when it refused to meet with the union representative.

Member Truesdale, dissenting, found that the offending union representative's future presence at the bargaining table would not have rendered good-faith bargaining impossible, since (1) over an extended period he had negotiated with the employer without any physical altercations; (2) his conduct was the product of momentary anger at what he regarded as an indication that the employer's personnel director was going to raise a subject about which he was particularly sensitive; (3) the union offered assurances that severe action would be taken if any further incidents occurred; and (4) the personnel director had left the employer's employ. Accordingly, he would find unlawful the employer's refusal to meet and bargain with the union's representative.

Contrary to their dissenting colleague, the panel majority was not persuaded by these factors, finding that the union's assurances were inadequate, that despite the personnel director's departure, the employer could reasonably fear that similar attacks might occur against other officials, and that the sudden and unprovoked attack here was sufficient to render good-faith bargaining impossible even though it was a single incident and not part of a pattern of assaults.

In *Nevada Resort Assn.*,[109] a Board panel considered the effect on an employer's violation of its duty to bargain on the union's corresponding duty to bargain under section 8(b)(3). The panel found that the employer violated its duty to bargain under section 8(a)(5) by withdrawing recognition from the union as the representative of its cocktail lounge and restaurant musicians. Meanwhile, however, the parties had agreed to proceed with negotiations for an agreement that would cover house

[109] 251 NLRB No 53 (Members Jenkins, Penello, and Truesdale)

orchestra musicians in the employer's main showrooms. After an oral agreement was reached and ratified initially by the union membership, the union refused to execute a written contract incorporating its terms. The Board panel found that this refusal violated the union's bargaining obligation under section 8(b)(3), rejecting the union's defense that its refusal was excused by the employer's violation of section 8(a)(5). Although it agreed with the principle that a violation of section 8(b)(3) based on a refusal to sign an agreed-upon contract will not be found where the alleged agreement was the direct result of the employer's refusal to bargain and the product of employer coercion, the panel found that principle was inapplicable here. The agreement that the union refused to execute was not the direct result of any coercion by the employer; indeed it was the union which proposed that a separate agreement be entered into covering the house orchestra musicians. While it may be true that no separate agreement would have been reached but for the employer's unlawful withdrawal of recognition, the panel found that the nexus between the withdrawal and the union's proposal for a separate contract for the house orchestra musicians was insufficient to justify the union's failure to execute the contract resulting from its proposal.

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 guarantees 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 *Eaton Corp.*,[110] a Board panel, reversing the administrative law judge, found that the union was justified in refusing to process a grievance on behalf of three laid-off employees where it had reasonably concluded that obscure contractual language pertaining to seniority, modified and further complicated by past practice, did not support the grievance arising from their layoff and recall. Noting that there was no

[110] *United Steelworkers of America, Local 7748 (Eaton Corp.)*, 246 NLRB No 6 (Chairman Fanning and Members Murphy and Truesdale)

evidence of hostility or personal animosity by the union against the laid-off employees, the panel found that the union acted in good faith in determining its position with respect to layoffs and recall and dismissed the 8(b)(1)(A) complaint in its entirety.

San Francisco Newspaper Agency [111] involved the union's duty of fair representation after a grievance was filed. A Board panel disagreed with the administrative law judge's finding that the union's processing of a grievance on behalf of two discharged employees was arbitrary and perfunctory, and that it thereby breached its duty of fair representation in violation of section 8(b)(1)(A) of the Act. Upon learning of the discharges, which resulted from an altercation in a bar, the union's president immediately initiated the contractual grievance procedure by calling a meeting of the joint standing committee composed of two representatives of the union and two of the company. In the investigation that followed, all of the witnesses present during the incident that resulted in the discharges were interviewed by one of the union's committee representatives who testified that the witnesses supported the company's position. When the joint standing committee met to discuss the matter, the company presented written statements in support of its position and adamantly refused to reinstate the employees. Largely because of the adverse evidence presented by the company to the committee, the union chose not to pursue the grievance to arbitration, a decision later approved by the membership.

Chairman Fanning and Member Penello disagreed with the administrative law judge's faulting of the union for accepting as fact "accounts of a dispute which are ambiguous and susceptible of more than one interpretation without making at least an effort to obtain the grievant's explanation of his conduct." They said that this standard would, in practice, require unions to obtain explanations from every grievant or discharged employee and that while such a practice may be salutary, neither the Board nor the courts have established any such requirement. They pointed out that the Board has recently stated that where, as here, a union undertakes to process a grievance, but decides to abandon the grievance short of arbitration, the finding of a violation turns on whether the union's disposition of the grievance was perfunctory or motivated by ill will or other invidious considerations. Here, the administrative law judge found that the union did not harbor any animus against either of the discharged employees and did not act through any hostile motivation. In these circumstances and since the issue presented was the narrow one of whether the union processed the grievance in a perfunctory manner, Chairman Fanning and Member Penello found and concluded that the union's handling of the grievance filed by it on behalf of the discharged

[111] *San Francisco Webb Pressmen & Platemakers' Union No 4 (San Francisco Newspaper Agency)*, 249 NLRB 88 (Chairman Fanning and Member Penello, Member Jenkins concurring)

employees was not outside the "wide range of reasonableness" [112] accorded a statutory bargaining representative and accordingly dismissed the complaint.

Unlike his colleagues, Member Jenkins thought the administrative law judge formulated the correct general standard for the union's discharge of its duty of fair representation. In the circumstances of this case, however, he agreed with them that the union carried its investigation to the point of ascertaining the facts with reasonable certainty, and did not breach its duty.

In *Sachs Electric Co.*,[113] contrary to the administrative law judge, a Board panel majority found that the union violated section 8(b)(1)(A) when its agents requested "travelers"—members of other locals who had been referred out of its hiring hall—to quit their jobs with the company in favor of the union's unemployed members. They stated that the operation of a union hiring hall imposes considerable responsibilities on the union agents in charge of the hall who must neither foster nor countenance discrimination with regard to access to, or referral from, the hall on the basis of International union membership, local union membership, or any other arbitrary, invidious, or irrelevant considerations. Similarly, they continued, a union violates the Act if it coerces employees previously referred out of its hiring hall into quitting their jobs based on such impermissible considerations.

Chairman Fanning and Member Jenkins found that the coercive nature of the requests was manifest in this case. Thus, they pointed out, these "requests" occasionally have been enforced by threats of violence and even actual violence and additionally, travelers asked to quit, under circumstances such as those present in the instant case, undoubtedly are aware that the "requests" come from union officials who, by virtue of their responsibilities in administering the hiring hall, control, and will continue to control, the travelers' livelihoods within the hiring hall's jurisdiction. Thus, it should not come as a surprise, if these "requests" are construed by traveler employees as more than more solicitations for "volunteers." Accordingly, they found that the union coerced travelers into quitting their jobs, and that this conduct violated section 8(b)(1)(A) of the Act.

Contrary to his colleagues, Member Truesdale would adopt the recommendation of the administrative law judge who rejected the General Counsel's allegation that the "requests" were unlawful as there was no evidence that the requests were accompanied by direct threats of reprisal. He agreed with the administrative law judge that there was no

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[112] *Ford Motor Co* v *Huffman*, 345 U S 330, 338 (1953)

[113] 248 NLRB 669 (Chairman Fanning and Member Truesdale, Member Jenkins concurring in part and dissenting in part)

element of restraint or coercion in said requests. In so concluding, he noted that the cases cited by his colleagues all concerned threats which were accompanied by threats and actual violence. Absent such circumstances here, Member Truesdale was not persuaded that the General Counsel had not met its burden of establishing that the threats were coercive and violated the Act.

2. Filing of Lawsuit

In *Kroger Co.* [114] a Board panel agreed with the administrative law judge's conclusion that the union violated section 8(b)(1)(A) and (2) of the Act when it filed a grievance to penalize an employee for crossing a picket line during an economic strike; but noted that, in so concluding, the administrative law judge made no findings as to the lawfulness of the section 301 suit filed by the union to compel arbitration of that dispute. It found that the union violated the Act by maintaining this action. In so finding, the panel explained that the Board has departed from the principle it established in *Clyde Taylor d/b/a Clyde Taylor Co.*,[115] that the filing of a civil lawsuit by an employer or labor organization does not violate the Act, where a respondent brings the lawsuit in pursuit of an unlawful objective. Stating that the union had, as its unlawful objective in processing the grievance, retaliation against an employee for crossing its picket line, the panel concluded that filing a section 301 suit to compel arbitration of this grievance likewise violated the Act.

The panel rejected the charging party's request that the Board order the union to reimburse it for expenses incurred in defending the section 301 suit. It found that the fact that the employer might incur expenses in defending the section 301 suit did not have as great an effect on the employees' exercise of section 7 rights as in those cases where the lawsuits, brought in pursuit of an unlawful objective, had the actual effect of inflicting substantial unforeseen expenses on the individual employee and, therefore, warranted reimbursement of all legal expenses.[116] Accordingly, the panel declined to provide the extraordinary remedy requested by the charging party.

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,

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[114] *United Food & Commercial Workers Intl Union, District Union 227, AFL–CIO (Kroger Co.)*, 247 NLRB No 23 (Chairman Fanning and Members Penello and Truesdale).

[115] 127 NLRB 103 (1960)

[116] See *George A Angle*, 242 NLRB 744 (1979), and *Power Systems*, 239 NLRB 445 (1978), enforcement denied 601 F 2d 936 (7th Cir 1979)

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).

In *Kemper Cabinets* [117] a Board panel found, contrary to the administrative law judge, that the International representative violated section 8(b)(1)(A) when during a local union's meeting he threatened eight union members with a lawsuit to impede their right to file a complaint with the Department of Labor. The union members wrote and petitioned the International's president asking for the recall of their local president and complaining about the operation of the local. The union's president responded only that he would or should sue all who had signed the letter and petition. When they received no further response, eight dissident members wrote another letter to the International's president stating they would refer the matter to the Department of Labor if nothing were done in 10 days. Thereafter the eight dissident members were requested by registered mail to attend a union meeting at which one of the dissidents stated that the Labor-Management Reporting Act, and the union's constitution and bylaws required that members be provided with copies of the bargaining contract. At that point, the International representative stated that the local could sue them all.

The panel found not only that these union members were engaged in protected activity under section 7 of the Act when they wrote and petitioned the International president with a list of complaints about the union and its president, but also that employees' section 7 right to seek redress from the Department of Labor was as great as their right to use Board processes, and the protection from activity prohibited by section 8(b)(1)(A) was the same. Thus, the real issue, the panel stated, was whether the statement made would tend to restrain and coerce the members in the exercise of their section 7 rights. Here, the panel found the statement coercive because (1) it was a reiteration of the local president's earlier statement, rather than an offhand or isolated statement; (2) it was made at an official union meeting at which the union had requested the dissidents to appear; and (3) most importantly, the statement came after the dissident members' reminder that the union was not in compliance with the Labor-Management Reporting and Disclosure Act and after their second letter that they would refer the dispute to the Department of Labor if the union did not meet their requests. In this context, the panel found that the statement about suing the members was more than a declaration of displeasure, it was a threat to impede the dissident's recourse to the Department of Labor. As the threat was both concrete

[117] *Local Union 5163, United Steelworkers of America, AFL–CIO (Kemper Cabinets)*, 248 NLRB 943 (Members Jenkins, Penello, and Truesdale)

and immediate, the panel found that the union violated section 8(b)(1)(A) by making it.

In *Western Publishing Co.*,[118] a Board panel disagreed with the administrative law judge's conclusion that the union did not violate section 8(b)(1)(A) when, in response to the employer's alleged unfair labor practices, it instituted a ban prohibiting its members from performing mandatory overtime work and enforced the ban through internal union charges, fines, and lawsuits. The union implemented the ban on overtime work after numerous bargaining sessions had failed to result in a new collective-bargaining agreement. Unfair labor practice charges of bad-faith bargaining and refusal to bargain were filed by the union 2 and 4 months, respectively, after the overtime ban had begun.

Chairman Fanning and Member Jenkins found that in the circumstances of this case, failure to work overtime was an unprotected partial strike despite the employer's alleged unfair labor practices, and thus the union violated section 8(b)(1)(A) by enforcing its overtime ban. The majority pointed out that in determining the legality of particular union rules under the proviso to section 8(b)(1)(A), the Supreme Court has historically held that the internal enforcement of a properly adopted union rule against voluntary union members by expulsion or a reasonable fine is permissible, where the rule reflects a legitimate union interest and frustrates no statutory labor policy. In this case, the union rule was properly adopted by a majority vote of the members, there is no showing that membership in the union was involuntary, and the rule was enforced solely through the internal method of union charges and fines collected by threat of judicial action. Therefore, the majority stated, the questions to be answered were whether the rule was invoked to promote a legitimate union interest and whether the rule invaded any overriding policy of the labor laws. They noted that the Supreme Court has also indicated that any rule which frustrates a statutory labor policy goes beyond the legitimate interests of a labor organization so that the crucial inquiry was thus whether the union's overtime ban violated any policy of the Act.

The majority concluded that employees voted to impose the overtime ban solely as a bargaining tactic, designed to put economic pressure on the employer and to force the employer to make bargaining concessions, rather than in response to any perceived unfair labor practices. Accordingly, they could not agree with the administrative law judge's conclusion that the planned refusal to work overtime was protected because it was in response to unfair labor practices. Accordingly, noting that it was clear that the repeated refusal of employees to perform mandatory assigned overtime work was unprotected by the Act because it constituted a recurring or intermittent partial strike, the majority found that the union

[118] *GAIU Local 13–B, Graphic Arts Intl Union (Western Publishing Co.)*, 252 NLRB No 130 (Chairman Fanning and Member Jenkins, Member Penello concurring)

violated the Act by disciplining its members who refused to engage in such unprotected activity.

In his concurrence Member Penello agreed with his colleagues that the union violated section 8(b)(1)(A) by discipling its members who refused to engage in an unprotected partial strike. However, in reaching this result, he found it unnecessary to disturb the administrative law judge's conclusion that the employees were protesting the employer's allegedly illegal conduct. For, even assuming that the overtime ban was instituted in response to actual unfair labor practices committed by the employer, he would conclude that such conduct by the employer would not privilege the employees to engage in what would otherwise be a clearly unprotected partial strike.

In *Roadway Express*,[119] a Board panel considered whether the union violated section 8(b)(1)(A) when it refused to allow a dissident member to post antiunion messages, and, in fact, removed unfavorable notices from the union bulletin board. The applicable collective-bargaining agreement provided that the union bulletin board was to be used for "official union business," although for at least 10 years the union had permitted employees to post all types of notices.

The administrative law judge found that the dissident's conduct was protected by section 7 of the Act, and that the union's actions were analogous to an employer's application of a presumptively valid no-solicitation rule to restrict only union solicitation. He reasoned similarly that, although the union could lawfully have restricted the use of its bulletin board to official union business, having permitted employees to post all types of notices it could not prohibit the posting of material critical of the union which is protected by section 7.

A panel majority disagreed with the administrative law judge, pointing out that the cases he relied on, although similar, differed critically in the material fact that they involved employer action and an employer respondent and thus a different section of the Act. Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 8(b)(1)(A), however, makes it an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of section 7 rights. The majority did not agree that the union's actions in this case, completely devoid of any implications of retribution, restrained or coerced the dissident member in the exercise of his section 7 rights. They noted that he had ready access to other, equally effective, means of distribution, noting that antiunion literature was distributed in the breakroom without any action being taken by either the employer or the union, and that the material could also have been posted on another

[119] *Teamsters Local 515 (Roadway Express)*, 248 NLRB 83 (Chairman Fanning and Member Penello, Member Jenkins dissenting)

"all-purpose" bulletin board. Further, the union did not discipline or threaten the member because of his actions. Consequently, the majority dismissed the complaint because they did not find that the union's actions restrained or coerced the dissident member in the exercise of his section 7 rights.

Member Jenkins, dissenting, found irrelevant the absence of any implication of retribution and the availability of means of communication other than the bulletin board. He would find a violation here relying on the rationale expressed in *N.L.R.B.* v. *Magnavox Co.*, [120] where the Supreme Court was concerned with the even-handed dissemination of employee views concerning unions, whether for or against, and treated as a nullity the union's contractual waiver of a no-distribution rule which had the effect of stifling the dissemination of antiunion views. There the Supreme Court stated that "a limitation of the right on in-plant distribution of union literature to employees opposing the union does not give a fair balance to Sec. 7 rights. . . . For employees supporting the union have as secure Sec. 7 rights as those in opposition. . . . It is the Board's function to strike a balance among 'conflicting legitimate interests' which will 'effectuate national labor policy,' including those who support *versus* those who oppose the union."[121] In addition, Member Jenkins pointed out, the Court found that, within the context of the issue, the availability of alternate channels of communication was immaterial. Member Jenkins added that "while a union may waive the right to distribute its own institutional literature, it cannot waive or preclude the employees' right to disseminate literature pertaining to their union views." He concluded therefore, as did the administrative law judge, that the union's conduct constituted an unlawful "restriction upon employees when they begin to question the quality of their representation" and that the union's censorship coerced and restrained the dissident employee in the exercise of his section 7 rights.

The majority responded that they do not find *Magnavox* controlling. Not only does *Magnavox* deal with section 8(a)(1), they state, but it also involves whether or not a union's agreement to a presumptively invalid no-distribution rule—a rule clearly restricting the section 7 rights of any opposing union faction—was a binding waiver of those individual rights. There is no such restriction at issue in this proceeding. Here the union, rather than waiving a right that was not its own, acquired the use of a bulletin board on the employer's premises for union purposes. Moreover, union policing of a union bulletin board is not the equivalent of the blanket denial to adversaries of "equal access to and communications with their fellow employees."

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[120] 415 U S 322 (1974)

[121] *Id* at 325-326

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.

The Board has held that union disciplinary actions against supervisors violate section 8(b)(1)(B) where they are rooted in disputes between employers and unions over the interpretation of their collective-bargaining agreements.[122] In *Northwest Publications*,[123] a panel majority, finding that the *Yakima* precedent was inapposite, concluded that the union did not violate section 8(b)(1)(B) when it fined a member, who was a supervisor, for performing without pay certain "pre-start" tasks before the normal starting time in violation of the collective-bargaining agreement calling for premium pay for prestart work. In a letter informing him of the fine, the union stated that the offense "was a union matter not involving the employer in any way." The panel majority concluded that the union had made it clear that it was not attempting through its discipline of the supervisor to force the employer to change its interpretation of the collective-bargaining agreement but, rather, to address the personal decision of the supervisor, as a union member, to violate trade union principles by "donating" labor to the employer. They noted that the union's concern with the supervisor's activities was identical to that expressed with regard to other members who had been fined for working "off the clock."

Member Jenkins, dissenting, concluded that the complaint against the supervisor for violating the contract by performing "off the clock" duties that, under established and longstanding practice, were performed by working foremen evidenced that the dispute, at least in substantial part, involved the interpretation of the contractual provisions in light of custom and work practices. Accordingly, he found that *Yakima* was applicable and that therefore the union's discipline violated section 8(b)(1)(B).

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 had been denied or terminated for reasons other than the failure to tender dues and initiation fees. Section 8(a)(3) of the Act

[122] *Teamsters Local 524 (Yakima County Beverage Co.)*, 212 NLRB 908 (1974)

[123] *Teamsters Local 996, Sales Delivery Drivers, Warehousemen & Helpers Union (Northwest Publications)*, 250 NLRB No 126 (Members Penello and Truesdale, Member Jenkins dissenting)

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.

In *Actors' Equity Assn.*,[124] a Board panel was presented not only with the usual labor-management considerations surrounding alleged union-caused discrimination, but constitutional and international implications as well. The union, pursuant to collective-bargaining agreements in the theatrical industry, maintained a union-membership requirement for all actors employed in those segments of the industry in which it was the exclusive bargaining representative. In addition, it required nonresident aliens to pay dues in amounts greater than that required for citizens or resident aliens. The complaint herein alleged that this disparate treatment, covering a matter which was a condition of employment, violated section 8(b)(2) by attempting to cause employers to discriminate against employees on grounds other than their failure to pay uniform dues. The administrative law judge, who was affirmed by the Board panel, noted that the statutory standard that dues be "uniformly required" does not mean that all members must be charged the same dues, but that distinctions between classes of members must be based on "reasonable general classifications." Drawing on constitutional law, he held that discrimination based on alienage is inherently suspect, observing that rarely will it be possible to show that alienage has relevance to employment or any legitimate union or business interest. Thus, he concluded that the burden must be on those who seek to justify it to show their reasons for such discrimination and that those reasons are sufficient to overcome the strong expressions of policy against it. The union argued that the special dues structure was necessary to protect American actors from competition from foreign actors, that its power to maintain a dues differential deterred British Actors' Equity from taking hostile and restrictive action against American actors, and that, if the union were deprived of its power, there could be a complete breakdown in the friendly relations between the two unions. After examining the history of the competition between American and British actors for work on the American stage since the 1920's, including union actions and immigration laws, the administrative law judge concluded that whatever purposes the dues differential originally may have served, it no longer had any practical effect except to raise revenues for the union. Concluding that this was not a sufficient justification for its treatment of nonresident aliens, the administrative law judge found that the union had violated section 8(b)(2) and (1)(A) of the Act.

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[124] *Actors Equity Assn (League of Resident Theatres)*, 247 NLRB No 172 (Chairman Fanning and Members Jenkins and Truesdale)

H. Prohibited Strikes and Boycotts

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

A Board panel, in *Curtin Matheson Scientific*,[125] in considering whether the union's strike against one branch of a national company picketed a branch located in another state violated section 8(b)(4) of the Act, started with "the fundamental proposition that Section 8(b)(4) was designed to preserve the traditional right of striking employees to bring pressure against employers who are substantially involved in the dispute, while protecting neutral employers from being enmeshed in it." It agreed with the union that the strike activity constituted lawful primary picketing because the picketed branch was not a neutral person, but was part of a single enterprise that encompassed both the struck branch and the other picketed branch. If the parent company is essentially a single enterprise, the panel held, its employees have the right to picket geographically separated parts of its integrated operation in support of a primary dispute in one part, without proving that there is a direct relationship between the branches at the local level. Considering many factors, including the cross-shipping of products by each branch to customers of other branches, the resultant insulation of each branch to a localized strike, and the parent company's control over branch labor relations, the panel concluded that the company was a single enterprise and that the picketed branch was not an unconcerned neutral in the union's dispute with the struck branch. Accordingly, the 8(b)(4) complaint against the union was dismissed.

Member Truesdale, concurring, stated that, in concluding that the parent company and its branches constituted an integrated enterprise, he emphasized such factors as the parent company's providing of accounting, advertising, financial planning, inventory control, and other services, and its involvement in branch labor relations, in addition to the cross-shipping policy which his colleagues found particularly significant.

Edward J. DeBartolo Corp.[126] involved an application of the proviso to

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[125] *Teamsters, Chauffeurs, Warehousemen & Helpers, Local 560 (Curtin Matheson Scientific)*, 248 NLRB 1212 (Chairman Fanning and Member Jenkins, Member Truesdale concurring)

[126] *Florida Gulf Coast Bldg Trades Council (Edward J DeBartolo Corp)*, 252 NLRB No 99 (Chairman Fanning and Member Jenkins, Member Penello dissenting)

section 8(b)(4) which exempts from its prohibition "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." According to the stipulation of facts, the union had a primary dispute with a construction company which, it contended, paid substandard wages and fringe benefits to its employees. The construction company had a contract with Wilson's Department Store to build a store in an existing shopping mall owned by the charging party, but had no contract or business relationship with the charging party or with any other tenant of the mall. The union distributed handbills at the mall entrances, requesting consumers not to shop at the stores in the mall because the charging party was permitting Wilson's store to be built by contractors who pay substandard wages and fringe benefits. The question before the Board panel was whether the construction company was a "producer" within the meaning of the publicity proviso, so that the union's handbilling urging a total consumer boycott of the shopping mall and its tenants was protected by the proviso. In so concluding and dismissing the 8(b)(4) complaint, the panel majority noted the mutually dependent and beneficial relationship between the construction company on the one hand and the shopping mall and its tenants on the other. Mutual obligations were exemplified by a keying of the tenants' rental and maintenance charges to the number of additional tenants opening businesses at the mall, while mutual benefits were exemplified by the advantage to each tenant and to the mall ownership, as each store attracted customers to the mall and thus created a market for the other tenants. In sum, the majority concluded that (1) the "mutual obligations between the parties and the benefits derived from participation in the mall enterprise reflected the symbiotic nature of the relationship between [the charging party] and its tenants, not unlike the relationship between the operations of a diversified corporation;" and (2) the construction company's contribution to this enterprise was as an employer which applies its labor to a product, i.e., the Wilson's store, from which the charging party and its tenants would derive substantial benefit. Consequently, as a result of its relationship with Wilson's and the shopping center enterprise, the majority found that the construction company applied capital, enterprise, and service to that enterprise, and thus it was a "producer" in the sense that that term is used in the publicity proviso.

Member Penello dissenting, would have revoked the Board's previous acceptance of the parties' stipulation of facts, because it appeared to him that the briefs raised significant questions of fact concerning another requirement of the publicity proviso, the truthfulness of the union's handbills. Therefore, he would not have reached the question the panel majority decided.

I. Jurisdictional Dispute Proceedings

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

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

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 *Rainbow Security Systems*,[127] a Board panel found no reasonable cause to believe that section 8(b)(4)(D) had been violated by the union's strike and quashed the 10(k) notice of hearing issued therein. The stipulation of facts showed that during contract negotiations with Nitec Paper Corporation, where it represented the production and maintenance employees, the union submitted 32 bargaining proposals and threatened to strike if it did not get all of them. One of these proposals was the replacement of security guards, then being provided by a nonunion contractor, with union members. Nitec offered to make one security

[127] *United Steelworkers of America, Local 12970 (Rainbow Security Systems)*, 250 NLRB No 106 (Members Jenkins, Penello, and Truesdale)

position, the "fire watch," a union position if the union would agree to contractual language concerning "freezing" employees into certain jobs. The union indicated its willingness to accept this offer in principle, although it still had some objections to the phrasing of the job-freezing language. Later, at a time when 10 or 12 bargaining issues were unresolved, including wages, pensions, holidays, job freezing, and the assignment of security work, the union struck. During strike settlement talks, the union accepted Nitec's prestrike offer with respect to the "fire watch" and job freezing. When the other issues were resolved and the strike was settled, the reassignment of the "fire watch" duties was put into the contract. The contractor who provided security services charged the union with violating section 8(b)(4)(D) by forcing Nitec to assign the work to employees represented by the union rather than to the unrepresented guards of the contractor. In holding that there was no reasonable cause to believe that such a violation occurred, the Board panel noted that the union did not threaten to strike over the assignment of the security work alone. After the generalized threat, the parties bargained over numerous issues, and Nitec itself proposed that unit employees perform the "fire watch" duties in return for a concession from the union that Nitec considered extremely important. In the circumstances shown, the panel ruled that it could not reasonably conclude that the initial generalized strike threat coerced Nitec into assigning the "fire watch" to the unit employees, or that an object of the subsequent strike was to force or require Nitec to assign the work in dispute to the unit employees, an issue on which the parties had reached substantial agreement before the strike began.

J. Discriminatory Fee Structure

Section 8(b)(5) makes it an unfair labor practice for a union to charge employees covered by a valid union-security agreement a membership fee "in an amount which the Board finds excessive or discriminatory under all the circumstances." The section further provides that "In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected."

In *Standard Auto Equipment Co.*,[128] the General Counsel contended that a new, increased schedule of initiation fees adopted by the union, a Teamsters local, was intended to discriminate against nonunion applicants in favor of union applicants and thus to create a closed shop. The new fee schedule was put into effect by the union's new officers upon their discovery that the fees had remained static for some time and were lower

[128] *Brewery & Soft Drink Workers, Liquor Drivers & New and Used Car Workers, Local 1040, IBT (Standard Auto Equipment Co.)*, 249 NLRB 339 (Chairman Fanning and Members Jenkins and Truesdale)

than those charged by other unions which were members of the same Teamsters joint council. The new schedule conformed, in theory, with a directive of the joint council as to the minimum and maximum initiation fee rates, although inadvertently it was set, in some cases, in excess of the maximum rate. A Board panel found that, as the new schedule was the result of an overall review of the union's initiation fee policy at many employers, and as its effect was to raise the fees at some employers, but not at others, in accord with a uniform formula, there was no basis for an inference that the motive was to freeze out unemployed nonmembers, even as to those employers where the increases were the sharpest. Moreover, it concluded that the union official's remarks in defense of the new schedule, to the effect that the new schedule would promote higher entry-level wages and job security, did not demonstrate an unlawful motivation to monopolize employment for union members, but rather predicted an effect which would likely *attract* nonunion applicants, not exclude them. The panel agreed with the administrative law judge that the General Counsel failed to prove that the union's fee increases were calculated to achieve a closed shop and that the fee adjustments, made at various rates for each unit of employees, were made in accordance with the union's understanding of the joint council's directive. Accordingly, it agreed that, in these circumstances, the administrative law judge properly dismissed the complaint.

K. Unit Work Preservation Issues

Section 8(e) makes it an unfair labor practice for an employer and a union to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains, or agrees to cease or refrain, from handling, using, selling, transporting, or otherwise dealing in any products or 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.*,[129] where the Court held that section 8(e) does not prohibit

[129] 386 U S 612 (1967), 32 Ann Rep 139 (1967)

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).

A Board panel found that the contract clause in *Gaslight Club, Palmer House*,[130] was unlawful under section 8(e). There, the charging party, a lessee in a hotel, refused the union's request to execute the collective-bargaining agreement, containing the clause in question, to which the hotel was bound. The clause in question required that, "in the event that the employer leases any portion of its premises where bargaining unit members are employed at the time of the lease, and if the lessee employs any employees in job classifications covered by the agreement, then the lessee must execute the collective-bargaining agreement or agree to be bound by its terms as a condition precedent to the lease transaction." According to the panel, the effect of this language was that the employer was prohibited from conducting such transactions with persons who did not recognize and become bound to the observance of the union's agreement. The clause did not, in any way, limit its effect to the preservation of the jobs of any unit employees that were employed in the leased premises, but required the lessee to become bound to the contract regardless of whether or not those unit employees would lose their jobs. Accordingly, the panel found that it was a typical "union signatory clause," normally proscribed by section 8(e), because it exceeded the legitimate primary purpose of protecting unit work and was directed at the secondary purpose of further general union objectives.

In *Associated General Contractors of Calif.*,[131] a Board panel considered the applicability to contractual provision of the proviso to section 8(e) that exempts from its prohibition certain agreements in the construction industry relating to the contracting or subcontracting of work to be done at the jobsite. From the stipulation of facts, it appeared that the contractual provisions under attack required the employers to cease doing business with dump truck owner-operators who do not become union members and employee-drivers subject to all the terms of the collective-bargaining agreement. The panel noted that the Board had found this type of provision, applied to individuals, found as here, to be independent contractors, was secondary on its face, since it was designed to serve the unions' general institutional interests rather than the legitimate interests of unit employees. Accordingly, the provisions violated section 8(e) of the Act, unless protected by the proviso.

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[130] *Chicago Dining Room Employees, Cooks & Bartenders Union, Local 42 (Clubmen, Inc d/b/a Gaslight Club, Palmer House)*, 248 NLRB 604 (Chairman Fanning and Members Penello and Truesdale)

[131] *Joint Council of Teamsters No 42 (Associated General Contractors of Calif)*, 248 NLRB 808 (Chairman Fanning and Members Penello and Truesdale)

In the first instance, the panel concluded that the clause extended to nonjobsite work because the transportation work was not restricted to transportation between sites controlled by the same contractor. However, for purposes of the decision herein, the panel considered what the validity of the clause would be if it were interpreted as narrowly as the unions contended; i.e., as applying only to the transportation of materials between construction sites, up to 10 miles apart, controlled by the same contractor. Even if construed that narrowly, the panel concluded that the coverage of the provisions was too broad to be exempted by the construction industry proviso. It found that the provisions would apply to an owner-operator who, in the course of a 10-mile roundtrip haul, spends an average of 10 minutes combined, at the geographical site of construction and the dumping location and an average of 50 minutes in offsite travel. Consistent with the legislative history of the proviso which indicates it was not intended to encompass the transportation of materials, even though some tasks might take place on the jobsite, and with Board decisions which repeatedly held that the proviso does not apply to jobsite deliveries which are only a small part of basically offsite transportation activity, the panel saw no justification for departing from this well-established precedent merely because the transportation activity took place between, and involved brief work on, two sites controlled by the same construction contractor. Accordingly, it held that such work was not jobsite work within the meaning and protection of the proviso.

L. Picketing of Health Care Institutions

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

In 1975, a Board maojrity held in *Lein-Steenberg* [132] that the notice

[132] *United Assn of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the U S & Canada, Local 630 (Lein-Steenberg)*, 219 NLRB 837 (1975) Members Fanning and Jenkins dissenting)

requirements of section 8(g) applied to any strike or picketing at the premises of a health care institution, even primary reserved gate picketing directed at a subcontractor. However, the United States Court of Appeals for the District of Columbia Circuit and the Seventh Circuit refused to enforce Board decisions applying that ruling, and held that only labor activity directed at employees of the health care institutions were subject to the 8(g) requirements.[133] The same question was raised again during this past fiscal year in *Henry C. Beck Co.*, [134] Based upon a stipulation of facts, a majority of the Board agreed with the courts and overruled *Lein-Steenberg*, deciding that picketing which was adjacent to a health care institution, but not directed at it and which honored reserved gates insuring the neutrality of the health care institution, was lawful despite the union's failure to give the 8(g) notice of intent to picket. Member Murphy, who had been in the majority in *Lein-Steenberg*, wrote a separate concurring opinion in which she expressed her disagreement with *Lein-Steenberg* after further reflection and after consideration of the court's decisions.

Member Penello, dissenting, adhered to the view expressed by the Board in *Lein-Steenberg* that "Congress intended the Board to interprete Section 8(g) according to its plain language and that, therefore, *any* strike or picketing at the premises of a health care institution, even primary reserved gate picketing directed at a subcontractor, is proscribed in the absence of proper notices."

M. Remedial Order Provisions

1. Appropriateness of Bargaining Orders

In *B-P Custom Bldg. Products & Thomas R. Peck Mfg.*,[135] a Board panel, while agreeing with the Administrative Law Judge that a *Gissel* bargaining order was warranted to remedy the effects of the employers' unfair labor practices,[136] indicated that it would issue a remedial bargaining order to only one of two joint union petitioners if the revised tally of ballots resulted in their defeat in the election. The Paint Makers and the Teamsters had petitioned for joint representation of the employers' employees, supporting their petition with 21 authorization cards for a unit of 37 employees. However, 20 of the cards unambiguously designated the

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[133] *N L R B* v *Intl Brotherhood of Electrical Workers, Local Union 388 [Hoffman Co]*, 548 F 2d 704 (7th Cir 1977), cert denied 434 U S 837, *Laborers' Intl Union of North America, AFL-CIO, Local Union 1057 [Mercy Hospital of Laredo]* v *N L R B* , 567 F 2d 1006 (D C Cir 1977)

[134] *Painters Local 452 (Henry C Beck Co)*, 246 NLRB No 148 (Chairman Fanning and Members Jenkins and Truesdale, Member Murphy concurring; Member Penello dissenting)

[135] 251 NLRB No 179 (Members Jenkins, Penello, and Truesdale)

[136] Citing the Supreme Court decision in *N L R B* v *Gissel Packing Co* , 395 U S 575 (1969) The administrative law judge found that the unfair labor practices had a tendency to undermine majority strength and impede the election process

Paint Makers; one employee signed a Teamsters card. The Board panel declined to order the employers to bargain with both unions, relying on the rule in *Natl. Heating Co.*,[137] that a remedial bargaining order cannot issue in favor of joint petitioners unless there is proof that a majority of unit employees designated both unions to represent them on a joint basis. In applying the rule here, the panel concluded that the faces of the authorization cards did not designate joint representation and also noted that there was no evidence that employees were told when they signed the cards that representation was being sought on a joint basis. Accordingly, the Board would not issue a bargaining order in favor of the joint petitioners, but only on behalf of the Paint Makers, the sole petitioner which demonstrated its majority status through the authorization cards.

