FIFTY-THIRD

ANNUAL REPORT

OF THE

NATIONAL LABOR RELATIONS BOARD

FOR THE FISCAL YEAR

ENDED SEPTEMBER 30

1988

FIFTY-THIRD

ANNUAL REPORT

OF THE

NATIONAL LABOR RELATIONS BOARD

FOR THE FISCAL YEAR

ENDED SEPTEMBER 30

1988

UNITED STATES GOVERNMENT PRINTING OFFICE
WASHINGTON, D.C. 20402 • 1990

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402 (paper cover)

NATIONAL LABOR RELATIONS BOARD

Members of the Board

JAMES M. STEPHENS, *Chairman*
WILFORD W. JOHANSEN MARY MILLER CRACRAFT
JOHN E. HIGGINS, JR.

Chief Counsels of Board Members

ELINOR H. STILLMAN
MICHAEL FOGERTY ANNE G. PURCELL
HOWARD D. JOHNSON[1]

JOHN C. TRUESDALE, *Executive Secretary*
, *Solicitor*
MELVIN J. WELLES, *Chief Administrative Law Judge*
DAVID B. PARKER, *Director of Information*

Office of the General Counsel

ROSEMARY M. COLLYER, *General Counsel*
, *Deputy General Counsel*
D. RANDALL FRYE, *Associate General Counsel*

JOSEPH E. DESIO
Associate General Counsel
Division of Operations Management

ROBERT E. ALLEN
Associate General Counsel
Division of Enforcement Litigation

HAROLD J. DATZ
Associate General Counsel
Division of Advice

ERNEST RUSSELL
Director
Division of Administration

[1] Acting Chief Counsel.

LETTER OF TRANSMITTAL

NATIONAL LABOR RELATIONS BOARD,
Washington, D.C., January 4, 1990.

SIR: As provided in Section 3(c) of the Labor Management Relations Act, 1947, I submit the Fifty-Third Annual Report of the National Labor Relations Board for the fiscal year ended September 30, 1988.

Respectfully submitted,
JAMES M. STEPHENS, *Chairman*

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

TABLE OF CONTENTS

TABLES

CHARTS IN CHAPTER I

I

Operations In Fiscal Year 1988

A. Summary

The National Labor Relations Board, an independent Federal agency, initiates no cases; it acts only on those cases brought before it. All proceedings originate from filings by the major segment of the public covered by the National Labor Relations Act—employees, labor unions, and private employers who are engaged in interstate commerce. During fiscal year 1988, the Board received 39,351 cases.

The public filed 31,453 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 7513 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. Also, the public filed 385 amendment to certification and unit clarification cases.

After the initial flood of charges and petitions, the flow narrows because the great majority of the newly filed cases are resolved—and quickly—in NLRB's national network of field offices by dismissals, withdrawals, agreements, and settlements.

At the end of fiscal year 1988, the five-member Board was composed of Chairman James M. Stephens and Members Wilford W. Johansen, Mary Miller Cracraft, and John E. Higgins, Jr.; one seat was vacant. Rosemary M. Collyer served as the General Counsel.

Statistical highlights of NLRB's casehandling activities in fiscal 1988 include:

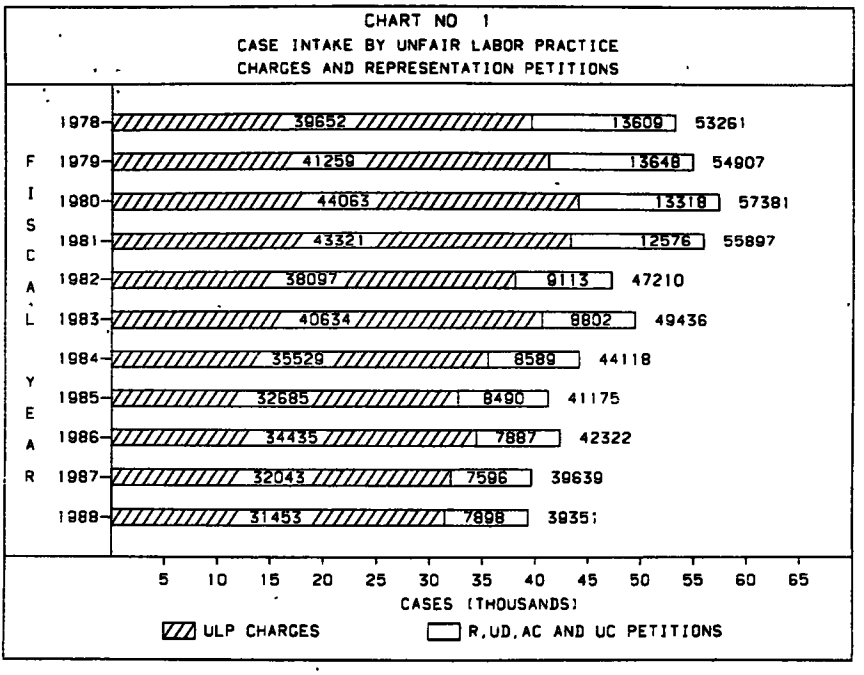
- The NLRB conducted 4153 conclusive representation elections among some 214,092 employee voters, with workers choosing labor unions as their bargaining agents in 46.3 percent of the elections.
- Although the Agency closed 37,701 cases, 21,573 cases were pending in all stages of processing at the end of the fiscal year. The closings included 30,090 cases involving unfair labor practice charges and 7110 cases affecting employee representation and 501 related cases.

• Settlements, avoiding formal litigation while achieving the goal of equitable remedies in unfair labor practice situations, numbered 9484.

• The amount of $35,014,701 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. This total was for lost earnings, fees, dues, and fines. The NLRB obtained 4179 offers of job reinstatements, with 2789 acceptances.

• Acting on the results of professional staff investigations, which produced a reasonable cause to believe unfair labor practices had been committed, Regional Offices of the NLRB issued 3450 complaints, setting the cases for hearing.

• NLRB's corps of administrative law judges issued 628 decisions.



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 was 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 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 that are filed in the NLRB's Regional, Subregional, and Resident Offices, which numbered 52 during fiscal year 1988.

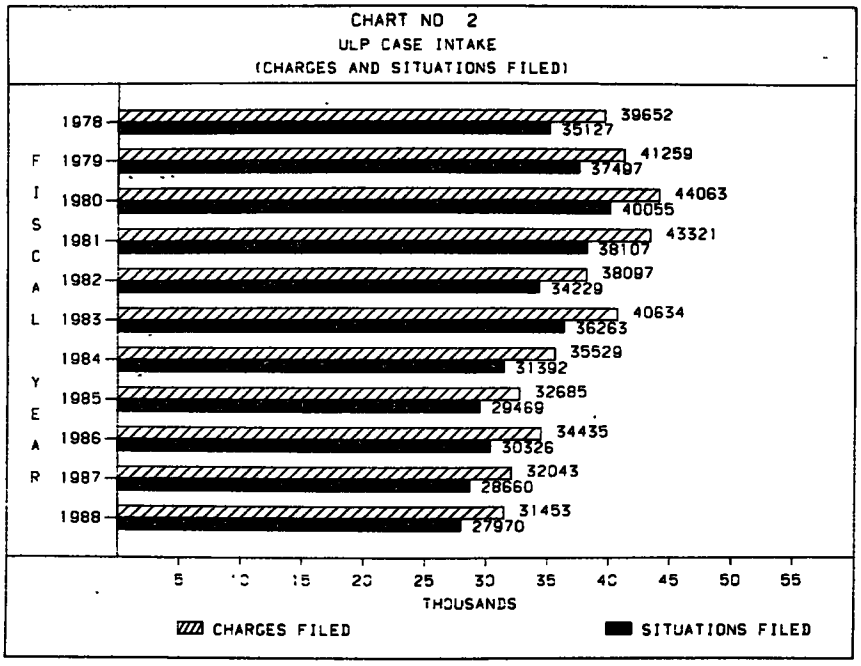
The Act's unfair labor practice provisions place certain restrictions on actions of employers and labor organizations in their relations with employees, as well as with each other. Its election provisions provide mechanics for conducting and certifying results of representation elections to determine collective-bargaining wishes of employees, 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 practices and election petitions, the NLRB is concerned with the adjustment of labor disputes either by way of settlements or through its quasi-judicial proceedings, or by way of secret-ballot employee elections.

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

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

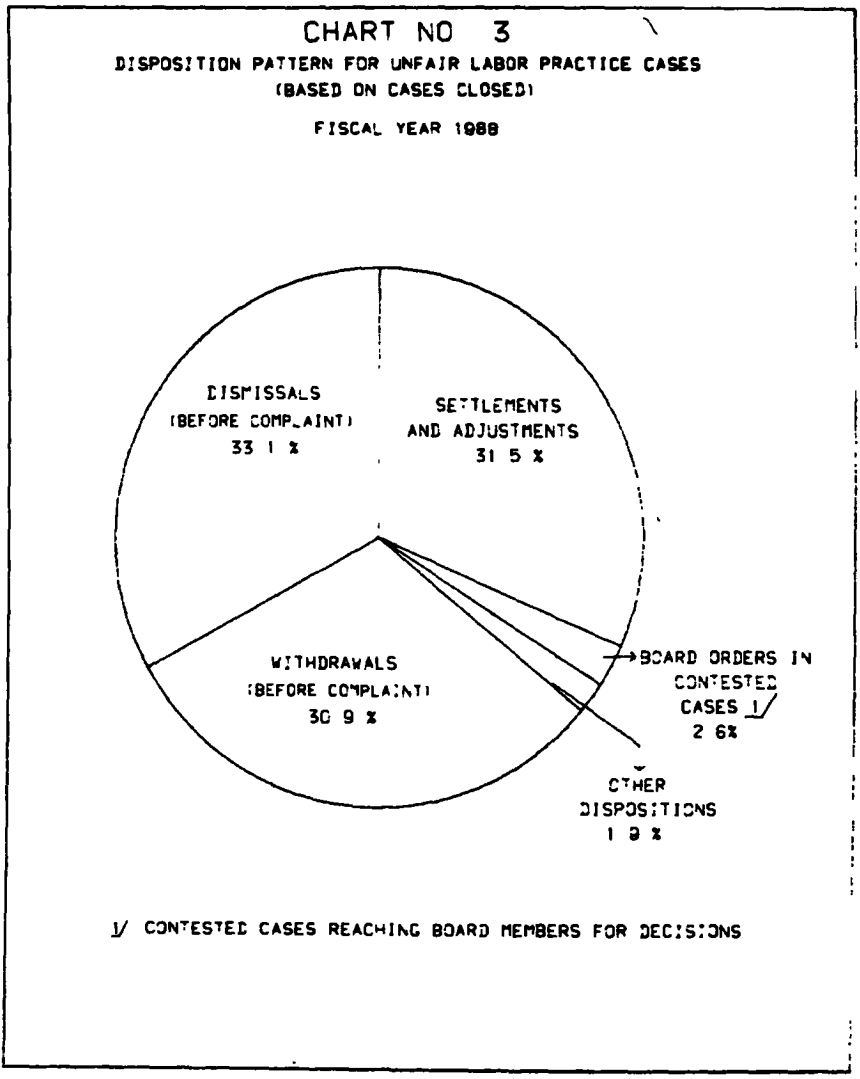
All cases coming to the NLRB begin their processing in the Regional Offices. Regional Directors, in addition to processing unfair labor practice cases in the initial stages, also have the authority to investigate representation petitions, to determine units of employees appropriate for collective-bargaining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

B. Operational Highlights

1. Unfair Labor Practices

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

Following their filing, charges are investigated by the Regional professional staff to determine whether there is a reasonable cause to believe that the Act has been violated. If such cause is



not found, 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; however, 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.

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. Less than 5 percent of the cases go through to Board decision.

In fiscal year 1988, 31,453 unfair labor practice charges were filed with the NLRB, a decrease of 2 percent from the 32,043 filed in fiscal 1987. In situations in which related charges are counted as a single unit, there was a 2-percent decrease from the preceding fiscal year. (Chart 2.)

Alleged violations of the Act by employers were filed in 22,266 cases, about 1 percent less than the 22,475 of 1987. Charges against unions decreased 4 percent to 9148 from 9523 in 1987.

There were 39 charges of violation of Section 8(e) of the Act, which bans hot-cargo agreements. (Tables 1A and 2.)

The majority of all charges against employers alleged illegal discharge or other discrimination against employees. There were 11,196 such charges in 50 percent of the total charges that employers committed violations.

Refusal to bargain was the second largest category of allegations against employers, comprising 9501 charges, in about 43 percent of the total charges. (Table 2.)

Of charges against unions, the majority (7384) alleged illegal restraint and coercion of employees, about 81 percent. There were 1096 charges against unions for illegal secondary boycotts and jurisdictional disputes, a decrease of 23 percent from the 1430 of 1987.

There were 1171 charges (about 13 percent) of illegal union discrimination against employees, a decrease of 10 percent from the 1298 of 1987. There were 248 charges that unions picketed illegally for recognition or for organizational purposes, compared with 274 charges in 1987. (Table 2.)

In charges filed against employers, unions led with 68 percent of the total. Unions filed 15,098 charges and individuals filed 7168.

Concerning charges against unions, 6520 were filed by individuals, or 71 percent of the total of 9148. Employers filed 2471 and other unions filed the 157 remaining charges.

In fiscal 1988, 30,090 unfair labor practice cases were closed. Some 96 percent were closed by NLRB Regional Offices, virtually the same as in 1987. During the fiscal year, 31.5 percent of the cases were settled or adjusted before issuance of administrative law judges' decisions, 30.9 percent were withdrawn before complaint, and 33.1 percent were administratively dismissed.

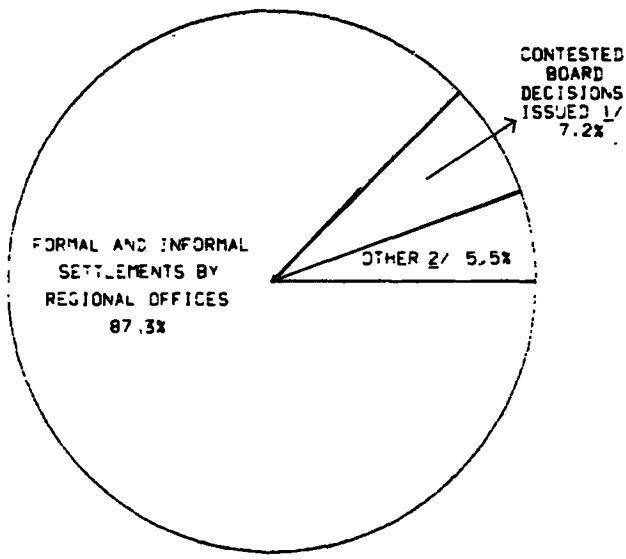
In evaluation of the Regional workload, the number of unfair labor practice charges found to have merit is important—the higher the merit factor the more litigation required. In fiscal year 1988, 37 percent of the unfair labor practice cases were found to have merit, as compared with 34 percent in 1987.

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 ef-

CHART NO 3A

DISPOSITION PATTERN FOR MERITORIOUS UNFAIR LABOR PRACTICE CASES (BASED ON CASES CLOSED)

FISCAL YEAR 1988



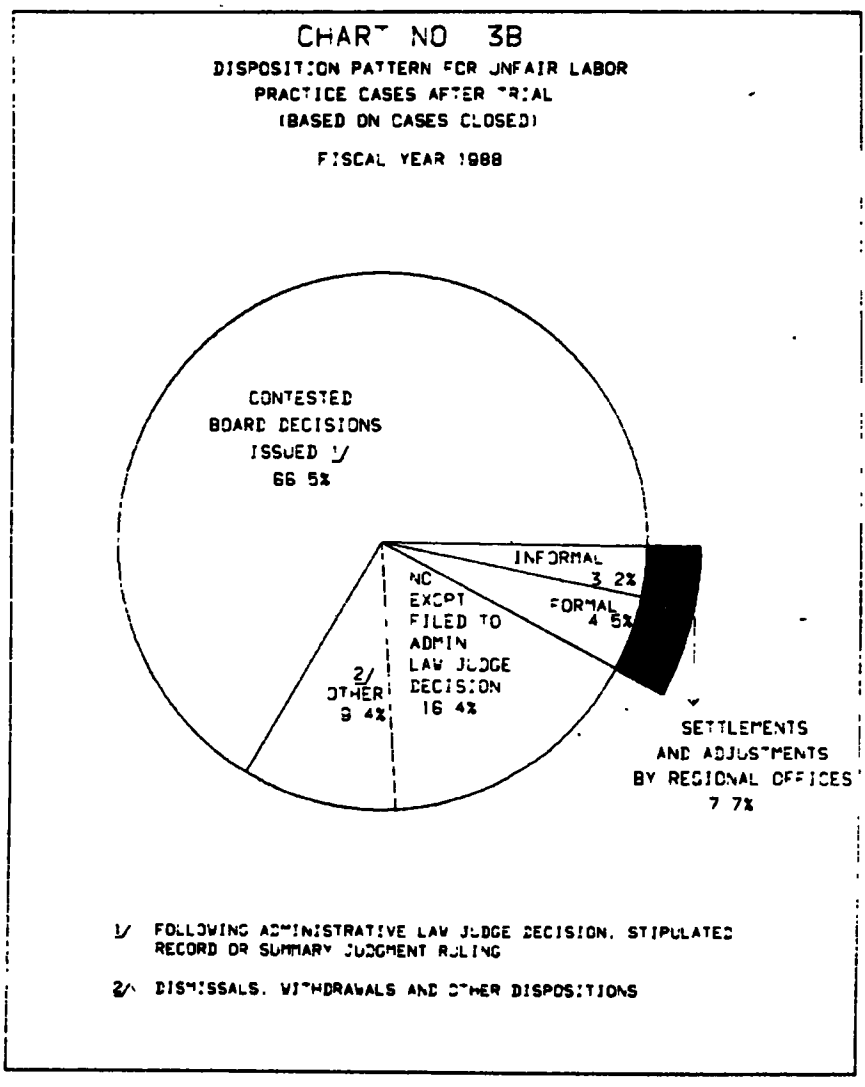
1/ FOLLOWING ADMINISTRATIVE LAW JUDGE DECISION, STIPULATED RECORD OR SUMMARY JUDGMENT RULING

2/ COMPLIANCE WITH ADMINISTRATIVE LAW JUDGE DECISION, STIPULATED RECORD OR SUMMARY JUDGMENT RULING

forts have been successful to a substantial degree. In fiscal 1988, precomplaint settlements and adjustments were achieved in 6658 cases, or 22.0 percent of the charges. In 1987 the percentage was 20.7. (Chart 5.)

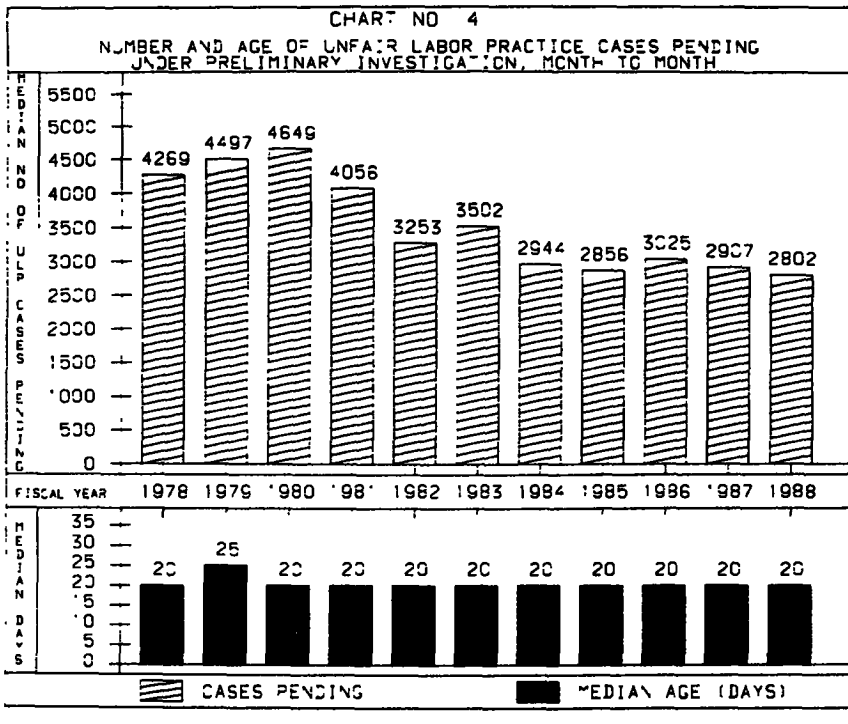
Cases of merit not settled by the Regional Offices produce formal complaints, issued on behalf of the General Counsel. This action schedules hearings before administrative law judges. During 1988, 3450 complaints were issued, compared with 3252 in the preceding fiscal year. (Chart 6.)

Of complaints issued, 83.5 percent were against employers, 14.9 percent against unions, and 1.6 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. The 46 days included 15 days in which parties had the opportunity to adjust charges and remedy violations without resorting to formal NLRB processes. (Chart 6.)

Additional settlements occur before, during, and after hearings before administrative law judges. The judges issued 628 decisions in 895 cases during 1988. They conducted 782 initial hearings, and 38 additional hearings in supplemental matters. (Chart 8 and Table 3A.)

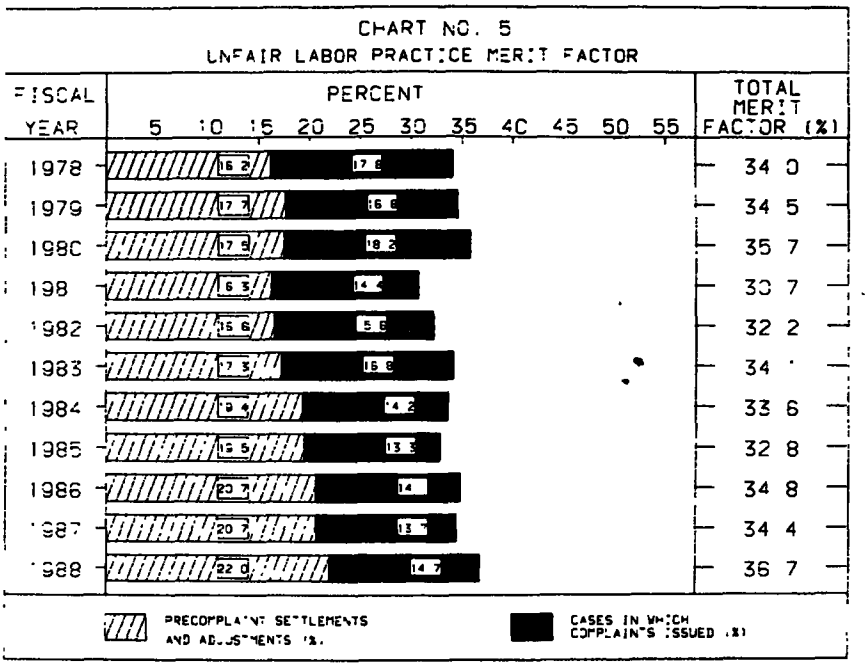


By filing exceptions to judges' findings and recommended rulings, parties may bring unfair labor practice cases to the five-member Board for final NLRB decision.

In fiscal 1988, the Board issued 704 decisions in unfair labor practice cases contested as to the law or the facts—626 initial decisions, 4 backpay decisions, 21 determinations in jurisdictional work dispute cases, and 53 decisions on supplemental matters. Of the 626 initial decision cases 551 involved charges filed against employers and 75 had union respondents.

For the year, the NLRB awarded backpay of $34.6 million. (Chart 9.) Reimbursement for unlawfully exacted fees, dues, and fines added another $372,825. Backpay is lost wages caused by unlawful discharge and other discriminatory action detrimental to employees, offset by earnings elsewhere after the discrimination. Some 4179 employees were offered reinstatement, and 67 percent accepted.

At the end of fiscal 1988, there were 18,672 unfair labor practice cases being processed at all stages by the NLRB, compared with 17,309 cases pending at the beginning of the year.



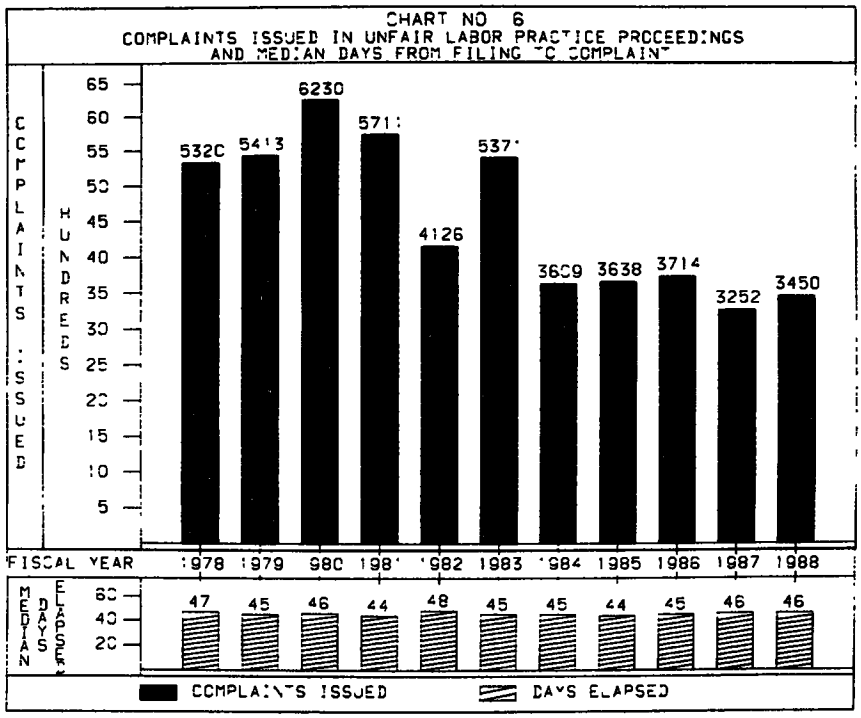
2. Representation Cases

The NLRB received 7898 representation and related case petitions in fiscal 1988, compared with 7596 such petitions a year earlier.

The 1988 total consisted of 6092 petitions that the NLRB conduct secret-ballot elections where workers select or reject unions to represent them in collective bargaining; 1256 petitions to decertify existing bargaining agents; 165 deauthorization petitions for referendums on rescinding a union's authority to enter into union-shop contracts; and 348 petitions for unit clarification to determine whether certain classifications of employees should be included in or excluded from existing bargaining units. Additionally, 37 amendment of certification petitions were filed.

During the year, 7611 representation and related cases were closed, compared with 7574 in fiscal 1987. Cases closed included 5846 collective-bargaining election petitions; 1264 decertification election petitions; 156 requests for deauthorization polls; and 345 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 16.3 percent of



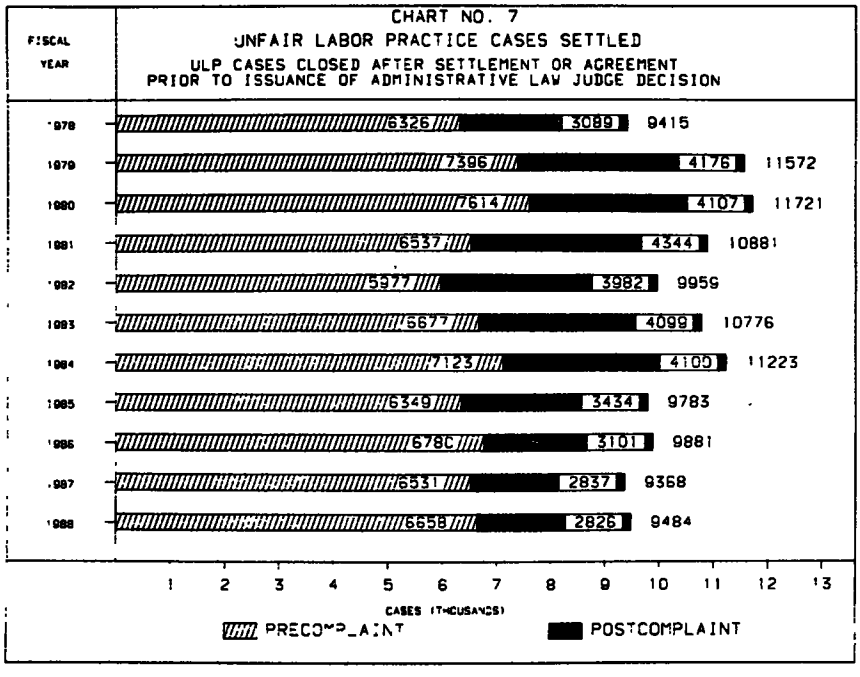
representation cases closed by elections, balloting was ordered by NLRB Regional Directors following hearing on points in issue. In three cases, the Board directed elections after transfers of cases from Regional Offices. (Table 10.) There were 12 cases that resulted in expedited elections pursuant to the Act's 8(b)(7)(C) provisions pertaining to picketing.

3. Elections

The NLRB conducted 4153 conclusive representation elections in cases closed in fiscal 1988, compared with the 4069 such elections a year earlier. Of 243,692 employees eligible to vote, 214,092 cast ballots, virtually 9 of every 10 eligible.

Unions won 1921 representation elections, or 46.3 percent. In winning majority designation, labor organizations earned bargaining rights or continued as employee representatives for 97,043 workers. The employee vote over the course of the year was 102,758 for union representation and 111,334 against.

The representation elections were in two categories—the 3509 collective-bargaining elections in which workers chose or voted down labor organizations as their bargaining agents, plus the 644 decertification elections determining whether incumbent unions would continue to represent employees.

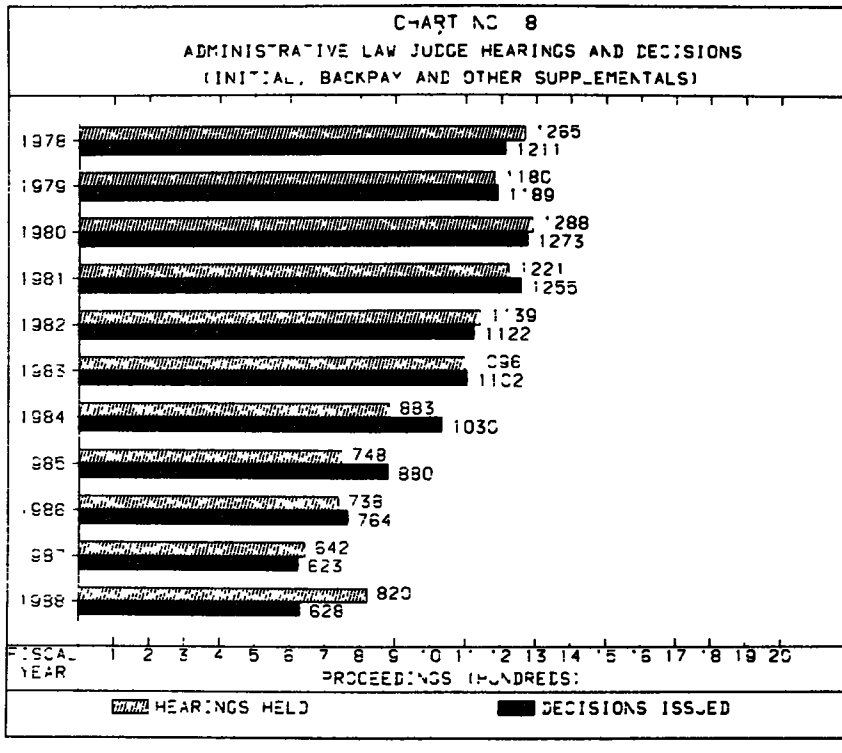


There were 3988 select-or-reject-bargaining-rights (one union on ballot) elections, of which unions won 1786, or 44.8 percent. In these elections, 90,304 workers voted to have unions as their agents, while 108,338 employees voted for no representation. In appropriate bargaining units of employees, the election results provided union agents for 82,710 workers. In NLRB elections the majority decides the representational status for the entire unit.

There were 165 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 135 elections, or 81.8 percent.

As in previous years, labor organizations lost decertification elections by a substantial percentage. The decertification results brought continued representation by unions in 185 elections, or 28.7 percent, covering 11,518 employees. Unions lost representation rights for 20,736 employees in 459 elections, or 71.3 percent. Unions won in bargaining units averaging 62 employees, and lost in units averaging 45 employees. (Table 13.)

Besides the conclusive elections, there were 106 inconclusive representation elections during fiscal 1988, 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 48 referendums, or 56 percent, while they maintained the right in the other 38 polls which covered 2862 employees. (Table 12.)

For all types of elections in 1988, the average number of employees voting, per establishment, was 52 the same as in 1987. About 71 percent of the collective-bargaining and decertification elections involved 59 or fewer employees. (Tables 11 and 17.)

4. Decisions Issued

a. The 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 1705 decisions concerning allegations of unfair labor practices and questions relating to employee representation. This total compared with the 1824 decisions rendered during fiscal 1987.

A breakdown of Board decisions follows:

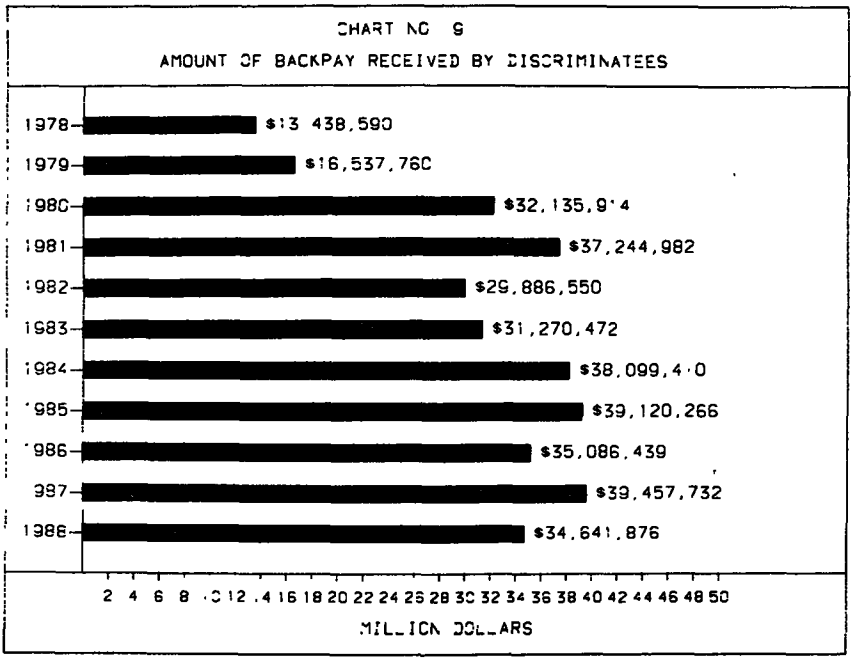


CHART NO 9
AMOUNT OF BACKPAY RECEIVED BY DISCRIMINATEES
1978 $13,438,590
1979 $16,537,760
1980 $32,135,914
1981 $37,244,982
1982 $29,886,550
1983 $31,270,472
1984 $38,099,410
1985 $39,120,266
1986 $35,086,439
1987 $39,457,732
1988 $34,641,876
2 4 6 8 10 12 14 16 18 20 22 24 26 28 30 32 34 36 38 40 42 44 46 48 50
MILLION DOLLARS

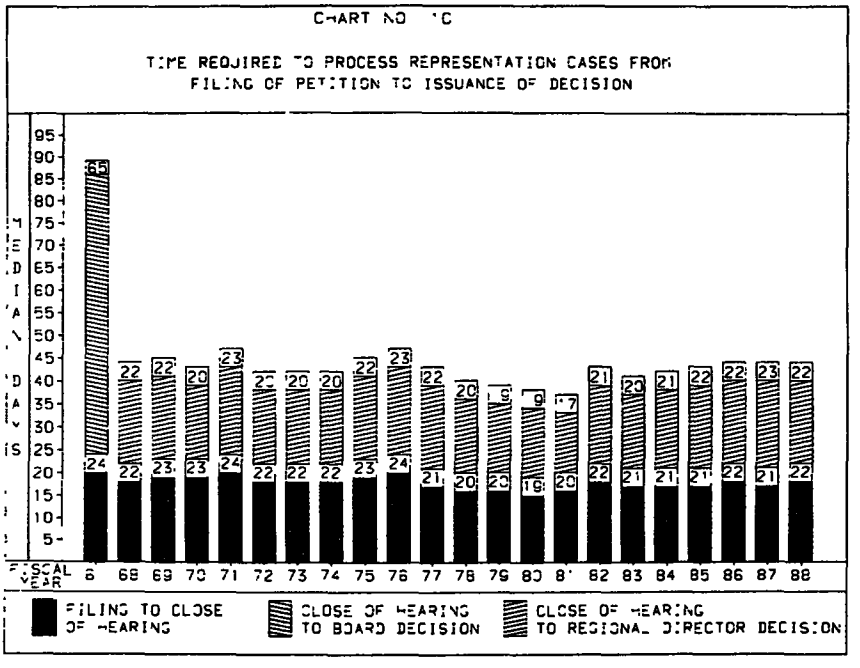
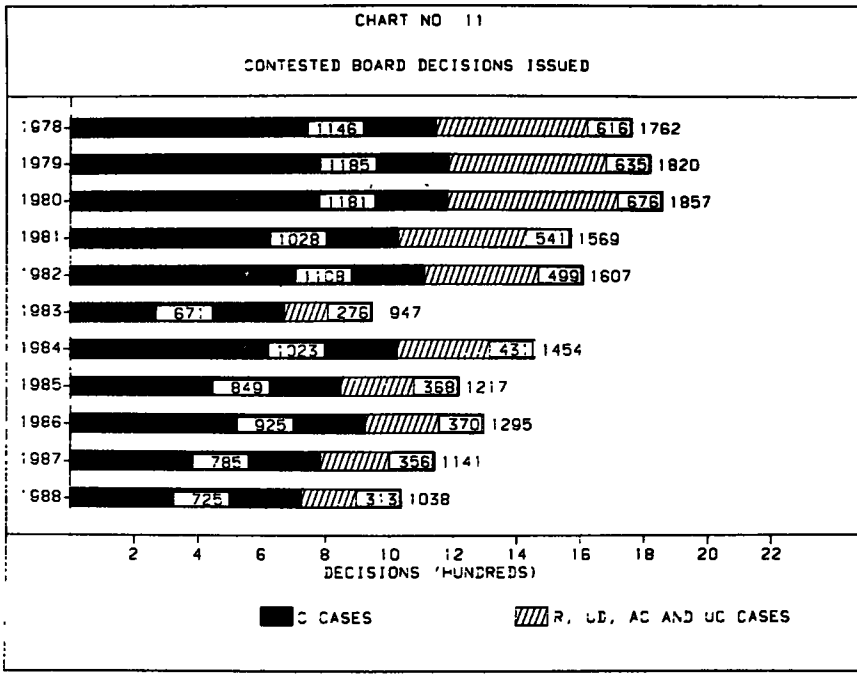


CHART NO 10
TIME REQUIRED TO PROCESS REPRESENTATION CASES FROM FILING OF PETITION TO ISSUANCE OF DECISION
FISCAL YEAR 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88
FILING TO CLOSE OF HEARING
CLOSE OF HEARING TO BOARD DECISION
CLOSE OF HEARING TO REGIONAL DIRECTOR DECISION



Total Board decisions		**1705**
Contested decisions		**1046**
Unfair labor practice decisions		725
Initial (includes those based on stipulated record)	647	
Supplemental	53	
Backpay	4	
Determinations in jurisdictional disputes	21	
Representation decisions		313
After transfer by Regional Directors for initial decisions	19	
After review of Regional Directors decisions	45	
On objections and/or challenges	249	
Other decisions		8
Clarification of bargaining unit	0	

Amendment to certification	0	
Union-deauthorization	8	
Noncontested decisions		659
Unfair labor practice	261	
Representation	395	
Other	3	

The majority (61 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.)

In fiscal 1988 about 7 percent of all meritorious charges and 67 percent of all cases in which a hearing was conducted reached the five-member Board for decision. (Charts 3A and 3B.) Generally, unfair labor practice cases take about 2-1/2 times longer to process than representation cases.

b. Regional Directors

NLRB Regional Directors issued 1567 decisions in fiscal 1988, compared with 1296 in 1987. (Chart 13 and Tables 3B and 3C.)

c. Administrative Law Judges

With a leveling in case filings alleging unfair labor practices, administrative law judges issued 628 decisions and conducted 820 hearings. (Chart 8 and Table 3A.)

5. Court Litigation

a. Appellate Courts

The National Labor Relations Board is involved in more litigation in the United States courts of appeals than any other Federal administrative agency.

In fiscal 1988, 166 cases involving the NLRB were decided by the United States courts of appeals compared with 199 in fiscal 1987. Of these 81.3 percent were won by NLRB in whole or in part compared with 87.4 percent in fiscal 1987; 4.8 percent were remanded entirely compared with 7.1 percent in fiscal 1987; and 13.9 percent were entire losses compared with 5.5 percent in fiscal 1987.

b. The Supreme Court

In fiscal 1988, the Supreme Court decided two Board cases; the Board won one in full and lost one. The Board participated as amicus in two cases and the Board's position prevailed in both cases.

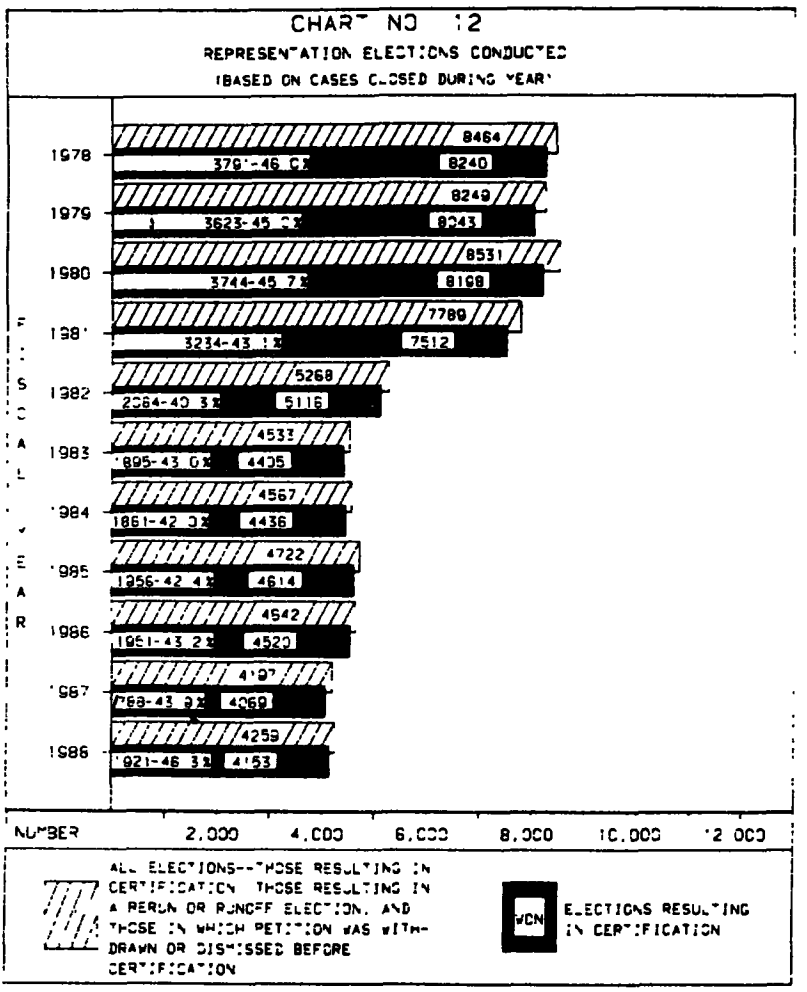
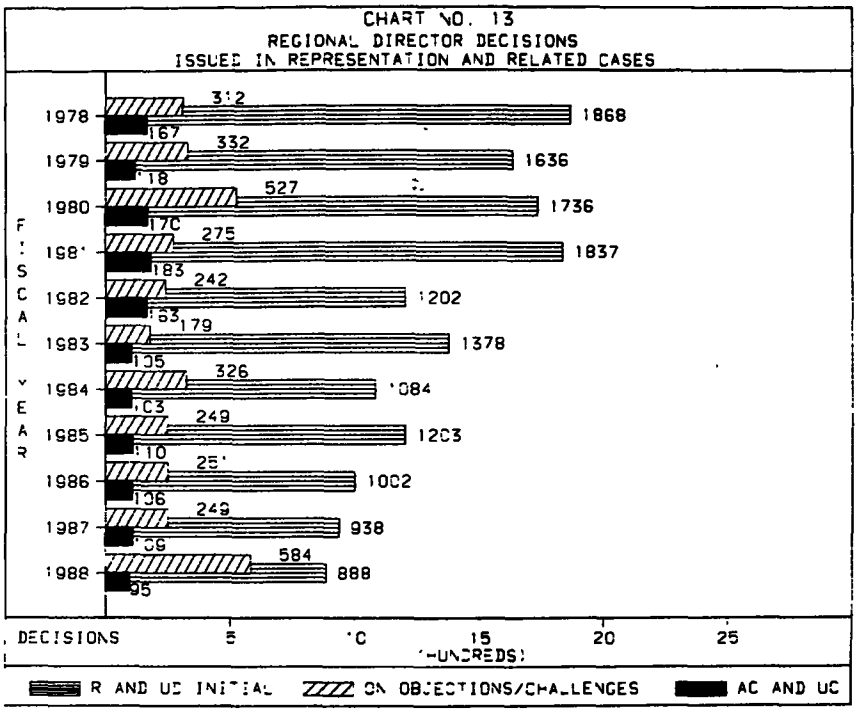


CHART NO 12
REPRESENTATION ELECTIONS CONDUCTED
(BASED ON CASES CLOSED DURING YEAR)
FISCAL YEAR
1978
8464
3791-46.0%
8240
1979
8249
3623-45.0%
8043
1980
8531
3744-45.7%
8198
1981
7780
3234-43.1%
7512
1982
5268
2084-40.3%
5116
1983
4533
1895-43.0%
4405
1984
4567
1861-42.0%
4436
1985
4722
1956-42.4%
4614
1986
4642
1951-43.2%
4520
1987
4259
1921-46.3%
4153
NUMBER
2,000
4,000
6,000
8,000
10,000
12,000
ALL ELECTIONS--THOSE RESULTING IN CERTIFICATION, THOSE RESULTING IN A RERUN OR RUNOFF ELECTION, AND THOSE IN WHICH PETITION WAS WITHDRAWN OR DISMISSED BEFORE CERTIFICATION
WON
ELECTIONS RESULTING IN CERTIFICATION



c. Contempt Actions

In fiscal 1988, 116 cases were referred to the contempt section for consideration of contempt action. There were 35 contempt proceedings instituted. There were 16 contempt adjudications awarded in favor of the Board; 3 cases in which the court directed compliance without adjudication; 2 cases in which the petition was withdrawn; and no cases in which the Board's petition was denied on the merits.

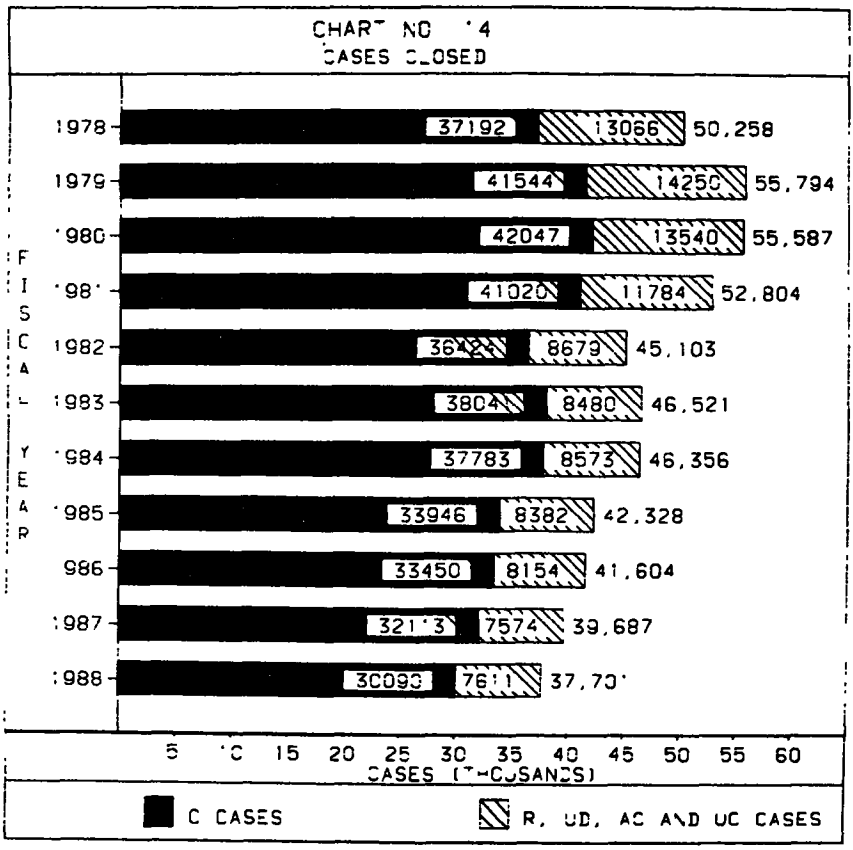
d. Miscellaneous Litigation

There were 43 additional cases involving miscellaneous litigation decided by appellate, district, and bankruptcy courts. The NLRB's position was upheld in 37 cases. (Table 21.)

e. Injunction Activity

The NLRB sought injunctions pursuant to Sections 10(j) and 10(l) in 69 petitions filed with the U.S. district courts, compared with 83 in fiscal 1987. (Table 20.) Injunctions were granted in 25, or 76 percent, of the 33 cases litigated to final order.

NLRB injunction activity in district courts in 1988:



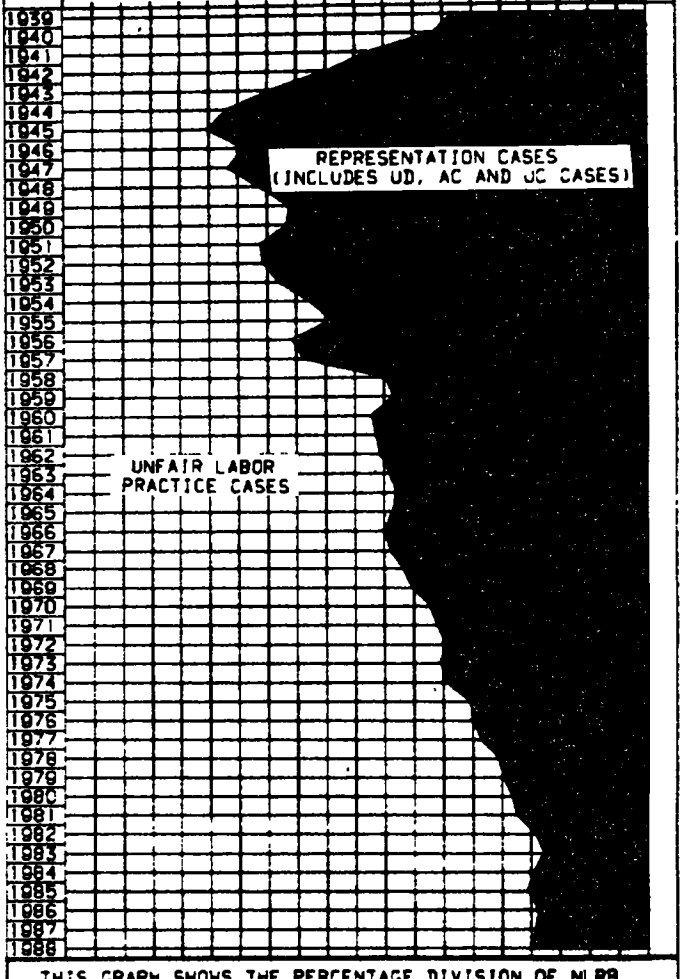
Granted	25
Denied	8
Withdrawn	2
Dismissed	4
Settled or placed on court's inactive lists	48
Awaiting action at end of fiscal year	5

C. Decisional Highlights

In the course of the Board's administration of the Act during the report period, it was required to consider and resolve complex problems arising from the great variety of factual patterns in the many cases reaching it. In some cases, new developments in industrial relations, as presented by the factual situation, required the Board's accommodation of established principles to those developments. Chapter II on "NLRB Jurisdiction," Chapter III on

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 FISCAL YEARS 1939-1988.

"NLRB Procedure," Chapter IV on "Representation Proceedings," and Chapter V on "Unfair Labor Practices" discuss some of the more significant decisions of the Board during the report period. The following summarizes briefly six of the decisions establishing or reexamining basic principles in significant areas.

1. Jurisdiction Over Foreign-Run Nonprofit Center

In *Goethe House New York,*[1] the Board asserted jurisdiction over a nonprofit cultural center sponsored and funded by the Federal Republic of Germany. The Board found that the employer did not come within any of the express exclusions defined in Section 2(2) of the Act and that certain cases dealing with foreign flagships were inapplicable because they dealt with disputes among foreign nationals on ships only temporarily within the territorial United States. Accordingly, the Board possessed statutory jurisdiction over the employer. The Board further concluded, as in *State Bank of India I,*[2] that it should not exercise its discretion to decline jurisdiction over an entity that was "an agency or instrumentality" of a foreign state where, as here, the employer is otherwise engaged in commerce within the meaning of the Act. In so holding, the Board expanded on *State Bank of India I*'s conclusion that the Foreign Services Immunities Act of 1976 (FSIA) was inapplicable, finding that the legislative history of the FSIA specifically stated that the employment of persons other than citizens of the sponsoring foreign government was not to be considered public or governmental activity.

2. Effect of Settlement Agreements

In *Independent Stave Co.,*[3] the Board, examining the standards to be applied in reviewing settlements, overruled the approach taken by the majority in *Clear Haven Nursing Home.*[4] The Board reasoned that the *Clear Haven* majority improperly presumed, as a predicate to examining the reasonableness of a settlement, that the General Counsel would prevail on every violation alleged in the complaint and that, therefore, the settlement must substantially remedy each and every such allegation. Instead, the Board adopted a more hospitable approach under which settlements will be evaluated in light of all the circumstances of the case including, but not limited to: (a) whether all parties have agreed to be bound; (b) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (c) whether the settlement was the product of fraud, coercion, or duress; and (d) whether the respondent had a history of violations or breaches of previous settlement agreements.

---

[1] 288 NLRB No. 29.
[2] 229 NLRB 838 (1977)
[3] 287 NLRB No. 76.
[4] 236 NLRB 853 (1978).

3. Investigatory Interview in Nonunion Setting

In *E. I. duPont & Co.*,[5] the Board concluded that employees in a nonunion setting may be discharged for refusing to submit to an investigatory interview without the presence of a fellow employee. It has long been established that employees in a unionized setting do have the right to request union representation at such an interview.[6] However, the Court in *Weingarten* specifically noted that the presence of a union representative at an investigatory interview served not only to protect the individual employee's rights "but also the interests of the entire bargaining unit" as well as the employer's interest in "getting to the bottom of the incident."[7] In the nonunion setting, however, the Board noted that these objectives were either much less likely to be achieved or were irrelevant. Thus, in the nonunion setting the presence of a fellow employee provides no assurance that the interests of the group as a whole will be safeguarded. And, while a fellow employee may be able to offer some assistance, it is far less likely that such an employee will possess the skills of a union representative in "eliciting favorable facts, and sav[ing] the employer production time."[8]

4. Access to Employer Premises

In *Jean Country*,[9] the Board clarified its approach in cases involving access to an employer's premises, overruling *Fairmont Hotel*[10] to the extent inconsistent with *Jean Country*. In *Fairmont*, the Board had established a test under which the strength of the Section 7 right to access would be balanced against the strength of the property right involved. If the rights were deemed relatively equal in strength, the existence of effective alternative means of communication would then become determinative. In *Jean Country* the Board concluded that the availability of reasonable alternative means of access is a factor that must be considered in every case, for the Board now views that as a factor that is "especially significant" in examining "the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted."

5. Peaceful Handbilling and Nonpicketing Publicity

In *Steelworkers (Pet, Inc.)*,[11] the Board applied the Supreme Court's holding in *DeBartolo Corp. v. Florida Gulf Coast Building*

[5] 289 NLRB No. 81.
[6] *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).
[7] Id. at 260–261, 263.
[8] Id. at 263.
[9] 291 NLRB No. 4.
[10] 282 NLRB 139 (1986).
[11] 288 NLRB No. 133.

Trades Council[12] that Section 8(b)(4)(ii)(B) does not proscribe peaceful handbilling and other nonpicketing publicity urging a total consumer boycott of neutral employers. Pet, Inc. is a large, diversified conglomerate with 27 operating divisions. Hussman Refrigeration Company, a wholly owned subsidiary of Pet, was being struck by the union in support of the union's economic bargaining demands. In aid of that strike, the union called for a "national boycott" of the products and services of all of Pet's divisions and subsidiaries. The union thereafter advertised in newspapers and distributed handbills advising the public of the strike against Hussman and of Hussman's relationship to Pet, Inc., and urged the public to join the boycott and to refuse to buy any of 17 named products of Pet. The Board concluded that even if Pet and its subsidiaries were neutrals for purposes of Section 8(b)(4), the union did not engage in prohibited conduct. Thus, the union's message was communicated through the media and by handbilling of the same nature as that conducted in *DeBartolo* unaccompanied by any violence, picketing, or patrolling. Moreover, the union's publicity truthfully revealed the existence of a labor dispute and asked for no more than that customers of the alleged neutrals not patronize Pet or its divisions or subsidiaries. Therefore, the union's appeals were not coercive and did not violate Section 8(b)(4).

6. Liability for Discriminatory Hiring Hall

In *Wolf Trap Foundation*,[13] the Board announced a new policy of finding employers jointly and severally liable for a union's discriminatory operation of a hiring hall only if they know or can be reasonably charged with notice of the union's discrimination. Previously, the Board had held employer's strictly liable for such conduct without regard to whether they had knowledge, actual or constructive, of the union's discriminatory conduct.

[12] 108 S.Ct. 1392 (1988).
[13] 287 NLRB No. 103.

D. Financial Statement

The obligations and expenditures of the National Labor Relations Board for the fiscal year ended September 30, 1988, are as follows:

Personnel compensation[14]	$91,339,811
Personnel benefits	12,868,418
Benefits for former personnel	15,844
Travel and transportation of persons	2,936,152
Transportation of things	130,147
Rent, communications, and utilities	19,042,095
Printing and reproduction	266,351
Other services	4,121,120
Supplies and materials	1,147,959
Equipment	718,509
Insurance claims and indemnities	106,042
Total obligations and expenditures	$132,692,448

[14] Includes $305,000 for reimbursables.

II

NLRB Jurisdiction

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 when 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 had 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. Sovereign Immunity Claim

In *Goethe House New York,*[6] the Board asserted jurisdiction over an employer that operates a nonprofit center for cultural,

---

[1] See Secs. 9(c) and 10(a) of the Act and also the definitions of "commerce" and "affecting commerce" set forth in Secs. 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 (Pub. L. 93-360, 88 Stat. 395, effective Aug. 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[s]," are now included in the definition of "health care institutions" 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] Although 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 when 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), concerning the treatment of local public utilities.

[6] 288 NLRB No. 29 (Chairman Stephens and Members Babson and Cracraft).

educational, and informational exchange sponsored and funded by the Federal Republic of Germany.

The petitioner sought to represent all employees who were not German nationals.[7] With respect to issues of statutory jurisdiction, the Board first determined, based on the stipulated facts, that the employer's funding from the Federal Republic met the Section 2(6) test of commerce between "any foreign country and any State" and that its amount demonstrated a substantial effect on commerce. Secondly, the Board discussed congressional intent regarding coverage of foreign instrumentalities as employers. The Board found that the employer did not come within any express exclusion defined in Section 2(2) of the Act.[8] In response to the employer's argument that it was engaged in diplomatic activities that took it outside the reach of the Act, the Board concluded, as it did in *State Bank of India I*, that certain Supreme Court cases dealing with foreign flagships[9] did not apply because they were limited to disputes among foreign nationals occurring on ships only temporarily within the territorial United States.[10]

Having determined that it had statutory jurisdiction over the employer, the Board addressed the employer's claim that the exercise of the Board's discretionary jurisdiction was inconsistent with the intent of the Foreign Sovereign Immunities Act of 1976 (FSIA).[11] The Board decided to continue to follow *State Bank of India I* in resolving sovereign immunity claims against an employer that is "an agency or instrumentality" of a foreign state when that employer is otherwise engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The Board also expanded on *State Bank of India I*'s discussion of the legislative history of the FSIA with respect to congressional intent to deny sovereign immunity to a foreign state's private or commercial acts occurring within the United States. In particular, the Board found that the immunity did not extend to certain labor disputes involving foreign government employers. The history states that the employment of "laborers, clerical staff or public relations or marketing agents" is included within "commercial activity" and

[7] Employees of the employer who were German citizens were represented for collective-bargaining purposes by a German union under German law.

[8] See *State Bank of India*, 229 NLRB 833 (1977) (*State Bank of India I*). The Board relied on this case in deciding *State Bank of India*, 273 NLRB 264 (1984) and 273 NLRB 267 (1984), enfd. 808 F.2d 526 (7th Cir. 1986) (*State Bank of India II*).

[9] *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138 (1957), and *McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10 (1963). The Court declined to construe the Act as extending to the internal operations of foreign flagships employing alien seamen only temporarily located in the United States.

[10] The Board noted that the court of appeals enforcing *State Bank of India II* relied on another case regarding the Board's jurisdiction over a foreign flagship, *Longshoremen ILA Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195 (1970). In that case, the Court limited *Benz* and *McCulloch* to their facts in holding that a dispute centering on American longshoremen on American docks was outside the internal operations of the ship and, accordingly, was within the Board's jurisdiction. The Board stated that *Ariadne* lent further support to its decisions in *State Bank of India I* and *II* and to its holding in this proceeding where the activities of the employer over which it had been requested to assert jurisdiction occurred solely within the territory of the United States.

[11] 28 U.S.C. § 1602 et seq.

that the employment of "American citizens or third country nationals by the foreign state in the United States" will not be considered public or governmental activity.

Because the employees for whom the petitioner had filed a representation petition were mostly in clerical or maintenance positions and either "Americans or third country nationals," they fit almost exactly within these examples of nonexempt commercial activity under the FSIA. Accordingly, the Board found that the employer is not entitled to sovereign immunity for the commercial activity of employing the employees at issue.

In asserting jurisdiction over the employer, the Board concluded that its determination of the sovereign immunity claim was made in conformance with the FSIA and effectuated the policies of both the Act and the FSIA.

B. Church-Owned College

In *Livingstone College*,[12] a Board majority concluded that asserting jurisdiction over a 4-year, church-owned liberal arts college would not create the same significant risk of entanglement between church and state as that envisioned by the Supreme Court in *NLRB v. Catholic Bishop of Chicago*.[13] Further, in reversing the Acting Regional Director, the majority found that, under the standards established by the Supreme Court in *NLRB v. Yeshiva University*,[14] the college's faculty members were managerial employees excluded from the protection of the Act, and therefore dismissed the representation petition.

The Board began by examining the church's role in the day-to-day administration of the college and the faculty's role in effectuating the policies of the church. Specifically, the majority found that although the church owned the college's property, provided financial support for the college, and appointed bishops of the church to one-half of the seats on the board of trustees, and although the students were required to take two courses in religious studies, asserting jurisdiction did not pose a significant risk of infringement on first amendment rights.

The majority based its conclusion on the fact that the college had a secular purpose, the board of trustees promulgated rules providing for academic freedom, faculty members were not required to propagate or conform to a particular religious faith, and there was no evidence that the church could require dismissal of faculty members who inculcated ideas contrary to the church's position, all of which significantly diminished the risk of infringement on first amendment rights. The majority distinguished *St. Joseph's College*,[15] in which the Board's assertion of

[12] 286 NLRB No. 124 (Members Babson, Stephens, and Cracraft; Chairman Dotson dissenting; Member Johansen concurring in part and dissenting in part).

[13] 440 U.S. 490 (1979).

[14] 444 U.S. 672 (1980).

[15] 282 NLRB 65 (1986).

jurisdiction presented a substantial likelihood of infringement on first amendment rights particularly because the Bishop had the authority to remove faculty members if their conduct was not in harmony with Catholic beliefs, and faculty were prohibited from knowingly inculcating ideas contrary to the position of the church.

Chairman Dotson, dissenting, believed that the administrative control exercised by the church, the financial dependence on the church, the church sponsorship, and the encouragement of Christian values through mandatory religious study and the overall atmosphere required a finding that the college was church-controlled and, therefore, he would have declined to assert jurisdiction.

The Board then examined the college's decision-making processes and concluded that the faculty members at Livingstone College played a major and effective role in formulating and effectuating policies affecting primary areas identified as characteristic of managerial employees in *Yeshiva.*

The majority found that by virtue of their presence on the curriculum catalog committee and other committees and the facultywide vote necessary before implementing any recommendations from these committees, the faculty members exercised substantial authority with respect to curriculum, degree requirements, graduation requirements, matriculation standards, and scholarship recipients, and they had established major fields of study, modified course requirements, added and deleted course offerings, and set course content, course descriptions, and course schedules. In particular, the majority noted that most of the recommendations made by the committees and approved by the faculty were implemented without prior approval from the administration, and there was no evidence that the administration had ever countermanded faculty decisions.

On the other hand, the majority found that only department and division heads had any authority in nonacademic matters such as hiring, firing, promotion, and salary increases, and that the faculty had virtually no input into the budget process, tenure decisions, and setting of tuition. Nevertheless, the majority stated that "we do not believe that lack of participation in these matters precludes a finding that the faculty are managerial employees." The majority noted that the Supreme Court in YESHIVA did not rely primarily on faculty authority in matters of hiring, firing, and related areas in finding the faculty to be managerial employees.

Member Johansen, dissenting in part, concluded that the majority erred in according only limited significance to the faculty's authority in nonacademic matters, as the Board analyzes faculty control in both academic and nonacademic areas in determining managerial status. Member Johansen, guided by *Yeshiva*, would have found the faculty to be nonmanagerial based on their lack

of participation in decisions relating to hiring, firing, promotion, tenure, and salary increases and their less than absolute academic control.

Member Johansen concurred in the assertion of jurisdiction.

C. Social Service Organization

In *United Way of Howard County*,[16] the Board, on review of a preelection determination, affirmed the Regional Director's conclusion that jurisdiction should be asserted over the employer. The employer, a nonprofit corporation, was engaged in the solicitation, collection, and distribution of funds in connection with its assessment of social service needs and its development of financial resources for community social services. The employer's annual revenues exceeded $1.3 million and it received over $150,000 annually in contributions from out-of-state sources.

The majority applied the Board's newly established *Hispanic Federation* jurisdictional standard, which set a $250,000 annual revenues minimum for all social service organizations not specifically covered by previously established jurisdictional standards.[17] The Board majority, finding that the employer was a social service organization not specifically covered by previous standards and that its annual revenues clearly exceeded the *Hispanic Federation* standard, concluded that it was appropriate to assert jurisdiction.

Member Johansen dissented, taking the view that the evidence was insufficient for application of the *Hispanic Federation* standard to this particular employer.

---

[16] 287 NLRB No. 98 (Members Babson, Stephens, and Cracraft; Member Johansen dissenting).

[17] *Hispanic Federation for Development*, 284 NLRB No. 50, slip op. at 6 (June 26, 1987).

III

NLRB Procedure

A. Timeliness

1. Unfair Labor Practice Allegations

In *Redd-I, Inc.*,[1] the Board majority found, inter alia, that an untimely allegation that is factually and legally related to the allegation(s) of a timely charge may be litigated, notwithstanding that another charge encompassing the untimely allegation has been withdrawn or dismissed.

The pertinent facts of *Redd-I, Inc.* are as follows. The employer discharged employee Don Kelley on August 19, 1985. Kelley was named as an alleged discriminatee, along with eight other employees, in a charge filed on September 30, 1985. This charge was withdrawn on November 14, 1985. On January 6, 1986, a charge was filed alleging that the employer violated Section 8(a)(1) and (3) of the Act by terminating the employment of all the employees named in the September charge with the exception of Kelley.[2] This charge was amended on March 3, 1986, to include seven additional employees who were also laid off on August 15, 1985. On May 6, 1986, the charging party requested that the charge be amended further to include Kelley's name. The General Counsel moved at the hearing to amend the complaint to include an allegation concerning Kelley's discharge. Relying on *Winer Motors*,[3] the administrative law judge denied the General Counsel's motion at the hearing and also denied the General Counsel's posthearing request that he reconsider his ruling on the motion to amend.

The Board majority found that the allegation concerning Kelley's discharge was not barred under Section 10(b) of the Act because the discharge occurred within 6 months of a timely filed charge and because it appeared to be closely related to the allegations of that charge. In analyzing the circumstances, the majority applied a traditional Board test to determine whether Kelley's discharge was factually and legally related to the allegations of the timely filed charge, without regard to the withdrawn Sep-

[1] 290 NLRB No. 140 (Members Johansen and Cracraft; Chairman Stephens dissenting in part).

[2] Seven of the employees were laid off on August 15, 1985, and one employee was discharged on September 20, 1985.

[3] 265 NLRB 1457 (1982).

tember 30, 1985 charge. The majority looked at whether the allegation concerning Kelley's discharge was of the same class as the violations alleged in the timely filed charge, whether Kelley's discharge arose from the same factual situation or sequence of events as the allegations in the pending timely charge, and whether the respondent would raise the same or similar defenses to both allegations. The majority concluded that the evidence was insufficient to determine whether Kelley's discharge was closely related to the discharge and layoff allegations of the timely filed January 6, 1986 charge. Therefore, the allegation concerning Kelley's discharge was remanded to the judge for further evidence and findings on the merits and whether all the 8(a)(3) allegations were closely related.

The majority also found that neither *Winer Motors* nor *Ducane Heating Corp.*[4] applied in these circumstances because neither of those cases involved an attempt to add closely related allegations to a pending charge, but instead involved attempts to reinstate dead allegations. Thus, the majority found it irrelevant that an earlier charge had been withdrawn or dismissed.

Contrary to the majority, Chairman Stephens, dissenting in part, expressed the view that the Board could not simply ignore the dismissal or withdrawal of a charge if it was not later refiled within the 10(b) period. If there was no timely refiling, the Chairman would first determine whether the "relation back" doctrine would permit the belated addition of the particular allegation if it had never been filed during the 10(b) period. If the answer to this question is yes, then Chairman Stephens would consider whether the original filing and withdrawal of the charge would have misled the respondent into believing that it would not have to litigate the merits of the allegation in a Board proceeding and therefore not preserve evidence generally relevant to the events concerned in that charge.[5]

Applying this test to the facts of the case, Chairman Stephens stated that the allegation concerning Kelley's discharge might have been fairly added to the January 6, 1986 charge if it had not been previously filed and then withdrawn. However, the Chairman found that the withdrawal of the September 30, 1985 charge would have reasonably led the employer to believe, at the end of the 10(b) period, that there was no possibility that it would be called on to defend against an allegation that Kelley's discharge violated the Act. Accordingly, Chairman Stephens would have dismissed the allegation concerning Kelley's discharge.

---

[4] 273 NLRB 1389 (1985).

[5] The majority noted at fn. 12 that the complaint, and not the charge, gives notice to the employer of specific claims made against it. Chairman Stephens acknowledged the significant difference between a charge and a complaint, but disagreed with the notion that a charge has no notice function at all.

2. Election Objections

Effective September 29, 1986, the Board revised its Rules and Regulations regarding the time periods in which to file documents with the Board, including the filing of election objections. The revised rules specifically provide that objections, as well as certain other documents, "must be received on or before the close of business of the last day for filing."[6] The explanatory note that accompanied the revised rules specifically stated that the effect of the revised rules regarding the filing of objections was to overrule the Board's then-established practice as articulated in *Rio de Oro Uranium Mines*, 119 NLRB 153 (1957), which treated as timely objections postmarked before the due date.

In *Drum Lithographers*,[7] the election was held on the Wednesday before Thanksgiving. The objections, although postmarked on the following Monday, the first workday following the election, were not received in the Regional Office until Thursday, 1 day after the due date. The Regional Director rejected the objections as untimely, and the Board majority sustained the Regional Director's decision that the revised rule "would be strictly applied, and that election objections now must actually be received in the Regional Office on the due date."

Member Cracraft, dissenting, would have treated the objections as timely on the grounds that she would amend the rules to provide an extension of the filing period when there is an intervening holiday and to codify the *Rio de Oro* principle "under which . . . there is little risk of anyone's rights being prejudiced."

3. Supporting Evidence

In *Star Video Entertainment*,[8] the Board certified the election results in light of the petitioning union's failure to submit timely evidence in support of its objections. The union had filed timely objections following an election held May 13, 1988. The Regional Director, by letter dated May 20, 1988, notified the union that supporting evidence must be submitted in accordance with Section 102.69(a) of the Board's Rules ("Within 7 days after the filing of objections, or such additional time as the Regional Director may allow"), and that the deadline was May 26, 1988. In his Report on Objections, although noting that the union submitted evidence on June 2, 1988, the Regional Director recommended overruling the objections for failure to proffer timely evidence. In exceptions to the Regional Director's report, the union's counsel noted that on May 27, 1988, a Board agent granted an additional 48 hours for the submission of names and ad-

[6] NLRB Rules and Regulations, Sec. 102.111(b).

[7] 287 NLRB No. 15 (Chairman Dotson and Members Johansen, Babson, and Stephens; Member Cracraft dissenting).

[8] 290 NLRB No. 119 (Chairman Stephens and Members Johansen and Cracraft).

dresses of witnesses and set aside June 3, 1988, for the taking of affidavits.

Although acknowledging a misunderstanding by the union regarding the time for submission of names and addresses of witnesses, the union's counsel argued that affidavits should have been taken. The Board noted, however, that as of September 29, 1986, when it revised its rules governing the time period for filing documents, it had put all parties on notice in the Federal Register that the new rules would be strictly applied. The Board further found the union's argument that the Regional Director mechanically applied the Board's Rules particularly unpersuasive in light of the extension of time granted by the Board agent.[9]

B. Procedurally Deficient Answer

In *Scotch & Sirloin Restaurant*,[10] the Board addressed the issue of the sufficiency of the respondents' answer to a backpay specification. The Board found the initial answer procedurally insufficient on the grounds that it was not sworn to by the respondents or their attorney and did not provide the post office addresses of the respondents,[11] but found a subsequent sworn declaration by the respondents' attorney that restated the "essential contents" of the initial answer and provided an "adequate" explanation for using the attorney's post office address sufficient to cure the defects of the initial answer. The Board overruled *Victoria Medical Group*,[12] however, to the extent that it found a procedurally deficient answer, by itself, sufficient to withstand a motion to strike the respondent's answer in its entirety.

Following a controversy over the amount of backpay due under a court-enforced Board Order, the Regional Director issued an amended backpay specification alleging the amounts of backpay due the discriminatees. The respondents filed an answer consisting of unnumbered paragraphs that did not correspond to the allegations of the specification. The answer was not sworn to and did not provide the addresses of the respondents. It alleged, inter alia, that respondent J&F, which had not been a named party to the unfair labor practice proceeding, was not associated with the restaurant at which the unfair labor practices had occurred.

In a motion to strike the respondents' answer and for summary judgment, the General Counsel alleged that the answer failed to conform to the procedural and substantive requirements of Sec-

[9] In this regard, the Board found it obvious that the timely submission of names and addresses of witnesses was a prerequisite to the taking of affidavits.

[10] 287 NLRB No. 143 (Chairman Stephens and Members Johansen, Babson, and Cracraft).

[11] Sec. 102.54(b) of the Board's Rules and Regulations requires:

> The answer to the specification shall be in writing, the original being signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed, and shall contain the post office address of the respondent.

[12] 274 NLRB 1006 (1985).

tion 102.54(b) and (c) of the Board's Rules and Regulations. The case was transferred to the Board and the respondents failed to respond to the Notice to Show Cause why the General Counsel's motion should not be granted. Subsequently, however, the respondents' attorney filed an opposition to the motion with a declaration made "under penalty of perjury within . . . [the] State of California."

Although finding that the respondents' initial answer by itself was procedurally deficient, the Board found that the respondents' attorney's declaration was sufficient to remedy the answer's procedural defects because it "provided the equivalent of a sworn answer with power of attorney and offered an adequate explanation of why" the respondents' attorney's address would suffice. The Board noted other cases in which it had treated attempts to cure the procedural defects of an initial answer to a backpay specification as a "timely amended answer."[13] The Board also noted its practice of liberally interpreting the Board's Rules where appropriate to "effectuate the purposes of the Act." Thus, although overruling *Victoria Medical Group* to the extent noted above, the Board denied the General Counsel's motion to strike the answer in its entirety for procedural deficiencies.

The Board, however, found the respondents' answer substantively deficient, with the exception of the respondents' general denial of the single employer status issue, in that it failed to specifically deny those compliance matters within the respondents' knowledge. Regarding the alleged single-employer status of the respondents, the Board relied on the principle in *Beach Branch Coal Co.*[14] that a general denial of single employer status is sufficient to require a hearing when a respondent named in the compliance proceeding was not made a party to the unfair labor practice proceeding.

C. Attorney-Client Privilege

In *Patrick Cudahy, Inc.*,[15] the outstanding complaint alleged, inter alia, that the employer had entered contract negotiations with an intent not to reach agreement with the union, having calculated that its proposals and positions would cause a strike and that it could hire striker replacements and displace the union as a viable bargaining agent. Prior to the trial, the General Counsel subpoenaed the employer's records, including bargaining notes, proposals, letters, memoranda, and strategies, relating to the employer's contract negotiations for a successor agreement with the union. Some of these documents had apparently come into the possession of the employer's parent corporation because one of

[13] See *Howard R. Singer Legal Services*, 278 NLRB 902, 903 (1986), and *Standard Materials*, 252 NLRB 679, 680 (1980).

[14] 269 NLRB 536, 537 (1984).

[15] 288 NLRB No. 107 (Chairman Stephens and Members Johansen, Babson, and Cracraft).

its employees had received these documents while serving as a director and former president of the employer. The employer and its parent corporation separately filed a petition to revoke the General Counsel's subpoenas to the extent they requested privileged communications between the employer and its law firm. In response, the General Counsel argued that the requested documents were not privileged because they reflected business advice as opposed to legal advice. The administrative law judge agreed with the General Counsel's position and ruled that the documents should be produced.

On review of the judge's ruling, the Board examined the scope of the attorney-client privilege that essentially prevents compelled disclosure of a document if it constitutes a communication made in confidence to an attorney by a client for the purpose of seeking or obtaining legal advice. The Board found, contrary to the judge, that the attorney-client privilege encompasses the advice rendered to the employer by its law firm in the course of helping it prepare for and conduct contract negotiations. In doing so, the Board rejected the General Counsel's invitation to broadly exclude attorney-client communications from the privilege on the ground that business and economic considerations are also present. The Board specifically recognized that labor law policy supports such a result when the legal advice relates to collective bargaining.

The Board also reversed the judge's alternative ruling that, even assuming the application of the attorney-client privilege, the subpoenaed documents must be produced because they come within the crime-fraud exception to the privilege. The Board initially observed that violations of the NLRA cannot come within the crime part of the crime-fraud exception. Then the Board stated that it was unwilling to find that the crime-fraud exception extends to unfair labor practices generally or to the specific 8(a)(5) complaint allegation pending. The Board specifically rejected an earlier position taken by a prior Board in *NLRB v. Harvey*[16] that a violation of the NLRA comes within the crime-fraud exception to the attorney-client privilege.

D. Effect of Settlement Agreements

In *Independent Stave Co.*,[17] the Board addressed the issue of the test to be applied by the Board in reviewing settlements. After reviewing the majority and dissenting opinions in *Clear Haven Nursing Home*,[18] the Board found, in agreement with the dissenters, that the majority's presumption that the General Counsel would prevail on every violation alleged in the complaint, coupled with their requirement that the settlement agree-

[16] 349 F.2d 900 (4th Cir. 1965).
[17] 287 NLRB No. 76 (Chairman Dotson and Members Johansen, Babson, Stephens, and Cracraft).
[18] 236 NLRB 853 (1978).

ment must substantially remedy *every* violation alleged, "went beyond using the remedy for the alleged violations as a benchmark by which to evaluate the reasonableness of the settlement."

The Board, overruling *Clear Haven*, rejected

> the limited approach to settlement agreements set forth in *Clear Haven* in favor of an expanded approach which will evaluate the settlement in light of all factors present in the case to determine whether it will effectuate the purposes and policies of the Act to give effect to the settlement.

In this regard, the Board stated that it will

> examine all the surrounding circumstances including, but not limited to, (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

Examining the settlements in this case in light of these factors, the Board approved the agreements. The Board noted that the three discriminatees, who were also the charging parties, the respondent, and the union all approved the settlements, and the case was settled 10 days after issuance of the complaint. Viewing the settlements against the customary risks inherent in any litigation and in light of the early stage of the proceedings and the nature of the allegations, the Board found the settlements to be reasonable. Noting also that there was no evidence of fraud, coercion, or duress or of prior violations or breaches of prior agreements committed by the respondent, the Board concluded that "honoring the parties' agreements advances the Act's purpose of encouraging voluntary dispute resolution, promoting industrial peace, conserving the resources of the Board, and serving the public interest."

In *American Pacific Concrete Pipe Co.*,[19] the Board considered whether a settlement agreement waiving an employee's backpay claim barred further litigation on the backpay issue.

The affected employee, the company, and the union executed an agreement providing that the respondent would pay the employee $20,000 in return for a waiver of the backpay claim. The General Counsel refused to approve the agreement and, in a subsequent backpay specification proceeding, the administrative law

[19] 290 NLRB No. 77 (Members Johansen, Babson, and Cracraft; Chairman Stephens concurring in the result).

judge awarded additional backpay. The judge relied on *Michael M. Schaefer,*[20] which held that backpay is a public rather than a private right, and only the Board or a Regional Director may settle it. For that reason the judge rejected the company's accord-and-satisfaction defense.

The Board reversed. The Board observed that in evaluating non-Board settlements it would follow *Independent Stave Co.,*[21] which subjects such settlements to an examination of all the surrounding circumstances, including whether all the parties and the discriminatee had agreed to be bound; the General Counsel's position on the settlement; whether the settlement was reasonable in view of the alleged violation, litigation risks, and the stage of litigation; whether fraud, coercion, or duress were present; and whether the respondent had previously violated the Act or breached previous settlement agreements.

Noting that the company's liability had been established and that the only issue was the amount of backpay, the Board concluded that backpay litigation nonetheless involves risks and uncertainties, and that, if a discriminatee prevails on all the particulars of his claim, he may have to wait years to receive backpay and even then may receive less than his full claim if in the interim the respondent's business has declined.

The Board concluded that the settlement agreement met the *Independent Stave* standard. The charging party, the respondent, and the discriminatee agreed to be bound. The agreement was entered into before the backpay hearing began, and was reasonable in light of the inherent risks of litigation. The discriminatee was not coerced into waiving his backpay claim, and there were no other circumstances, such as a history of violations or of breached settlement agreements, that might cause the Board to question the settlement.

Accordingly, the Board held that honoring the settlement advanced the Act's purpose of encouraging dispute resolution, and that public policy would not be served by adjudicating the merits of the backpay claim. The Board overruled *Michael M. Schaefer,* supra, and *Stevens Ford*[22] to the extent they are inconsistent with its ruling.

E. Entitlement to Hearing

In *Longshoremen ILWU Local 6 (Golden Grain),*[23] the Board denied the General Counsel's Motion for Summary Judgment and remanded this 8(b)(4)(D) case for a hearing. The Board found that the pleadings and submissions of the parties raised issues that could best be resolved by a hearing.

---

[20] 261 NLRB 272 (1982), enfd. 697 F.2d 558 (3d Cir. 1983).
[21] 287 NLRB No. 76.
[22] 271 NLRB 628 (1983).
[23] 289 NLRB No. 4 (Chairman Stephens and Members Johansen, Babson, and Cracraft).

The Board held that an 8(b)(4)(D) proceeding, unlike a 10(k) proceeding, is an adjudicatory proceeding required to be conducted pursuant to the Administrative Procedure Act, 5 U.S.C. § 554. Therefore, when a 10(k) determination does not end the work dispute, the proceeding becomes adjudicatory following the issuance of an unfair labor practice complaint. At that point, if a genuine issue of material fact exists as to whether an unfair labor practice has occurred, a hearing before an administrative law judge is required, even if the issue was previously litigated in the underlying 10(k) proceeding. A genuine issue of material fact exists when there are credibility issues to be resolved or when a respondent denies the existence of an element of the 8(b)(4)(D) violation, either directly or by raising an affirmative defense. An 8(b)(4)(D) respondent is not required to proffer new and previously unavailable evidence to be entitled to a hearing. The Board overruled prior Board cases to the extent they suggest that a respondent in an 8(b)(4)(D) proceeding is not entitled to relitigate factual issues concerning the elements of the 8(b)(4)(D) violation that were raised in an underlying 10(k) proceeding unless it presents new or previously unavailable evidence. The Board stated that it will not, however, relitigate threshold matters that are not necessary to prove an 8(b)(4)(D) violation.

In this case, the respondent's work-preservation defense was a mixed question of fact and law relating to the alleged illegal object of the conduct. Thus, the respondent demonstrated the existence of a material fact regarding the elements of the alleged 8(b)(4)(D) violation and a hearing was required.

The Board also noted that the refusal to promise compliance with a 10(k) determination does not serve as an independent basis for finding an 8(b)(4)(D) violation. Rather, noncompliance with the 10(k) determination serves as a triggering event for the issuance of a complaint. The Board overruled prior cases to the extent they were inconsistent.

Member Cracraft expressed no view as to what result she would have reached had the General Counsel's Motion for Summary Judgment been made and supported in conformity with Rule 56 of the Federal Rules of Civil Procedure.

F. Bar to Complaint

In *Purolator Products*,[24] the Board granted the employer's Motion for Summary Judgment, finding that the General Counsel's complaint was barred by prior litigation of the same issue. The complaint alleged that the respondent had violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the union based on a decertification petition obtained with the respondent's assistance. In the prior litigation, the General Counsel

[24] 289 NLRB No. 99 (Members Johansen, Babson, and Cracraft).

alleged that the withdrawal of recognition was unlawful, but stipulated that she did not contend that the respondent had aided or encouraged the decertification petition.

Relying on *Jefferson Chemical Co.*,[25] the Board rejected the General Counsel's attempt to relitigate the withdrawal-of-recognition issue on a theory she had previously disavowed. The Board stated that "'such multiple litigation of issues which should have been presented in the initial proceeding' is not permitted." The Board concluded that the instant complaint was based on events that were, or should have been, known to the General Counsel in the prior proceeding.

In a personal footnote, Member Cracraft added that the General Counsel had not shown by any admissible evidence that the instant case would fall outside the scope of *Jefferson Chemical Co.* In Member Cracraft's view, Federal Rule of Civil Procedure 56(e) required the General Counsel to support her allegation that the evidence underlying the complaint was unknown to the General Counsel and was not readily discoverable at the time of the prior litigation. Absent any supporting documentation, this bare allegation failed to raise a genuine issue of material fact.

G. Filing of Petition to Deauthorize

In *Rose Metal Products*,[26] the Board found that a statutory supervisor who was a member of the union, paid union dues, and voted in union elections could not file a deauthorization petition under Section 9(e) of the Act. The Board noted that this decision was consistent with previous decisions that precluded "a statutory supervisor from participating in matters that concern solely the relationship between the employees and their collective-bargaining representative."

The Board noted that this case was similar to a prior case, *Doak Aircraft Co.*,[27] in which the Board found that a statutory supervisor could not vote in a decertification election.

The Board examined the language in Section 9(c)(1)(A)[28] and (e)[29] and determined that Congress had not intended to include supervisors under the term "employees." Accordingly, the Board determined that the supervisor could not file the deauthorization petition and dismissed the petition.

---

[25] 200 NLRB 992 (1972).

[26] 289 NLRB No. 146 (Chairman Stephens and Members Johansen, Babson, and Cracraft).

[27] 107 NLRB 924 (1954).

[28] The pertinent part of the statue reads "Whenever a petition shall have been filed . . . (A) by an *employee* or group of employees" (emphasis added).

[29] The pertinent part of the statute reads "Upon the filing with the Board, by 30 per centum or more of the *employees* in a bargaining unit" (emphasis added).

IV

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 to 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, and other conditions of employment. The Act also empowers the Board to conduct elections to decertify incumbent bargaining agents that have been previously certified or that 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 representative were adapted to novel situations or reexamined in the light of changed circumstances.

A. Bars to Conduct of Elections

The Board, in the interest of promoting the stability of labor relations, will sometimes find that circumstances appropriately preclude the raising of a question concerning representation.

One such circumstance occurs under the Board's contract-bar rules. Under these rules, an election among employees currently covered by a valid collective-bargaining agreement may, with certain exceptions, be barred by an outstanding contract. Generally, these rules require that, to operate as a bar, the contract

must be in writing, properly executed, and binding on the parties; it also must be of definite duration and in effect for no more than 3 years; and, finally, it must contain substantive terms and conditions of employment and cannot otherwise be contrary to established policies of the Act.

In *Corporacion de Servicios Legales*,[1] the Board considered the question of whether a contract covering a combined unit of professional and nonprofessional employees could bar a petition to represent only the employer's professional employees, who had never had the opportunity to vote on whether they wanted to be included in a combined unit pursuant to Section 9(b)(1) of the Act.[2] The Board affirmed the Regional Director's conclusion that the then-existing collective-bargaining agreement between the employer and the intervenor, Union Independiente de Trabajadores de Servicios Legales, constituted a bar to the conduct of an election and that the petition therefore must be dismissed.

In finding that the contract barred the election petition in this case, the Regional Director had relied on the Board's decision in *Pennsylvania Power & Light Co.*[3] Thereafter, the petitioner, Union de Abogados de Servicios Legales de Puerto Rico, filed a timely request for review, maintaining that the contract could not bar its petition to represent only the employer's professional employees because those employees had not voted to be included in the combined unit, as provided for in Section 9(b)(1) of the Act.

In granting the petitioner's request, the Board expressed its concern that two recent decisions[4] "may have undermined the application of the contract-bar rule as applied to a mixed professional-nonprofessional unit where a separate professional unit is sought." However, after further review, it concluded that "a close reading" of those cases had shown that the holding of *Pennsylvania Power* "has not been so eclipsed."

First, the Board found that the facts of the instant case paralleled those in *Utah Power* only insofar as it was the professional employees in that case who sought to take themselves out of the mixed unit. It noted that although *Utah Power* authorizes the Board to entertain a decertification petition, as distinguished from a representation petition seeking a unit comprised only of professional employees, neither *Utah Power* nor *Wells Fargo* supports the proposition that a petition may be filed at any time, even during the term of a collective-bargaining agreement.

---

[1] 289 NLRB No. 79 (Chairman Stephens and Members Johansen and Babson).

[2] See *Sonotone Corp.*, 90 NLRB 1236 (1950). A *Sonotone* self-determination election carries out the statutory requirement of Sec. 9(b)(1) by asking the professional employees (1) whether they desire to be included in a group composed of nonprofessional employees; and (2) their choice with respect to a bargaining representative. If the majority of the professionals vote "yes" on inclusion, their votes are counted with those of the nonprofessionals; if the majority vote "no," their votes are counted separately to determine which labor organization, if any, they want to represent them in a separate unit.

[3] 122 NLRB 293 (1958), reaffd. in *Retail Clerks Local 324 (Vincent Drugs)*, 144 NLRB 1247 (1963).

[4] See *Wells Fargo Corp*, 270 NLRB 787 (1984), affd. sub nom. *Teamsters Local 807 v. NLRB*, 755 F.2d 5 (2d Cir. 1985), and *Utah Power & Light Co.*, 258 NLRB 1059 (1981).

Further, the Board noted that finding contract-bar principles inapplicable to the present case would be contrary to the Board's general approach toward employers' voluntary recognition of collective-bargaining representatives. "In a mixed unit of professional and nonprofessional employees, as with most other units, an employer under the general rules of voluntary recognition need only be satisfied that the union has the majority support of the entire unit," stated the Board. Moreover, as was explained in *Vincent Drugs*, "the legislative history of Section 9(b)(1) does not demonstrate an outright hostility to voluntarily recognized mixed units." The Board concluded that neither *Utah Power* nor *Wells Fargo* presented any new evidence to impeach this earlier interpretation.

Finally, the Board noted that the employer and the intervenor had had successive collective-bargaining agreements since 1977, and that there were legally recognized opportunities during the window periods in 1980 and again in 1983 in which to file a timely petition. Because there was no evidence to suggest that the professional employees had been precluded from availing themselves of those opportunities, the Board concluded that it was not unreasonable to defer the exercise of the professional employees' right of self-determination until the end of the then-current contract.

In *Georgia Kaolin Co.*,[5] the Board considered whether a schism existed within a union such that a current collective-bargaining agreement did not bar an election. The Board majority concluded, applying *Hershey Chocolate Corp.*,[6] that the contract did bar the election because there was no basic intraunion conflict at the international union's highest level.

The petition was filed after the merger of two internationals, which resulted in one of the unions becoming a division of the other. Under the terms of the merger agreement, a new vice-presidency was created to serve on the merged international's governing executive council. The agreement specified the procedure for filling that position. Following an election for the position, conducted at a consolidated convention, disaffected members, who were dissatisfied with the outcome of the election, created a new labor organization and filed a petition seeking to represent the unit covered by the existing contract. The Board majority found that no basic policy dispute at the unions' highest level existed because neither the members of the international's governing body nor the delegates to the consolidated convention expressed dissatisfaction with the election procedure. Accordingly, the majority concluded that the definition of schism was not met under *Hershey* and dismissed the petition.

---

[5] 287 NLRB No. 50 (Chairman Dotson and Member Babson; Member Johansen dissenting).

[6] 121 NLRB 901, 907–908 (1958).

Member Johansen, dissenting, concluded that a schism as defined in *Hershey* was present because the procedure to select the vice president was disputed and thus the composition of the international's governing body was in contention.

B. Election Ballots

1. Foreign Language Ballots

In *Bridgeport Fittings,*[7] the Board considered whether a foreign language ballot was defective so as to impair employees' right to a free choice in an election.[8]

The ballot used at the election was printed in English, Spanish, and Portuguese, and handwritten in Laotian. The ballot contained line-by-line translations in the respective languages, and allegedly contained errors in the translations. In affirming the Acting Regional Director's finding that the ballot did not interfere with employee free choice in the election, the Board concluded that the ballot was not facially defective and its layout had not made it unreasonably difficult for any of the voters—either English-reading or foreign language-reading—to understand. The Board found that the ballot was well organized, orderly in appearance, and not difficult to read. The Board thereby distinguished its decision in this case from that in *Kraft, Inc.,*[9] in which the English and translated words on the ballot ran into each other or were placed without apparent connection. The Board in *Kraft* concluded that the ballot was so confusing as to affect the employees' ability to cast an informed ballot. In *Bridgeport Fittings,* the Board noted that the ballot used in the election was a marked improvement over that used in *Kraft,* as the ballot was orderly and not confusing despite the fact that it was in English and three other languages. The Board stated that it did not believe that employees would have had unreasonable difficulty in locating their own languages. It therefore held that the ballot was not so seriously defective in format or content[10] to require that the election be overturned.

In *Horton Automatics,*[11] the Board majority counted as a vote against the union a ballot with the letters "NON" or "NOW" written across both the "yes, si" and "no, no" boxes on the Spanish-English ballot.

The majority found that "by casting a marked ballot, the voter evidenced an intent to register a preference," and that the ballot indicated a clear preference to vote against union representation,

[7] 288 NLRB No. 25 (Chairman Stephens and Members Johansen and Cracraft).

[8] The Board had denied the employer's request for review. In *Bridgeport Fittings,* the Board denied the employer's motion for reconsideration.

[9] 273 NLRB 1484 (1985).

[10] The Board also concluded that certain alleged imperfections in the translations, and the fact that certain proper names were not translated, did not warrant a new election.

[11] 286 NLRB No. 134 (Chairman Dotson and Members Stephens and Cracraft; Members Johansen and Babson dissenting).

holding that the letters spelled "NON." The majority noted that a plural form of "non" in Spanish means "repeated negation or denial; refusal," while the word "non" in English is defined as meaning "not."

Dissenting Members Johansen and Babson pointed out that there was no showing the "word" was Spanish or what it was intended to convey and that it was not a Spanish plural (nones). They found that the marking was ambiguous, that it was impossible to determine the clear intent of the voter, and that the ballot was void.

2. Altered Ballot

In *BIW Employees Federal Credit Union*,[12] the Board majority held that if an altered ballot would appear to employees to be part of the employer's election campaign material and it could be plainly identified as such, it would not find its use objectionable. In reversing the administrative law judge, the majority found that the employer's use of the marked ballot in its election campaign material did not mislead employees into believing that the Board favored one party over the other.

The employer had distributed a two-page document to all employees the day before the election. The first page was on the employer's stationery and urged employees to vote no. The second page contained a copy of an official Board sample ballot that had an "x" in the "no" box and a hand-drawn arrow directing attention to that box with a statement explaining that a mark in the "no" box meant employees did not wish to be represented by the union.

The Board applied a two-part analysis, originally adopted in *SDC Investment*,[13] which first examines the ballot to determine if the source of the altered document is clearly identified on its face. If the source of the document can be clearly identified on its face, then the Board will find that the document is not misleading because employees will understand that the document emanated from a party rather than from the Board. If, on the other hand, the source cannot be clearly identified, the Board will apply the second part of its analysis by examining the nature and content of the material to determine whether the document has a tendency to mislead employees into believing the Board favors one party over the other.

The Board majority accepted the Regional Director's first conclusion that the identity of the party that altered the sample ballot did not appear on the face of the ballot, but it rejected his finding that an employee could have concluded that the Board favored a "no" vote. The altered ballot was attached by staple to a partisan memorandum that unmistakenly originated from the

[12] 287 NLRB No. 45 (Chairman Dotson and Member Cracraft; Member Johansen dissenting).
[13] 274 NLRB 556 (1985).

employer, as it was prepared on the employer's stationery. This memorandum directed employees' attention to the attached sample ballot as demonstrating a "no" vote and urged employees to vote no. Based on the above, the majority concluded that the altered ballot would appear to employees to be part of the employer's election campaign material, which was clearly identified as such, and not an official communication from the Board.

In dissent, Member Johansen contended that the sample ballot failed to indicate on its face, nor was it obvious, that it was altered, what the alterations were, and who made them. Further, he stated that these factors "could mislead employees into believing that the ballot was prepared by the Board."

In a dissent in *Professional Care Centers*,[14] Member Johansen stated that he did not believe a per se rule that permits a party to alter official Board documents and ignores whether or not voters would be aware the document *was* altered furthers the objectives of the statute. He noted that the party responsible for the "x" on a sample ballot is not clear from the face of the document. The implication is that the Board is endorsing a specific vote. The failure to note that alterations were made, and what the alterations were, should result in the sample ballot being found objectionable and require a new election.

3. Ballot Secrecy

In *Sorenson Lighted Controls*,[15] the Board majority held that the secrecy of a ballot was destroyed when the voter handed his unfolded ballot to another voter who looked at it before dropping it in the ballot box.