In *Patsy Bee*,[138] a Board panel concluded, contrary to the administrative law judge, that the gravity of the employer's unlawful 8(a)(1) conduct warranted the issuance of a *Gissel* bargaining order on behalf of the union which had a numerical card majority but had lost the election. The administrative law judge had found that the employer committed a series of preelection 8 (a) (1) violations by interrogating its employees concerning their union activities and sympathies; threatening employees with a loss of future benefits and with termination of employment because of their union activities; creating the impression of surveillance of employees' union activities and by engaging in surveillance of such activities; promulgating and enforcing an impermissibly broad no-distribution rule; soliciting employee grievances and indicating a willingness to rectify them; threatening to shut down operations before accepting a union; and threatening employees with plant closure and with job loss in the event of a union election victory. Finding that the employer not only attempted to thwart the representation desires of its employees, but also intentionally sought to preclude a free election, the panel concluded that the odds for a free choice in a rerun election were minimal. Further, noting that the presence of direct threats to close operations is the hallmark of cases in which bargaining orders issue, the panel required the employer to bargain with the union.[139]

In *J. J. Newberry Co., a Wholly Owned Subsidiary of McCrory Corp.*,[140] a case involving substantially preelection unfair labor practices in violation of Section 8(a)(1) and a single 8(a)(3) violation, a Board panel majority issued a *Gissel* bargaining order on behalf of a union with an established card majority. The panel unanimously agreed with the

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[137] 167 NLRB 534 (1967)

[138] 249 NLRB 976 (Chairman Fanning and Members Jenkins and Penello)

[139] Member Penello agreed that the 8(a)(1) violations required the election to be set aside He relied on the fact that the union's written and timely objections specifically alleged that the employer threatened plant closure and economic reprisals to discourage employees' union activities citing his dissenting opinion in *Dayton Tire & Rubber Co* , 234 NLRB 504 (1978)

[140] 249 NLRB 991 (Chairman Fanning and Member Jenkins, Member Penello dissenting in part and concurring in part)

administrative law judge that the employer violated section 8(a)(1) by interrogating employees about their union activities; soliciting employee grievances and promising that complaints would be corrected; informing employees that they were being disloyal to the store manager because of their union activities; promising to grant employees benefits not previously enjoyed as a reward for voting against the union; and granting employees a wage increase shortly before the election. In addition, contrary to the administrative law judge, the panel also found that the employer violated section 8(a)(3) by withholding a wage increase given to other employees earlier.

The panel majority concluded that these unfair labor practices were serious enough to justify a bargaining order, pointing out that the grant of a substantial wage increase to all unit employees in violation of section 8(a)(1) was sufficient to render it unlikely that a fair election could be held. It further noted that this was only one of numerous unfair labor practices by the employer clearly designed to undermine the union's majority status by promising to grant, and actually granting, employees much, if at all, of what they were seeking through union representation.

Contrary to the panel majority, Member Penello found that the employer's unlawful actions were not of the type to preclude employees' free choice in the election process. He pointed out that, although the employer's grant of a wage increase was announced during a preelection antiunion speech, the increases had been planned prior to any union activity. Further, Member Penello emphasized that in announcing that the employees would now receive the increase they deserved and that the "logjam" was finally broken, the employer placed the onus for the delay on the Board's regional director and the timing of the Decision and Direction of Election rather than blaming employees' union sentiments or activities. Concluding that the employer's unlawful conduct was not the type to preclude the employees' free choice in the election process, Member Penello would set the election aside, if the union did not receive a majority of the valid votes cast and would remand the representation case to the regional director to conduct a rerun election.

2. Backpay Computation

In *Olympic Medical Corp.*,[141] a Board majority adhered to the automatically adjusting formula set forth in *Florida Steel Corp.*[142] for computing the Board's remedial interest rate, agreeing that such a formula, following the Internal Revenue Service's adjusted prime rate, provided the preferable method for setting its interest rates. The majority chose to adhere to the formula for the reasons set forth in *Florida*

[141] 250 NLRB No 11 (Chairman Fanning and Members Penello and Truesdale, Member Jenkins dissenting in part) The Board rejected the flat 9-percent interest rate for backpay awards proposed by the General Counsel

[142] 231 NLRB 651 (1977)

Steel: "First, it is directly tied to interest rates in the private money market. Second, it is subject to periodic semi-automatic adjustment. Third, it is relatively easy to administer, as it cannot be changed more frequently than once every 2 years; adjustments are announced well ahead of the effective date; and the rate is rounded to the nearest whole percent."[143]

Member Jenkins, dissenting in pertinent part, would overrule *Florida Steel*, and find the adjusted prime rate inadequate to make whole the wronged employees. He explained that that method in no way met the problem posed by the large and frequent fluctuations in interest rates in recent years because it was unchangeable for 2 years. Further, he found that a "windfall-penalty effect" of the Internal Revenue Service's adjusted prime rate was inherent in its statutorily imposed requirements of a 2-year lag behind current interest rates, and a 1-percent lag behind actual market rates. In other words, in a period of rising interest rates, employees will receive less interest than market rates, with a corresponding windfall to employers; but when interest rates are falling, employees receive the windfall and employers are penalized. He also noted that, while windfalls and penalties may balance out, or nearly so, those who get the windfall are not the same as those penalized. Rather, Member Jenkins would base interest rates on the rate the Treasury pays to borrow on 2-year notes, plus an additional 5 or 6 percent to approximate the rate at which employees would have to borrow. He pointed out that the 2-year period of the notes is approximately the period between an unlawful discharge and the receipt of backpay for the employee—the period for which the employee would be compelled to lend the money to the employer. Finally, if, as the majority argued, monthly changes in the rate proved unwieldly, Member Jenkins stated that the rate could be averaged and adjusted quarterly.

Replying to Member Jenkins' dissent, the majority noted that his proposal focused only on the cost to the backpay recipient of borrowing money and not on the return due him as a creditor of the employer. In contrast, the Internal Revenue Service formula achieves a rough balance between that aspect of remedial interest which attempts to compensate one for losses, both as a borrower and a creditor, by setting the same interest rate for overpayment and underpayment of taxes. Further, the majority rejected Member Jenkins' proposal because the monthly change in the treasury rate would increase the complexity of calculating monetary awards and the amount of time and manpower to do so, and because lack of advance notice of rate revisions could impede Board settlements as parties operate in an atmosphere where interest rates are uncertain.

In *Graves Trucking*,[144] a Board panel fashioned a remedy for an employee who was unable to work because of an injury inflicted by the

[143] *Florida Steel Corp*, *supra* at 652

[144] 246 NLRB No. 52 (Members Jenkins, Murphy, and Truesdale)

employer in response to the employees' protected activity. Contrary to the administrative law judge, it required the employer to make whole the employee from the date he was rendered unable to work because of his injury caused by its unlawful conduct, until a reasonable period after he is deemed physically able to resume his former or a substantially equivalent job with the employer, or any other employer. Also contrary to the administrative law judge, the panel did not order reinstatement since the employee was never discharged or prevented from returning to work for reasons other than his injury. It stated that like other Board remedies, backpay is intended to dispel the effect of unlawful conduct, whether in response to protected concerted activities or union activities, by restoring discriminatees as nearly as possible to the economic position they would have enjoyed absent the unlawful conduct. Accordingly, the panel found a monetary award appropriate although the employee was never discharged, because he suffered the monetary consequence of discharge without the physical capacity to mitigate his loss.

In *Matlock Truck Body & Trailer Corp.*,[145] a Board panel included in backpay a striking employee's expenses for replacing his tools and toolbox after he had accepted other employment during an unfair labor practice strike at the employer's facility. Although the employee did not personally attempt to retrieve his tools, the panel found that the employer bore some responsibility for protecting its employees' property, even if those employees are striking. Here, the panel found that the employee would not have been forced to purchase new tools in the absence of the employer's unfair labor practices and noted also that the employer neither offered to produce the tools nor to show that they were still intact in the plant. Thus, absent a showing that the employer made a reasonable effort to protect the tools and toolbox, the employee was entitled to replacement expenses.

3. Availability of Remedy to Illegal Aliens

During the report year the Board was asked to clarify a conventional reinstatement and backpay order involving five illegal alien employees who had been constructively discharged when, in retaliation for their union activities, the employer prevailed upon the Immigration and Naturalization Service to deport them. In *Sure-Tan & Surak Leather Co.*,[146] a Board majority denied the General Counsel's request to clarify its prior order [147] so as to require an offer of reinstatement only to those discriminatees who are able to reenter the United States lawfully. Rejecting the contention that the Board's order contravened national immigration law and policy by not distinguishing between legal and illegal

[145] 248 NLRB 461 (Chairman Fanning and Members Jenkins and Truesdale)

[146] 246 NLRB No 134 (Chairman Fanning and Members Jenkins and Truesdale, Members Penello and Murphy separately dissenting)

[147] 245 NLRB 1187 (1978)

immigrant status, the majority did not regard it within the Board's authority to alter the Act's obligations in a manner which might assist in reaching whatever may be the current goals of immigration policies, and would be uncertain how to do so even if they considered it proper. Rather, they concluded that the remedial policies of the Act would be best effectuated by ordering that the discriminatees be offered unconditional reinstatement, thereby affording them full protection notwithstanding the circumstances attendant to their illegal discharge. The majority adverted to the use of the Board's usual procedures for handling the claims of discriminatees who are missing, located after long delays, or located but found unavailable for work (including unavailability because of forced absence from the country), and indicated that the appropriate forum for implementing the order was in the compliance proceeding. In response to their dissenting colleagues that the Board was obligated to accommodate the policies of the Act to other Federal statutes, the majority was of the view that the remedy ordered was not so incompatible with immigration law so as to render it an abuse of the Board's authority under *Southern Steampship*.[148]

Member Penello, dissenting, would have granted the General Counsel's motion to clarify the Board's order to require that the employer offer reinstatement only to discriminatees lawfully in the country. Otherwise, a discriminatee may seek to return immediately to this country, without waiting until he may be able to do so legally, in order to enjoy the benefiit of a Board-ordered job waiting for him here. Member Penello was of the view that, as the majority's order now stood, it might encourage an alien discriminatee to reenter the country illegally—conduct which constitutes a felony under United States criminal laws.

Member Murphy, dissenting, also disagreed with the majority's order, stating that the majority was indulging in the fiction that the discriminatees did not leave the labor market and were available for work. Thus, by leaving future determination of uncertainties to the compliance stage, neither the employer nor the General Counsel would know what was required to comply with the order unless the Boar informed them and to this extent she would grant the motion for clarification. Further, Member Murphy pointed out that, although the Board is not empowered to enforce other legislation including the Immigration and Nationality Act (INA), it was incumbent on it to take cognizance of other statutes and accommodate them if possible. She concluded that, although the illegal aliens were employees within the Act and entitled to its protection, that did not make them immune from the provisions of INA.

Contrary to Member Penello's dissent, Member Murphy did not agree with a remedy providing that offers of reinstatement be made only to persons who prove they are legally in this country since it was not within

[148] *Southern Steamship Co* v *N L R B* , 316 U S 31 (1942)

the Board's competence to determine the legal status of aliens. Instead, she would have had the Board employ a rulemaking procedure to determine the appropriate remedy in circumstances like these.

4. Litigation and Bargaining Expenses

In *Wellman Industries*,[149] a Board panel reviewed Board policy regarding remedial orders that require reimbursement of litigation and negotiation expenses. The Board's basic policy is set forth in *Heck's*,[150] where the Board indicated an intention to refrain from assessing litigation expenses against an employer, notwithstanding that the employer may be found to have engaged in "clearly aggravated and pervasive misconduct" or in the "flagrant repetition" of conduct previously found unlawful," where the defenses raised by that employer are "debatable" rather than "frivolous."[151] Where, however, defenses to a refusal to bargain are frivolous, remedial aspects of ordering reimbursement for litigation and negotiation expenses are well within the scope of the Board's section 10(c) authority to remedy unfair labor practices. The panel noted that the mere fact the refusal to bargain is frivolous suggests it has been undertaken, at least in part, to create an economic imbalance favoring the violator and that, from that perpective, the expenses are the direct consequence of the frivolous refusal, and not an expense collateral to the unlawful conduct. Moreover, the very principle that litigation expenses are recoverable by a charging party in limited circumstances, flows from the public interest which seeks to remove frivolous litigation from crowded Board and court dockets.[152]

In the instant case the panel majority modified the administrative law judge's recommended order to provide for the reimbursement by the employer of the reasonable litigation and negotiation expenses incurred by the union subsequent to the date on which the employer's statutory duty to bargain was clearly established by virtue of the Supreme Court's denial of the employer's second petition for certiorari in the proceeding. As of that time, the majority found little room for doubt that the employer's purported justification for its subsequent refusal to bargain was not occasioned by a reasonably debatable point of view but, instead, was a meritless attempt to relieve itself of its statutory duty to bargain in good faith.

Member Truesdale, concurring in part, generally agreed with the discussion of the Board's policy concerning reimbursement of litigation

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[149] 248 NLRB 325 (Chairman Fanning and Member Jenkins, Member Truesdale concurring and dissenting in part)

[150] 215 NLRB 765 (1974)

[151] *Id.* at 767

[152] The panel also referred to *Tudee Products*, 194 NLRB 1234, 1236 (1972), in which reimbursement for legal and related fees was granted, and which set out the reasons why the role of a charging party should not preclude a reimbursement order in a case involving "frivolous" defenses to the violations alleged

and related expenses as elucidated in *Heck's*. However, dissenting in part, he was not persuaded that a proper application of the *Heck's* principle warranted granting reimbursement of litigation and negotiation expenses here.

In *Harowe Servo Controls*,[153] a Board panel ordered the employer to reimburse the union for bargaining expenses it incurred, including clerical expenses and union representatives' salaries and mileage during the period in which the employer failed to negotiate in good faith. Disagreeing with the administrative law judge's holding that the injury imposed on the union by the employer's bad-faith bargaining was basically institutional rather than financial, the panel concluded that the economic resources wasted by the union in futile pursuit of a collective-bargaining agreement were a direct and proximate result of the employer's willful defiance of its statutory obligation. It noted that the employer embarked on an unlawful course of conduct calculated to thwart the entire collective-bargaining process. Thus, following hard on the heels of the union's certification, the employer engendered acrimony in the bargaining relationship by instituting a number of unilateral changes in terms and conditions of employment and, once the parties entered into negotiations, the employer exacerbated the bargaining atmosphere by unlawfully refusing to provide the union with requested information, attempting to deal with employee grievances directly, changing or withdrawing proposals without explanation, and by the frequent and inordinately late arrival of its representatives to scheduled bargaining sessions.

Accordingly, the panel ordered reimbursement for bargaining expenses incurred in order to restore the *status quo ante*.

5. Other Issues

In *RJR Communications*,[154] a Board panel adopted an administrative law judge's order requiring the employer to resume broadcasting its discontinued 6 p.m. local news, agreeing with the administrative law judge's finding that the employer violated section 8(a)(3) of the Act when it carried out contingency plans, made during the campaign, to eliminate its 6 o'clock newscast. The employer contended that the Board had no power to order resumption because to do so would infringe on its first amendment rights. The panel found no merit in this contention, noting that the newscast was not eliminated on first amendment grounds, but, rather, that the employer purported to discontinue its newscast and discharge four employees for bona fide business reasons. Accordingly, the panel reasoned that since this was a case of unlawful discrimination, merely restoring the *status quo ante* to remedy the employer's unlawful discrimination did not infringe on its first amendment rights.

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[153] 250 NLRB No 120 (Chairman Fanning and Members Jenkins and Truesdale)

[154] 248 NLRB 920 (Members Jenkins, Penello, and Truesdale)

In *O.K. Machine & Tool Corp. & Gyrotronics*,[155] a Board panel considered an appropriate remedy to correct the employer's violation of Section 8(a)(3) of the Act by its unlawful application of the collective-bargaining agreement and its union-security clause to male employees where the agreement and clause applied only to female employees. The panel adopted the remedy proposed by the administrative law judge who ordered the employer not to extend the agreement to male employees, to reimburse male employees for initiation fees or dues paid pursuant to its enforcement of the union-security clause, and to reinstate and make whole any employees discharged thereunder. It rejected the employer's argument that this remedy improperly sanctioned a bargaining unit based on sex, in violation of Board law and Title VII, explaining that the decision simply recognized a situation as it existed as a result of the employer's and the union's actions. Although the panel found that the collective-bargaining agreement could not now be extended to cover the employer's male employees, it pointed out that this was not meant to suggest that the Board would in the future *certify* a unit consisting exclusively of either the employer's female or male employees.

The sole issue in *Intl. Technical Products Corp.*,[155] was whether a judicial sale, free and clear of all liens, pursuant to the authority of a bankruptcy court, extinguished any backpay liability imposed on a successor-employer for the unfair labor practices committed by its predecessor-employer. The Board majority held the successor-employer liable for backpay. They pointed out that in *Golden State Bottling Co.*,[157] the Supreme Court sustained the Board's *Perma Vinyl* [158] doctrine and held that a successor-employer which acquired a business with knowledge of an outstanding Board order requiring its predecessor to reinstate with backpay an unlawfully discharged employee may properly be required to share jointly and severally with the predecessor the backpay liability required by the order.

Additionally, the majority found, contrary to the employer's argument, that the bankruptcy court's order did not extinguish the successor's backpay liability. Rather, they noted that, while a bankruptcy court may have the authority to assign a certain priority to the Board's claim for backpay, the authority to modify or set aside the order upon which the claim was based rests exclusively with the Board and the appropriate reviewing Federal courts, but not the bankruptcy courts. To find otherwise, the majority continued, would be tantamount to a relinquishment by the Board of its statutory obligation to remedy unfair labor practices,

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[155] 251 NLRB No 30 (Chairman Fanning and Members Penello and Truesdale)

[156] *Intl Technical Products Corp*, 249 NLRB 1301 (Chairman Fanning and Members Jenkins and Truesdale, Member Penello dissenting).

[157] 414 U S 168 (1973)

[158] 164 NLRB 968 (1967)

and also its authority as defined in *Perma Vinyl* and *Golden State Bottling Co., supra.* Finally, the majority explained that, unlike the bankruptcy court's order which affects only the assets of bankrupt, a Board order, which enforces a public rather than a private right, reaches beyond the assets of an employer and attaches to the employing entity itself. Thus, a Board order cannot be classified or treated simply as a "lien, claim, or encumbrance" within the common usage of those terms, and, consequently, any liability arising therefrom cannot be extinguished or modified through the purchase of a bankrupt's assets "free and clear of all liens, claims and encumbrances" at a judicial sale.

Member Penello, dissenting, believes that the majority failed to interpret the Act in comity with the Bankruptcy Act, and moreover ignored the Supreme Court's clear instructions, in *Trustee in Bankruptcy of Nathanson* v. *N.L.R.B.*,[159] that the Board's backpay orders are not entitled to special status under the Bankruptcy Act. He explained that the purpose of the "free and clear" sale by which the successor-employer acquired the bankrupt predecessor's assets, is to remove encumbrances on the bankrupt's estate, where sale of the estate's assets without such conditions would not provide sufficient return to satisfy lienholders. He explained further that the bankruptcy court must approve the "free and clear" sale after an adversary hearing at which lienors may object to the terms of the proposed sale, and those not objecting at that hearing are deemed to have waived their right to object to the sale. Member Penello pointed out that the regional director received notice of the hearing, but failed to appear and interpose objections to the "free and clear" sale; instead, he attempted to enforce the backpay obligation, outside the bankruptcy procedure, by proceeding directly against the successor-employer. Member Penello believes the regional director's actions to be inconsistent with the Board's rights and obligations as a creditor of the bankrupt predecessor. In his view, *Nathanson* and subsequent cases [160] show unequivocably that the Board's backpay orders are not entitled to greater respect than other debts of the bankrupt; hence, in obtaining backpay from a bankrupt, the Board must conform to and be bound by the bankruptcy procedures.

In response to Member Penello's reliance on *Nathanson*, the majority found that case not to be controlling here pointing out that, since the issue was not before it, the Supreme Court did not pass on the question raised in this case of whether the Board may be precluded from proceeding against a successor-employer who purchases free and clear of all liens, claims, and encumbrances the assets of a bankrupt employer against whom the backpay claim was filed.

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[159] 344 U S 25 (1952)

[160] *N L R B* v *Deena Artware*, 251 F 2d 183 (6th Cir 1958), *In the Matter of Daryl Industries*, 74 LC ¶ 10, 126 (S D Fla. 1973), *L E Durand* v *N L R B* , 296 F Supp 1049 (D C Ark 1969)

VII

Supreme Court Litigation

During the fiscal year 1980, the Supreme Court decided three cases in which the Board was a party.

A. Status Under the Act of University Faculty

Yeshiva University [1] involved the question whether the university's full-time faculty were managerial employees, and therefore excluded from coverage under the Act [2] because they participated in decision-making regarding the hiring, compensation, and promotion of the faculty, and the academic standards of the university. The Board certified the union as bargaining representative of the full-time faculty at most of the university's schools, concluding that the faculty were not managerial employees, but professional employees who were covered by the Act. The Board explained that "[a]t Yeshiva University, faculty participation in collegial decision making is on a collective basis, it is exercised in the faculty's own interest rather than 'in the interest of the employer,' and final authority rests with the board of trustees." (221 NLRB at 1054.)

The Supreme Court, in a 5-to-4 decision,[3] disagreed with the Board. The Court stated (100 S.Ct. at 864):

> The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served.

[1] *N L R B* v *Yeshiva University*, 100 S Ct 856, affg 582 F 2d 686 (2d Cir 1978), reversing 231 NLRB 597 (1977)

[2] Managerial employees are defined as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." See *N L R B* v *Bell Aerospace Co*, 416 U S 267, 288 (1974)

[3] Justice Powell wrote the opinion of the Court, Justice Brennan, joined by Justices White, Marshall, and Blackmun dissented

The Court rejected the Board's contention that the faculty's decisions were not managerial but merely an exercise of independent professional judgment because the faculty acted in their own interest rather than in that of the university. The Court concluded that "the faculty's professional interests—as applied to governance at a university like Yeshiva—cannot be separated from those of the institution." (*Id.* at 865.) "Faculty members enhance their own standing and fulfill their professional mission by ensuring that the university's objectives are met. But there can be no doubt that the quest for academic excellence is a 'policy' to which the administration expects the faculty to adhere whether it be defined as a professional or an institutional goal." (*Ibid.*)

However, the Court, expressing approval of Board decisions recognizing that "employees whose decision-making is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty," [4] concluded that "they provide an appropriate starting point for analysis in cases involving professionals alleged to be managerial." (*Id.* at 866.) The Court added (*id.* at 866–867, fn. 31):

> It is plain, for example, that professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research. There thus may be institutions of higher learning unlike Yeshiva where the faculty are entirely or predominantly nonmanagerial. There also may be faculty members at Yeshiva and like universities who properly could be included in a bargaining unit. It may be that a rational line could be drawn between tenured and untenured faculty members, depending upon how a faculty is structured and operates. . . .

The dissenting Justices agreed with the Board that "[t]he touchstone of managerial status is . . . an alliance with management, and the pivotal inquiry is whether the employee in performing his duties represents his own interests or those of his employer." (*Id.* at 869.) They concluded that the Board was reasonable in finding that the Yeshiva faculty did not exercise their decisionmaking authority in the interest of management.

B. Secondary Product Picketing Which Threatens Neutrals With Substantial Loss or Ruin

In *Safeco*,[5] striking employees of that insurance company picketed and handbilled outside the offices of five land title companies that sell only

[4] See, e g , *General Dynamics Corp* , 213 NLRB 851, 857–858 (1974), *Wurster, Bernardi & Emmons*, 192 NLRB 1049, 1051 (1971), *Skidmore, Owings & Merrill*, 192 NLRB 920, 921 (1971)

[5] *N L R B* v *Retail Stores Employees Union, Local 1001, Retail Clerks Intl Assn , AFL–CIO*, 100 S Ct 2372 reversing 600 F 2d 280 (D.C Cir 1979), reversing 226 NLRB 754 (1976)

Safeco title insurance policies. The Board found that the picketing was not permitted by the *Tree Fruits* [6] doctrine which allows 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." (377 U.S. at 63.) Rather, the Board concluded that, although the union's secondary-site picketing was limited to Safeco's products, it violated section 8 (b) (4) (ii) (B) of the Act [7] 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 Safeco 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." (226 NLRB at 757.)

The Court [8] upheld the Board's decision. It explained (100 S.Ct. at 2377):

> As long as secondary picketing only discourages consumption of a struck product, incidental injury to the neutral is a natural consequence of an effective primary boycott. But the Union's secondary appeal against the central product sold by the title companies in this case is "reasonably calculated to induce customers not to patronize the neutrals at all." The resulting injury to their businesses is distinctly different from the injury that the Court considered in *Tree Fruits*. Product picketing that reasonably can be expected to threaten neutral parties with ruin or substantial loss simply does not square with the language or the purpose of § 8(b)(4)(ii)(B). Since successful secondary picketing would put the title companies to a choice between their survival and the severance of their ties with Safeco, the picketing plainly violates the statutory ban on the coercion of neutrals with the object of "forcing or requiring [them] to cease . . . . dealing in the [primary] produc[t] . . . or to cease doing business with" the primary employer. . . .

The Court further held that a ban on "picketing that predictably encourages consumers to boycott a secondary business . . . imposes no impermissible restrictions upon constitutionally protected free speech." "Such picketing spreads labor discord by coercing a neutral party to join the fray." Under settled principles, a ban on picketing in furtherance of such an unlawful objective does not offend the first amendment.[9] (*Id.* at 2378).

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[6] *N L R B* v *Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U S 58 (1964)

[7] Sec 8 (b) (4) (ii) (B) makes it an unfair labor practice for a labor organization "to threaten, coerce, or restrain" a person not a party to a labor dispute "where an object thereof is forcing or requiring [him] to cease dealing in the products of any other producer or to cease doing business with any other person "

[8] Justice Powell wrote the opinion of the Court, Justices Stevens and Blackmun filed separate concurring opinions Justice Brennan, joined by Justices White and Marshall, dissented

[9] See *Intl Brothd of Electrical Workers* v *N L R B* , 341 U S 694, 705 (1951)

The dissenting Justices charged that the Court's decision "stunts *Tree Fruits*." (*Id.* at 2380.) In their view, *Tree Fruits* holds "that the legality of secondary site picketing should turn upon whether the union pickets urge only a boycott of the primary employer's product," and not "upon the extent of loss suffered by the secondary firm through diminished purchases of the primary product." (*Id.* at 2381.)

C. Lawfulness of Rules Promulgated in Response to Containerization in the Shipping Industry

ILA [10] involved the lawfulness, under the Act, of the rules on containers negotiated by the ILA and the shipping companies employing ILA-represented longshoremen. The rules, which were negotiated in response to the loss of longshore jobs caused by technological changes in the industry, require that the work of loading and unloading containers, originated or destined for delivery within 50 miles of the pier, be done on the pier by longshoremen. The Board, relying on its decision in *Consolidated Express*,[11] found that the work at issue traditionally was performed off pier by truckers and consolidators, and that therefore the rules did not have a valid work-preservation purpose, but had a secondary objective forbidden by section 8 (e) of the Act. For the same reason, ILA's efforts to enforce the rules by imposing economic sanctions violated section 8 (b) (4) (B) of the Act.

The Court,[12] by a 5-to-4 vote, agreed with the court of appeals that the Board improperly "focused on the work done by the employees of the charging parties, the truckers and consolidators, after the introduction of containerized shipping," rather than on the work of the bargaining unit employees. (100 S.Ct. 2315.) Thus, the Court concluded (*id.* at 2316) that the Board had failed to consider:

> how the contracting parties sought to preserve [traditional longshore] work, to the extent possible, in the face of a massive technological change that largely eliminated the need for cargo handling at intermediate stages of the intermodal transportation of goods, and to evaluate the relationship between traditional longshore work and the work which the Rules attempt to assign ILA members. . . . The legality of the agreement turns, as an initial matter, on whether the historical and functional relationship between [the work sought to be] retained . . . and traditional longshore

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[10] *N L R B* v *Intl Longshoremen's Assn , AFL-CIO, et al* , 100 S Ct 2305, affg 613 F 2d 890 (D C Cir 1979), reversing and remanding 231 NLRB 351 (1977) and 236 NLRB 525 (1978)

[11] *Intl Longshoremen's Assn , AFL-CIO (Consolidated Express)*, 221 NLRB 956 (1975), enfd 537 F 2d 706 (2d Cir 1976), cert denied 429 U S 1041 (1977)

[12] Justice Marshall wrote the opinion of the Court Chief Justice Burger, joined by Justices Stewart, Rehnquist, and Stevens, dissented

work can support the conclusion that the objective of the agreement was work preservation rather than the satisfaction of union goals elsewhere.

The Court noted that the ILA and the shipping companies "assert that the stuffing and stripping reserved for the ILA by the Rules is functionally equivalent to their former work of handling break-bulk cargo at the pier," and that the Board and the consolidators and truckers "argue that containerization has worked such fundamental changes in the industry that the work formerly done at the pier by both longshoremen and employees of motor carriers has been completely eliminated." (*Id.* at 2316–17.) "These questions," the Court held, "are not appropriate for initial consideration by reviewing courts," but must first be considered by the Board. The Court emphasized that "neither our decision nor that of the Court of Appeals implies that the result of the Board's reconsideration is foreordained." (*Id.* at 2317.) The Court also directed that if, on remand, the Board were to find that the rules did not have "a lawful work preservation objective," it should consider the allegation that the primary employers, the shipping companies who employ the ILA-represented longshoremen,, "did not have the right to control the stuffing and stripping of containers." (*Ibid.*) [13] Because the Board found that the rules did not have a work-preservation objective, it had not reached that issue in its initial decision.

The dissenting Justices believed that the Board had properly defined the work in issue. Noting that containerization "affects both sea and land transportation systems," they concluded that the Board had "invalidated only that part of the Rules on Containers whose primary effect was to influence the loading and unloading of containers functioning away from the pier as truck trailers." (*Id.* at 2323.)

[13] Under *N L R B* v *Enterprise Assn of Steam, Hot Water, etc., Pipefitters*, 429 U S 507 (1977), a union may not exert economic pressure to compel an employer to grant its members work which the employer lacks the "right to control"

VIII

Enforcement Litigation

A. Board Jurisdiction

In *Catholic Bishop* [1] the Supreme Court held that the Board lacked jurisdiction over "church-operated schools." In *Bishop Ford* [2] the Second Circuit was presented with the application of that holding to a situation in which the Roman Catholic Diocese of Brooklyn had transferred a high school to a predominantly lay board of trustees. The transfer was made at the behest of parent groups, which feared that the school might otherwise be closed. This board is solely responsible for the "operation and maintenance of the school" and for its "debts, obligations or liabilities." The principal, a Franciscan Brother, was retained, but his chief responsibility was to "implement the policy decisions" made by this predominently lay board. The transfer document provided that the school would continue to be operated as a "Roman Catholic high school" and that if it ceased to be so operated, all rights, title, and interest would revert to the Diocese. The court, disagreeing with the Board, held that despite the the transfer in ownership, the school remained "church-operated." In so finding the court relied on its view that despite the transfer the danger remained of "entanglement with the religious mission of the school in the setting of mandatory collective bargaining." [3]

Section 2(2) of the Act expressly exempts "political subdivisions" from the Board's jurisdiction. Where a political subdivision chooses to perform a function through another, nongovernmental agency, however, that exemption is not automatically extended. Rather the issue is whether the private employer retains sufficient control over the employment relationship to bargain effectively with respect to wages, hours, or other conditions of employment. In *Bishop Randall Hospital* [4] the Tenth Circuit considered the application of this doctrine where the Board had certified a unit of registered nurses at the hospital. The trustees, appointed by the County to oversee the operations of this and another hospital, constituted a political subdivision. The trustees, however, contracted with the Lutheran Hospitals and Homes Society of America to operate the hospital. After the Board's certification issued, the Association which repre-

[1] *N L R B* v *Catholic Bishop of Chicago*, 440 U S 490 (1979)

[2] *N L R B* v *Bishop Ford Central Catholic High School*, 623 F 2d 818

[3] *Catholic Bishop*, 440 U S at 502

[4] *Bd of Trustees of the Memorial Hospital of Fremont County, Wyoming, d/b/a Bishop Randall Hospital* v *N L R B*, 624 F 2d 177

sented the nurses requested bargaining beginning November 1, but the trustees requested the Society's administrator to delay bargaining until after a trustees meeting on November 10. Prior to that meeting the Society and the trustees negotiated amendatory provisions to the lease under which the hospital was operated. These provisions prohibited the Society from entering into a collective-bargaining agreement without approval of the trustees. The amendments also required the Society to provide annual recommendations—and semiannual reports—concerning staffing levels, wage rates, and fringe benefits for each classification and prohibited the Society from deviating from established rates except in situations beyond its control. The court agreed with the Board that the trustees and the Society amended the lease to take advantage of the political subdivision exemption, but found this fact was immaterial in the absence of "devious maneuvers or any mistated documents." The court was also satisfied, as the Board was not, that the amendments reflected an active role on the part of the trustees, rather than mere paper authority. The court noted, for example, that nurses' salaries were not raised as recommended by the administrator until 4 months had elapsed and the trustees had directed a study of the matter.

B. Board Procedure

1. Service of Board Orders

In a case [5] which arose from a circuit race, the D.C. Circuit placed its stamp of approval on the Board's current procedure for issuing and serving its orders. Under this procedure, copies are sent by registered mail to the designated representative of each party; and by first class mail to each of the parties, to other interested persons, and to all persons sent copies by registered mail. In the instant case, because of a delayed pickup by the Postal Service, the first class orders went out a full day before the registered ones. For this reason, and because the union had a Washington office, the union received its first class mail copy of the Board's order—and filed for review in the D.C. Circuit—several days before the employer received its first notice of the order, by registered mail. The employer then filed for review in the Sixth Circuit, and asked the D.C. Circuit to dismiss the union's petition on the ground that sections 10(c) and 11(4) of the Act, read together, prohibited the union from filing for review until service *by registered mail* had been effectuated.[6]

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[5] *Intl Union of Electrical, Radio & Machine Wkrs* v *N L R B* [*East Dayton Tool & Die Co*], 610 F 2d 956 (D C Cir)

[6] Sec 10(c) provides that the Board "shall issue and cause [its order] to be served on" persons it determines have violated the Act Sec 11(4) states that "orders, and other process and papers of the Board may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served "

Rejecting this argument, the court ruled that *issuance* and *service* of orders were different matters. The court was satisfied that the order in question had been validly *issued* prior to the union's filing for review. That left the question whether the Board's dissemination of its order by first class mailing was sufficiently reasonable and fair. The court approved the practice, noting that it provided for service on the parties as well as others who were most concerned with the Board's rulings, and was not calculated to give any party an advantage in selecting a court for the litigation. While the court recognized that in the instant case the union had benefited from having a local mailing address, and from the Postal Service's tardiness in picking up the orders scheduled for registered delivery, it declined to penalize the union, in effect, for not awaiting the order's delivery via registered mail before filing for review.

2. Settlements

In *George Ryan Co.*,[7] the Seventh Circuit held that the Board did not abuse its discretion in approving an informal postcomplaint settlement agreement including unfair labor practice charges brought against a union, despite the objection of the charging party to the settlement on both procedural and substantive grounds. Two construction companies, both members of the same contractors' association, had filed charges alleging that the union had violated section 8(e) of the Act by including in its collective-bargaining agreement with the association a provision binding all subcontrators of the contracting employers to the terms of the agreement and that the union had also violated section 8(b)(4)(B) and 8(b)(1)(A) by various efforts undertaken to enforce that provision—such as a strike of one jobsite, physical blockage of entry to another, and threats of reprisal and bodily harm made to the employees and supervisors of one employer. Following the issuance of a Board complaint and the commencement of a hearing before an administrative law judge, the General Counsel and union reached an informal settlement agreement, providing that the union would not enforce the allegedly unlawful contract provision and that it would not induce employees to strike, threaten, or coerce the charging party, any person engaged in commerce, or any employee for the purpose of forcing an employer to cease doing business with the subcontractor involved in the case or any other employer. The companies objected to the agreement, primarily on the ground that it permitted the union to enforce other "union standards" provisions of the multiemployer contract which they argued had the same effect as the voided provision. However, after listening to their objections, the administrative law judge approved the settlement agreement, relying on the fact that the agreement was satisfactory to the representative of the

[7] *George Ryan Co , et al* v *N L R B* , 609 F 2d 1249

General Counsel in charge of prosecution of the case. The companies filed a request for leave to appeal the administrative law judge's approval of the informal settlement with the Board, which was denied by telegraphic order.

In upholding the Board's position that approval of the informal settlement agreement was proper, the Seventh Circuit relied on the principle that the Board, which acts in the public interest and not in vindication of private rights in enforcing the Act, is entitled to broad discretion in approving informal settlement agreements and that "[p]rivate rights must give way when the Board reasonably determines that the purposes of the Act are best served by settlement."[8] The court recognized that the attorneys for the General Counsel and the union had presented no arguments countering those advanced by the charging party, and that the administrative law judge gave no indication of her reasons for approving the settlement despite the charging party's objections, but rejected the charging party's request that the case be remanded to the Board for an articulation of its reasons for approving the settlement. The court concluded that remand for an articulation of reasons would serve no useful purpose under the circumstances of this case and thus was unnecessary, noting that the companies' principal substantive contentions regarding other contractual provisions left intact by the agreement "do not involve agency discretion but questions of statutory construction that . . . have already been decided by the courts" and that the other substantive objections raised "allege no possible line of reasoning that would invalidate the Board's action." [9] The court also held that an evidentiary hearing was not required to test the propriety of the administrative law judge's acceptance of the settlement agreement, since the companies did not contend that a dispute about any material fact existed or allege any facts that would bring into question the propriety of the Board's exercise of its discretion in approving the settlement.

In rejecting the companies' primary substantive contention that the settlement inadequately remedied the alleged 8(e) violations because it allowed the union to achieve the same ends through other "union standards" provisions, the court emphasized the distinction between agreements which have the "primary" purpose of protecting work standards for union members—which are not prohibited by section 8(e)—and those agreements which have unlawful "secondary" objectives. The court concluded that the union standards provision left intact by the settlement agreement in this case had a lawful "primary" objective, since it served only to dissuade companies from contracting out unit work by requiring them to reimburse subcontractors' employees for any difference between the rate paid them and the contractual rate. Since the union standards

[8] 609 F 2d at 1252
[9] 609 F 2d at 1253

provision had lawful primary objectives, the court reasoned that another contractual provision, which allowed the union to use "economic recourse" to remedy any breach of the contract, was also permissible and thus no bar to the validity of the settlement, since "economic recourse is permitted so long as it is directed to benefitting union members in their relations with their employer rather than to achieving union objectives elsewhere." [10] The court held that the lack of any provision for a "consent decree" or entry of a court order if the union breaches the terms of the settlement was no basis for overturning the agreement, explaining that if the agreement was breached it could be set aside and the case heard on the merits. Finally, the court found the companies' objections to the form of the notice of the agreement provided to employees and the inclusion of a nonadmission clause in the agreement to be without merit, noting these matters were entrusted to the Board's discretion and were not so serious as to require judicial intervention.

3. Admissibility of Evidence

In *Lemon Tree*,[11] the Ninth Circuit affirmed the Board's ruling that the testimony of a Federal Mediation and Conciliation Service (FMCS) mediator concerning a matter occurring in his presence was inadmissible in Board proceedings. The FMCS mediator had attended the three final negotiating sessions between the company and the union. Afterwards, the union filed an unfair labor practice charge claiming that during these sessions the parties had finalized a collective-bargaining agreement and that the company violated section 8(a)(5) and (1) of the Act by refusing to execute the negotiated agreement. The company contended that the parties never reached an agreement. At the hearing, the testimony of the union and company representatives concerning the sessions attended by the FMCS mediator, where the agreement was alleged to have been finalized, directly contradicted each other. In an effort to support its version of the facts, the company requested that the administrative law judge subpena the mediator. The administrative law judge initially agreed, but later revoked the subpena. He then resolved the conflict in testimony based on his observation that the union's witnesses were more credible. The court agreed with the administrative law judge's decision, which had been adopted by the Board, to quash the subpena. The court observed that although the exclusion of the mediator's testimony "conflicts with the fundamental principles of Anglo-American law that the public is entitled to every person's evidence . . . the public interest in maintaining the perceived and actual impartiality of federal mediators

[10] 609 F 2d at 1254

[11] *N L R B* v *Joseph Macaluso, d/b/a Lemon Tree*, 618 F 2d 51 (9th Cir)

[outweighs] the benefits derivable from [the mediator's] testimony." The court further noted that "federal mediation has become a substantial contribution to industrial peace in the United States" and that "the complete exclusion of mediator testimony is necessary to the preservation of an effective system of labor mediation."

C. Deferral to Other Means of Adjustment

In *Northeast Okla. City*,[12] the court upheld the Board's refusal to defer to contract grievance procedures under the *Collyer* standards,[13] as reapplied in *Roy Robinson Chevrolet* [14] and *General American Transport*.[15] The court in *Northwest Oklahoma City* noted that the case involved not only allegations that the employer had violated its bargaining obligation but also claims that the employees' section 7 rights had been abridged in violation of section 8(a)(3) of the Act. Observing that the Board premised its refusal to defer on the ground that "resolution of the contract issue by the arbitration [would not] dispose of the unfair labor practice issue," the court then analyzed the alleged 8(a)(3) and (5) violations. In the court's view, only one construction of the contract would "have disposed of the the § 8(a)(3) issue"; "[a]ny other interpretation would have required the Board to determine whether § 8(a)(3) had been violated . . . ." The court held that the Board's refusal to defer in these circumstances was "no abuse of discretion" and acknowledged that "the decision not to defer when both a Section 8(a)(5) and a Section 8(a)(3) violation are alleged in the complaint is a logical extension of the *General American/Roy Robinson* deferral policy."

In another case,[16] the Third Circuit had occasion to consider the propriety of the Board's refusal to defer to an arbitrator's award on an employee's grievance under the Board's *Spielberg* policy.[17] The court noted that the Board had declined to defer to the award on the *Spielberg* ground that it was "clearly repugnant to the purpose and policies of the Act." The court acknowledged that the *Spielberg* doctrine was an allowable exercise of the Board's discretion and that it served the salutary purpose of accommodating the policies of the Act to the national policy favoring the resolution of labor-management disputes through the arbitral process where the parties have agreed to such machinery. In the court's view, however, the Board, having adopted the "clearly repugnant" standard, erred in declining to defer to the award here, for, as the court found, "the findings of the arbitrator may arguably be characterized

[12] *N L R B* v *Northeast Okla City Mfg Co*, 631 F 2d 669 (10th Cir)
[13] *Collyer Insulated Wire*, 192 NLRB 837 (1971)
[14] *Roy Robinson Chevrolet*, 228 NLRB 828 (1977)
[15] *General American Transport Corp*, 228 NLRB 808 (1977)
[16] *N L R B* v *Pincus Bros —Maxwell*, 620 F 2d 367
[17] *Spielberg Mfg Co*, 112 NLRB 1080, 1082 (1955)

as not inconsistent with Board policy." [18] The dissenting judge opined that there was no statutory basis for a general board deferral policy, and, accordingly, deferral was improper where noncontractual statutory rights were involved.

D. Representation Issues

1. Employer and Employee Status

In *North American Soccer* [19] the Fifth Circuit sustained a Board holding that a professional soccer league and its member clubs are joint employers of the players employed by the clubs. The court agreed with the Board that the League "exercised a significant degree of control" over the players' working conditions so as to constitute it an employer or a joint employer with the clubs of the players. The court based its ruling on evidence showing that the League controls, through a draft, the selection of players by the clubs; the League promulgates working conditions by requiring the players on every club to execute a standard contract; and the League imposes discipline on the players. The court also upheld the Board's further conclusion that, in view of the joint employer finding, a leaguewide unit of all of the players was an appropriate unit for purposes of collective bargaining and thus the League and the clubs violated section 8(a)(5) by refusing to bargain with a union which had won a Board-conducted election in that unit.

A Board finding that persons operating taxicabs for a cab company were employees and not independent contractors was sustained by the District of Columbia Circuit in *City Cab Co.*[20] Applying a "right of control" test, the court agreed with the Board that the cab company retained sufficient control over the working conditions of the taxicab drivers to make the drivers its employees. The court noted that the cab company required its drivers to maintain a trip sheet recording the drivers' movements and fares, regulated the drivers' hours of work, passenger selection and mode of dress, and claimed for itself the "goodwill" created by the enterprise. The court distinguished one of its prior cases which had overturned a Board finding of employee status for drivers for a different taxicab company,[21] stating that the factors found decisive in the instant case were not present in the prior case.

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[18] In their separate opinions, the majority judges disagreed only with respect to the standard of review to be applied in deferring to an award—an "abuse of discretion standard" or an "error of law" standard

[19] *North American Soccer League* v *N L R B* , 613 F 2d 1379

[20] *City Cab of Orlando* v *N L R B* , 628 F 2d 261

[21] *Local 777, Seaferer's Intl Union* v *N L R B* , 603 F 2d 862 (1978), rehearing denied 603 F 2d 891 (1979)

2. Health Care Unit Issues

The litigation discussed in last year's Annual Report (pp. 203–203) over the congressional admonition against undue proliferation of bargaining units at health care facilities continued during this year. In *Allegheny General Hospital* [22] the Third Circuit reaffirmed its holding in an earlier case [23] that the Board was precluded by the legislative history from applying traditional community of interest standards in determining appropriate units in the health care industry. Accordingly, the court denied enforcement of a Board bargaining order based on such standards. And in *Mary Thompson Hospital* [24] the Seventh Circuit followed the Third Circuit's precedents as well as a prior case of its own [25] and reached the same result. Chief Judge Fairchild, dissenting, stated that the Board was not required to give greater effect to the congressional admonition.

3. Objections to Conduct of Election

The Board has consistently refused to count as valid ballots which identify the voters casting the ballots. In *A. G. Parrott*,[26] the Fourth Circuit reviewed Board holdings involving two election ballots with allegedly identifying markings on them. The court agreed with the Board that the first ballot with the mark "C" in the "yes" box instead of the customary crossmark should be counted as a valid vote in favor of the union, noting that there was no evidence in the record to support the employer's contention that the marking may have served to reveal the identity of the employee casting the ballot. The court disagreed with the Board, however, that a second ballot on which the voter had signed his name should be voided. The Board agent when opening the ballot had initially counted the ballot as a "no" vote but then noticed the signature on the ballot and accordingly withdrew the ballot without allowing the employer to exercise its normal right to inspect the ballot to verify that the ballot had been signed. The Board upheld its agent's action, reasoning that, in the exceptional circumstances of the case, to allow the employer to view the ballot would destroy the secrecy of the ballot inasmuch as the parties already were aware of how the voter had voted. The court rejected the Board's ruling on the ground that, if a mistake had been made, it was one made by the Board agent, not the parties, and because the ballot was decisive of the outcome of the election, the election should not stand. Judge Phillips, dissenting, would have upheld the Board's conclusion concerning the second ballot as within the Board's discretion in regulating the conduct of elections.

[22] *Allegheny General Hospital* v *N L R B* , 608 F 2d 965
[23] *St Vincent's Hospital* v *N L R B* , 567 F 2d 588 (1977)
[24] *Mary Thompson Hospital* v *N L R B* , 621 F 2d 858
[25] *West Suburban Hospital* v *N L R B* , 570 F 2d 213 (1978)
[26] *N L R B* v *A G Parrott Co* , 630 F 2d 212

E. Unfair Labor Practices

1. Employer Interference With Employee Rights

Section 8(a)(1) makes it unfair labor practice for an employer to interfere with rights guaranteed by section 7 of the Act. One of these rights is the right to strike. In two cases the interference was a benefit bestowed by the employer on employees who had not participated in a strike, at least not fully. In one case [27] the Association, which represented the Hospital's registered nurses, called a strike in July in support of its contract demands. Of 447 nurses, 47 did not join the strike, and 11 returned to work in August or September. In addition 14 nurses were hired during the strike. The strike ended with the signing of a contract in September. In October, the Hospital granted a "compensatory day off" to nurses who either did not strike, abandoned the strike, or were hired during the strike. None of the nurses who continued the strike were given a day off. The court, in agreement with the Board, held that the grant violated the Act, rejecting the Hospital's contention that the grant had only a minimal impact on the employees' exercise of the right to strike.

In the other case [28] the employer, a trucking company, instituted a $50-per-trip payment for nonstriking over the road drivers, all of whom were members of the unit which was on strike. The court agreed with the Board that this payment interfered with the employees' right to strike.

2. Employer Discrimination Against Employee

Most of the cases falling in this category, while substantial in number, involve only factual issues, rather than legal principles. Moreover, the principal area of legal disagreement between the Board and some courts of appeals as to analysis in this area was addressed by the Board in *Wright Line* [29] and will be considered by the courts during the next fiscal year. Other issues, however, do arise. In one case [30] the employer Association had a contract with the union providing for contributions to a pension fund. For years the employers had a practice of making pension contributions on behalf of "casual" employees only if they were members of the union signatory to the contract. Since the contributions established employment toward qualifying for a pension, the effect was to confer a benefit on union members not shared by nonmembers, even though all were in the same employment category. Accordingly, based on charges

[27] *N L R B* v *Swedish Hospital Center*, 619 F 2d 33 (9th Cir)
[28] *S&W Motor Lines* v *N L R B* , 621 F 2d 598 (4th Cir)
[29] *Wright Line, a Div of Wright Line*, 251 NLRB No 150, *supra*, p 121
[30] *B G Costich & Sons* v *N L R B* , 613 F 2d 450 (2d Cir)

filed by the fund, the Board found that the practice violated section 8(a)(3)'s prohibition against discrimination in regard to in any term or condition of employment, to encourage or to discourage membership in any labor organization. The Second Circuit disagreed, finding that the benefit was not such as to encourage membership. First the court noted that the casual employees were subject to discriminatory treatment for no more than 30 working days, since if they worked for a longer period they were required under the union-security clause in the contract to become union members as a condition of employment. Second, the court noted that the benefit was one which would not be realized until the employee both accumulated 15 years of credited service and reached the age of 60. The court also relied on evidence that many casuals were hired for periods of short duration through sources such as the Department of Labor as indicating that the employees did not intend to make a career in the industry. Finally, the court regarded evidence that only 17 of 118 casuals hired in the 6 months before the charge was filed had joined the union as supplying "empirical evidence that the challenged practice did not serve as a source of encouragement to join the union." Accordingly, the court regarded the benefit here lacked sufficient immediacy to constitute encouragement.

3. The Bargaining Obligation

In *Bartlett-Collins* [31] the Board overruled a line of cases which had, in effect, treated insistence on the presence of a court reporter at bargaining sessions as raising a question of good faith in the approach to the bargaining obligation. In other words, such a preliminary matter was treated as a mandatory subject of bargaining. In *Bartlett-Collins*, however, the Board held that the question of whether a court reporter should be present during negotiations does not involve "wages, hours, or other terms and conditions of employment and hence it was not a mandatory subject of bargaining." Accordingly, the Board held that insistence to impasse on the presence of a court reporter constituted an unlawful refusal to bargain. The issue first reached a court of appeals in *Latrobe Steel* [32] and the Third Circuit there upheld the Board's new position. In so holding the court rejected the argument that the new position was contrary to law, because courts of appeals had accepted the Board's old approac—although differing with the Board's conclusion in those cases that insistence on a court reporter evinced a lack of good faith. The court held that since Congress placed the definition of mandatory bargaining subjects peculiarly within the Board's area of expertise, the Board may change its view as long as its "new position is fully reasoned and explained and . . . does not exceed the bounds of the Act . . . ."

[31] *Bartlett-Collins Co*, 237 NLRB 770 (1978)
[32] *Latrobe Steel Co* v *N L R B*, 630 F 2d 171

In another case [33] the court was presented with the issue of whether certain newspaper rules—for example, requiring that information obtained by employees by reason of their employment be treated as confidential and prohibiting the acceptance of gifts—were mandatory subjects of bargaining. The Board had held that the rules were not but that the penalty for their violation was a mandatory subject. The court accepted the premise for the Board's holding; namely, that protection of the editorial integrity of a newspaper lies at the core of publishing control and that in order to preserve its integrity it must be free to establish, without interference, reasonable rules designed to prevent employees from engaging in activities which may directly compromise their standing as responsible journalists. The court also agreed that this right exists even if imposition of such rules may have an impact on employees' wages, hours, and other terms and conditions of employment or their civil rights. In the court's view, however, the Board should look at each rule and seek to strike a balance which will take account of the relative importance of the proposed actions to the two parties. The court perceived significant differences, for example, between "a gift from a news source designed to influence news coverage and a freebie (e.g., a ticket to a major league baseball game) given relatively indiscriminately to journalists and other well known persons." The court agreed with Chairman Fanning's dissent with respect to penalties, holding that the rule and the penalty for its violation were subject to the same classification as a mandatory or a nonmandatory subject. Accordingly, the court remanded the case to the Board to make such an examination of each rule.

While the obligation to bargain in a multiemployer unit is initially consensual, once bargaining for a contract has begun, no party may leave the unit in the absence of consent or unusual circumstances. After a substantial disagreement arose between the Board and the courts of appeals as to whether impasse in negotiations or interim agreements between the union and some of the employer-members constituted special circumstances, the Board decided to reexamine its position. This fiscal year the matter came before the First Circuit in *Bonanno*,[34] a case in which the employer withdrew from the association following impasse, a selective strike, and contacts looking toward separate agreement with the union by two employers. In accepting the Board's view the court first noted the advantages of multiemployer bargaining—for example, it enables a small employer to bargain on an equal basis with a large union and avoids competitive disadvantages from nonuniform contract terms; promotes flexibility in exploring possible benefits; and allows concentrating bargaining resources. The court also noted that without some constraints on withdrawal, the utility of this bargaining process would be substan-

[33] *Newspaper Guild of Greater Philadelphia, Local 10 [Peerless Publications]* v *N L R B* , 89 LC ¶ 12, 207 (D C Cir)

[34] *N L R B* v *Charles D Bonanno Linen Service*, 630 F 2d 25

tially undermined. Turning to the decisions in which courts have disagreed with the Board in this area, the First Circuit noted that three involved the actual execution of agreements between the union and one or more of the employers in the multiemployer unit.[35]

The First Circuit questioned the weight given this factor—in view of the Supreme Court's admonition against judging the legality of bargaining tactics on the basis of an assessment of relative bargaining strength [36]—but noted that this issue was not before it. Accordingly, the court directly confronted only the Third Circuit's decision in *Beck Engraving* [37] which held that impasse and the *possibility* of an interim agreement between the union and another employer in the association warrants withdrawal. First, the court noted that contrary to *Beck Engraving*'s premise, the Board's sanction of interim—that is, temporary—agreements between a union and one or more employer-members has *not* been conditioned on the existence of impasse. Second, the court noted that contrary to the further premise of *Beck Engraving*, impasse *can* be brought on by a party which seeks to escape from multiemployer bargaining. Third, the court noted that since a precise formula for defining impasse has not been—and perhaps cannot be—formulated "tying the right of withdrawal to this event can only lead to confusion concerning the rights of the parties." Accordingly, the court accepted the Board's judgment that impasse is not an "unusual circumstance" but simply a commonplace in bargaining and that the balance should be struck in favor of stability of bargaining by prohibiting withdrawal because of impasse. In sum, the court held this judgment was one that Congress had left to the Board's "specialized judgment."

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 conditions of employment 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.[38] In *Lone Star Steel*,[39] the Tenth Circuit reviewed a Board finding that two contract clauses proposed by a union were mandatory bargaining subjects and that the union therefore acted lawfully in striking over those clauses. The court sustained the Board's finding that one of the clauses, which prohibited the employer from selling, conveying, or otherwise transferring or assigning the operations covered by the contract to any successor unless the suc-

[35] *N L R B* v *Hi-Way Billboards*, 500 F 2d 181 (5th Cir 1974), *N L R B* v *Associated Shower Door Co*, 512 F 2d 230 (9th Cir), cert denied 423 U S 893 (1975), *N L R B* v *Independent Assn of Steel Fabricators*, 582 F 2d 135 (2d Cir 1978), cert denied 439 U S 1130 (1979)

[36] *American Ship Building Co* v *N L R B*, 380 U S 300, 317 (1965)

[37] *N L R B* v *Beck Engraving Co*, 522 F 2d 475, 483 (1975)

[38] *Allied Chemical & Alkali Wkrs of America* v *Pittsburgh Plate Glass Co*, 404 U S 157, 179 (1971)

[39] *Lone Star Steel Co* v *N L R B*, 104 LRRM 3144 (10th Cir), ptns for cert pending

cessor agreed to assume the employer's contractual obligations, was a mandatory subject of bargaining. The court held that the Board had properly found that the clause was vital to assure the survival of the contractual wages and working conditions of the unit employees in the event of a sale of the mine where they worked. Without the clause, the purchaser of the mine could refuse to abide by the terms of the contract, and the employees would have to "start all over again" by striking anew to retain the wages and working conditions which they had previously obtained by striking. The court rejected the employer's contention that the clause unduly interfered with the employer's freedom to rearrange its business, holding that the Board had properly weighed the possible impact on the transfer of capital against the need to protect the employees' interests and struck the balance in favor of the latter. In the court's view, *N.L.R.B.* v. *Burns Intl. Security Service*,[40] holding that a successor employer could not be required by law to abide by a predecessor's contract, did not preclude a voluntary agreement which imposed such a requirement on the successor. The primary concern of the Supreme Court in *Burns* was not with safeguarding the free flow of capital, but with the fundamental policy of freedom to negotiate embodied in section 8(d) of the Act, which precluded the Board from requiring any party to abide by a contractual term to which it had not agreed. The clause in this case did not contravene that policy. Nor did it conflict with prior case law [41] holding that an employer is not required to bargain about a decision to sell all or part of its business; the clause did not require bargaining about such a decision, but only about the effects of the decision on unit employees.

However, the court reached the opposite result with respect to another proposed clause which would have extended the contract to all coal lands or coal producing or preparation facilities owned by the employer, or acquired by it during the term of the contract, if the union were recognized or certified as the bargaining representative of the employees at such facilities. The court held that, to be a mandatory subject of bargaining, the clause had to be a "direct frontal attack" on a problem threatening the maintenance of contractual wages or benefits, and that this clause was not. The clause was designed to remove any economic incentive for the employer to undermine the contractual wages and benefits by transferring work to other mines with lower wages or fewer benefits. However, in the court's view, the clause was much broader than necessary to accomplish this goal; it covered other facilities to which unit work could not possibly be transferred, because they involved other phases of coal production, and it required the application of the entire contract, including noneconomic provisions having no bearing on the working conditions

[40] 406 U S 272 (1972)

[41] *General Motors Corp , GMC Truck & Coach Div* , 191 NLRB 951 (1971), affd 470 F 2d 422 (D C Cir 1972)

of unit employees, to other facilities. Accordingly, the court concluded that the Board erred in holding that this clause was a mandatory subject of bargaining.[42]

4. Union Interference With Employee Rights

As exclusive bargaining representative of all employees in the unit, a union has a duty of "fair representation" toward all unit members. Two cases presented issues as to whether a union had breached that duty when it acted to affect the employer's work assignment of a unit employee. In one case [43] the Stereotypers had negotiated a collective-bargaining agreement with the publishers of the *Denver Post* and the *Rocky Mountain News* to provide for a method of attrition in view of anticipated technological changes that would eliminate the work of stereotypers, who made metal printing plates for the newspaper's presses. In 1975 the *News* acquired a printing press which did not require stereotypers. Paul Simonette, a stereotyper, was assigned pursuant to the agreement to the street circulation department of the *News* but was discharged shortly afterward because prior physical injuries impaired his ability to do that work. He then applied for placement on the list of substitute stereotypers for the *Post*. On the basis of the date he first worked as a stereotyper in Denver—his "town priority"—Simonette was entitled to the second highest position on the substitute list. The Stereotypers executive board voted, however, to place him at the bottom, because the stereotyping trade was dying, he had taken and lost a job which was provided by the attrition agreement and which was not available to another stereotyper, and the executive board believed that the local and International constitutions did not directly speak to Simonette's situation. The Board found that while one provision of the local's constitution and bylaws pertaining to a journeyman's losing his "situation" was not clearly applicable to Simonette's case, another provision concerning a substitute's "priority"—that is his "town priority"—clearly was applicable. Based on this factor, as well as irregularities in handling Simonette's intraunion appeal, the Board found that the Stereotypers had breached its duty of fair presentation with respect to Simonette. The court disagreed, finding that the Board had held the union officials to too high a standard of legal knowledge in interpreting the constitution's provision concerning "town priority." The court also noted that the Board had not regarded the irregularities with respect to handling Simonette's appeal to be sufficient grounds standing alone for impugning the officers' motives.

[42] The Third Circuit, considering the same clause in *Amax Coal Co* v *N L R B* , 614 F 2d 872, also held that it was not a mandatory subject of bargaining The Third Circuit also viewed the clause as much broader than necessary to protect the jobs and working conditions of unit employees It further viewed the clause as requiring expansion of the certified bargaining unit, the scope of which is not a mandatory subject of bargaining

[43] *Denver Stereotypers & Electrotypers Union, Local 13* v *N L R B* , 623 F 2d 134 (10th Cir)

The other case [44] also involved application of an agreement concerning work assignment. In this case, the contract provided that employees were to receive overtime when they worked outside scheduled hours at the Postal Service's request. The Postal Service, in an effort to control overtime, sought "volunteers" willing to work outside their schedules at straight-time rates. The union contended that such work did not fall under the "employee convenience" exception to the overtime rule. In arbitration—the "Gamser Award"—it was found that the "volunteers" were used to cover vacancies rather than for their own convenience. To avoid possible further circumvention of the overtime provision the Gamser Award provided for union approval of any "employee convenience" assignments. Later, in 1977, to meet union concerns for job-bidding rights, the Postal Service agreed to find specific job assignments for 160 regular employees who had no specific assignments. After bidding was completed, employees still unassigned were "drafted" for unfilled positions. Mary Berry, who had been working day shift unassigned was notified that she had been drafted for an assignment on the graveyard shift beginning in November. Berry, who was solely responsible for the care of her blind mother, filled out the required "employee convenience" request forms for permission to defer working on the new shift for 60 days. The request was approved by the union's general president and the Postal Service advised her that she would not have to report on the new shift until February. Sometime later the request came to the attention of William Mooney, the president of the clerk craft division of the union, who had been active in enforcing the Gamser Award. He wrote the Postal Service citing alleged irregularities in Berry's request and stating that if she was allowed to continue on the day shift the union would demand overtime for her. The Postal Service immediately notified Berry that her day-shift detail would terminate on December 30. The Board rejected Mooney's allegations as to irregularities in the form and validation of Berry's request and found that the 30-day limitation on temporary assignment was not union policy, but a personal policy which Mooney did not follow consistently. Accordingly the Board found that Mooney's action was arbitrary and hence a breach of the union's duty of fair representation. The court agreed.

In *Granite State* [45] the Supreme Court held that while a union may discipline *members* for crossing a lawful picket line, "when there is a lawful dissolution of the union-member relations, the union has no more control over the former member than it has over the man in the street." In *Granite State*, and more pointedly in *Booster Lodge* [46] the Court made clear that it was not dealing with the situation in which a member had

[44] *N L R B v American Postal Wkrs Union, St Louis, Mo , Local*, 618 F 2d 1249 (8th Cir)

[45] *N L R B v Granite State Joint Bd , Textile Wkrs Union [Intl Paper Box Machine Co]*, 409 U S 213, 217 (1972)

[46] *Booster Lodge No 405, Intl Assn of Machinists [Boeing Co] v N L R B* , 412 U S 84, 88 (1973)

purported to resign but the union's constitution or bylaws contained a provision expressly forbidding such resignation. In *Dalmo Victor* [47] the court addressed a union constitutional provision which labeled as "improper conduct" a union member's accepting employment without permission in an establishment where there is a recognized strike. The section also provides that: "Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike . . . or within 14 days preceding its commencement." Under this provision the union fined employees who were members at the time of the strike vote, but 8 months later tendered resignations, then returned to work. In holding that the constitution did not justify the discipline, the Board found that the provision did not purport to restrict the right to resign from the union, but rather sought only to unlawfully regulate postresignation conduct. The court, Judge Kennedy dissenting, disagreed, finding that the constitutional provision "plainly" restricted resignation. Accordingly, the court remanded the case to the Board to resolve the question reserved in *Granite State* and *Booster Lodge*—that is, whether a union can lawfully prohibit resignation during or immediately preceding a strike.

5. Union Coercion of Employer in Selection of Representative

Under section 8(b)(1)(B) it is an unfair labor practice for a union to coerce an employer in the selection of his representatives "for the purposes of collective bargaining or the adjustment of grievances." In *Amax Coal Co.*,[45] the Third Circuit held that the union violated section 8(b)(1)(B) by striking to obtain the employer's participation in the union's industrywide pension and welfare funds, whose management trustee had already been selected by other employers. In *Sheet Metal Workers*,[49] the Board had decided that multiemployer fund trustees are not collective-bargaining representatives within the meaning of section 8(b)(1)(B) because they owe a strict fiduciary duty to the beneficiaries of the fund, and therefore cannot seek to operate the fund to advance the interests of the employer or union which appointed them as trustees. Relying on that case, the Board held in *Amax* that the union did not violate section 8(b)(1)(B) by striking to obtain the employer's participation in its existing industrywide funds, even though their management trustees had already been selected by other employers. The Third Circuit, relying on dictum from one of its own decisions,[50] held that Cogress, by requiring in section 302(c)(5) of the Act that management and employees be equally

[47] *N L R B* v *Machinists Local 1327, Intl Assn of Machinists, AFL-CIO*, 608 F 2d 1219 (9th Cir)

[48] *Amax Coal Co* v *N L R B* , 614 F 2d 872, cert granted January 19, 1981

[49] *Sheet Metal Workers' Intl Assn* , 234 NLRB 1238 (1978), ptn for review pending *sub nom Central Florida Sheetmetal Constructors Assn* v *N L R B* (5th Cir No 79-2396)

[50] *Associated Contractors of Essex County* v *Laborers Intl Union*, 559 F 2d 222 (3d Cir 1977)

represented in the administration of joint trust funds, intended that the trustees appointed by each side attempt to advance the interest of their appointing party in the operation of the fund. "Insofar as it is consistent with their fiduciary obligations," the court held, "employer trustees are expected to advance the interests of the employer while employee trustees are expected to further the concerns of the union in the ongoing collective bargaining process between them." Accordingly, the court reversed the Board and held that management appointed trustees of a joint trust fund are collective-bargaining representatives within the meaning of section 8(b)(1)(B) and that the union's strike in support of its bargaining demand for participation in the existing industrywide trust funds, whose trustees were already in office, coerced the employer in the selection of its collective-bargaining representative in violation of that section.

In *Electric Smith*,[51] the Ninth Circuit held, contrary to the Board, that it is not a violation of section 8(b)(1)(B) for a union to discipline a member for working as a bargaining representative for a nonunion employer, "if the union neither represents nor shows an intent to represent the employer's employees." The case arose when an employee represented by the union opened his own business, in which he acted as grievance adjuster, but retained his union membership. The union then fined him for violating a union bylaw prohibiting members from working for nonunion employers. The court, noting that the bylaw was not invalid and that the fine could have been avoided merely by resigning from the union before opening the new business, concluded that the concerns which led Congress to enact section 8(b)(1)(B) are not present when there is no current or potential collective-bargaining relationship between the union and the employer concerned. Accordingly, the court held that the Union had not violated section 8(b)(1)(B).

6. Union Causation of Employer Discrimination

In *PaintSmiths*,[52] the Eighth Circuit, reversing the Board, held that a union violated the Act by exercising its contractual authority to require the hiring of a steward where the hiring resulted in the layoff of another employee. Citing *Dairylea*,[53] the court recognized that steward "superseniority" provisions served the legitimate purpose of insuring effective representation and hence were presumptively lawful; the court concluded, however, that this purpose could have been served by the appointment of a working employee as steward, that the discharge of another employee significantly encouraged union activity, and that no

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[51] *N L R B v Intl Brothd of Electrical Wkrs , Local 73, AFL-CIO [Electric Smith]*, 621 F 2d 1035

[52] *PaintSmiths v N L R B* , 620 F 2d 1326 (8th Cir)

[53] *Dairylea Cooperative*, 219 NLRB 656 (1975), enfd 531 F 2d 1162 (2d Cir 1976)

"legitimate and substantial" purpose [54] was served by the union's action. The court suggested that such union action might be lawful where a union demonstrated a specific need to appoint a steward from outside the current work force so that the discriminatory action would have a "legitimate and substantial" purpose.

By contrast, in *Printers League*,[55] the Second Circuit found a substantial legitimate purpose served by a contract provision giving hiring preference to employees employed under union contracts. The court noted that the preference was not given to all union members or to only union members, but rather to employees employed in shops under contract with the union. The court also noted that since preference was given only to those employed on the contract's effective date, the "benefited class" was "closed" to new members. For these reasons, the court concluded that the encouragement of union activity resulting from the preference was negligible. The court further noted that the parties had created the hiring preference in order to minimize payments from a guaranteed income fund established as part of a comprehensive solution to the industry's automation difficulties; the court accordingly concluded that the challenged preference served a "laudable goal" and was therefore lawful absent affirmative evidence of unlawful motive.

7. Secondary Boycott Issues

The District of Columbia Circuit was presented with two cases involving the application of the concept of a "reserved gate." In *General Electric* [56] the Supreme Court recognized that a union which has a dispute with an employer ordinarily may picket that employer wherever it does business, even if the premises belong to a neutral employer and are shared by other neutral employees which are also performing work at a "common situs." The Court held, however, that where a special entrance is reserved for the employer with the dispute—the "primary"—so that its employees and suppliers must use only that gate, the union must confine its picketing to that gate. If it pickets other entrances used by neutral employees, its conduct ordinarily violates the secondary boycott provisions of section 8 (b) (4) of the Act. In one case [57] the labor dispute was between American Broadcasting Company and NABET, the union representing its technicians. The situs of the activity principally involved was the hotel at which Vice President Mondale was scheduled to speak. The day before, ABC informed NABET which entrance to the hotel would be used exclusively by ABC for covering the speech. NABET

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

[55] *N L R B* v *N Y Typographical Union 6* [*Printers League*], 632 F 2d 171

[56] *Local 761, Intl Union of Electrical Workers* [*General Electric*] v *N L R B*, 366 U S 667, 673 (1961)

[57] *N L R B* v *Natl Assn of Broadcast Employees & Technicians, AFL-CIO* [*CBS*], 631 F 2d 944

picketed only that entrance but handbilled the main entrance of the hotel with leaflets reading "PLEASE DO NOT ENTER." The leaflets also stated that "THIS EVENT" was appearing on "UNFAIR ABC TELEVISION" and that the person distributing the handbill could show the reader the place "around the corner" where NABET was picketing ABC. Finally the handbill stated that the message was addressed exclusively to members of the public and was not an appeal to other employees not to perform services. Because of these activities, Columbia Broadcasting System employees refused to enter the hotel and CBS lost the coverage. The court held, in agreement with the Board, that the handbilling—which specifically mentioned the picketing in progress at the reserved gate and appealed to the reader not to enter the hotel, without identifying the event being boycotted—in effect extended the picketing beyond the reserve gate. Accordingly the activity was secondary and unlawful.

In the other case [58] the union extended its picketing to a "neutral" gate, but only after supplies, ordered by the project owner to be used by the contractor with which the union had its dispute, had been delivered through the neutral gate. The court accepted the Board's view that such a delivery by a supplier "tainted" the neutral gate so that picketing there was primary. In so holding the court declined to limit *Linbeck* [59] to situations in which the project owner *changed* the method of delivering supplies to avoid picketing of the subcontractor with which the union had its dispute. The court noted that since *Denver Building*,[60] the interdependence of various contractors on a single building site was not enough to make them all subject to picketing when the dispute was with only one of them. The court held, however, that this principle does not insulate the otherwise neutral employer from picketing when it ordered and retained title to materials to be used by the primary employer in its work on the common situs.