The record showed that the voter in question emerged from the voting booth with his unfolded ballot in his hand and, as he walked toward the door leading out of the voting area, handed his unfolded ballot to another voter. The latter voter glanced at the ballot, folded it, and dropped it in the ballot box. The record also showed that the disputed ballot was commingled with all other ballots the instant it was deposited in the ballot box. There was no indication that the parties' designated election observers or the Board agent challenged or objected to the ballot before it was placed in the ballot box.

In not counting this disputed ballot, the majority applied a well-established Board and court rule that a ballot that reveals the identity of the voter is void. This same rule has been applied where the marking is on the ballot itself or, as here, the voter's conduct reveals the vote. Thus, the majority ruled that the secrecy of the employee's vote was destroyed when he handed his unfolded ballot to another voter who looked at it before dropping it in the ballot box. Because this ballot was commingled with all

[14] 279 NLRB 814.

[15] 286 NLRB No. 108 (Chairman Dotson and Member Johansen; Member Stephens dissenting in part).

other ballots when it was deposited in the ballot box, the majority further ruled that it would issue a certification of representative only if a majority plus one, or more, voted in favor of union representation. Thus, the disputed ballot could not be determinative and, as no other valid objection was established against the union, no valid reason existed for denying such certification of representative.[16]

Member Stephens, dissenting in part, agreed with certain propositions of ballot secrecy, but found that the principle of ballot secrecy is not absolute. He pointed out that the Board will count a single determinative challenged ballot even though that will reveal the vote of that employee.[17] Here, he pointed out that, although the "confused" voter had revealed his vote to another employee who had already voted, the ballot was not shown to have been revealed to anyone waiting to vote. In circumstances where the ballot was subsequently commingled with others in the ballot box, he disagreed with the majority's "scheme to attempt to void the unidentifiable ballot."

C. Expedited Election

In *Hassett Storage Warehouse*,[18] the Board found that a Regional Director had properly conducted an expedited election in accordance with the provisions of Section 8(b)(7)(C) among employees of an employer who were represented by an incumbent union. The employer in this case had withdrawn recognition from the picketing incumbent union after all the unit employees had crossed the picket line and announced that they no longer wished to be represented by, or remain members of, the union.

When the union continued picketing, the employer filed a petition for an expedited election under Section 8(b)(7)(C). The union opposed the election on the ground that the expedited election procedure of Section 8(b)(7)(C) "is applicable only to initial organizational efforts and does not apply to picketing by an incumbent Union." However, in its decision the Board found, in agreement with the Regional Director, that the proscriptions of Section 8(b)(7)(C) are not limited to initial organizational activities, and that the "Union's continued picketing in the face of the unit employees' clear and unequivocal rejection of the Union's representation constitutes the type of 'top down' organizing which Congress sought to limit by enacting Section 8(b)(7)(C) of the Act."[19]

---

[16] In the event the revised tally resulted in a majority against the union or in a tie vote, the election would be set aside based on meritorious objections filed by the union.

[17] See, e.g., *Lemon Drop Inn*, 269 NLRB 1007, 1009, 1025 (1984), enfd. on other grounds 752 F.2d 323 (8th Cir. 1985).

[18] 287 NLRB No. 75 (Chairman Dotson and Members Johansen and Babson).

[19] Citing *NLRB v. Iron Workers Local 103 (Higdon Contracting)*, 434 U.S. 335 (1978).

The Board found this case to be distinguishable from that of *Whitaker Paper*[20] and *Wheatley Pump*,[21] relied on by the union. Thus, it noted that the *Whitaker* and *Wheatley* decisions involved the question of whether picketing by an incumbent union to improve the working conditions of its members was converted to recognitional picketing of the type prohibited by Section 8(b)(7)(C) by virtue of the fact that the employer had replaced most or all the strikers during the strike. Unlike *Whitaker* and *Wheatley*, the issue here was whether the continuation of the union's picketing, after it no longer enjoyed the support of a majority of the employer's employees and the employer had lawfully withdrawn recognition, had a recognitional objective proscribed by Section 8(b)(7)(C).

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

In *Beatrice Grocery Products*,[22] the Board majority overruled the employer's objections and held that a union's alleged racial appeal to unit employees did not affect the results of the election. Several weeks before the election, a union representative allegedly told employees at a union meeting that the employer's general manager or another employer representative had called them "dumb niggers."[23]

The majority found that this isolated statement did not warrant setting aside the election. The majority noted that the alleged racial appeal was made in the first of seven union meetings held more than 1 month before the election and that race was not a significant aspect in the campaign. The majority also noted that the union representative made the alleged statement as part of a general comment on the employer's treatment of employees. Thus, several employees had complained to the union representative that the general manager implied that they were dumb and

[20] *Teamsters Local 570 (Whitaker Paper)*, 149 NLRB 731 (1964).

[21] *Machinists Local 790 (Wheatley Pump)*, 150 NLRB 565 (1964).

[22] 287 NLRB No. 31 (Members Babson, Stephens, and Cracraft; Chairman Dotson dissenting).

[23] The hearing officer did not make credibility resolutions and the majority, like the hearing officer, assumed, arguendo, that this alleged statement was made.

illiterate. The general manager allegedly questioned employees about their signing of union cards and petitions, saying that, as some of them could not read or write, he doubted that the cards and petitions reflected their own opinions. In response to these complaints, the union representative made the alleged racial statement, essentially denouncing the employer's treatment of its employees.

Although the majority overruled the employer's objection, it made clear the limits of its holding, stating:

> We do not condone the use of racial or ethnic epithets such as that at issue here. Had a union representative used such a term in comments attacking a particular racial, ethnic, or religious group, or . . . as part of an inflammatory campaign theme, or . . . in a totally gratuitous way, unconnected to any employee concerns, we would not hesitate to set aside the election.

However, the majority concluded that "this single incident [did not] 'so [lower]' proper election standards 'that the uninhibited desires of the employees could not be determined in the election.'"[24]

Chairman Dotson, dissenting, would have remanded the case to the hearing officer to determine whether the union attributed the racial remark to the employer or to its counsel. If the union had attributed the racial statement to the general manager, Chairman Dotson would have set aside the election under *Sewell Mfg. Co.*, which he interpreted as requiring unobjectionable racial appeals to be both truthful and germane to the election. Chairman Dotson also found that the union's remark was not isolated given the 30–40 employees who heard it, the fact that employees were already upset at the employer's intimation that they were dumb and illiterate, and the opprobrious nature of the remark.

In *Young Men's Christian Assn.*,[25] the Board majority found that the employer's offer to pay and subsequent payment of 2 hours' wages to employees not scheduled to work who came in to vote did not interfere with the election.

The bargaining unit included part-time employees rendering specialized services on an infrequent but regular basis. The employer disseminated to all employees an "Election Notice" (not an official NLRB notice of election) advising the employees of the election date, urging them to vote, and offering to pay 2 hours' wages to all employees not scheduled to work who came in to vote. The notice stated that the payment was to cover the employees' time and transportation costs. The notice also included an exhortation to "Protect Your Future—Vote—Vote No." There was no allegation that the employer conditioned payment

[24] *Sewell Mfg. Co.*, 138 NLRB 66, 72 (1962).
[25] 286 NLRB No. 98 (Members Johansen and Cracraft; Member Stephens dissenting in part).

on how the employees voted or that the employer tried to ascertain how the employees voted.

The majority found that the moneys paid did not constitute a substantial benefit that would influence votes, but rather were a reasonable reimbursement for transportation and time costs. It noted that the facts of this case were unusual in that there were many part-time employees who worked only a few hours a pay period, and there appeared to be no reasonable way for the employer to provide actual transportation nor to schedule the election when all eligible voters were working. The payment was made on a nondiscriminatory basis and its stated purpose was to cover time and transportation costs. The majority rejected the contention that, because the employer did not ascertain the employees' actual expenses, a substantial portion of the payment was likely to appear to be a payment to vote. The money paid was to compensate employees for their time as well as out-of-pocket costs in coming to the polls and was not so grossly disproportionate as to reasonably tend to influence their vote.

Member Stephens, dissenting in part, would have sustained the objection and found the payment reasonably tended to influence the election. He cited factors that he found to be especially salient. First, the employer made no effort to ascertain any employee's actual transportation costs or amount of time consumed in coming to vote. Second, the sums of money paid were not insubstantial, and employees who regularly worked only 2–4 hours a week received the equivalent of an additional week's paycheck. Third, although the employer did not condition payment on how an employee voted, the juxtaposition of the payment offer with a statement about the need for support of employees to keep the union out would reasonably tend to place employees leaning toward support of the union in an uncomfortable position.

In *United Builders Supply Co.*,[26] the Board majority held that the facts there were insufficient to support a conclusion that employee advocate Wentworth was an agent of the union. An election objection had alleged that Wentworth made threats warranting a new election.

The majority concluded, contrary to dissenting Member Johansen, that Wentworth was not a general agent of the petitioner under the principles of apparent authority. The majority stressed that the dissent made no attempt to differentiate those actions of Wentworth that were actually authorized, either expressly or by implication, from those that might have resulted merely from Wentworth's own enthusiasm for the union's cause and his penchant for self-promotion. Although recognizing that the union gave Wentworth actual authority to solicit and collect authorization cards and also asked him, among other employees, to

[26] 287 NLRB No. 150 (Chairman Stephens and Members Babson and Cracraft; Member Johansen dissenting).

set up some union meetings, the majority found that such evidence that arguably establishes limited actual or apparent authority was not a "manifestation" to employees broad enough to render Wentworth a general agent.

With regard to a possible implied "manifestation" of authority, the majority found Wentworth clearly was a leading, if not the leading, union supporter and his actions reflected that status. It emphasized, however, that the Board has never held that such status alone is sufficient to establish general union agency. Moreover, although noting that the union must have known of some of Wentworth's actions, the majority concluded that the record does not establish to what degree the union was aware of the actions by Wentworth that were not expressly authorized, thus eliminating the possibility of finding that the union implicitly created apparent authorization of other conduct by ratification. The majority also stressed that the union did not abdicate its role in the campaign and, through the union organizer's conduct of union meetings and other activity, it was clear to employees that the union had its own spokesman separate and apart from union activists such as Wentworth.

In dissent, Member Johansen concluded that the evidence, when considered in toto, demonstrated that Wentworth was the union's agent. He found, based in part on the testimony of several employees, that the record clearly supported a finding that Wentworth was the principal leader of the organizing drive at the employer's facility. Because the petitioner, under these circumstances, did not disassociate itself from nor repudiate Wentworth's exercise of apparent authority, Member Johansen would have found that certain threatening statements made by Wentworth to another employee constituted objectionable conduct warranting a new election.

E. Unit Clarification

In *University of Dubuque*,[27] the Board clarified a bargaining unit to exclude all full- and part-time faculty members as managerial employees. The Board found it appropriate to entertain the University's petition to clarify despite the lack of evidence of any change in the duties of the faculty since the unit's formation, and despite the Board's general policy against entertaining unit clarifications during the term of a collective-bargaining agreement that contains a clear recognition clause.

The Board found it appropriate to entertain the University's petition for two reasons. First, it noted that in light of the Supreme Court's decision in *NLRB v. Yeshiva University*,[28] the Board has found it appropriate to clarify a unit composed of faculty to exclude those who are managerial and, therefore, not

[27] 289 NLRB No. 34 (Chairman Stephens and Member Babson; Member Johansen dissenting).
[28] 444 U.S. 672 (1980).

"employees" within the meaning of the Act, citing *Lewis University.*[29] The Board stated that clarification was appropriate even absent evidence of any change in faculty duties since the unit's formation. Second, the Board noted that, although the Board had dismissed clarification petitions filed midway through the term of an agreement, the Board had entertained such petitions when they were filed shortly before the agreement's expiration as the parties were preparing for negotiations. Because the University's petition was filed just about 3 months before negotiations for a new collective-bargaining agreement were to begin, the Board found it appropriate to process the petition.

The majority, consisting of Chairman Stephens and Member Babson, held that Dubuque faculty members were managerial employees and should be excluded from the bargaining unit. In doing so, the majority applied the Court's holding in *Yeshiva*[30] and noted that the Court in *Yeshiva* focused primarily on whether faculty members, though they may not have absolute authority in academic matters, play a major and effective role in the formulation of academic policy. The majority stated that under *Yeshiva* it is the faculty members' participation in the formulation of academic policy that aligns their interest with that of management. The majority cited the Dubuque faculty's exclusive right to set general student grading and classroom conduct standards and degree requirements, recommend earned-degree recipients, "initially receive, and consider" new degree requirements, and develop, recommend, and ultimately approve curricular content and course schedules, admission standards, student retention, the distribution of financial aid to students, and the modification of programs or departments. Because Dubuque faculty members had substantial authority in formulating and effecting policies in the academic area, the majority concluded that they were managerial employees.

Although of less significance to a determination of the faculty's managerial status, the majority also noted that the Dubuque faculty could effectively recommend discretionary actions with respect to the implementation of university policy in *nonacademic* areas—e.g., budget matters, capital improvements, the promotion and tenure of faculty members, dismissals for cause and nonrenewal of contract for probationary employees, the granting of leave, and the distribution of funds for faculty development. Thus, the majority concluded that the Dubuque faculty played a significant role in the operations of the university.

Member Johansen dissented, finding the Dubuque faculty members to be statutory employees. Member Johansen found Dubuque to be a school "unlike Yeshiva" because Dubuque faculty members exercised authority in only five areas, areas in

[29] 265 NLRB 1239 (1982), revd. on other grounds 765 F.2d 616 (7th Cir. 1985).
[30] 444 U.S. 672 (1980).

which faculty routinely exercised authority, and because the Dubuque faculty's authority in academic matters was not absolute. Member Johansen cited the fact that Yeshiva faculty exercised authority in 18 areas, and also that the Supreme Court found the Yeshiva faculty had absolute authority in academic matters. Member Johansen found the authority exercised by Dubuque faculty members in nonacademic areas to be significant, but concluded that, on the whole, the Dubuque faculty lacked the depth and breadth of authority possessed by the Yeshiva faculty and, therefore, the Dubuque faculty members were nonmanagerial.

F. Union Affiliation

Section 9(c)(1) of the Act provides the Board with the authority to issue certifications of bargaining representatives. Implied within this authority is the Board's capacity to amend its certifications—on petition of a party—to reflect changes in the representative or the employer that do not present a question concerning representation. One of the most common situations underlying a petition for amendment of certification is the affiliation of the bargaining representative with another labor organization.

In *Western Commercial Transport*,[31] the Board examined its role, under the guiding light of *NLRB v. Financial Institution Employees*,[32] of how properly to determine whether an affiliation of one labor organization with another raises a question concerning representation.

The Board's traditional method of determining whether an affiliation raises a question concerning representation was to decide if the affiliation procedure was conducted with appropriate due process safeguards and whether there was a substantial change in the identity of the representative entity. However, the relative weight to be accorded these factors had not been fully considered and precedent in the area presented conflicts.

In *Western Commercial*, the certified representative was the Southwest Tank Lines Employees Union (STLEU), a small, independent union whose entire membership was composed of the employees of the employer. The union leadership, facing deteriorating finances and a declining membership, investigated the prospects of affiliating with a larger and more financially sound organization. A plan was worked out with the International Association of Machinists for the STLEU to affiliate with IAM District Lodge 776. After explaining to employees, in meetings and by letter, the effects of an affiliation, the union conducted a secret-ballot vote among all unit members, resulting in a 71 to 13 vote in favor of affiliation.

---

[31] 288 NLRB No. 27 (Chairman Stephens and Members Babson and Cracraft; Member Johansen dissenting).

[32] 475 U.S. 192 (1986).

The employer refused to recognize the IAM as the representative of its employees, citing, inter alia, a substantial change in the identity of the representative. A Board majority agreed. The size of the organization grew from 136 (the number of employees in the unit) to 8500 (the number of employees District Lodge 776 represented in a 9-county area in the State of Texas among a variety of employers). The day-to-day administration of the union would no longer be in the hands of an employee/STLEU officer, but would be directed by a District Lodge official who had no prior relationship with the employer or the unit employees. None of the incumbent STLEU officers would play any role in union affairs after the affiliation. Membership dues, which had always been within the control of the STLEU, would now be shared among the local, district, and international IAM levels. The power of the unit to effect any action within the union would be diminished to the point that their numbers could not even control the selection of a single delegate within the District Lodge. In sum, the autonomy of the STLEU and the power of its constituency would be "all but extinguished," with the replacement of the original organization by a structure bearing little resemblance to its predecessor.

Turning then to the Supreme Court's decision in *Financial Institution* (which did not pass specifically on the issue of continuity of representative, but held only that there was no requirement that *all* employees be permitted to vote on a question of affiliation), the majority pointed to language suggesting that certain changes brought about through affiliation could alter the relationship between the representative and the employees, thereby raising the question of its continued majority support and, thus, presenting a question concerning representation. Although the Court in *Financial Institution* noted that not every change in the organizational or structural composition of a union presents a new entity, it stated that "[i]f these changes are *sufficiently dramatic* to alter the union's identity, affiliation may raise a question of representation, and the Board may then conduct a representation election." The Board majority concluded, applying the Court's standard, that the types of changes brought about through the STLEU's affiliation with the IAM demonstrated precisely the wholesale transformation that warranted finding a question concerning representation. In so concluding, the majority found that the issue of due process within the affiliation procedure did not have to be reached.

Member Johansen dissented, focusing not on the identity of the representative as the critical issue, but rather on the employees' continued support for the union. He reasoned that a question concerning representation is presented only when it is unclear whether the representative, by virtue of its postaffiliation altered relationship with the employees, continues to maintain majority following. In the circumstances of this case, the process by

which the affiliation vote was accomplished incorporated adequate due process safeguards, resulting in demonstrated majority support for the reorganized union. He concluded that the majority's analysis runs contrary to "the Act's policies of promoting stable bargaining relationships and prohibiting unwarranted interference in internal union affairs . . . [and] . . . employees' freedom to select a bargaining representative."

V

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 Sec. 8) affecting commerce. In general, Section 8 prohibits an employer or a union or their agents from engaging in certain specified types of activity that 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 1988 that 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 derivation 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 that independently tends to interfere with, restrain, or coerce employees in exercising their statutory rights. This section treats only decisions involving activities that constitute such independent violations of Section 8(a)(1).

1. Concerted Nature of Activity

The definition of "concerted activity" played a major role in the Board's decisions this past year. The following cases illustrate the Board's modified interpretation of that term.

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

In *Daly Park Nursing Home*,[2] the panel majority found, in agreement with the administrative law judge, that the respondent did not violate Section 8(a)(1) when it reduced employee Gwen Herald's workweek for discussing with other employees the termination of employee Gail Davis.

The record showed that Herald remarked to other employees that the discharge of fellow nurses aide Davis was "unfair" and that it was a shame Davis could not hire a lawyer and fight it. When another employee commented that Davis would lose a legal fight to the respondent's wealthy owners, Herald agreed and said she hoped Davis would at least be able to receive unemployment compensation. Shortly thereafter, Herald was informed that she was being transferred to the day shift and that her schedule was being reduced from 5 to 3 days per week.

The panel majority agreed with the judge that Herald's transfer and the reduction of her workweek were attributable "to her conduct with respect to the termination of Davis on 9 May." However, the judge concluded that Herald's discussions regarding the Davis discharge did not constitute concerted activity under *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). The Board has defined the term "concerted activity" as activity that "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management."

Accordingly, the panel majority concluded that the standard for determining the existence of concerted activity was not met in this case. There was no evidence that Herald or any of the employees with whom the Davis discharge was discussed contemplated doing anything about the discharge. Nor was there evidence that the respondent suspected such motivation when it reduced Herald's workweek. Although Herald expressed her opinion that it was a shame Davis could not hire a lawyer to fight the discharge, she readily agreed with another employee's opinion that Davis would lose such a fight to the respondent's wealthy owners. There was not even the suggestion that the employees might attempt to give mutual aid or protection to Davis by encouraging her to institute legal action to challenge her termination.

Member Johansen, dissenting in part, would have found that no matter what "Herald was intending, contemplating, or referring to, she was engaged in actual concerted activity when she spoke with her fellow employees on 12 May" regarding Davis' discharge. In his view, discussing the termination of a fellow employee (certainly a condition of employment) and the possibility of obtaining legal assistance is action for the mutual aid and pro-

[2] 287 NLRB No. 73 (Chairman Dotson and Member Babson; Member Johansen dissenting in part).

tection of employees protected by Section 7 of the Act. Accordingly, Member Johansen would have concluded that the respondent violated Section 8(a)(1) when it changed Herald's working conditions.

2. Investigatory Interview in Nonunion Setting

In *E. I. duPont & Co.*,[3] the Board considered whether, in a nonunion setting, an employer violates Section 8(a)(1) of the Act by discharging an employee for refusing to submit to an investigatory interview without the presence of a fellow employee.

The Board has long held, with Supreme Court approval,[4] that Section 7 embodies a statutory right for an employee to refuse to submit without union representation to an interview by employer representatives that he or she reasonably fears may result in discipline. The Court, in affirming the existence of this right, reasoned that the Board was charged with striking a balance between the interests of labor and management in this area and that permitting union representation at an investigatory interview serves to redress "the perceived imbalance of economic power between labor and management."[5] In pointing out a number of benefits to be obtained by having union representation at an investigatory interview, the Court specifically noted that a union representative might be able to safeguard "not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly,"[6] and that the presence of a knowledgeable union representative could also serve the interest of the employer because the "union representative could assist the employer by eliciting favorable facts" that an inarticulate employee might be too fearful or otherwise unable to mention, thereby "sav[ing] the employer production time by getting to the bottom of the incident occasioning the interview."[7]

Examining those interests in the nonunion setting, however, the Board concluded that the objectives listed by the Court were either much less likely to be achieved or were irrelevant, so that recognition of the right here would not represent "a fair and reasoned balance" of employee and employer interests.[8] Thus, the Board noted that in the nonunion setting there is no guarantee that the interests of the employees as a group would be safeguarded by the presence of a fellow employee at an investigatory interview. Furthermore, an employee in a nonunion work force would be less able than a union representative to "exercis[e] vigi-

---

[3] 289 NLRB No 81 (Chairman Stephens and Members Johansen, Babson, and Cracraft).
[4] *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).
[5] 420 U.S at 262, 267.
[6] Id. at 260–261.
[7] Id. at 263.
[8] Id. at 267.

lance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly,"[9] as it is unlikely that such an employee would have the benefit of a framework similar to that typically established in a collective-bargaining agreement in which acts amounting to misconduct and means of dealing with them are defined. Although a fellow employee might be able to offer some assistance in getting to the bottom of an incident, it is less likely that in the nonunion setting the employee would possess the necessary skills to assist the employer in "eliciting favorable facts, and sav[ing] the employer production time."[10]

The Board acknowledged that an employee in a workplace without union representation might welcome the support of a fellow employee at an interview he or she fears will lead to discipline, and that in some circumstances the presence of such a person might aid the employee or both the employee and the employer; however, the Board concluded that the interests in assuring such representation under Section 7 are less numerous and less weighty than the interests apparent in the union setting and are outweighed by interests of the employer that the Court in *Weingarten* clearly indicated must be taken into account. Thus, the Board concluded that an employee in a nonunionized workplace does not possess a right under Section 7 to insist on the presence of a fellow employee in an investigatory interview by the employer's representatives, even if the employee reasonably believes that the interview may lead to discipline.

3. Unlawful Employer Threats

In *Gino Morena Enterprises*,[11] the Board considered whether the employer violated Section 8(a)(1) of the Act by threatening its employees with loss of their jobs if they engaged in an economic strike. The Board reaffirmed the rule in *Eagle Comtronics*,[12] holding that an employer does not violate the Act by truthfully informing its employees that they are subject to permanent replacement in the event of an economic strike; however, if the employer's statement can be "fairly understood as a threat of reprisal against employees or is explicitly coupled with such threats," it is not protected by Section 8(c) of the Act.[13]

Based on credited testimony, the administrative law judge found that the respondent told employees it would be futile to engage in a strike and that they would probably lose their jobs if they struck. The Board concluded that the employer's statement

[9] Id. at 260–261.

[10] Id. at 263.

[11] 287 NLRB No. 145 (Chairman Stephens and Members Johansen, Babson, and Cracraft).

[12] 263 NLRB 515 (1982).

[13] Member Johansen, who did not participate in *Eagle Comtronics*, took no position on the question whether an employer violates Sec. 8(a)(1) of the Act through a totally unqualified statement that it can permanently replace economic strikers.

violated Section 8(a)(1) of the Act because it "may be fairly understood as a threat of reprisal" as indicated in *Eagle Comtronics.*

It held that the employer's combined references to the futility of striking and the employees' probable loss of employment were not consistent with *Laidlaw Corp.*,[14] which guarantees permanently replaced strikers, who have made unconditional offers to return to work, the right to full reinstatement when positions are available and to be placed on a preferential hiring list if positions are not available. Because an employer's right to permanently replace economic strikers does not render it futile to engage in the protected right to strike, or entail an absolute loss of employment for those striking employees who are replaced, the Board concluded that the respondent's remarks went beyond the permissible boundaries of protected speech and restrained or coerced employees in the exercise of their rights under the Act.[15]

In *Carborundum Materials Corp.*,[16] the Board reversed the administrative law judge to find that a supervisor's threat to "get" an employee and to sue her because she had jeopardized his job by filing an unfair labor practice charge with the Board violated Section 8(a)(1).

In dismissing the allegation, the judge relied on *Postal Service,*[17] in which the Board found that a supervisor's threat to file a lawsuit against a union—for harassing her by filing grievances contending that she had received preferential treatment—was not unlawful. The Board in *Carborundum,* however, distinguished *Postal Service,* where the threat to sue, on the temporary supervisor's own behalf and in response to actions affecting her status as an employee, could not be construed as any threatened retaliation by the respondent employer at the workplace. That situation was in contrast to the situation in *Carborundum,* where the supervisor was not temporary, and the supervisor's threat to "get" an employee, made together with the threat to sue her, involved a form of retaliation by the supervisor in question within the framework of his supervisory capacities.

The Board further found that the Supreme Court's decision in *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731 (1983), holding that the Board could not enjoin the filing and prosecution of a well-founded lawsuit, was inapplicable to the situation in *Carborundum,* which involved a threat directly related to the workplace and a threat to sue rather than the actual filing of a suit.

In *Carborundum,* the Board also rejected the respondent's contention that the 8(a)(1) threat was appropriate for arbitration under the parties' contract under *United Technologies Corp.*, 268

---

[14] 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

[15] Member Babson found it unnecessary in the context of this case to pass on the distinction drawn by the Board in fn. 8 of *Eagle Comtronics.* In that case, the Board distinguished cases involving employer conduct that merely informs employees of the risk of being permanently replaced and from those in which an employer tells employees they would permanently *lose* their jobs.

[16] 286 NLRB No. 126 (Members Johansen, Babson, and Stephens).

[17] 275 NLRB 360 (1985).

NLRB 557 (1984), finding that, insofar as the 8(a)(1) allegation involved a question of interference with an employee's access to the Board's processes, it was an issue for resolution solely within the Board's provinces. The Board further rejected the Respondent's contention that the finding of this single 8(a)(1) violation did not warrant a remedy under *Titanium Metals Corp.*, 274 NLRB 706 (1985). The Board distinguished the nature of the violation found here, i.e., interference with an employee's access to the Board's processes, from the nature of those that the Board has found technically violative of the Act but of a de minimis nature.

4. Illegal Discharge of Supervisor

In *Oakes Machine Corp.*,[18] the Board applied the standards of *Meyers Industries*,[19] and found, in agreement with the administrative law judge, that the respondent violated Section 8(a)(1) by discharging employee Russo for mailing an unsigned letter, prepared in concert with other employees, to the respondent's parent company. The Board, however, reversed the judge and found that the respondent's discharge of employee Zuber for complaining to a state agency about allegedly unsafe working conditions was not unlawful because Zuber did not act in concert with other employees.[20] In addition, the Board affirmed the judge's 8(a)(1) finding regarding the discharge of Kress, the supervisor of both Russo and Zuber, because Kress was discharged for stating that he intended to testify on Zuber's behalf "in court" if necessary.

As to Russo's conduct, the Board agreed with the judge that the preparation of the letter was clearly concerted activity within the meaning of Section 7, noting particularly the letter's overall wording, consistent use of the pronoun "we," and specific complaints concerning more than one employee. The Board further found that the respondent reasonably believed from reading the letter that it represented the thinking of more than one employee.

With respect to Kress, the judge found that the respondent had lawful and unlawful reasons for discharging Kress: first, his failure to exercise sufficient control over the conduct of employees (Russo and Zuber) under his supervision was arguably a lawful reason warranting his discharge; and, second, Kress' statement of intention to testify on Zuber's behalf "in court" if necessary was an unlawful reason. The Board found that the judge correctly reasoned that Kress' "broad statement . . . would in-

[18] 288 NLRB No. 52 (Chairman Stephens and Members Babson and Cracraft).

[19] *Meyers I*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985); *Meyers II*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

[20] The judge, whose decision issued before *Meyers I*, found that Zuber's discharge violated Sec. 8(a)(1) based on the Board's earlier decision in *Alleluia Cushion Co.*, 221 NLRB 999 (1975). *Alleluia Cushion* was subsequently overruled by *Meyers I*.

clude, by reasonable implication, proceedings within the ambit of the National Labor Relations Act." The Board relied on *Parker-Robb Chevrolet*,[21] a case that issued subsequent to the judge's decision, which preserved existing case law's special circumstances wherein the discharge of a supervisor may violate the Act. The applicable circumstance here involved Kress' intent to give testimony adverse to the employer's interest at a Board proceeding and, as the Board explained in *Parker-Robb*, there is a need "to ensure that even statutorily excluded individuals may not be . . . discouraged from participating in Board processes.[22]

The Board acknowledged that Kress' demonstrated inability properly to supervise his employees could, standing alone, justify Kress' discharge. It expressly held that, because Kress' discharge was found to have been motivated in part by a reason that is unlawful under the foregoing exception to the *Parker-Robb Chevrolet* rule, "it was incumbent on the Respondent to establish by a preponderance of the evidence that it would have fired Kress even if he had not threatened to testify on Zuber's behalf 'in court,'" citing *Wright Line*.[23] The Board continued:

> We think that the Respondent failed to meet that burden. . . . Although the judge found that the lawful reason was "primary," still in light of *Wright Line* the Respondent could not prevail without an additional showing that that reason alone would have prompted Kress' discharge.

5. Right of Nonemployee Organizers to Solicit

In *SCNO Barge Lines*,[24] a panel majority held that the respondent's property rights and the union's Section 7 rights were both very strong and stood on relatively equal footing with respect to towboats and barges along the Illinois, Mississippi, Missouri, and Ohio Rivers. Accordingly, it was necessary to consider whether the General Counsel showed that the union could not reasonably have communicated its message during an organizing campaign except by boarding the respondent's boats. The panel majority concluded that the General Counsel had failed to do so.

The majority noted that, although the crewmen lived and worked on SCNO's premises, they did so for only 30 days at a time, and then had 30 days' leave, during which they usually went home. This fact was of great importance because the respondent had provided the union with the crewmen's names and home addresses. This presented an opportunity for the union to

---

[21] 262 NLRB 402, 404 (1982).

[22] The Board noted that the protection of a supervisor from retaliation for giving testimony in a Board proceeding for an employee who is found not to have a viable claim under the Act is not anomalous because the effect of the supervisor's discharge "is to tend to dry up legitimate sources of information to Board agents, to impair the functioning of the machinery provided for the vindication of the employees' rights and, probably, to restrain employees in the exercise of their protected rights." *NLRB v. Electro Motive Mfg. Co.*, 389 F.2d 61, 62 (4th Cir. 1968).

[23] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

[24] 287 NLRB No. 29 (Members Babson and Stephens; Member Johansen dissenting).

mail campaign materials to the crewmen and to telephone or visit the crewmen at home during their lengthy leave periods. Further, the union in the past had achieved sufficient success to file a petition. The majority noted the geographical dispersion of the employees over 12 States, but found that this dispersion did not rule out telephone calls and home visits as possible alternative means of communication. The majority stated:

> It may be that reasonable efforts to reach the crewmen by these methods would not result in the Union's achieving personal contact with all of them. As the Union, however, neither attempted these methods nor demonstrated that, if diligently tried, these methods would have failed, we cannot determine what the results would have been.

Member Johansen, in his dissent, noted that face-to-face contact is an essential element of effective union organizing. In his view, the alternative techniques advanced by the majority fell short of offering a reasonable opportunity for face-to-face solicitation. The union did not know when individual crewmen would be home. Further, 44 percent of the crewmen's addresses contained no street addresses; many were situated in isolated rural communities and they lived in 12 different States. The techniques of telemarketing representative appeals is well beyond the "usual channels" of alternatives approved in *NLRB v. Babcock & Wilcox Co.*[25] Member Johansen found that the Section 7 interest outweighed the property interest, and that the latter must yield.

In *G. W. Gladders Towing Co.*,[26] a panel concluded that the property right and the Section 7 right with respect to towboats were relatively equal. It found that the union's request for access to the boats was unlawfully denied in violation of Section 8(a)(1) because there were no other reasonable means of communicating the union's organizational message.

The panel majority noted that this case was similar to *SCNO Barge Lines*, supra, in many respects. However, it concluded there were two significant differences, stating:

> The Union asked the Respondent for its crewmen's names and addresses, but the Respondent did not supply this information and the Union had no other way to obtain it. Absent knowledge of the crewmen's names and addresses, the Union could not attempt to visit or telephone the crewmen at their homes. Additionally, unlike *SCNO*, there is no record of prior union success in contacting the Respondent's crewmen that would indicate the availability of means of communicating with the crewmen.

Member Johansen concurred, finding that the Section 7 interest outweighed the property interest. He noted his disagreement

[25] 351 U.S. 105, 112 (1956).
[26] 287 NLRB No. 30 (Members Babson and Stephens; Member Johansen concurring).

with the weight the majority attached to telephone calls, and ultimately home visits, citing his dissent in *SCNO.*

6. Access to Employer Premises

In *Jean Country,*[27] the Board clarified its approach in access cases and specifically concluded that the availability of reasonable alternative means is a factor that must be considered in every access case. The Board overruled *Fairmont Hotel,* 282 NLRB 139 (1986), to the extent inconsistent with its decision in *Jean Country.*

In *Fairmont Hotel,* the Board announced a test under which the strength of the claim of Section 7 right would be balanced against the strength of the property right involved, with the stronger right prevailing. If the rights were deemed relatively equal in strength, the existence of effective alternative means of communication would then become determinative. Chairman Stephens expressed his disagreement with the plurality view in his separate concurring opinion in *Fairmont.* Member Johansen has consistently viewed the factor of alternative means of communication as one that is always of some significance in assessing the weight of the Section 7 claim.

In cases decided subsequent to *Fairmont,* it became apparent that individual Board Members differed over interpretation and application of the *Fairmont* test. On consideration of its experience in applying the *Fairmont* test and on reexamination of two principal Supreme Court cases (*NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956), and *Hudgens v. NLRB,* 424 U.S. 507 (1976)), the Board believed that further clarification of its approach in access cases was necessary.

"Accordingly, in all access cases our essential concern will be the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted," the Board said. The Board continued:

> We view the consideration of the availability of reasonably effective alternative means as especially significant in this balancing process. In the final analysis, however, there is no simple formula that will immediately determine the result in every case. As the Court made clear in *Hudgens,* we are trying to accommodate interests along a spectrum.

The Board stated:

> Factors that may be relevant to assessing the weight of property rights include, but are not limited to, the use to which the property is put, the restrictions, if any, that are imposed on public access to the property, and the property's relative size and openness. (The term "property" includes both

[27] 291 NLRB No. 4 (Chairman Stephens and Members Johansen, Cracraft, and Higgins).

open spaces and buildings—whichever is the situs to which those asserting Section 7 rights seek access.) Factors that may be relevant to the consideration of a Section 7 right in any given case include, but are not limited to, the nature of the right, the identity of the employer to which the right is directly related (e.g., the employer with whom a union has a primary dispute), the relationship of the employer or other target to the property to which access is sought, the identity of the audience to which the communications concerning the Section 7 right are directed, and the manner in which the activity related to that right is carried out. Factors that may be relevant to the assessment of alternative means include, but are not limited to, the desirability of avoiding the enmeshment of neutrals in labor disputes, the safety of attempting communications at alternative public sites, the burden and expense of nontrespassory communication alternatives, and, most significantly, the extent to which exclusive use of the nontrespassory alternatives would dilute the effectiveness of the message.

Although the Board identified the foregoing factors within categories labeled "property rights," "Section 7 rights," and "alternative means," those categories are not entirely distinct and self-contained. The Board remarked, "A given factor may be relevant to more than one inquiry."

The Board also noted that it is the General Counsel's burden to prove, by objective considerations rather than subjective impressions, that reasonably effective alternative means were not available in the circumstances. Additionally, the Board pointed out that it is the burden of the party claiming a property right to establish the nature of its property interest.

The instant case involved picketing by nonemployee union agents carrying signs to inform the public that the employees of a particular store in a large shopping mall were not represented by a union. The issue was the location of the picketing—whether those who controlled the mall property around the store could lawfully prevent the pickets from communicating their message to the public near the store entrance.

Pursuant to its accommodation of the respective rights of the parties, the Board concluded that the communication of the union's message from public property at the entrances to the shopping center was not a reasonably effective alternative, and that there was in fact no method of communicating the union's message effectively other than entry onto the mall property. Accordingly, it held that the respondents—the mall operator and the store that was the target of the picketing—violated Section 8(a)(1) by demanding that the union refrain from informational picketing protected by Section 7 and causing the police to threaten pickets with arrest for trespass if they did not cease such protected picketing.

7. Other Issues

In *Lynn-Edwards Corp.*,[28] the Board accepted a remand from the United States Court of Appeals for the Ninth Circuit, which had vacated the Board's earlier Decision and Order.[29] On remand, the Board found, contrary to the administrative law judge, that an Employee Stock Ownership Plan (ESOP), by statutory definition, is a retirement plan within the meaning of the Employee Retirement Income Security Act of 1974 (ERISA),[30] even if the ESOP is funded from company profits. Premised on this finding, the Board concluded, contrary to the judge, that the eligibility provisions in the respondent's ESOP did not violate Section 8(a)(1).[31] The Board, however, reaffirmed that part of the judge's Conclusions of Law in which he found that "Respondent has violated Section 8(a)(1) of the Act . . . by maintaining those portions of existing booklets and documents which contain related explanatory material" because these materials suggested that coverage of employees would automatically be withdrawn as soon as they became represented by a union or that continued coverage under the plan would not be subject to bargaining, distinguishing *Handleman Co.*[32] and *A. H. Belo Corp.*[33] from the instant case.

In reaching the determination that the respondent's ESOP was a retirement plan, the Board considered that the respondent's ESOP was expressly designed pursuant to a 1983 amendment to come within the statutory purview of ERISA. The Board further considered that ESOPs, such as the one in question, are in fact created under and defined by ERISA and related regulations. Moreover, an examination of the ERISA definition of an employee pension benefit plan confirms that ESOPs are merely subspecies of federally regulated employee retirement benefit plans.[34] In finding that the respondent's eligibility provision did not violate Section 8(a)(1), the Board noted that the provision did not automatically terminate the employees' benefits upon selection of the union as their exclusive representative. Rather, the Board reasoned, it provided that the benefits may only be terminated if retirement benefits for the covered employees are the subject of good-faith bargaining and the employees' benefits are funded pursuant to the collective-bargaining agreement. Thus,

---

[28] 290 NLRB No. 28 (Chairman Stephens and Members Johansen and Babson).

[29] 282 NLRB 52 (1986), vacated and remanded 825 F.2d 413 (1987).

[30] Pub. L. 93-406, 88 Stat. 829 (codified as amended 29 U.S.C. § 1001-1462, and in various sections of 26 U.S.C.).

[31] The respondent's ESOP included an eligibility provision that states:

> [N]otwithstanding any provision to the contrary, no employee covered by a collective-bargaining agreement between an Employee representative and the Employer shall become a Participant in the Plan, provided that retirement benefits of said class of Employees was the subject of good faith bargaining between the Employee representative and the Employer, and said Employee's retirement benefits are being funded pursuant to said collective-bargaining agreements.

[32] 283 NLRB No. 65 (Mar. 31, 1987).

[33] 285 NLRB No. 106 (Sept. 16, 1987).

[34] 29 U.S.C. § 1002 (2)(A).

the employees' participation in the respondent's ESOP continued throughout the negotiation process and would be discontinued *only* in the event that a new retirement plan is funded through the agreement. Finally, the Board noted that the respondent and the union under this scheme maintained the option, through good-faith negotiations, either to continue coverage for employees under the respondent's ESOP, or to negotiate for the substitution of a different plan, which may include stock ownership features.

In *Ohmite Mfg. Co.*,[35] the Board dismissed an allegation that the employer violated Section 8(a)(1) when it refused to grant an employee an excused absence from work to attend a Board representation hearing as the union's "observer."

Following *Standard Packaging Corp.*,[36] and overruling to the extent inconsistent the Board's later decision in *Earringhouse Imports*,[37] the Board majority held that the burden was on the General Counsel in such cases to show that the employer's refusal was improperly motivated or that the employee had demonstrated to the employer at the time of the request that there was a real need to attend the hearing, and that only when the General Counsel had presented prima facie evidence of either or both of the above would the burden shift to the employer either to discredit the General Counsel's evidence or to show an overriding business reason for its decision.

The majority found that the General Counsel had failed to meet this burden in the case at hand. The majority noted that there was no evidence that the employer's refusal to grant an excused absence was improperly motivated. Nor, the majority found, was there any evidence that the employee had a real need to attend the representation hearing. The majority rejected the contention that a real need was demonstrated by the fact that the employee was one of the most active union supporters and had been requested to attend as the union's "observer." In the absence of any explanation as to why such an "observer" was actually needed, the majority found that these facts indicated no more than that the employee had a genuine personal interest in the hearing. Such an interest, the majority stated, did not rise to the level of a "real need." Accordingly, the majority held that the General Counsel failed to establish that the employer violated Section 8(a)(1) when it refused to grant the employee an excused absence to attend the hearing.

Dissenting in part, Chairman Stephens agreed with the majority that *Earringhouse Imports* should be overruled and that the Board should return to the rule of *Standard Packaging*. He disagreed, however, that there had been an insufficient showing of

[35] 290 NLRB No. 130 (Members Johansen and Cracraft; Chairman Stephens dissenting in part).
[36] 140 NLRB 628 (1963).
[37] 227 NLRB 1107 (1977), enf. denied sub nom. *Service Employees Local 250 v. NLRB*, 600 F.2d 930 (D.C. Cir. 1979).

need under the circumstances so as to trigger the employer's burden of explanation. In his view, the fact that the employee was known to be the principal union organizer and had been requested by the union to attend as its "observer," indicated that the employee had an interest beyond mere curiosity in attending. Such circumstances, he concluded, triggered at least a burden of inquiry on the part of the employer to determine if some reasonable accommodation could be made. Accordingly, as the employer had simply rejected the employee's request without explanation, and made no claim that the employee's absence on unpaid leave would have actually caused a disruption of production, he found that the balance weighed against the employer and that a violation of Section 8(a)(1) had been established.

B. Employer Assistance to Union

In *Flatbush Manor Care Center*,[38] a panel majority reversed the administrative law judge's finding that, after the union's certification by the Regional Director, the employer violated Section 8(a)(2) and the union violated Section 8(b)(1)(A) based on the employer's recognition of the union in a technical, service, and maintenance unit and their execution of collective-bargaining agreements. Several months after the contracts were entered into, another union filed charges asserting that the recognition was premature and that payments to employees by the certified union were unlawful. Prior to commencement of a scheduled Notice to Show Cause proceeding, the certified union withdrew its petition and the Regional Director revoked the certification retroactive to the date of recognition.

The judge applied the *Herman Bros.* test[39] for premature recognition and found the reciprocal violations based on the fact that at the time of recognition the employer was not engaged in normal business operations and had not employed a substantial and representative complement of its projected work force. However, a panel majority, though fully aware of the retroactive revocation, pointed out that the judge had failed to consider the effect of the union's status as a Board-certified representative at the time of recognition. The majority held that, viewing the situation as the parties saw it immediately following the certification, and in the absence of fraud or collusion, it would not find premature recognition violations when either of the parties by acting otherwise could have subjected itself to unfair labor practice charges based on a refusal to bargain in the presence of a then-valid Board certification. Therefore, the majority also dismissed derivative 8(a)(3) and 8(b)(2) allegations concerning contractual union-security and dues-checkoff provisions.

---

[38] 287 NLRB No. 48 (Chairman Dotson and Member Johansen; Member Stephens dissenting in part).

[39] *Herman Bros.*, 264 NLRB 439 (1982).

Member Stephens dissented from the dismissal. In his view, *Ladies Garment Workers (Bernhard-Altmann) v. NLRB*[40] plainly controlled here—a good-faith belief that a union is the majority representative is no defense to 8(a)(2) and 8(b)(1)(A) allegations involving the extension of recognition to a minority union. Member Stephens read the majority as having implicitly recognized an exception to *Bernhard-Altmann* when the parties' good-faith reliance is based on a Board certification. In his view, however, this begged the question of whether the certification had been properly granted in the first instance. Because here it was not, as shown by the retroactive revocation, Member Stephens would have adopted the judge's 8(a)(2) and 8(b)(1)(A) findings and the corresponding derivative violations of Sections 8(a)(3) and 8(b)(2).[41]

The entire panel adopted the judge's finding that the employer violated Section 8(a)(2) by recognizing the union for a unit of registered nurses following a request based on a card majority. Five days later, the rival union filed a petition supported by cards representing its own majority. The judge applied the Board's dual-card theory to disallow certain of the union's cards because the employees signing them had also signed cards for the rival union. The panel agreed with the judge's reliance on *Bruckner Nursing Home*[42] in finding the violation based on the lack of a majority for Local 1115. A panel majority, however, went on to find, in accord with the *Bruckner* policy, that an election is the best means of resolving the competing claims of the rival unions. Because the election had already been conducted, the majority found that the recognition of the union, though "technically" in contravention of the Act, did not warrant a remedy, particularly where there was no evidence that the employer ever engaged in bargaining with the union. Accordingly, the majority dismissed the allegation.

Member Stephens agreed with the finding of the 8(a)(2) violation based on *Bernhard-Altmann*. He parted company with his colleagues, however, when they not only declined to meet the Board's 10(c) obligation to remedy the unfair labor practice, but also actually dismissed the complaint. Member Stephens stressed that *Bruckner*, in espousing an election to resolve a representation issue in which rival unions both claim majority support, is predicated on the presence of actual uncoerced majority support for the union recognized before a rival petition is filed. *Bruckner* did not, in Member Stephens' view, contemplate the situation presented here, namely, an 8(a)(2) charge filed after a petition was filed in a two-union initial organizing context, alleging that the employer had accorded prepetition recognition to a labor organization that did not actually have majority support. More spe-

[40] 366 U.S. 731 (1961).
[41] See *Rainey Security Agency*, 274 NLRB 269, 281 (1985).
[42] 262 NLRB 955 fn. 13 (1982), citing *Ladies Garment Workers (Bernhard-Altmann) v. NLRB*, supra.

cifically, *Bruckner* certainly does not cover the situation in which the petitioner filed postelection but pretally charges that the employer violated Section 8(a)(2) by prepetition recognition of the union. Member Stephens would have adopted the judge's recommended remedy—order the employer to withdraw and withhold recognition from the unlawfully recognized union until it is certified by the Board in an appropriate unit.

C. Employer Discrimination Against Employees

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

1. Striker Reinstatement Rights

In *Aqua-Chem, Inc.*,[43] the Board held that the company violated the Act in recalling laid-off striker replacements before more senior unreinstated strikers. In reaching this decision, the Board set out a new framework for determining whether the layoff of a permanent replacement creates a vacancy that activates a striker's reinstatement rights.

In March 1980, the company's production and maintenance employees commenced an economic strike, and the company began hiring permanent replacements for the strikers the following month. The strike ended in August 1980 when the company executed a new collective-bargaining agreement that included an agreement that strikers were deemed to have made an unconditional offer to return to work and that they would be returned to work as job vacancies occurred. In March 1982, the company indefinitely laid off 15 employees, 14 of whom were striker replacements. The company began recalling employees from layoff in May 1982, and by August it had recalled four employees, three of whom were striker replacements. The company did not consider recalling any of the remaining unreinstated strikers, taking the position that its layoff of replacements did not create any vacancies to which the unreinstated strikers were entitled to be recalled.

The judge concluded that the company had violated Section 8(a)(3). The judge noted that, under *Laidlaw Corp.*,[44] economic strikers who have been permanently replaced but who unconditionally offer to return to work are entitled to be reinstated upon

[43] 288 NLRB No. 121 (Chairman Stephens and Member Babson; Member Johansen concurring).
[44] 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

the departure of the replacements. The judge found that the replacements' layoff for a prolonged, indefinite period did constitute their departure from the company and, hence, the later reopening of positions constituted vacancies to which the unreinstated strikers were statutorily entitled to be recalled.

Although Chairman Stephens and Member Babson agreed with the judge's finding of a violation, they disagreed with the judge's reasoning that an economic layoff of permanent replacements for a prolonged, indefinite period is per se a vacancy that triggers strikers' reinstatement rights. The Chairman and Member Babson found that the question of whether the layoff of a permanent replacement creates such a vacancy must be resolved by balancing the rights of the parties involved, and that this should be done in the following manner.