8. Hot Cargo Agreements

Section 8(e) of the Act makes it an unfair labor practice for an employer and a union to enter into an agreement whereby the employer agrees to "cease doing business with any other person." Section 8(b)(4)(A) prohibits a union from striking to force an employer to enter into an agreement prohibited by section 8(e). A number of cases decided during the past year raised the question of what transactions constituted "doing business" for the purpose of these sections. In one such case,[61] the Third Circuit considered several clauses which a union had sought to obtain by

[58] *J H Hoff Electric Co v N L R B*, 105 LRRM 2345 (D C Cir)

[59] *Intl Union of Operating Engineers, Local 450 (Linbeck Constr Corp)*, 219 NLRB 997 (1975), enfd 550 F 2d 311 (5th Cir 1977)

[60] *NLRB v Denver Bldg & Constr Trades Council*, 341 U S 675 (1951)

[61] *Amax Coal Co v N L R B*, *supra*, fn 48

striking. The court agreed with the Board that one clause, which prohibited the employer from selling, conveying, or otherwise transferring or assigning the operations covered by the contract to any successor unless the successor agreed to assume the employer's contractual obligations, did not violate section 8(e), and that a strike to obtain that clause was therefore lawful. The court held that the phrase "doing business" in section 8(e) referred to a continuing business relationship which one employer could discontinue in order to force another employer to accede to union demands; only where such a relationship existed could the first employer be pressured to assist a union in a dispute with another employer. Here, the sale of all or part of a company's business operations would involve no continuing relationship between the seller and the purchaser, and thus would create no possibility of involving the seller in a labor dispute between the union and the purchaser. Moreover, the clause benefited only the employees of the contracting employer, and was therefore primary and lawful. It was designed to ensure that the employees would retain their current contractual benefits if their place of employment was sold to a new employer. Once the sale was completed, the clause could be enforced only against the new employer, who would then be the primary employer of the unit employees. Thus, the clause would not enlist the aid of the signatory employer in affecting the labor relations of anyone who was not the employer of the unit employees.[62]

The court sustained the Board's findings that other clauses sought by the union requiring that coal mining operations be leased or licensed out and coal transportation, repair and maintenance work, and construction of mining facilities subcontracted, only to firms employing members of the union, did violate section 8(e), and that the union therefore violated section 8(b)(4)(A) by striking to obtain such clauses. The court noted that a lease or subcontract, unlike the sale of a capital asset, created a continuing relationship which constituted "doing business" within the meaning of section 8(e). Thus, if the union had a dispute with the lessee or subcontractor, the proposed clauses would enable the union to put pressure on the signatory employer to cancel the lease or subcontract, thus enmeshing that employer in a labor dispute not its own. Moreover, the clauses had unlawful secondary effects, because they benefited union members generally; they did not require the employment of unit employ-

[62] The Tenth Circuit, considering the same clause in *Lone Star Steel Co* v *N L R B* , 104 LRRM 3144 (10th Cir) cert denied February 23, 1981, also sustained the Board's conclusion that the clause did not violate sec 8(e) The court found that sales of coal properties were not a common occurrence in the normal course of business, that an isolated sale of capital assets did not create a continuing relationship which could enmesh the seller in the union's disputes with the purchaser; that the legislative history of sec 8(e) indicated that Congress was concerned with pressure which could be placed on neutral employers to abide by their agreements where such continuing relationships existed and not with agreements relating to the sale of all or part of a business, and that the clause did not restrict the sale or purchase of raw materials or the leasing or subcontracting of coal operations, either of which would be covered by sec 8(e) It pointed out that other clauses (discussed *infra*) dealing with leasing and subcontracting would be mere surplusage if this cause required a lessee or subcontractor to assume the entire contract

The court's further holding that the clause was a mandatory subject of bargaining is discussed *supra*, p

ees by a lessee or subcontractor, nor did they protect such employees' work standards.

In another case,[63] the Ninth Circuit sustained the Board's finding that a contract clause providing that, if the owner of a bowling alley leased out a coffeeshop located on the premises, the contract would be binding on the lessee, and the owner would be liable for any failure by the lessee to comply with the contract, violated section 8(e). The court noted that the applicability of section 8(e) depended on the nature, rather than the title, of the transaction involved, and agreed with the Third Circuit's holding in *Amax, supra*, that the phrase "doing business" in section 8(e) refers to a continuing relationship which one employer could discontinue in order to force another employer to accede to union demands. In the absence of such a relationship, the court pointed out that the secondary pressures which section 8(e) was designed to prevent could not occur. In this case, however, the court held that the Board had properly found a relationship which came within the statutory provision. The owner of the bowling alley and the lessee of the coffeeshop occupied a relationship of landlord and tenant—a continuing relationship which enabled the owner to force the lessee to accede to union demands by threatening to cancel the lease. The contract clause at issue clearly contemplated such coercion, as it made the owner liable for the lessee's failure to comply with the union contract. The court found Board cases [64] holding that the sale of all or part of a business is not covered by section 8(e) to be clearly distinguishable. In those cases, once the transaction was over, the seller and purchaser operated as separate entities; neither had any means of applying pressure to the other, and the union could not obtain victory in a dispute with one by applying secondary pressure to the other. Here, the owner of the bowling alley and the lessee of the coffeeshop remained interdependent business associates, each catering to the other's clientele and financially dependent on the success of the other. Thus, they continued to have a strong business relationship capable of being disrupted by secondary pressure.

9. Remedial Order Provisions

In *Markle* [65] the court agreed with the Board that the employer had committed the unfair labor practices found, but disagreed as to the proper scope of the remedy. The court's reservation arose from the unusual procedural characteristics of the case. Thus, in an earlier Board proceeding Markle had filed unfair labor practice charges alleging that

[63] *N L R B* v *Hotel & Restaurant Employees & Bartenders' Union Local 531 [Verdugo Hills Bowl]*, 623 F 2d 61 (9th Cir)

[64] *Dist 71, IAM (Harris Truck & Trailer Sales)*, 224 NLRB 100 (1976), *Intl Union of Operating Engineers, Local 701, AFL–CIO (Cascade Employers Association)*, 221 NLRB 751 (1975)

[65] *N L R B* v *Markle Mfg Co of San Antonio*, 623 F 2d 1122 (5th Cir)

the union, which represented Markle's employees on strike for a new contract, had engaged in strike violence. The General Counsel issued a complaint alleging that certain named employees had engaged in specified strike violence. Thereafter the union and Markle executed a formal settlement agreement which was approved by the Board's regional director. This agreement—which contained no admissions except as to jurisdictional facts and also contained a nonadmissions clause—provided for the entry of an order requiring the union to cease and desist from engaging in specified conduct of the sort alleged in the complaint. Upon approval by the Board, the order was enforced by the Fifth Circuit. Later the union filed charges alleging as unfair labor practices Markle's failure to reinstate 16 named economic strikers whose positions had become available. Six of these strikers were named in the complaint against the union as having engaged in strike violence, and five of them testified that they had not engaged in such conduct. The company refused to cross-examine these witnesses or tender evidence with respect to them, contending that the Board was estopped from finding that these employees had not engaged in violence. The administrative law judge, who held that the General Counsel had the burden of showing that the employees had not engaged in such conduct, credited the employees' testimony and the Board adopted the findings that the company unlawfully refused to reinstate them. The court agreed that the Board could so find, since the company had consented to the settlement without any findings as to misconduct. The court held, however, that Markle's obligation to reinstate the employees was tolled until the entry of the second Board order, noting that the Board had placed the burden on the General Counsel to prove that the employees were innocent of the misconduct, rather than on the employer to prove that they were guilty.

In another Fifth Circuit case, *Fla. Steel*,[66] the violation was the employer's refusal to give the Steelworkers information needed to perform its function as bargaining representative—the names of employees to be reinstated under a prior court-enforced Board order and the names of employees displaced to effect that reinstatement. In addition to requiring the company to provide that information, the Board's order required that the notice be mailed, posted, and read to the employees at all Florida Steel plants, as well as included in appropriate company publications. The order also provided that the union be given an opportunity to address employees on company time at any Florida Steel plant when within 2 years when a Board election was scheduled or when a company official addresses employees on union representation. In reviewing the scope of the Board's order, the court adverted to the company's having been found guilty of unfair labor practice by the Board on 17 occasions since 1974, with enforcement ordered in 10 of the 12 cases reviewed by a court of

[66] *Fla Steel Corp* v *N L R B* , 620 F 2d 79

appeals. Nevertheless, the court regarded the Board's order as overbroad in granting the Steelworkers access to the plants other than the two plants in which it represented the employees, at least in the absence of violations in connection with multiplant organizational efforts, particularly where the employees in the other plants were to receive copies of the notice. The court also regarded as overbroad the requirement of publishing the notice in company publications, since it was to be posted, read, and mailed to all employees.

Prior to *Abilities & Goodwill*,[67] the Board had held that unlawfully discharged, working employees were eligible for backpay from the date of their discharge, but unlawfully discharged, striking employees were eligible for backpay only from the date of their offering to return to work. In *Abilities & Goodwill*, the Board held that strikers are also entitled to backpay from the date of the discharges. The Board recognized that, on one hand, such an employee may still be refraining from work voluntarily, in which case backpay would more than make him whole, while, on the other hand, the employee may have decided to abandon the strike, but felt it futile to apply because of the unlawful discharge. The Board reasoned that given this ambiguity, the employer who committed the unfair labor practice should be responsible for backpay, since the employer could have removed the ambiguity by offering reinstatement to the employee. The Board's new rule was first presented to a court in *Mars Sales*,[68] and the court accepted it as a proper exercise of the Board's wide discretion with respect to remedies. With respect to one of the striking employees involved, however, the court concluded that, although the employer had never offered reinstatmeent, the employee had made clear, through subsequent resignation and other conduct, that he no longer wished to work for the company. The court held that, in these circumstances, the striking employee should not be eligible for backpay, absent evidence that the resignation or related conduct simply represented an effort to mitigate damages by securing alternative employment.

[67] *Abilities & Goodwill*, 241 NLRB No 5, 44 NLRB Ann Rep 181 (1979)
[68] *N L R B* v *Mars Sales & Equipment Co*, 626 F 2d 567 (7th Cir)

IX

Injunction Litigation

Sections 10 (j) and 10 (l) authorize application to the U.S. district courts, by petition on behalf of the Board, for injunctive relief pending hearing and adjudication of unfair labor practice charges by the Board.

A. Injunctive Litigation Under Section 10 (j)

Section 10(j) empowers the Board, in its discretion, after issuance of an unfair labor practice complaint against an employer or a labor organization, to petition a U.S. district court for appropriate temporary relief or restraining order in aid of the unfair labor practice proceeding pending before the Board. In fiscal 1980, the Board filed 50 petitions for temporary relief under the discretionary provisions of section 10(j): 45 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 23 cases and denied in 7. Of the remaining cases, 14 were settled prior to court action, 3 were withdrawn, 13 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 20 cases and against labor organizations in 3 cases. 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 cases against unions variously involved a union and its members engaging in violent acts and serious picket line misconduct, and a union insisting to impasse during collective-bargaining negotiations on a merger of certified bargaining units and on a contract clause which would permit employees to honor secondary picket lines, and striking in furtherance of these proposals.

A recurring issue under section 10(j) is whether a temporary bargaining order in favor of a nonincumbent union may be appropriate interim relief where an employer's serious unfair labor practices have effectively dissipated the union's former majority support and impeded the election process. The question was presented in five cases on the district and appellate court level during the last fiscal year. In each case, the court

[1] See table 20 at p 291, *infra*

rejected the Fifth Circuit's view that such an interim bargaining order is inappropriate because it alters, rather than maintains, the status quo,[2] and adopted the Second Circuit's contrary view that such relief may be "just and proper" to restore and maintain the status quo which existed before the onset of the unfair labor practices.[3]

Addressing the issue for the first time in *Levine* v. *C & W Mining Co.*,[4] the Sixth Circuit reasoned that "[t]he Second Circuit rule appears to be more in accord with the purposes of the Act." Accordingly, the court held that "[u]pon finding reasonable cause to believe that unfair labor practices have occurred a district court may grant injunctive relief, including an interim bargaining order, upon further finding that, at some point, a union had majority support which the unfair labor practices threatened to erode during the normal process of Board determination and court enforcement." Observing that the "burden of proof on the regional director is relatively insubstantial when he seeks a temporary injunction," the court of appeals sustained the district court's finding of reasonable cause to believe the employer swiftly dissipated a union's majority status in a unit of truckdrivers by committing massive unfair labor practices, including threats to sell its trucks and discharge the drivers, the sale of some trucks, direct dealing with employees, and the formation of an "employee committee" to supplant the union, and affirmed the district court's grant of an interim bargaining order. However, the court vacated that portion of the district court's order enjoining the employer from selling its trucks without bargaining with the union because, in the appellate court's view, the employer's right unilaterally to change its mode of operation "was an issue better left for Board determination."

Following its *C & W Mining* decision, the Sixth Circuit subsequently affirmed another interim bargaining order in *Gottfried* v. *Mayco Plastics*[5] on the basis of a stipulation that the union, which had lost a Board-conducted election, had once possessed a card majority and that there was reasonable cause to believe that numerous actions alleged to constitute serious violations of the Act had occurred.

The Second Circuit also upheld similar injunctive relief in *Kaynard* v. *Palby Lingerie*,[6] reaffirming its holding in *Seeler* v. *Trading Port*,[7] that such relief is appropriate upon a showing of reasonable cause to believe "that the union at one point had a clear majority and that the employer then engaged in such egregious and coercive unfair labor practices as to make a fair election virtually impossible." Rejecting the employer's con-

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[2] *Boire* v *Pilot Freight Carriers*, 515 F 2d 1185 (5th Cir 1975), cert denied 426 U S 434

[3] *Seeler* v *Trading Port*, 517 F 2d 33 (2d Cir 1975)

[4] 610 F 2d 432 (1979), rehearing denied February 25, 1980, affg in part and vacating in part 465 F Supp 690 (D C Ohio 1979), 44 NLRB Ann Rep 228 (1979)

[5] 103 LRRM 3104, affg 472 F Supp 1161 (D C Mich 1979), 44 NLRB Ann Rep 229 (1979)

[6] 625 F 2d 1047

[7] 517 F 2d 33 (2d Cir 1975)

tention that it was contesting the appropriate unit for bargaining and that a final unit determination by the Board is an essential prerequisite to a bargaining order, the court held that "where there is a substantial basis for the Regional Director's unit determination, a district court acts within its discretion to include a bargaining order in a Section 10(j) injunction." The court also affirmed the district court's order directing the interim reinstatement of two "active and open union supporters," on the ground that "[t]heir discharges . . . risked a serious adverse impact on employee interest in unionization."

Finally, interim bargaining orders were granted by district courts in *Hirsch* v. *Trim Lean Meat Products*,[8] and *Wilson* v. *Liberty Homes*.[9] In *Trim Lean Meat*, the trial court found reasonable cause to believe the employer had unlawfully interrogated employees, threatened reprisals, including a plant relocation or shutdown, created the impression of surveillance, assisted and prematurely recognized a minority union, and discharged over 20 employees because of their activities on behalf of the majority union. Also finding reasonable cause to believe the union possessed a card majority, and that the employer's conduct had the effect of undermining the union's support while nullifying the possibility that a fair election could be held, the court concluded that an interim bargaining order was just and proper relief. The court further ordered the employer to cease recognizing or otherwise supporting the minority union and to offer interim reinstatement to the discharged employees "so as to enable [the union] to regain the organizational strength it possessed prior to [the discharges]." In *Liberty Homes*, the district court found reasonable cause to believe the employer subcontracted for the delivery of its mobile homes and discharged the entire unit of truckdrivers at one of its plants in retaliation for the drivers' unanimous selection of the union to represent them in collective bargaining at that plant. Finding that the employer's conduct made an election impossible, and observing that the employer had simply transferred the majority of its trucks to its other plants, the court issued an injunction directing the employer to restore the *status quo ante* by resuming its delivery operation at the affected plant, recalling the discharged drivers, and recognizing the bargaining with the union, pending a final Board order.

In other significant 10 (j) litigation during the year, the Second Circuit, in *Kaynard* v. *Mego Corp.*,[10] affirmed a 10(j) injunction ordering an employer and a union to cease extending their collective-bargaining agreement to a unit of employees at a new facility, and to cease coercing and restraining those employees in their efforts to secure representation by another union, pending the Board's resolution of charges alleging

[8] 479 F Supp 1351 (D C Del 1979)

[9] No 80–C–221 (D C Wis), appeal pending (7th Cir)

[10] 633 F 2d 1026 (2d Cir), affg 484 F Supp 167 (D C N Y)

violations of section 8(a)(1) and (2) and section 8(a)(1)(A) and (2) of the Act. The court acknowledged that there may be some "discordant voices in the chorus of accretion cases" relied on by the regional director, but emphasized that the reasonable cause standard does not require the regional director to "show that an unfair labor practice has occurred, or that the precedents governing the case are in perfect harmony," and that "[u]nless the district court is convinced that the legal position of the Regional Director is wrong . . . a finding of reasonable cause must ensue." Although the court of appeals was troubled by the absence of "flagrant or egregious violations of the Act" and was not wholly convinced of the urgency of the case, it concluded that the district court had not abused its discretion in granting temporary injunctive relief because "[t]he advantages of incumbency are potent indeed and may be corrosive of the free and uncoerced choice which forms the foundation of our system of collective bargaining." However, in view of the uncomplicated facts and the employees' continued unrepresented status, the court placed stringent time limits on the duration of the injunction to encourage expedited resolution of the issues.

In *Morio* v. *North American Soccer League*,[11] a novel case involving collective bargaining in the professional sports industry, a district court granted unique relief which was carefully designed to restore and maintain the status quo as it existed when the union was originally certified. The district court found reasonable cause to believe the employer had violated section 8(a) (5) of the Act when, during the period while it was refusing to bargain with the union to test its certification, and even after court affirmance of the certification, it continued to deal directly with individual players and made unilateral changes in working conditions, including the imposition of a winter indoor season over and above the traditional outdoor summer season. In addition to a general cease-and-desist order, the court concluded that, to restore the pre-unfair labor practice status quo and to permit meaningful bargaining, it was just and proper that the employer be directed to rescind the unilateral changes, render voidable, at the union's option, all provisions, except the "exclusive rights" clauses, in the players' individually negotiated contracts, and to refrain from implementing the 1980–81 winter indoor season without first bargaining with the union to agreement or good-faith impasse.

Finally, in *Walsh* v. *Gene's Restaurant & Pub*,[12] a district court found reasonable cause to believe that two restaurants constituted a single employer for purposes of the Act and that the employer had violated section 8(a) (1) and (3) of the Act by discharging the entire unit of waiters at one of its restaurants, and then closing the restaurant, because of the

[11] 501 F 2d 633 (D C N Y), appeal pending (2d Cir)

[12] No 80–Civ–1378–Z (D C Mass), appeal pending (1st Cir)

employees' union organizing activities. In addition to a general cease-and-desist order, the court issued an order directing the employer to reinstate the discharged employees at the closed restaurant, if and when it reopens, and, pending reopening, to place the discharged employees on a preferential hiring list at the employer's other restaurant.[13]

B. Injunctive Litigation Under Section 10 (l)

Section 10(l) imposes a mandatory duty on the Board to petition for "appropriate injunctive relief" against a labor organization or its agent charged with a violation of section 8(b) (4) (A), (B), and (C),[14] or section 8(b) (7),[15] and against an employer or union charged with a violation of section 8(e),[16] 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 provisions shall be applicable, "where such relief is appropriate," to violations of section 8(b)(4)(D) of the Act, which prohibits strikes and other coercive conduct in support of jurisdictional disputes. In addition, under section 10(l) a temporary restraining order pending the hearing on the petition for an injunction may be obtained, without notice to the respondent, upon a showing that "substantial and irreparable injury to the charging party will be unavoidable" unless immediate injunctive relief is granted. Such *ex parte* relief, however, may not extend beyond 5 days.

In this report period, the Board filed 195 petitions for injunctions under section 10(l). Of the total caseload, comprised of this number together with 32 cases pending at the beginning of the period, 89 cases were settled, 9 dismissed, 12 continued in an inactive status, 9 withdrawn, and 21 pending court action at the close of the report year.[17] During this

[13] The employer had commenced bankruptcy proceedings with respect to the closed restaurant, and the regional director did not seek an order directing the restoration of that operation

[14] 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 retraint 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)

[15] Sec 8(b) (7), incorporated in the Act by the 1959 amendments, makes organizational or recognitional picketing under certain circumstances an unfair labor practice

[16] Sec 8(e), also incorporated in the Act by the 1959 amendments, makes hot cargo agreements unlawful and unenforceable, with certain exceptions for the construction and garment industries

[17] See table 20, p 291, *infra*

period, 87 petitions went to final order, the courts granting injunctions in 81 cases and denying them in 6 cases. Injunctions were issued in 45 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 12 cases involving jurisdictional disputes in violation of section 8(b)(4)(D). Injunctions were issued in 20 cases to proscribe alleged recognitional or organizational picketing in violations of section 8(b)(7). The remaining four cases in which injunctions were granted arose out of charges involving violations of section 8(e).

Of the six in which injunctions were denied, five involved secondary picketing activity by labor organizations and one involved implementation of illegal hot cargo clauses.

The International Longshoremen's Association's refusal to service Russian ships or to handle cargo arriving from, or destined to, the U.S.S.R., as a protest against the U.S.S.R.'s invasion of Afghanistan, produced significant section 10(l) litigation during the past fiscal year. Injunction petitions were filed in district courts sitting at Houston, Texas, Savannah, Georgia, and Boston, Massachusetts, alleging that the union's refusal to service Russian ships or Russian cargo constituted a secondary boycott of the longshoremen's domestic stevedoring employers. The district court in Houston dismissed the first petition for injunctive relief based on its conclusion that the union's boycott did not "affect commerce" within the meaning of the Act and, therefore, was not subject to the Board's jurisdiction.[20] Several weeks later, the district court in Savannah reached the opposite conclusion regarding the Board's jurisdiction and issued an injunction based on its determination that there was reasonable cause to believe that the boycott constituted a secondary boycott violative of section 8(b)(4)(B) of the Act. The court rejected the union's contention that the Houston court's decision barred relitigation of the jurisdictional issue under the doctrine of *res judicata*, concluding that the conduct underlying the Savannah petition occurred subsequent to that alleged in Houston, and thus created a separate cause of action.[21] Finally, the district court in Boston disagreed with both the Houston and Savannah courts. While convinced that the Houston court's decision would otherwise stand as *res judicata* on the jurisdictional issue, the court concluded that the doctrine of *res judicata* is inapplicable to proceedings under section 10(l) of the Act because they are merely ancillary to the Board's labor practice proceedings and do not finally resolve the issues. The court then reached its independent conclusion that the union's conduct affected commerce and fell within the Board's statutory

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[20] *Baldovin* v *Intl Longshoremen's Assn , et al (Tex Farm Bureau)*, Civ No H-80-259 (D C Tex)

[21] *Mack* v *Intl Longshoremen's Assn et al (Occidental Chemical Co)*, Civ No CV-480-051, 104 LRRM 2892 (D C Ga)

jurisdiction. However, adopting the Fourth Circuit's reasoning in *Ocean Shipping Services*,[22] the court found no reasonable cause to believe the union's essentially political activities violated section 8(b)(4)(B) of the Act, and dismissed the petition on its merits.[23]

The Board appealed the Houston and Boston district courts' denial of injunctive relief to the Fifth and First Circuits, respectively, and the union appealed the Savannah court's grant of a temporary injunction to the Fifth Circuit. The Fifth Circuit consolidated the Houston and Savannah cases, affirmed the Houston court's dismissal of the petition, and reversed the court in Savannah. The court of appeals acknowledged that the union's conduct was "secondary" in that all of the domestic employers dealing with the boycotted Russian cargo were neutrals in the union's dispute with the U.S.S.R. However, analyzing the Supreme Court's *Windward* [24] and *Mobile* [25] decisions, holding that a union's picketing of foreign flag ships to protest the payment of less than "area standards" wages to their foreign crews was not "in" or "affecting" domestic commerce and, therefore, not even arguably either protected or proscribed by the Act, the appellate court concluded that the boycott of Russian cargo was similarly not "in" or "affecting" commerce. In the court's view, the object of the union's conduct and the responses which would accommodate the union's complaint control the jurisdictional issue. Reasoning that, like the picketing in *Windward* and *Mobile*, the union's boycott was intended to compel a foreign entity to change a course of conduct wholly removed from domestic commerce, the court held that there was not reasonable cause to believe that the union's conduct "affected commerce" within the meaning of the Act.[26]

The First Circuit did not reach the jurisdictional issue or the merits of the violation, holding, instead, that the petition in Boston must be dismissed as barred by *res judicata*. Recognizing that the issue was one of first impression, the court of appeals vacated the decision of the district court in Boston and held that the doctrine of *res judicata* is applicable to successive 10(l) proceedings so that a decision in one such case may preclude a later petition seeking to enjoin the same conduct. The court concluded that the Houston court's jurisdictional holding constituted a decision on the merits. Observing that the petitioner and respondents in the Houston and Boston cases were essentially identical, and that the pattern of conduct giving rise to both proceedings was in furtherance of a single general policy of the union, the court concluded that the issue of the Board's jurisdiction over the union's conduct was the same in both cases.

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[22] *N L R B* v *Intl Longshoremen's Assn (Ocean Shipping Services)*, 332 F 2d 992 (1964), denying enforcement to 146 NLRB 723 (1964)

[23] *Walsh* v *Intl Longshoremen's Assn (Allied Intl)*, Civ No 80–559–S, 104 LRRM 2730 (D C Mass)

[24] *Windward Shipping (London) Ltd* v *American Radio Assn* , 414 U S 104 (1974)

[25] *American Radio Assn* v *Mobile Steamship Assn* , 419 U S 215 (1974)

[26] *Baldovin* v *Intl Longshoremen's Assn* , 626 F 2d 445 (5th Cir)

Accordingly, the court held that regardless of whether the two causes of action were the same, under the collateral estoppel, or issue preclusion, branch of the *res judicata* doctrine, the Houston court's dismissal of the petition for lack of jurisdiction precluded relitigation of the jurisdictional issue in the subsequent proceedings in Boston.[27]

[27] *Walsh* v *Intl Longshoremen's Assn et al*, 630 F 2d 864 (1st Cir)

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Contempt Litigation

During fiscal 1980, petitions for adjudication in contempt for noncompliance with decrees enforcing Board orders were filed in 34 cases, seeking civil contempt and 1 civil and criminal contempt.[1] As to the civil petitions, five were granted and civil contempt adjudicated,[2] while three were discontinued upon full compliance.[3] In another case, the Board's petition was denied upon the court's assumption that respondent will comply after the court rejected its defense.[4] In 14 cases, the courts referred the issues to special masters for trials and recommendations: three to U.S. district court judges;[5] one to a circuit court judge;[6] eight to U.S. magistrates;[7] and two to other experienced triers.[8] Four cases are

[1] *N L R B* v *Fry Foods*, in civil and criminal contempt of the 8 (a) (1), (3), (4), and (5) provisions of 609 F 2d 267 (6th Cir) and the temporary injunction of July 18, 1979, in No 79–1210

[2] *N L R B* v *Local 30, United Slate, Tile & Composition Roofers, Damp & Waterproof Workers Assn , AFL–CIO*, by order of February 20, 1980, in civil contempt of the 8 (b) (1) (A) provisions of the judgment of April 11, 1978, in No 78–1260 (3d Cir), *N L R B* v *Local 1396, Intl Union of Painters & Allied Trades, AFL–CIO*, by order of July 7, 1980, in civil contempt of the secondary boycott provisions of the judgments of September 26, 1974, in No 74–2058 and December 10, 1976, in No 76–2563 (6th Cir), *N L R B* v *ARC Industries, by order of August 14, 1980, in civil contempt of the* bargaining provisions of the judgment of March 21, 1975, in No 74–1203 (7th Cir), *N L R B* v *Lithography Services, & Lear Colorprint*, was adjudicated in civil contempt by order of December 1, 1980, and the case continued against *Lear Colorprint*, in civil contempt of the judgment of April 19, 1979, in No 79–1282 (7th Cir), *N L R B* v *Armored Transfer Service*, by order of January 8, 1980, in civil contempt of the reinstatement provisions of the judgment of July 12, 1979, in No 79–1462 (10th Cir)

[3] *N L R B* v *United Assn of Journeymen & Apprentices of the Plumbing & Pipefitting Industry, Local 13, AFL–CIO*, by order of February 15, 1980, upon compliance with the secondary boycott provisions of the judgment of December 5, 1973, and the civil contempt adjudication of April 24, 1974, in No 73–2598 (3d Cir), *N L R B* v *Kenworth Trucks of Philadelphia*, by order of September 9 1980, upon compliance with 580 F 2d 55 (3d Cir 1977), *N L R B* v *Tipton Electric Co & Professional Furniture Co* , by order of April 14, 1980, upon compliance with the bargaining provisions of 104 LRRM 2073 (8th Cir 1979)

[4] *N L R B* v *San Antonio Portland Cement Co* , by order of April 25, 1980, upon the bargaining provisions of 611 F 2d 1148 (5th Cir 1980)

[5] To United States District Judge Clarkson S Fisher in *N L R B* v *Intl Union of Bridge, Structural & Ornamental Ironworkers, Local 373*, and *N L R B* v *Intl Union of Bridge, Structural & Ornamental Ironworkers Local 45*, in civil contempt of the hiring hall judgment of October 24, 1978, in Nos 78–1085, 1086, 1435, and 1572 (3d Cir), *N L R B* v *Airlines Parking*, to United States District Judge Thomas P Thornton in civil contempt of 470 F 2d 994 (6th Cir 1972), to United States District Judge Thomas P Thornton in *N L R B* v *Bruce Cartage*, in civil contempt of the reinstatement provisions of the judgment of July 18, 1979, in No 79–1185 (6th Cir)

[6] To Senior Circuit Judge Francis L Van Duesen in *N L R B* v *Lehigh Lumber Co , Brown-Borhek Co* , and *Ritter & Smith Co* , in civil contempt of the bargaining provisions of 99 LRRM 2633 (3d Cir 1977), cert denied 439 U S 928

[7] *N L R B* v *Acme Wire Works*, in civil contempt of the bargaining provisions of 582 F 2d 153 (2d Cir 1978), *N L R B* v *Terrace Lithographers*, and *General Lithographers Corp* , in civil contempt of the bargaining provisions of the judgment *of October 18, 1978, in No 78–4110, N L R B* v *Local 825, IUOE, AFL–CIO*, in civil contempt of the secondary boycott provisions of 430 F 2d 1225 (3d Cir 1970), N L R B v *Turbodyne Corp as successor to Wagner Electric Corp* , in civil contempt of the bargaining provisions of 586 F 2d 1074 (5th Cir 1979), *N L R B* v *United Inventories of Dallas, & United Physical Inventories*, in civil contempt of the reinstatement provisions of the judgment of July 13, 1979, in No 79–2274 (6th Cir), *N L R B* v *Kurt A Perschke d/b/a Perschke Hay & Grain*, in civil contempt of the backpay provisions of the judgment of July 12, 1978, in No 78–1741 (7th Cir), *N L R B* v *United Contractors*, in further civil contempt of the reinstatement provisions of 539 F 2d 713 (7th Cir 1976), cert denied 429 U S 1061, *N L R B* v *Local 13 Detroit Newspaper Printing & Graphic Communications Union*, in civil contempt of the bargaining provisions of 598 F d 267 (D C Cir 1979)

[8] *N L R B* v *Kenn Steel Products, Robert Palatnik*, for the continued refusal to pay backpay pursuant to the contempt adjudication of September 7, 1978, in No 74–1872 (2d Cir), *N L R B* v *Intl Assn of Bridge, Steelworkers & Ornamental Ironworkers, Local 433*, in civil contempt of the hiring hall provisions of 600 F 2d 770 (9th Cir 1979)

awaiting referral to a special master.[9] The remaining seven cases are before the courts in various stages of litigation: two await the issuance of an order to show cause,[10] four are awaiting disposition of the Board's motion for summary adjudication,[11] and one is awaiting entry of a consent contempt adjudication.[12] In addition, protective orders enjoining the dissipation of respondents' assets were obtained in three cases.[13]

Twenty cases which were commenced prior to fiscal 1980 were disposed of during the period. In 11 of these, civil contempt was adjudicated;[14] in 2, in addition to adjudicating civil contempt for a second time, the court imposed the prospective fine which had been assessed in the earlier adjudication;[15] 1 was discontinued upon full compliance;[16] 6 were dis-

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[9] *N L R B* v *J Ray McDermott & Co* , in civil contempt of 571 F 2d 850 (5th Cir 1978), cert denied 439 U S 893, *N L R B* v *Abrahamson Chrysler Plymouth*, in civil contempt of the bargaining provisions of March 20, 1980, in No 80–1223 (7th Cir), *N L R B* v *Lloyd Wells d/b/a Pere Marquette Park Lodge*, in further civil contempt of the 8(a)(1) and 8(a)(3) provisions of the judgment of February 2, 1979, in No 78–2468 (7th Cir), *N L R B* v *Tony DeClue, an individual d/b/a Liberty Cleaners & d/b/a T & T Drapery Service, T & T Drapery Service, and Real Cleaners*, in civil contempt of the backpay provisions of the judgment of August 3, 1979, in No 79–1533 (8th Cir)

[10] *N L R B* v *Hoover*, in civil contempt of the reinstatement provisions of the judgment of January 18, 1980, in No 79–2132 (5th Cir), *N L R B* v *Franklin Property Co* , d/b/a *Hilton Inn*, in civil contempt of the 617 F 2d 447 (6th Cir 1980), cert denied 105 LRRM 2809 (1980)

[11] *N L R B* v *Mattiace Petrochemical Co* , in civil contempt of the 8(a)(1), (2), and (3) provisions of the judgment of October 1, 1979, in No 79–4029 (2d Cir), *N L R B* v *LeRoy W Craw, Jr , Vernon E Craw and Daniel G Leonard, d/b/a Craw & Son* in civil contempt of the bargaining and reinstatement provisions of 565 F 2d 1267 (3d Cir), *N L R B* v *Heavy Lift Services*, on the renewed motion for summary judgment, in civil contempt of the bargaining provisions of 607 F 2d 1121, *N L R B* v *Falkowski Grocery*, in civil contempt of the bargaining provisions of the judgment of July 25, 1979 in No 78–1737 (8th Cir)

[12] *N L R B* v *Romo Paper Products Corp* , in civil contempt of the bargaining judgments of March 31, 1975, in No 74–4006, July 7, 1976, in No 75–4285 and May 1, 1980, in No 80–4069 (2d Cir)

[13] *N L R B* v *Ellsworth Sheetmetals*, to protect judgment of April 30, 1979 in No 78–4122 (2d Cir), *N L R B* v *Steere Dairy*, to protect backpay judgment of August 14, 1979, in No 79–1084 (4th Cir), *N L R B* v *Gerald S Maykuth d/b/a Bighorn Beverage*, to protect 614 F 2d 1238 (9th Cir)

[14] *N L R B* v *Union Nacional de Trabajadores*, 611 F 2d 926 (1st Cir), *N L R B* v *Clearview Concrete Products Corp* , civil contempt order of January 21, 1980, in Nos 74–2604 and 75–4013 upon the reinstatement provisions of the judgment of October 9, 1975 (2d Cir), *N L R B* v *Local 32B–32J Service Employees Intl Union*, civil contempt order of August 28, 1980, in No 78–1466 upon the secondary boycott provisions of the judgment of October 17, 1978 (2d Cir), *N L R B* v *Midot Management Corp d/b/a Klein's Park Manor*, civil contempt order of February 20, 1980, in No 78–4132 upon the reinstatement and backpay provisions of the judgment of September 14, 1978 (2d Cir), *N L R B* v *James K Sterritt, Concrete Haulers*, civil contempt order of March 25, 1980, in Nos 75–4044 and 76–4253 upon the backpay provisions of the judgments of October 17, 1975, and December 30, 1976 (2d Cir), *N L R B* v *Delta Metal Crafters Corp* , civil contempt order of November 14, 1979, in Nos 79–1942, upon the reinstatement provisions of the judgment of February 25, 1977 (3d Cir), *N L R B* v *Milford Manor*, civil contempt order of December 18, 1979, in No 78–1248 upon the reinstatement provisions of the judgment of November 15, 1978 (3d Cir), *N L R B* v *R M M* , civil contempt order of November 7, 1979, in No 79–1556 upon the reinstatement provisions of the judgment of April 11, 1979 (5th Cir), *N L R B* v *Gyuro Grading Co* , order of February 26, 1980, in No 78–1432 upon the bargaining provisions of the judgment of May 23, 1978 (7th Cir), *N L R B* v *Local 70, Teamsters*, civil contempt order of April 30, 1980, upon 530 F 2d 1053 (9th Cir 1978), *N L R B* v *Orange County Dist Council of Carpenters*, civil contempt order of February 25, 1980, in No 77–3836 upon the secondary boycott provisions of the judgment of March 27, 1978 (9th Cir)

[15] *N L R B* v *Union de Tronquistas de Puerto Rico, Local 901*, by order of April 1, 1980, in No 71–1371, assessing $30,000 in fines and costs for continued violation of the judgment of February 15, 1972 (1st Cir), *N L R B* v *Alfred & Amelia Gilgen d/b/a Decor Unfinished Furniture Co* , order of December 10, 1979, assessing a fine of $10,000 for continued violation of the judgment of July 2, 1976, in No 76–1725 (9th Cir)

[16] *N L R B* v *MFY Industries, Inc d/b/a Oertle's*, by order of January 31, 1980, in No 77–1607 upon full compliance with 573 F 2d 673 (10th Cir 1977)

posed of by orders calling for full compliance.[17] In one criminal contempt proceeding against a union and its business agent pending before the U.S. district court, sitting as special master, the union pleaded *nolo contendere*, and the business agent pleaded guilty.[18]

Two opinions rendered during the fiscal period are noteworthy. In *Union National*,[19] while recognizing that a Board notice posted pursuant to an enforced Board order does not deprive the union of the right to express opinions in a contemporaneous side notice, the court found that the side notice in that case lost its Constitutional cloak, and became contumacious when it expressed an intent to threaten and use violence in the future even if the side notice itself did not threaten. The side notice asserted that the Board's order violated the constitutional rights of workers, proclaimed the union's unyielding commitment to the defense of those rights, and called on workers to repudiate the labor laws of the United States.