Chairman Stephens and Member Babson stated that the General Counsel would first be required to establish a prima facie case that "the layoff truly signified the departure of the replacements under *Laidlaw* and thus created vacancies to which the unreinstated strikers were entitled to be recalled. The elements of this prima facie case would include showing that the strikers have made an unconditional offer to return to work, that a layoff of permanent striker replacements has occurred, that the replacements were recalled from layoff instead of the former strikers, and that, based on objective factors, the laid-off replacements had no reasonable expectancy of recall. The factors relevant to determining whether there was a reasonable expectancy of recall would include, inter alia, evidence concerning the employer's past business experience and its future plans, the length and circumstance of the layoff, and what the employee was told regarding the likelihood of recall. Once the General Counsel has established this prima facie case, the majority said, the burden shifts to the employer to show that in fact no such *Laidlaw* vacancy occurred or that its failure to recall the striker was otherwise based on legitimate and substantial business justifications. Chairman Stephens and Member Babson found a violation in this case because the General Counsel had established a prima facie case, and the company failed to rebut it.

In his concurrence, Member Johansen disagreed with placing the burden of proving "vacancies" on the General Counsel. Member Johansen noted that "the [Supreme] Court and the Board have consistently placed the burden on the employer to show that its replacements are permanent," and that the majority's approach ran against this precedent. This reallocation of burdens, Member Johansen concluded, would "disturb the balance of the economic weaponry established by Congress and preserved in Court and Board opinions defining the rights of strikers and their replacements."

In *Delta-Macon Brick & Tile Co.*,[45] an administrative law judge found that an employer's recall of laid-off striker replacements before unreinstated economic strikers, after a layoff of more than 15 months, did not violate Section 8(a)(3) and (1) of the Act, as had been alleged in the complaint.

Following the judge's decision in this case, the Board issued a Decision and Order in *Aqua-Chem*,[46] setting forth the criteria to be used in determining whether a layoff has resulted in the departure of a striker replacement under *Laidlaw Corp.*,[47] and allocating to parties their respective burdens of proof on this issue.

In *Delta-Macon*, the Board majority decided to remand the proceeding to the judge for the purpose of allowing the parties an opportunity to present evidence on this issue in accordance with the Board's holding in *Aqua-Chem* and for the judge's further consideration under the *Aqua-Chem* holding. The majority noted that given the rule in *Aqua-Chem*, which places the burden on the General Counsel to show that permanent replacements who were subsequently laid off had no reasonable expectation of recall, it was appropriate, notwithstanding the passage of time, to give the General Counsel an opportunity to meet the burden in this case.[48]

Member Johansen dissented from the majority's decision to remand the case for further findings. Rather, relying on his concurring opinion in *Aqua-Chem*, Member Johansen expressed the view that the burden is on the employer to show that the layoff of striker replacements did not result in vacancies under *Laidlaw* to which unreinstated strikers would be entitled. He found that the respondent in this case had ample opportunity during the hearing to make such a showing, but the evidence demonstrated that it failed to do so. Thus, he found that no purpose was served by giving the respondent, more than 6 years after the judge's decision in this case, a second chance to prove that the layoffs did not create vacancies within the meaning of *Laidlaw*. In his view, the long, indefinite layoffs that occurred here constituted a sufficient interruption of the employment relationship to warrant the recall of the unreinstated strikers.

---

[45] 289 NLRB No. 111 (Chairman Stephens and Member Babson; Member Johansen dissenting).

[46] 288 NLRB No. 121 (Chairman Stephens and Member Babson; Member Johansen concurring).

[47] 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert denied 397 U.S. 920 (1970). Under *Laidlaw*, economic strikers who have been permanently replaced but who unconditionally offer to return to work are entitled to reinstatement on the departure of their replacements. Under *Aqua-Chem*, the burden of proving that the layoff of a striker replacement resulted in the departure of the replacement under *Laidlaw* is on the General Counsel. Member Johansen, who concurred in the *Aqua-Chem* decision, is of the view that this is not so; rather, he believes that "the burden is on the employer to show that its replacements are permanent.

[48] The judge's decision in this case issued on June 9, 1982. The Board issued its *Aqua-Chem* decision on May 26, 1988.

2. Withholding Benefits During Strike

In *Energy Cooperative*,[49] the Board held, contrary to an administrative law judge, that waivers of accrued contractual benefits contained in strike settlement agreements may result in dismissal of charges filed by individual employees because a collective-bargaining representative may waive its individual members' statutory right to receive contractual benefits free from discrimination or coercion as long as the waiver is clear and unmistakable.[50]

On commencement of a lawful economic strike, the respondent ceased paying accrued sickness and accident benefits to 11 employees who had been receiving them before the strike began. The respondent and the union settled the strike and executed a memorandum of agreement providing that, in consideration of certain benefits not paid as a result of the strike, the respondent would pay the company's portion of the employees' health insurance premiums, which employees had assumed during the strike. The memorandum of agreement also provided that payment of insurance premiums was in full settlement of any pending or future grievance or NLRB charge related to the handling of all benefits during the strike.

The majority, citing *Texaco, Inc.*,[51] recognized that the withholding of accrued benefits on the apparent basis of a strike can be a violation of Section 8(a)(3). The majority held, however, that the respondent successfully defended itself against this allegation of discrimination by proving that the union, in its strike settlement agreement with the respondent, clearly and unmistakably waived the employees' statutory right to be free of discrimination. The majority relied on both the language of the strike settlement agreement and the relevant bargaining history as evidence that the parties clearly and unmistakably intended that disabled employees' rights to receive sickness and accident benefits during the strike were waived.

The majority reasoned that giving effect to private settlement agreements that amicably resolve labor disputes serves the public interest as well as that of the parties. The majority concluded that, in securing the good of the entire unit, the union was empowered to bind its members wholly apart from their consent, subject to the duty of fair representation.

In agreeing with the majority, Chairman Stephens stressed the fact that the right waived by the union was a dual right, both statutory and contractual. The Chairman reasoned that, although it is clear the union is free to bargain away its members' economic rights, the Board must carefully consider waiver of a statutory right because it may have a discouraging effect on present or

---

[49] 290 NLRB No. 78 (Members Johansen and Babson; Chairman Stephens and Member Cracraft concurring separately).

[50] Citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983).

[51] 285 NLRB No. 45 (Aug. 6, 1987).

future concerted activity. The Chairman concluded that in this case, where the statutory right waived was closely aligned to the right to strike, which was clearly waivable by the union, the union had the power to enter into an agreement that settled statutory violations and might lead to dismissal of individual members' charges against the respondent.

Member Cracraft concurred in the majority's finding that the union waived disabled employees' rights to accrued sickness and accident benefits denied them during the strike. Member Cracraft relied, however, only on the language of and negotiations leading to the strike settlement agreement, which provided that the respondent's payment of its share of health insurance premiums was in "full settlement of *any grievance*, NLRB charges or action pending or in the future related to the handling of *all* benefits during the strike."[52] Member Cracraft concluded that this language, coupled with the fact that sickness and accident benefits were discussed during the strike settlement negotiations, evidenced the union's intent to clearly and unmistakably waive disabled employees' contractual entitlement to sickness and accident benefits.

3. Retaliatory Discharges

In *SMCO, Inc.*,[53] a Board panel held that a single employer (RCA Truck Lines, Georgia Southern Transportation, and SMCO) fired union-represented drivers at Memphis and subcontracted their work in retaliation for the union's rejection of the company's final contract proposal and the union's attempt to set up joint negotiations with other unions representing drivers at other facilities.

In October 1984, the union notified the respondent that a majority of its Memphis drivers had signed authorization cards. The respondent agreed to recognize the union, but insisted that the company wished to negotiate a separate Memphis contract rather than agreeing to be bound by a national agreement. During negotiations, the union proposed that the company agree to a rider to the national agreement; the company declined.

In February 1985, after two bargaining meetings, the company wrote that it would be a waste of time to meet again and offered for the first time a complete contract proposal, stating that the union had until February 13 to accept and that the company was considering temporarily locking out the drivers and substituting an independent contractor or nonunit employees. The parties did exchange further communications. The respondent testified that the reason it opposed a national agreement was that tough negotiations with the union at another facility had polarized the parties. In March or April, a sales manager told an employee that

[52] 290 NLRB No. 78, slip op. at 17.
[53] 286 NLRB No. 122 (Members Johansen, Babson, and Stephens).

the company would subcontract the Memphis hauling work to a cartage agent unless employees got rid of the union. On April 30 the parties met again. The respondent's attorney said the company was losing money and revenue was declining because of the loss of a major customer. The attorney also said the company was definitely going to close the Memphis terminal and subcontract to a cartage company. At the end of the meeting, and after the company adamantly indicated that it would offer nothing for the effects of the closing, the union agent was asked, "Why don't you get [the drivers] a job at a union truck line since they want a union so bad?"

On May 17, the respondent reached agreement with a cartage company to provide hauling in the Memphis area, closed its facility, and discharged unit drivers.

The Board found the discharges violated Section 8(a)(3). It relied on the sales manager's unlawful threat to close the Memphis terminal and on the company's statement (that the union should find the employees a union job because they wanted a union so bad) as evidence of animus. The Board also rejected the respondent's proffered business reasons on the grounds that the economic assertions did not withstand scrutiny and the company had never mentioned economic difficulties during negotiations.

The Board observed that the company's opposition to joint negotiations and extension of the national agreement to the Memphis terminal were positions the company could maintain in good faith, but the Board held that the company could not retaliate against employees for union activity to avoid dealing with their bargaining representative. The Board further held that because its decision was motivated by antiunion reasons, the company also violated Section 8(a)(5) by refusing to bargain about the decision to subcontract and its effects on employees.

D. Employer Discrimination for Filing Charge

On remand from the Supreme Court, the Board issued a supplemental decision in *Bill Johnson's Restaurants*,[54] in which it applied the principles set forth in the Court's decision[55] to determine whether the respondent employer's filing and prosecution of a lawsuit against its employees in state court violated the Act. The Board found that the respondent had violated Section 8(a)(4) and (1) of the Act by filing and prosecuting a business interference claim in retaliation for its employees' exercise of their Section 7 rights, but had not violated the Act by filing and prosecuting its libel claim.

The respondent had discharged the charging party, who then filed unfair labor practice charges and picketed the respondent's

[54] 290 NLRB No. 5 (Members Johansen, Babson, and Cracraft; Chairman Stephens concurring in part and dissenting in part).

[55] *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983).

business establishment with three fellow employees and a few nonemployees. They carried signs and distributed leaflets asking customers to boycott the restaurant and accusing the respondent of unfair labor practices. The respondent confronted the picketers and threatened to "get even" with them and then filed a lawsuit against the employees in state court alleging that the employees' actions had interfered with its business (business interference claim) and that the leaflets were libelous (libel claim). The employee-defendants counterclaimed for abuse of process and libel. The state court granted the employee-defendants' Motion for Summary Judgment on the business interference claim and dismissed their abuse of process counterclaim, but left the libel claim and counterclaim for trial.

In its initial decision,[56] the Board had found that the respondent had violated Section 8(a)(4) and (1) by filing the state court lawsuit with the intent of impeding the Board's processes and punishing the employees for exercising their Section 7 rights. The United States Court of Appeals for the Ninth Circuit issued a judgment[57] enforcing the Board's Order in its entirety. Finding that the first amendment right of access to the courts and the State's compelling interest in maintaining domestic peace overrode the concerns embodied in Section 8(a)(4) and (1) of the Act, however, the Supreme Court vacated the judgment and remanded the case to the Board. The parties thereafter entered into an agreement settling the remaining libel claims before the state court and providing for a maximum payment by the respondent to the employees to compensate them for fees and costs.

In its opinion, the Court indicated that the Board could not enjoin a lawsuit that had a reasonable basis in law or fact, but could enjoin a suit that did not have such a reasonable basis. In the event that the suit lacked a reasonable basis, the Court declared that the Board could proceed with the unfair labor practice proceeding and decide whether the suit was filed with a retaliatory motive. The Court further indicated, however, that if a reasonable basis for the suit existed the Board must stay its unfair labor practice proceeding until the state court suit was concluded. If the state court then found merit in the suit, the Court stated, then the employer should also prevail before the Board because the filing of a meritorious lawsuit, even with a retaliatory motive, is not an unfair labor practice. If the state court judgment went against the employer, or the suit was withdrawn or otherwise shown to be without merit, however, the Court stated, then the Board could proceed to adjudicate the unfair labor practice case because the employer has had its day in court and the State's interest in providing a forum for its citizens has been vindicated.

[56] 249 NLRB 155 (1980).
[57] 660 F.2d 1335 (1981) (as modified on denial of rehearing and rehearing en banc Mar. 2, 1982).

Applying the Court's principles, the Board determined that, as the state court had granted summary judgment on the business interference claim and no reason existed for not deferring to that judgment, the respondent's business interference claim lacked a reasonable basis. The Board further found that the record established that the respondent had filed the lawsuit in retaliation for the employees' exercise of their Section 7 rights. Accordingly, the Board concluded that the respondent had violated the Act by filing and prosecuting the business interference suit, and ordered the respondent to cease and desist from engaging in such conduct and to reimburse the employees for all attorneys' fees and other expenses they had incurred in defending against the suit but not for filing their counterclaims.

Regarding the libel claim, a Board majority determined that that claim had a reasonable basis because the state court had denied the employee-defendants' Motion for Summary Judgment. Although the parties had entered into an agreement settling the libel claim, the Board majority noted that the settlement agreement, by its terms, had not settled the unfair labor practice charge and that the Court's opinion had not discussed the effect of a settlement agreement. As the state court would never reach the merits of the libel claim in light of the settlement agreement, the Board majority determined that the General Counsel had not shown that the libel claim was baseless.

In reaching that conclusion, the Board majority rejected the argument that the settlement of the libel claim was equivalent to the withdrawal of the claim, and therefore meritless under the Court's opinion. That result would discourage settlements and would be contrary to Rule 408 of the Federal Rules of Evidence, which prohibits the use of a settlement agreement as evidence to establish the validity or invalidity of a claim. Although nothing in the Court's opinion would preclude it from deciding the merits of the state court suit to resolve the unfair labor practice case, the Board majority declined to do so on the basis that its expertise lay in resolving labor law questions that arise under the Act and that its resources were limited. Having found that the libel claim was neither baseless nor withdrawn, the Board majority concluded that the filing and prosecution of the libel suit did not violate the Act. Accordingly, it was unnecessary to decide whether the libel suit was filed with a retaliatory motive.

In a partial dissent, Chairman Stephens indicated that resolution of the merits of the libel claim was beyond neither the Board's jurisdiction nor its expertise. Noting that both the administrative law judge and the court of appeals had found that the libel allegations lacked merit, he would have concluded that the libel claim was otherwise shown to be without merit, and therefore baseless under the Court's opinion, and filed with a retaliatory motive. He thus would have concluded that the filing and prosecution of the libel claim violated the Act.

E. Employer Bargaining Obligation

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

1. Impasse Over Nonmandatory Bargaining Subject

In *Reichhold Chemicals*,[58] the Board reconsidered a prior decision[59] and emphasized that in some cases the Board will consider the content of a party's bargaining proposals in assessing the totality of its conduct during negotiations. The majority stated, however, that it would not decide whether particular proposals are either "acceptable" or "unacceptable" to a party. Instead, the majority held that "relying on the Board's cumulative institutional experience in administering the Act, we shall continue to examine proposals when appropriate and consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract."

Turning to the merits of the case, the majority reaffirmed the Board's prior finding that the employer's overall conduct—including its insistence on a broad management-rights clause, a narrow grievance definition, and a comprehensive no-strike provision—established that the employer engaged in hard bargaining, rather than unlawful surface bargaining. The majority also affirmed the Board's previous holding that the employer's proposal that the union waive the right to engage in unfair labor practice strikes is a mandatory subject of bargaining.

Nevertheless, on further consideration, the majority reversed part of the Board's earlier decision in the case and found that the employer violated Section 8(a)(5) by insisting to impasse on a nonmandatory subject of bargaining, i.e., a waiver of access to Board processes that was part of the employer's proposed no-strike clause. In addition to a waiver of employees' statutory right to strike, including the right to strike in protest of employer unfair labor practices, the employer's proposed unauthorized strike clause sought to have employees forfeit their right to seek redress from the Board or other tribunal for discipline imposed under the clause on strikers who are replaced. The majority decided that the future waiver of the right to Board access sought in this case was not a mandatory subject of bargaining because it is contrary to a fundamental policy of the Act and is unrelated to terms and conditions of employment.

---

[58] 288 NLRB No. 8 (Chairman Stephens and Members Babson and Cracraft; Member Johansen dissenting).

[59] 277 NLRB 639 (1985).

The majority concluded, however, that a strike by the employer's employees was not an unfair labor practice strike because there was insufficient evidence that one of the reasons for the strike was the strikers' desire to protest the employer's unlawful insistence to impasse on the waiver of access to the Board.

Member Johansen, dissenting, criticized the delay on the motion and would not have reconsidered the Board's prior decision in the case, and therefore would have adhered to the prior holding that the proposed waiver of access to the Board was a mandatory subject of bargaining because it "is merely derivative of the waiver of the right to strike"—which clearly is a mandatory subject of bargaining. Member Johansen stated that the proposed waiver would not apply to a situation in which an employee was alleging that discipline imposed under the no-strike provision was discriminatory or pretextual.

Member Johansen also stated that he adhered to his previous finding that the employer had not engaged in unlawful surface bargaining, and he declared that he would continue to review bargaining proposals to the extent that they relate to bargaining tactics as evidence of the totality of circumstances of bargaining. He emphasized, however, that he would not find an 8(a)(5) bad-faith bargaining violation based on the content of allegedly unreasonable bargaining proposals viewed in isolation from the context of negotiations.

2. Unilateral Changes

In *Murphy Oil USA*,[60] the Board held that the respondent violated Section 8(a)(5) as well as 8(a)(3) and (1) by unilaterally withdrawing certain sickness and disability benefits from former striking employees.

The record showed that certain employees became sick or were injured during their lawful economic strike and could not return to work immediately when the strike ended. These employees returned later, but the respondent denied them certain benefits for their continued disability after the strike ended.

The Board found that the collective-bargaining agreement made employees entitled to benefits "in accordance with the terms of the Plan existing when [their] sickness or disability occurred." The respondent made no attempt to dispute the administrative law judge's interpretation, with which the panel agreed, that the terms of the plan, as existed before the strike ended, entitled employees to such benefits if they continued to be disabled after the strike ended.

In arriving at its holding, the panel noted the parties' agreement gave the respondent final authority to "interpret, apply, amend or revoke" the plan. However, it found that whatever right the respondent may have had to make *prospective* changes

[60] 286 NLRB No. 104 (Chairman Dotson and Members Stephens and Cracraft).

was irrelevant here. Thus, this case was distinguishable from cases involving entitlement to disability benefits *during* a strike.[61]

The Board in *Murphy Oil* also held that the "zipper clause" in the parties' collective-bargaining agreement did not give the respondent the right to make certain unilateral changes in terms and conditions of employment.

The record showed, inter alia, that the respondent unilaterally implemented new work rules and changed the method by which it computed overtime. In rejecting the respondent's contention that the "zipper clause" gave it the right to make these changes, the panel found that the zipper clauses at issue here do not purport to affect either party's statutory duty to bargain before making such changes. Rather, the panel pointed out, the normal function of such clauses is to maintain the status quo. Furthermore, the evidence of bargaining history and of past practice pertaining to such changes was at best equivocal and did not show a clear waiver by the union of its right to notice and opportunity to bargain.

In *Francis J. Fisher, Inc.*,[62] the administrative law judge found that the respondent violated Sections 8(a)(5) and 8(d) by unilaterally changing employees' wages and benefits at a time it had not reached an agreement with the union and had not reached impasse. The judge acknowledged that given the respondent's dire financial circumstances, together with the union's unwillingness to consider changes of the magnitude proposed by the respondent, there existed the high probability that the parties would in fact ultimately have reached impasse. Nevertheless, he found that the respondent's decision to make unilateral changes after only two negotiation sessions was premature, particularly where the respondent first delayed negotiations and then sought to compress them into two meetings during 1 week's time, and where evidence of the respondent's owner's belief that the employment conditions set by the collective-bargaining agreement ended with the agreement's expiration suggested a predetermined plan to set limits on negotiations.

The Board adopted the judge's findings that the respondent's unilateral actions were premature. In doing so, moreover, it overruled the decision in *Bell Transit Co.*[63] to the extent that it held that impasse can be found on the basis of subsequent events rather than on the state of negotiations at the time of the unilateral action and to the effect that an impasse and tentative agreement may exist simultaneously.

---

[61] See slip op. at 3 fn. 3, where the Board agreed with the judge that this case is distinguishable from *Conoco, Inc.*, 265 NLRB 819 (1982), enfd. 740 F.2d 811 (10th Cir. 1984), which was superseded in *Texaco, Inc.*, 285 NLRB No. 45 (Aug. 6, 1987).

[62] 289 NLRB No. 104 (Chairman Stephens and Members Johansen and Babson).

[63] 271 NLRB 1272 (1984), enf. denied sub nom. *Teamsters Local 175 v. NLRB*, 788 F.2d 27 (D.C. Cir. 1986).

In *United Technologies Corp.*,[64] the panel majority, reversing the administrative law judge, held that the employer did not violate Section 8(a)(5) when it unilaterally altered its system of progressive discipline for absenteeism.

The employer had a practice of using progressive discipline to deal with employees who had attendance problems. Under this practice, an employee would receive an oral warning, a written warning, and a 3-day disciplinary suspension prior to being discharged. A long-term employee might receive an additional 5-day suspension before being discharged.

In June 1983, however, the employer posted a notice stating that it was changing its system of progressive discipline in cases of poor attendance by omitting suspensions from the disciplinary steps. The notice explained that imposition of additional time off in the form of a suspension was counterproductive as discipline for poor attendance. After the notice was posted, the union sent the employer a letter contending that the progressive discipline procedure was a mandatory subject of bargaining and requesting that the employer negotiate. The employer denied the request, relying on the management functions clause of the contract.

The majority agreed with the employer that the management functions clause plainly waived the union's right to bargain over this change. The clause granted the employer the "sole right and responsibility . . . to select, hire, and demote employees, including the right to make and apply rules and regulations for production, *discipline*, efficiency, and safety" (emphasis added). The majority reasoned that the characterization of the employer's action as changing a rule, rather than as making a rule, was merely a semantical difference and did not take the employer's action outside the scope of the management functions clause.

The majority also noted that there was no bargaining history indicating that the contract language in issue was intended to mean something other than that which it plainly stated. Five or 6 years earlier the employer had attempted to change unilaterally certain other rules but ultimately agreed to bargain over the changes as part of a settlement of unfair labor practice charges. The majority found that the employer's failure to insist on exercising its right to make the changes unilaterally on that one occasion did not nullify the union's express contractual waiver of its right to bargain over the making of rules for discipline.

Member Johansen, dissenting, found that the management functions clause did not constitute a waiver of the union's right to bargain over a change in disciplinary rules in view of the employer's prior unsuccessful attempt to assert that interpretation of this provision. In Member Johansen's view, the employer's previous agreement to bargain when the union had challenged the employer's attempt to make a unilateral rule change led the union

[64] 287 NLRB No. 16 (Chairman Dotson and Member Stephens; Member Johansen dissenting).

reasonably to believe that the contract language did not authorize the employer to make such changes unilaterally and, thus, the union had no need to negotiate a change in the contract language. Thus, Member Johansen concluded, at the very least, this past practice demonstrated that there was no clear and unequivocal waiver of the union's right to bargain over rule changes.

3. Subcontracting Unit Work

In *Eltec Corp.*,[65] the Board adopted, under a somewhat altered rationale, the administrative law judge's finding that the employer violated Section 8(a)(5) and (1) by failing to give the union adequate notice and a meaningful opportunity to bargain over its decision to transfer and subcontract the parts assembly portion of its operation.

The employer's parts assembly division constituted one of the employer's two major operations. In February 1980, the employer gave the union 4 days' written notice that it planned to terminate its parts assembly operation for business and economic reasons. In response to the union's request for a meeting, the employer advised that it was unavailable until 1 day before the scheduled termination date. During the subsequent meeting, the employer maintained that its economic problems resulted from a 25-percent decline in sales, noncompetitive wage rates and benefits for parts assembly employees, burdensome state business taxes, and high workers' compensation and unemployment taxes.

When the union asked what could be done to keep the affected jobs in-plant, the employer indicated that it would need substantial wage reductions, a freeze on COLAs, reduced health benefits, a decrease in paid holidays, changes in the grievance procedure, and relief from various work rules. The employer, in response to the union's question whether the decision was final, stated that the decision was not irreversible although, for economic reasons, it needed an answer regarding its requested concessions by the next morning. Not hearing from the union, the employer moved its equipment and operations within a few days to Ohio, where, in early 1980, it formed a corporation in which its vice president became a large stockholder, entered into a lease agreement, and placed advertisements for employees.

The judge, noting that the employer informed the union on several occasions after it subcontracted the subject work to the Ohio corporation that it was still available and willing to talk about its decision, concluded that the employer presented the union with a fait accompli in February 1980, that the notice given to the union was not meaningful or adequate, and that its postmove statement of availability to talk about its subcontracting decision was not a specific offer to bargain.

---

[65] 286 NLRB No. 85 (Members Stephens and Johansen; Chairman Dotson concurring in part and dissenting in part).

The Board majority, although agreeing with the judge that the employer violated the Act, analyzed the facts in light of the plurality opinion in *Otis Elevator*,[66] which held that the critical factor in determining whether a management decision is subject to mandatory bargaining is the essence of the decision itself, i.e., whether it turns on a change in the nature or direction of the business or turns on labor costs. In finding that the employer's decision turned on labor costs, the Board majority noted that the first announcement of the subcontracting plans came on the heels of unsuccessful attempts to obtain economic concessions from the union in 1979, that the employer specifically referred to labor costs in its meeting with the union the day before the scheduled termination of operations, that the initial subcontracting arrangement was a temporary one, and that the employer subsequently stated that its decision was not irreversible. The Board majority concluded that, had the employer obtained its requested concessions, it would not have transferred its operations.

Chairman Dotson, dissenting on this issue, maintained that the employer's subcontracting decision turned not on labor costs but on a significant change in the nature and direction of the business and therefore was not subject to mandatory bargaining. The Chairman noted that, by subcontracting one of its two major operations, the employer was attempting to restore its enterprise to economic viability despite diminishing sales and an unfavorable business environment. He further noted that, although the subcontracting decision was initially arranged as a temporary venture, the Ohio corporation had, and exercised in July 1980, an option to purchase the parts assembly equipment and operations. Through the sale, the Chairman maintained, the employer experienced a substantial capital restructuring and ceased to be engaged in parts assembly work. The Chairman further noted that the employer retained no control over the equipment or the employees in the subcontractor's operation and that no alter ego or other sham device was employed.

In response to the Chairman's partial dissent, the Board majority stated that, despite the subcontracting arrangement, the employer retained its customers' purchase orders and the right of quality control and, by initially retaining ownership rights to the equipment used by the subcontractor, the employer did not engage in a substantial capital restructuring. The majority recognized, however, that when the subcontracted operation was sold in July 1980 the sale represented a change in the scope and direction of the respondent's business over which it had no obligation to bargain. Accordingly, the majority found that ordering the employer to bargain over its subcontracting decision would be a meaningless gesture. Instead, the Board ordered that the employer cease and desist from engaging in the unlawful conduct and in

[66] 269 NLRB 891 (1984).

the future bargain collectively with the union regarding like decisions entailing mandatory subjects of bargaining, and that it also make whole employees who were laid off between February and July 1980 when the equipment was sold.

In *Collateral Control Corp.*,[67] the Board held that, in evaluating the mandatory bargaining status of an employer's decision to subcontract unit work, the General Counsel need not sustain a burden of showing that the decision turned on labor costs when "all that is involved is the substitution of one group of workers for another to perform the same task in the same plant under the ultimate control of the same employer."[68]

The respondent, a third-party guarantor operating a public warehouse to guard inventory at the premises of a bankrupt steel mill, laid off guard employees with whom it had signed a collective-bargaining agreement without giving the union notice or an opportunity to bargain. It then subcontracted the work to an independent guard service. The administrative law judge found that the respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain with the union over the decision to subcontract and its effects and that it failed to comply with the provisions of Section 8(d) by repudiating the parties' contract midterm.

The Board agreed with the judge's conclusion that the respondent violated Section 8(a)(5), but did not base its agreement on the judge's conclusions regarding contract repudiation. Instead, it relied on the Supreme Court's decision in *Fibreboard Corp. v. NLRB*,[69] that an employer must give notice to and, on request, bargain with the exclusive bargaining representative of its employees over a decision and the effects of a decision to subcontract unit work, a mandatory subject of bargaining.

The respondent had contended that its decision to subcontract the guard work was not subject to mandatory bargaining under the Supreme Court's decision in *First National Maintenance Corp. v. NLRB*.[70] Specifically, it argued that, with the elimination by subcontracting of a "profit" it had previously derived from a payroll surcharge to the bankrupt company and its creditors, labor costs were not among the considerations that could have influenced its decision to subcontract, and consequently the decision was unamenable to resolution through collective bargaining. The Board rejected this argument.

The Board noted that three *Fibreboard* principles were reaffirmed in *First National Maintenance*, each applicable to this case: First, no alteration occurred in the company's "basic operation." Second, the basis for the company's decision was a matter "peculiarly suitable for resolution within the collective bargaining

[67] 288 NLRB No. 41 (Chairman Stephens and Members Johansen and Babson).

[68] Quoting Justice Stewart's concurring opinion in *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 224 (1964).

[69] Ibid.

[70] 452 U.S. 666 (1981).

framework." Third, the Board noted, *Fibreboard* recognized that the amenability of subcontracting to negotiation is at least to some extent a function of this type of management decision itself.

The respondent also contended that the terms of the collective-bargaining agreement negotiated by the parties authorized the subcontracting and that, by these terms, the union waived its right to bargaining. The Board rejected this contention, finding that there was no express mention in the contract of an intention by the union to waive its right to bargaining on subcontracting guard work. Citing *Metropolitan Edison Co. v. NLRB*,[71] the Board found no clear and unmistakable waiver of bargaining rights.

4. Withdrawal of Recognition

In *United Supermarkets*,[72] a panel majority of Members Johansen and Stephens agreed with an administrative law judge's finding that the respondent's purported objective considerations were insufficient to justify its withdrawal of recognition from a union within 14 months of its certification while the respondent was contesting backpay awarded in a related unfair labor practice proceeding that had begun several years earlier. Chairman Dotson dissented.

In the underlying proceeding,[73] the Board determined that the respondent's violations of Section 8(a)(3) and (1)—occurring within the context of organizing campaigns in two units of the respondent's employees—were both "extensive and serious." That proceeding resulted in the Board's certification of the union in one unit (involved in the instant case) and the direction of a second election in the other unit.

Approximately 5 years had elapsed between the onset of the organizational campaign and the Board's certification of representative. The union requested bargaining shortly after being certified, but the parties did not meet until 2-1/2 months later and the respondent provided no reply to the union's proposal until after 3 weeks. Meanwhile, the respondent continued to litigate the unfair labor practices in the court of appeals, contesting the Board's remedial order. Three months after the union's certification, a decertification petition was filed. Bargaining continued intermittently for several months thereafter until the respondent withdrew recognition 14 months after certification, relying primarily on a 9-month-old document supporting the decertification petition that was signed by 90 percent of the unit employees.

The majority concluded that in these circumstances, where the respondent had outstanding, unremedied unfair labor practices of a type that could reasonably be expected to have a lingering coercive effect on employees, the indication of support for the de-

[71] 460 U.S. 693 (1983).

[72] 287 NLRB No. 11 (Members Johansen and Stephens; Chairman Dotson dissenting).

[73] *United Supermarkets*, 261 NLRB 1291 (1982).

certification petition was not a free and uncoerced expression of employee sentiment, but rather the tainted byproduct of the respondent's efforts at thwarting their exercise of protected concerted activities. Accordingly, the respondent was not privileged to withdraw recognition from the union, and its doing so violated Section 8(a)(5) and (1).

Chairman Dotson, in dissent, pointed to the passage of several years since the commission of unfair labor practices as likely having a diminishing effect on any coercion that may have been felt among the employees. He would have accorded great weight to the showing of support for the decertification petition as a reliable indicator of the union's loss of majority. He noted that although the petition and the expression in its behalf both arose during the first year of the union's certification—when a union's majority status cannot be challenged—the withdrawal of recognition itself did not take place until after the union's majority was deemed rebuttable. The Chairman contended that, because there was no evidence that the employees' disaffection with the union had undergone a change in the interim, the respondent should be permitted to rely on their support for decertification as a basis for believing that employees no longer supported the union.

In *Gulf States Mfrs.*,[74] a Board panel held that the employer violated Section 8(a)(5) by refusing to provide wage and benefit information regarding supervisors who performed unit work, but the panel concluded that the employer did not violate Section 8(a)(5) by its bargaining conduct, withdrawing recognition from the union, and unilaterally implementing postwithdrawal changes in wages, insurance benefits, working hours, and employee layoffs.

The administrative law judge found that the withdrawal of recognition took place within a context of unremedied unfair labor practices contributing to the union's loss of majority support, and that the employer was therefore not free to withdraw recognition until the unfair labor practices were remedied and no further violations were committed. The unfair labor practices at issue were the employer's refusal to provide information in contract negotiations, denial of union representation to an employee at a disciplinary meeting, and the layoff of employees without giving the union sufficient notice and an opportunity to bargain.

Noting that the unfair labor practices occurred more than a year and a half before the employer received a petition stating that its employees no longer supported the union, the Board panel majority ruled that the unfair labor practices were not designed to cause rejection of the union and had no appreciable impact on employees' disaffection with it. The panel majority observed that the refusal to accord union representation affected only one employee; the layoffs resulted from compelling business

[74] 287 NLRB No. 4 (Chairman Dotson and Member Cracraft; Member Johansen dissenting in part).

considerations that bargaining would not have changed; the refusal to provide information did not contribute to the union's loss of majority, particularly in the absence of evidence that the employer's position was disseminated to employees; and the employer had not engaged in tactics calculated to frustrate the bargaining process.

Consequently, the panel majority held that the employer was free to rely on the employees' petition as establishing a reasonable doubt of loss of majority support and, because the withdrawal of recognition was not unlawful, the allegation regarding the employer's subsequent unilateral changes was also dismissed. As the union no longer represented the employees, Member Cracraft found it inappropriate to include disclosure and bargaining language in the Board's Order and notice regarding the employer's refusal to provide information concerning supervisors who performed unit work. Chairman Dotson agreed because he would not have found the refusal violative.

Member Johansen dissented in part. He concurred with Member Cracraft that the employer unlawfully refused to furnish information on supervisors performing unit work, but unlike the panel majority he found that the employer additionally violated Section 8(a)(5) by engaging in dilatory bargaining. Accordingly, he found the withdrawal of recognition and unilateral changes violative as well. He pointed out that in 15 months of bargaining the employer met with the union only 13 times, although the union made repeated requests to schedule negotiations more frequently. Relying on the employer's insistence on infrequent bargaining sesssions, its failure to provide information relevant to negotiations, and its negotiator's remarks suggesting that the union terminate the bargaining relationship, Member Johansen concluded that the evidence showed a refusal to meet at reasonable times and a design to avoid consummating an agreement with the union. He therefore found it unnecessary to pass on the judge's finding that the employer's unremedied unfair labor practices made the withdrawal of recognition unlawful.

In reply, the panel majority adhered to the judge's findings that both parties contributed to the confusion and delays surrounding the negotiations, and that the scheduling difficulties were neither preconceived nor intentional.

In *Richmond Toyota*,[75] the Board reversed the administrative law judge and held that the employer violated Section 8(a)(5) and (1) by withdrawing recognition from the union.

The union informed the employer's general manager that it represented a majority of the employees and offered to demonstrate its majority status. The general manager requested proof of that status and verified the employees' signatures on union authorization cards. When the union asked to meet with the gener-

[75] 287 NLRB No. 13 (Members Johansen and Babson; Member Stephens dissenting).

al manager to negotiate a collective-bargaining agreement, the general manager stated that she was unavailable and knew nothing about negotiations, but that her husband, the employer's president, would handle the negotiations and contact the union. The general manager later repeated to the union that she was unavailable to meet on the scheduled date but that her husband would talk to the union.

In concluding that the employer did not recognize the union, the judge noted, inter alia, that the general manager was unfamiliar with labor relations and that she did not acknowledge that the authorization cards constituted a majority. Accordingly, her statements that her husband would "handle" or "take care of" negotiations did not constitute voluntary recognition.

In reversing the judge's conclusion, the majority held that the general manager, the employer's highest ranking onsite official responsible for day-to-day operations, had at least apparent authority to recognize and bargain with the union. Further, by requesting proof of the union's majority status and authenticating employee support, the general manager did not demonstrate naivete in labor relations. As the general manager "only questioned the union's majority status before examining and verifying the authorization cards, and because she consented to future negotiations after authenticating the cards," the majority ruled that she recognized the union. Citing *Jerr-Dan Corp.*, 237 NLRB 302 (1978), the majority held that the general manager did not have to expressly state that she recognized the union for this obligation to attach.

Member Stephens, dissenting, agreed with the judge that the employer did not recognize the union as the exclusive representative of its employees. Member Stephens found that the general manager never agreed to recognize the union, never acknowledged its majority support, and never expressly committed her husband to negotiating with the union. In Member Stephens' view, the general manager's statements that her husband would "handle" or "take care of" negotiations were equivocal and ambiguous.

In *Alexander Linn Hospital Assn.*,[76] the Board found that a decertification petition had been tainted by unfair labor practices and therefore directed that the petition be dismissed. The Board also found, contrary to the administrative law judge, that the respondent did not have a good-faith doubt, based on objective considerations, of the union's majority status so as to justify withdrawal of recognition and the making of unilateral changes.

In a prior case, the Board had found that this respondent had engaged in unfair labor practices in March and April 1978. These violations had not been remedied when the decertification petition was filed on September 29, 1978. In dismissing the decertifi-

[76] 288 NLRB No. 18 (Chairman Stephens and Members Johansen and Babson).

cation petition, the Board cited *Hearst Corp.*,[77] in which it held that "a decertification petition will be valid only if, prior to an employer's reliance on the petition, it has not engaged in conduct 'designed to undermine employee support for, or cause their disaffection with, the union.'"

As to whether the respondent had a good-faith doubt, based on objective considerations, of the union's majority status, the factors relied on by the respondent and the Board's reasoning in rejecting those factors were as follows:

1. Limited participation in a strike. The Board noted that employees' nonparticipation in a strike does not mean rejection of the union.[78]

2. Replacement of some strikers. The Board cited *Station KKHI*[79] for the proposition that "no presumptions should be applied to determine the view of strike[r] replacements."

3. Turnover in employees. The Board noted that it presumes new employees support the union.[80]

4. Few employees authorizing dues deductions. The Board stated "that majority support for [a union] is not to be confused with majority union membership."[81]

5. The filing of a decertification petition and the statement of the employee who filed the petition that she and other employees "felt" that a majority did not want the union. The Board stated that "absent a definite showing that a majority of employees signed in support of the petition, the petition, without more, would not justify a withdrawal of recognition or the making of unilateral changes."[82] Further, the Board held that the employee's statement was "nothing more than conjecture and opinion."[83] The Board stated that, when employees' "statements may be deemed definite and reliable," they may support a finding of reasonably based doubt of the union's majority status.[84] However, employee statements purporting to represent the views of other employees must be viewed with suspicion and caution. Thus, when the employee did not name the other employees rejecting the union,[85] or employee assertions were unverified,[86] objective considerations were not established.

Hospital Administrator Marzella testified regarding meetings in which employees expressed a desire not to be represented by the union. He did not give names, or specific dates, or "set forth one specific or definite statement made by any particular RN." Thus,

[77] 281 NLRB 764 (1986).

[78] Citing *Mobile Home Estates*, 259 NLRB 1384, 1404 (1982), enfd. in pertinent part 707 F.2d 264 (6th Cir. 1983); *Seeburg Corp.*, 192 NLRB 290, 304–305 (1971).

[79] 284 NLRB No. 113 (July 27, 1987).

[80] Citing *Laystrom Mfg. Co.*, 151 NLRB 1482 (1965), enf. denied 359 F.2d 799 (7th Cir. 1966).

[81] See *Atlanta Hilton & Towers*, 278 NLRB 474 (1986).

[82] Citing *Sanderson Farms*, 271 NLRB 1477 (1984).

[83] Citing *Atlanta Hilton*, supra.

[84] Citing *U-Save Food Warehouse*, 271 NLRB 710, 717 (1984); *Sofco, Inc.*, 268 NLRB 159 (1983).

[85] *Redok Enterprises*, 277 NLRB 1010 (1985).

[86] *Cornell of California*, 222 NLRB 303 (1976).

the Board found "Marzella's testimony [to be] far too imprecise and uncertain to convey other than his general impression."

The Board concluded that the above factors did not constitute sufficient objective considerations to warrant a good-faith doubt.

5. Processing Grievances Under Expired Contract

In *Litton Business Systems*,[87] the Board applied the rule of *Indiana & Michigan Electric Co.*[88] to the respondent's layoff of employees in connection with a change in production methods. The panel majority of Members Babson and Stephens found that the respondent violated Section 8(a)(5) by repudiating its obligation to process grievances under its expired collective-bargaining agreement and to arbitrate grievances originating after expiration but "arising under" the contract within the meaning of *Nolde Bros. v. Bakery Workers Local 358*.[89] The majority, however, found that the grievances at issue did not actually "arise under" the expired agreement and therefore were not arbitrable after contract expiration under *Nolde*. In addition, it found that the respondent violated Section 8(a)(5) by refusing to bargain over the layoffs as an effect of the decision to alter production methods. Chairman Dotson dissented.

In 1980, the respondent decided to convert its Santa Clara plant from a hot-type to a cold-type printing operation. The conversion resulted in the layoff of 10 employees. The parties' collective-bargaining agreement, which had expired in 1979, provided that, in case of layoffs, length of service would be determinative "if other things such as aptitude and ability are equal." The respondent neither notified the union in advance of the layoffs nor laid employees off by seniority. The union grieved the layoffs and also sought to "discuss this layoff and its impact." The respondent refused to process the grievances and expressed a willingness to bargain over the effects of the layoffs but not the layoff decision itself.

The majority interpreted the parties' expired contract as subjecting the respondent to a "potentially viable" obligation to arbitrate postexpiration grievances and viewed the respondent's conduct as an unlawful repudiation of that obligation. Further, the majority disagreed with the administrative law judge that the layoff could not be discussed separately from the nonnegotiable decision to convert the plant.

The majority viewed the decision to lay off employees as one possible outcome of the conversion, and applied *Morco Industries*[90] to find that the respondent was obligated to bargain over the layoff decision as an effect of the conversion. Finally, the majority remedied the repudiation violation by ordering the re-

[87] 286 NLRB No. 79 (Members Babson and Stephens; Chairman Dotson dissenting).
[88] 284 NLRB No. 7 (May 29, 1987).
[89] 430 U.S. 243, 255 (1977).
[90] 279 NLRB 762 (1986).

spondent to process the layoff grievances through the contractual procedure. It did not, however, order the respondent to arbitrate the grievances, as it found that they did not involve a right "worked for or accumulated over time" and, hence, did not arise under the expired contract within the meaning of *Nolde*, supra.

Chairman Dotson dissented from the majority finding that the respondent violated Section 8(a)(5) by repudiating the arbitration procedure and by refusing to bargain over the effects of the conversion decision. First, he found insufficient evidence of repudiation of the postexpiration duty to arbitrate and, in keeping with his partial dissent in *Indiana & Michigan Electric*, supra, he would have held that the respondent in this case had no postexpiration duty to process the grievances as they did not "arise under" the expired contract.

Secondly, Chairman Dotson disagreed that the layoff decision was an effect of the conversion decision. He viewed the layoff as the "natural and logical" outcome of the conversion and not subject to effects bargaining. Even assuming that the two decisions were separable, Chairman Dotson reasoned, under *Otis Elevator Co.*[91] the layoff decision was a nonmandatory subject of bargaining as it was not motivated by a desire to reduce labor costs, and hence the respondent was not required to bargain over it.

In *Uppco, Inc.*,[92] the Board adopted the administrative law judge's decision that the employer violated Section 8(a)(5) and (1) by refusing to arbitrate two grievances arising out of events occurring after the expiration of a collective-bargaining agreement.

After the parties' collective-bargaining agreement expired, employees went on strike. The strike ended and the employer recalled employees on a departmental basis despite the union's request that employees be recalled according to plantwide seniority. The expired contract contained detailed provisions regarding seniority and provided for a grievance procedure culminating in binding arbitration. The union, relying on provisions in the expired contract, grieved the failure to recall employees by plantwide seniority and the employer's refusal to pay holiday pay for Christmas and New Year's to those employees who had not been recalled on those days. The employer denied both grievances and refused to arbitrate.

The panel majority of Members Johansen and Babson found the parties' agreement did not negate the presumption that the agreement to arbitrate disputes arising under the contract continued after expiration of the contract.[93] Thus, the majority reasoned, under *Indiana & Michigan Electric Co.*,[94] the parties must

[91] 269 NLRB 891 (1984).
[92] 288 NLRB No. 98 (Members Johansen and Babson; Member Cracraft dissenting).
[93] See *Nolde Bros. v. Bakery Workers Local 358*, 430 U.S. 243 (1977).
[94] 284 NLRB No. 7 (May 29, 1987).

approach hiatus grievances on an "'ad hoc, case-by-case' basis, distinguishing those that are arbitrable under *Nolde* from those that are not."

The majority found that the employer's "course of conduct . . . demonstrates . . . [an] unlawful across-the-board refusal to arbitrate hiatus grievances." The majority noted that "[i]n its refusals to arbitrate, the [employer] adopted and maintained the position that both grievances were nonarbitrable, grounding its refusal on their having arisen out of events occurring after contract expiration."

The majority continued to cite *Indiana & Michigan* stating: "[A] dispute based on postexpiration events 'arises under' the contract . . . only if it concerns contract rights capable of accruing or vesting to some degree during the life of the contract and ripening or remaining enforceable after the contract expires." The majority concluded "that the rights involved in the holiday pay grievance do not arise under the expired contract." The majority noted that the events giving rise to the grievance occurred after contract expiration, and that the contract language indicated the right to holiday pay did not accrue or vest "during the life of the contract," and did not indicate "the right to holiday pay was intended . . . to ripen or remain enforceable after [contract expiration]."

The majority concluded, however, that the rights involved in the recall grievance did arise under the expired contract. They noted that under the contract seniority is accrued during the life of the contract and that the contract's failure to specify that contract expiration could result in loss of seniority rights indicated the parties' intent that they remained enforceable thereafter.

Member Johansen indicated he would find that both grievances "were 'arguably' over provisions of the expired contract and thus 'arose under' the contract."

In dissent, Member Cracraft stated that the test of *Indiana & Michigan* is "whether the employer's conduct amounts to a wholesale repudiation of the collective-bargaining agreement." Member Cracraft noted that during the contractual hiatus in this case the parties resolved a number of grievances and the employer "appears to have approached grievances on a case-by-case basis." Further, the employer gave reasons "based on the language of the contract for its position that the [two] grievances [not resolved] were not arbitrable under the expired contract."

Member Cracraft concluded the employer's "conduct falls far short of a wholesale repudiation of its contractual commitment to arbitrate hiatus grievances that arise under the contract."

6. Continuity of Bargaining Agent

The Board continues to apply its traditional continuity of bargaining representative analysis prior to granting a union's petition to amend its certification based on an affiliation. This analysis

consists of a factual comparison between the pre- and post-affiliation bargaining representative to determine whether the affiliation has so substantially altered the union's identity so as to raise a question concerning representation and require a new representation election.

In *Seattle-First National Bank*,[95] the Board determined that although some differences did exist between the preaffiliation Local 1182 of the Financial Institution Employees Union and the postaffiliation Local 1182 of the Retail Clerks International Union, these differences were not sufficiently dramatic to alter the identity of the bargaining representative so as to raise a question concerning representation.

In reaching this determination, the Board applied its factual analysis and observed that there was a substantial continuity of the executive committee from the pre- to the post-affiliation local. According to the Board, any changes in officers since affiliation were the result of a natural turnover and not the result of a required condition of the affiliation. Additionally, the Board noted that the postaffiliation local retained substantial control over day-to-day union operations that included, inter alia, contract administration; handling of grievances; control of collective bargaining, including final ratification of contracts; and the ability to participate in or to call strikes.

The Board pointed out that although there were differences between the pre- and the post-affiliation local, including, inter alia, modifications in the requirements for union membership as well as the eligibility of a member to hold a union office, these differences were not sufficient to demonstrate that there existed a lack of continuity in the bargaining representative.

The Board therefore found that the employer had violated Section 8(a)(5) and (1) when it failed and refused to recognize and bargain with the postaffiliation Local 1182 of the Retail Clerks International Union as the affiliation did not give rise to a question concerning representation.

7. Duty to Furnish Information

In *York International Corp.*,[96] the Board concluded, based on a stipulated record, that the respondent had not violated Section 8(a)(5) by refusing to disclose the monetary amount and type of employment references given a former bargaining unit member as part of a settlement agreement of various claims relating to the former employee's discharge, including a state administrative complaint, a Federal district court complaint, and contractual grievances. The panel majority found that the information was not so obviously related to the union's duty as bargaining representative as to make it presumptively relevant.

---

[95] 290 NLRB No. 72 (Chairman Stephens and Members Babson and Cracraft).

[96] 290 NLRB No. 57 (Chairman Stephens and Member Johansen; Member Babson dissenting).

In attempting to establish the information's relevancy, the General Counsel and the union argued that the union could not properly decide whether to pursue the grievance on behalf of the former employee unless it knew whether the respondent had offered the employee a fair settlement. The majority stated, however, that the record failed to show that the union had objected to the private settlement discussions between the former employee, his attorney, and the respondent in which the contractual grievances could have been coupled with the numerous noncontractual claims and that, in fact, the discussions resulted in a settlement that satisfied the former employee. The General Counsel and the union also asserted that the information was relevant because it could be used as precedent for future grievance settlements. In rejecting this assertion, the majority stated that, in addition to the two contractual grievances, the former employee had also filed numerous noncontractual claims that precluded a determination of which portion of the monetary amount, if any, pertained to the contractual grievances. As a result, the monetary amount was found to be of little precedential value to the union in processing future grievances.

With respect to the information on employment references, the majority found that that term of the settlement agreement was in response to the allegation in the Federal court complaint that the respondent gave the former employee adverse employment references, thereby placing the matter outside the purview of the filed grievances. The majority concluded that the unique circumstances of this case showed that requiring disclosure of the requested information would not enhance the union's ability to represent the employees in future grievance settlement negotiations.

In a dissenting opinion, Member Babson stated that the information was presumptively relevant because it concerned the settlement of contractual grievances that arose under the bargaining agreement in effect between the union and the respondent. Member Babson found that withholding the information from the union, in light of the union's right to pursue the grievances notwithstanding the settlement, undermined the union's ability to intelligently administer the grievances. He also found that the mixture of contractual and noncontractual claims involved in the case went to the weight the parties would accord the settlement in future negotiations, not to its relevance. Member Babson concluded that, even absent the presumption of relevance, the information's relevance had been established based on the union's right to review the terms of the settlement agreement to enable it to satisfy its statutory obligation to fairly represent the former employee.

8. Accretion to Represented Unit

In *Geo. V. Hamilton, Inc.*,[97] the Board held that a previously unrepresented group of two warehouse employees of CMD, Inc. did not constitute an accretion to a represented unit of two warehouse employees of Geo. V. Hamilton, Inc., notwithstanding the full operational integration of the warehouse functions of those two companies and their status as a single employer.[98] The Board also found that, following the operational integration of the previously separate Hamilton and CMD warehouse functions, the employer was no longer under an obligation to bargain with the union about the two represented Hamilton employees. Thus, it concluded that the employer did not violate the Act as alleged, and dismissed the complaint.

In finding no accretion, the Board distinguished this case from *Central Soya Co.*,[99] in which the majority found that an unrepresented group of 13 feed mill employees at a newly acquired location constituted an accretion to a represented unit of 15 feed mill employees at another location following the consolidation of the company's feed mill operations at the newly acquired, historically unrepresented location. "Thus, a crucial factor in the finding of an accretion in *Central Soya*—union majority status—is not present here," stated the Board, noting that there were an equal number of represented Hamilton employees and unrepresented CMD employees. Accordingly, the Board overruled *Public Service Co. of New Hampshire*,[100] in which the majority found that an unrepresented group of five employees constituted an accretion to a represented unit of five employees.

In finding that the employer had no obligation to continue to bargain with the union about the represented employees following the operational integration of the represented and unrepresented groups, the Board relied on *Abbott-Northwestern Hospital*[101] and *Renaissance Center Partnership*.[102] In those cases, the Board held that "an employer is not obligated to continue to recognize and bargain with a union as the exclusive bargaining representative of one group of its employees when that represented group is merged with an unrepresented group in such a manner that an accretion cannot be found and the original represented group is no longer identifiable."

Applying this principle to the facts in *Geo. V. Hamilton*, the Board found that, in light of the full operational and administrative integration of the Hamilton and CMD warehouse functions

---

[97] 289 NLRB No. 165 (Chairman Stephens and Members Johansen, Babson, and Cracraft).

[98] A "single employer" relationship exists when two nominally separate entities are actually part of a single integrated enterprise so that for all purposes, including liability for actions alleged to be in violation of the National Labor Relations Act, there is in fact only a "single employer." See *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982).

[99] 281 NLRB 1308 (1986).

[100] 190 NLRB 350 (1971).

[101] 274 NLRB 1063 (1985).

[102] 239 NLRB 1247 (1979).

and work forces under a single employer, a unit of only Hamilton employees ceased to be appropriate. Instead, the only appropriate unit after the warehouse functions and work forces were integrated was an overall unit composed of all warehouse employees employed by the single employer. Because employees from the former union-represented unit were not a majority in this new unit, a question concerning representation existed.

9. Construction Industry Bargaining Agreement

In *Brannan Sand & Gravel Co.*,[103] the Board held that construction industry bargaining relationships that began prior to the 1959 enactment of Section 8(f) cannot be presumed to be relationships under Section 9(a); that the lawfulness of the origination of the relationship is irrelevant to determining the current nature of the relationship; and that Section 10(b) of the Act, as construed in *Machinists Local 1424 (Bryan Mfg.) v. NLRB*,[104] does not preclude a finding that a construction industry bargaining relationship, whatever its age, is not a 9(a) relationship. The Board also held that it will find full 9(a) status with respect to all construction industry bargaining relationships only if the signatory union has been certified following a Board election or has been recognized on the basis of an affirmative showing of majority support.

The case involved an administrative law judge's findings that the respondent, a construction industry employer, violated Section 8(a)(5) by failing to bargain in good faith with the union regarding a successor collective-bargaining agreement, by unilaterally discontinuing provisions of the expired collective-bargaining agreement, and by placing contract proposals into effect prior to an impasse in bargaining. While the respondent's exceptions to the judge's decision were pending before the Board, the respondent filed a motion to dismiss the complaint based on the Board's decision in *John Deklewa & Sons*,[105] which issued after the judge's decision. It argued that under *Deklewa* its collective-bargaining relationship with the union was governed by Section 8(f), and therefore it had no obligation to bargain over a successor contract once the prior contract had expired. The General Counsel opposed the respondent's motion.

The Board concluded that, in view of the legislative history of Section 8(f) and the traditional practice prevailing in the construction industry prior to 8(f)'s enactment, there was no basis for a presumption that construction industry bargaining relationships in existence prior to the enactment of Section 8(f) were initiated under Section 9(a).

---

[103] 289 NLRB No. 128 (Chairman Stephens and Members Johansen, Babson, and Cracraft).

[104] 362 U.S. 411 (1960).

[105] 282 NLRB 1375 (1987), enfd. sub nom *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988).

The Board found no merit in the General Counsel's effort to use Section 10(b) to support an irrebuttable presumption of initial 9(a) status or otherwise bar a determination that any construction industry relationship predating Section 8(f) was a nonmajority prehire agreement at its inception. The Board also rejected the General Counsel's suggestion that Congress intended only to give Section 8(f) prospective application to contractual relationships inaugurated after its effective date. On the contrary, the Board concluded that Congress gave Section 8(a)(2) immunity to all nonmajority bargaining relationships in the construction industry, not just those established after or within 6 months of the enactment of Section 8(f). In addition, the Board found that nothing in *Bryan* precludes inquiry into the establishment of construction industry bargaining relationships outside the 10(b) period. "Going back to the beginning of the parties' relationship here simply seeks to determine the majority or nonmajority based nature of the current relationship and does not involve a determination that any conduct was unlawful, either within or outside the 10(b) period," the Board stated.

Pointing out that *Deklewa* places the burden of proving 9(a) status in construction industry cases on the party asserting the existence of a 9(a) relationship, the Board decided to deny the respondent's motion to dismiss and to remand the case to the judge for further consideration in light of *Deklewa*, including, if necessary, reopening the record to obtain more evidence on the collective-bargaining representative status of the union.

F. Union Interference with Employee Rights

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

The Board faces a continuing problem of reconciling the prohibitions of Section 8(b)(1)(A) with the proviso to that section. It is well settled that a union may enforce a properly adopted rule reflecting a legitimate interest if it does not impair any congressional policy imbedded in the labor laws. However, a union may not, through fine or expulsion, enforce a rule that "invades or frustrates an overriding policy of the labor law."[106] During the

[106] *Scofield v. NLRB*, 394 U.S. 423, 429 (1969), *NLRB v. Shipbuilders*, 391 U.S. 418 (1968).

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

1. Duty of Fair Representation

In *Sheet Metal Workers Local 49 (Aztech International)*,[107] the Board considered a union's deficiencies in representing employees and found they amounted to no more than mere negligence. A panel majority concluded that the union did not breach its duty of fair representation in violation of Section 8(b)(1)(A).

The union failed to coordinate the beginning date of a strike with the date it filed strike notices with the Federal Mediation and Conciliation Service as required by Section 8(d)(3), and the strike began less than the required 30 days after the union gave the notice. When the strike began, the employer mailed letters to the strikers stating that the strike was illegal because the union failed to give proper notice and declaring the strikers were terminated. Some employees questioned the union's business agents about the situation, and the agents replied that the letter was a company "ploy" and urged the strikers to "stick together" to win the strike.

The majority concluded that, although the union's conduct did not meet standards of competence and caution in representation that the Board would like to see observed, the conduct was not "arbitrary,[108] and did not constitute more than mere negligence.[109] The majority emphasized that the union agents, who were not lawyers, did not appreciate the effect of the failure to give proper strike notice on the strikers' status as employees or the distinction between "terminating" and "replacing" strikers. They viewed the employer's letter as a tactical maneuver designed to break the strike and judged that continued economic pressure was the most effective means of protecting the strikers. The majority further noted that the strikers were free to accept or reject the union's advice and were not coerced into remaining on strike.

Chairman Stephens, dissenting, agreed that the failure to time the strike notice properly might only constitute mere negligence. However, contrary to the majority, he concluded that the union agents' conduct after they knew of the employer's letter affirmatively misled inquiring employees about the status of their strike and went beyond mere negligence to reckless disregard of the harm to employees.

In *Rubber Workers Local 250 (Mack-Wayne Closures) (Mack-Wayne II)*,[110] after requesting and being granted a remand from

---

[107] 291 NLRB No. 41 (Members Johansen and Cracraft; Chairman Stephens dissenting).

[108] *Vaca v. Sipes*, 386 U.S. 171, 190 (1967).

[109] *Teamsters Local 692 (Great Western Unifreight)*, 209 NLRB 446 (1974).

[110] 290 NLRB No. 90 (Chairman Stephens and Members Johansen and Babson; Member Cracraft concurring in part and dissenting in part).

the United States Court of Appeals for the Third Circuit of its decision in *Mack-Wayne I*,[111] the Board held that it would adhere generally to the provisional make-whole remedy set out in *Mack-Wayne I*, although it announced several procedural requirements, particularly regarding burdens of proof and union defenses. Under that remedy, when a union breached its duty of fair representation in violation of Section 8(b)(1)(A) in processing a grievance, the union was ordered to pursue the grievance procedure, including arbitration. In the event that the union was unable to obtain a decision on the merits of the grievance, it was ordered to make the employee whole for any losses suffered as a result of the union's unlawful conduct, unless it showed that the grievance lacked merit.

In *Mack-Wayne II*, the majority ruled that the burden of proof on the merits of the grievance initially falls on the General Counsel to show that the grievance was not "clearly frivolous." Once this burden has been met, the burden shifts to the wrongdoing union to establish that the grievance lacked merit. Member Cracraft concurred in part and dissented in part.

The majority further held that the union is allowed, "at its election, to litigate the merits of the grievance at the underlying unfair labor practice hearing or to defer the issue to the compliance stage." The majority remanded the case to the administrative law judge to allow the union to elect at which stage of the proceeding it would present evidence on the merits of the grievance at issue.

The majority reasoned that the union should bear the shifted burden of proof because, although the outcome of a grievance is uncertain absent a determination under the agreed-on procedure, the uncertainty is due to the union's violation of its statutory duty; and the wrongdoer should bear the risk of the uncertainty. The majority also noted that the employer bears the burden of justifying its actions in a disciplinary arbitration proceeding. Accordingly, imposing the ultimate burden of proof on the General Counsel would deprive the grievant of a tactical advantage he/she would have had but for the union's unfair labor practice.

The majority further argued that the placement of the burden is justified by the union's superior knowledge of the facts of the grievance and the collective-bargaining relationship with the employer. The majority distinguished this type of case from attorney malpractice cases (where the plaintiff bears the burden of establishing the merits of his/her initial cause) on the basis of the presumption of innocence of a grievant in an arbitration proceeding.

Finally, the majority did not rely on cases decided under Section 301 for placement of the burden of proof because the Board has applied its own "unique institutional and policy consider-

[111] 279 NLRB 1074 (1986).

ation" in considering a union's breach of its duty of fair representation.

Member Cracraft agreed with the majority that the case should be remanded to the judge, but she disagreed with the allocation of the burden of proof. Member Cracraft stated that in an 8(b)(1)(A) breach of the duty of fair representation case she would place the burden of proof in accordance with the burden of proof in a Section 301 failure to fairly represent suit. She noted that the duty of fair representation is a court-created doctrine and, therefore, the burden of proof should be the same in both Board and court proceedings. Accordingly, she would require the General Counsel to prove that the employee's grievance was meritorious before she would assess backpay against the union. Member Cracraft also set out why she disagreed with the majority's reasoning that a different burden of proof is required to administer the Board's resources, comply with the Board's congressional mandate, or provide a meaningful remedy in duty of fair representation cases.

2. Coercion Through Mass Demonstration

In *Meat Packers NAMPU (Hormel & Co.)*,[112] the Board found that the union (NAMPU) violated Section 8(b)(1)(A) by engaging in and encouraging a mass demonstration to harass and impede representatives of the trustee for Local P-9, United Food and Commercial Workers International Union (UFCW) at the Austin Labor Center (ALC).

This case arose in the context of the UFCW Local P-9 strike against Geo. A. Hormel & Company (Hormel) in Austin, Minnesota. In an effort to end the strike after certain unsanctioned activity by Local P-9, the parent international union secured a trusteeship of the local and took physical possession of the ALC, a building leased by Local P-9 for office and meeting facilities. That same day, General Counsel George Murphy and other UFCW representatives confronted 80–120 protesters, including unidentified P-9 members and members of Respondent NAMPU, which had been formed by 7 striking P-9 members. Murphy told employee Merrill Evans, who led the protesters in persistent acrimonious questioning, that he would return to the ALC on July 3, 1986, to answer numerous questions posed about UFCW and the P-9 trusteeship.

Contrary to his stated intentions, however, Murphy did not return to the ALC on July 3. Before the scheduled meeting, UFCW deputy trustees Kenneth Kimbro and Jack Smith, along with seven other UFCW agents who had inspected the premises, concluded that the building was not fit for use and so informed James Rogers, the president of Active Retirees (AR), a social group that supported P-9 strike activities against Hormel.

[112] 287 NLRB No. 74 (Chairman Dotson and Member Babson; Member Johansen dissenting).

Soon thereafter, a group of retirees angrily demanded access to and use of a meeting room for the AR. Concurrently, Evans appeared at the ALC with a group of individuals, some of whom were unidentified P–9 members. Kimbro adhered to his refusal to permit the retirees the use of the meeting room. He also told Evans that Murphy had returned to Washington, D.C., and was not there to answer questions. For 10 minutes Evans stood among those at the side doorway and engaged Kimbro in angry conversation while a vituperative crowd of 50–60 persons shouted insults at the trustee's representatives. At one point, AR member Raymond Arens prevented Kimbro from closing the door. When police, summoned by the UFCW officials, arrived, AR President Rogers felt constrained to calm the crowd because "we didn't need any people in jail." The two police officers, the UFCW agents, NAMPU's Evans, and the AR representatives then ended the incident by leaving the ALC for a meeting elsewhere.

The administrative law judge found that the mass demonstration was no more "than a brief boisterous expression of frustration and exasperation." He therefore concluded that the General Counsel had not met the burden of proving that the protesters' conduct was unlawfully coercive. However, a panel majority of the Board disagreed.

The majority held that under the circumstances here, noting particularly "the acrimonious union factionalism" that had developed during Local P–9's extended strike against Hormel, the act of massing a hostile crowd before a small door to confront and insult rival union officials, and to prevent closing that door, "would reasonably tend to coerce and threaten employees from engaging in protected activities in support of the Local P–9 trusteeship." This is particularly true where, as here, the misconduct directed against nonemployee third parties became or was sure to become known to employees, the majority noted. The fact that there was no physical violence or property damage, or that the protesters did not actually prevent anyone from passing through their midst, was not considered to be legally significant. Moreover, the majority added, the misconduct here was indistinguishable from the type of conduct that, as previously engaged in by suspended P–9 officers and their agents, had been enjoined by a Federal district court order.

The panel majority further found that the conduct of Evans and the other participants in the mass demonstration was attributable to Respondent NAMPU. As stated by the judge, Evans was "a well recognized and vociferously active agent of NAMPU." Independent of the retirees, who had their own representative (Rogers) during the events at issue, Evans, as NAMPU's charter member and organizer, assumed the role of leader and spokesperson for the nonretiree P–9 members who opposed the trusteeship

when he stood at the head of the mass demonstration. His conduct encouraged insults and hostility from others in the crowd.

Member Johansen dissented. In agreement with the judge, he did not find a violation of Section 8(b)(1)(A). He found that, although the events were "tumultuous," they "did not create a coercive or threatening atmosphere." Instead, he noted, the confrontation with UFCW trustee representatives was basically limited to the hurling of insults. It did not involve any threats or acts of violence attributable to agents of Respondent NAMPU.

In Member Johansen's view, Evans' service as a spokesman for Local P–9 members, particularly when UFCW General Counsel Murphy had promised on the previous day to return to answer questions about the trusteeship, "could hardly be a basis" for finding an unfair labor practice. Member Johansen observed that, in view of this "broken promise," among other things, there was also no basis for finding that the crowding of 50 or more "suddenly disinvited persons" around the ALC's only entrance for 10 minutes was somehow coercive of employees' statutory rights.

3. Contractual Leave of Absence Provision

In *Electrical Workers IBEW Local 1212 (WPIX, Inc.)*,[113] a Board panel held that the union did not violate Section 8(b)(1)(A) and (2) by demanding the reinstatement of an employee pursuant to a leave of absence provision in the parties' collective-bargaining agreement that made some distinction between employees on the basis of union status or activity. Accordingly, it dismissed the complaint.

The employee who had been appointed business representative of the union had taken a leave of absence from his bargaining unit job pursuant to a clause in the union's collective-bargaining agreement with the employer. That clause provided that an employee wishing to serve as a union official could be granted a leave of absence for a period of 2 years while unit seniority continued to accrue for layoff purposes. Under the contract, an employee seeking leave for other, nonunion-related purposes was entitled to only a 6-month leave of absence with accrued seniority for layoff purposes, provided he or she did not solicit or accept employment elsewhere. Subsequently, the employee informed the employer that he no longer served as business representative and requested reinstatement to his bargaining unit job. The employer refused the employee's request.

The administrative law judge concluded that the contractual leave of absence provisions bestowed on union officials significant benefits that were not granted to other unit employees and thus had a substantial adverse effect on the rights of other unit employees. The judge found that the union failed to show that these benefits furthered the effective administration of bargaining

[113] 288 NLRB No. 49 (Chairman Stephens and Members Johansen and Babson).

agreements. He also found that the union failed to demonstrate the existence of any other sufficiently compelling legitimate interests served by such clauses that would warrant overcoming the presumption of illegality dictated by *Dairylea Cooperative*.[114] The judge therefore concluded that the union's efforts to enforce the clause violated the Act.

The Board disagreed and reversed the judge. The Board said that, in deciding whether a particular collective-bargaining provision that makes some distinction between employees on the basis of union status or activity violates Section 8(b)(1)(A) and (2), it would use a three-step analysis, adding that the third step need not be reached in all cases. The Board stated:

> First we look to see whether the provision treats employees differently on the basis of union status or activity. Next we look at whether this distinction tends to encourage the union status or activity in question. If the answer to either of those first two questions is no, then we need not reach the third step. If the answer to both is yes, then we determine whether the disparate treatment that tends to encourage or discourage union activity is justified by policies of the Act.

If the answers to the first two questions are unclear, the Board noted, then it may be necessary, in certain circumstances, to examine the justification for the distinction according to the third step of the analysis.

In the instant case, the Board did not reach the third step. First, it concluded that the contract clause at issue here treated employees differently on the basis of union-related considerations because employees on a union-related leave of absence could take leave for longer periods of time than could employees who took leave for other, nonunion-related reasons. However, it further concluded that the clause did not encourage employees to become active unionists so that they might be selected to take temporary union jobs. Instead, the Board stated, the clause merely removed, in part, a condition that would otherwise discourage employees from taking temporary union jobs. Thus, it concluded that the clause in issue here provided the employee returning from a union-related leave of absence with a restoration of his job in no better position than if he had never left, rather than with a preference or benefit. In finding no violation of the Act, the Board overruled *Mead Packaging*[115] to the extent it is inconsistent with the foregoing analysis.

---

[114] 219 NLRB 656 (1975), enfd. sub nom. *NLRB v. Teamsters Local 338*, 531 F.2d 1162 (2d Cir. 1976). See also *Gulton Electro-Voice, Inc.*, 266 NLRB 406 (1983), enfd. sub nom. *Electrical Workers IUE Local 900 v. NLRB*, 727 F.2d 1184 (D.C. Cir 1984).

[115] 273 NLRB 1451 (1985).

4. Coupling Reinstatement with Backpay Obligation

In *Teamsters Local 282 (Willets Point Contracting)*,[116] a Board panel held, contrary to the administrative law judge, that the respondent union's conduct in coupling its request for reinstatement of discriminatees Kuebler and Curd at Willets Point Contracting Corp. (Willets) with the demand that Willets pay the backpay obligation for which the respondent union was liable under the Board's Order in *Frank Mascali Construction*[117] did not constitute a separate violation of Section 8(b)(1)(A) and (2).

In *Mascali*, the Board, having found the respondent union in violation of Section 8(b)(1)(A) and (2) by causing the discharges of the discriminatees from Willets because of their dissident union activity, ordered that the respondent union request Willets to reinstate the discriminatees immediately and that the respondent union make them whole for all losses incurred as a result of the unlawful discharges. The Board further ordered that, in the event Willets refused to reinstate the discriminatees, the backpay obligation would be extended until the discriminatees found substantially equivalent employment.

Subsequent to the issuance of *Mascali*, the respondent union's initial request to Willets that it reinstate the discriminatees was refused. The respondent union thereafter renewed the request, and then entered into a series of meetings with representatives of Willets and the discriminatees. During the meetings, the respondent union coupled its request for reinstatement with the demand that Willets assume the backpay obligation to the discriminatees and further stated that, if Willets refused to assume the obligation, it would take the matter to arbitration. The employer eventually agreed to reinstate the discriminatees, but adamantly refused to assume backpay obligations or to arbitrate the matter.[118] After numerous discussions and negotiations, however, the respondent union withdrew its backpay demand and its related grievance and, therefore, after over 2 years of discussion and negotiation, the discriminatees were reinstated.

The Board concluded that it did not "consider the Respondent's actions to be the type with which the Board should concern itself in a newly filed, separate, unfair labor practice proceeding. Rather, in our view, the conduct involved herein relates to the Respondent's compliance, or lack thereof, with the outstanding Board order in *Mascali*." Accordingly, the Board dismissed the complaint.

---

[116] 288 NLRB No. 13 (Chairman Stephens and Members Babson and Cracraft).

[117] 251 NLRB 219 (1980), enfd. mem. 697 F.2d 294 (2d Cir. 1982), cert. denied 459 U.S. 988 (1982).

[118] During the 2-year period in which the parties met, the respondent union filed a petition in state court to compel arbitration. The petition was subsequently denied.

5. Discipline Against Supervisor-Member

Under Section 8(b)(1)(B), a union may not obstruct an employer's right to select its own collective-bargaining representatives. Specifically, the section provides that "[it] shall be an unfair labor practice for a labor organization or its agents . . . to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."

In *Operating Engineers Local 501 (Golden Nugget)*,[119] the Board held that the union did not violate Section 8(b)(1)(B) when it fined a member for working behind the picket line during a strike, even though he was a supervisory representative of the employer for the purpose of grievance adjustment.

Union disciplinary proceedings were initiated against the supervisor-member pursuant to charges that he violated union constitution and bylaws provisions generally prohibiting discreditable conduct and any member's working contrary to a declared strike. At his intraunion hearing, the supervisor-member admitted that he worked behind the picket line and answered affirmatively when asked if he was continuing to cross the picket line and to perform bargaining unit work. No inquiry was made at the intraunion hearing into the amount of bargaining unit work the supervisor-member performed and he did not volunteer any information in this regard. The record developed in the Board proceeding, however, established that more than a minimal amount of his work behind the picket line involved "carrying tools," i.e., performing struck work.

Relying on *Florida Power & Light Co. v. Electrical Workers IBEW Local 641*[120] and *Columbia Typographical Union 101 (Washington Post)*,[121] the Board majority found that the imposition of discipline did not adversely affect the employer in its selection of a collective-bargaining representative. The majority reasoned that it need not decide whether either the supervisor-member's "unqualified admission at the intraunion trial" or the evidence of his performance of more than a minimal amount of bargaining unit work would suffice independently as grounds for concluding the discipline was lawful because the existence of the two compelled a finding that the conduct was lawful. The majority also noted that the general references in the union constitution and bylaws and in the intraunion charge to "a member" and "any member" were similar to the language used in the constitution and disciplinary charge deemed lawful in *Florida Power Co.*, supra, and *Carpenters Local 1959 (Aurora Modular)*,[122] respectively.

---

[119] 287 NLRB No. 68 (Chairman Dotson and Members Johansen, Babson, and Stephens).
[120] 417 U.S. 790 (1973).
[121] 242 NLRB 1079 (1979).
[122] 217 NLRB 508 (1975).

Chairman Dotson, dissenting, believed that because the institution of disciplinary proceedings and the imposition of a fine were done without regard to a member's status and the type and amount of bargaining unit work performed, the union violated the Act. He noted that neither the union's constitution and bylaws nor the charges and notification of fine distinguished between employer representative and rank-and-file employees. Accordingly, he deemed the case apposite to *American Broadcasting Cos. v. Writers Guild*,[123] in which the Supreme Court affirmed the Board's finding that the Guild violated Section 8(b)(1)(B) by formulating strike rules that prohibited all members from crossing a picket line regardless of the capacity in which they were working and enforcing those rules against supervisor-members while professing "little or no interest in what kind of work was done during the strike."

G. Union Causation of Employer Discrimination

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

In *Morrison-Knudsen Co.*,[124] a panel majority found that the General Counsel's showing that nonmembers paid approximately twice as much in fees as did members to use the respondent local union's hiring hall supported an inference that the fees were discriminatory in violation of Section 8(b)(2). Accordingly, that part of the case was remanded to give the union the opportunity to rebut the inference. The Board also dismissed the complaint allegation that the union and employers maintained an exclusive hiring hall that operated in an arbitrary, unfair, or discriminatory manner in violation of Sections 8(b)(2) and 8(a)(3), respectively. Member Johansen dissented.

Regarding the hiring hall issue, the administrative law judge found that the parties had an unwritten exclusive hiring hall arrangement that required the union to refer the most qualified individual, as determined by the judgment of a union representative, at the time of a job opening. The hiring hall arrangement

[123] 437 U.S. 411 (1978).
[124] 291 NLRB No. 40 (Chairman Stephens and Member Cracraft; Member Johansen dissenting).

also allowed for referrals out of the order that persons signed the out-of-work register to meet affirmative action goals and to accommodate employer requests for named employees, many of whom were without written documentation.

In dismissing this allegation, the Board stated: "These practices may lend themselves to abuse, allowing a union to disguise favoritism or patronage in referrals; they are not, however, sufficient in themselves to prove such abuse." The Board adopted the judge's finding that the hiring hall was operated in a nonviolative manner, relying on his findings that the union representative sought in good faith to determine the qualifications of applicants at the hiring hall; the lack of evidence or allegation that the union preferred its own members in referrals; and the lack of evidence that there was discrimination based on the exercise of Section 7 rights, race, sex, or any other impermissible basis.

Regarding the allegedly discriminatory fees, the majority noted that every employee paid a 5-cent-per-hour-worked service fee. In addition to that hourly amount, nonmembers of the union paid $5 per week "applicant service dues" during part of the period in question and $10 per week in another period. Members of "sister locals" paid "travel service dues" of $2.50 and $5 per week in corresponding periods. In the same periods, members of the local union paid dues with weekly equivalents that ranged from $2.30 to $3.

The judge had dismissed this allegation based on his reading of *Operating Engineers Local 825 (Homan Co.)*.[125] There, the General Counsel had not established the cost of operating the hiring hall, a step that the *Homan* majority found necessary to determine what a fair charge to individuals using the hall would be and therefore what a disproportionate and unlawful charge would be. The *Morrison-Knudsen* majority distinguished *Homan*, noting that in *Homan* there was only a "rough equivalency" between membership dues and nonmember fees. In contrast, the nonmembers in *Morrison-Knudsen* paid approximately twice the amount that local members paid. In such a circumstance, the majority found that the General Counsel made out a prima facie case that nonmembers were paying more than their pro rata share of operating the hiring hall and that the burden should shift to the union to rebut the inference of discrimination. With regard to the members of "sister locals," the majority similarly found that the General Counsel had made a prima facie case for the period in which the "travel service" dues were approximately double the members' dues. However, the complaint was dismissed as to the allegation covering the period in which the "travel service dues" were approximately the same as member dues.

[125] 137 NLRB 1043 (1962).

Member Johansen dissented on the discriminatory fees issue. He noted that nonmembers and members of sister locals paid the allegedly excessive fees only when employed, while members paid dues whether working or not, and that members may use the hiring hall less than nonmembers or travelers. He agreed with the judge's reading of *Homan* that it was the General Counsel's burden to produce evidence on the cost of operating the hiring hall to establish what a fair pro rata cost of operating the hall was. Because the General Counsel produced no evidence on the cost of operations, Member Johansen would have dismissed that part of the complaint.

H. Illegal Secondary Activity

The statutory prohibitions against certain types of strikes or boycotts are contained in Section 8(b)(4). 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; 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, for the purpose of truthfully advising the public" and "any primary strike or primary picketing."

1. Peaceful Handbilling and Nonpicketing Publicity

In *Steelworkers (Pet, Inc.)*,[126] on remand from the United States Court of Appeals for the Eighth Circuit,[127] the Board found controlling the Supreme Court's holding in *DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*[128] that Section 8(b)(4)(ii)(B) does not proscribe peaceful handbilling and other nonpicketing publicity urging a total consumer boycott of neutral employers and dismissed the complaint alleging that such conduct by the union was unlawful.

Pet, Inc. is a large diversified conglomerate with 27 operating divisions, each in separate and distinct lines of business. Hussman Refrigeration Company, a wholly owned subsidiary of Pet, manufactures refrigeration and other industrial equipment. The employees of Hussman's Bridgeton, Missouri plant were represented by the union and, when the collective-bargaining agreement covering these employees expired, the union commenced an economic strike. Subsequently, the union's president announced at a press conference that, in support of this strike, the union was calling a "national boycott" of the products and services of Pet and its divisions and subsidiaries. Thereafter, the union advertised

[126] 288 NLRB No. 133 (Chairman Stephens and Members Babson and Cracraft).
[127] *Pet, Inc. v. NLRB*, 641 F.2d 545 (1981).
[128] 108 S.Ct. 1392 (1988).

in newspapers and distributed handbills, all in the St. Louis area, advising the public of the union's strike against Hussman's Bridgeton plant, noting that Hussman was owned by Pet, and requesting the public to boycott Stuckey's and 905 stores, all owned by Pet, and to refuse to buy any of 17 named products of Pet. The handbilling activity occurred away from any retail establishment owned by Pet or selling Pet products and did not interfere with the entrance or exit of workers or others in any way.

Applying *DeBartolo*, the Board found that, even if Pet and its divisions and subsidiaries are neutrals for the purpose of Section 8(b)(4), the union did not engage in prohibited conduct. The union announced its boycott through newspaper advertisements, leafletting, and other media. The handbilling was of the same nature as that conducted by the union in *DeBartolo*. There was no violence, picketing, or patrolling, but only an attempt to persuade customers not to buy products of Pet or its divisions or subsidiaries. The union's handbills and other nonpicketing publicity truthfully revealed the existence of a labor dispute and urged potential customers of the alleged neutrals to follow a wholly legal course of action, namely, not to patronize Pet or its divisions or subsidiaries. They advised the public of the union's strike against the Hussman Bridgeton plant and urged a public boycott of the products of Pet and its divisions and subsidiaries. Such appeals are not coercive. The Board therefore found that the union's consumer boycott did not violate Section 8(b)(4).

2. Filing Work Assignment Grievances

In *Longshoremen ILWU Local 7 (Georgia-Pacific)*,[129] the Board, on its own motion, reconsidered its earlier decision[130] finding that ILWU Local 7 had violated Section 8(b)(4)(ii)(D) by filing time in-lieu-of pay grievances against Bellingham Stevedoring Co. both before and after the issuance of the Board's 10(k) determination[131] awarding the disputed work to employees of Bellingham Division, Georgia-Pacific Corporation (the employer) who were represented by Local Union No. 194, Association of Western Pulp and Paper Workers (AWPPW).

On reconsideration, the Board concluded that it was lawful for the respondent to file arguably meritorious work assignment grievances prior to the issuance of the Board's 10(k) determination.[132] Thus, the Board, citing *Brockton Newspaper Guild (En-*

[129] 291 NLRB No. 13 (Chairman Stephens and Members Johansen and Cracraft).

[130] 273 NLRB 363 (1984).

[131] 267 NLRB 26 (1983).

[132] The Board also found, however, that it had jurisdiction to issue the 10(k) award based on AWPPW's work stoppage threat. It then reaffirmed its earlier finding that ILWU Local 7's filing of grievances after the 10(k) determination violated Sec. 8(b)(4)(ii)(D) because at that point the grievance filings lacked a reasonable basis and reflected an improper motivation to undermine the Board's 10(k) award.

terprise Publishing),[133] and *Sheet Metal Workers Local 49 (Los Alamos Constructors)*,[134] adhered to precedent holding generally that the mere filing of such grievances does not constitute "coerc[ion]" within the meaning of Section 8(b)(4)(ii)(D).

In reversing the earlier finding that ILWU Local 7's filing of grievances before the issuance of the Board's 10(k) award was unlawful, the Board noted that it should be reluctant to find that the mere filing of arguably meritorious contractual grievances is prohibited under the Act in light of the strong congressional policy of encouraging the private settlement of disputes through the grievance-arbitration machinery. It emphasized that, in *Carey v. Westinghouse Electric Corp.*,[135] the Supreme Court spelled out its view that the grievance-arbitration process has a major role to play in settling jurisdictional disputes.

Further, the Board did not distinguish *Carey* on the ground that there the employer against which the grievance was filed controlled the assignment of the disputed work, whereas here Bellingham did not control the disputed work. The Board found that this reasoning missed the point because the national labor policy was equally implicated in either situation.

Finally, the Board concluded that the Supreme Court's decision in *Bill Johnson's Restaurants v. NLRB*[136] lent further support to its views here. Although noting that the Court in that case had held that the Board may not enjoin a state court lawsuit regardless of the plaintiff's motive, unless the suit lacks a reasonable basis in fact or law, the Board stated that "analogous considerations" led it to conclude that under the *Bill Johnson's* test both unlawful motive and lack of a reasonable basis should be established before the Board may brand the mere filing of a pre-10(k) grievance as unlawful coercion under Section 8(b)(4)(ii)(D).

Accordingly, the Board modified its original Decision and Order and dismissed the complaint insofar as it alleged that the filing of grievances before the 10(k) determination issued violated the Act. In finding no violation of Section 8(b)(4)(D), Chairman Stephens acknowledged that whether the grievances at issue in this case might be found to be a violation of Section 8(b)(4)(B)—an issue that was not before the Board—remained "an open question."

3. Compelling Union Representation

In *Teamsters Local 483 (Ida Cal Freight)*,[137] the Board dismissed a complaint alleging that the respondent union violated Section 8(b)(4)(ii)(A) by attempting to force owner-operators to join the union and to require Ida Cal to enter into a bargaining

[133] 275 NLRB 135, 136–137 (1985).
[134] 206 NLRB 473, 476–477 (1973).
[135] 375 U.S. 261 (1964).
[136] 461 U.S. 731 (1983).
[137] 289 NLRB No. 120 (Chairman Stephens and Members Babson and Cracraft).

agreement prohibited by Section 8(e). The Board concluded that the union's filing of a grievance and a Section 301 lawsuit to compel union representation of the owner-operators was not unlawful, even though the owner-operators were found to be independent contractors and not statutory employees.

The union's bargaining agreement had covered Ida Cal's truck-driving employees. Ida Cal also had owner-operators, who the union claimed were employees and should be covered by the parties' contract. The union pursued its claim by filing an 8(a)(5) charge alleging that Ida Cal refused to apply the terms of the parties' extant contract to the owner-operators. The Regional Director dismissed that charge on the ground that the owner-operators were independent contractors, and the General Counsel denied the union's appeal of that dismissal. The union also filed a grievance seeking a determination that the owner-operators were covered by the contract, and demanded arbitration. The employer rejected the union's grievance and refused to go to arbitration. In addition, the union filed a Section 301 suit, which the court held in abeyance pending the Board's decision in this case.

Relying on its two decisions in *Warwick Caterers*,[138] the Board concluded that the union had a legitimate object in seeking a resolution of the owner-operators' status through the grievance-arbitration and the Section 301 proceedings. In this regard, it noted that:

> Although the Respondent did take the actions to compel representation of Ida Cal's owner-operators, there had been no adjudicatory determination at that time, or at the time of the complaint or the hearing, that the owner-operators were independent contractors. Furthermore, the Respondent's actions were consistent with a goal of obtaining an adjudication, through arbitration or court action, of the status of the owner-operators; the Respondent did not strike or picket. In addition, the Respondent's contention that the owner-operators are statutory employees was not unreasonable.

The Board therefore distinguished its decision in *Emery Air Freight*,[139] in which it held that the union's grievance filing violated the Act because it was not intended to preserve existing bargaining unit jobs, a legitimate work-preservation object, because the union never represented the employees who did the work.

---

[138] *Hotel & Restaurant Employees Local 274 (Warwick Caterers)*, 282 NLRB 939 (1987), supplementing 269 NLRB 482 (1984).

[139] *Teamsters Local 705 (Emery Air Freight)*, 278 NLRB 1303 (1986), enf. denied in relevant part and remanded 820 F.2d 448 (D.C. Cir. 1987).

I. Recognitional Picketing

In *Food & Commercial Workers Local 23 (S & I Valu King)*,[140] the Board found, contrary to an administrative law judge, that the union had not violated Section 8(b)(7)(C) by its picketing of Charging Party Thomas Suleiman's store (S & I Valu King).

On May 30, 1985, the union filed a petition seeking to represent employees at two stores owned by Mario A. Morini. On June 20, 1985, a Stipulated Election Agreement covering both stores was executed by the union and Morini. Before an election was held, one of the stores, Valu King, was sold by Morini to Suleiman. This occurred on or about November 23, 1985. Suleiman informed the Valu King employees of the sale.

About November 24, 1985, the union picketed the Valu King store. Suleiman filed a charge and a complaint was issued on January 15, 1986, alleging that the union had violated Section 8(b)(7)(C) by engaging in recognitional picketing. On January 17, 1986, a temporary injunction against the union was issued by the United States District Court for the Western District of Pennsylvania. The union ceased picketing at the Valu King store.

On February 3, 1986, the Regional Director withdrew approval of the June 20, 1985 Stipulated Election Agreement.

The judge found that the union had violated Section 8(b)(7)(C) because it engaged in recognitional picketing at the Valu King store without filing a representation petition. The judge found that the union had not filed a petition as to Valu King's employees within 30 days of the commencement of its picketing at Suleiman's store.

The Board determined that a petition was pending during the union's recognitional picketing and therefore no violation occurred. The Board determined that the petition filed on May 30, 1985, covering Morini's two stores continued in effect as to both stores until February 3, 1986, when the Regional Director withdrew his approval of the stipulation and, in effect, dismissed the part of the petition dealing with the Valu King store. The Board dismissed the complaint.

J. Deferral to Arbitration

In *Ryder Truck Lines*,[141] a unit employee was discharged after refusing to drive a truck he reasonably considered unsafe. The driver filed a charge alleging that the discharge violated Section 8(a)(1) and grieved his discharge under the collective-bargaining agreement. That grievance was denied by the bipartite Southern Conference Joint Area Grievance Committee.

The employer argued to the administrative law judge that the Board should defer to the parties' grievance procedure and, ac-

[140] 288 NLRB No 103 (Chairman Stephens and Members Johansen and Babson).

[141] 287 NLRB No. 82 (Members Johansen and Stephens; Chairman Dotson dissenting).

cordingly, dismiss the complaint. The judge found deferral inappropriate because the Area Committee issued no written decision from which it could be determined whether the statutory issue was considered. The judge further found, on the merits, that the driver's discharge violated Section 8(a)(1).

The Board, in an unpublished Order, remanded the case to the judge for further consideration under its newly issued *Olin* decision.[142] In his supplemental decision, the judge again found deferral inappropriate. Although he noted that the bipartite Southern Multi-State Grievance Committee was presented with facts generally relevant to the unfair labor practice issue, and thus satisfied the *Olin* requirements, the Multi-State Committee had deadlocked over the driver's grievance. As provided for in the parties' contract, the grievance then progressed to the Area Committee, which, according to the judge, issued brief, cursory minutes that did not address the facts relevant to the unfair labor practice issue. The minutes did, however, state that "[t]he transcript of the Multi-State [Committee] hearing will be made a part of the [Area Committee] record." Having determined that deferral was inappropriate, the judge reaffirmed his earlier 8(a)(1) finding.

The Board reversed the judge, found deferral appropriate, and dismissed the complaint.[143] The majority stated that "the parties' presentation of the facts relevant to the unfair labor practice at the Multi-State Committee stage of the grievance proceeding, together with the General Counsel's failure to affirmatively establish that these facts were not presented to the Area Committee, satisfies the requirement set forth in *Olin*." *Ibid.*

The Eleventh Circuit Court of Appeals vacated the Board's Order and remanded the case for further consideration. *Taylor v. NLRB*, 786 F.2d 1516 (1986). The court held that the *Olin* standard of deferral abdicated too much of the Board's responsibility to protect employee rights under the Act, and it therefore refused to apply the *Olin* standard. The court also found that the evidence failed to establish that the Area Committee considered factors relevant to the driver's statutory claim or that the Area Committee's proceedings satisfied the "fair and regular" requirements under *Spielberg Mfg. Co.*[144]

On remand, the Board treated the court's opinion as the law of the case and found deferral inappropriate. The majority therefore applied a deferral standard under which deferral is "improper unless the party urging deferral has demonstrated that the arbitral forum in question has considered the facts relevant to the unfair labor practice issue." Because the employer did not establish that the relevant facts were considered by the Area Committee, the majority denied the deferral request.

---

[142] *Olin Corp.*, 268 NLRB 573 (1984).
[143] 273 NLRB 713 (1984).
[144] 112 NLRB 1080 (1955).

On the merits of the complaint, the majority found, in agreement with the judge, that the employer violated Section 8(a)(1) by discharging the employee for refusing to drive a truck the employee reasonably considered unsafe.

Under the parties' collective-bargaining agreement, the employer could not require its employees to drive unsafe vehicles. The parties' side agreement also provided that certain large drivers were not required to drive Ford trucks because of their small cabs. In addition, applicable Department of Transportation (DOT) regulations required the employer's drivers to complete reports verifying the safety of their equipment.

The employer assigned a large driver to drive a Ford truck. The driver repeatedly protested to the employer, both verbally and in DOT reports, that he was unable to drive the vehicle because of his size, because of his medical history, and because the steering column would not fully retract. The driver discussed his complaint with other employees who validated his concerns. After the employer made repairs to the vehicle, which the driver claimed did not eliminate the problem, the driver refused to drive the vehicle and was discharged.

The majority agreed with the judge that the driver was engaged in protected concerted activity under *Interboro*[145] when he refused to drive the Ford truck. Thus, the driver honestly believed that he had been assigned an unsafe vehicle and clearly voiced his safety complaints to the employer. Although he did not specifically mention the collective-bargaining agreement or side agreement when protesting his assignment, the majority found that the driver's complaints concerned reasonably perceived violations of these agreements and the DOT regulations. Accordingly, the majority held that, by discharging the driver for voicing his safety complaints, the employer violated Section 8(a)(1).

Chairman Dotson, dissenting, would have remanded the case to the judge to take additional evidence on whether and to what extent the Area Committee considered the Multi-State Committee's hearing transcript.

In *Consolidated Freightways Corp.*,[146] the Board found, contrary to the administrative law judge, that deferral to the contractual grievance procedure was proper under *United Technologies Corp.*,[147] even though the charging party in the case was an individual, rather than a labor organization.

The Board noted that the judge had based her refusal to defer on a footnote in *United Technologies* that states:[148]

> Contrary to our dissenting colleague's assertion, the pre-arbitral deferral policy articulated herein does not constitute a

[145] *Interboro Contractors*, 157 NLRB 1295 (1966).
[146] 288 NLRB No. 144 (Chairman Stephens and Members Johansen and Babson).
[147] 268 NLRB 557 (1984).
[148] Id. at 560 fn. 17.

waiver of employees' statutory rights nor does it "force individual employees to litigate statutory rights in a contractual forum." Nothing in this decision diminishes the right of employees to seek statutory relief for alleged unfair labor practices. We simply hold that where contractual grievance-arbitration procedures have been invoked voluntarily we shall stay the exercise of the Board's processes in order to permit the parties to give full effect to those procedures.

The Board found that the judge evidently had interpreted that footnote to mean that an individual, as opposed to a labor organization, cannot be compelled to consign an unfair labor practice claim to the contractual grievance-arbitration machinery, but always may have his/her claim decided by the Board, even if it is otherwise suitable for deferral.

The judge's interpretation would mean, in effect, that a union could always defeat deferral simply by having an individual member, rather than the union itself, file an unfair labor practice charge. Such an outcome, the Board observed, would seriously impair the public policy favoring private dispute resolution mechanisms.

The Board found, instead, that footnote 17 must be read in the context of the rest of the decision in *United Technologies*, in which the Board held that it should not jump into the fray prior to an honest attempt by the parties to resolve their disputes by means of the grievance-arbitration machinery. The Board noted that deferral to private dispute resolution mechanisms is not abdication of its statutory responsibility, but merely the prudent exercise of restraint while the parties' own processes are given a chance to work. Moreover, it added, the Board's processes are available if private dispute resolution mechanisms do not exist, if they prove to be inadequate, or if the arbitral result is inconsistent with the standards of *Spielberg Mfg. Co.*[149] Accordingly, in cases where private dispute resolution mechanisms exist and the other standards for deferral are met, the Board will stay its hand while the grievance-arbitration machinery is given the first opportunity to decide the disputed issue regardless of the identity of the charging party.

K. Remedial Order Provisions

1. Bargaining Orders

In *Ambulette Transportation Service*,[150] a panel majority of Members Johansen and Stephens agreed with the administrative law judge's imposition of a *Gissel* bargaining order.[151] The re-

[149] 112 NLRB 1080 (1955).
[150] 287 NLRB No. 23 (Members Johansen and Stephens; Chairman Dotson dissenting in part).
[151] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

spondent had retaliated against its employees' organizing efforts by discharging the entire work force and thereafter telling them that it would be futile to continue to support the union because the company would go out of business before it would deal with the union.

The majority found that the respondent's immediate, sweeping, and severe reaction to its employees' unionization was the type of unlawful action calculated to have a powerful, lasting, and chilling effect on the employees. Although the respondent had notified all the employees 1 week after the discharges simply to "disregard [its] notice of termination" and that "jobs are available and awaiting your return," the majority agreed with the judge's finding that the respondent's "terse" retraction of its dismissal did not effectively repudiate its earlier unfair labor practices, citing *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). The employees were neither compensated for the loss of a week's wages, nor assured that the respondent would then recognize and accept their right to engage in protected activities free of the threat of future retaliatory action.

The majority stated: "The angry dismissal of an entire work force and the dire threat of plant closure require affirmative and explicit repudiation by the Respondent." The respondent's failure to take such timely action on its own made it unlikely that employees would "feel sufficiently secure against the potential for retribution by the Respondent," the majority added. In these circumstances, it was unlikely that a free and fair representation election could be conducted. The majority thus concluded that no remedy short of an order that the respondent bargain with the union could guarantee the employees their rights under Section 7.

Chairman Dotson, although agreeing that the respondent violated Section 8(a)(3) and (1) by its mass terminations and subsequent threats, dissented as to the appropriateness of a bargaining order. He stated that the employees' engaging in a 4-month strike following the respondent's attempt to reinstate them to their former jobs evidenced the lack of any chilling effect the respondent's unlawful discharges and threats could have had on them. He noted that the respondent did not engage in any additional unfair labor practices during the strike and that, when the work stoppage ended, it reinstated the most senior former strikers to its reduced work force and placed the remainder on a preferential hiring list. In Chairman Dotson's view, the respondent's attempt to allow the discharged employees to return to their jobs just 1 week after their discharge and its subsequent good behavior in honoring their protected rights softened the impact of its prior misconduct, thereby militating against the need for the imposition of extraordinary remedies such as a bargaining order.

In *White Plains Lincoln Mercury*,[152] the Board, reversing the administrative law judge, set aside an election and issued a *Gissel* bargaining order based on unfair labor practices during the preelection critical period that were not specifically alleged as objections by the union.

Following an election, the union filed two specific objections and a third "catch-all" objection to its conduct. The Regional Director overruled the two specific objections, but ordered a hearing on the third "to the extent that [it paralleled the substance of] allegations in paragraph 11 of the Complaint." Paragraph 11 alleged a coercive interrogation, which was the only unfair labor practice alleged in the complaint as having occurred during the postpetition critical period.