In *Teamsters Local 825*,[20] a United States District Court appointed by the Ninth Circuit as special master to fix the Board's costs in a contempt proceeding in which the Board prevailed substantially, rejected the union's contention that the award to the Board should be apportioned merely because the Board did not prevail on all the issues in the contempt proceedings.

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[17] *N L R B* v *Milbin Printing, Moran Press*, order of June 10, 1980, upon the bargaining provisions of the judgment of May 15, 1978, in No 78-4013 (2d Cir), *N L R B* v *Jorgensen's Inn*, by order of April 7, 1980, upon 588 F 2d 822 (3d Cir 1979), *N L R B* v *North Gate Cinema & Wyandotte Theatres*, order of June 24, 1980, upon the reinstatement provisions of the judgment of November 9, 1979, in No 78-1433 (7th Cir), *N L R B* v *Royal Typewriter Co & Litton Industries*, order of February 12, 1980, upon the bargaining provisions of 533 F 2d 1030 (8th Cir 1976), *N L R B* v *Aircraft & Helicopter Leasing & Sales*, order of November 9, 1979 upon the backpay provisions of the judgment of January 27, 1978, in No 77-1538 (9th Cir), *N L R B* v *Timberland Packing Corp* , order of February 28, 1980, upon the bargaining provisions of 550 F 2d 500 (9th Cir 1977)

[18] *N L R B* v *In Re Michigan State Bldg & Constr Trades Council, AFL-CIO and Eugene Tolot*, see 34 NLRB Ann Rep 238 (1969)

[19] See fn 14, *supra*

[20] *N L R B* v *Teamsters, Chauffeurs, Warehousemen and Helpers Local 85, IBTCWHA*, 103 LRRM 2796 (special master's report), settled on appeal 103 LRRM 2795 (9th Cir) See 34 LRRM Ann Rep 237, fn 13

XI

Special and Miscellaneous Litigation

A. Litigation Involving the Board's Jurisdiction

In *Physicians Natl. House Staff Assn.* v. *Fanning*, the District of Columbia Circuit, *en banc*,[1] affirmed the district court's judgment that it was without jurisdiction to review the Board's decision that interns and residents are not "employees" within the meaning of section 2(3) of the Act. The court noted that the Supreme Court, in *Leedom* v. *Kyne*,[2] established a narrow exception to the rule of nonreviewability of Board representation decisions limited to circumstances where the Board acted in excess of its powers, violating a clear and mandatory provision of the Act. The court further noted that the fact that the Board may have made an error of fact or law is insufficient to vest a district court with jurisdiction. Thus, the court stated that in the instant case the appellants would have to demonstrate a specific command of the Act which mandated a finding that housestaff are "employees" eligible to participate in a representation election.

In its decision, the court found that appellants had not met their burden. The court held that neither section 2(3) of the Act, nor any other section of the Act, defined the term employee. The issue of whether a particular individual is an employee is dependent on the facts of each case; a decision on the facts of each case is committed to the Board's informed discretion. In finding that housestaff are primarily engaged in graduate study and that their status was therefore that of students rather than employees, the Board acted within its jurisdiction. For that reason, the Board's action was not reviewable by the district court.

The court rejected the appellants' arguments that a specific mandate could be found in the definition of a professional employee contained in section 2(12) of the Act or in the legislative history of the health care amendments. The court found that section 2(12) did not mandate that anyone be regarded as an employee, but rather classified certain employees as professionals once they are found to be employees. Similarly, the

[1] 104 LRRM 2940, 89 LC ¶ 12, 117

[2] 358 U S 184 (1958)

court held that while Congress amended the Act to include private nonprofit hospitals within the definition of employer, it left it to the Board to determine who was a health care employee.

In *Newport News Shipbldg. & Dry Dock Co.* v. *N.L.R.B.*, the Fourth Circuit [3] reversed the district court's decision [4] ordering the Board to reinstate and further investigate a decertification petition. The regional director had dismissed the employee petition, filed 4 months after court enforcement of a bargaining order against the company, as untimely. The company's suit in district court contended that the regional director had arbitrarily failed to consider preenforcement bargaining between the company and the union.[5] Noting that the regional director's dismissal letter had stated the results of the investigation and the rationale of his decision, the circuit court held that the district court lacked subject matter jurisdiction to review the scope of a representation investigation or the merits of the decision.

In *Kentucky Society of Industrial Trades* v. *N.L.R.B.*, the union sought review of a bargaining unit determination. The union claimed that the Board's holding that the single-plant unit sought by the union was not coextensive with the existing contractual unit and therefore not appropriate was arbitrary, in violation of the NLRA and the first amendment to the Constitution. The Sixth Circuit [6] affirmed the district court's judgment in favor of the Board holding that the Board's unit determinations are discretionary under section 9(b) of the Act; that the Board did not contravene a specific statutory mandate; and that the union did not raise any substantial constitutional question.

In *N.L.R.B.* v. *Dutch Boy*, the Tenth Circuit [7] upheld the district court's enforcement of a Board subpena and dismissal for lack of jurisdiction of the company's counterclaim for enforcement of a subpena revoked by the administrative law judge. The company argued that its counterclaim for enforcement of its subpena for Board documents, which had been quashed by the Board, should have been enforced by the district court as a prerequisite to enforcement of the Board's subpena of its documents. The court reasoned that the counterclaim must be treated as a compulsory counterclaim because it lacked the necessary independent jurisdictional basis required of permissive counterclaims. It failed as a compulsory counterclaim because arguments addressing the due process of Board proceedings are reviewable in subsequent enforcement proceedings.

In *Fla. Bd. of Business Regulation* v. *N.L.R.B.*, the Fifth Circuit [8] reversed the district court's decision dismissing as moot a suit by the

[3] 631 F 2d 263
[4] 104 LRRM 2330 (D C Va.)
[5] United Steelworkers of America, AFL–CIO
[6] 610 F 2d 454
[7] 600 F 2d 929
[8] 605 F 2d 916.

State of Florida to enjoin the Board from taking jurisdiction over the state-regulated jai alai industry.[9] The court held that the State's suit was not moot even though the union had lost the election, because the Board's assertion of jurisdiction applied generally to the entire state jai alai industry and the suit thus presented issues that were "capable of decision, yet evading review."

On remand, the district court [10] held that the Board did not act arbitrarily in asserting jurisdiction over the jai alai industry while declining to do so in the horseracing and dogracing industries, because the State's interests would not be substantially prejudiced by the Board's failure to extend jurisdiction to horseracing and dogracing as well. The court also found that the Board's action did not violate the State's tenth amendment rights since it imposed no direct obligation on the State itself, but merely on the jai alai fronton operators.

In two cases, district courts held that they lacked jurisdiction to review the Board's application of its "blocking charge rule." In both cases employers sued to compel the Board to hold representation elections which the regional director had postponed because of the filing of unfair labor practice charges. In *Gould* v. *Robert S. Fuchs*,[11] the court found that the regional director acted well within his discretion in postponing a scheduled election until he had time to investigate the late-filed charges. The court held that section 9(c)(1) of the Act does not mandate the manner in which the Board must conduct an election. Rather the determination of whether a question concerning representation exists, whether an election must therefore be conducted and the timing of such an election are matters committed to the Board's wide discretion. In *Smitty's Super Market* v. *N.L.R.B.*,[12] a union picketed for more than 30 days causing the employer to file a petition for a representation election. The union also filed unfair labor practice charges against the employer. The court found that there was no allegation that the Board had exceeded its statutory authority; that the timing of representation elections in cases where recognitional picketing has occurred is a matter within the Board's discretion; and that the question whether certain picketing is recognitional or merely informational is also a matter within the discretion of the Board.

In three cases it was held that district courts did not have jurisdiction to review the appropriateness of Board preelection hearings. In *Blue Cross & Blue Shield of Mich.* v. *N.L.R.B.*, the Sixth Circuit [13] reversed the district court's decision ordering the Board to reopen a preelection

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[9] In *Volusia Jai Alai*, 221 NLRB 1280 (1975), the Board had reversed its policy of declining jurisdiction over the jai alai industry

[10] 105 LRRM 2858 (D C Fla)

[11] 104 LRRM 2421 (D C Conn)

[12] 104 LRRM 3183, 90 LC ¶ 12, 451 (D C Mo)

[13] 609 F 2d 240 (1979)

hearing which it found constitutionally inadequate on due process grounds. The Sixth Circuit found that while the statute itself provides for "an appropriate hearing," it does not spell out any particular requirements for either the preelection or the postelection hearing. Thus there was "no Board action in excess of its delegated powers or 'contrary to a specific prohibition of the Act' " justifying an exception to the principle of non-reviewability. Finally, the Sixth Circuit found that neither the Act nor its legislative history, nor any Supreme Court decision, commands or authorizes the delay inherent in district court review of interlocutory Board orders. Rather the company must exhaust its administrative and legal remedies.

In *U.S. Metal Co. Employees' Assn. & U.S. Metal Co.* v. *U.S.*[14] the district court similarly found that section 9 (c) (1) of the Act requiring the Board to conduct "an appropriate hearing" was not sufficiently clear and mandatory to vest the district court with jurisdiction. And in *Intl. Assn. of Machinists & Aerospace Workers, AFL–CIO* v. *Hendrix*,[15] the district court held that allegations as to errors in the exclusion of evidence regarding the place of the election do not rise to the level of a clear violation of statutory powers. Instead questions concerning the administration of appropriate election procedures and the admission or exclusion of evidence are vested in the Board's wide discretion.

B. Litigation Involving the General Counsel's Decisions Regarding Unfair Labor Practice Complaints

In *George Banta Co., Banta Div.* v. *N.L.R.B.*, the Fourth Circuit [16] found that it lacked jurisdiction to review, under section 10(f) of the Act, the General Counsel's decision to withdraw a complaint and dismiss a charge, when the General Counsel's decision is based on prosecutorial discretion. The court found the company's argument that *Leeds & Northrup Co.* v. *N.L.R.B.*,[17] required review of postcomplaint dispositions by the General Counsel unpersuasive. The court found that *Leeds & Northrup Co.* was addressed to settlement agreements accepted by the General Counsel to adjust "conflicting interests," whereas the General Counsel's disposition in this case "was based essentially upon the independent conclusion that the available evidence was insufficient to prove the charge."

In *Associated Builders & Contractors, Balto. Metropolitan Chapter* v. *Irving*, the Fourth Circuit [18] affirmed the district court's holding that it

[14] Unpublished decision (Docket 79–1519, D C Pa)
[15] Unpublished decision (Docket 80–1071, D C Kan)
[16] 626 F 2d 354
[17] 357 F 2d 527 (3d Cir 1966)
[18] 610 F 2d 1221, cert denied 104 LRRM 2367

lacked subject matter jurisdiction to review the General Counsel's refusal to issue a complaint. While the General Counsel's decision not to prosecute turned upon a purely legal interpretation of the statute, his interpretation was not "so far outside the prescriptions of law as to amount to an action taken in excess of delegated power." The court analogized the office of the General Counsel to that of "an attorney general" and concluded that he is clearly vested with authority to interpret statutes in the course of his "ordinary day to day duties."

In *Rockford Redi-Mix Co.* v. *Glenn Zipp*,[19] the district court found that the General Counsel's decision not to issue complaint is discretionary, so that a mandamus action to compel issuance of complaint is unsupportable. The court similarly found that it lacked subject matter jurisdiction to review the General Counsel's decision not to issue complaint. On appeal the Seventh Circuit [20] affirmed the district court.

C. Litigation Involving the Freedom of Information Act

In *Madeira Nursing Center* v. *N.L.R.B.*,[21] and *Howard Johnson Co.* v. *N.L.R.B.*,[22] the Sixth Circuit, following decisions of the Third Circuit [23] and the Fifth Circuit,[24] found that Exemption 6 of the FOIA protects authorization cards from disclosure.

In *Red Food Stores* v. *N.L.R.B.*, the Fifth Circuit [25] applying a previous ruling,[26] held that Exemption 7(A) applied to affidavits obtained by the Board during its investigation of a representation case. The court found that Exemption 7(A) as interpreted by the Supreme Court in *N.L.R.B.* v. *Robbins Tire & Rubber Co.*,[27] protected documents from pre-trial disclosure to any person without regard to the requester's status in the representation proceeding. Accordingly, the fact that the requester was not a party in the representation case did not affect the documents' exemption under the FOIA.

In *Anderson Greenwood & Co.* v. *N.L.R.B.*, the Fifth Circuit [28] again held that Exemption 7 (A) of the Freedom of Information Act applied to affidavits contained in representation case files. The court expressed its views poetically:

> Our decision of Robbins Tire,
> Interpreting Congresses' reported desires,

[19] 103 LRRM 2363 (D C Ill)
[20] 632 F 2d 30
[21] 615 F 2d 728
[22] 618 F 2d 1
[23] *Committee on Masonic Homes* v *N L R B* , 556 F 2d 214 (1977)
[24] *Pacific Molasses Co* v *N L R B* , 577 F 2d 1172 (1978)
[25] 604 F 2d 324
[26] *Clements Wire & Mfg Co* v *N L R B* , 589 F 2d 894 (1979)
[27] 437 U S 214 (1978)
[28] 604 F 2d 322

Exposed workers to their bosses' ire.
The High Court, avoiding this sticky quagmire,
And fearing employers would threaten to fire,
Sent our holding to the funeral prye.

Then along came Clements Wire,
Soon after its venerable sire.
To elections, Wire extended Tire,
Leaving app'llees arguments higher and drier.

Now to colors our focus must shift
To Green Wood and stores that are Red
We hope this attempt at a rhyme, perhaps two,
Has not left this audience feeling too blue.

In *Werner-Continental* v. *Emil C. Farkas*, the district court [29] held that the plaintiff was not entitled under the Freedom of Information Act to an award of attorneys fees because the Board's denial of the FOIA request was not arbitrary in light of its policy of protecting affiants; the plaintiff's request was based on its private interest in the information; and the plaintiff's request did not promote a public benefit contemplated by Congress.

In *Louis Alirez* v. *N.L.R.B.*,[30] the district court, relying on *Margo Poss* v. *N.L.R.B.*,[31] rejected the Board's arguments that Exemption 7(A), (C), and (D) protected affidavits in a closed unfair labor practice case, except that the court permitted excision of "the name, address, and phone number of each witness on all documents and the names of persons other than plaintiff . . . wherever they appear in the context of a statement."

In *Westinghouse Electric Corp.* v. *N.L.R.B.*,[32] the district court denied plaintiff's request for attorneys fees after weighing four factors: "(1) the benefit to the public, (2) the commercial benefit to the plaintiff, (3) the nature of the plaintiff's interest and (4) whether the government's withholding had a reasonable basis in law." After finding that the first three factors weighed against awarding attorneys fees to the plaintiff, the court concluded that "without characterizing [the refusal to furnish the information] . . . of itself, as reasonable or unreasonable, it is sufficient to hold that the refusal to disclose was not so unreasonable to warrant overriding the previously discussed considerations."

In *Trustees of Boston University* v. *N.L.R.B.*,[33] the district court addressed the issue of the applicability of Exemption 7(C) and (D) of the

[29] 478 F Supp 815 (D C Ohio)
[30] 103 LRRM 2841 (D C Colo)
[31] 565 F 2d 654 (10th Cir 1977)
[32] 105 LRRM 2754 (D C Penn)
[33] 105 LRRM 2159 (D C Mass)

Freedom of Information Act to deletions made by the General Counsel prior to disclosure. The affidavits were part of a closed case file and the court found that they were not covered by Exemption 7(A). In determining the extent of protection afforded for privacy interest under Exemption 7(C), the court ordered *in camera* inspections to consider:

> (a) whether any of the individuals mentioned are currently employees of the University, (b) the potential for retaliation by the University against such individuals, (c) the extent to which the identities of the unnamed individuals may be inferred from other information in the affidavits, and (d) whether the University already possesses all or a portion of the undisclosed information.

The court also concluded that the balancing to be applied against whatever privacy interest exists should take into account "the nature and extent of the interest of the University and the public in seeking this information, their need, and their intended use." The court also found that *in camera* inspection was necessary to decide the applicability of Exemption 7(D). Finally the court concluded that no award of attorneys fees was warranted.

D. Litigation Involving the Bankruptcy Act and the Bankruptcy Code

On October 1, 1979, the Bankruptcy Code of 1978 became effective, prospectively repealing the former Bankruptcy Act. The new Bankruptcy Code includes a provision expressly excepting governmental regulatory proceedings from the scope of bankruptcy stays that automatically enjoin other nonregulatory proceedings. 11 U.S.C. Section 362 (b)(4). The old Bankruptcy Act contained no such express exception, and the rules promulgated under the old Bankruptcy Act broadly stayed "the commencement or the continuation of any . . . proceedings against the debtor . . . ." [34] B.R. 11–44(a). During FY 1979, the Ninth and Seventh Circuits decided the "virtually moot" issue of whether the facially broad language contained in Bankruptcy Rule 11–44 applied to proceedings initiated under the National Labor Relations Act. In *In Re Bel Air Chateau Hospital*, the Ninth Circuit [35] was unsure whether the bankruptcy court had enjoined the Board under the automatic stay provision, or whether the bankruptcy court had issued the injunction as a matter of discretion. The court did not resolve the uncertainty because it held the bankruptcy court erred in staying the Board proceedings on either ground. In holding that the bankruptcy court abused its discretion in

[34] *In the Matter of Shippers Interstate*, 618 F 2d 9, 10 (7th Cir 1980)
[35] 611 F 2d 1248 (1979)

enjoining the Board proceeding independent of the automatic stay, the court announced that bankruptcy courts cannot issue discretionary injunctions against the Board unless the "regulatory proceedings threaten the assets of the estate . . . ." The Seventh Circuit's decision, *In the Matter of Shippers Interstate*,[36] reached the same result with respect to the applicability of the automatic stay, and *in dicta* adopted the Ninth Circuit's limitation of the bankruptcy court's power to grant discretionary injunctions to situations when the assets of the estate are threatened.

In another bankruptcy case decided during the last fiscal year, the Second Circuit held that a chapter 11 debtor must obtain formal court approval to reject its labor agreements, and that in absence of such rejection, the debtor's abrogation of its contractual severance pay provisions during the chapter 11 proceeding gives rise to costs of administration priority debts.[37]

In the Matter of Connecticut Celery Co.,[38] presented the question of whether the bankruptcy court should allow rejection of a collective-bargaining agreement, upon formal request by the debtor. The debtor argued that the contract should be rejected because otherwise the company would be in an unfavorable competitive position. The court found that argument to be irrelevant because, in order to justify rejection, the debtor must demonstrate that, if the contract were enforced, it would cause the collapse of the debtor. The court denied the motion to reject the contract for the additional reason that the debtor did not meet its burden of demonstrating that the equities tip decidedly in favor of rejection of the contract. This holding was premised upon the court's finding that if rejection were allowed employees might be forced to choose between their jobs and their union membership.

In *In re Trans-Coal Barge Co.*, the district court [39] affirmed the bankruptcy court's holding [40] that the National Labor Relations Board's late-filed proof of claim was not barred because the trustee did not duly notify the Board of the last day of the filing period. In strictly applying B.R. 122 (8), the court indicated that the need for procedural regularity, which was lacking, made it irrelevant that the Board had actual knowledge of the bar date.

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[36] 618 F 2d 9 (1980)

[37] *In re W T Grant*, 620 F 2d 319

[38] Unpublished decision (Docket H79-146) (D C Conn)

[39] Unpublished decision (Docket C80-0468-WAI) (D C Calif)

[40] Unpublished decision (Bankruptcy No 3-78-0199, Adversary Proceeding No 1979-135)

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 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 committeed 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 committeed 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 committeed 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 1980 [1]

	Total	Identification of filing party					
		AFL-CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
Pending October 1, 1979	20,324	8,186	2,325	760	707	6,388	1,958
Received fiscal 1980	57,381	18,733	6,535	1,830	1,586	22,692	6,005
On docket fiscal 1980	77,705	26,919	8,860	2,590	2,293	29,080	7,963
Closed fiscal 1980	55,587	18,057	6,288	1,678	1,561	21,930	6,073
Pending September 30, 1980	22,118	8,862	2,572	912	732	7,150	1,890
	Unfair labor practice cases [2]						
Pending October 1, 1979	16,657	6,422	1,531	560	488	5,924	1,732
Received fiscal 1980	44,063	12,842	3,558	1,173	891	20,551	5,048
On docket fiscal 1980	60,720	19,264	5,089	1,733	1,379	26,475	6,780
Closed fiscal 1980	42,047	12,128	3,233	1,009	837	19,758	5,082
Pending September 30, 1980	18,673	7,136	1,856	724	542	6,717	1,698
	Representation cases [3]						
Pending October 1, 1979	3,464	1,710	787	196	216	363	192
Received fiscal 1980	12,400	5,591	2,925	630	644	1,816	794
On docket fiscal 1980	15,864	7,301	3,712	826	860	2,179	986
Closed fiscal 1980	12,618	5,627	3,009	647	680	1,828	827
Pending September 30, 1980	3,246	1,674	703	179	180	351	159
	Union-shop deauthorization cases						
Pending October 1, 1979	98					98	
Received fiscal 1980	301					301	
On docket fiscal 1980	399					399	
Closed fiscal 1980	323					323	
Pending September 30, 1980	76					76	
	Amendment of certification cases						
Pending October 1, 1979	15	13	1	0	1	0	0
Received fiscal 1980	72	39	10	5	9	4	5
On docket fiscal 1980	87	52	11	5	10	4	5
Closed fiscal 1980	78	46	11	4	9	3	5
Pending September 30, 1980	9	6	0	1	1	1	0
	Unit clarification cases						
Pending October 1, 1979	90	41	6	4	2	3	34
Received fiscal 1980	545	261	42	22	42	20	158
On docket fiscal 1980	635	302	48	26	44	23	192
Closed fiscal 1980	521	256	35	18	35	18	159
Pending September 30, 1980	114	46	13	8	9	5	33

[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 1980 [1]

	Total	Identification of filing party					
		AFL-CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
	CA cases						
Pending October 1, 1979	13,213	6,388	1,523	553	419	4,293	37
Received fiscal 1980	31,281	12,746	3,534	1,162	799	12,976	64
On docket fiscal 1980	44,494	19,134	5,057	1,715	1,218	17,269	101
Closed fiscal 1980	29,411	12,043	3,211	995	739	12,362	61
Pending September 30, 1980	15,083	7,091	1,846	720	479	4,907	40
	CB cases						
Pending October 1, 1979	2,342	30	7	6	13	1,596	690
Received fiscal 1980	8,976	66	17	6	37	7,219	1,631
On docket fiscal 1980	11,318	96	24	12	50	8,815	2,321
Closed fiscal 1980	8,916	62	14	9	31	7,096	1,704
Pending September 30, 1980	2,402	34	10	3	19	1,719	617
	CC cases						
Pending October 1, 1979	730	1	1	1	29	29	669
Received fiscal 1980	2,468	7	3	5	47	205	2,201
On docket fiscal 1980	3,198	8	4	6	76	234	2,870
Closed fiscal 1980	2,445	7	4	5	57	175	2,197
Pending September 30, 1980	753	1	0	1	19	59	673
	CD cases						
Pending October 1, 1979	107	1	0	0	0	2	104
Received fiscal 1980	519	18	2	0	0	74	425
On docket fiscal 1980	626	19	2	0	0	76	529
Closed fiscal 1980	477	10	2	0	0	59	406
Pending September 30, 1980	149	9	0	0	0	17	123
	CE cases						
Pending October 1, 1979	123	1	0	0	26	3	93
Received fiscal 1980	154	2	2	0	5	8	137
On docket fiscal 1980	277	3	2	0	31	11	230
Closed fiscal 1980	168	3	2	0	7	5	151
Pending September 30, 1980	109	0	0	0	24	6	79
	CG cases						
Pending October 1, 1979	33	1	0	0	0	0	32
Received fiscal 1980	65	0	0	0	1	2	62
On docket fiscal 1980	98	1	0	0	1	2	94
Closed fiscal 1980	70	1	0	0	0	2	67
Pending September 30, 1980	28	0	0	0	1	0	27
	CP cases						
Pending October 1, 1979	109	0	0	0	1	1	107
Received fiscal 1980	600	3	0	0	2	67	528
On docket fiscal 1980	709	3	0	0	3	68	635
Closed fiscal 1980	560	2	0	0	3	59	496
Pending September 30, 1980	149	1	0	0	0	9	139

[1] See Glossary for definitions of terms

Table 1B.—Representation Cases Received, Closed, and Pending, Fiscal Year 1980 [1]

	Total	Identification of filing party					
		AFL-CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
		RC cases					
Pending October 1, 1979	2,920	1,707	787	196	214	16	
Received fiscal 1980	9,828	5,577	2,923	629	635	64	
On docket fiscal 1980	12,748	7,284	3,710	825	849	80	
Closed fiscal 1980	10,000	5,612	3,007	647	671	63	
Pending September 30, 1980	2,748	1,672	703	178	178	17	
		RM cases					
Pending October 1, 1979	192						192
Received fiscal 1980	794						794
On docket fiscal 1980	986						986
Closed fiscal 1980	827						827
Pending September 30, 1980	159						159
		RD cases					
Pending October 1, 1979	352	3	0	0	2	347	
Received fiscal 1980	1,778	14	2	1	9	1,752	
On docket fiscal 1980	2,130	17	2	1	11	2,099	
Closed fiscal 1980	1,791	15	2	0	9	1,765	
Pending September 30, 1980	339	2	0	1	2	334	

[1] See Glossary for definitions of terms

Table 2.—Types of Unfair Labor Practices Alleged, Fiscal Year 1980

	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	31,281	100 0
8(a)(1)	5,552	17 7
8(a)(1)(2)	340	1 1
8(a)(1)(3)	14,091	45 1
8(a)(1)(4)	281	0 9
8(a)(1)(5)	6,619	21 2
8(a)(1)(2)(3)	290	0 9
8(a)(1)(2)(4)	7	0 0
8(a)(1)(2)(5)	138	0 4
8(a)(1)(3)(4)	828	2 6
8(a)(1)(3)(5)	2,786	8 9
8(a)(1)(4)(5)	22	0 1
8(a)(1)(2)(3)(4)	26	0 1
8(a)(1)(2)(3)(5)	144	0 5
8(a)(1)(2)(4)(5)	7	0 0
8(a)(1)(3)(4)(5)	123	0 4
8(a)(1)(2)(3)(4)(5)	27	0 1
Recapitulation [1]		
8(a)(1) [2]	31,281	100 0
8(a)(2)	979	3 1
8(a)(3)	18,315	58 5
8(a)(4)	1,321	4 2
8(a)(5)	9,866	31 5
B Charges filed against unions under sec 8(b)		
Subsections of sec 8(b) Total cases	12,563	100 0
8(b)(1)	6,380	50 8
8(b)(2)	200	1 6
8(b)(3)	513	4 1
8(b)(4)	2,987	23 8
8(b)(5)	15	0 1
8(b)(6)	23	0 2
8(b)(7)	600	4 8
8(b)(1)(2)	1,405	11 2
8(b)(1)(3)	324	2 6
8(b)(1)(5)	17	0 1
8(b)(1)(6)	7	0 1
8(b)(2)(3)	14	0 1
8(b)(2)(6)	2	0 0
8(b)(3)(5)	1	0 0
8(b)(3)(6)	2	0 0
8(b)(1)(2)(3)	53	0 4
8(b)(1)(2)(5)	10	0 1
8(b)(1)(2)(6)	3	0 0
8(b)(1)(3)(5)	1	0 0
8(b)(1)(3)(6)	2	0 0
8(b)(1)(5)(6)	1	0 0
8(b)(1)(2)(3)(5)	1	0 0
8(b)(1)(2)(3)(6)	2	0 0

	Number of cases showing specific allegations	Percent of total cases
Recapitulation [1]		
8(b)(1)	8,206	65 3
8(b)(2)	1,690	13 5
8(b)(3)	913	7 3
8(b)(4)	2,987	23 8
8(b)(5)	46	0 4
8(b)(6)	42	0 3
8(b)(7)	600	4 8
B1 Analysis of 8(b)(4)		
Total cases 8(b)(4)	2,987	100 0
8(b)(4)(A)	217	7 3
8(b)(4)(B)	2,049	68 6
8(b)(4)(C)	19	0 6
8(b)(4)(D)	519	17 4
8(b)(4)(A)(B)	171	5 7
8(b)(4)(A)(C)	2	0 1
8(b)(4)(B)(C)	9	0 3
8(b)(4)(A)(B)(C)	1	0 0
Recapitulation [1]		
8(b)(4)(A)	391	13 1
8(b)(4)(B)	2,230	74 7
8(b)(4)(C)	31	1 0
8(b)(4)(D)	519	17 4
B2 Analysis of 8(b)(7)		
Total cases 8(b)(7)	600	100 0
8(b)(7)(A)	149	24 8
8(b)(7)(B)	31	5 2
8(b)(7)(C)	409	68 2
8(b)(7)(A)(B)	2	0 3
8(b)(7)(A)(C)	5	0 8
8(b)(7)(B)(C)	1	0 2
8(b)(7)(A)(B)(C)	3	0 5
Recapitulation [1]		
8(b)(7)(A)	159	26 5
8(b)(7)(B)	37	6 2
8(b)(7)(C)	418	69 7
C Charges filed under sec 8(e)		
Total cases 8(e)	154	100 0
Against unions alone	147	95 5
Against employers alone	1	0 6
Against unions and employers	6	3 9
D Charges filed under sec 8(g)		
Total cases 8(g)	65	100 0

[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 3A.—Formal Actions Taken in Unfair Labor Practice Cases, Fiscal Year 1980 [1]

Types of formal actions taken	Cases in which formal actions taken	Formal actions taken by type of case											
		Total formal actions taken	CA	CB	CC	CD		CE	CG	CP	CA combined with CB	C combined with representation cases	Other C combinations
						Jurisdictional disputes	Unfair labor practices						
10(k) notices of hearings issued	88	71			#1/	71							
Complaints issued	7,925	6,230	5,164	491	218		10	16	15	46	125	89	56
Backpay specifications issued	7	6	4	1	0		0	0	0	0	1	0	0
Hearings completed, total	1,841	1,327	1,059	106	17	39	4	2	4	11	42	35	8
Initial ULP hearings	1,812	1,300	1,037	105	17	39	4	2	4	11	42	35	4
Backpay hearings	7	5	5	0	0		0	0	0	0	0	0	0
Other hearings	22	22	17	1	0		0	0	0	0	0	0	4
Decisions by administrative law judges, total	1,910	1,273	1,020	106	23		3	4	1	14	34	65	3
Initial ULP decisions	1,872	1,237	993	100	23		3	4	1	14	34	65	0
Backpay decisions	13	12	11	1	0		0	0	0	0	0	0	0
Supplemental decisions	25	24	16	5	0		0	0	0	0	0	0	3
Decisions and orders by the Board, total	2,300	1,780	1,409	146	95	42	5	6	2	17	12	22	24
Upon consent of parties													
Initial decisions	281	211	82	55	64		0	2	0	2	2	2	2
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	458	384	316	39	9		1	1	0	5	2	4	7
Backpay decisions	6	4	4	0	0		0	0	0	0	0	0	0
Contested													
Initial ULP decisions	1,493	1,126	960	48	21	42	4	3	2	10	6	16	14
Decisions based on stipulated record	18	14	9	1	1		0	0	0	0	2	0	1
Supplemental ULP decisions	4	3	3	0	0		0	0	0	0	0	0	0
Backpay decisions	40	38	35	3	0		0	0	0	0	0	0	0

[1] See Glossary for definitions of terms

Table 3B.—Formal Actions Taken in Representation and Union Deauthorization Cases, Fiscal Year 1980 [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	2,479	2,291	1,994	82	215	10
Initial hearings	2,183	1,995	1,726	74	195	8
Hearings on objections and/or challenges	296	296	268	8	20	2
Decisions issued, total	2,126	1,874	1,625	65	184	9
By regional directors	1,971	1,729	1,497	60	172	7
Elections directed	1,711	1,513	1,317	42	154	5
Dismissals on record	260	216	180	18	18	2
By Board	155	145	128	5	12	2
Transferred by regional directors for initial decision	57	53	43	3	7	2
Elections directed	42	38	31	3	4	1
Dismissals on record	15	15	12	0	3	1
Review of regional directors' decisions						
Requests for review received	798	693	629	20	44	3
Withdrawn before request ruled upon	5	4	4	0	0	0
Board action on request ruled upon, total	687	603	554	17	32	3
Granted	101	96	91	2	3	1
Denied	585	507	463	15	29	2
Remanded	1	0	0	0	0	0
Withdrawn after request granted, before Board review	0	0	0	0	0	0
Board decision after review, total	98	92	85	2	5	0
Regional directors' decisions						
Affirmed	53	51	46	2	3	0
Modified	26	23	21	0	2	0
Reversed	19	18	18	0	0	0
Outcome						
Election directed	79	76	71	0	5	0
Dismissals on record	19	16	14	2	0	0

[1] See Glossary for definitions of terms

Table 3B.—Formal Actions Taken in Representation and Union Deauthorization Cases, Fiscal Year 1980 [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	1,710	1,662	1,490	43	129	13
By regional directors	535	520	474	14	32	7
By Board	1,175	1,142	1,016	29	97	6
In stipulated elections	1,103	1,073	964	22	87	5
No exceptions to regional directors' reports	641	617	544	13	60	4
Exceptions to regional directors' reports	462	456	420	9	27	1
In directed elections (after transfer by regional director)	71	68	51	7	10	1
Review of regional directors' supplemental decisions						
Request for review received	70	68	61	1	6	0
Withdrawn before request ruled upon	0	0	0	0	0	0
Board action on request ruled upon, total	48	47	41	1	5	0
Granted	5	5	4	0	1	0
Denied	41	40	36	0	4	0
Remanded	2	2	1	1	0	0
Withdrawn after request granted, before Board review	0	0	0	0	0	0
Board decision after review, total	1	1	1	0	0	0
Regional directors' decisions						
Affirmed	1	1	1	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 1980 [1]

Types of formal actions taken	Cases in which formal actions taken	Formal actions taken by type of case	
		AC	UC
Hearings completed	115	8	85
Decisions issued after hearing	129	10	96
By regional directors	127	9	95
By Board	2	1	1
Transferred by regional directors for initial decision	2	1	1
Review of regional directors' decisions Requests for review received	12	1	7
Withdrawn before request ruled upon	0	0	0
Board action on requests ruled upon, total	12	1	7
Granted	2	1	1
Denied	9	0	5
Remanded	1	0	1
Withdrawn after request granted, before Board review	0	0	0
Board decision after review, total	0	0	0
Regional directors' decisions			
Affirmed	0	0	0
Modified	0	0	0
Reversed	0	0	0