In the consolidated proceeding, the judge determined that the respondent committed certain unfair labor practices and he dismissed others. Among those dismissed was the interrogation alleged in paragraph 11. However, the judge also determined that the respondent had committed other unfair labor practices during the critical period. Although these were not alleged in the complaint, they were fully and fairly litigated at the hearing. The judge found that these unfair labor practices would justify setting aside the election, but he reasoned that he was constrained by the narrow wording of the Regional Director's order consolidating the proceeding and could consider only the nonmeritorious allegations of paragraph 11 as potentially objectionable preelection conduct. Citing *Irving Air Chute Co.*[153] and *Bandag, Inc.*,[154] the judge concluded that in the absence of meritorious objections, he could not set aside the election and impose a remedial bargaining order.

The Board disagreed both with the judge's overly restrictive interpretation of his authority to consider objectionable conduct and with his interpretation of *Irving Air Chute* and *Bandag*.

The principle enunciated in *Irving Air Chute* is that in a consolidated unfair labor practice/representation proceeding the Board will not direct a bargaining order to remedy a respondent's unfair labor practices even if they occurred during the critical preelection period, unless the election is itself first set aside on the basis of a union's objections. In *Bandag I*, following the *Irving Air Chute* principle, the Board determined that, because the union had withdrawn its objections to the election, it would not order the employer to bargain despite the fact that unfair labor practices were committed during the critical period. This was because the election was no longer under dispute by the parties and its results should be considered final.

---

[152] 288 NLRB No. 122 (Chairman Stephens and Members Johansen, Babson, and Cracraft).

[153] 149 NLRB 627 (1964), enfd. 350 F.2d 176 (2d Cir. 1965).

[154] 225 NLRB 72 (1976) (*Bandag I*) and 228 NLRB 1045 (1977) (*Bandag II*), remanded on other grounds 583 F.2d 765 (5th Cir. 1978).

In *Bandag II*, however, the Board acknowledged that the union had withdrawn only its specific allegations of misconduct, leaving on file its "catch-all" objection to the election. In these circumstances, the Board determined that the election was still being contested, thereby permitting the Board to continue its inquiry into the circumstances surrounding it. When conduct likely to have interfered with the election is thus found to exist, the Board may properly rely on it to set aside the election and, if sufficiently egregious, to order the employer to bargain. Subsequent cases have reiterated this point, emphasizing the Board's role to ensure that employees exercise their right to choose whether or not to be represented by a labor organization in a free and uncoerced atmosphere.[155]

Accordingly, the Board in *White Plains* determined that the judge felt constrained from considering evidence of misconduct occurring during the critical period that may have interfered with the election because it was not included specifically within the Regional Director's description of conduct falling within the "catch-all" objection. The Board considered this evidence of misconduct and found that the violations of Section 8(a)(1) and (3) were sufficiently serious and of widespread impact to have interfered with the election, and to have a devastating and lingering effect. The Board ordered that the election be set aside and that the respondent bargain with the union.

2. Proof of Union Support

In *Grey's Colonial Acres Boarding Home*,[156] the Board agreed with an administrative law judge that the dues-checkoff cards signed by four employees during a union organizational campaign were indicative of their support for the union and should be counted for purposes of determining if the union enjoyed the support of a majority of the employer's employees and whether a bargaining order should issue. A Board majority agreed with the judge that the Board's decision in *Lebanon Steel Foundry*[157] was controlling. That case held that "an employee who signs such a checkoff card thereby clearly evinces a desire to have the union in whose favor the check-off is authorized negotiate a contract with his employer as his collective bargaining representative." 33 NLRB at 239.

The Board majority noted that the court of appeals in *Lebanon Steel* had stated that to interpret the cards as not necessarily indicating an intent to support the union and authorize it to bargain for the signers would be to assume that the signers were deliber-

---

[155] *Fashion Fair, Inc.*, 157 NLRB 1645 (1966), enfd. in pertinent part 399 F.2d 764 (6th Cir. 1968). See also *American Safety Equipment*, 234 NLRB 501 (1978); *Pure Chem Corp.*, 192 NLRB 681 (1971); and *Dawson Metal Products*, 183 NLRB 191 (1970)

[156] 287 NLRB No. 89 (Members Babson, Stephens, and Cracraft; Chairman Dotson and Member Johansen dissenting in part).

[157] 33 NLRB 233 (1941), enfd. 130 F.2d 404 (D.C. Cir. 1942), cert. denied 317 U.S. 659 (1942).

ately engaging in a "futile act" because dues could not be checked off if the union were not the employees' lawful bargaining representative. The court thus concluded that "[t]he card must be given some effect" and that "can be done only if it is effective to give authority to bargain collectively." 130 F.2d at 404.

The Board majority found that the language of the checkoff form, as well as the testimony of the cardsigners, substantially supported the conclusion that representation by the union was contemplated and that, in the absence of a union-security clause, they could envision no other explanation for the voluntary signing of a dues-checkoff card. In this regard, they found their holding in the case to be consistent with the Supreme Court's decision in *NLRB v. Gissel Packing Co.*[158] The Board majority concluded that the union had obtained the support of a majority of the employer's employees by virtue of the signed dues-checkoff cards and authorization cards obtained by the union during the organizational campaign and, on the basis of that majority showing and the unfair labor practices found to have been committed by the employer, issued a bargaining order.

Chairman Dotson and Member Johansen dissented on the grounds that the dues-checkoff cards did not, in their view, constitute evidence of the cardsigner's support for the union. Rather, citing *Cumberland Shoe Corp.*[159] and *Levi Strauss & Co.*,[160] they pointed out that the Board has long held that, when the purpose of a card is clearly and unambiguously stated on its face, it would give effect to the card's stated purpose and would not inquire into the cardsigner's subjective intent when signing the card. They further noted that in *Gissel Packing*, the Supreme Court upheld that view by stating that "employees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature." 395 U.S at 606.

Chairman Dotson and Member Johansen would have found that the language on the face of the dues-checkoff cards clearly indicated that they were intended to serve as nothing more than an authorization for the deduction of fees and dues, and that there was nothing on the face of the card to suggest that its execution was to be construed either as an expression of the signer's support for the union or as an authorization to the union to represent the signer for collective-bargaining purposes. Thus, they would not have counted the dues-checkoff cards as evidence of employee support for the union and, as the union had failed to

[158] 395 U.S. 575 (1969).
[159] 144 NLRB 1268 (1963), enfd. 351 F.2d 917 (6th Cir. 1965).
[160] 172 NLRB 732 (1968).

show that it had majority support, would have found a bargaining order to be inappropriate in this case.[161]

3. Offer of Reinstatement

On remand, the Board in *Consolidated Freightways*[162] held that "[i]f, and only if, an offer of reinstatement is fully valid on its face, then an examination of a discriminatee's reasons for declining the offer must be undertaken" (slip op. at 5).

The respondent discharged employee Hennessey for conduct found to be protected. An arbitrator ordered that Hennessey be reinstated without backpay, and that a final warning letter be placed in Hennessey's personnel file. The respondent's offer of reinstatement, on those terms, was rejected by Hennessey.

The administrative law judge found the offer invalid due to the warning letter and ordered the respondent to offer Hennessey reinstatement with backpay. The Board adopted the judge's decision.

The Court of Appeals for the District of Columbia Circuit remanded the case to the Board (669 F.2d 790 (1981)), instructing the Board to explain its rationale for not inquiring into the reasons Hennessey rejected the respondent's offer and to reconcile its position with *Research Designing Service*[163] and *L. Ronney & Sons Furniture Mfg. Co.*[164]

The Board responded that in *Research Designing* "the reinstatement offer, when made, apparently had no invalid conditions attached." The Board then stated:

> [A]ssuming arguendo that *L. Ronney* indicates that the Board will examine a discriminatee's reasons for declining a reinstatement offer even when the only offer made is invalid on its face, we overrule it and other similar cases and adhere to the rule of *Craw & Son*[165] . . . that a reinstatement offer invalid on its face obviates the obligations on the part of a discriminatee to respond and that a discriminatee's refusal of the offer, on whatever ground, will not relieve the respondent employer of its obligation to make a valid offer in order to toll the running of backpay.

The Board reasoned that it was "the Respondent who acted unlawfully in discharging Hennessey," and the equities fell with Hennessey. Thus, the respondent must extend "a facially valid offer of reinstatement before the burden shifts to the injured employee to accept or reject the offer."

---

[161] Citing *Gourmet Foods*, 270 NLRB 578 (1984).

[162] 290 NLRB No. 85 (Chairman Stephens and Members Johansen and Babson).

[163] 141 NLRB 211 (1963).

[164] 97 NLRB 891 (1951), enfd. as modified 206 F.2d 730 (9th Cir. 1953), cert. denied 346 U.S. 937 (1954).

[165] 244 NLRB 241 (1979).

The Board also noted that *Abilities & Goodwill*[166] and *Marlene Industries Corp.*,[167] two other cases also cited by the court, were "[b]oth cases treat[ing] the backpay and reinstatement rights of discharged *strikers*." The Board stated that it "may properly differentiate in its treatment of backpay between discriminatees whose rights were violated while they were on the job and discriminatees who were withholding their services at the time of their discriminatory discharge."

The Board further stated that the respondent's good-faith reliance on the arbitrator's award was not sufficient to toll its backpay liability. The Board noted that in its original decision in this case it found the arbitrator's award to be repugnant to the Act and that deferral was not appropriate. The Board concluded that, if it found that the respondent's backpay obligation was tolled because it complied with the "repugnant award," the Board would, in effect, be deferring to the award.

In *Esterline Electronics Corp.*,[168] the Board held that it will not hold an otherwise valid offer of reinstatement to be invalid simply because the specific reporting date appears to be unreasonably short. The Board tolled the discriminatee's backpay as of a reasonable time after she failed to respond to the unconditional offer of reinstatement.

The record showed that the discriminatee received a letter on November 23, 1982, unconditionally offering her reinstatement and directing her to report to work the next day. The letter did not state that the offer would lapse if she was unable to report the next day or tell her to commence work then or soon thereafter. The discriminatee made no response at all, giving the employer no clue as to why she could not respond to the offer.

The Board predicated its decision on the "requirement of good faith dealings" imposed on both the employer and the employee. The Board cited language from *NLRB v. Betts Baking Co.*[169] that it is not an undue burden on an employee to require him to inform his employer of his intentions concerning reinstatement within a reasonable time after notice. However, the Board also stated that an offer will be treated as invalid if on its face it makes it clear that reinstatement is dependent on the employee's returning on a specified date or if the offer otherwise suggests that it will lapse if a decision on reinstatement is not made by that date.[170]

In the instant case, the Board found the employer's letter to the employee dated November 23, 1982, unconditionally offering her reinstatement and directing her to report the next day re-

[166] 241 NLRB 27 (1979).
[167] 255 NLRB 1446 (1981).
[168] 290 NLRB No. 92 (Chairman Stephens and Members Johansen and Cracraft)
[169] 428 F.2d 156, 158 (10th Cir 1970)
[170] *Harrah's Club*, 158 NLRB 758 (1966), and other like cases were overruled to the extent that they are inconsistent with this analysis.

mained open for 10 days, after which time the employer's backpay liability was tolled. The Board relied on the employer's existing policies and agreements governing bargaining unit members in determining what constituted a "reasonable time."

4. "Model" Visitatorial Clause

In *Cherokee Marine Terminal*,[171] the Board examined the issue of whether a "model" visitatorial provision[172] should be routinely included in its orders. The General Counsel urged routine inclusion arguing, inter alia, that the provision was necessary as the Board has often been unable to obtain sufficient information to determine whether there has been compliance with court-enforced orders. The General Counsel maintained that violators have resisted compliance by the use of delaying tactics and the concealment of assets, and that it has often been difficult to obtain documentation concerning both alleged financial inability to comply and possible alter ego status of a nonparty.

In its decision, the Board noted that, although it recognized visitatorial-type clauses were necessary in specific remedial situations, it was concerned about the hardships that could result from routine inclusion. The Board was troubled by practical concerns regarding the administration of the General Counsel's suggested model clause and the potential for abuse inherent in its lack of limits, specificity, and procedural safeguards.

Additionally, despite the General Counsel's contentions to the contrary, the Board was not persuaded that visitatorial provisions were necessarily preferable to existing remedial procedures, including Section 11 administrative subpoenas and Rule 69 of the Federal Rules of Civil Procedure, which allows the Board to obtain postjudgment discovery in aid of a money judgment against a respondent.

The Board, concerned that visitatorial provisions not be turned from remedial devices into punitive measures, determined that it would not routinely include such provisions, but would continue to grant them only on a case-by-case basis when the equities demonstrate a likelihood that a respondent would fail to cooperate or otherwise attempt to evade compliance.

---

[171] 287 NLRB No. 53 (Chairman Stephens and Members Johansen and Babson).

[172] The provision reads:

> For the purpose of determining or securing compliance with this Order, the Board, or any of its duly authorized representatives, may obtain discovery from the Respondent, its officers, agents, successors or assigns, or any other person having knowledge concerning any compliance matter, in the manner provided by the Federal Rules of Civil Procedure Such discovery shall be conducted under the supervision of the United States Court of Appeals enforcing this Order and may be had upon any matter reasonably related to compliance with this Order, as enforced by the Court.

5. Reimbursement of Union Initiation Fee

In *Mode O'Day Co.*,[173] the Board reconsidered its prior decision[174] in this case and reached the same conclusion on the merits of the unfair labor practice issue, but revised its earlier remedy.

The employer was found to have violated Section 8(a)(2) and (1) by requiring an employee to sign a union dues-checkoff authorization form on her first day of employment, despite the 30-day grace period permitted under the contract for new employees to join the union. The employer deducted $25 per week from her pay towards the union's initiation fee. No part of the deductions was applied towards dues. Despite the employee's protests, the deductions continued for 5 weeks, then stopped. The employee voluntarily left the respondent's employ after 6 weeks on the job.

In its original decision, the Board affirmed the administrative law judge's recommended Order that the employer restore to the employee the total amount deducted under the coerced checkoff—$125. The judge cited *General Instrument Corp.*,[175] in support of this remedy.

In its supplemental decision, a panel majority of Chairman Stephens and Member Cracraft disavowed the remedial approach of *General Instrument* and applied instead the long-established rule espoused in *Campbell Soup Co.*,[176] that reimbursement of initiation fees, as opposed to union dues, is not appropriate once an employee has worked a sufficient period of time to become liable for the payment of such fees. Here, once an employee worked past the 30-day grace period, he or she was liable for the full fee payment regardless of how long after the grace period the employee worked. Thus, the employee was not entitled to the reimbursement of the $125 because she would have been required to pay the initiation fee in any event because she worked beyond 30 days. This formula allowed the restoration of the status quo ante, i.e., it placed the parties in the position they would have been in had no unfair labor practice taken place. There was neither unjust enrichment for the employee who would have owed the fee, nor was there any unauthorized punitive effect on the employer. The majority noted that the *General Instrument* formula is at odds with these well-recognized remedial policies.

Member Johansen, in dissent regarding the remedy, would have required the employer to reimburse the employee $100—the amount that was improperly deducted during the grace period. In his view, because the installment deductions began prematurely (due to the coerced checkoff), the employee was entitled to

[173] 290 NLRB No. 162 (Chairman Stephens and Member Cracraft; Member Johansen dissenting in part).
[174] 280 NLRB 253 (1986).
[175] 262 NLRB 1178 (1982).
[176] 152 NLRB 1645 (1965).

have the money deducted during the grace period restored to her. The remaining $25, on the other hand, was properly deducted beyond the 30-day grace period during the fifth week of employment. Member Johansen noted that this partial reimbursement formula restored the status quo ante, the essential theme of *Campbell Soup.*

6. Liability for Discriminatory Hiring Hall

In *Wolf Trap Foundation,*[177] the Board overruled prior precedent and announced a new policy of finding employers jointly and severally liable for a union's discriminatory operation of a hiring hall only if they know or can be reasonably charged with notice of a union's discrimination. Previously, the Board had adhered to the principle of strict liability and held employers responsible even if they had no knowledge, either actual or constructive, of a union's discriminatory operation of a referral system.[178]

The union and three employers—Wolf Trap, Ford's Theatre, and National Theatre—had an arrangement whereby the union, through an exclusive hiring hall, referred stagehand employees to work. In the course of operating the hiring hall, the union, in violation of Section 8(b)(2) of the Act, refused to refer Regina Becker, the charging party, to employment because she was a female nonmember of the union. Acknowledging that he was bound by Board law that held an employer strictly liable for a union's discriminatory acts when it delegates hiring to a union, the judge found that, as parties to the hiring hall arrangement by which the union discriminated against Becker, the employers violated Section 8(a)(3) despite the lack of any evidence that they had actual knowledge of the discrimination.

The Board affirmed the 8(a)(3) findings with respect to Wolf Trap and Ford's Theatre. Although noting that these employers had no actual knowledge of the union's unlawful conduct, the Board held that, when a collective-bargaining agreement itself, either on its face or by reference to another agreement or to union rules, requires discrimination or when the discriminatory acts are widespread or repeated or notorious, the employer might reasonably be charged with notice. Wolf Trap and Ford's Theatre had written collective-bargaining agreements with the union that contained unlawful "closed-shop" provisions expressly requiring discrimination in employment against nonmembers of the union. Applying its new standard, the Board concluded that despite the lack of actual knowledge the inclusion of the closed-shop provisions in their contracts was sufficient ground to charge Wolf Trap and Ford's Theatre with notice of the union's discrimination and to hold them jointly and severally liable with the

[177] 287 NLRB No. 103 (Chairman Stephens and Members Johansen, Babson, and Cracraft).

[178] See *Frank Mascali Construction,* 251 NLRB 219 (1980), enfd. mem. 697 F.2d 294 (2d Cir. 1982).

union for any backpay due Becker because of the discriminatory operation of the hiring hall.[179]

The Board concluded, however, that National Theatre had neither actual knowledge of the union's discrimination nor a closed-shop provision in its collective-bargaining agreement under which it could be reasonably charged with notice of the unlawful conduct. Therefore, as there was nothing on the face of a written contract that would have alerted National Theatre to possible discriminatory practices by the union, the Board dismissed the 8(a)(3) allegation against it.

L. Equal Access to Justice Act

In *Brandeis School*,[180] the Board granted in part and denied in part an application for attorneys' fees and expenses under the Equal Access to Justice Act (EAJA). The Board found that the applicant was a prevailing party and that the General Counsel's position had not been substantially justified in a significant and discrete portion of the underlying unfair labor practice case. Further, the Board found that the applicant was not a prevailing party as to settled complaint allegations and, therefore, was not entitled to recover fees and expenses related to these allegations. Finally, the Board concluded that the applicant was entitled to recover fees and expenses incurred in preparing its EAJA application.

The underlying unfair labor practice case arose in part out of a strike by the applicant's employees. Approximately 2 weeks before issuance of the complaint, which alleged, inter alia, that the applicant had violated Section 8(a)(3) by failing to reinstate the strikers, the General Counsel learned that the strikers' collective-bargaining representative had failed to file 8(d) strike notices, and that, accordingly, the strikers had lost their employee status under Section 8(d). After the applicant learned of the failure to file the notices during the course of the hearing, the administrative law judge dismissed the portions of the complaint related to the 8(a)(3) allegations. The parties informally settled the remaining allegations.

The Board found that the General Counsel was not substantially justified in pursuing the 8(a)(3) allegations. Thus, the Board rejected the General Counsel's arguments that the union's failure to comply with Section 8(d) was an affirmative defense waived by the applicant, that by attempting to reemploy some of the strikers the applicant condoned the strike, and that the applicant's failure to disclose that it had not received a strike notice constituted "special circumstances" justifying denial of an award.

---

[179] In a supplemental decision, 289 NLRB No. 96, the Board limited the backpay liability of Wolf Trap and Ford's Theatre to the duration of the contracts that contained the unlawful closed-shop clauses.

[180] 287 NLRB No. 85 (Chairman Dotson and Members Babson and Stephens).

The Board held, however, that the applicant was not entitled to an award of fees and expenses associated with the settled allegations as the settlement's terms did not render it a prevailing party.

Finally, the Board reversed the judge's denial of an award for preparation of the EAJA application. The judge based his denial on the inclusion of noncompensable fees and expenses and on the applicant's inadequate response to an order requiring it to specify which fees and expenses were related to compensable matters. As virtually all the applicant's brief in support of the application dealt with the dismissed allegations and the appended time records enabled a calculation of an award on a reasonable basis, the Board found that an award of fees for time adequately documented as relating to the EAJA application was proper. As to the applicant's expenses, the Board reversed the judge's award of $1 per hour as having no basis in the record and awarded only those expenses documented as relating to compensable matters.

In *Industrial Security Services*,[181] the Board found that an applicant had not established its eligibility for an award under EAJA and dismissed the application. The Board majority concluded that the applicant failed to submit "probative evidence of its net worth" and, therefore, had failed to satisfy its burden of showing its eligibility for an EAJA award.

The applicant had initially filed a timely application and supplemental application for an award of attorneys' fees and expenses under EAJA. In its original Order,[182] the Board had found that material issues of fact existed concerning the applicant's net worth. Thus, the Board noted that, although the applicant had submitted its financial statements, the record contained a letter from an accounting firm stating that the applicant's management had prepared the financial statements and that the accounting firm merely reviewed them in a fashion that was "substantially less in scope than an examination in accordance with generally accepted auditing standards." Consequently, the Board had remanded the case to the administrative law judge and ordered the record reopened to permit the applicant to submit additional evidence establishing its eligibility.

The applicant thereafter filed a second supplemental application, which included a detailed statement of the applicant's employee complement prepared by its administrative assistant and the sworn affidavit of its certified public accountant. That affidavit indicated that the accountant had determined the applicant's net worth on the basis of attached financial information, which was the same compilation of unaudited figures that the applicant had submitted with its initial application, and that he had prepared the net worth statement "in accordance with general ac-

[181] 289 NLRB No. 53 (Chairman Stephens and Member Johansen; Member Babson dissenting).
[182] 272 NLRB 1083 (1984).

counting principles of certified public accountants." The second supplemental application also included the previously submitted affidavits of the applicant's administrative assistant, who stated that he had reviewed the net worth statement prepared by the accountant and had concluded that it accurately reflected the applicant's net worth.

In agreement with the judge, the Board majority concluded that, although the applicant had satisfied EAJA's requirement that it have fewer than 500 employees, it had not shown that it satisfied the net worth requirement. The Board majority found that the net worth statement submitted by the accountant relied on the same unattested to and unaudited financial statements previously considered and found deficient by the Board in its original Order. They noted that the statement was deficient because the accountant "applied his professional expertise only to the extent of verifying the summary arithmetic contained in the financial statement" prepared by the applicant, "did not examine any of the underlying business records," and therefore "refrained from expressing his professional opinion as to the accuracy of the financial statement 'taken as a whole.'" The Board majority indicated that this procedure, as well as the accountant's lack of personal knowledge of the applicant's business records, distinguished this case from *American Pacific Pipe Co. v. NLRB*[183] and *D'Amico v. Marine & Shipbuilding Workers*,[184] two cases cited by Member Babson in his dissenting opinion.

With regard to the administrative assistant's affidavits, the Board majority concluded that they were not admissible to prove that the net worth statement was an accurate indication of the applicant's net worth. The Board majority noted that Federal Rule of Evidence 901(a) requires that evidence be authenticated, and that Federal Rule of Evidence 901(b)(1) permits authentication through the testimony of a witness with firsthand knowledge. The Board majority found that the administrative assistant had not declared that he had prepared or reviewed the financial information supplied to the accountant, and had not indicated how he knew that the net worth statement was accurate. Therefore, the Board majority concluded, he lacked the firsthand knowledge necessary to authenticate the net worth statement. Consequently, the Board majority concluded that the applicant had not submitted properly authenticated evidence of its net worth and, therefore, had not satisfied its burden of eligibility for an EAJA award.

In a dissenting opinion, Member Babson concluded that the applicant had established its eligibility under EAJA and, thus, he would have reached the merits of the applicant's entitlement to an EAJA award. He noted that, in light of the affidavits submit-

[183] 788 F.2d 586 (9th Cir. 1986).
[184] 630 F.Supp. 919 (D.Md. 1986).

ted by the accountant and the administrative assistant, the net worth statement provided "sufficient evidence" that the applicant satisfied the EAJA net worth requirement. In Member Babson's view, "the evidentiary burden imposed on this applicant by my colleagues is inconsistent with . . . court decisions that found similar documentary evidence submitted by EAJA applicants to be sufficient."

VI

Supreme Court Litigation

During fiscal year 1988, the Supreme Court decided two cases in which the Board was a party. The Board participated as amicus curiae in two other cases.

A. Nonreviewability of the General Counsel's Prosecutorial Decisions

In *Food & Commercial Workers Local 23*,[1] a unanimous Supreme Court held that neither the National Labor Relations Act nor the Administrative Procedure Act affords judicial review of a decision by the General Counsel to dismiss an unfair labor practice complaint pursuant to a prehearing informal settlement that the charging party refused to join.

The Board's regulations provide that after a complaint has been issued, but before commencement of a hearing thereon, the Regional Director who issued the complaint may enter into either a formal or informal settlement of the underlying unfair labor practice charges.[2] The regulations expressly allow a nonconsenting party to appeal a formal settlement to the General Counsel and then to the Board itself, and the Board's order is "a final order of the Board," subject to court review under Section 10(f) of the Act. If the prehearing settlement is informal, however, the regulations permit an appeal to the General Counsel, but not to the Board.[3]

The Regional Director issued a complaint on Local 23's charges alleging violations of the Act on the part of the employer and another union. Before the scheduled hearing, all parties, except Local 23, agreed to the Regional Director's proposal to enter into an informal settlement, which called for the charged parties to take certain remedial action in return for dismissal of the complaint. Local 23 appealed to the General Counsel, requesting an evidentiary hearing on its objections to the settle-

[1] *NLRB v. Food & Commercial Workers Local 23*, 108 S.Ct. 413, revg. 788 F.2d 178 (3d Cir. 1986).

[2] A formal settlement requires Board approval and is accompanied by the charged party's agreement to a remedial Board order and usually consent to the entry of a court of appeals enforcement decree. 29 CFR § 101.9(b)(1) (1987). An informal settlement provides that the charged party will take or refrain from taking certain action, in return for which the Regional Director agrees not to file a complaint or to withdraw a previously filed complaint. 29 CFR §§ 101.7 and 101.9(b)(2).

[3] See 29 CFR § 101.9(c)(2) and (3).

ment. The General Counsel determined that there was no need for an evidentiary hearing and sustained the settlement.

Local 23 petitioned for review in the Court of Appeals for the Third Circuit. That court, considering itself bound by its own precedents,[4] held that it had jurisdiction to review the General Counsel's action in approving the informal settlement because, inasmuch as a complaint had issued, the General Counsel's action must be deemed that of the Board. On the merits, the court held the complaint should not have been dismissed without an evidentiary hearing on Local 23's objections to the settlement.

The Supreme Court reversed the Third Circuit's jurisdictional holding. The Court concluded that the "words, structure, and history" of the 1947 amendments to the NLRA establishing a separate Office of the General Counsel with prosecutorial responsibility[5] reveal that Congress intended to differentiate between "prosecutorial" determinations, which are to be made solely by the General Counsel independent of the Board, and "adjudicatory" decisions, which are to be made by the Board subject to judicial review (108 S.Ct. at 421). The Court further concluded that it is a reasonable construction of the Act to treat postcomplaint prehearing settlement determinations as prosecutorial because, until a hearing is held, "the Board has taken no action [and] no *adjudication* has yet taken place" (id. at 422, emphasis in original). The Court added that the General Counsel's concededly "unreviewable discretion to file [or refuse to file] a complaint, in turn, logically supports a reading that she must also have final authority to dismiss a complaint in favor of an informal settlement, at least before a hearing begins" (ibid.). Nor, in the Court's view, does the legislative history's silence respecting settlements indicate a congressional intention to carry forward the practice prior to 1947 under which all postcomplaint settlements were reviewed by the Board. For the history shows that Congress intended to give the General Counsel final authority to handle all aspects of prosecutions, not merely the filing of complaints. Moreover, it does not indicate "an intention to deny the Board the usual flexibility accorded an agency in interpreting its authorizing statute and in developing new regulations to meet changing needs" (id. at 423, footnote omitted).

The Court rejected the contention that, because Section 3(d) of the Act states that the General Counsel acts "on behalf of the Board," her final determinations are reviewable under Section 10(f) as orders of the Board. The Court observed that that language had been added to Section 3(d) to make clear that "the General Counsel acted within the agency, not to imply that the acts of the General Counsel would be considered acts of the Board" (id. at 424), and that, although Section 10(f) "[f]airly read

[4] *Leeds & Northrup Co. v. NLRB*, 357 F.2d 527 (3d Cir. 1966).

[5] Sec. 3(d) of the Act provides that the General Counsel has "final authority, on behalf of the Board," regarding the investigation, filing, and prosecution of unfair labor practice complaints.

. . . may encompass any Board adjudication resolving an unfair labor practice complaint, whether by final order, consent decree, or settlement," it "plainly cannot be read to provide for judicial review of the General Counsel's prosecutorial function (ibid.).

The Court further held that the General Counsel's prosecutorial decisions could not be reviewed under the Administrative Procedure Act (APA) as final agency action "for which there is no other adequate remedy in a court" (5 U.S.C. § 704). Review under the APA is unavailable where the statute establishing the agency "preclude[s] judicial review" (5 U.S.C. § 701(a)(1)). The Court found that the NLRA's structure and history clearly establish the requisite congressional intent to preclude judicial review of the General Counsel's prosecutorial decisions, including those involving settlements.

B. Handbilling of Consumers Requesting Boycott of Secondary Employer

In *DeBartolo*,[6] a unanimous Supreme Court held that union handbilling at the entrance to a shopping mall, asking potential customers not to patronize any of the mall stores until DeBartolo, the mall owner, promised that all mall construction would be done by contractors paying fair wages, was not a violation of Section 8(b)(4)(ii)(B) of the Act. The union had engaged in the handbilling in furtherance of a primary labor dispute with a construction contractor that had a contract to build a department store at the mall.

The Board originally had dismissed the complaint alleging that the handbilling violated the Act's secondary boycott provisions on the ground that the handbilling was protected by the publicity proviso of Section 8(b)(4), which exempts nonpicketing publicity intended to inform the customers of a distributor of goods that the goods were produced by an employer involved in a labor dispute.[7] The Supreme Court, however, concluded that the handbilling was not protected by the proviso because DeBartolo and the mall tenants other than the department store that had engaged the contractor did not distribute the contractor's products.[8] It remanded the case to the Board to determine whether the handbilling fell within the prohibition of Section 8(b)(4)(ii)(B), making it unlawful for a union to "threaten, coerce, or restrain" any person to cease doing business with any person and, if so, whether the handbilling was protected by the first amendment.

---

[6] *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, 108 S.Ct. 1392, affg. 796 F.2d 1328 (11th Cir. 1986).

[7] *Florida Gulf Coast Building Trades Council (DeBartolo Corp.)*, 252 NLRB 702 (1980), affd. 662 F.2d 264 (4th Cir. 1981).

[8] *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147 (1983).

On remand, the Board held that the handbilling, which called for a total boycott of neutral employers' businesses, was a form of economic coercion proscribed by Section 8(b)(4)(ii)(B), and entered a remedial order.[9] The Board declined to consider first amendment questions, stating that "as a congressionally created administrative agency, we will presume the constitutionality of the Act we administer.[10]

The Court of Appeals for the Eleventh Circuit,[11] perceiving serious questions concerning the constitutionality of a ban on peaceful handbilling, followed the teaching of *Catholic Bishop*[12] and examined the language and legislative history of Section 8(b)(4)(ii)(B) to determine whether there was a clear congressional intent to proscribe such handbilling. Finding no such clear congressional intent, it construed the section as not prohibiting appeals to consumers by means other than picketing, and denied enforcement of the Board Order.

The Supreme Court affirmed. Although noting that the Board's construction of the Act is ordinarily entitled to deference, it agreed with the court of appeals that *Catholic Bishop* requires that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress" (108 S.Ct. at 1397).

The Supreme Court further agreed with the court of appeals that the Board's construction of the statute posed serious constitutional questions. It observed that the handbilling was truthful and urged potential customers of the mall to follow a wholly legal course of action. Moreover, it was peaceful, involved no picketing or patrolling, and, facially, "was expressive activity arguing that substandard wages should be opposed by abstaining from shopping in a mall where such wages were paid" (ibid.). The Court said that proscription of such activity as part of an educational campaign would clearly raise serious first amendment issues and that "[t]he same may well be true in this case, although here the handbills called attention to a specific situation in the mall allegedly involving the payment of unacceptably low wages by a construction contractor" (id. at 1398).

The Supreme Court concluded, as did the court of appeals, that Section 8(b)(4)(ii)(B) was open to a construction that "obviates deciding whether a congressional prohibition on handbilling . . . would violate the First Amendment" (id. at 1399). Thus, the handbilling need not be held to "coerce" mall customers or secondary employers within the meaning of Section 8(b)(4)(ii)(B)

[9] *Florida Gulf Coast Building Trades Council (DeBartolo Corp.)*, 273 NLRB 1431 (1985).

[10] Id. at 1432.

[11] *Florida Gulf Coast Building Trades Council (DeBartolo Corp.) v. NLRB*, 796 F.2d 1328 (11th Cir. 1986).

[12] *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

because there was no violence, picketing, protesting, or other intimidating conduct, but only an attempt to persuade customers not to shop in the mall. The Court added that, although the handbilling may inflict economic harm on the secondary employers by causing them to lose business, "the loss of customers because they read a handbill urging them not to patronize a business, and not because they are intimidated by a line of picketers, is the result of mere persuasion, and the neutral who reacts is doing no more than what its customers honestly want it to do" (id. at 1400).[13]

Moreover, the fact that handbilling and other nonpicketing consumer appeals not involving a distributor are outside the publicity proviso's protection does not require the conclusion that such appeals must be considered coercive under Section 8(b)(4)(ii)(B). For the proviso need not be viewed "as establishing an exception to a prohibition that would otherwise reach the conduct excepted," but may more reasonably be read as providing protection for a type of communication that might otherwise be considered coercive, "even if other forms of publicity would not be" so considered (id. at 1401).

Nor does the legislative history contain any "clear indication . . . that Congress intended § 8(b)(4)(ii) to proscribe peaceful handbilling, unaccompanied by picketing, urging a consumer boycott of a neutral employer" (id. at 1402). The Court noted that the proponents of the secondary boycott provision never "suggest[ed] that merely handbilling the customers of the neutral employer was one of the evils at which their proposals were aimed," and that the only such suggestions came from opponents of the secondary boycott ban (ibid.).

C. Use of Agency Fees for Other than Collective-Bargaining Activities

In *Beck*,[14] a divided Supreme Court[15] held that Section 8(a)(3) of the Act[16] does not authorize a union, over the objections of dues-paying nonmember employees, to expend funds collected from them under a union-security agreement for activities unrelated to collective bargaining, contract adjustment, or griev-

[13] Distinguishing its holding in *NLRB v. Retail Store Employees*, 447 U.S. 607 (1980) (*Safeco*), that picketing urging a total boycott of a secondary employer is coercive and unlawful, the Court said that "picketing is qualitatively 'different from other modes of communication'" (ibid., quoting from *Babbitt v. Farm Workers*, 442 U.S. 289, 311 fn. 17 (1979)). The conduct element in picketing "'often provides the most persuasive deterrent to third persons about to enter a business establishment,'" while handbills containing the same message are "'much less effective . . . [because they] depend entirely on the persuasive force of the idea'" (ibid., quoting from *Safeco*, 447 U.S. at 619 (Stevens, J., concurring)).

[14] *Communications Workers of America v. Beck*, 108 S.Ct. 2641, affg. 800 F.2d 1280 (4th Cir. 1986).

[15] Justice Brennan delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices White, Marshall, and Stevens joined. Justice Blackmun, joined by Justices O'Connor and Scalia, filed an opinion, concurring in part and dissenting in part. Justice Kennedy took no part in the case.

[16] Provisos to Sec. 8(a)(3) permit an employer and a union to enter into an agreement requiring all employees in the bargaining unit to pay periodic union dues as a condition of continued employment, whether or not the employees become union members.

ance adjustment ("collective-bargaining activities"), and that such expenditures thus violated the union's duty of fair representation.

In that case, the union had entered into a collective-bargaining agreement that contains a union-security clause under which all represented employees who do not become union members must pay the union "agency fees" in amounts equal to the dues paid by union members. Certain bargaining unit employees who chose not to become union members filed suit in Federal district court alleging that the union's expenditure of their agency fees on activities such as organizing the employees of other employers, lobbying for labor legislation, and participating in social, charitable, and political events violated the union's duty of fair representation, Section 8(a)(3), and the first amendment. The district court held that the disputed expenditures violated the associational and free speech rights of objecting nonmembers. A divided Court of Appeals for the Fourth Circuit, sitting en banc, did not resolve the constitutional issues, but held that the union's collection of fees from nonmembers to finance activities unrelated to collective bargaining violated its duty of fair representation.

Resolving a conflict in the circuits,[17] the Supreme Court found controlling its holding in *Machinists v. Street*, 367 U.S. 740 (1961), that Section 2, Eleventh of the Railway Labor Act (RLA) does not permit a union, over the objections of nonmembers, to expend compelled agency fees on political causes[18] "for § 8(a)(3) and § 2, Eleventh are in all material respects identical" (id. at 2648).[19] Thus, the Court noted that, in amending Section 8(a)(3) in 1947, Congress intended to correct abuses of compulsory unionism that had developed under closed-shop agreements, while, at the same time, to permit union-security clauses that ensured that there would be no employees who were getting the benefits of union representation without paying for them. "This same concern over the resentment spawned by 'free-riders' in the railroad industry prompted Congress, [in 1951,] to amend the RLA" (id. at 2651).

The fact that in 1947 Congress expressly considered proposals regulating union finances but ultimately placed only a few limitations on the collection and use of dues and fees, and otherwise left unions free to arrange their financial affairs as they saw fit, was not sufficient, in the Court's view, to compel a broader con-

[17] The Court of Appeals for the Second Circuit had reached a contrary result in *Price v. Auto Workers*, 795 F.2d 1128 (1986).

[18] In *Ellis v. Railway Clerks*, 466 U.S. 435, 447–448 (1984), the Court extended *Street* and held that, under Section 2, Eleventh, objecting nonmembers could only be charged for those expenditures "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive [bargaining] representative."

[19] Initially, the Court concluded (id. at 2646–2647) that the court below had properly exercised jurisdiction over the judicially created duty of fair representation claim and the first amendment claim, and that, although the Board had primary jurisdiction over the 8(a)(3) claim, the courts were not precluded from determining the merits of that claim because the union had sought to defend itself from the duty of fair representation claim on the ground that Sec. 8(a)(3) authorized its challenged actions.

struction of Section 8(a)(3) than that accorded Section 2, Eleventh in *Street*. Nor could *Street* be distinguished on the theory that its construction of Section 2, Eleventh was merely expedient to avoid a constitutional problem not present under the NLRA.[20] Assuming, without deciding, that a union's exercise of rights permitted, though not compelled, by Section 8(a)(3) involves no state action, the Court said that, in *Street*, it had concluded that its "interpretation of § 2, Eleventh was 'not only "fairly possible" but entirely reasonable,'" and that it had "adhered to that interpretation since" (id. at 2657).

The dissenting Justices stated that the Court's conclusion that Section 8(a)(3) prohibits unions from requiring nonmembers to pay fees for purposes unrelated to collective bargaining "simply cannot be derived from the plain language of the statute" (id. at 2660) or from its legislative history. In their view, the legislative history "reinforces what the statutory language suggests: the provisos [to Sec. 8(a)(3)] neither limit the uses to which agency fees may be put nor require nonmembers to be charged less than the 'uniform' dues and initiation fees" paid by members (id. at 2661).

D. ERISA Enforcement of Postcontract Obligation to Contribute to Multiemployer Pension Plans

Section 515 of the Employee Retirement Income Security Act (ERISA) provides that an employer who is obligated to make contributions to a multiemployer employee benefit plan "under the terms of the plan or under the terms of a collectively bargained agreement shall . . . make such contributions in accordance with the terms and conditions of such plan or . . . agreement." Section 502(g)(2) of ERISA provides for enforcement of that liability by the Federal district courts, and further requires that judgments for delinquent contributions include an award of prejudgment interest, plus liquidated damages, attorney's fees, and costs. The question in *Laborers Health & Welfare Trust Fund*[21] was whether those provisions also conferred jurisdiction on district courts to determine obligations that flowed from the employer's alleged breach of his duty under Section 8(a)(5) of the NLRA to make postcontract contributions while negotiations for a new contract are being conducted. A unanimous Supreme Court affirmed the holding of the court of appeals that the district courts lacked jurisdiction to adjudicate the NLRA claim.

The Court observed that the "text of Section 515 plainly describes the employer's contractual obligation to make contribu-

---

[20] The constitutional problem in *Street* arose from the Court's holding in *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956), that, because the RLA preempts all state laws banning union-security agreements, the negotiation and enforcement of such RLA agreements involves "governmental action," and accordingly is subject to constitutional limitations. Sec. 8(a)(3) does not preempt contrary state law. See 29 U.S.C. § 164(b).

[21] *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 108 S.Ct. 830, affg. 779 F.2d 497 (9th Cir. 1985).

tions but omits any reference to a noncontractual obligation imposed by the NLRA." 108 S.Ct. at 834. Moreover, the legislative history of Section 502(g)(2) explains the special remedies there provided as "a strong incentive [to employers] to honor their contractual obligations to contribute," but contains no mention of postcontract statutory obligations.[22] Id. at 835. Thus, both the text and the legislative history of those ERISA provisions indicate that the special judicial remedy applies only to contractually "promised contributions," and was not intended to be an exception to the general rule of NLRB preemption with respect to claims for unpaid contributions allegedly due under the provisions of the NLRA. Id. at 834, 836.

The Court found Congress' intent to so limit the availability of the special judicial remedy too plain to permit consideration of the policy arguments that precluding ERISA enforcement of postcontract obligations creates a gap in the enforcement scheme and that the remedies available to plan trustees in NLRB proceedings are inadequate. The Court observed, however, that "countervailing policy arguments . . . make it highly unlikely that the limited reach of the [special judicial remedy] is the consequence of inadvertence rather than deliberate choice" (id. at 837). Thus, although the remedies mandated by Section 502(g)(2) are "entirely appropriate" for an employer's failure to make contractually specified payments, the issues presented in a dispute over liability under the NLRA are more complex; there may be a good-faith dispute as to the existence and extent of an employer's liability and, in that context, the mandatory remedies are "problematic[al]" (ibid.). In addition, the Court said, the question of whether an employer's unilateral decision to discontinue plan contributions is a failure to bargain in good faith "is the kind of question that is routinely resolved by the administrative agency with expertise in labor law," and "[i]n cases like this, which involve either an actual or an 'arguable' violation . . . of the NLRA, federal courts typically defer to the judgment of the NLRB" (ibid.).

[22] By contrast, the provision of ERISA dealing with an employer's "withdrawal liability," Sec. 4212(a), "unambiguously includes both the employer's contractual obligations and any obligations imposed by the NLRA" (ibid.).

VII

Enforcement Litigation

A. Jurisdiction

1. Employee Status in Rehabilitative Setting

In *Arkansas Lighthouse for the Blind v. NLRB*,[1] the Eighth Circuit held that the Board abused its discretion when the Board found that Lighthouse's workers were employees within the meaning of the Act and asserted jurisdiction over that charitable nonprofit corporation that provides services to and carries on programs for individuals with visual impairments. In the court's view, the employment of these workers was primarily rehabilitative and therapeutic, rather than primarily industrial. The court believed that the Board took a much too restrictive view of what constitutes rehabilitation and therapy. The court found that, because work is probably the most productive and successful method of rehabilitation for handicapped persons, especially the blind who are able to work, the usual employer-employee relationship in our competitive marketplace is not present in Lighthouse's efforts to employ the handicapped, and that the union's normal objective of securing improved working conditions for such employees is neither necessary nor productive of that objective. In refusing to enforce the Board's Order, the court specifically noted that its decision was at odds with decisions by the Fifth and Sixth Circuits in *NLRB v. Lighthouse for the Blind of Houston*[2] and *Cincinnati Assn. for the Blind v. NLRB*,[3] respectively.

2. Court Jurisdiction to Determine when Enforcement Is Unnecessary

In *NLRB v. Greensboro News & Record*,[4] the Board sought enforcement of a 3-year-old Board Order because the company had ceased complying with that Order and a Board investigation resulted in the issuance of new allegations against the company. The Fourth Circuit, exercising its "equitable and supervisory powers," denied enforcement of that Order, finding that the Order was "both unnecessary and obsolete." The court found en-

[1] 851 F.2d 180.
[2] 696 F.2d 399 (1983).
[3] 672 F2d 567 (1982).
[4] 843 F.2d 795 (4th Cir.).

forcement "unnecessary" because the Board offered no reason for the delay in seeking enforcement, and the differences in the old violations and new allegations militated against using the new allegations as justification to enforce a 3-year-old Order. The court found the 3-year-old Order "obsolete" because judicial enforcement of the Order would have absolutely no effect on the new alleged violations.

B. Concerted Activity

Section 8(a)(1) of the Act protects employees who exercise their Section 7 right to "engage in . . . concerted activities for . . . [their] mutual aid or protection." In *Meyers II*,[5] the Board adhered to its determination in *Meyers I*[6] that an employee's action may be concerted if it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." During the past year, the *Meyers* interpretation of "concerted" action was again presented to the District of Columbia Circuit in a case in which the Board found that the safety complaints of a single employee acting on his own did not constitute concerted activity protected under the Act.[7]

In its *Prill II* decision, the court noted with approval that "*Meyers II* adopts the reasoning of *Mushroom Transportation*"[8] by construing "the words 'concerted activity' to '[encompass] . . . those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." The court concluded that, "[b]y requiring that workers actually band together, the [Board] has adopted a reasonable—but by no means the only reasonable—interpretation of Section 7 . . . [that] is consistent with the history of the Act." The court therefore affirmed the Board's finding that employee Prill, who "acted on his own, without inducing or preparing for group action . . . when he complained to his employer and . . . state officials, and when he refused to tow the unsafe truck," was not "protected from dismissal under the Board's current reading of [S]ection 7, which requires that both the 'mutual aid or protection' *and* the 'concerted activity' prongs be satisfied."

The *Meyers* standard was also presented to the First Circuit in a case in which the Board found that Section 7 protected employee Duchesne's solicitation of employees to oppose the employer's basis for compensating all of them and protected employee Ramos' solicitation of employees for assistance in demanding greater compensation only for himself.[9] The court

[5] *Meyers Industries*, 281 NLRB 882 (1986).
[6] *Meyers Industries*, 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985) (*Prill I*), cert. denied 474 U.S. 948 (1985).
[7] *Prill v. NLRB*, 835 F.2d 1481 (*Prill II*), affg. *Meyers Industries*, 281 NLRB 882, supra.
[8] *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964).
[9] *El Gran Combo v. NLRB*, 853 F.2d 996.

noted that "[S]ection 7 protects the attempts of an employee to initiate or induce or prepare for group action," but that "'mere griping' is not afforded protection." The court agreed that Duchesne's continued complaints were protected concerted activity because they were "meant to implore or persuade others to take a stance against [their employer]." It also agreed that Ramos' conduct was concerted and that "[i]t is immaterial that Ramos was seeking assistance only for himself, and that any proceeds he garnered might have been subtracted from those received by the [other employees, for] requesting assistance for one's own benefit can fairly be characterized as 'for mutual aid or protection.'" Finally, the court, recognizing that "there was an element of 'griping,' as well in at least some of Duchesne's and Ramos's comments," concluded that "even if [they] were griping, they were also soliciting, and such activity can be considered concerted activity for mutual aid or protection under [S]ection 7."

C. Lockouts

Section 8(a)(3) of the Act generally proscribes employer "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." It has long been established that "an employer violates neither § 8(a)(1) nor § 8(a)(3) when, after a bargaining impasse has been reached, he temporarily shuts down his plant and lays off his employees for the sole purpose of bringing economic pressure in support of his legitimate bargaining position."[10] It is further established that the use of temporary replacements to maintain operations following a lockout of employees by the nonstruck employers of a multiemployer bargaining association is likewise not proscribed by Section 8(a)(1) or (3).[11] Relying on these two Supreme Court cases, the Board has held that an employer does not violate Section 8(a)(3) by hiring temporary employees after lawfully locking out its permanent employees to apply economic pressure in support of a legitimate bargaining position.[12] In the second case to reach the courts of appeals on this issue, the District of Columbia Circuit, agreeing with the Board, held that Section 8(a)(1) and (3) of the Act, as the Supreme Court has analyzed them, compel the Board's conclusion that an employer may, for the sole purpose of strengthening its bargaining position, continue to operate its business with temporary workers after lawfully locking out its permanent employees.[13]

---

[10] *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965).

[11] *NLRB v. Brown Food Store*, 380 U.S. 278 (1965).

[12] *Harter Equipment*, 280 NLRB 597 (1986), enfd. sub nom. *Operating Engineers Local 825 v. NLRB*, 829 F.2d 458 (3d Cir. 1987); *National Gypsum Co.*, 281 NLRB 593 (1986).

[13] *Boilermakers Local 88 v. NLRB*, 858 F.2d 756, enfg. *National Gypsum Co.*, supra.