[1] See Glossary for definitions of terms

Table 4.—Remedial Actions Taken in Unfair Labor Practice Cases Closed, Fiscal Year 1980 [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] 13,039												
Notice posted	4,894	3,753	2,725	83	20	563	362	1,141	890	61	0	154	36
Recognition or other assistance withdrawn	39	39	23	0	1	7	8						
Employer-dominated union disestablished	10	10	4	0	0	3	3						
Employees offered reinstatement	2,851	2,851	2,041	60	21	422	307						
Employees placed on preferential hiring list	998	998	710	25	9	145	109						
Hiring hall rights restored	189							189	108	13	0	55	13
Objections to employment withdrawn	204							204	117	13	0	60	14
Picketing ended	753							753	725	11	0	12	5
Work stoppage ended	198							198	189	6	0	2	1
Collective bargaining begun	2,227	2,024	1,696	25	5	166	132	203	196	1	1	3	2
Backpay distributed	3,984	3,676	2,981	50	22	369	254	308	199	15	0	77	17
Reimbursement of fees, dues, and fines	1,498	1,231	921	26	14	158	112	267	171	15	0	67	14
Other conditions of employment improved	3,292	2,295	2,277	0	3	11	4	997	984	2	0	11	0
Other remedies	18	16	16	0	0	0	0	2	2	0	0	0	0

B By number of employees affected													
Employees offered reinstatement, total	10,033	10,033	8,570	38	10	433	982						
Accepted	8,952	8,952	7,941	14	1	260	736						
Declined	1,081	1,081	629	24	9	173	246						
Employees placed on preferential hiring list	3,915	3,915	3,601	26	14	20	254						
Hiring hall rights restored	560							560	25	14	0	520	1
Objections to employment withdrawn	98							98	66	15	0	14	3
Employees receiving backpay													
From either employer or union	15,566	15,357	11,551	216	33	893	2,664	209	83	1	0	96	29
From both employer and union	76	76	65	0	0	10	1	76	65	0	0	10	1
Employees reimbursed for fees, dues, and fines													
From either employer or union	1,681	754	594	20	10	10	120	927	340	10	0	567	10
From both employer and union	122	122	100	0	0	22	0	122	100	0	0	22	0
C By amounts of monetary recovery, total	$32,424,132	$31,834,059	$10,619,010	$217,612	$147,938	$4,425,595	$16,423,904	$590,073	$151,790	$2,926	0	$344,405	$90,952
Backpay (includes all monetary payments except fees, dues, and fines)	32,135,914	31,639,996	10,435,149	215,624	147,838	4,424,241	16,417,144	495,918	103,340	2,376	0	299,305	90,897
Reimbursement of fees, dues, and fines	288,218	194,063	183,861	1,988	100	1,354	6,760	94,155	48,450	550	0	45,100	55

[1] See Glossary for definitions of terms Data in this table are based on unfair labor practice cases that were closed during fiscal year 1980 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 1980 [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	2,646	2,017	1,520	439	42	6	3	0	7	578	452	36	90	17	6	28
Tobacco manufacturers	54	44	33	10	1	0	0	0	0	10	9	0	1	0	0	0
Textile mill products	481	378	312	57	5	1	0	0	3	96	77	8	11	5	0	2
Apparel and other finished products made from fabric and similar materials	744	581	427	128	10	4	1	0	11	157	116	8	33	4	0	2
Lumber and wood products (except furniture)	801	564	455	77	18	5	2	0	7	229	175	12	42	3	0	5
Furniture and fixtures	764	615	516	83	9	4	0	0	3	144	110	12	22	4	0	1
Paper and allied products	789	614	450	145	16	2	1	0	0	155	136	2	17	3	2	15
Printing, publishing, and allied products	1,305	935	750	166	7	8	2	0	2	339	269	14	56	5	0	26
Chemicals and allied products	1,240	976	760	165	38	8	0	0	5	240	193	6	41	8	2	14
Petroleum refining and related industries	746	632	485	65	72	4	1	0	5	108	82	6	20	2	3	1
Rubber and miscellaneous plastic products	945	723	611	98	8	5	0	0	1	209	163	10	36	9	1	3
Leather and leather products	231	189	155	32	1	0	0	0	1	38	35	0	3	1	0	3
Stone, clay, glass, and concrete products	1,155	931	619	223	54	16	4	0	15	206	161	17	28	8	4	6
Primary metal industries	1,718	1,434	997	373	41	16	2	0	5	262	216	8	38	7	6	9
Fabricated metal products (except machinery and transportation equipment)	2,349	1,807	1,317	439	35	12	1	0	3	504	397	26	81	17	5	16
Machinery (except electrical)	2,211	1,731	1,290	357	68	9	0	0	7	447	361	19	67	12	3	18
Electrical and electronic machinery, equipment, and supplies	1,575	1,257	940	266	27	12	6	0	6	297	254	3	40	5	2	14
Aircraft and parts	355	308	197	110	0	1	0	0	0	44	34	1	9	0	0	3
Ship and boat building and repairing	371	298	213	79	5	0	0	0	1	42	29	2	11	1	0	30
Automotive and other transportation equipment	1,534	1,264	865	388	7	3	0	0	1	253	211	5	37	6	5	6
Measuring, analyzing, and controlling instruments, photographic, medical, and optical goods, watches and clocks	429	317	259	52	2	1	0	0	3	108	95	3	10	1	2	1
Miscellaneous manufacturing industries	1,968	1,631	1,034	525	48	10	3	0	11	323	272	12	39	5	2	7
Manufacturing	24,411	19,246	14,205	4,277	514	127	26	0	97	4,789	3,847	210	732	123	43	210
Metal mining	118	96	72	17	3	3	0	0	1	22	19	1	2	0	0	0
Coal mining	449	400	305	70	11	6	3	0	5	46	42	2	2	0	0	3
Oil and gas extraction	79	65	56	6	2	1	0	0	0	12	9	3	0	1	1	0
Mining and quarrying of nonmetallic minerals (except fuels)	121	77	49	19	5	3	1	0	0	41	26	7	8	1	0	2

Mining	767	638	482	112	21	13	4	0	6	121	96	13	12	2	1	5
Construction	5,545	4,979	1,938	1,009	1,354	284	83	0	311	546	342	154	50	6	0	14
Wholesale trade	2,414	1,528	1,172	288	40	9	2	0	17	805	621	56	128	22	3	56
Retail trade	5,353	3,714	3,034	522	75	13	5	0	65	1,547	1,114	149	284	56	1	35
Finance, insurance, and real estate	880	600	421	101	59	10	3	0	6	262	224	19	19	5	1	12
U S Postal Service	1,367	1,349	1,068	276	3	1	0	0	1	16	16	0	0	1	0	1
Local and suburban transit and interurban highway passenger transportation	729	552	456	92	4	0	0	0	0	170	138	5	27	7	0	0
Motor freight transportation and warehousing	3,882	3,015	2,180	676	105	12	10	0	32	837	667	60	110	12	2	16
Water transportation	377	322	138	143	30	1	4	0	6	50	41	4	5	0	0	5
Other transportation	334	236	177	35	16	3	3	0	2	95	87	1	7	2	0	1
Communication	1,252	881	653	195	21	8	3	0	1	339	282	4	53	7	3	22
Electric, gas, and sanitary services	929	700	547	128	22	3	0	0	0	197	163	5	29	3	0	29
Transportation, communication, and other utilities	7,503	5,706	4,151	1,269	198	27	20	0	41	1,688	1,378	79	231	31	5	73
Hotels, rooming houses, camps, and other lodging places	1,165	918	671	186	42	5	1	0	13	240	197	10	33	5	0	2
Personal services	269	168	131	33	3	0	0	0	1	98	71	7	20	1	0	2
Automotive repair, services, and garages	534	305	241	56	6	1	0	0	1	223	174	13	36	4	0	2
Motion pictures	298	251	145	92	7	3	2	0	2	44	39	1	4	0	0	3
Amusement and recreation services (except motion pictures)	374	259	158	64	17	11	2	0	7	108	82	11	15	5	0	2
Health services	3,259	2,130	1,766	262	25	2	2	65	8	1,023	865	41	117	20	6	80
Educational services	442	278	236	29	4	4	0	0	5	143	130	2	11	3	4	14
Membership organizations	305	257	171	68	18	0	0	0	0	33	21	2	10	1	3	11
Business services	1,801	1,289	958	261	45	5	4	0	16	483	411	15	57	12	2	15
Miscellaneous repair services	171	120	93	21	3	0	0	0	3	48	34	1	13	2	0	1
Legal services	91	61	53	7	1	0	0	0	0	26	26	0	0	0	0	4
Museums, art galleries, and botanical and zoological gardens	2	1	1	0	0	0	0	0	0	1	1	0	0	0	0	0
Social services	293	168	122	27	19	0	0	0	0	124	113	6	5	0	0	1
Miscellaneous services	83	58	37	9	9	3	0	0	0	24	19	4	1	1	0	0
Services	9,087	6,263	4,783	1,115	199	34	11	65	56	2,618	2,183	113	322	54	15	137
Public administration	54	40	27	7	5	1	0	0	0	8	7	1	0	1	3	2
Total, all industrial groups	57,381	44,063	31,281	8,976	2,468	519	154	65	600	12,400	9,828	794	1,778	301	72	545

[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 1980 [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	195	130	92	28	9	1	0	0	0	51	46	0	5	1	0	13
New Hampshire	121	82	56	20	4	1	0	0	1	37	27	3	7	0	0	2
Vermont.	106	76	60	7	3	3	0	0	3	29	27	1	1	0	0	1
Massachusetts	1,541	1,162	863	212	48	28	4	2	5	348	293	20	35	6	1	24
Rhode Island	260	199	151	35	6	4	2	0	1	52	43	2	7	0	6	3
Connecticut	727	565	390	139	29	4	1	2	0	143	127	2	14	5	1	13
New England	2,950	2,214	1,612	441	99	41	7	4	10	660	563	28	69	12	8	56
New York	5,225	3,851	2,402	1,125	169	41	18	22	74	1,295	1,124	63	108	29	2	48
New Jersey	1,950	1,381	1,016	259	56	23	5	2	20	534	461	20	53	21	2	12
Pennsylvania	3,248	2,507	1,701	496	197	57	10	3	43	697	593	24	80	12	3	29
Middle Atlantic	10,423	7,739	5,119	1,880	422	121	33	27	137	2,526	2,178	107	241	62	7	89
Ohio	3,392	2,688	2,001	538	113	19	2	0	15	664	543	21	100	18	3	19
Indiana.	2,516	2,171	1,592	517	37	15	1	0	9	324	250	16	58	10	2	9
Illinois	3,713	3,029	2,019	703	190	47	20	0	50	618	486	44	88	43	4	19
Michigan	2,760	2,142	1,604	380	106	40	2	3	7	571	462	28	81	20	4	23
Wisconsin	1,237	924	703	178	28	3	1	2	9	296	233	8	55	3	2	12
East North Central	13,618	10,954	7,919	2,316	474	124	26	5	90	2,473	1,974	117	382	94	15	82
Iowa	371	243	191	21	21	6	0	0	4	123	100	2	21	0	1	4
Minnesota	801	505	338	65	64	14	6	0	18	281	216	21	44	5	3	7
Missouri	2,361	1,975	1,374	477	71	13	5	0	35	361	289	17	55	13	0	12
North Dakota	69	40	36	1	2	0	0	0	1	29	19	2	8	0	0	0
South Dakota	50	20	14	3	2	0	0	0	1	30	24	3	3	0	0	0
Nebraska	242	173	122	40	8	1	0	0	2	68	52	5	11	0	0	1
Kansas.	357	276	211	42	14	6	0	0	3	77	59	7	11	0	0	4
West North Central	4,251	3,232	2,286	649	182	40	11	0	64	969	759	57	153	18	4	28
Delaware	142	120	84	14	16	6	0	0	0	19	18	0	1	2	0	1
Maryland	874	712	475	207	16	7	1	1	5	157	134	6	17	1	0	4
District of Columbia	307	230	156	58	10	5	1	0	0	67	55	5	7	1	0	9
Virginia	726	565	472	84	4	3	0	1	1	159	144	3	12	0	0	2
West Virginia	595	500	372	80	22	12	0	0	14	88	72	4	12	1	0	6
North Carolina	774	647	594	51	1	0	0	0	1	125	108	3	14	0	1	1

South Carolina	278	234	204	30	0	0	0	0	0	42	39	0	3	0	0	2
Georgia	1,206	974	772	174	19	7	0	0	2	226	185	13	28	0	3	3
Florida	1,091	833	641	155	27	7	1	1	1	249	215	5	29	0	2	7
South Atlantic	5,993	4,815	3,770	853	115	47	3	3	24	1,132	970	39	123	5	6	35
Kentucky	931	714	572	94	39	7	0	0	2	197	163	11	23	7	1	12
Tennessee	1,050	821	645	130	37	6	0	0	3	216	175	11	30	0	4	9
Alabama	627	480	375	73	13	3	0	0	16	140	117	7	16	0	0	7
Mississippi	271	216	168	45	2	0	0	0	1	54	48	3	3	0	0	1
East South Central	2,879	2,231	1,760	342	91	16	0	0	22	607	503	32	72	7	5	29
Arkansas	275	216	189	25	1	1	0	0	0	59	41	6	12	0	0	0
Louisiana	538	418	296	93	18	8	2	0	1	115	82	9	24	1	1	3
Oklahoma	396	293	248	30	9	0	4	0	2	96	70	4	22	3	1	3
Texas	1,612	1,298	1,011	217	59	10	1	0	0	292	228	13	51	0	8	14
West South Central	2,821	2,225	1,744	365	87	19	7	0	3	562	421	32	109	4	10	20
Montana	281	193	119	39	24	6	0	0	5	83	56	6	21	2	0	3
Idaho	197	125	101	17	4	1	0	0	2	71	60	5	6	0	0	1
Wyoming	102	83	64	15	2	1	0	0	1	19	12	1	6	0	0	0
Colorado	807	631	483	118	19	6	3	0	2	164	129	10	25	6	0	6
New Mexico	293	214	149	50	4	6	1	0	4	73	60	6	7	0	1	5
Arizona	766	609	446	98	46	5	3	1	10	151	134	6	11	0	1	5
Utah	201	128	100	27	1	0	0	0	0	70	58	5	7	0	0	3
Nevada	521	415	235	114	50	1	0	0	15	105	88	7	10	0	0	1
Mountain	3,168	2,398	1,697	478	150	26	7	1	39	736	597	46	93	8	2	24
Washington	1,509	1,020	707	194	80	23	1	0	15	451	275	36	140	15	1	22
Oregon	558	310	194	68	28	4	2	1	13	223	136	29	58	13	2	10
California	8,214	6,286	4,017	1,279	684	56	57	23	170	1,732	1,174	247	311	51	10	135
Alaska	276	216	136	49	20	1	0	0	10	57	29	17	11	2	1	0
Hawaii	291	198	139	26	30	1	0	0	2	83	74	3	6	3	0	7
Guam	9	8	6	2	0	0	0	0	0	1	1	0	0	0	0	0
Pacific	10,857	8,038	5,199	1,618	842	85	60	24	210	2,547	1,689	332	526	84	14	174
Puerto Rico	368	188	157	30	0	0	0	1	0	164	154	3	7	7	1	8
Virgin Islands	53	29	18	4	6	0	0	0	1	24	20	1	3	0	0	0
Outlying areas	421	217	175	34	6	0	0	1	1	188	174	4	10	7	1	8
Total, all States and areas	57,381	44,063	31,281	8,976	2,468	519	154	65	600	12,400	9,828	794	1,778	301	72	545

[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 [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	727	565	390	139	29	4	1	2	0	143	127	2	14	5	1	13
Maine	195	130	92	28	9	1	0	0	0	51	46	0	5	1	0	13
Massachusetts	1,541	1,162	863	212	48	28	4	2	5	348	293	20	35	6	1	24
New Hampshire	121	82	56	20	4	1	0	0	1	37	27	3	7	0	0	2
Rhode Island	260	199	151	35	6	4	2	0	1	52	43	2	7	0	6	3
Vermont	106	76	60	7	3	3	0	0	3	29	27	1	1	0	0	1
Region I	2,950	2,214	1,612	441	99	41	7	4	10	660	563	28	69	12	8	56
Delaware	142	120	84	14	16	6	0	0	0	19	18	0	1	2	0	1
New Jersey	1,950	1,381	1,016	259	56	23	5	2	20	534	461	20	53	21	2	12
New York	5,225	3,851	2,402	1,125	169	41	18	22	74	1,295	1,124	63	108	29	2	48
Puerto Rico	368	188	157	30	0	0	0	1	0	164	154	3	7	7	1	8
Virgin Islands	53	29	18	4	6	0	0	0	1	24	20	1	3	0	0	0
Region II	7,738	5,569	3,677	1,432	247	70	23	25	95	2,036	1,777	87	172	59	5	69
District of Columbia	307	230	156	58	10	5	1	0	0	67	55	5	7	1	0	9
Maryland	874	712	475	207	16	7	1	1	5	157	134	6	17	1	0	4
Pennsylvania	3,248	2,507	1,701	496	197	57	10	3	43	697	593	24	80	12	3	29
Virginia	726	565	472	84	4	3	0	1	1	159	144	3	12	0	0	2
West Virginia	595	500	372	80	22	12	0	0	14	88	72	4	12	1	0	6
Region III	5,750	4,514	3,176	925	249	84	12	5	63	1,168	998	42	128	15	3	50
Alabama	627	480	375	73	13	3	0	0	16	140	117	7	16	0	0	7
Florida	1,091	833	641	155	27	7	1	1	1	249	215	5	29	0	2	7
Georgia	1,206	974	772	174	19	7	0	0	2	226	185	13	28	0	3	3
Kentucky	931	714	572	94	39	7	0	0	2	197	163	11	23	7	1	12
Mississippi	271	216	168	45	2	0	0	0	1	54	48	3	3	0	0	1
North Carolina	774	647	594	51	1	0	0	0	1	125	108	3	14	0	1	1
South Carolina	278	234	204	30	0	0	0	0	0	42	39	0	3	0	0	2
Tennessee	1,050	821	645	130	37	6	0	0	3	216	175	11	30	0	4	9
Region IV	6,228	4,919	3,971	752	138	30	1	1	26	1,249	1,050	53	146	7	11	42

Illinois	3,713	3,029	2,019	703	190	47	20	0	50	618	486	44	88	43	4	19
Indiana	2,516	2,171	1,592	517	37	15	1	0	9	324	250	16	58	10	2	9
Michigan	2,760	2,142	1,604	380	106	40	2	3	7	571	462	28	81	20	4	23
Minnesota	801	505	338	65	64	14	6	0	18	281	216	21	44	5	3	7
Ohio	3,392	2,688	2,001	538	113	19	2	0	15	664	543	21	100	18	3	19
Wisconsin	1,237	924	703	178	28	3	1	2	9	296	233	8	55	3	2	12
Region V	14,419	11,459	8,257	2,381	538	138	32	5	108	2,754	2,190	138	426	99	18	89
Arkansas	275	216	189	25	1	1	0	0	0	59	41	6	12	0	0	0
Louisiana	538	418	296	93	18	8	2	0	1	115	82	9	24	1	1	3
New Mexico	293	214	149	50	4	6	1	0	4	73	60	6	7	0	1	5
Oklahoma	396	293	248	30	9	0	4	0	2	96	70	4	22	3	1	3
Texas	1,612	1,298	1,011	217	59	10	1	0	0	292	228	13	51	0	8	14
Region VI	3,114	2,439	1,893	415	91	25	8	0	7	635	481	38	116	4	11	25
Iowa	371	243	191	21	21	6	0	0	4	123	100	2	21	0	1	4
Kansas	357	276	211	42	14	6	0	0	3	77	59	7	11	0	0	4
Missouri	2,361	1,975	1,374	477	71	13	5	0	35	361	289	17	55	13	0	12
Nebraska	242	173	122	40	8	1	0	0	2	68	52	5	11	0	0	1
Region VII	3,331	2,667	1,898	580	114	26	5	0	44	629	500	31	98	13	1	21
Colorado	807	631	483	118	19	6	3	0	2	164	129	10	25	6	0	6
Montana	281	193	119	39	24	6	0	0	5	83	56	6	21	2	0	3
North Dakota	69	40	36	1	2	0	0	0	1	29	19	2	8	0	0	0
South Dakota	50	20	14	3	2	0	0	0	1	30	24	3	3	0	0	0
Utah	201	128	100	27	1	0	0	0	0	70	58	5	7	0	0	3
Wyoming	102	83	64	15	2	1	0	0	1	19	12	1	6	0	0	0
Region VIII	1,510	1,095	816	203	50	13	3	0	10	395	298	27	70	8	0	12
Arizona	766	609	446	98	46	5	3	1	10	151	134	6	11	0	1	5
California	8,214	6,286	4,017	1,279	684	56	57	23	170	1,732	1,174	247	311	51	10	135
Hawaii	291	198	139	26	30	1	0	0	2	83	74	3	6	3	0	7
Guam	9	8	6	2	0	0	0	0	0	1	1	0	0	0	0	0
Nevada	521	415	235	114	50	1	0	0	15	105	88	7	10	0	0	1
Region IX	9,801	7,516	4,843	1,519	810	63	60	24	197	2,072	1,471	263	338	54	11	148
Alaska	276	216	136	49	20	1	0	0	10	57	29	17	11	2	1	0
Idaho	197	125	101	17	4	1	0	0	2	71	60	5	6	0	0	1
Oregon	558	310	194	68	28	4	2	1	13	223	136	29	58	13	2	10
Washington	1,509	1,020	707	194	80	23	1	0	15	451	275	36	140	15	1	22
Region X	2,540	1,671	1,138	328	132	29	3	1	40	802	500	87	215	30	4	33
Total, all States and areas	57,381	44,063	31,281	8,976	2,468	519	154	65	600	12,400	9,828	794	1,778	301	72	545

[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 1980 [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	42,047	100 0	0 0	29,411	100 0	8,916	100 0	2,445	100 0	477	100 0	168	100 0	70	100 0	560	100 0
Agreement of the parties	11,531	27 5	100 0	8,678	29 5	1,477	16 6	1,146	46 9	6	1 2	28	16 7	33	47 2	163	29 1
Informal settlement	11,357	27 0	98 5	8,588	29 1	1,444	16 2	1,100	45 0	6	1 2	28	16 7	33	47 2	158	28 2
Before issuance of complaint	7,424	17 7	64 4	5,289	18 0	1,093	12 3	878	35 9	(2)		21	12 5	22	31 4	121	21 6
After issuance of complaint, before opening of hearing	3,848	9 2	33 4	3,230	10 9	345	3 9	213	8 7	6	1 2	7	4 2	11	15 8	36	6 4
After hearing opened, before issuance of administrative law judge's decision	85	0 2	0 7	69	0 2	6	0 0	9	0 4	0		0		0		1	0 2
Formal settlement	174	0 5	1 5	90	0 3	33	0 4	46	1 8	0		0		0		5	0 9
After issuance of complaint, before opening of hearing	118	0 3	1 0	56	0 1	26	0 2	34	1 4	0		0		0		2	0 4
Stipulated decision	60	0 2	0 5	36	0 1	7	0 0	16	0 7	0		0		0		1	0 2
Consent decree	58	0 1	0 5	20	0 0	19	0 2	18	0 7	0		0		0		1	0 2
After hearing opened	56	0 2	0 5	34	0 1	7	0 0	12	0 4	0		0		0		3	0 5
Stipulated decision	17	0 1	0 2	11	0 0	1	0 0	5	0 2	0		0		0		0	
Consent decree	39	0 1	0 3	23	0 0	6	0 0	7	0 2	0		0		0		3	0 5
Compliance with	1,318	3 1	100 0	1,105	3 7	152	1 7	37	1 5	6	1 2	6	3 5	2	2 8	10	1 7
Administrative law judge's decision	33	0 1	2 5	32	0 1	1	0 0	0		0		0		0		0	
Board decision	819	1 9	62 1	648	2 2	129	1 4	24	1 0	4	0 9	6	3 5	2	2 8	6	1 0

Adopting administrative law judge's decision (no exceptions filed)	91	0 2	6.9	63	0 2	23	0 2	3	0 1	1	0 2	1	0 6	0		0	
Contested	728	1 7	55 2	585	1 9	106	1 1	21	0 8	3	0 7	5	2 9	2	2 8	6	1 0
Circuit court of appeals decree	461	1 1	35 0	420	1 4	22	0 2	13	0 5	2	0 4	0		0		4	0 7
Supreme Court action	5	0 0	0 4	5	0 0	0		0		0		0		0		0	
Withdrawal	13,424	31 9	100.0	9,328	31 7	2,965	33 2	814	33 3	0		65	38 7	17	24 3	235	42 0
Before issuance of complaint	12,967	30 9	96.6	8,948	30 4	2,908	32 7	800	32 7	(2)	.	62	36.9	15	21 5	234	41 8
After issuance of complaint, before opening of hearing	430	1 0	3.2	362	1 2	49	0 5	14	0 6	0		3	1 8	1	1 4	1	0 2
After hearing opened, before administrative law judge's decision	10	0 0	0 1	7	0 0	3	0 0	0		0		0		0		0	
After administrative law judge's decision, before Board decision	5	0 0	0.0	4	0 0	1	0 0	0		0		0		0		0	
After Board or court decision	12	0 0	0 1	7	0 0	4	0 0	0		0	. .	0		1	1 4	0	
Dismissal	15,301	36 4	100.0	10,292	34 9	4,322	48 5	448	18 3	0	.	69	41 1	18	25 7	152	27 2
Before issuance of complaint	14,687	34 9	96.0	9,786	33 2	4,241	47 6	432	17 7	(2)		67	39 9	11	15 7	150	26 8
After issuance of complaint, before opening of hearing	164	0 4	1.1	126	0 4	22	0 2	8	0 3	0		1	0 6	6	8 6	1	0 2
After hearing opened, before administrative law judge's decision	8	0 0	0.1	6	0 0	1	0 0	0		0		1	0 6	0		0	
By administrative law judge's decision	8	0 0	0 1	7	0 0	1	0 0	0		0		0		0		0	
By Board decision	368	0 9	2.4	302	1 0	56	0 7	8	0 3	0		0		1	1 4	1	0 2
Adopting administrative law judge's decision (no exceptions filed)	128	0 3	0 8	106	0 4	20	0 3	1	0 0	0		0		0		1	0 2
Contested	240	0 6	1 6	196	0 6	36	0 4	7	0 3	0		0		1	1 4	0	
By circuit court of appeals decree	65	0 2	0 4	64	0 2	1	0 0	0		0		0		0		0	
By Supreme Court action	1	0 0	0.0	1	0 0	0		0		0		0		0		0	
10(k) actions (see table 7A for details of dispositions)	465	1 1	0 0	0		0		0		465	97 6	0		0		0	
Otherwise (compliance with order of administrative law judge or Board not achieved—firm went out of business)	8	0 0	0.0	8	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 1980

Method and stage of disposition	Number of cases	Percent of total closed
Total number of cases closed before issuance of complaint	465	100 0
Agreement of the parties—informal settlement	173	37 2
Before 10(k) notice	150	32 3
After 10(k) notice, before opening of 10(k) hearing	23	4 9
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	0	0 0
Compliance with Board decision and determination of dispute	17	3 6
Withdrawal	168	36 2
Before 10(k) notice	148	31 8
After 10(k) notice, before opening of 10(k) hearing	10	2 2
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	0	0 0
After Board decision and determination of dispute.	10	2 2
Dismissal	107	23 0
Before 10(k) notice	93	20 0
After 10(k) notice, before opening of 10(k) hearing	5	1 1
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	0	0 0
By Board decision and determination of dispute.	9	1 9

Table 8.—Disposition by Stage of Unfair Labor Practice Cases Closed, Fiscal Year 1980 [1]

Stage of disposition	All C cases		CA cases		CB cases		CC cases		CD cases		CE cases		CG cases		CP cases	
	Number	Percent of cases closed	Number	Percent of cases closed	Number	Percent of cases closed	Number	Percent of cases closed	Number	Percent of cases closed	Number	Percent of cases closed	Number	Percent of cases closed	Number	Percent of cases closed
Total number of cases closed	42,047	100 0	29,411	100 0	8,916	100 0	2,445	100 0	477	100 0	168	100 0	70	100 0	560	100 0
Before issuance of complaint	35,543	84 5	24,023	81 7	8,242	92 4	2,110	86 3	465	97 5	150	89 3	48	68 6	505	90 2
After issuance of complaint, before opening of hearing	4,560	10 9	3,774	12 8	442	5 0	269	11 0	6	1 3	11	6 5	18	25 7	40	7 1
After hearing opened, before issuance of administrative law judge's decision	159	0 4	116	0 4	17	0 2	21	0 9	0		1	0 6	0		4	0 7
After administrative law judge's decision, before issuance of Board decision	46	0 1	43	0 2	3	0 0	0		0		0		0		0	
After Board order adopting administrative law judge's decision in absence of exceptions	219	0 5	169	0 6	43	0 5	4	0 2	1	0 2	1	0 6	0		1	0 2
After Board decision, before circuit court decree	980	2 3	788	2 7	146	1 6	28	1 1	3	0 6	5	3 0	4	5 7	6	1 1
After circuit court decree, before Supreme Court action	526	1 3	484	1 6	23	0 3	13	0 5	2	0 4	0		0		4	0 7
After Supreme Court action	6	0 0	6	0 0	0		0		0		0		0		0	

[1] See Glossary for definitions of terms

Table 9.—Disposition by Stage of Representation and Union Deauthorization Cases Closed, Fiscal Year 1980 [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	12,618	100 0	10,000	100 0	827	100 0	1,791	100 0	323	100 0
Before issuance of notice of hearing	3,624	28 6	2,292	22 8	468	56 7	864	48 1	215	66 6
After issuance of notice, before close of hearing	6,773	53 6	5,788	57 8	263	31 8	722	40 3	16	5 0
After hearing closed, before issuance of decision	79	7	70	7	3	3	6	4	3	9
After issuance of regional director's decision	2,078	16 4	1,795	18 1	89	10 8	194	10 8	88	27 2
After issuance of Board decision	64	7	55	6	4	4	5	4	1	3

[1] See Glossary for definitions of terms

Table 10.—Analysis of Methods of Disposition of Representation and Union Deauthorization Cases Closed, Fiscal Year 1980 [1]

Method and stage of disposition	All R cases		RC cases		RM cases		RD cases		UD cases	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total, all	12,618	100 0	10,000	100 0	827	100 0	1,791	100 0	323	100 0
Certification issued, total	8,223	65 1	6,979	69 8	335	40 5	909	50 8	152	47 1
After										
Consent election	371	2 9	298	3 0	16	1 9	57	3 2	16	5 0
Before notice of hearing	170	1 3	130	1 3	9	1 1	31	1 7	15	4 7
After notice of hearing, before hearing closed	201	1 6	168	1 7	7	8	26	1 5	1	3
After hearing closed, before decision	0	0	0	0	0	0	0	0	0	0
Stipulated election	6,232	49 4	5,294	52 9	230	27 8	708	39 5	50	15 5
Before notice of hearing	1,544	12 2	1,194	11 9	91	11 0	259	14 4	43	13 3
After notice of hearing, before hearing closed	4,669	37 0	4,082	40 8	139	16 8	448	25 0	7	2 2
After hearing closed, before decision	19	2	18	2	0	0	1	1	0	0
Expedited election	38	3	9	1	29	3 5	0	0	0	0
Regional director directed election	1,544	12 2	1,345	13 5	58	7 1	141	7 9	85	26 3
Board directed election	38	3	33	3	2	2	3	2	1	3
By withdrawal, total	3,278	26 0	2,441	24 4	300	36 3	537	30 0	133	41 2
Before notice of hearing	1,328	10 5	775	7 7	205	24 8	348	19 4	123	38 1
After notice of hearing, before hearing closed	1,671	13 2	1,419	14 2	87	10 6	165	9 2	6	1 9
After hearing closed, before decision	41	3	36	3	1	1	4	2	3	9
After regional director's decision and direction of election	231	1 8	205	2 1	7	8	19	1 1	1	3
After board decision and direction of election	7	2	6	1	0	1	1	1	0	0
By dismissal, total	1,117	8 9	580	5 8	192	23 2	345	19 2	38	11 7
Before notice of hearing	544	4 3	184	1 8	134	16 3	226	12 6	34	10 5
After notice of hearing, before hearing closed	232	1 8	119	1 1	30	3 6	83	4 6	2	6
After hearing closed, before decision	19	2	16	2	2	2	1	1	0	0
By regional director's decision	303	2 4	245	2 5	24	2 9	34	1 8	2	6
By Board decision	19	2	16	2	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 1980

	AC	UC
Total, all	78	521
Certification amended or unit clarified	26	52
Before hearing	0	0
By regional director's decision	0	0
By Board decision	0	0
After hearing	26	52
By regional director's decision	26	52
By Board decision	0	0
Dismissed	22	140
Before hearing	7	17
By regional director's decision	7	17
By Board decision	0	0
After hearing	15	123
By regional director's decision	14	122
By Board decision	1	1
Withdrawn	30	329
Before hearing	29	325
After hearing	1	4

Table 11.—Types of Elections Resulting in Certification in Cases Closed, Fiscal Year 1980 [1]

Type of case	Total	Type of election				
		Consent	Stipulated	Board-directed	Regional director-directed	Expedited elections under 8(b)(7)(C)
All types, total						
Elections	8,350	410	6,262	58	1,589	31
Eligible voters	536,914	11,350	393,674	7,699	123,440	751
Valid votes	469,062	9,555	345,835	6,584	106,478	610
RC cases						
Elections	7,021	319	5,319	47	1,328	8
Eligible voters	471,651	9,016	346,254	6,899	109,284	198
Valid votes	415,048	7,617	306,409	5,937	94,927	158
RM cases						
Elections	275	13	194	3	42	23
Eligible voters	7,170	137	5,253	291	936	553
Valid votes	6,187	118	4,563	264	790	452
RD cases						
Elections	902	64	699	2	137	0
Eligible voters	42,781	1,346	34,988	176	6,271	0
Valid votes	36,879	1,161	30,448	139	5,131	0
UD cases						
Elections	152	14	50	6	82	
Eligible voters	15,312	851	7,179	333	6,949	
Valid votes	10,948	659	4,415	244	5,630	

[1] See Glossary for definitions of terms

Table 11A.—Analysis of Elections Conducted in Representation Cases Closed, Fiscal Year 1980

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	8,531	125	208	8,198	7,332	117	194	7,021	280	2	3	275	919	6	11	902
Rerun required			174				161				3				10	
Runoff required			34				33				0				1	
Consent elections	412	4	12	396	335	4	12	319	13	0	0	13	64	0	0	64
Rerun required			9				9				0				0	
Runoff required			3				3				0				0	
Stipulated elections	6,445	99	134	6,212	5,536	92	125	5,319	196	2	0	194	713	5	9	699
Rerun required			111				103				0				8	
Runoff required			23				22				0				1	
Regional director-directed	1,583	22	54	1,507	1,401	21	52	1,328	43	0	1	42	139	1	1	137
Rerun required			47				45				1				1	
Runoff required			7				7				0				0	
Board-directed	58	0	6	52	52	0	5	47	3	0	0	3	3	0	1	2
Rerun required			5				4				0				1	
Runoff required			1				1				0				0	
Expedited—sec 8(b)(7)(C)	33	0	2	31	8	0	0	8	25	0	2	23	0	0	0	0
Rerun required			2				0				2				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 1980

	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	8,531	826	9 7	239	2 8	230	2 7	1,056	12 4	469	5 5
By type of case.											
In RC cases	7,332	740	10 1	204	2 8	212	2 9	952	13 0	416	5 7
In RM cases	280	14	5 0	18	6 4	4	1 4	18	6 4	22	7 9
In RD cases	919	72	7 8	17	1 8	14	1 5	86	9 4	31	3 4
By type of election.											
Consent elections	412	18	4 4	1	0.2	6	1 5	24	5 8	7	1 7
Stipulated elections	6,445	583	9 0	156	2 4	160	2 5	743	11 5	316	4 9
Expedited elections	33	5	15 2	0		0		5	15 2	0	
Regional director-directed elections	1,583	213	13 5	82	5 2	60	3 8	273	17 2	142	9 0
Board-directed elections	58	7	12 1	0		4	6 9	11	19 0	4	6 9

[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 1980 [1]

	Total		By employer		By union		By both parties [2]	
	Number	Percent by type	Number	Percent by type	Number	Percent by type	Number	Percent by type
All representation elections	1,281	100 0	531	41 5	718	56.0	32	2 5
By type of case								
RC cases	1,161	100 0	502	43 2	638	55 0	21	1 8
RM cases	20	100 0	1	5 0	16	80.0	3	15 0
RD cases	100	100 0	28	28 0	64	64 0	8	8 0
By type of election·								
Consent elections	29	100 0	7	24 1	19	65 6	3	10 3
Stipulated elections	914	100 0	369	40 4	529	57.9	16	1 7
Expedited elections	5	100 0	2	40 0	3	60 0	0	0 0
Regional director-directed elections	322	100 0	152	47 2	158	49 1	12	3 7
Board-directed elections	11	100 0	1	9 1	9	81 8	1	9 1