The court first agreed with the Board that hiring temporary replacements was not inherently destructive of the rights of the employees. Stating that the question raised is whether an employer's hiring temporary replacements for the employees it has locked out is inherently destructive of the "process" of collective bargaining, the court concluded that such employer conduct has little if any impact on the employees' right to bargain. The court found no reason to expect that hiring temporary replacements for locked-out employees would create a cleavage within the group of locked-out employees. Moreover, the court found nothing about hiring temporary replacements for locked-out employees that discourages collective bargaining by making it seem a futile exercise in the eyes of employees.[14]

Second, the court agreed with the Board that, to the extent the employer's conduct had a comparatively slight impact on employee rights, the conduct had a legitimate, substantial, and sufficient business justification. The employer's sole purpose in hiring replacements and continuing to operate was the same as its purpose in locking out employees: to secure a new collective-bargaining agreement on favorable terms. The court concluded that the business justification of bringing economic pressure to bear in support of a legitimate bargaining position was, "as the Board correctly noted, 'unassailable' in light of *American Ship Building*."[15]

D. The Bargaining Obligation

1. The Duty to Furnish Information

An employer's duty to bargain collectively, under Section 8(a)(5) and 8(d) of the Act, obligates it to provide the employees' statutory bargaining representative, on request, with information relevant to the representative's performance of its collective-bargaining duties.[16] In a case decided this year, the Sixth Circuit upheld the Board's determination that the United States Postal Service violated its statutory bargaining obligation by refusing to furnish a local of the American Postal Workers Union with the names of union officials who had applied for supervisory positions with the Postal Service.[17] The international union had adopted a constitutional amendment providing that applicants for Postal Service supervisory positions could not hold union office. Thereafter, the local union asked the Postal Service to tell it which union officers had applied for supervisory positions and the Postal Service refused.

---

[14] 858 F.2d at 762–764.

[15] 858 F.2d at 767.

[16] See, e.g., *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

[17] *NLRB v. Postal Service*, 841 F.2d 141.

The union filed charges with the Board alleging that the information was relevant to the performance of its collective-bargaining duties because union officers and stewards who had applied for supervisory positions would have a conflict of interest. According to the union, stewards and officers in those circumstances "might compromise the rights of employees they represent because of concern for the effect that their activities as stewards or officers would have on the possibility of their promotion."[18] The Board (Member Johansen dissenting) agreed and ordered the Postal Service to furnish the information requested to the union.[19]

The Sixth Circuit affirmed the Board's conclusion that "the names of union officials who have applied for Postal Service supervisory positions was information *relevant* to the unions' representative duties in collective bargaining and grievance proceedings."[20] In so holding, the court emphasized that the "remarkably minimal" standard applicable "merely requires the Board to find a 'probability that the desired information [is] *relevant* . . . and that it would be *of use* to the union in carrying out its statutory duties and responsibilities.'"[21] Noting that "employees are entitled to 'be represented . . . by individuals who have a single-minded loyalty to their interests,'" the court concluded that the "potential for divided loyalty," recognized by the Board in this case, "is not merely speculative."[22] Given the importance of the immediate supervisor's opinion in the decision whether to promote an employee applicant to supervisor, the court found that, when a union official has applied for such a promotion, "[t]he desire for supervisor approval is likely to affect [the] union official's ability to represent the employees' interest." The court held that, because "[c]onflict of interest problems are difficult to detect by their very nature," they "necessitate preventative measures." Accordingly, the court affirmed "the Board's determination that the preventative information sought was relevant to the union's duty to provide loyal representation."[23]

Finally, the court rejected the Postal Service's defense that disclosure of the information would violate the Privacy Act, would sacrifice an overriding confidentiality interest, and would interfere with management's exclusive right to select supervisors. The court held that disclosure pursuant to the National Labor Relations Act comes within the "routine use" exception to the Privacy Act, that the information sought is not sensitive, and that dis-

---

[18] Id. at 143.

[19] *Postal Service*, 280 NLRB 685 (1986).

[20] 841 F.2d at 144.

[21] Ibid. (quoting, with emphasis added, *E. I. du Pont & Co. v. NLRB*, 744 F.2d 536, 538 (6th Cir. 1984) (per curiam)), and *NLRB v. Acme Industrial Co.*, 385 U.S. at 437.

[22] Id. at 145 (quoting *Nassau & Suffolk Contractors Assn.*), 118 NLRB 174, 187 (1957).

[23] Id. at 145–146.

closure of the information would not prevent the Postal Service from selecting or rejecting supervisory candidates as it pleased.[24]

The duty to furnish information was the subject of another case of interest this year. In that case, the Seventh Circuit rejected the Board's finding that an employer had, in effect, claimed an inability to afford existing labor costs, giving rise to an obligation to furnish supporting data to the union bargaining representative on request.[25] A leading case in this area of the law is *NLRB v. Truitt Mfg. Co.*[26] The Supreme Court there held that it is an unfair labor practice for an employer who claims to be financially incapable of paying a wage increase requested by a union to refuse to let the union see the employer's books for purposes of verifying its claim. Emphasizing the statutory policy of ensuring that parties in collective bargaining confine themselves to good-faith dealing and "honest claims," the Court stated: "If . . . an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy."[27]

Turning to the facts of this case, the Seventh Circuit found that, although the company had never claimed that it was *unable* to pay existing wages and benefits, it had done more than merely express a desire for lower costs and higher profits. Thus, the company had claimed that wage cuts were necessary if the company was to remain competitive and reverse a trend of losing business to lower cost competitors, threatening that its survival and employees' jobs were at stake. Initially, the court observed that it was "not an irrational extension of *Truitt*" for the Board to hold that the company's statements were sufficient to create a duty of substantiation to the union. But, the court added, "[t]he problem is that right after [the Board] ruled in favor of the union we decided *NLRB v. Harvstone Mfg. Corp.* . . . a case similar to the present one, against the Board."[28] The court characterized its decision in *Harvstone* as holding that "predictions that a business will falter—even that it will close—are 'nothing more than truisms' . . . and do not trigger the duty of disclosure under *Truitt*, a duty that we deemed limited to inability to pay during 'the term [ordinarily 3 years] of the new collective bargaining agreement' being negotiated."[29] Although the Board had cited its own decision in *Harvstone* in this case and the company had thereafter moved for reconsideration, citing the Seventh Circuit's reversal of the Board in *Harvstone*, the Board had summarily denied the motion.

---

[24] Id. at 146.

[25] *Nielsen Lithographing Co. v. NLRB*, 854 F.2d 1063.

[26] 351 U.S. 149 (1956). See also *Atlanta Hilton & Tower*, 271 NLRB 1600, 1602–1603 (1984).

[27] 351 U.S. at 152–153.

[28] 854 F 2d at 1065 (citing *Harvstone*, 785 F.2d 570 (7th Cir. 1986)).

[29] 854 F.2d at 1065–1066 (quoting *Harvstone*, 785 F.2d at 577).

The court recognized that "[t]his circuit is not authorized to interpret the labor laws with binding effect throughout the whole country, and the Board therefore is not obliged to accept our interpretation." 854 F.2d at 1066–1067. In addition, the court recognized that the case at bar arose in the Sixth Circuit, rather than the Seventh, and that the company had elected to file its petition for review in the Seventh Circuit, which also had venue because the company did business there. Nonetheless, the court faulted the Board for not facing up to the conflict the court perceived in the decisions of the Board and the circuits. Thus, the court stated that "the Board had the duty to take a stance, to explain which decisions it agreed with and why, and to explore the possibility of intermediate solutions," noting that the facts of this case may "place it halfway between *Truitt* and *Harvstone*." Id. at 1067. Amplifying on that last point, the court stated: "The company's ambiguous statements could be interpreted as a veiled threat of layoffs in the near if not the immediate future, thus upping the ante compared to *Harvstone* and perhaps bringing the case within the gravitational field of *Truitt*." Ibid. Moreover, the court added, "We do not follow stare decisis inflexibly; if the Board gives us a good reason to do so, we shall be happy to reexamine *Harvstone*."[30] Accordingly, the court remanded the case to the Board for further proceedings consistent with its opinion.

2. Successorship

The presumption of continuing majority status enjoyed by a certified union is, absent unusual circumstances, irrebuttable during the certification year or the term of a collective-bargaining agreement.[31] In a case decided this year,[32] the Fourth Circuit upheld the Board's determination that the mere change in the stock ownership of a corporation did not constitute such an unusual circumstance or relieve the corporation of a duty to bargain.

In this case, about 1 year into a 3-year contract, the employer, a corporation, was acquired by another corporation through the purchase of its stock. The employing entity maintained its name and legal identity, and the operations of its unionized facility remained unchanged. The method of acquisition was chosen because of the tax advantages the purchaser would obtain from the employer's losses. Soon after the change in ownership, the employer made significant unilateral changes and ultimately withdrew recognition from the union.

The Board reasoned that, if a change in stock ownership were accorded significance, everyday stock transactions would have the potential for disruption of labor relations and industrial

[30] 854 F.2d at 1066–1067.

[31] See, for example, *NLRB v. Iron Workers Local 103 (Higdon Contracting)*, 434 U.S. 335, 343 fn. 8 (1978).

[32] *EPE, Inc. v. NLRB*, 845 F.2d 483 (4th Cir.).

peace. The Board also deemed it fair that a company purposely preserving the corporate form to obtain tax benefits also accept the labor law consequences of that decision. In enforcing the decision, the court noted that the business remained unchanged and held that the change in corporate ownership, without more, did not relieve the new owner of its obligations under the collective-bargaining agreement. The court rejected the employer's assertion that it was a *Burns* successor,[33] and therefore not bound by the agreement because the same corporation remained the employing entity with operations uninterrupted and unchanged.

3. Effect of Passage of Time on Validity of Bargaining Order

In two cases arising in the Second Circuit, employers contended that, even if the Board's findings of 8(a)(5) violations were proper, the Board's issuance of bargaining orders was inappropriate in view of the lengthy passage of time since any determination of the unions' majority status. In *NLRB v. Einhorn Enterprises*,[34] a hearing on election objections and challenged ballots was held before an administrative law judge. Three years after the administrative law judge's decision and 5 years after the election, the Board certified the victorious union. The employer refused to bargain, contending that the passage of time and the high turnover of employees in the bargaining unit cast doubt on the union's majority status. The court, although criticizing the Board's "dilatory approach to its statutory responsibilities" "egregious administrative delay" and "inexcusably slow processes," enforced the Board's Order. Id. at 1508–1510. It noted that a certified union, absent unusual circumstances, enjoys an irrebuttable presumption of majority status for 1 year following the certification, and that apparent loss of majority status and delay in certification do not normally constitute unusual circumstances. The court referred to its prior holding in *NLRB v. Patent Trader, Inc.*,[35] that it was error to refuse enforcement of a bargaining order on the basis of passage of time and employee repudiation of the union "when it is conceded that there has been a Board election, the [u]nion was duly certified, and the [employer] thereafter refused to bargain in good faith" because requiring another election in such circumstances "undermines the central purpose of the . . . Act" by giving an employer an incentive to disregard its duty to bargain in the hope that over a period of time the union will lose its majority status. Id. at 1509. The court found this case indistinguishable from *Patent Trader* and distinguishable from cases in which it had denied enforcement of bargaining orders when no election had been held, the union had lost the election, or there had been no reliable determination of the validity of the election because the Board had erroneously failed to

[33] *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).
[34] 843 F.2d 1507 (2d Cir.).
[35] 426 F.2d 791 (2d Cir. 1970) (en banc).

hold hearings on election objections. Accordingly, the court concluded that enforcement of the Board's Order would "marginally reduce the incentive of employers" to take advantage of Board delays and enforced the Board's Order. However, to mitigate the effect of imposing a bargaining representative that a majority of the employees might not want, enforcement was conditioned on the Board's giving actual notice to the current employees of their statutory right to petition for a decertification election.

However, in *NLRB v. Koenig Iron Works*,[36] the Second Circuit reached the opposite result because 12 years had passed since the expiration of the last collective-bargaining agreement and the union had not been certified. The court distinguished *Einhorn* and *Patent Trader* as having relied explicitly on the significance of determining majority status by an election. It concluded that, in the absence of such a determination, the Board's authority to issue a bargaining order after an extended period "is at some point circumscribed." 856 F.2d at 3. This was such a case, the court held, in view of the passage of 12 years—a "truly extraordinary interval," longer than in any prior case in which a bargaining order had been enforced—since the last contract and the fact that the employers had engaged in a protracted series of bargaining sessions over a period of years and had a considerable basis for doubting the union's current majority status. Ibid. On these facts, the court concluded, the issuance of a bargaining order in the abence of an election was beyond the Board's discretion. The court emphasized that its decision was based on "the circumstances of this case" and was not intended to reward employers for obstructionism or to establish an automatic time limit beyond which an election would always be required.

E. Prehire Agreements

Section 8(f) of the Act, enacted to accommodate the pattern of irregular employment and prehire bargaining in the construction industry, authorizes collective-bargaining agreements covering construction employees even though the majority status of the union has not been established in accordance with the Board's traditional standards. The final proviso of the section, however, specifies that a contract privileged by Section 8(f) is not to be treated as a bar to a Board-conducted election testing the union's majority support. In an important case decided in the report year,[37] the Third Circuit approved the Board's new *Deklewa* rule[38] that an agreement permitted by Section 8(f) is enforceable for its term through the Act's processes unless the employees exercise their 8(f) proviso right to repudiate the union in a Board election. The court also approved the Board's *Deklewa* rule that,

[36] 856 F.2d 1 (2d Cir)

[37] *Iron Workers Local 3 (Deklewa & Sons) v. NLRB*, 843 F.2d 770 (3d Cir.).

[38] *John Deklewa & Sons*, 282 NLRB 1375 (1987).

on the expiration of such a contract, the union is not entitled to a presumption of majority status and neither party may compel the other to continue the 8(f) relationship.

The Third Circuit recognized that *Deklewa* overturned a 1971 Board decision holding that an 8(f) relationship was voidable at will unless and until the union could demonstrate majority support.[39] The court further recognized that the Board's policy had been upheld by the Supreme Court.[40] The Third Circuit concluded, however, that the Supreme Court had merely determined that the Board's former *R. J. Smith* policy was based on a permissible construction of the statute and that this limited approval did not represent the Supreme Court's own definitive and binding reading of Section 8(f)'s scope. Furthermore, the Third Circuit was convinced that the Board had persuasively demonstrated the need to change the ground rules governing construction industry bargaining to better achieve the statutory goals of employee free choice and labor relations stability. Based on its own independent analysis of the text of Section 8(f) and its legislative history, the court was satisfied that the Board had steered a middle course that reasonably balanced the interests of labor and management.

The court further found that the Board had fairly determined to apply its *Deklewa* rules retroactively. The court emphasized that the Board's new rules did no more than to hold the employer and the union to the terms of the 8(f) contract they had both voluntarily entered. Nor did the fact that the Board's former rules permitted midcontract repudiation make retroactive application unfair because parties who exercised that limited right assumed the risk that the Board would find that their 8(f) contract had "converted" into a binding contract prior to repudiation. Indeed, on the particular facts presented, the court thought it entirely likely that even under its old rules the Board would have held that the employer was not free to repudiate its contract with the union.

For these reasons, the Third Circuit upheld both the Board's findings that the employer had violated Section 8(a)(5) of the Act by unilaterally repudiating its 8(f) contract during its term and the Board's further finding that the employer had no obligation to bargain with the union after the contract expired.

---

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

[40] *NLRB v. Iron Workers Local 103 (Higdon Contracting)*, 434 U.S. 335 (1978).

VIII

Injunction Litigation

A. Injunctive Litigation Under Section 10(j)

Section 10(j) of the Act 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 injunctive relief or restraining order in aid of the unfair labor practice proceeding while the case is pending before the Board. In fiscal 1988, the Board filed a total of 33 petitions for temporary relief under the discretionary provisions of Section 10(j): 32 against employers and 1 against a labor organization. Of this number, together with petitions pending or reinstated in court at the beginning of this report period, injunctions were granted by the courts in 19 cases and denied in 6 cases. Of the remaining cases, 10 were settled prior to court action, 1 was withdrawn based on changed circumstances, and 6 remained pending further proceedings by the courts.

Injunctions were obtained against employers in 17 cases and against labor organizations in 2 cases. The cases against employers involved a variety of alleged violations, including interference with nascent union organizational activity, conduct designed to undermine an incumbent union's representational status, and several instances when an employer's cessation of operations necessitated an injunction to sequester assets to protect an eventual Board backpay order. The cases against unions involved serious picket line misconduct during a labor dispute when local authorities appeared unable to control the misconduct and a union's strike that was designed to compel a multiemployer association to agree to a trust fund arrangement that contravened an outstanding court order.

Several cases decided during the past year were of sufficient interest to warrant particular attention.

In *Miller v. Pacific Isle Packaging*,[1] the Board sought a 10(j) injunction ordering the employer to reinstate a group of unfair labor practice strikers whom the employer had allegedly unlawfully discharged and to bargain with the union that had the support of a majority of the employer's employees. The district court, observing that the ultimate merits of the case turned on a

[1] No. 87-0907 ACK (D.Hawaii).

close credibility dispute, entered an order deferring decision on the matter until the administrative law judge could issue a decision in the underlying administrative proceeding. The Board then filed with the Ninth Circuit a petition for a writ of mandamus to direct the district court to decide the case promptly, arguing that, because a 10(j) injunction lasts only for the duration of the administrative proceeding, it was inappropriate for the district court to defer action on the 10(j) petition pending completion of any significant aspect of that proceeding. In an unpublished opinion, the Ninth Circuit agreed and directed the district court to promptly determine the merits of the 10(j) petition.[2] Pursuant to that direction, the district court did issue the injunction the Board had sought. However, shortly before that order was to take effect, the administrative law judge issued a decision resolving the credibility disputes against the General Counsel and recommending that the complaint be dismissed. The Board then promptly sought a stay of the injunction order to permit the district court to assess the impact of the administrative law judge's decision on its injunction order. Subsequently, with the Board's partial concurrence, the district court vacated the injunction on grounds that the relief sought was no longer just and proper under the particular circumstances.[3]

In *Aguayo v. Tomco Carburetor Co.*,[4] the Ninth Circuit reversed a district court's refusal to order the interim reinstatement of a group of 11 employees allegedly discharged because of their union organizing activities. The district court assumed, without deciding, that there was reasonable cause to believe the employer violated the Act by discharging 11 union committee members for their attempts to secure union representation, but concluded without elaboration "that the Board failed to show the 'requisite necessity' to justify interim relief."[5] The Ninth Circuit disagreed. Initially, it concluded that the affidavits submitted by the Board in support of the 10(j) petition, if true, amply warranted a finding of reasonable cause to believe that the employer violated the Act. For, "[g]iven the low threshold of proof section 10(j) imposes on the Board to establish reasonable cause . . . the allegations contained in the Board's petition were not 'insubstantial and frivolous.'"[6] Accordingly, although the employer had not had an opportunity to cross-examine the Board's affiants, because the affidavits "more than satisfied" the Board's "minimal burden," no remand was necessary to resolve the reasonable cause issue.[7] The circuit court further concluded that the district court abused its discretion by failing to order the reinstatement of the discharged

[2] See *Fuchs v. Hood Industries*, 590 F.2d 395, 397 (1st Cir. 1979).
[3] 129 LRRM 2723 (D.Hawaii).
[4] 853 F.2d 744.
[5] Id. at 749.
[6] Id. at 748.
[7] Id. at 750–751.

employees. The record established that "interest in the union's organizational program at Tomco ended with the firing of the eleven union committee members. If [they] must wait until the Board's final order . . . they most likely will have found work elsewhere. An order of reinstatement would then be an 'empty formality' . . . [for] Tomco will have succeeded in removing the union organizers and the union from its facility."[8] The circuit court also rejected the employer's claim that a 4-month delay in filing the injunction petition warranted denial of the relief sought. Agreeing with the Sixth and Eighth Circuits that "[d]elay by itself is not a determinative factor,"[9] the court held that "[a]lthough interim reinstatement may not precisely restore the status quo . . . it would revive the union's organizational campaign at Tomco."[10] Finally, the circuit court rejected the employer's claim that a reinstatement order would be inequitable because it would require the discharge of 11 "innocent" replacement employees. "[T]he predominant focus under section 10(j) is the harm to the bargaining process, not to individual employees," the court observed, and in any event "the rights of the employees who were discriminatorily discharged are superior to the rights of those whom the employer hired to take their places."[11] Accordingly, the court remanded the case to the district court with instructions to issue an order requiring interim reinstatement of the discharged employees.

In *Kobell v. Menard Fiberglass Products*,[12] a union was attempting to organize the employees of two commonly owned and operated companies that were located at a single plant. The district court found these companies to be a single employer under the Act. The court further found reasonable cause to believe that the companies had threatened their employees with plant closure and discharge if they joined the union and had discriminatorily discharged or laid off more than 10 employees at both of the companies to discourage their union activities or support. At the time of the hearing, one of the companies had completely ceased its operations. The court found that the Regional Director's request for an order directing a sequestration of assets in the amount of $48,000 was "just and proper" to protect the future backpay claims of the discharged and laid-off employees because testimony was adduced that the companies were in the process of selling off assets without providing for satisfaction of the Board's backpay claim. The court concluded that, if it failed to act, any ultimate backpay award issued by the Board could be rendered meaningless.[13] The court also concluded that a cease-and-desist

[8] Id. at 749.

[9] *Gottfried v. Frankel*, 818 F.2d 485, 495 (6th Cir. 1987); *Solien v. Merchants Home Delivery Service*, 557 F.2d 622, 627 (8th Cir. 1977).

[10] 853 F.2d at 750.

[11] Ibid.

[12] 678 F.Supp. 1155 (W.D.Pa).

[13] 678 F.Supp. at 1167.

order and an affirmative order to reinstate certain employees and place other employees on a preferential hiring list was just and proper to restore the status quo and protect the union's organizational campaign from irreparable injury. In the latter regard, the court observed that the Third Circuit's earlier decision in *Eisenberg v. Wellington Hall Nursing Home*[14] raises a "presumption" that ultimate Board-ordered reinstatement is unlikely to vindicate the remedial purposes of the Act,[15] and found inapposite the circuit court's subsequent decision in *Kobell v. Suburban Lines*,[16] in which the court carved out an exception to that rule because the discriminatees were members of an established, "small and intimate" bargaining unit.

Another district court was confronted with an employer's alleged egregious response to a union's organizational campaign in *Gottfried v. Pillsbury Chemical & Oil Co.*[17] There, the court found reasonable cause to believe that, in response to a union's organizing activities at a plant in Michigan, the employer commenced an unlawful antiunion campaign, including the maintenance of unlawfully broad no-solicitation and no-distribution rules, the interrogation of an employee about union activity, the layoff of five employees to discourage their union activities or support, and the discriminatory termination of a portion of its Michigan operation and relocating it to another plant in South Carolina. The court concluded that it would be just and proper to restore the conditions to those that existed before the employer's alleged violations to assure that the Board could effectively exercise its ultimate remedial powers. The court therefore ordered the employer to reinstate the laid-off employees, to restore to the Michigan plant the operations relocated to South Carolina, to cease and desist from further such violations, and to post the court's order in conspicuous locations within the Michigan plant.[18]

In *Pascarell v. Orit Corp./Sea Jet Trucking*,[19] a recently certified union called the employees out on strike to protest the employer's alleged unfair labor practices.[20] Several weeks later, the union terminated the strike and made an unconditional offer to return to work on behalf of all strikers. The employer did not respond to the offer. Approximately 90 former strikers presented themselves for work on the day specified by the union. The em-

[14] 651 F.2d 902 (1981).

[15] 678 F.Supp. at 1167–1168.

[16] 731 F.2d 1076 (1984), affg. 113 LRRM 2990 (W.D.Pa. 1983), discussed in 49 NLRB Ann. Rep. 140–142 (1984).

[17] Civil No. 88–CV–73623 DT (E.D.Mich.).

[18] The court further specified that the underlying complaint proceeding before the Board was to be expedited, and that the employer could petition the court to allow a lawful layoff of employees and a transfer of work to South Carolina on the presentation of competent, documentary evidence establishing the purely economic predicate for such action.

[19] 130 LRRM 2650 (D.N.J), appeal pending No. 88–5453 (3d Cir.).

[20] For the purposes of the injunction proceeding, the respondent stipulated that the strike was an unfair labor practice strike.

ployer reinstated only 27 of the strikers that day, but sent mailgrams to those strikers who had not appeared, requiring them to contact the employer within 48 hours or be deemed to have abandoned their jobs. The employer reinstated 16 additional strikers within the next several workdays, but failed to terminate any striker replacements to make room for the former strikers. Twelve former strikers were offered reinstatement to another of the employer's facilities in another State. The district court found reasonable cause to believe that the employer had failed to comply with its statutory obligation to promptly offer reinstatement to all the unfair labor practice strikers on their union's unconditional offer to return to work, displacing, if necessary, any replacement employees.[21] The court found that the offers of reinstatement to the other facility were invalid and did not have to be accepted by the former strikers. Citing *Kobell v. Suburban Lines*, supra, the court agreed with the Regional Director that interim reinstatement was presumptively necessary to protect the Board's ultimate remedial authority. The court observed that, if these union supporters were unlawfully excluded from the bargaining process pending final Board resolution of the unfair labor practice charges, many supporters would lose confidence in the collective-bargaining process. Moreover, some employees could be forced to accept employment elsewhere, and would therefore be unable or unwilling to return to their former jobs should reinstatement be ultimately ordered by the Board. In addition, the "manipulation of union leadership" through offers to strike captains for reinstatement at another, distant location greatly reduced employee confidence in the union leaders' ability to challenge their employer. The court rejected an employer defense that the relief should be denied based on the time taken by the Region to file the 10(j) petition. The court concluded that there had been no "undue" delay, and that to deny relief on such a basis would "only serve to further respondent's alleged violations and would not give effect to the purposes of the Act." The district court subsequently denied the employer's motion to stay the 10(j) decree; the employer's renewed motion for a stay was similarly denied by the court of appeals. The employer's appeal was pending before the Third Circuit at the end of the fiscal year covered by this report.

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 violation of Section 8(b)(4)(A),

[21] The court relied on *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956).

(B), or (C)[22] or Section 8(b)(7),[23] and against an employer or union charged with a violation of Section 8(e),[24] 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 threats or other coercive conduct in support of jurisdictional disputes under Section 8(b)(4)(D) of the Act.[25] 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, on 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 52 petitions for injunctions under Section 10(l). Of the total caseload, comprised of this number together with 14 cases pending at the beginning of the period, 43 cases were settled, 2 were dismissed, 2 were withdrawn, and 2 were pending court action at the close of the report year. During this period, 17 petitions went to final order, the courts granting injunctions in 14 cases and denying them in 3 cases. Injunctions were issued in 8 cases involving secondary boycott action proscribed by Section 8(b)(4)(B), as well as in instances involving a violation of Section 8(b)(4)(A), which proscribes certain conduct to obtain hot cargo agreements barred by Section 8(e). Injunctions were granted in 4 cases involving jurisdictional disputes in violation of Section 8(b)(4)(D). Injunctions were also issued in 2 cases to proscribe alleged recognitional or organizational picketing in violation of Section 8(b)(7).

Of the 3 in which injunctions were denied, 1 involved secondary picketing activity by a labor organization and 2 involved recognitional picketing.

---

[22] Sec. 8(b)(4)(A), (B), and (C), as enacted by the Labor Management Relations Act, 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 the Labor Management-Reporting and Disclosure Act) to prohibit not only strikes and the inducement of work stoppages for these objects, but also to proscribe threats, coercion, and restraint addressed to employers for these objects, and to prohibit conduct of this nature when an object is to compel an employer to enter into a hot cargo agreement declared unlawful in another section of the Act, Sec. 8(e).

[23] Sec. 8(b)(7), incorporated in the Act by the 1959 amendments, makes organizational or recognitional picketing under certain circumstances an unfair labor practice.

[24] 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.

[25] Sec. 8(b)(4)(D) was enacted as part of the Labor Management Relations Act, 1947.

One case of particular interest was *Gottfried v. Sheet Metal Workers Local 80 (Limbach Co.)*.[26] In that case, the Board sought a 10(l) injunction to enjoin a union from disclaiming interest in representing the employees of Limbach, and encouraging its members not to work for Limbach, when the union engaged in that conduct in furtherance of a dispute it had with a Florida corporation wholly owned by the same parent corporation that owned Limbach. In the Board's view, because the Florida corporation was a separate employer within the meaning of the Act, even though it was affiliated with Limbach through bonds of common ownership, the union's pressure against Limbach had a secondary object proscribed by Section 8(b)(4)(B) of the Act. The union's encouragement of employees not to perform services for Limbach constituted inducement and encouragement of employees to strike within the meaning of Section 8(b)(4)(i). Further, the disclaimer of recognition constituted restraint and coercion within the meaning of Section 8(b)(4)(ii) both because it effectively led to a refusal by Limbach's union employees to perform services for it, and because the consequence of causing Limbach to become a nonunion employer would effectively deny Limbach access to a significant sector of the Detroit construction market. Accordingly, in the Board's view, the union's scheme amounted to an unlawful secondary boycott.[27]

The district court, without conducting a hearing, denied the request for temporary injunctive relief. In its view, the Board's recent decision in *John Deklewa & Sons*[28] unconditionally privileged the union to renounce its 8(f) relationship with Limbach on expiration of the parties' labor agreement without regard to the union's motive for so doing. The Board's appeal from this decision was pending before the Sixth Circuit at the close of the fiscal year.[29]

---

[26] Civil No. 88 CB 72208 DT (E.D.Mich.)

[27] Two other district courts previously had issued 10(l) injunctions against other locals of the Sheet Metal Workers based on this legal theory. *Sharp v. Sheet Metal Workers Local 10*, Civil No. 3-87-153 (D.Minn. Apr. 7, 1987), and *Zipp v. Sheet Metal Workers Local 91*, Civil No. 87-4060 (C.D.Ill. Apr. 8, 1987).

[28] 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988).

[29] No. 88-1757.

IX

Contempt Litigation

In fiscal year 1988, 116 cases were referred to the Contempt Litigation Branch for consideration for contempt or other appropriate action to achieve compliance with court decrees, as compared with 117 cases in fiscal year 1987. Voluntary compliance was achieved in 12 cases during the fiscal year, without the necessity of filing a contempt petition, although in 60 others it was determined that comtempt was not warranted.

During the same period, 32 civil contempt proceedings were instituted,[1] and the Board brought 1 additional case in which

[1] *NLRB v. Fancy Trims, Inc., et al.*, in No. 85–4016 (2d Cir.) (writ of body attachment against companies' secretary-treasurer, Pooran Roopan, for failure to comply with prior contempt adjudications of April 4, 1986, and May 7, 1987, for violation of the court's judgment of February 13, 1985, directing reinstatement, bargaining, and notice posting); *NLRB v. EPE, Inc.*, in Nos. 85–1052 and 85–1501 (4th Cir.) (civil contempt for failing to abide by collective-bargaining agreement, failing to bargain with union, and failing to supply information to union; for bypassing union and engaging in direct dealing with employees; and for making unilateral changes and disciplining employees for violating unilaterally imposed policy in violation of the court's judgments of May 16 and July 5, 1985); *NLRB v. Alamo Cement Co.*, in No. 86–4056 (5th Cir.) (civil contempt for delaying rescission of unlawful no-solicitation, no-distribution rule, continuing to maintain and enforce unlawful rules, suspending and discharging employee for engaging in union activities, threatening employees with reprisals for attending union meetings, and discriminatorily forbidding employees to talk about the union during worktime in violation of the court's judgment of January 5, 1987); *NLRB v. Laborers, et al.*, in No. 84–4035 (5th Cir.) (civil contempt against international, Local 350, the alter ego and disguised continuance of Local 38, and International Vice President Vinall because of their active concert and participation in a scheme to evade the court's judgment of December 17, 1984, requiring Local 38 to pay backpay); *NLRB v. Tri-State Warehouse & Distributing, et al.*, in Nos. 80–1724 and 84–5092 (6th Cir.) (civil contempt against companies and their alter ego and their president and owner, William Banker, for failing to pay backpay to discriminatee and failing to make whole union by making payments to health and welfare fund and pension fund and making payments of dues in violation of the court's judgments of April 3, 1982, and March 8, 1984); *NLRB v. Windsor Place Corp.*, in No. 86–4030 (2d Cir.) (civil contempt for failing to bargain in good faith by refusing to meet at reasonable times and intervals, refusing to respond to requests for bargaining by union representatives, and failing to vest representative with sufficient authority in violation of the court's judgment of April 7, 1986); *NLRB v. John Mahoney Construction Co.*, in No. 85–1607 (1st Cir.) (writ of body attachment against company's president and sole owner, John Mahoney, for failure to comply with prior contempt adjudication of March 18, 1987, for violation of the court's judgment of October 23, 1985, directing posting and mailing of notice and copy of contempt adjudication, paying union's costs incurred in collective bargaining, and reimbursement of Board's costs and expenses, including attorney's fees); *NLRB v. Value Line Co.*, in Nos. 86–6042 and 86–6103 (6th Cir.) (civil contempt against Harold F. Kidd, sole proprietor, for refusing to permit union access to employer's facility, failing to provide relevant and necessary information, failing to pay accrued vacation pay, failing to post notices, and refusing to meet and bargain with the union in violation of two of the court's judgments of March 13, 1987); *NLRB v. Dickerson Pond Associates, et al.*, in No. 86–4061 (2d Cir.) (civil contempt against Dickerson Pond, Maureton Corporation, a general partner of Dickerson Pond, and Maureen Erickson, a limited partner of Dickerson Pond taking active part in the control of the business of Dickerson Pond, for failing to pay backpay in violation of the court's judgment of June 11, 1986); *NLRB v. Mall Security*, in No. 87–5380 (6th Cir.) (civil contempt for failing to bargain, post notices, and report compliance to Regional Director in violation

Continued

both civil and criminal sanctions were sought.[2] This compares

of the court's judgment of May 26, 1987); *NLRB v. Frankfathers & Son's Trucking*, in No. 87–5528 (6th Cir.) (civil contempt for failing to offer reinstatement, expunge personnel records, provide backpay records, and inform the Regional Director of compliance status in violation of the court's judgment of August 4, 1987); *NLRB v. Calvin Hill*, in No. 84–4401 (5th Cir.) (civil contempt for coercing employees during efforts of union to engage in organizational handbilling at employer's premises in violation of the court's judgment of July 9, 1984); *NLRB v. Jerome Towers, Inc., et al.*, in No. 86–4094 (2d Cir.) (civil contempt for failing to pay backpay, expunge personnel records, bargain with the union, post and mail notices, and make compliance reports to the Regional Director in violation of the court's judgment of July 16, 1986); *NLRB v. Arnold Cleaners*, in No. 86–5758 (6th Cir.) (writ of body attachment and assessment of $200-per-day fines against company's president and sole owner, David Rosenthal, and assessment of fines of $5000 per violation and $500 per day against the Company for failing to bargain with, and furnish information to, the union, mail notices to employees, file compliance reports with the court, and reimburse the Board for its costs and attorney's fees); *NLRB v. Laborers Local 185*, in No. 86–7110 (9th Cir.) (civil contempt for engaging in secondary activity in violation of the court's judgment of April 25, 1986); *NLRB v. WBKB–TV Channel 11, et al.*, in No. 85–5871 (6th Cir.) (writ of body attachment and assessment of $500 per violation and $100 per day fines against company's president, Steven Marks, and assessment of fines of $5000 per violation and $500 per day against the company for failing to offer reinstatement, provide backpay records, post and mail notices, pay Board costs and attorneys' fees, and file compliance reports with the court in violation of the court's December 30, 1987 contempt adjudication and November 8, 1985 judgment); *NLRB v. James Troutman & Associates, et al.*, in No. 86–7738 (9th Cir.) (civil contempt for failing to provide union with information in violation of the court's judgment of March 5, 1987); *NLRB v. Barnes Excavating Co.*, in No. 87–2539 (4th Cir.) (civil contempt against a sole proprietorship of Billy Wayne Barnes for failing to offer reinstatement, expunge personnel files, furnish backpay records, post notices, and make compliance reports to Region in violation of the court's judgment of August 20, 1987); *NLRB v. Service Employees Local 73*, in Nos. 79–1281, 79–1706, 79–1715, 79–2193 (7th Cir.) (civil contempt to assess fines and increase prospective fines against union for threatening to picket employer to force employer to recognize union in violation of the court's judgments and the contempt adjudication of July 11, 1984); *NLRB v. Metropolitan Teletronics Corp.*, in Nos. 86–4164 and 86–4182 (2d Cir.) (civil contempt for failure to engage in effects bargaining with union in violation of the court's judgment of April 7, 1987); *NLRB v. Iron Workers Local 15 Joint Apprenticeship Committee*, in Nos. 86–4060 and 86–4080 (2d Cir.) (civil contempt to assess fines and issue writ of body attachment for failing to offer reinstatement and post notices in violation of the court's judgment); *NLRB v. Stage Employees Local 41*, in No. 87–8153 (11th Cir.) (civil contempt against union for altering its hiring hall procedure in violation of rules and without notice to its users and for operating hall in a manner that unduly favored union officers in violation of the court's judgment of May 20, 1987); *NLRB v. Fishing Vessel Comet*, in No. 87–1755 (1st Cir.) (civil contempt against company and its president for failure to recognize and bargain with union, furnish union with requested information, and post remedial notice in violation of the court's judgment of September 8, 1987); *NLRB v. Shawnee-Penn Mfg. Co., et al.*, in No. 88–3274 (3d Cir.) (civil contempt against affiliated companies and their president for failing to pay contractual benefits in violation of the court's judgment of July 6, 1981, and its consent order of August 7, 1984); *NLRB v. Peng Tang & Lex Management, et al.*, in No. 86–4044 (2d Cir.) (civil contempt against company and its alter ego for failure to pay agreed-upon backpay in violation of the court's judgment of September 12, 1986); *NLRB v. S.S.R. Systems, et al.*, in No. 81–1469 (3d Cir.) (civil contempt against companies and their president for failure to pay backpay in violation of the court's judgment of October 6, 1980); *NLRB v. Carpenters Local 608*, in No. 86–4107 (2d Cir.) (civil contempt against union for failure to provide hiring hall information to member in violation of the court's judgment of February 10, 1987); *NLRB v. Dane County Dairy, et al.*, in No. 87–2249 (7th Cir.) (civil contempt for failure to pay backpay); *NLRB v. Iron Workers Local 118, et al.*, in No. 87–7222 (9th Cir.) (civil contempt against union and its business agent for engaging in unlawful secondary picketing in violation of the court's judgment of September 16, 1987); *NLRB v. Philadelphia Building Trades Council, et al.*, in No. 85–3418 (3d Cir.) (civil contempt against union and its business manager for engaging in unlawful secondary activity in violation of several prior judgments and contempt adjudications issued by the court); *NLRB v. Horizon Foods, et al.*, in Nos. 86–2295 and 86–2583 (7th Cir.) (civil contempt against company and its owner for failing to properly reinstate discriminatees, for making coercive antiunion statements, and for discharging discriminatees following their reinstatement for antiunion reasons in violation of the court's judgment of March 31, 1987); *NLRB v. FCP, Inc.*, in No. 87–3380 (3d Cir.) (civil contempt for failure to honor collective-bargaining agreement in violation of the court's judgment of July 28, 1987).

[2] *NLRB v. Mattiace Petrochemical Co., et al.*, in Nos. 86–4105 and 79–4029 (2d Cir.) (assessment of fines against the company and its president imposed by civil contempt adjudication of October 21, 1980, for failing to reinstate and make whole locked-out employees, failing to bargain with the union, failing to post notices, and failing to report compliance steps to Regional Director in violation of the court's judgment of August 26, 1986; and assessment of criminal fines against the company and impris-

Continued

with 20 civil proceedings instituted in fiscal year 1987. The cases instituted in fiscal year 1988 included three motions for assessment of fines,[3] two motions for writs of body attachment,[4] and three proceedings in which both fines and body attachment were sought.[5] A total of 16 contempt or equivalent adjudications were awarded in favor of the Board,[6] including 3 in which compliance

onment of company president for willfully engaging in the foregoing conduct in violation of the judgment of August 26, 1986).

[3] *NLRB v. Mattiace Petrochemical Co., et al.*, in Nos. 86–4105 and 79–4029 (2d Cir.); *NLRB v. Service Employees Local 73*, in Nos. 79–1281, 79–1706, 79–1715, 79–2193 (7th Cir.); *NLRB v. Philadelphia Building Trades Council*, in No. 85–3418 (3d Cir.).

[4] *NLRB v. Fancy Trims, Inc., et al.*, in No. 85–4016 (2d Cir.); *NLRB v. John Mahoney Construction Co.*, in No. 85–1607 (1st Cir.).

[5] *NLRB v. Arnold Cleaners*, in No. 86–5758 (6th Cir.); *NLRB v. WBKB–TV Channel 11, et al.*, in No. 85–5871 (6th Cir.); *NLRB v. Iron Workers Local 15 Joint Apprenticeship Committee*, in Nos. 86–4060, 86–4080 (2d Cir.).

[6] *NLRB v. Newspaper & Mail Deliverers, et al.*, in No. 86–4004 (2d Cir.) (order of October 1, 1987, adjudging union and its business representative, Joseph Cotter, in further civil contempt of prior contempt adjudications directing posting, mailing, and publishing notices; ordering union to pay further fine of $150,000, in addition to fine of $25,000 previously assessed, for a total of $175,000; directing issuance of writ of body attachment against Business Representative Joseph Cotter; fixing reimbursement of Board costs and attorneys' fees; order of November 2, 1987, reducing amount of contempt fine to $112,000 and vacation of writ of body attachment on condition of payment of fine within 2 weeks; imposition of daily fines of $1000 per day and vacation of stay of arrest order if fine is not paid within 2 weeks); *NLRB v. Gentzler Tool & Die Corp.*, in Nos. 84–5699, 85–5830, and 85–5850 (6th Cir.) (order of November 16, 1987, adjudging company in civil contempt of the court's December 16, 1985 judgment for failing to execute and give effect to collective-bargaining agreement; order directing company to honor and give retroactive effect to contract, pay backpay and make whole for loss of contract benefits, reimburse Board for costs and attorneys' fees, and imposing prospective noncompliance fine of $10,000 per violation and $1000 per day); *NLRB v. Shearer, et al.*, in No. 86–3042 (3d Cir.) (order of December 7, 1987, adjudging, on consent, Robert Shearer and George C. Shearer in civil contempt of the court's judgments of November 4, 1980, and May 4, 1983, for failing to pay backpay to discriminatees; order directing respondents to pay backpay and to partially reimburse Board for costs and attorneys' fees and imposing prospective noncompliance fine of $10,000 per violation and $1000 per day); *NLRB v. WBKB–TV, Channel 11, et al.*, in No. 85–5871 (6th Cir.) (order of December 30, 1987, adjudging, on consent, WBKB–TV and its president, Steven Marks, in civil contempt of the court's order of November 8, 1985, for failing to properly reinstate employees and pay backpay and discriminatorily refusing to pay bonuses, refusing to rescind unilateral changes, making additional unilateral changes, refusing to furnish information to the union and abide by an agreed-upon contract, improperly posting Board notices, failing to expunge discipline discharge references from personnel records; and failing to file compliance status reports with Regional Director; order directing respondents to, inter alia, comply with court's judgment of November 8, 1985, offer reinstatement and make whole discriminatees, furnish information to, and bargain with, the union; partially reimburse Board for costs and attorneys' fees and imposing prospective noncompliance fine of $5000 per violation and $500 per day against the company and $500 per violation and $100 per day against Marks, not to be refunded by the company if assessed); *NLRB v. Laborers Fund Corp., et al.*, in No. 81–7401 (9th Cir.) (consent civil contempt adjudication against Laborers Fund Corp. and Fund Secretary David Johnson finding them in further violation of the court's judgment of August 14, 1981, and the contempt adjudications entered against the Fund on February 16, 1983, November 25, 1983 (as amended January 10, 1984), and December 9, 1986, for failing to comply, and fining Fund $105,700 representing fines conditionally suspended by the court on December 9, 1986, concerning which it was directed to pay $25,000, the balance to be suspended conditioned on compliance for a 2-year period; fining Johnson $15,800, of which $2500 was to be paid and the remainder to be suspended conditioned on future compliance for 2 years; directing payment by the Fund of $1000 to the Board for reimbursement of its costs and attorneys' fees; and imposing prospective noncompliance fines of $10,000 per violation and $1000 per day against the Fund and $200 per day against each member of the Fund's board of directors and board of trustees, the Fund's secretary, and any other person or body who has impeded the Fund's compliance, not to be reimbursed by the Fund or any other source, if assessed); *NLRB v. James K. Sterritt, Inc., et al.*, in Nos. 75–4044 and 76–4253 (2d Cir.) (order of February 17, 1988, on consent, adjudging James K. Sterritt and four other respondents in the case, K.I.T. Transportation, Inc., Sandra S. Sterritt, Mark D. Sterritt, and Suzanne Sterritt Tratnack, in civil contempt of the court's contempt adjudication of March 25, 1980, and directing them, jointly and severally, to pay the Board $45,000 in reimbursement of its costs and attorneys' fees, and to pay $25,000 in fines, remitted

Continued

fines were assessed[7] and 2 in which the court both ordered the civil arrest of the respondent's agent and assessed fines against the respondent.[8] Three cases were consummated by settlement orders requiring compliance,[9] and nine cases were discontin-

---

from $1,343,500 assessed by order of August 17, 1987, on condition on compliance with the contempt adjudication); *NLRB v. Iron Workers Local 15, Joint Apprenticeship Committee*, in Nos. 86–4060 and 86–4080 (2d Cir.) (order of March 21, 1988, adjudging the Joint Apprenticeship Committee in civil contempt for refusing to reinstate employee in violation of the court's judgment of October 14, 1986, and directing it to reinstate and pay backpay to discriminatee, to pay Board $500 in costs, and to take other steps, and imposing $500 per day prospective compliance fine commencing 30 days from date of order); *NLRB v. Dickerson Pond Associates, et al.*, in No. 86–4061 (2d Cir.) (order of March 25, 1988, adjudging Maureen Erickson, Stewart Muller, et al., d/b/a Dickerson Pond Associates, Ltd., Maureton Corporation, and Maureen Erickson in civil contempt, on default, for failing to pay backpay in violation of the court's judgment of June 11, 1986, and directing payment of backpay plus interest and payment of Board's costs and attorneys' fees, and imposing prospective compliance fines against the partnership and corporation of $10,000 each per violation and $1000 per day, $1000 per violation, and $100 per day against Maureen Erickson and any other person with knowledge of the judgment acting in concert with them); *NLRB v. Arnold Cleaners*, in No. 86–5756 (6th Cir.) (order of March 28, 1988, assessing $5000 fine against the company in partial discharge of fines imposed by contempt order entered August 20, 1987, and suspending balance if compliance achieved within 15 days of order; assessing $1000 fine against company president, David Rosenthal, in partial charge of fines previously imposed, and suspending remainder conditioned on compliance; directing issuance of writ of attachment against Rosenthal; and directing reimbursement of Board's costs and attorneys' fees); *NLRB v. Shearer, et al.*, in No. 86–3042 (3d Cir.) (order, on consent, adjudicating Total Transportation Corporation, another respondent in the proceeding, in civil contempt of the court's judgments of November 4, 1980, and May 4, 1983, and directing it to pay all amounts due under the Board's proof of claim as determined by the bankruptcy court, and imposing prospective compliance fines of $1000 per violation and $500 per day commencing 10 days after entry of the adjudication); *NLRB v. Calvin Hill*, in No. 84–4401 (5th Cir.) (order, on consent, adjudicating respondent in civil contempt for violating the 8(a)(1) provisions of the court's judgment, and imposing prospective fines of $2500 per violation and $2500 per day); *NLRB. v. Carlow's Ltd.*, in No. 86–3711 (3d Cir.) (order of July 18, 1988, adjudicating respondent in civil contempt for violating the bargaining provisions of the court's judgment of June 15, 1984, and directing respondents to comply with the court's judgment, and to reimburse the Board for its costs and attorneys' fees, and imposing prospective noncompliance fines of $10,000 per violation and $1000 per day); *NLRB v. Service Employees Local 73*, in Nos. 79–1706, 79–1715, 79–2193, and 82–2629 (7th Cir.) (order, on consent, entered August 3, 1988, finding union in civil contempt for violating the 8(b)(7) provisions of the court's judgments and prior contempt adjudication, assessing fines of $2500, and imposing increased prospective noncompliance fines of $5000 per violation and $500 per day); *NLRB v. Great Lakes Chemical Corp., et al.*, in No. 77–1732 (6th Cir.) (order of August 24, 1988, affirming Board's finding that Aquabrom, a division of Great Lakes, was a successor employer to employer named in the court's judgment and was therefore liable for compliance with that judgment, and was in civil contempt for failure to recognize and bargain with union as judgment requires; order directing Aquabrom to bargain and threatening "appropriate fines" for continued noncompliance); *NLRB v. Barnes Excavating Co.*, in No. 87–2539 (4th Cir.) (order of September 2, 1988, adjudicating Barnes in civil contempt, ordering compliance with the court's judgment, directing payment of the Board's costs and attorneys' fees, and imposing prospective noncompliance fines of $5000 per violation and $5000 per day); *NLRB v. EPE, Inc.*, in No. 85–1501, 85–1502 (4th Cir.) (order of August 31, 1988, adjudicating company in civil contempt of the court's judgments of May 16 and July 5, 1985, but holding adjudication in abeyance provided the company bargained with union, abided by previous collective-bargaining agreement, rescinded unilateral changes, and took other related actions).

[7] *NLRB v. Laborers Fund Corp., et al.*, in No. 81–7401 (9th Cir.); *NLRB v. James K. Sterritt, Inc., et al.*, in Nos. 75–4044 and 76–4253 (2d Cir.); *NLRB v. Service Employees Local 73*, in Nos. 79–1281, 79–1706, 79–1715, 79–2193 (7th Cir.).