[1] See Glossary for definitions of terms
[2] Objections filed by more than one party in the same case are counted as one

Table 11D.—Disposition of Objections in Representation Cases Closed, Fiscal Year 1980 [1]

	Objections filed	Objections withdrawn	Objections Ruled upon	Overruled		Sustained [2]	
				Number	Percent of total ruled upon	Number	Percent of total ruled upon
All representation elections	1,281	225	1,056	848	80 3	208	19 7
By type of case							
RC cases	1,161	209	952	759	79 7	193	20 3
RM cases	20	2	18	16	88 9	2	11 1
RD cases	100	14	86	73	84 9	13	15 1
By type of election							
Consent elections	29	5	24	17	70 8	7	29 2
Stipulated elections	914	171	743	598	80 5	145	19 5
Expedited elections	5	0	5	4	80 0	1	20 0
Regional director-directed elections	322	49	273	225	82 4	48	17 6
Board-directed elections	11	0	11	4	36 4	7	63 6

[1] See Glossary for definitions of terms
[2] See table 11E for rerun elections held after objections were sustained In 20 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 1980 [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	155	100 0	41	26 5	114	73 5	41	26 5
By type of case								
RC cases	144	100 0	35	24 3	109	75 7	36	25 0
RM cases	2	100 0	1	50 0	1	50 0	0	0
RD cases	9	100 0	5	55 6	4	44 4	5	55 6
By type of election								
Consent elections	7	100 0	2	28 6	5	71 4	2	28 6
Stipulated elections	107	100 0	31	29 0	76	71 0	29	27 1
Expedited elections	1	100 0	1	100 0	0		0	
Regional director-directed elections	35	100 0	6	17 1	29	82 9	10	28 6
Board-directed elections	5	100 0	1	20 0	4	80 0	0	

[1] See Glossary for definitions of terms

[2] More than one rerun election was conducted in 33 cases—however, only the final election is included in this table

Table 12.—Results of Union-Shop Deauthorization Polls in Cases Closed, Fiscal Year 1980

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	152	83	54 6	69	45 4	15,312	4,300	28 1	11,012	71 9	10,948	71 5	3,518	23 0
AFL-CIO unions	98	55	56 1	43	43 9	8,479	2,887	34 0	5,592	66 0	6,797	80 2	2,285	26 9
Teamsters	34	22	64 7	12	35 3	2,853	766	26 8	2,087	73 2	2,300	80 6	706	24 7
Other national unions	9	1	11 1	8	88 9	3,014	146	4 8	2,868	95 2	1,073	35 6	110	3 6
Other local unions	11	5	45 5	6	54 5	966	501	51 9	465	48 1	778	80 5	417	43 2

[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 1980 [1]

Participating unions	Total elections [2]	Elections won by unions						Elections in which no representative chosen	Employees eligible to vote						In elections where no representative chosen
		Percent won	Total won	AFL-CIO unions	Teamsters	Other national unions	Other local unions		Total	In elections won	In units won by				
											AFL-CIO unions	Teamsters	Other national unions	Other local unions	
						A All representation elections									
AFL-CIO	4,451	43 9	1,953	1,953				2,498	283,916	95,500	95,500				188,416
Teamsters	2,439	41 0	999		999			1,440	89,609	27,743		27,743			61,866
Other national unions	522	51 9	271			271		251	50,271	15,973			15,973		34,298
Other local unions	333	54 1	180				180	153	25,997	7,755				7,755	18,242
1-union elections	7,745	43 9	3,403	1,953	999	271	180	4,342	449,793	146,971	95,500	27,743	15,973	7,755	302,822
AFL-CIO v AFL-CIO	93	60 2	56	56				37	11,776	5,042	5,042				6,734
AFL-CIO v Teamsters	92	70 7	65	34	31			27	14,171	5,895	2,531	3,364			8,276
AFL-CIO v national	43	79 1	34	18		16		9	5,983	4,790	3,169		1,621		1,193
AFL-CIO v local	121	81 0	98	51			47	23	22,880	19,345	12,081			7,264	3,535
Teamsters v national	13	61 5	8		2	6		5	1,663	528		199	329		1,135
Teamsters v local	30	86 7	26		15		11	4	2,519	2,294		1,928		366	225
Teamsters v Teamsters	4	100 0	4		4			0	58	58		58			0
National v local	16	87 5	14			9	5	2	2,959	2,645			816	1,829	314
National v national	3	66 7	2			2		1	190	30			30		160
Local v local	9	100 0	9				9	0	331	331				331	0
2-union elections	424	74 5	316	159	52	33	72	108	62,530	40,958	22,823	5,549	2,796	9,790	21,572
AFL-CIO v AFL-CIO v AFL-CIO	4	50 0	2	2				2	253	86	86				167
AFL-CIO v AFL-CIO v Teamsters	3	100 0	3	2	1			0	136	136	38	98			0
AFL-CIO v AFL-CIO v national	3	100 0	3	2		1		0	278	278	264		14		0
AFL-CIO v AFL-CIO v local	7	85 7	6	3			3	1	2,187	1,801	1,218			583	386
AFL-CIO v Teamsters v local	3	66 7	2	1	0		1	1	1,175	1,035	995	0		40	140
AFL-CIO v national v national	1	100 0	1	0		1		0	206	206	0		206		0
AFL-CIO v national v local	2	100 0	2	0		1	1	0	1,905	1,905	0		1,600	305	0
AFL-CIO v local v local	1	100 0	1	0			1	0	67	67	0			67	0
Teamsters v Teamsters v local	2	100 0	2		0		2	0	288	288		0		288	0
AFL-CIO v AFL-CIO v local v local	1	100 0	1	0			1	0	217	217	0			217	0
AFL-CIO v AFL-CIO v AFL-CIO v local	1	100 0	1	1			0	0	9	9	9			0	0
AFL-CIO v AFL-CIO v AFL-CIO v national v local	1	100 0	1	0		0	1	0	2,558	2,558	0		0	2,558	0

Table 13.—Final Outcome of Representation Elections in Cases Closed, Fiscal Year 1980 [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		
3 (or more)-union elections	29	86 2	25	11	1	3	10	4	9,279	8,586	2,610	98	1,820	4,058	693
Total representation elections	8,198	45 7	3,744	2,123	1,052	307	262	4,454	521,602	196,515	120,933	33,390	20,589	21,603	325,087
B Elections in RC cases															
AFL-CIO	3,772	47 2	1,782	1,782				1,990	255,891	84,463	84,463				171,428
Teamsters	2,080	45 0	937		937			1,143	80,915	24,625		24,625			56,290
Other national unions	458	53 7	246			246		212	45,829	14,017			14,017		31,812
Other local unions	300	57 0	171				171	129	24,904	7,430				7,430	17,474
1-union elections	6,610	47 4	3,136	1,782	937	246	171	3,474	407,539	130,535	84,463	24,625	14,017	7,430	277,004
AFL-CIO v AFL-CIO	88	61 4	54	54				34	11,606	4,966	4,966				6,640
AFL-CIO v Teamsters	80	66 3	53	27	26			27	13,424	5,148	2,083	3,065			8,276
AFL-CIO v national	42	78 6	33	17		16		9	5,956	4,763	3,142		1,621		1,193
AFL-CIO v local	109	79 8	87	44			43	22	17,562	14,116	7,225			6,891	3,446
Teamsters v national	12	66 7	8		2	6		4	1,659	528		199	329		1,131
Teamsters v local	27	85 2	23		13		10	4	1,776	1,551		1,291		260	225
Teamsters v Teamsters	3	100 0	3		3			0	40	40		40			0
National v local	13	92 3	12			7	5	1	2,685	2,590			761	1,829	95
National v national	3	66 7	2			2		1	190	30			30		160
Local v local	7	100 0	7				7	0	199	199				199	0
2-union elections	384	73 4	282	142	44	31	65	102	55,097	33,931	17,416	4,595	2,741	9,179	21,166

AFL-CIO v AFL-CIO v AFL-CIO	4	50 0	2	2				2	253	86	86				167
AFL-CIO v AFL-CIO v Teamsters	3	100 0	3	2	1			0	136	136	38	98			0
AFL-CIO v AFL-CIO v national	1	100 0	1	0		1		0	14	14	0		14		0
AFL-CIO v AFL-CIO v local	7	85 7	6	3			3	1	2,187	1,801	1,218			583	386
AFL-CIO v Teamsters v local	3	66 7	2	1	0		1	1	1,175	1,035	995	0		40	140
AFL-CIO v national v national	1	100 0	1	0		1		0	206	206	0		206		0
AFL-CIO v national v local	2	100 0	2	0		1	1	0	1,905	1,905	0		1,600	305	0
AFL-CIO v local v local	1	100 0	1	0			1	0	67	67	0			67	0
Teamsters v Teamsters v local	2	100 0	2		0		2	0	288	288		0		288	0
AFL-CIO v AFL-CIO v local v local	1	100 0	1	0			1	0	217	217	0			217	0
AFL-CIO v AFL-CIO v AFL-CIO v local	1	100 0	1	1			0	0	9	9	9			0	0
AFL-CIO v AFL-CIO v AFL-CIO v national v local	1	100 0	1	0		0	1	0	2,558	2,558	0		0	2,558	0
3 (or more)-union elections	27	85 2	23	9	1	3	10	4	9,015	8,322	2,346	98	1,820	4,058	693
Total RC elections	7,021	49 0	3,441	1,933	982	280	246	3,580	471,651	172,788	104,225	29,318	18,578	20,667	298,863

Table 13.—Final Outcome of Representation Elections in Cases Closed, Fiscal Year 1980 [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	164	13 4	22	22				142	4,452	827	827				3,625
Teamsters	77	24 7	19		19			58	1,232	360		360			872
Other national unions	10	30 0	3			3		7	376	61			61		315
Other local unions	12	33 3	4				4	8	236	91				91	145
1-union elections	263	18 3	48	22	19	3	4	215	6,296	1,339	827	360	61	91	4,957
AFL-CIO v AFL-CIO	4	50 0	2	2				2	90	76	76				14
AFL-CIO v Teamsters	3	100 0	3	3	0			0	152	152	152	0			0
AFL-CIO v local	1	100 0	1	0			1	0	219	219	0			219	0
Teamsters v national	1	0 0	0		0	0		1	4	0		0	0		4
Teamsters v local	1	100 0	1		1		0	0	145	145		145		0	0
2-union elections	10	70 0	7	5	1	0	1	3	610	592	228	145	0	219	18
AFL-CIO v AFL-CIO v national	2	100 0	2	2		0		0	264	264	264		0		0
3 (or more union)-elections	2	100 0	2	2	0	0	0	0	264	264	264	0	0	0	0
Total RM elections	275	20 7	57	29	20	3	5	218	7,170	2,195	1,319	505	61	310	4,975

	D Elections in RD cases														
AFL-CIO	515	28 9	149	149				366	23,573	10,210	10,210				13,363
Teamsters	282	15 2	43	.	43	.		239	7,462	2,758		2,758			4,704
Other national unions	54	40 7	22			22		32	4,066	1,895			1,895		2,171
Other local unions	21	23 8	5	.		.	5	16	857	234			.	234	623
1-union elections	872	25 1	219	149	43	22	5	653	35,958	15,097	10,210	2,758	1,895	234	20,861
AFL-CIO v AFL-CIO	1	0 0	0	0				1	80	0	0				80
AFL-CIO v Teamsters	9	100.0	9	4	5			0	595	595	296	299		..	0
AFL-CIO v national	1	100 0	1	1		0		0	27	27	27		0		0
AFL-CIO v local	11	90 9	10	7			3	1	5,099	5,010	4,856			154	89
Teamsters v local	2	100 0	2		1		1	0	598	598	.	492		106	0
Teamsters v Teamsters	1	100 0	1		1			0	18	18		18			0
National v local	3	66 7	2			2	0	1	274	55			55	0	219
Local v local	2	100 0	2				2	0	132	132				132	0
2-union elections	30	90 0	27	12	7	2	6	3	6,823	6,435	5,179	809	55	392	388
Total RD elections	902	27 3	246	161	50	24	11	656	42,781	21,532	15,389	3,567	1,950	626	21,249

[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 1980 [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	250,293	54,578	54,578				28,186	55,258	55,258				112,271
Teamsters	79,363	16,114		16,114			8,108	17,663		17,663			37,478
Other national unions	45,501	9,245			9,245		4,904	11,137			11,137		20,215
Other local unions	21,715	4,380				4,380	1,838	5,387				5,387	10,110
1-union elections	396,872	84,317	54,578	16,114	9,245	4,380	43,036	89,445	55,258	17,663	11,137	5,387	180,074
AFL-CIO v AFL-CIO	10,175	3,293	3,293				830	2,218	2,218				3,834
AFL-CIO v Teamsters	11,799	4,416	2,195	2,221			588	2,273	879	1,394			4,522
AFL-CIO v national	4,942	3,448	2,011		1,437		406	333	79		254		755
AFL-CIO v local	19,682	16,063	8,210			7,853	585	1,038	683			355	1,996
Teamsters v national	1,446	463		170	293		8	305		213	92		670
Teamsters v local	2,110	1,706		1,120		585	210	62		49		13	133
Teamsters v Teamsters	53	50		50			3	0		0			0
National v. local	2,540	2,255			1,112	1,143	55	63			31	32	167
National v. national	158	20			20		1	54			54		83
Local v local	255	220				220	35	0				0	0
2-union elections	53,160	31,933	15,709	3,561	2,862	9,801	2,721	6,346	3,859	1,656	431	400	12,160
AFL-CIO v AFL-CIO v AFL-CIO	192	45	45				0	43	43				104
AFL-CIO v AFL-CIO v Teamsters	131	130	70	60			1	0	0	0			0
AFL-CIO v AFL-CIO v national	257	257	238		19		0	0	0		0		0
AFL-CIO v AFL-CIO v local	1,782	1,199	834			365	222	154	99			55	207
AFL-CIO v Teamsters v local	983	679	514	88		77	166	64	51	13		0	74
AFL-CIO v national v national	149	149	8		141		0	0	0		0		0
AFL-CIO v national v local	1,702	1,135	22		809	304	567	0	0		0	0	0
AFL-CIO v local v local	64	57	17			40	7	0	0			0	0
Teamsters v Teamsters v local	267	265		96		169	2	0		0		0	0
AFL-CIO v AFL-CIO v local v local	191	188	86			102	3	0	0			0	0
AFL-CIO v AFL-CIO v AFL-CIO v local	8	8	8			0	0	0	0			0	0
AFL-CIO v AFL-CIO v AFL-CIO v national v. local	2,356	2,343	356		690	1,297	13	0	0		0	0	0

3 (or more)-union elections	8,082	6,455	2,198	244	1,659	2,354	981	261	193	13	0	55	385
Total representation elections	458,114	122,706	72,485	19,919	13,766	16,535	46,738	96,052	59,310	19,332	11,568	5,842	192,619
B Elections in RC cases													
AFL-CIO	226,675	48,453	48,453				24,712	51,497	51,497				102,013
Teamsters	71,665	14,387		14,387			7,050	16,382		16,382			33,846
Other national unions	41,479	8,124			8,124		4,223	10,412			10,412		18,720
Other local unions	20,787	4,189				4,189	1,744	5,165				5,165	9,689
1-union elections	360,606	75,153	48,453	14,387	8,124	4,189	37,729	83,456	51,497	16,382	10,412	5,165	164,268
AFL-CIO v AFL-CIO	10,023	3,223	3,223				829	2,198	2,198				3,773
AFL-CIO v Teamsters	11,178	3,885	1,928	1,957			498	2,273	879	1,394			4,522
AFL-CIO v national	4,915	3,431	1,994		1,437		396	333	79		254		755
AFL-CIO v local	14,942	11,487	5,558			5,929	507	1,011	658			353	1,937
Teamsters v. national	1,442	463		170	293		8	303		211	92		668
Teamsters v local	1,409	1,153		700		453	61	62		49		13	133
Teamsters v Teamsters	36	33		33			3	0		0			0
National v local	2,337	2,203			1,076	1,127	55	21			21	0	58
National v national	158	20			20		1	54			54		83
Local v local	165	131				131	34	0				0	0
2-union elections	46,605	26,029	12,703	2,860	2,826	7,640	2,392	6,255	3,814	1,654	421	366	11,929
AFL-CIO v. AFL-CIO v AFL-CIO	192	45	45				0	43	43				104
AFL-CIO v. AFL-CIO v Teamsters	131	130	70	60			1	0	0	0			0
AFL-CIO v AFL-CIO v national	12	12	0		12		0	0	0		0		0
AFL-CIO v AFL-CIO v local	1,782	1,199	834			365	222	154	99			55	207
AFL-CIO v Teamsters v local	983	679	514	88		77	166	64	51	13		0	74
AFL-CIO v. national v national	149	149	8		141		0	0	0		0		0
AFL-CIO v national v local	1,702	1,135	22		809	304	567	0	0		0	0	0
AFL-CIO v local v local	64	57	17			40	7	0	0			0	0
Teamsters v Teamsters v local	267	265		96		169	2	0		0		0	0
AFL-CIO v. AFL-CIO v local v local	191	188	86			102	3	0	0			0	0
AFL-CIO v AFL-CIO v AFL-CIO v local	8	8	8			0	0	0	0		0	0	0
AFL-CIO v AFL-CIO v AFL-CIO v national v local	2,356	2,343	356		690	1,297	13	0	0		0	0	0
3 (or more)-union elections	7,837	6,210	1,960	244	1,652	2,354	981	261	193	13	0	55	385
Total RC elections	415,048	107,392	63,116	17,491	12,602	14,183	41,102	89,972	55,504	18,049	10,833	5,586	176,582

Table 14.—Valid Votes Cast in Representation Elections, by Final Results of Election, in Cases Closed, Fiscal Year 1980 [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	3,817	450	450				242	703	703				2,422
Teamsters	1,051	220		220			85	178		178			568
Other national unions	335	35			35		24	77			77		199
Other local unions	188	59				59	9	47				47	73
1-union elections	5,391	764	450	220	35	59	360	1,005	703	178	77	47	3,262
AFL-CIO v AFL-CIO	85	70	70				1	4	4				10
AFL-CIO v Teamsters	121	111	74	37			10	0	0	0			0
AFL-CIO v local	205	199	82			117	6	0	0			0	0
Teamsters v national	4	0		0	0		0	2		2	0		2
Teamsters v local	136	136		92		44	0	0		0		0	0
2-union elections	551	516	226	129	0	161	17	6	4	2	0	0	12
AFL-CIO v AFL-CIO v national	245	245	238		7		0	0	0		0		0
3 (or more)-union elections	245	245	238	0	7	0	0	0	0	0	0	0	0
Total RM elections	6,187	1,525	914	349	42	202	377	1,011	707	180	77	47	3,274

	D Elections in RD cases												
AFL-CIO	19,801	5,675	5,675				3,232	3,058	3,058				7,836
Teamsters	6,647	1,507		1,507			973	1,103		1,103			3,064
Other national unions	3,687	1,086			1,086		657	648			648		1,296
Other local unions	740	132				132	85	175				175	348
1-union elections	30,875	8,400	5,675	1,507	1,086	132	4,947	4,984	3,058	1,103	648	175	12,544
AFL-CIO v. AFL-CIO	67	0	0				0	16	16				51
AFL-CIO v Teamsters	500	420	193	227			80	0	0	0			0
AFL-CIO v national	27	17	17		0		10	0	0		0		0
AFL-CIO v local	4,535	4,377	2,570			1,807	72	27	25			2	59
Teamsters v local	565	416		328		88	149	0		0		0	0
Teamsters v. Teamsters	17	17		17			0	0		0			0
National v. local	203	52			36	16	0	42			10	32	109
Local v. local	90	89				89	1	0				0	0
2-union elections	6,004	5,388	2,780	572	36	2,000	312	85	41	0	10	34	219
Total RD elections	36,879	13,788	8,455	2,079	1,122	2,132	5,259	5,069	3,099	1,103	658	209	12,763

[1] See glossary for definitions of terms.

Table 15A.—Geographic Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1980

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	38	18	13	3	1	1	20	2,624	2,384	956	797	107	11	41	1,428	764
New Hampshire	17	4	4	0	0	0	13	1,154	1,071	448	222	226	0	0	623	101
Vermont	21	9	4	4	1	0	12	1,524	1,361	575	465	57	45	8	786	492
Massachusetts	277	135	70	39	16	10	142	18,635	16,182	7,136	4,192	1,364	1,283	297	9,046	7,593
Rhode Island	35	17	12	5	0	0	18	2,453	2,029	747	549	74	0	124	1,282	551
Connecticut	97	48	32	9	6	1	49	6,850	5,958	2,900	1,919	204	692	85	3,058	2,617
New England	485	231	135	60	24	12	254	33,240	28,985	12,762	8,144	2,032	2,031	555	16,223	12,118
New York	662	351	197	76	37	41	311	38,452	32,362	17,144	11,408	2,469	1,398	1,869	15,218	18,877
New Jersey	318	149	73	40	19	17	169	15,780	13,448	6,677	3,419	1,189	1,045	1,024	6,771	6,796
Pennsylvania	503	223	108	88	12	15	280	34,794	31,260	14,679	7,718	2,692	2,255	2,014	16,581	11,085
Middle Atlantic	1,483	723	378	204	68	73	760	89,026	77,070	38,500	22,545	6,350	4,698	4,907	38,570	36,758
Ohio	464	187	105	48	21	13	277	33,802	29,972	15,716	8,179	2,612	2,413	2,512	14,256	13,264
Indiana	208	84	50	23	9	2	124	13,898	12,486	5,578	3,323	876	1,132	247	6,908	4,995
Illinois	411	187	101	55	19	12	224	30,687	26,951	14,153	7,228	2,224	2,431	2,270	12,798	13,114
Michigan	443	209	103	47	51	8	234	18,690	16,222	7,986	3,886	1,050	2,478	572	8,236	7,757
Wisconsin	205	87	53	24	3	7	118	13,573	12,323	5,140	2,422	1,569	447	702	7,183	4,163
East North Central	1,731	754	412	197	103	42	977	110,650	97,954	48,573	25,038	8,331	8,901	6,303	49,381	43,293
Iowa	79	40	25	11	3	1	39	4,462	3,769	1,610	1,048	297	256	9	2,159	1,223
Minnesota	205	101	55	30	5	11	104	9,176	7,439	3,758	2,481	567	544	166	3,681	4,214
Missouri	242	112	50	46	13	3	130	15,796	14,025	8,002	4,009	1,162	1,348	1,483	6,023	7,668
North Dakota	15	8	4	3	1	0	7	646	533	247	105	123	18	1	286	334
South Dakota	11	4	3	0	1	0	7	827	780	379	67	27	279	6	401	608
Nebraska	38	17	14	3	0	0	21	1,404	1,240	538	470	68	0	0	702	649
Kansas	83	26	16	8	1	1	57	5,346	4,731	1,686	1,410	213	40	23	3,045	638
West North Central	673	308	167	101	24	16	365	37,657	32,517	16,220	9,590	2,457	2,485	1,688	16,297	15,334
Delaware	16	4	1	3	0	0	12	787	730	255	143	112	0	0	475	95
Maryland	139	57	39	13	1	4	82	8,977	7,961	3,330	1,950	1,186	142	52	4,631	2,430
District of Columbia	37	24	18	2	0	4	13	2,533	1,976	1,097	910	64	0	123	879	1,522

Virginia	88	50	34	10	3	3	38	10,695	9,440	4,565	3,104	942	394	125	4,875	4,207
West Virginia	61	38	24	11	3	0	23	2,152	1,895	1,006	825	156	25	0	889	1,435
North Carolina	96	33	22	11	0	0	63	12,140	10,986	4,276	2,696	1,571	0	9	6,710	1,961
South Carolina	27	13	11	2	0	0	14	4,128	3,731	1,918	1,878	40	0	0	1,813	1,933
Georgia	174	81	56	21	3	1	93	17,277	15,710	7,446	5,548	1,486	346	66	8,264	6,386
Florida	166	68	43	21	1	3	98	12,551	10,898	4,338	2,617	925	697	99	6,560	2,175
South Atlantic	804	368	248	94	11	15	436	71,240	63,327	28,231	19,671	6,482	1,604	474	35,096	22,144
Kentucky	129	57	27	17	11	2	72	14,189	13,034	6,793	3,131	752	1,562	1,348	6,241	6,300
Tennessee	157	62	36	20	5	1	95	17,336	15,962	6,385	5,021	754	546	64	9,577	3,545
Alabama	98	47	37	6	3	1	51	6,174	5,560	2,537	2,322	102	50	63	3,023	2,377
Mississippi	49	27	19	5	0	3	22	7,021	6,397	3,342	2,860	166	149	167	3,055	4,191
East South Central	433	193	119	48	19	7	240	44,720	40,953	19,057	13,334	1,774	2,307	1,642	21,896	16,413
Arkansas	45	18	12	4	1	1	27	5,412	5,054	2,181	1,088	693	355	45	2,873	1,132
Louisiana	103	34	18	14	1	1	69	7,342	6,657	2,676	1,830	467	56	323	3,981	1,343
Oklahoma	64	25	10	13	2	0	39	5,361	4,948	1,981	1,400	231	348	2	2,967	944
Texas	201	89	54	28	2	5	112	17,298	14,908	7,601	5,281	1,842	251	227	7,307	7,381
West South Central	413	166	94	59	6	7	247	35,413	31,567	14,439	9,599	3,233	1,010	597	17,128	10,800
Montana	51	30	17	12	0	1	21	872	745	365	236	113	0	16	380	418
Idaho	47	21	16	5	0	0	26	2,190	1,929	645	470	134	0	41	1,284	403
Wyoming	17	6	4	1	1	0	11	1,592	1,378	444	377	10	57	0	934	89
Colorado	120	58	41	12	2	3	62	7,834	6,754	3,197	2,748	256	80	113	3,557	3,452
New Mexico	51	29	23	4	0	2	22	2,343	2,135	1,241	1,034	72	88	47	894	1,215
Arizona	98	60	39	17	1	3	38	4,220	3,715	2,000	1,534	326	87	53	1,715	2,367
Utah	39	17	11	5	1	0	22	1,761	1,573	655	422	132	28	73	918	343
Nevada	43	15	7	6	1	1	28	2,267	1,980	792	681	81	11	19	1,188	283
Mountain	466	236	158	62	6	10	230	23,079	20,209	9,339	7,502	1,124	351	362	10,870	8,570
Washington	312	131	71	45	4	11	181	12,926	11,186	4,813	2,235	809	60	1,709	6,373	3,173
Oregon	126	46	30	14	1	1	80	3,947	3,319	1,522	1,033	236	110	143	1,797	1,090
California	1,078	497	267	158	33	39	581	47,486	40,678	19,864	10,641	5,983	1,409	1,831	20,814	21,367
Alaska	32	10	8	2	0	0	22	1,124	874	369	273	85	0	11	505	170
Hawaii	50	30	16	4	8	2	20	1,996	1,680	728	295	70	346	17	952	700
Guam	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Pacific	1,598	714	392	223	46	53	884	67,479	57,737	27,296	14,477	7,183	1,925	3,711	30,441	26,500
Puerto Rico	104	45	14	4	0	27	59	8,779	7,554	4,193	1,748	285	22	2,138	3,361	4,375
Virgin Islands	8	6	6	0	0	0	2	319	241	147	147	0	0	0	94	210
Outlying Areas	112	51	20	4	0	27	61	9,098	7,795	4,340	1,895	285	22	2,138	3,455	4,585
Total, all States and areas	8,198	3,744	2,123	1,052	307	262	4,454	521,602	458,114	218,757	131,795	39,251	25,334	22,377	239,357	196,515

[1] The States are grouped according to the method used by the Bureau of the Census, U S Department of Commerce

Table 15B.—Geographic Distribution of Collective-Bargaining Elections Held in Cases Closed, Fiscal Year 1980

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	37	17	12	3	1	1	20	2,573	2,334	924	765	107	11	41	1,410	713
New Hampshire	13	4	4	0	0	0	9	1,121	1,041	447	222	225	0	0	594	101
Vermont	21	9	4	4	1	0	12	1,524	1,361	575	465	57	45	8	786	492
Massachusetts	259	127	65	37	15	10	132	17,994	15,608	6,816	3,940	1,312	1,267	297	8,792	7,143
Rhode Island	35	17	12	5	0	0	18	2,453	2,029	747	549	74	0	124	1,282	551
Connecticut	87	44	28	9	6	1	43	6,386	5,537	2,712	1,788	147	692	85	2,825	2,387
New England	452	218	125	58	23	12	234	32,051	27,910	12,221	7,729	1,922	2,015	555	15,689	11,387
New York	616	336	186	74	37	39	280	36,745	30,972	16,265	10,786	2,335	1,391	1,753	14,707	17,723
New Jersey	292	145	71	40	18	16	147	15,087	12,880	6,418	3,364	1,161	1,025	868	6,462	6,562
Pennsylvania	468	216	103	86	12	15	252	33,685	30,347	14,283	7,446	2,613	2,210	2,014	16,064	10,807
Middle Atlantic	1,376	697	360	200	67	70	679	85,517	74,199	36,966	21,596	6,109	4,626	4,635	37,233	35,092
Ohio	420	172	96	45	18	13	248	27,772	24,604	11,160	5,537	2,505	2,195	923	13,444	8,217
Indiana	184	71	40	21	8	2	113	12,208	10,982	4,769	2,688	781	1,053	247	6,213	3,759
Illinois	373	176	95	51	18	12	197	29,032	25,467	13,423	6,839	2,078	2,237	2,269	12,044	12,359
Michigan	392	197	98	45	46	8	195	17,468	15,121	7,559	3,700	980	2,314	565	7,562	7,328
Wisconsin	171	80	46	24	3	7	91	12,261	11,168	4,664	2,056	1,459	447	702	6,504	3,575
East North Central	1,540	696	375	186	93	42	844	98,741	87,342	41,575	20,820	7,803	8,246	4,706	45,767	35,238
Iowa	72	37	24	9	3	1	35	3,111	2,920	1,423	965	202	247	9	1,497	1,044
Minnesota	176	96	51	29	5	11	80	8,351	6,746	3,509	2,291	525	527	166	3,237	3,944
Missouri	211	109	49	45	12	3	102	14,953	13,350	7,744	3,855	1,157	1,264	1,468	5,606	7,441
North Dakota	13	7	3	3	1	0	6	603	503	236	94	123	18	1	267	310
South Dakota	11	4	3	0	1	0	7	827	780	379	67	27	279	6	401	608
Nebraska	30	14	12	2	0	0	16	1,205	1,072	456	401	55	0	0	616	526
Kansas	74	26	16	8	1	1	48	5,074	4,508	1,622	1,351	208	40	23	2,886	638
West North Central	587	293	158	96	23	16	294	34,124	29,879	15,369	9,024	2,297	2,375	1,673	14,510	14,511
Delaware	15	4	1	3	0	0	11	777	720	252	140	112	0	0	468	95
Maryland	124	55	37	13	1	4	69	8,536	7,576	3,155	1,808	1,164	140	43	4,421	2,284
District of Columbia	33	22	17	1	0	4	11	2,107	1,599	932	777	32	0	123	667	1,272

Virginia	84	49	34	10	2	3	35	9,890	8,739	4,227	3,004	942	156	125	4,512	3,739
West Virginia	58	37	23	11	3	0	21	2,120	1,867	993	812	156	25	0	874	1,415
North Carolina	92	32	22	10	0	0	60	11,712	10,604	4,099	2,636	1,454	0	9	6,505	1,729
South Carolina	26	13	11	2	0	0	13	4,116	3,719	1,915	1,875	40	0	0	1,804	1,933
Georgia	161	76	53	19	3	1	85	15,599	14,186	6,626	5,412	846	331	37	7,560	5,096
Florida	150	65	40	21	1	3	85	11,856	10,365	4,076	2,398	882	697	99	6,289	1,786
South Atlantic	743	353	238	90	10	15	390	66,713	59,375	26,275	18,862	5,628	1,349	436	33,100	19,349
Kentucky	113	51	24	16	9	2	62	12,792	11,932	6,402	2,933	704	1,417	1,348	5,530	5,822
Tennessee	143	54	30	19	4	1	89	16,252	14,959	5,845	4,730	598	453	64	9,114	2,904
Alabama	90	44	34	6	3	1	46	5,289	4,805	2,208	2,035	102	40	31	2,597	2,108
Mississippi	46	26	18	5	0	3	20	6,817	6,218	3,251	2,769	166	149	167	2,967	4,021
East South Central	392	175	106	46	16	7	217	41,150	37,914	17,706	12,467	1,570	2,059	1,610	20,208	14,855
Arkansas	38	14	10	4	0	0	24	5,187	4,834	2,060	1,045	680	335	0	2,774	958
Louisiana	89	32	16	14	1	1	57	6,325	5,747	2,235	1,445	464	56	270	3,512	890
Oklahoma	58	24	10	13	1	0	34	5,066	4,693	1,883	1,327	231	325	0	2,810	910
Texas	168	80	47	27	2	4	88	15,189	13,038	6,882	4,747	1,765	164	206	6,156	7,049
West South Central	353	150	83	58	4	5	203	31,767	28,312	13,060	8,564	3,140	880	476	15,252	9,807
Montana	43	26	15	11	0	0	17	710	617	304	204	100	0	0	313	288
Idaho	41	21	16	5	0	0	20	1,844	1,601	540	433	66	0	41	1,061	403
Wyoming	16	6	4	1	1	0	10	1,582	1,369	444	377	10	57	0	925	89
Colorado	107	54	38	12	1	3	53	7,283	6,270	2,960	2,526	249	72	113	3,310	3,176
New Mexico	47	26	20	4	0	2	21	2,191	1,993	1,154	947	72	88	47	839	1,124
Arizona	93	58	38	16	1	3	35	3,990	3,513	1,940	1,497	303	87	53	1,573	2,282
Utah	37	17	11	5	1	0	20	1,664	1,482	644	412	131	28	73	838	343
Nevada	37	15	7	6	1	1	22	2,202	1,921	787	677	80	11	19	1,134	283
Mountain	421	223	149	60	5	9	198	21,466	18,766	8,773	7,073	1,011	343	346	9,993	7,988
Washington	233	111	59	39	3	10	122	11,092	9,611	4,182	1,719	702	56	1,705	5,429	2,431
Oregon	94	41	25	14	1	1	53	3,160	2,656	1,283	842	190	110	141	1,373	934
California	928	452	241	145	31	35	476	41,146	35,177	17,117	9,105	5,267	1,134	1,611	18,060	17,973
Alaska	26	9	7	2	0	0	17	999	781	332	257	75	0	0	449	142
Hawaii	47	29	16	4	7	2	18	1,952	1,639	716	290	70	339	17	923	691
Guam	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Pacific	1,328	642	348	204	42	48	686	58,349	49,864	23,630	12,213	6,304	1,639	3,474	26,234	22,171
Puerto Rico	97	45	14	4	0	27	52	8,642	7,450	4,178	1,746	285	22	2,125	3,272	4,375
Virgin Islands	7	6	6	0	0	0	1	301	224	147	147	0	0	0	77	210
Outlying Areas	104	51	20	4	0	27	53	8,943	7,674	4,325	1,893	285	22	2,125	3,349	4,585
Total, all States and areas	7,296	3,498	1,962	1,002	283	251	3,798	478,821	421,235	199,900	120,241	36,069	23,554	20,036	221,335	174,983

[1] The States are grouped according to the method used by the Bureau of the Census, U S Department of Commerce

Table 15C.—Geographic Distribution of Decertification Elections Held in Cases Closed, Fiscal Year 1980

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	1	1	1	0	0	0	0	51	50	32	32	0	0	0	18	51
New Hampshire	4	0	0	0	0	0	4	33	30	1	0	1	0	0	29	0
Vermont	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Massachusetts	18	8	5	2	1	0	10	641	574	320	252	52	16	0	254	450
Rhode Island	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Connecticut	10	4	4	0	0	0	6	464	421	188	131	57	0	0	233	230
New England	33	13	10	2	1	0	20	1,189	1,075	541	415	110	16	0	534	731
New York	46	15	11	2	0	2	31	1,707	1,390	879	622	134	7	116	511	1,154
New Jersey	26	4	2	0	1	1	22	693	568	259	55	28	20	156	309	234
Pennsylvania	35	7	5	2	0	0	28	1,109	913	396	272	79	45	0	517	278
Middle Atlantic	107	26	18	4	1	3	81	3,509	2,871	1,534	949	241	72	272	1,337	1,666
Ohio	44	15	9	3	3	0	29	6,030	5,368	4,556	2,642	107	218	1,589	812	5,047
Indiana	24	13	10	2	1	0	11	1,690	1,504	809	635	95	79	0	695	1,236
Illinois	38	11	6	4	1	0	27	1,655	1,484	730	389	146	194	1	754	755
Michigan	51	12	5	2	5	0	39	1,222	1,101	427	186	70	164	7	674	429
Wisconsin	34	7	7	0	0	0	27	1,312	1,155	476	366	110	0	0	679	588
East North Central	191	58	37	11	10	0	133	11,909	10,612	6,998	4,218	528	655	1,597	3,614	8,055
Iowa	7	3	1	2	0	0	4	1,351	849	187	83	95	9	0	662	179
Minnesota	29	5	4	1	0	0	24	825	693	249	190	42	17	0	444	270
Missouri	31	3	1	1	1	0	28	843	675	258	154	5	84	15	417	227
North Dakota	2	1	1	0	0	0	1	43	30	11	11	0	0	0	19	24
South Dakota	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Nebraska	8	3	2	1	0	0	5	199	168	82	69	13	0	0	86	123
Kansas	9	0	0	0	0	0	9	272	223	64	59	5	0	0	159	0
West North Central	86	15	9	5	1	0	71	3,533	2,638	851	566	160	110	15	1,787	823
Delaware	1	0	0	0	0	0	1	10	10	3	3	0	0	0	7	0
Maryland	15	2	2	0	0	0	13	441	385	175	142	22	2	9	210	146
District of Columbia	4	2	1	1	0	0	2	426	377	165	133	32	0	0	212	250

Virginia	4	1	0	0	1	0	3	805	701	338	100	0	238	0	363	468
West Virginia	3	1	1	0	0	0	2	32	28	13	13	0	0	0	15	20
North Carolina	4	1	0	1	0	0	3	428	382	177	60	117	0	0	205	232
South Carolina	1	0	0	0	0	0	1	12	12	3	3	0	0	0	9	0
Georgia	13	5	3	2	0	0	8	1,678	1,524	820	136	640	15	29	704	1,290
Florida	16	3	3	0	0	0	13	695	533	262	219	43	0	0	271	389
South Atlantic	61	15	10	4	1	0	46	4,527	3,952	1,956	809	854	255	38	1,996	2,795
Kentucky	16	6	3	1	2	0	10	1,397	1,102	391	198	48	145	0	711	478
Tennessee	14	8	6	1	1	0	6	1,084	1,003	540	291	156	93	0	463	641
Alabama	8	3	3	0	0	0	5	885	755	329	287	0	10	32	426	269
Mississippi	3	1	1	0	0	0	2	204	179	91	91	0	0	0	88	170
East South Central	41	18	13	2	3	0	23	3,570	3,039	1,351	867	204	248	32	1,688	1,558
Arkansas	7	4	2	0	1	1	3	225	220	121	43	13	20	45	99	174
Louisiana	14	2	2	0	0	0	12	1,017	910	441	385	3	0	53	469	453
Oklahoma	6	1	0	0	1	0	5	295	255	98	73	0	23	2	157	34
Texas	33	9	7	1	0	1	24	2,109	1,870	719	534	77	87	21	1,151	332
West South Central	60	16	11	1	2	2	44	3,646	3,255	1,379	1,035	93	130	121	1,876	993
Montana	8	4	2	1	0	1	4	162	128	61	32	13	0	16	67	130
Idaho	6	0	0	0	0	0	6	346	328	105	37	68	0	0	223	0
Wyoming	1	0	0	0	0	0	1	10	9	0	0	0	0	0	9	0
Colorado	13	4	3	0	1	0	9	551	484	237	222	7	8	0	247	276
New Mexico	4	3	3	0	0	0	1	152	142	87	87	0	0	0	55	91
Arizona	5	2	1	1	0	0	3	230	202	60	37	23	0	0	142	85
Utah	2	0	0	0	0	0	2	97	91	11	10	1	0	0	80	0
Nevada	6	0	0	0	0	0	6	65	59	5	4	1	0	0	54	0
Mountain	45	13	9	2	1	1	32	1,613	1,443	566	429	113	8	16	877	582
Washington	79	20	12	6	1	1	59	1,834	1,575	631	516	107	4	4	944	742
Oregon	32	5	5	0	0	0	27	787	663	239	191	46	0	2	424	156
California	150	45	26	13	2	4	105	6,340	5,501	2,747	1,536	716	275	220	2,754	3,394
Alaska	6	1	1	0	0	0	5	125	93	37	16	10	0	11	56	28
Hawaii	3	1	0	0	1	0	2	44	41	12	5	0	7	0	29	9
Guam	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Pacific	270	72	44	19	4	5	198	9,130	7,873	3,666	2,264	879	286	237	4,207	4,329
Puerto Rico	7	0	0	0	0	0	7	137	104	15	2	0	0	13	89	0
Virgin Islands	1	0	0	0	0	0	1	18	17	0	0	0	0	0	17	0
Outlying Areas	8	0	0	0	0	0	8	155	121	15	2	0	0	13	106	0
Total, all States and areas	902	246	161	50	24	11	656	42,781	36,879	18,857	11,554	3,182	1,780	2,341	18,022	21,532

[1] The States are grouped according to the method used by the Bureau of the Census, U S Department of Commerce

Table 16.—Industrial Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1980

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	411	186	89	81	5	11	225	27,823	23,780	12,038	7,042	4,312	56	628	11,742	12,777
Tobacco manufacturers	6	1	1	0	0	0	5	1,822	1,751	568	432	0	0	136	1,183	100
Textile mill products	54	17	14	1	1	1	37	9,812	8,949	3,518	3,221	135	50	112	5,431	1,425
Apparel and other finished products made from fabric and similar materials	102	49	38	5	2	4	53	11,562	10,572	4,793	4,471	122	70	130	5,779	4,252
Lumber and wood products (except furniture)	178	82	55	18	3	6	96	10,874	9,695	4,343	3,362	655	102	224	5,352	3,753
Furniture and fixtures	114	47	35	8	3	1	67	8,802	7,925	3,665	2,777	401	416	71	4,260	2,728
Paper and allied products	95	46	29	10	4	3	49	7,500	6,713	2,944	1,612	1,154	99	79	3,769	2,317
Printing, publishing, and allied products	241	107	92	12	0	3	134	13,165	11,986	5,225	4,436	676	0	113	6,761	3,939
Chemicals and allied products	192	70	35	31	3	1	122	8,182	7,572	3,347	1,992	1,167	154	34	4,225	2,106
Petroleum refining and related industries	70	30	14	15	0	1	40	3,299	2,880	1,137	683	332	0	122	1,743	848
Rubber and miscellaneous plastics products	172	82	51	17	10	4	90	11,852	10,582	4,698	3,163	731	680	124	5,884	4,560
Leather and leather products	36	12	8	1	0	3	24	7,757	7,008	2,777	2,227	269	11	270	4,231	1,214
Stone, clay, glass, and concrete products	149	59	32	18	3	6	90	12,700	11,019	6,197	2,772	480	1,142	1,803	4,822	5,241
Primary metal industries	202	96	52	21	18	5	106	13,436	12,218	5,864	3,242	925	1,256	441	6,354	5,761
Fabricated metal products (except machinery and transportation equipment)	343	141	88	30	20	3	202	22,759	20,379	9,352	5,162	1,733	1,847	610	11,027	7,339
Machinery (except electrical)	326	114	61	22	27	4	212	27,714	25,682	11,354	6,300	1,752	3,148	154	14,328	9,068
Electrical and electronic machinery, equipment, and supplies	227	90	59	15	9	7	137	37,854	34,658	17,244	10,420	3,023	1,549	2,252	17,414	15,985
Aircraft and parts	204	90	27	21	37	5	114	29,588	26,649	12,547	3,452	940	5,322	2,833	14,102	7,441
Ship and boat building and repairing	27	9	5	1	2	1	18	2,394	2,158	826	523	70	213	20	1,332	472
Automotive and other transportation equipment	13	6	2	1	3	0	7	2,622	2,331	1,305	269	14	943	79	1,026	2,075
Measuring, analyzing, and controlling instruments, photographic, medical, and optical goods, watches and clocks	86	32	20	5	4	3	54	6,722	5,887	2,499	1,821	383	253	42	3,388	1,515
Miscellaneous manufacturing industries	234	107	54	34	13	6	127	12,529	11,405	4,855	2,609	832	1,256	158	6,550	3,687
Manufacturing	3,482	1,473	861	367	167	78	2,009	290,768	261,799	121,096	71,988	20,106	18,567	10,435	140,703	98,603
Metal mining	11	2	1	1	0	0	9	1,730	1,590	537	523	14	0	0	1,053	158
Coal mining	40	19	6	0	10	3	21	2,553	2,307	1,314	767	5	402	140	993	1,166
Oil and gas extraction	7	2	2	0	0	0	5	876	801	221	221	0	0	0	580	11

Mining and quarrying of nonmetallic minerals (except fuels)	33	16	7	8	1	0	17	881	771	381	215	121	45	0	390	358
Mining	91	39	16	9	11	3	52	6,040	5,469	2,453	1,726	140	447	140	3,016	1,693
Construction	265	135	94	30	4	7	130	8,547	7,180	3,772	2,819	664	145	144	3,408	4,132
Wholesale trade	522	216	64	141	5	6	306	16,647	14,935	8,068	3,683	2,580	158	1,647	6,867	8,014
Retail trade	936	414	260	105	22	27	522	31,625	27,312	12,401	7,862	3,159	683	697	14,911	11,866
Finance, insurance, and real estate	156	82	66	8	3	5	74	6,002	5,292	2,488	1,871	174	70	373	2,804	1,889
U S Postal Service	6	4	0	3	1	0	2	217	181	112	0	73	31	8	69	178
Local and surburban transit and interurban highway passenger transportation	90	46	28	15	2	1	44	6,250	4,376	2,392	793	1,098	181	320	1,984	3,232
Motor freight transportation and warehousing	553	246	26	196	18	6	307	17,808	15,485	7,339	1,193	5,199	627	320	8,146	7,580
Water transportation	24	6	3	0	2	1	18	956	862	390	290	37	36	27	472	113
Other transportation	62	30	15	14	0	1	32	3,130	2,678	1,240	801	152	0	287	1,438	814
Communication	250	131	114	9	0	8	119	9,398	8,390	4,585	3,927	188	0	470	3,805	4,409
Electric, gas, and sanitary services	156	82	48	29	1	4	74	9,196	8,500	5,833	3,500	603	115	1,615	2,667	5,823
Transportation, communication, and other utilities	1,135	541	234	263	23	21	594	46,738	40,291	21,779	10,504	7,277	959	3,039	18,512	21,971
Hotels, rooming houses, camps, and other lodging places	113	45	31	9	1	4	68	7,518	6,074	2,328	1,854	231	123	120	3,746	2,137
Personal services	66	36	18	18	0	0	30	1,341	1,162	656	191	427	38	0	506	898
Automotive repair, services, and garages	128	61	22	36	1	2	67	3,353	2,789	1,390	449	725	46	170	1,399	1,579
Motion pictures	28	18	17	0	0	1	10	594	536	244	216	8	0	20	292	211
Amusement and recreation services (except motion pictures)	47	19	14	4	0	1	28	2,566	2,068	878	437	436	0	5	1,190	350
Health services.	695	352	253	24	40	35	343	74,207	62,812	29,841	21,660	2,347	3,126	2,708	32,971	28,752
Educational services	100	58	36	4	3	15	42	6,473	5,489	2,850	1,894	248	143	565	2,639	2,941
Membership organizations	20	15	10	0	0	5	5	532	398	220	123	11	0	86	178	229
Business services	275	153	84	24	18	27	122	12,644	10,133	5,526	2,814	477	627	1,608	4,607	7,431
Miscellaneous repair services	35	15	8	4	3	0	20	977	919	450	323	66	60	1	469	373
Museums, art galleries, botanical and zoological gardens	1	1	1	0	0	0	0	30	22	14	14	0	0	0	8	30
Legal services	19	17	1	0	3	13	2	665	566	453	32	0	57	364	113	622
Social services	56	37	23	2	2	10	19	3,224	2,103	1,382	1,037	91	54	200	721	1,945
Miscellaneous services	17	9	6	1	0	2	8	809	508	314	256	11	0	47	194	618
Services	1,600	836	524	126	71	115	764	114,933	95,579	46,546	31,300	5,078	4,274	5,894	49,033	48,116
Public administration	5	4	4	0	0	0	1	85	76	42	42	0	0	0	34	53
Total, all industrial groups	8,198	3,744	2,123	1,052	307	262	4,454	521,602	458,114	218,757	131,795	39,251	25,334	22,377	239,357	196,515

[1] Source Standard Industrial Classification, Statistical Policy Division, Office of Management and Budget, Washington 1972

Table 17.—Size of Units in Representation Cases Closed, Fiscal Year 1980 [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	478,821	7,296	100 0	. .	1,962	100 0	1,002	100 0	283	100 0	251	100 0	3,798	100 0
Under 10	9,533	1,691	23 2	23 2	470	23 9	386	38 5	44	15 5	43	17 1	748	19 7
10 to 19	22,246	1,593	21 8	45 0	429	21 8	281	28 0	63	22 2	42	16 7	778	20 5
20 to 29	21,058	880	12 1	57 1	258	13 1	97	9 7	43	15 2	41	16 3	441	11 6
30 to 39	20,722	604	8 3	65 4	174	8 8	73	7 3	27	9 5	27	10 8	303	8 0
40 to 49	18,112	411	5 6	71 0	121	6 1	40	4 0	15	5 3	14	5 5	221	5 7
50 to 59	17,427	320	4 4	75 4	84	4 3	25	2 5	14	4 9	20	8 0	177	4 7
60 to 69	16,447	257	3 5	78 9	77	3 9	12	1 2	21	7 4	7	2 8	140	3 7
70 to 79	14,195	191	2 6	81 5	69	3 5	11	1 1	4	1 4	12	4 8	95	2 5
80 to 89	12,427	148	2 0	83 5	37	1 9	8	0 8	6	2 1	10	4 0	87	2 3
90 to 99	12,997	138	1 9	85 4	34	1 7	8	0 8	4	1 4	2	0 8	90	2 4
100 to 109	8,492	82	1 1	86 5	17	0 9	6	0 6	2	0 7	2	0 8	55	1 4
110 to 119	9,069	79	1 1	87 6	18	0 9	9	0 9	3	1 1	3	1 2	46	1 2
120 to 129	9,429	76	1 0	88.6	16	0 8	6	0 6	4	1 4	1	0 4	49	1 3
130 to 139	8,566	64	0 9	89 5	17	0 9	2	0 2	1	0 4	5	2 0	39	1 0
140 to 149	7,620	53	0 7	90 2	7	0 4	5	0 5	2	0 7	2	0 8	37	1 0
150 to 159	9,578	62	0 8	91 0	11	0 6	4	0 4	0		1	0 4	46	1 2
160 to 169	7,393	45	0 6	91 6	14	0 7	4	0 4	3	1 1	1	0 4	23	0 6
170 to 179	7,344	42	0 6	92 2	14	0 7	4	0 4	1	0 4	0		23	0 6
180 to 189	7,539	41	0 6	92 8	6	0 3	4	0 4	3	1 1	2	0 8	26	0 7
190 to 199	3,883	20	0 3	93 1	3	0 2	1	0 1	1	0 4	2	0 8	13	0 3
200 to 299	46,966	197	2 7	95 8	32	1 6	8	0 8	12	4 2	7	2 8	138	3 6
300 to 399	41,314	120	1 6	97 4	21	1 1	3	0 3	2	0 7	2	0 8	92	2 4
400 to 499	23,824	54	0 7	98 1	9	0 5	1	0 1	2	0 7	0		42	1 1
500 to 599	20,605	38	0 5	98 6	8	0 4	1	0 1	3	1 1	0		26	0 7
600 to 799	24,732	36	0 5	99 1	3	0 2	1	0 1	2	0 7	1	0 4	29	0 8
800 to 999	10,351	12	0 2	99 3	5	0 3	1	0 1	0		0		6	0 2
1,000 to 1,999	46,713	35	0 5	99 8	7	0 4	1	0 1	1	0 4	2	0 8	24	0 6
2,000 to 2,999	12,790	5	0 2	100 0	1	0 1	0		0		2	0 8	2	0 1
3,000 to 9,999	7,459	2	0 0	100 0	0		0		0		0		2	0 1

Total RD elections	B Decertification elections (RD)													
	42,781	902	100 0	.	161	100 0	50	100 0	24	100 0	11	100 0	656	100 0
Under 10	1,508	267	29 6	29 6	8	5 0	10	20 0	2	8 3	0		247	37 7
10 to 19	2,492	183	20 3	49 9	25	15.6	8	16 0	3	12 5	0		147	22 4
20 to 29	2,777	115	12 8	62 7	24	14 9	14	28 0	2	8 3	1	9 1	74	11 3
30 to 39	3,130	90	10 0	72 7	19	11 8	2	4 0	4	16 7	5	45 5	60	9 1
40 to 49	1,962	44	4 9	77 6	15	9 3	2	4 0	1	4 2	0		26	3 9
50 to 59	1,773	33	3.8	81 4	13	8 1	1	2 0	0		1	9 1	18	2 7
60 to 69	1,829	29	3 2	84 6	12	7 5	0		2	8 3	0		15	2 2
70 to 79	1,210	16	1 7	86 3	4	2 5	3	6 0	0		1	9 1	8	1 2
80 to 89	1,192	14	1 6	87 9	3	1 9	0		2	8 3	0		9	1 4
90 to 99	1,676	18	2 0	89 9	5	3 1	1	2 0	1	4 2	2	18 1	9	1 4
100 to 109	940	9	1 0	90 9	2	1.2	0		0		1	9 1	6	0 9
110 to 119	1,026	9	1 0	91 9	2	1 2	1	2 0	1	4 2	0		5	0 8
120 to 129	1,124	9	1 0	92 9	4	2 5	1	2 0	2	8 3	0		2	0 3
130 to 139	1,629	12	1 3	94 2	1	0 6	2	4 0	0		0		9	1 4
140 to 149	1,161	8	0 9	95 1	4	2 5	0		2	8 3	0		2	0 3
150 to 159	1,071	7	0 8	95 9	3	1 9	1	2 0	1	4 2	0		2	0 3
160 to 169	167	1	0 1	96 0	1	0 6	0		0		0		0	
170 to 199	1,808	10	1 1	97 1	7	4 3	0		0		0		3	0 5
200 to 299	3,772	16	1 7	98 8	5	3 1	1	2 0	0		0		10	1 5
300 to 499	2,232	5	0 5	99 3	2	1 2	1	2 0	1	4 2	0		1	0 2
500 to 799	2,782	5	0 5	99 8	1	0 6	2	4 0	0		0		2	0 3
800 and over	5,520	2	0 2	100 0	1	0 6	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 1980 [1]

Size of establishment (number of employees)	Total number of situations	Total		Type of situations																	
		Percent of all situations	Cumulative percent of all situations	CA		CB		CC		CD		CE		CG		CP		CA-CB combinations		Other C combinations	
				Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class
Total	[2] 40,055	100 0	.	28,111	100 0	6,814	100 0	1,965	100.0	389	100 0	120	100 0	52	100 0	498	100 0	1,716	100 0	390	100 0
Under 10	11,479	28.7	28 7	7,401	26 4	2,178	32 1	841	42 4	143	36 3	74	61 7	12	23 3	243	48 9	416	24 4	171	43 8
10–19	3,385	8 5	37 2	2,530	9 0	344	5 0	234	11 9	53	13 6	15	12 5	1	1 9	79	15 9	104	6 1	25	6 4
20–29	2,423	6 0	43 2	1,849	6 6	262	3 8	133	6 8	22	5 7	3	2 5	0		42	8 4	76	4 4	36	9 2
30–39	1,989	5 0	48.2	1,470	5 2	270	4 0	103	5 2	22	5 7	3	2 5	0		31	6 2	71	4 1	19	4 9
40–49	1,352	3 4	51 6	1,042	3 7	157	2 3	68	3 5	14	3 6	1	8	0		16	3 2	41	2 4	13	3 3
50–59	1,559	3 9	55.5	1,129	4 0	248	3 6	60	3 1	29	7 5	2	1 7	0		17	3 4	59	3 4	15	3 8
60–69	993	2 5	58 0	770	2 7	139	2 0	29	1 5	7	1 8	0		0		9	1 8	36	2 1	3	8
70–79	832	2 1	60 1	609	2 2	134	2 0	24	1 2	6	1 5	0		0		6	1 2	47	2 7	6	1 5
80–89	618	1 5	61 6	476	1 7	86	1 3	19	1 0	3	8	1	8	1	1 9	2	4	24	1 4	6	1 5
90–99	348	9	62.5	264	9	52	8	18	9	3	8	0		1	1 9	3	6	6	3	1	3
100–109	1,410	3 5	66 0	946	3 4	296	4 3	54	2 7	14	3 6	1	8	2	3 8	9	1 8	74	4 3	14	3 6
110–119	267	7	66 7	210	7	35	5	7	4	3	8	0		0		1	2	8	5	3	8
120–129	522	1 3	68 0	408	1 5	71	1 0	11	6	3	8	0		2	3 8	0		25	1 5	2	5
130–139	286	7	68 7	228	8	35	5	7	4	0		0		2	3 8	3	6	8	5	3	8
140–149	200	5	69 2	159	6	24	4	11	6	1	3	0		0		0		3	2	2	5
150–159	821	2 0	71 2	587	2 1	133	2.0	32	1 6	8	2 1	2	1 7	1	1 9	7	1 4	47	2 7	4	1 0
160–169	189	5	71 7	151	5	29	4	5	3	0		0		0		1	2	3	2	0	
170–179	239	6	72 3	200	7	26	4	2	1	0		0		0		0		10	6	1	3
180–189	164	4	72 7	131	5	14	2	6	3	2	5	0		1	1 9	3	6	6	3	1	3
190–199	57	1	72 8	41	1	9	1	3	2	0		0		0		0		4	2	0	
200–299	2,187	5 5	78 3	1,624	5 8	359	5 3	48	2 4	12	3 1	2	1 7	4	7 7	10	2 0	113	6 6	15	3 8
300–399	1,508	3 8	82 1	1,048	3 7	321	4 7	33	1 7	6	1 5	0		3	5 8	3	6	86	5 0	8	2 1
400–499	896	2 2	84 3	667	2 4	155	2 3	26	1 3	1	3	1	8	1	1 9	3	6	40	2 3	2	5
500–599	870	2 2	86 5	607	2 2	186	2 7	10	5	3	8	3	2 5	1	1 9	0		54	3 1	6	1 5
600–699	444	1 1	87 6	298	1 1	97	1.4	12	6	1	3	0		0		0		35	2 0	1	3
700–799	382	1 0	88 6	263	9	57	8	25	1 3	5	1 3	5	4 2	1	1 9	6	1 2	13	8	7	1 8
800–899	328	8	89 4	234	8	52	8	10	5	1	3	0		3	5 8	1	2	27	1 6	0	
900–999	207	5	89 9	131	5	46	7	10	5	0		0		4	7 7	0		11	6	5	1 3
1,000–1,999	1,641	4 1	94 0	1,110	3 9	349	5 1	70	3 6	9	2 3	4	3 3	5	9 6	1	2	86	5 0	7	1 8
2,000–2,999	744	1 9	95 9	467	1 7	195	2 9	14	7	7	1 8	0		3	5 8	0		51	3 0	7	1 8
3,000–3,999	443	1 1	97 0	276	1 0	112	1 6	15	8	2	5	2	1 7	0		1	2	34	2 0	1	3
4,000–4,999	213	5	97 5	119	4	67	1 0	5	3	1	3	0		0		0		19	1 1	2	5
5,000–9,999	570	1 4	98 9	347	1 2	160	2 3	7	4	7	1 8	0		0		0		47	2 7	2	5
Over 9,999	489	1 1	100 0	319	1 1	116	1 7	13	7	1	3	1	8	4	7 7	1	2	32	1 9	2	5

[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 Chart 2 of Chapter I, which are based on single and multiple filings of same type of case

Table 19.—Litigation for Enforcement and/or Review of Board Orders, Fiscal Year 1980; and Cumulative Totals, Fiscal Years 1936–1980

	Fiscal year 1980									July 5, 1935–Sept 30, 1980	
	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	478	440	29	2	7						
On petitions for review and/or enforcement	449	419	21	2	7	100 0	100 0	100 0	100 0	7,666	100 0
Board orders affirmed in full	291	272	13	2	4	64 9	61 9	100 0	57 1	4,870	63 5
Board orders affirmed with modification	48	46	2	0	0	11 0	9 5			1,195	15 6
Remanded to Board	28	25	2	0	1	6 0	9 5		14 3	344	4 5
Board orders partially affirmed and partially remanded	3	2	1	0	0	0 4	4 8			120	1 6
Board orders set aside	79	74	3	0	2	17 7	14 3		28 6	1,137	14 8
On petitions for contempt	29	21	8	0	0	100 0	100 0				
Compliance after filing of petition, before court order	10	9	1	0	0	42 8	12 5				
Court orders holding respondent in contempt	18	11	7	0	0	52 4	87 5				
Court orders denying petition	1	1	0	0	0	4 8					
Proceedings decided by U S Supreme Court	3	1	1	1	0	100 0	100 0	100 0		229	100 0
Board orders affirmed in full	1	0	1	0	0		100 0			137	59 8
Board orders affirmed with modification	0	0	0	0	0					17	7 4
Board orders set aside	1	1	0	0	0	100 0				37	16 3
Remanded to Board	1	0	0	1	0			100 0		19	8 3
Remanded to court of appeals	0	0	0	0	0					16	7 0
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 definitions of terms

[2] A proceeding in which the Board had entered an order dismissing the complaint and the charging party appealed such dismissal in the courts of appeals

Table 19A.—Proceedings Decided by Circuit Courts of Appeals on Petitions for Enforcement and/or Review of Board Orders, Fiscal Year 1980, Compared With 5-Year Cumulative Totals, Fiscal Years 1975 Through 1979 [1]

Circuit courts of appeals (headquarters)	Total fiscal year 1980	Total fiscal years 1975–1979	Affirmed in full				Modified				Remanded in full				Affirmed in part and remanded in part				Set aside			
			Fiscal Year 1980		Cumulative fiscal years 1975–1979		Fiscal Year 1980		Cumulative fiscal years 1975–1979		Fiscal Year 1980		Cumulative fiscal years 1975–1979		Fiscal Year 1980		Cumulative fiscal years 1975–1979		Fiscal Year 1980		Cumulative fiscal years 1975–1979	
			Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total all circuits	449	1,520	291	64 8	1,035	68 1	48	10 7	164	10 8	28	6 2	71	4 7	3	0 7	39	2 6	79	17 6	211	13 9
1 Boston, Mass	13	77	7	53 8	52	67 5	1	7 7	12	15 6	1	7 7	2	2 6	0		3	3 9	4	30 8	8	10 4
2 New York, N Y	28	130	17	60 7	86	66 2	4	14 3	15	11 5	1	3 6	7	5 4	0		4	3 1	6	21 4	18	13 8
3 Philadelphia, Pa	39	124	25	64 1	90	72 6	6	15 4	11	8 9	3	7 7	7	5 6	0		1	0 8	5	12 8	15	12 1
4 Richmond, Va.	33	108	20	60 6	72	66 7	4	12 1	16	14 8	2	6 1	9	8 3	2	6 1	0		5	15 1	11	10 2
5 New Orleans, La	54	224	37	68 5	159	71 0	6	11 1	28	12 5	4	7 4	5	2 2	0		5	2 2	7	13 0	27	12 1
6 Cincinnati, Ohio	76	155	50	65 8	101	65 2	7	9 2	13	8 4	4	5 3	6	3 9	1	1 3	4	2 6	14	18 4	31	20 0
7 Chicago, Ill	55	164	30	54 5	106	64 6	10	18 2	22	13 4	2	3 6	9	5 5	0		1	0 6	13	23 6	26	15 0
8 St Louis, Mo	30	113	21	70 0	74	65 5	3	10 0	16	14 2	1	3 3	0		0		4	3 5	5	16 7	19	16 8
9 San Francisco, Calif	89	258	63	70 8	180	69 8	4	4 5	20	7 8	9	10 1	12	4 7	0		6	2 3	13	14 6	40	15 5
10 Denver, Colo	16	53	11	68 8	34	64 2	2	12 5	5	9 4	0		3	5 7	0		2	3 8	3	18 8	9	17 0
Washington, D C	16	114	10	62 5	81	71 1	1	6 3	6	5 3	1	6 3	11	9 7	0		9	7 9	4	25 0	7	6 1

[1] Percentages are computed horizontally by current fiscal year and total fiscal years

Table 20.—Injunction Litigation Under Section 10(e), 10(j), and 10(l), Fiscal Year 1980

	Total proceedings	Injunction proceedings		Total dispositions	Disposition of injunctions						Pending in district court Sept 30, 1980
		Pending in district court Oct 1, 1979	Filed in district court fiscal year 1980		Granted	Denied	Settled	Withdrawn	Dismissed	Inactive	
Under Sec 10(e) Total	[1] 10	0	10	10	4	5	1	0	0	0	0
Under Sec 10(j) Total	58	8	50	45	23	7	9	3	2	1	13
8(a)(1)	1	0	1	1	0	1	0	0	0	0	0
8(a)(1)(2)	2	0	2	2	2	0	0	0	0	0	0
8(a)(1)(2), 8(b)(1)	1	0	1	1	0	0	0	0	1	0	0
8(a)(1)(3)	9	1	8	8	4	2	1	1	0	0	1
8(a)(1)(4)	1	0	1	1	1	0	0	0	0	0	0
8(a)(1)(5)	6	0	6	5	3	1	1	0	0	0	1
8(a)(1)(2)(3)	2	0	2	2	1	1	0	0	0	0	0
8(a)(1)(2)(5)	1	0	1	1	1	0	0	0	0	0	0
8(a)(1)(3)(4)	1	0	1	0	0	0	0	0	0	0	1
8(a)(1)(3)(5)	22	6	16	14	4	2	6	1	0	1	8
8(a)(1)(2)(3)(4)	1	0	1	1	1	0	0	0	0	0	0
8(a)(1)(2)(3)(5)	2	0	2	2	2	0	0	0	0	0	0
8(a)(1)(3)(4)(5)	3	0	3	3	1	0	1	1	0	0	0
8(b)(1)	4	1	3	3	2	0	0	0	1	0	1
8(b)(3)	2	0	2	1	1	0	0	0	0	0	1
Under Sec 10(l) Total	227	32	195	206	81	6	89	9	9	12	21
8(b)(4)(A)	7	2	5	6	1	0	4	0	0	1	1
8(b)(4)(A)(B)	5	2	3	5	2	0	1	1	0	1	0
8(b)(4)(A), 8(b)(7)(C)	1	0	1	1	0	0	1	0	0	0	0
8(b)(4)(A), 8(e)	1	1	0	1	0	0	1	0	0	0	0
8(b)(4)(A)(B)(D)	1	0	1	1	1	0	0	0	0	0	0
8(b)(4)(A)(B), 8(e)	1	0	1	1	0	0	1	0	0	0	0
8(b)(4)(A)(B)(D), 8(e)	1	0	1	1	1	0	0	0	0	0	0
8(b)(4)(B)	111	7	104	101	38	4	49	4	2	4	10
8(b)(4)(B)(D)	7	0	7	7	1	0	5	1	0	0	0
8(b)(4)(B), 8(b)(7)(C)	5	0	5	2	1	1	0	0	0	0	3
8(b)(4)(B), 8(b)(7)(B)(C)	1	0	1	1	1	0	0	0	0	0	0
8(b)(4)(C)	8	0	8	8	2	0	0	1	5	0	0
8(b)(4)(D)	32	8	24	30	12	0	13	2	0	3	2
8(b)(7)(A)	7	2	5	4	2	0	0	0	2	0	3
8(b)(7)(B)	5	1	4	5	2	0	2	0	0	1	0
8(b)(7)(C)	29	8	21	28	16	0	10	0	0	2	1
8(b)(7)(B)(C)	1	0	1	0	0	0	0	0	0	0	1
8(e)	4	1	3	4	1	1	2	0	0	0	0

[1] In courts of appeals

Table 21.—Miscellaneous Litigation Involving NLRB; Outcome of Proceedings in Which Court Decision Issued in Fiscal Year 1980

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
Total—all types	94	87	7	37	36	1	57	51	6
NLRB-initiated actions or interventions	11	10	1	4	4	0	7	6	1
To enforce subpena	2	2	0	2	2	0	0	0	0
To defend Board's jurisdiction	5	4	1	2	2	0	3	2	1
To prevent conflict between NLRA and Bankruptcy Code	4	4	0	0	0	0	4	4	0
Action by other parties	83	77	6	33	32	1	50	45	5
To review non-final orders	9	9	0	9	9	0	0	0	0
To restrain NLRB from	42	39	3	10	10	0	32	29	3
Proceeding in R case	21	18	3	5	5	0	16	13	3
Proceeding in unfair labor practice case	21	21	0	5	5	0	16	16	0
To compel NLRB to	32	29	3	14	13	1	18	16	2
Issue complaint	11	11	0	6	6	0	5	5	0
Take action in R Case	7	7	0	5	5	0	2	2	0
Comply with Freedom of Information Act [1]	14	11	3	3	2	1	11	9	2
Other	0	0	0	0	0	0	0	0	0

[1] FOIA cases are categorized as to court determination depending on whether NLRB substantially prevailed

Table 22.—Advisory Opinion Cases Received, Closed, and Pending, Fiscal Year 1980 [1]

	Total	Number of cases			
		Identification of petitioner			
		Employer	Union	Courts	State boards
Pending October 1, 1979	1	1	0	0	0
Received fiscal 1980	9	8	1	0	0
On docket fiscal 1980	10	9	1	0	0
Closed fiscal 1980	10	9	1	0	0
Pending Sept 30, 1980	0	0	0	0	0

[1] See Glossary for definitions of terms

Table 22A.—Disposition of Advisory Opinion Cases, Fiscal Year 1980 [1]

Action taken	Total cases closed
	10
Board would assert jurisdiction	2
Board would not assert jurisdiction	2
Unresolved because of insufficient evidence submitted	0
Dismissed	4
Withdrawn	2

[1] See Glossary for definitions of terms

Table 23.—Time Elapsed for Major Case Processing Stages Completed, Fiscal Year 1980; and Age of Cases Pending Decision, September 30, 1980

Stage	Median days
I Unfair labor practice cases	
A Major stages completed —	
1 Filing of charge to issuance of complaint	46
2 Complaint to close of hearing	155
3 Close of hearing to issuance of administrative law judge's decision	158
4 Administrative law judge's decision to issuance of Board decision	133
5 Filing of charge to issuance of Board decision	484
B Age [1] of cases pending administrative law judge's decision September 30, 1980	362
C Age [1] of cases pending Board decision September 30, 1980	547
II Representation cases	
A Major stages completed —	
1 Filing of petition to notice of hearing issued	8
2 Notice of hearing to close of hearing	11
3 Close of hearing to —	
Board decision issued	187
Regional director's decision issued	19
4 Filing of petition to —	
Board decision issued	295
Regional director's decision issued	42
B Age [2] of cases pending Board decision September 30, 1980	295
C Age [2] of cases pending Regional Director's decision September 30, 1980	46

[1] From filing of charge
[2] From filing of petition

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 C 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	1,784	1,189	949	93	21		2	4	1	6	29	78	6
Initial ULP decisions	1,762	1,169	932	91	21		2	4	1	6	29	77	6
Backpay decisions	22	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	1,101	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]—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	1,228	1,165	1,048	33	84	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.

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	139	63	48	9	2	4	76	9,827	8,890	3,653	2,957	435	106	155	5,237	1,711
U S Postal Service	4	4	4	0	0	0	0	312	269	231	179	0	0	52	38	312
Local and suburban transit and interurban highway passenger transportation	63	38	18	14	0	6	25	4,453	3,286	1,847	1,170	454	0	223	1,439	3,060
Motor freight transportation and warehousing	550	265	33	212	10	10	285	14,642	12,955	6,014	878	4,233	679	224	6,941	5,581
Water transportation	14	8	4	2	2	0	6	220	191	113	54	26	29	4	78	114
Other transportation	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