[8] *NLRB v. Newspaper & Mail Deliverers, et al.*, in No. 86–4004 (2d Cir.); *NLRB v. Arnold Cleaners*, in No. 86–5756 (6th Cir.).

[9] *NLRB v. Esco Elevators*, in No. 86–4054 (5th Cir.) (settlement order of October 27, 1987, providing for payment of backpay, pension contributions, and reinstatement of service routes to discriminatee in compliance with the court's judgment of July 23, 1986); *NLRB v. James K. Sterritt, Inc., et al.*, in Nos. 75–4044 and 76–4253 (2d Cir.) (order of February 17, 1988, directing Spancrete Northeast, Inc., another respondent in the proceeding, to pay $185,000 in backpay and pension contributions due under the court's judgment of December 30, 1976); *NLRB v. Windsor Place Corp.*, in No. 86–4030 (2d Cir.) (settlement order of May 24, 1988, requiring respondent to bargain in good faith with union and providing for extension of union's certification year).

ued.[10] In one case, the court denied a third party's motion to institute contempt proceedings over the Board's objections.[11] Five motions for protective restraining orders were filed,[12] and five protective restraining orders were entered.[13]

During the fiscal year, the Contempt Litigation Branch collected $187,996 in fines and $397,759 in backpay, while recouping $102,289 in court costs and attorneys' fees incurred in contempt litigation.

A number of Board proceedings during the fiscal year were noteworthy. The Board was again faced with some difficult bankruptcy issues requiring accommodation of the Act with the

---

[10] *NLRB v. Laborers Local 324*, in No. 85-7485 (9th Cir.) (order granting Board's motion to withdraw petition without prejudice because of respondent's compliance; each party to bear its own costs); *NLRB v. Alamo Cement Co.*, in No. 86-4056 (5th Cir.) (order of February 2, 1988, granting Board's motion to withdraw petition without prejudice because of respondent's compliance; each party to bear its own costs); *NLRB v. Fancy Trims, Inc., et al.*, in No. 85-4016 (2d Cir.) (order of February 3, 1988, granting Board's motion to withdraw motion for body attachment, without prejudice, because of respondents' compliance); *NLRB v. Frankfathers & Son's Trucking*, in No. 87-5528 (6th Cir.) (order of February 25, 1988, granting Board's motion to withdraw petition because of respondent's compliance); *NLRB v. John Mahoney Construction Co.*, in No. 85-1607 (1st Cir.) (order of March 28, 1988, granting Board's motion to dismiss Board's motion for writ of body attachment against company president John Mahoney on compliance); *NLRB v. Mall Security*, in No. 87-5380 (6th Cir.) (order of May 17, 1988, granting Board's motion to withdraw contempt petition because of mootness); *NLRB v. Fishing Vessel Comet*, in No. 87-1755 (1st Cir.) (order of July 13, 1988, granting Board's motion to withdraw contempt petition, without prejudice because of company's filing for relief under Bankruptcy Code); *NLRB v. Iron Workers Local 15 Joint Apprenticeship Committee*, in No. 86-4060 (2d Cir.) (order of September 15, 1988, granting Board's motion to dismiss its motion for assessment of fines and issuance of writ of body attachment in light of compliance by respondent); *NLRB v. Marriott In-Flite Services*, in No. 82-4165 (2d Cir.) (order of September 19, 1988, discontinuing contempt proceedings in light of stipulation for dismissal between Board and respondent).

[11] *State Bank of India v. NLRB, et al.*, in Nos. 85-1028, 85-1029, 85-1585, and 85-1586 (7th Cir.) (order of November 5, 1987).

[12] *NLRB v. Coal Systems, et al.*, in No. 85-5298 (6th Cir.) (emergency motion for pendente lite relief restraining respondents and others from transferring equipment auction proceeds until respondents furnish security for amounts of backpay alleged in Board's backpay specification in pending backpay proceeding); *NLRB v. Dahl Fish Co., et al.*, in No. 86-1369 (D.C. Cir.) (emergency motion for pendente lite protective order restraining respondents from transferring assets until they establish security of $2.4 million in escrow account to protect estimated backpay and fees liability under court's unliquidated judgment of March 31, 1987); *NLRB v. B & W Machine & Welding Co.*, in No. 87-7058 (9th Cir.) (pendente lite motion for order restraining transfer of assets until security provided in amount of $58,000); *NLRB v. Challenge Cook Bros.*, in No. 87-5153 (6th Cir.) (emergency motion for order restraining transfer of assets, pendente lite, until security furnished in amount of $465,000); *NLRB v. Limestone Apparel Corp., et al.*, in No. 81-1693 (6th Cir.) (pendente lite motion for order restraining respondents and several alleged alter egos from transferring assets until security in amount of $125,000 is provided).

[13] *NLRB v. Coal Systems, et al.*, in No. 85-5298 (6th Cir.) (order of October 16, 1987, granting on temporary basis Board's emergency motion for pendente lite relief restraining respondents and others from transferring equipment auction proceeds until respondents furnish security for amounts of backpay alleged in Board's backpay specification in pending backpay proceeding); *NLRB v. Amason, Inc., et al.*, in No. 84-1561 (4th Cir.) (consent order, in lieu of protective restraining order, directing respondents to post bond in amount of $40,000 to cover any potential backpay judgment or contempt adjudication); *NLRB v. Coal Systems, et al.*, in No. 85-5298 (6th Cir.) (order of December 14, 1987, granting permanent injunction on Board's emergency motion for pendente lite relief restraining respondents and others from disbursing equipment auction proceeds or other assets to any respondent or officer or shareholder thereof until respondents furnish security in form acceptable to Board for amounts of backpay ($73,000) alleged in Board's backpay specification in pending backpay proceeding; restraining third parties from distributing funds to respondents; and other relief); *NLRB v. Dahl Fish Co., et al.*, in No. 86-1369 (D.C. Cir.) (order of February 24, 1988, restraining respondents from selling or transferring assets until they furnish security in the amount of $2,395,645 by depositing that amount in the registry of the district court until backpay is determined and paid, and other relief); *NLRB v. B & W Machine & Welding Co.*, in No. 87-7058 (9th Cir.) (order of April 20, 1988).

Bankruptcy Code. In *Shearer, et al.*,[14] the respondent had for years resisted the Board's efforts to remedy its violations through the creation of successive corporate alter egos. During 1982 and 1983, while compliance proceedings were pending against one of these alter egos, respondents' principals secretly and gratuitously transferred assets to a new corporate alter ego, thereby rendering the predecessor insolvent and frustrating the Board's efforts to collect backpay. By the time these facts came to light, however, even this entity was insolvent, and a voluntary Chapter 11 petition had been filed. The Board then filed a contempt petition naming all parties, including the Chapter 11 debtor, and obtained an order freezing their assets pendente lite. The Board successfully argued in the contempt proceeding that both its contempt petition and its motion for pendente lite relief were exempted from the "automatic" stay provisions of Section 362(a) of the Bankruptcy Code. Thereafter, the Board filed a proof of claim in the Chapter 11 proceeding for the full amount of backpay and interest, which then stood at $104,000, while continuing to prosecute the contempt case.

The Board subsequently negotiated a contempt settlement under which respondents' principals were required to pay the full amount of backpay, interest, and the Board's litigation costs, totaling some $113,000 over a period of 7 years. Pursuant to the settlement the Board agreed to pursue recovery of a portion of the backpay in the pending bankruptcy proceeding, by filing an amended proof of claim for $40,000 that the debtor entity agreed not to contest. Because respondents' principals no longer had a controlling financial interest in the Chapter 11 debtor, any recovery by the Board in the bankruptcy proceeding would have reduced their overall liability. This aspect of the contempt settlement, however, affected other creditors' rights in the Chapter 11 proceeding, and approval of the settlement by the bankruptcy court under Rule 9019 of the Bankruptcy Rules was therefore necessary. Because the Board lacked standing to request approval of the settlement, the debtor agreed to seek such approval. When this approval was obtained, the parties returned to the contempt forum and jointly moved the court of appeals for entry of a contempt adjudication incorporating the settlement.

In another development in the line of cases involving the use of contempt procedures against successors, the Sixth Circuit returned to the case of *Great Lakes Chemical Corp. v. NLRB*. In its earlier decision, reported at 746 F.2d 334 (1984), the court remanded the case to the Board for its determination, in the first instance, of the successorship issue.[15] On June 30, 1986, the Board issued its decision (280 NLRB 1131), finding Great Lakes to be a successor to the original respondent, Bromine Division,

[14] See fn. 6, supra.

[15] See also *NLRB v. Gamco Industries*, 820 F.2d 289 (9th Cir. 1987); *Computer Sciences Corp. v. NLRB*, 677 F.2d 804 (11th Cir. 1982).

Drug Research, Inc. The Board thereafter returned to the Sixth Circuit, requesting that the court find for the Board on its contempt petition against Great Lakes now that the Board had determined Great Lakes to be a successor employer. In *Great Lakes II*, 855 F.2d 1174 (6th Cir. 1988),[16] the court affirmed the Board's determination on the successorship issue, and concluded that the company could properly be held in contempt based on that finding. In particular, the court noted that "while the factual determination of successorship is best made by the Board, the legal obligations of Great Lakes could be determined in the first instance in the context of the contempt proceeding itself" (855 F.2d at 1181). Moreover, the court concluded, contempt proceedings could be brought against the employer even though there had not been a Board determination prior to the filing of the contempt petition that the company was a successor employer. The court stated: "An employer must always decide in the first instance what its legal obligations are, including its legal obligations as a successor employer. The Board does not provide declaratory judgments in such circumstances." 855 F.2d at 1186. Great Lakes was, therefore, ordered to bargain with the union for a full certification year, including expedited bargaining for a minimum of 6 months, under the supervision of the Board and a special master (see amended order, supra at fn. 16).

One bargaining case of note during the fiscal year was *NLRB v. Gentzler Tool & Die Corp.*[17] In that case the court, by order dated November 16, 1987, affirmed a special master's report that the company had violated the court's judgment by failing to execute an agreed-upon contract, failing to implement and apply retroactively the terms of the contract, and failing to make employees whole for lost benefits. Specifically, the court construed an automatic renewal clause in a collective-bargaining agreement as having extended the contract several years beyond the original 1983 expiration date and found that the company had violated the judgment by failing to execute and adhere to that contract. In so doing, it rejected the company's contention that the agreed-upon contract was not intended to include an automatic renewal clause under the doctrine of collateral estoppel, and further ruled that a notice seeking modification of the contract did not effect termination under the automatic renewal clause. Finally, the court found that the company violated the general make-whole provisions of the judgment by failing to pay vacation pay benefits, the amounts of which were agreed upon. The contempt adjudication included, inter alia, payment by the company of the Board's attorneys' fees and prospective fines of $10,000 per violation and $1000 per day for future violations.

[16] The court clarified the remedial portion of its decision, by published order dated December 1, 1988 (862 F.2d 100).

[17] See fn. 6, supra.

Finally, the saga of *NLRB v. Newspaper & Mail Deliverers*[18] continued during fiscal year 1988. In the 1987 annual report, we reported on two contempt adjudications issued against the union during that year—an initial contempt adjudication issued on October 30, 1986, and a second adjudication issued May 4, 1987, imposing a fine of $25,000. The union's refusal to post and publish Board notices continued despite these orders. Accordingly, the Board moved the court for the imposition of additional fines and for issuance of a writ of body attachment against the responsible union agent. On October 1, 1987, the Second Circuit upheld the Board's position and issued its third contempt adjudication against the union. In that order the court assessed a fine of $175,000 against the union, ordered that the union pay $2,895.11 in costs and attorneys' fees, and issued a writ of body attachment against the business representative to be effective until full compliance was achieved. The court subsequently reduced the compliance fine to $112,000 and all aspects of the Board's Order and adjudication were satisfied before the body attachment writ was executed.

[18] See fn. 6, supra.

X

Special and Miscellaneous Litigation

A. Litigation Under the Equal Access to Justice Act

In *All Shores Radio Co. v. NLRB*,[1] the Second Circuit denied All Shore's petition for review of a Board Order dismissing, for lack of jurisdiction, an application for fees under the Equal Access to Justice Act (5 U.S.C. § 504) (EAJA). The court found the undisputed facts showed that the company filed its application 1 week after the 30-day period required by statute pursuant to an extension granted by the Board's Executive Secretary. The Board dismissed the application, concluding that the EAJA's 30-day filing requirement "is jurisdictional and cannot be waived or extended." The court agreed with the Board and followed the Fifth, Seventh, Eighth, and Ninth Circuits in holding that the EAJA deadline is jurisdictional and cannot be waived by the Board or the courts. Further, the court held that the Board should not be estopped from enforcing the deadline because: (1) the deadline is a limitation of the Board's subject matter jurisdiction to which the principles of estoppel do not apply and (2) there is no factual basis for estoppel here because the Executive Secretary's grant of an extension of time in the context of a newly enacted statute did not rise to the level of affirmative misconduct. Finally, the court rejected the company's contention that the *Thompson* rule[2] of "unique circumstances" required the Board to entertain the untimely fee application.

The District of Columbia Circuit in *Leeward Auto Wreckers v. NLRB*,[3] held that, although the Board's General Counsel was substantially justified in filing a complaint against Leeward and proceeding to hearing, she lost "the protective mantle of 'substantial justification' . . . at the conclusion of the hearing." The court therefore remanded the case to the Board for calculation of fees for that period beginning after the conclusion of the administrative law judge's hearing. In so doing, the court agreed with the judge's analysis of the case, which had been reversed by the Board, that, once Leeward had established its *Westinghouse* de-

[1] 841 F.2d 474.
[2] *Thompson v. INS*, 375 U.S. 384 (1964).
[3] 841 F.2d 1143.

fense,[4] the matter should have gone no further.[5] The court rejected the Board's position that continuation of the suit was supportable because the Government could have prevailed if the judge had resolved two conflicts in testimony in favor of the General Counsel. The court did, however, conclude that the General Counsel acted reasonably in investigating and prosecuting the charges to the conclusion of the trial in view of Leeward's failure to give hard evidence of its defenses prior to the hearing. It is noteworthy that, in making its determination whether the Board's position was substantially justified, the court looked to whether it was "slightly more than reasonable." This test has since been rejected by the Supreme Court in favor of one requiring only that the Government action be reasonable in fact and in law.[6]

B. Litigation Involving the Board's Jurisdiction

In *Augusta Bakery Corp. v. NLRB*,[7] the District Court for the Northern District of Illinois Eastern Division dismissed a request for injunctive relief, finding that it lacked jurisdiction to enjoin the Board's unfair labor practice proceedings. The General Counsel had issued a complaint against Augusta alleging that the company violated Section 8(a)(3) and (1) of the Act by failing and refusing, since March 27, 1986, to reinstate economic strikers who had made an unconditional offer to return to work. During the course of the unfair labor practice hearing, the administrative law judge overruled Augusta's objection to the scope of the General Counsel's prosecution. The judge ruled that he could consider Augusta's failure to reinstate the employees subsequent to March 27, 1986. Augusta contested this interlocutory ruling by filing with the Board a request for special permission to appeal. The Board denied Augusta's request and the unfair labor practice hearing proceeded until closing. Before the district court, Augusta argued that the Board exceeded its statutory subject matter jurisdiction under Section 10(b) by permitting the litigation of conduct that occurred subsequent to March 27, 1986. The court readily dismissed Augusta's argument that the *Leedom v. Kyne*[8] exception to nonreviewability applied in this case. The court, citing *Abercrombie v. Office of Comptroller of Currency*,[9] stated that *Kyne* "is available only where the agency has exceeded a plain and unambiguous statutory command or prohibition . . . that is, the agency takes 'blatantly lawless' action—in circumstances where no adequate alternative judicial remedy exists for the unlawful activity's victims." The court found it doubtful

[4] *Westinghouse Electric Corp.*, 150 NLRB 1574 (1965).
[5] 841 F.2d at 1147–1148.
[6] See *Pierce v. Underwood*, 108 S.Ct. 2541 (1988).
[7] No. 88 Civ. 2845 (N.D.Ill.).
[8] 358 U.S. 184 (1958).
[9] 833 F.2d 672, 675 (7th Cir. 1987).

that Augusta had satisfied the first requirement of a clear violation of a statutory command, but found it unnecessary to decide the issue because Augusta failed to satisfy the requirement of no adequate alternative judicial remedy. The court further rejected Augusta's claim that it should not have to suffer through the Board's alleged violation of a statutory mandate. The court noted that such an argument would make the second element of the *Kyne* exception—inadequate alternative remedy—superfluous because satisfying the first element necessarily involves statutory violations. Upon motion by the Board, the court imposed sanctions against Augusta pursuant to Rule 11 of the Federal Rules of Civil Procedure. The court noted that the case was frivolous, that citations were mischaracterized and ignored by Augusta, and that a dilatory motive may have been evident.[10]

In *Summitville Tiles v. NLRB*,[11] the District Court for the Northern District of Ohio Eastern Division dismissed a request for mandamus, declaratory judgment, injunctive relief, and damages against the Board, finding that it lacked jurisdiction to review the complained-of Board representation proceeding. The United Steel Workers of America had filed with the Board a petition for certification seeking to represent Summitville's employees. Summitville sent objections to the election by mail to the Board. Under the Board's new rules and regulations, the objections were untimely filed. In the district court, Summitville argued, inter alia, that it was unaware of the new rules and that the Board had arbitrarily applied the new rules to actions pending before the effective date. The court held that, generally, the Board's representation orders are not subject to district court review, and that the *Leedom v. Kyne* exception[12] to this rule was inapplicable to the instant case. The court stated that Summitville failed to show that the Board exceeded its statutory authority. It was further noted that the court of appeals could entertain the question of whether the Board violated its rules and regulations, i.e., Summitville could refuse to bargain and then, if necessary, contest the result of the unfair labor practice case that would likely be filed by the union in an appropriate circuit court pursuant to Section 10(f) of the Act. The court summarily disposed of Summitville's due-process claim, stating that no statutory violation was shown, and observing that a private party does not have a constitutional right to the prosecution of its unfair labor practice complaint.

---

[10] Augusta also filed a "Petition to Review" the Board's action and an "Emergency Motion for Stay Pending Review" with the Seventh Circuit Court of Appeals. The Seventh Circuit denied both the Petition to Review and the Emergency Motion for Stay Pending Review (Docket No. 88-1632, appeal dismissed May 6, 1988).

[11] No. C87-1303 (N.D.Ohio).

[12] 358 U.S. 184.

C. Bankruptcy Litigation

In *NLRB v. Better Building Supply Corp.*,[13] the Ninth Circuit ruled that the liability of a corporation for backpay under the NLRA survives Chapter 7 bankruptcy proceedings and will attach to alter egos formed after bankruptcy. On appeal from a decision of the Board in an unfair labor practice case, the findings of alter ego status were not disputed. Rather, the respondents contended that the backpay liability incurred under the NLRA was discharged by application of the Bankruptcy Code. The Ninth Circuit, agreeing with the Board, found that the liability of the surviving alter ego was not discharged as a result of the liquidation proceedings undergone by the predecessors. The court observed that Section 727 of the Bankruptcy Code (11 U.S.C. § 727) specifically provides that the court shall grant the debtor a discharge only when the debtor is an individual. Thus, although partnerships and corporations may be liquidated under Chapter 7, they do not thereby receive a discharge of their debts. Indeed, the court noted that the legislative history of 11 U.S.C. § 727 shows that it was enacted precisely to prohibit the trafficking in corporate shells undertaken by respondents before the Board. Finally, the court concluded that the personal discharge of the principal owner of the various alter egos would not be permitted to insulate the companies from their remedial obligations. Although the common management and control of labor relations of the various entities were relevant to their alter ego status, the court found that they were not sufficient to warrant the conclusion that the corporate liability was to be treated as the owners' personal liability subject to discharge under 11 U.S.C. § 727.

In another case, *In re Goodman*,[14] the Board's General Counsel issued an unfair labor practice complaint alleging that various companies and James Goodman were alter egos and, as such, they were continuing to violate Section 8(a)(5) of the Act, as well as the bargaining obligations previously established in *E. G. Sprinkler Corp.*, 268 NLRB 1241 (1984), by failing to apply the terms of a collective-bargaining contract executed by one of the alter ego entities, unilaterally changing conditions of employment, and refusing to provide relevant information to the union. Goodman and one of the alleged alter egos then filed a complaint in bankruptcy court seeking protection from the General Counsel's prosecution. The bankruptcy court initially held that it had no jurisdiciton to adjudicate claims brought by alleged alter ego GASC because GASC had not previously been a debtor before the court. The court went on, however, to find that Goodman's prior discharge relieved him of the obligation under the NLRA to recognize and bargain with the union, and further

[13] 837 F.2d 377 (9th Cir.). This appeal, adjudicated under 29 U.S.C. § 160, is treated with the special litigation cases because of its significant bankruptcy issue.

[14] No. 84-21376 (Bankr. W.D.N.Y.), reversed in part 81 B.R. 786.

discharged the backpay obligations of E.G. Sprinkler Corp. The bankruptcy court additionally decided that, for the purposes of labor law, there was no alter ego relationship between GASC and the other companies. On appeal, the District Court for the Western District of New York agreed that the bankruptcy court had no jurisdiction to hear the claims of GASC. The district court further held that the bankruptcy court had erred in concluding that GASC was the after-acquired property of Goodman and, accordingly, the district court ruled that GASC was not protected by Goodman's discharge. The court relied on *NLRB v. Better Building Supply Corp.*[15] and *NLRB v. Edward Cooper Painting,*[16] to conclude that a discharged Chapter 7 debtor's interest in an entity found to be an alter ego of a company guilty of an unfair labor practice does not shield the alter ego from liability. The district court affirmed the lower court's assertion of jurisdiction to determine whether GASC was the alter ego of the other corporations, finding that issue collateral to the question raised concerning the scope of Goodman's personal discharge. The district court concluded, however, that the record before the court was inadequate, and remanded for additional evidence concerning the alter ego issue. Finally, the district court affirmed the bankruptcy court's finding that the prepetition recognition and bargaining obligations ordered by the Board in *E.G. Sprinkler Corp.* were dischargeable obligations as to Goodman, but held that Goodman could nonetheless be liable to bargain with the union for a new contract and for any postpetition monetary obligations if he is found to be an alter ego of the predecessor company.[17]

D. Litigation Involving the Freedom of Information Act

Three notable decisions were issued applying the Freedom of Information Act (FOIA) this year. In *Electrical Workers IBEW Local 3 v. NLRB,*[18] the union filed a number of representation petitions under Section 9(c) of the Act, all of which were dismissed by the Board's Regional Director. Subsequently, the Union filed a FOIA request for all documents relating to the investigation and decision by the Regional Director. The Board refused to turn over many of the requested materials and the union filed suit in district court. The district court observed that Exemption 5 protected documents "routinely" or "normally" privileged in the civil discovery context and that courts recognize three types of privilege: deliberative process, attorney work product, and attorney-client confidences. For the deliberative

[15] Supra, fn. 13.
[16] 804 F.2d 934 (6th Cir. 1986).
[17] This decision has been appealed and reversed in part by the Second Circuit in *NLRB v. Goodman,* 131 LRRM 2129 (1989).
[18] 126 LRRM 2743 (S.D.N.Y.), affd. 845 F.2d 1177 (2d Cir.).

process privilege to apply, the materials sought must be both "predecisional" and "deliberative." The court held that all the representation case memoranda that the Board sought to protect were not required to be disclosed under Exemption 5 due to their character as intra-agency predecisional analyses communicated from agents in the Board's Regional Office to their Regional Director. The court further ruled that the remaining documents were protected under Exemption 6 on the ground that such documents were "personnel and medical files and similar files the disclosue of which would constitute a clearly unwarranted invasion of personal privacy." Initially, as to Exemption 6, the court noted that "similar files" had been construed broadly and that the records at stake—consisting of employees' names and addresses and payroll records—easily fit into that category. The court concluded that the employees' right to privacy as to their addresses and payroll records, although slight, nonetheless outweighed the public interest in their disclosure. It noted that Local 3's interest was, in essence, as a litigant before the Board to determine the names of employees needed to sign union authorization cards. The court accordingly ruled that the union could not use a FOIA request to circumvent the Board's "*Excelsior* Rule,"[19] which requires disclosure of a list of employee names and addresses only *after* the union has demonstrated sufficient employee interest and the Regional Director has directed that an election be held.

In *Los Angeles County Building Trades Council v. NLRB*,[20] the district court granted the Board's Motion for Summary Judgment based on the FOIA Exemption 5 protection for attorney work product materials as applied to disputed records consisting of copies of affidavits and declarations given to the Board in an unfair labor practice proceeding. The court found, moreover, that Exemption 7(C) of FOIA protects such materials from disclosure when the privacy interest of the subject employees outweighs the public interest in disclosure. Because, in this case, the risk of reprisals and embarrassment to the employees who provided the statements was great, and the plantiff's interest in the documents was its private interest in aiding its own litigation effort, the court ruled that the documents were exempt from disclosure under Exemption 7(C).

Finally, in *Thurner Heat Treating Corp. v. NLRB*,[21] Thurner sought a large number of documents, including witness statements from various unfair labor practice case files. The Seventh Circuit upheld the district court decision that the witness statements were not protected by Exemption 5 on the ground that the witness' affidavits had not been shown to satisfy the threshold re-

[19] *Excelsior Underwear*, 156 NLRB 1236 (1966).
[20] No. 87-01647 (C.D.Cal.).
[21] 839 F.2d 1256 (7th Cir.).

quirement of comprising intra-agency memoranda. The court construed the intra-agency documents language of Exemption 5 to require that the materials be internally created and maintained within the agency, rather than simply documents within the possession of the agency. The court held that, on the evidence available, it appeared that the affidavits were the product of the witnesses who made the statements, rather than of the Board attorney who recorded them. Thereafter, on remand, the district court found that a great majority of the remaining disputed documents were protected under FOIA Exemptions 5 and 7(A), (C), and (D).[22]

E. Miscellaneous Litigation

In *NLRB v. Florida Department of Business Regulations*,[23] the Board filed a *Nash-Finch* suit[24] to enjoin the State of Florida from enforcing a regulation requiring employees in the jai alai industry to give 15 days' notice prior to leaving their place of employment. The district court granted the Board's motion for a preliminary injunction. Initially, the court found that the Board was likely to prevail on the merits, noting that the Florida provision appeared to directly conflict with the employees' protected right to strike under Section 7. The court found an alternative basis for concluding that the state regulation is preempted in that it impermissibly regulates conduct exclusively within the Board's jurisdiction. The court additionally ruled that the Board's injunction would not cause undue harm to the State because its right to seek judicial relief from violent conduct, should that occur, was not impaired; that the Board would suffer injury in its ability to protect employee rights if enforcement of the state regulation was not prohibited; and that the public interest would not be harmed by the injunction.

In another case, counsel for John E. Sparks[25] filed a petition to review the General Counsel's refusal to issue a complaint. Sparks' counsel then voluntarily sought to dismiss the petition when she discovered that such refusals are not subject to judicial review. Both the employer and the union, who were also named in the action, sought sanctions for a frivolous appeal. The court stated that in authorizing sanctions under Rule 38, F.R.App.P., it would look to the principles evolved in the interpretation of Rule 11, F.R.Civ.P. It concluded that sanctions were appropriate because the principle that the decision of the General Counsel not to issue a complaint is not reviewable is a "bedrock principle of labor law," and Sparks' counsel, as a specialist in labor law, should have been aware of that principle.

---

[22] *Thurner Heat Treating Corp. v. NLRB*, 129 LRRM 3012 (E.D.Wisc.).
[23] TCA 88-40079-WS (N.D Fla.).
[24] *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971).
[25] *Sparks v. NLRB*, 835 F.2d 705 (7th Cir.).

Finally, in *Pons & Davis*,[26] a union brought suit pursuant to Section 301 of the Act to confirm an arbitration award obtained through an interest arbitration provision in its expiring collective-bargaining contract. The Board moved to intervene and to stay the district court proceedings pending resolution of an unfair labor practice case raising the same issues involving the same parties. In the unfair labor practice case, the General Counsel had alleged that, once an employer properly has withdrawn from a multiemployer bargaining unit, the union may no longer rely on an interest arbitration clause of the existing contract to force the employer to such arbitration against its will; nor may it lawfully enforce such an arbitration award in a court proceeding. The court granted both Board motions, concluding that there was a "quite real" potential for conflict in that the court might award damages for breach of an agreement that the Board subsequently could declare invalid.

[26] *Pons & Davis v. Sheet Metal Workers Local 312*, Civil No. 87C-1038W (D.Utah).

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 specifically 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 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 Case" 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 or she 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.

Election, Runoff

An election conducted by the Regional Director after an initial election, having three or more choices on the ballot, has turned out to be inconclusive (none of the choices receiving a majority of the valid votes cast). The Regional Director conducts the runoff election between the choices on the original ballot which received the highest and the next highest number of votes.

Election, Stipulated

An election held by the Regional Director pursuant to an agreement signed by all the parties concerned. The agreement provides for the waiving of hearing and the establishment of the appropriate unit by mutual consent. Postelection rulings are made by the Board.

Eligible Voters

Employees within an appropriate bargaining unit who were employed as of a fixed date prior to an election, or are otherwise qualified to vote under the Board's eligibility rules.

Fees, Dues, and Fines

The collection by a union or an employer of dues, fines, and referral fees from employees may be found to be an unfair labor practice under Section 8(b)(1)(A) or (2) or 8(a)(1) and (2) or (3), where, for instance such moneys were collected pursuant to an illegal hiring hall arrangement, or an invalid or unlawfully applied union-security agreement; where dues were deducted from employees' pay without their authorization; or, in the cases 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 decision-making authority of the Board (the Regional Director in representation cases), as provided in Sections 9 and 10 of the Act, must be exercised in order to achieve the disposition of a case or the resolution of any issue raised in a case. Thus, formal action takes place when a Board decision and consent order is issued pursuant to a stipulation, even though the stipulation constitutes a voluntary agreement.

Formal Agreement (in unfair labor practice cases)

A written agreement between the Board and the other parties to a case in which hearing is waived and the specific terms of a Board order agreed upon. The agreement may also provide for the entry of a consent court decree enforcing the Board order.

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 the 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.

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 purpose 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 intitated 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 combination of other types of C cases. It does not include representation cases.

Types of Cases

General:

Letter designations are given to all cases depending upon the subsection of the Act allegedly violated or otherwise describing the general nature of each case. Each of the letter designations appearing below is descriptive of the case it is associated with.

C Cases (unfair labor practice cases)

A case number which contains the first letter designation C, in combination with another letter, i.e., CA, CB, etc., indicates that it involves a charge that an unfair labor practice has been committed in violation of one or more subsections of Section 8.

CA:

A charge that an employer has committed unfair labor practices in violation of Section 8(a)(1), (2), (3), (4), or (5), or any combination thereof.

CB:

A charge that a labor organization has committed unfair labor practices in violation of Section 8(b)(1), (2), (3), (5), or (6), or any combination thereof.

CC:

A charge that a labor organization has committed unfair labor practices in violation of Section 8(b)(4)(i) and/or (A), (B), or (C), or any combination thereof.

CD:

A charge that a labor organization has committed an unfair labor practice in violation of Section 8(b)(4)(i) or (ii)(D). Preliminary actions under Section 10(k) for the determination of jurisdictional disputes are processed as CD cases. (See "Jurisdictional Disputes" in this glossary.)

CE:

A charge that either a labor organization or an employer, or both jointly, have committed an unfair labor practice in violation of Section 8(e).

CG:

A charge that a labor organization has committed unfair labor practices in violation of Section 8(g).

CP:

A charge that a labor organization has committed unfair labor practices in violation of Section 8(b)(7)(A), (B), or (C), or any combination thereof.

R Cases (representation cases)

A case number which contains the first letter designation R, in combination with another letter, i.e., RC, RD, RM, indicates that it is a petition for investigation and determination of a question concerning representation of employees, filed under Section 9(c) of the act.

RC:

A petition filed by a labor organization or an employee alleging that a question concerning representation has arisen and seeking an election for 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 classification of employ-

ees should or should not be included within a presently existing bargaining unit.

UD:

(Union Deauthorization case): 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 Deauthorization 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 or the charge of 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 1988[1]

	Total	Identification of filing party					
		AFL-CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
All cases							
Pending October 1, 1987	*19,923	8,558	1,925	639	1,176	5,980	1,645
Received fiscal 1988	39,351	14,128	4,234	854	1,988	15,109	3,038
On docket fiscal 1988	59,274	22,686	6,159	1,493	3,164	21,089	4,683
Closed fiscal 1988	37,701	13,718	3,963	708	1,829	14,363	3,120
Pending September 30, 1988	21,573	8,968	2,196	785	1,335	6,726	1,563
Unfair labor practice cases[2]							
Pending October 1, 1987	*17,309	7,400	1,466	576	973	5,518	1,376
Received fiscal 1988	31,453	10,422	2,652	724	1,460	13,688	2,507
On docket fiscal 1988	48,762	17,822	4,118	1,300	2,433	19,206	3,883
Closed fiscal 1988	30,090	10,180	2,462	564	1,329	12,951	2,604
Pending September 30, 1988	18,672	7,642	1,656	736	1,104	6,255	1,279
Representation cases[3]							
Pending October 1, 1987	*2,409	1,116	447	61	190	418	177
Received fiscal 1988	7,348	3,548	1,538	122	492	1,256	392
On docket fiscal 1988	9,757	4,664	1,985	183	682	1,674	569
Closed fiscal 1988	7,110	3,397	1,462	137	464	1,255	395
Pending September 30, 1988	2,647	1,267	523	46	218	419	174
Union-shop deauthorization cases							
Pending October 1, 1987	*43	—	—	—	—	43	—
Received fiscal 1988	165	—	—	—	—	165	—
On docket fiscal 1988	208	—	—	—	—	208	—
Closed fiscal 1988	156	—	—	—	—	156	—
Pending September 30, 1988	52	—	—	—	—	52	—
Amendment of certification cases							
Pending October 1, 1987	*12	5	1	0	5	0	1
Received fiscal 1988	37	17	2	0	12	0	6
On docket fiscal 1988	49	22	3	0	17	0	7
Closed fiscal 1988	30	10	2	0	13	0	5
Pending September 30, 1988	19	12	1	0	4	0	2
Unit clarification cases							
Pending October 1, 1987	*150	37	11	2	8	1	91
Received fiscal 1988	348	141	42	8	24	0	133
On docket fiscal 1988	498	178	53	10	32	1	224
Closed fiscal 1988	315	131	37	7	23	1	116
Pending September 30, 1988	183	47	16	3	9	0	108

[1] See Glossary of terms for definitions. 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
* Revised, reflects lower figures than reported pending Sept. 30, 1987, in last year's annual report. Revised totals result from post-report adjustments to last year's "on docket" and/or "closed" figures.

Table 1A.—Unfair Labor Practice Cases Received, Closed, and Pending, Fiscal Year 1988[1]

	Total	Identification of filing party					
		AFL–CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
CA cases							
Pending October 1, 1987	*13,761	7,227	1,454	563	928	3,588	1
Received fiscal 1988	22,266	10,362	2,621	708	1,407	7,168	0
On docket fiscal 1988	36,027	17,589	4,075	1,271	2,335	10,756	1
Closed fiscal 1988	21,156	10,089	2,432	545	1,268	6,821	1
Pending September 30, 1988	14,871	7,500	1,643	726	1,067	3,935	0
CB cases							
Pending October 1, 1987	*2,824	166	10	10	31	1,929	678
Received fiscal 1988	7,767	36	21	5	36	6,520	1,149
On docket fiscal 1988	10,591	202	31	15	67	8,449	1,827
Closed fiscal 1988	7,436	71	18	6	45	6,130	1,166
Pending September 30, 1988	3,155	131	13	9	22	2,319	661
CC cases							
Pending October 1, 1987	*469	2	0	3	7	1	456
Received fiscal 1988	851	9	3	8	7	0	824
On docket fiscal 1988	1,320	11	3	11	14	1	1,280
Closed fiscal 1988	958	8	3	11	4	0	932
Pending September 30, 1988	362	3	0	0	10	1	348
CD cases							
Pending October 1, 1987	*106	3	1	0	3	0	99
Received fiscal 1988	245	11	5	1	8	0	220
On docket fiscal 1988	351	14	6	1	11	0	319
Closed fiscal 1988	236	9	6	1	9	0	211
Pending September 30, 1988	115	5	0	0	2	0	108
CE cases							
Pending October 1, 1987	*33	0	1	0	2	0	30
Received fiscal 1988	39	3	0	0	0	0	36
On docket fiscal 1988	72	3	1	0	2	0	66
Closed fiscal 1988	32	1	1	0	0	0	30
Pending September 30, 1988	40	2	0	0	2	0	36
CG cases							
Pending October 1, 1987	*11	0	0	0	1	0	10
Received fiscal 1988	37	0	0	0	1	0	36
On docket fiscal 1988	48	0	0	0	2	0	46
Closed fiscal 1988	37	0	0	0	2	0	35
Pending September 30, 1988	11	0	0	0	0	0	11
CP cases							
Pending October 1, 1987	*105	2	0	0	1	0	102
Received fiscal 1988	248	1	2	2	1	0	242
On docket fiscal 1988	353	3	2	2	2	0	344
Closed fiscal 1988	235	2	2	1	1	0	229
Pending September 30, 1988	118	1	0	1	1	0	115

[1] See Glossary of terms for definitions.

* Revised, reflects lower figures than reported pending Sept. 30, 1987, in last year's annual report. Revised totals result from post-report adjustments to last year's "on docket" and/or "closed" figures.

Table 1B.—Representation Cases Received, Closed, and Pending, Fiscal Year 1988[1]

	Total	Identification of filing party					
		AFL–CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
RC cases							
Pending October 1, 1987	*1,800	1,105	446	61	187	1	—
Received fiscal 1988	5,700	3,548	1,538	122	492	0	—
On docket fiscal 1988	7,500	4,653	1,984	183	679	1	—
Closed fiscal 1988	5,451	3,389	1,462	137	463	0	—
Pending September 30, 1988	2,049	1,264	522	46	216	1	—
RM cases							
Pending October 1, 1987	*177	—	—	—	—	—	177
Received fiscal 1988	392	—	—	—	—	—	392
On docket fiscal 1988	569	—	—	—	—	—	569
Closed fiscal 1988	395	—	—	—	—	—	395
Pending September 30, 1988	174	—	—	—	—	—	174
RD cases							
Pending October 1, 1987	*432	11	1	0	3	417	—
Received fiscal 1988	1,256	0	0	0	0	1,256	—
On docket fiscal 1988	1,688	11	1	0	3	1,673	—
Closed fiscal 1988	1,264	8	0	0	1	1,255	—
Pending September 30, 1988	424	3	1	0	2	418	—

[1] See Glossary of terms for definitions.

* Revised, reflects lower figures than reported pending Sept. 30, 1987, in last year's annual report. Revised totals result from post-report adjustments to last year's "on docket" and/or "closed" figures.

Table 2.—Types of Unfair Labor Practices Alleged, Fiscal Year 1988

	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	22266	100.0
8(a)(1)	3435	15.4
8(a)(1)(2)	272	1.2
8(a)(1)(3)	8111	36.4
8(a)(1)(4)	161	0.7
8(a)(1)(5)	7093	31.9
8(a)(1)(2)(3)	214	1.0
8(a)(1)(2)(4)	6	0.0
8(a)(1)(2)(5)	84	0.4
8(a)(1)(3)(4)	559	2.5
8(a)(1)(3)(5)	2115	9.5
8(a)(1)(4)(5)	16	0.1
8(a)(1)(2)(3)(4)	7	0.0
8(a)(1)(2)(3)(5)	83	0.4
8(a)(1)(2)(4)(5)	3	0.0
8(a)(1)(3)(4)(5)	89	0.4
8(a)(1)(2)(3)(4)(5)	18	0.1
Recapitulation[1]		
8(a)(1)[2]	22266	100.0
8(a)(2)	687	3.1
8(a)(3)	11196	50.3
8(a)(4)	859	3.9
8(a)(5)	9501	42.7
B. Charges filed against unions under sec. 8(b)		
Subsections of Sec. 8(b): Total cases	9111	100 0
8(b)(1)	5998	65.9
8(b)(2)	103	1.1
8(b)(3)	265	2.9
8(b)(4)	1096	12.0
8(b)(5)	1	0.0
8(b)(6)	6	0.1
8(b)(7)	248	2.7
8(b)(1)(2)	1003	11.0
8(b)(1)(3)	308	3.4
8(b)(1)(5)	5	0.1
8(b)(1)(6)	8	0.1
8(b)(2)(3)	5	0.1
8(b)(3)(5)	1	0.0
8(b)(3)(6)	2	0.0
8(b)(1)(2)(3)	49	0.5
8(b)(1)(2)(5)	5	0.1
8(b)(1)(3)(6)	2	0.0
8(b)(1)(3)(5)	1	0.0
8(b)(1)(2)(3)(6)	4	0.0
8(b)(1)(2)(3)(5)(6)	1	0.0
Recapitulation[1]		
8(b)(1)	7384	81.0
8(b)(2)	1171	12.9
8(b)(3)	638	7.0
8(b)(4)	1096	12.0
8(b)(5)	14	0.2
8(b)(6)	23	0.3
8(b)(7)	248	2.7

Table 2.—Types of Unfair Labor Practices Alleged, Fiscal Year 1988—Continued

	Number of cases showing specific allegations	Percent of total cases
B1. Analysis of 8(b)(4)		
Total cases 8(b)(4)	1096	100.0
8(b)(4)(A)	69	6.3
8(b)(4)(B)	721	65.7
8(b)(4)(C)	11	1.0
8(b)(4)(D)	245	22.4
8(b)(4)(A)(B)	44	4.0
8(b)(4)(A)(C)	2	0.2
8(b)(4)(B)(C)	3	0.3
8(b)(4)(A)(B)(C)	1	0.1
Recapitulation[1]		
8(b)(4)(A)	116	10.6
8(b)(4)(B)	769	69.8
8(b)(4)(C)	17	1.6
8(b)(4)(D)	245	22.4
B2. Analysis of 8(b)(7)		
Total cases 8(b)(7)	248	100 0
8(b)(7)(A)	56	22.6
8(b)(7)(B)	16	6.5
8(b)(7)(C)	167	67.3
8(b)(7)(A)(B)	4	1.6
8(b)(7)(A)(C)	4	1.6
8(b)(7)(B)(C)	1	0.4
Recapitulation[1]		
8(b)(7)(A)	65	26.2
8(b)(7)(B)	21	8.5
8(b)(7)(C)	172	69.3
C Charges filed under sec. 8(e)		
Total cases 8(e)	39	100.0
Against unions alone	39	100 0
D. Charges filed under sec. 8(g)		
Total cases 8(g)	37	100.0

[1] A single case may include allegations of violations of more than one subsection of the Act. Therefore, the total of the various allegations is greater than the total number of cases.

[2] Sec. 8(a)(1) is a general provision forbidding any type of employer interference with the rights of the employees guaranteed by the Act, and therefore is included in all charges of employer unfair labor practices.

Table 3A.—Formal Actions Taken in Unfair Labor Practice Cases, Fiscal Year 1988[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	64	62	—	—	—	62	—	—	—	—	—	—	—
Complaints issued	4,458	3,450	2,839	292	75	—	6	3	5	23	55	42	110
Backpay specifications issued	84	44	41	2	0	—	0	0	0	0	0	1	0
Hearings completed, total	882	835	688	85	9	15	1	2	0	4	7	9	15
Initial ULP hearings	827	797	652	83	9	15	1	2	0	4	7	9	15
Backpay hearings	45	29	27	2	0	—	0	0	0	0	0	0	0
Other hearings	10	9	9	0	0	—	0	0	0	0	0	0	0
Decisions by administrative law judges, total	895	628	510	63	9	—	0	2	0	6	13	10	15
Initial ULP decisions	843	591	474	62	9	—	0	2	0	6	13	10	15
Backpay decisions	32	21	21	0	0	—	0	0	0	0	0	0	0
Supplemental decisions	20	16	15	1	0	—	0	0	0	0	0	0	0
Decisions and orders by the Board, total	1,114	965	772	123	20	21	10	2	0	2	3	7	5
Upon consent of parties:													
Initial decisions	105	62	42	13	7	—	0	0	0	0	0	0	0
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	250	195	132	60	3	—	0	0	0	0	0	0	0
Backpay decisions	4	4	4	0	0	—	0	0	0	0	0	0	0
Contested:													
Initial ULP decisions	668	628	533	39	10	21	7	2	0	1	3	7	5
Decisions based on stipulated record	25	19	11	7	0	—	0	0	0	1	0	0	0
Supplemental ULP decisions	58	53	46	4	0	—	3	0	0	0	0	0	0
Backpay decisions	4	4	4	0	0	—	0	0	0	0	0	0	0

[1] See Glossary of terms for definitions.

Table 3B.—Formal Actions Taken in Representation and Union Deauthorization Cases, Fiscal Year 1988[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	1,251	1,185	944	76	165	4
Initial hearings	1,041	988	797	62	129	4
Hearings on objections and/or challenges	210	197	147	14	36	0
Decisions issued, total	988	933	780	39	114	19
By Regional Directors	921	869	728	33	108	19
Elections directed	812	761	638	26	97	18
Dismissals on record	109	108	90	7	11	1
By Board	67	64	52	6	6	0
Transferred by Regional Directors for initial decision	20	19	17	1	1	0
Elections directed	16	15	13	1	1	0
Dismissals on record	4	4	4	0	0	0
Review of Regional Directors' decisions:						
Requests for review received	299	268	224	16	28	2
Withdrawn before request ruled upon	6	6	5	0	1	0
Board action on request ruled upon, total	217	197	162	12	23	1
Granted	29	28	23	1	4	1
Denied	187	168	138	11	19	0
Remanded	1	1	1	0	0	0
Withdrawn after request granted, before Board review	0	0	0	0	0	0
Board decision after review, total	47	45	35	5	5	0
Regional Directors' decisions.						
Affirmed	34	32	25	5	2	0
Modified	4	4	4	0	0	0
Reversed	9	9	6	0	3	0
Outcome.						
Election directed	31	30	22	5	3	0
Dismissals on record	16	15	13	0	2	0

Table 3B.—Formal Actions Taken in Representation and Union Deauthorization Cases, Fiscal Year 1988[1]—Continued

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	1,319	1,221	962	65	194	15
By Regional Directors	602	580	435	37	108	4
By Board	717	641	527	28	86	11
In stipulated elections	663	595	489	25	81	11
No exceptions to Regional Directors' reports	413	395	342	13	40	3
Exceptions to Regional Directors' reports	250	200	147	12	41	8
In directed elections (after transfer by Regional Director)	54	46	38	3	5	0
Review of Regional Directors' supplemental decisions:						
Request for review received	212	193	174	5	14	0
Withdrawn before request ruled upon	3	3	3	0	0	0
Board action on request ruled upon, total	204	196	167	17	12	1
Granted	26	26	23	1	2	0
Denied	176	168	143	16	9	1
Remanded	2	2	1	0	1	0
Withdrawn after request granted, before Board review	0	0	0	0	0	0
Board decision after review, total	3	3	3	0	0	0
Regional Directors' decisions:						
Affirmed	1	1	1	0	0	0
Modified	1	1	1	0	0	0
Reversed	1	1	1	0	0	0

[1] See Glossary of terms for definitions.

Table 3C.—Formal Actions Taken in Amendment of Certification and Unit Clarification Cases, Fiscal Year 1988[1]

Types of formal actions taken	Cases in which formal actions taken	Formal actions taken by type of case	
		AC	UC
Hearings completed	88	0	83
Decisions issued after hearing	101	1	94
By Regional Directors	101	1	94
By Board	0	0	0
Transferred by Regional Directors for initial decision	0	0	0
Review of Regional Directors' decisions:			
Requests for review received	34	0	31
Withdrawn before request ruled upon	1	0	1
Board action on requests ruled upon, total	23	0	22
Granted	9	0	9
Denied	14	0	13
Remanded	0	0	0
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 of terms for definitions.

Table 4.—Remedial Actions Taken in Unfair Labor Practice Cases Closed, Fiscal Year 1988[1]

Action taken	Total all	Remedial action taken by—											
		Employer						Union					
		Total	Pursuant to—					Total	Pursuant to—				
			Agreement of parties		Recommendation of administrative law judge	Order of—			Agreement of parties		Recommendation of administrative law judge	Order of—	
			Informal settlement	Formal settlement		Board	Court		Informal settlement	Formal settlement		Board	Court
A. By number of cases involved	[2]10,281	—	—	—	—	—	—	—	—	—	—	—	—
Notice posted	3,237	2,293	1,615	92	8	391	187	944	663	141	0	94	46
Recognition or other assistance withdrawn	31	31	28	0	1	2	0	—	—	—	—	—	—
Employer-dominated union disestablished	4	4	3	0	0	0	1	—	—	—	—	—	—
Employees offered reinstatement	2,137	2,137	1,545	99	8	313	172	—	—	—	—	—	—
Employees placed on preferential hiring list	881	881	644	42	4	124	67	—	—	—	—	—	—
Hiring hall rights restored	239	—	—	—	—	—	—	239	166	43	3	17	10
Objections to employment withdrawn	231	—	—	—	—	—	—	231	160	43	3	15	10
Picketing ended	105	—	—	—	—	—	—	105	101	2	0	2	0
Work stoppage ended	86	—	—	—	—	—	—	86	83	3	0	0	0
Collective bargaining begun	3,007	2,793	2,525	55	1	122	90	214	201	1	0	9	3
Backpay distributed	3,285	2,898	2,434	79	6	257	122	387	290	47	3	34	13
Reimbursement of fees, dues, and fines	1,451	1,102	853	41	6	132	70	349	259	45	3	29	13
Other conditions of employment improved	987	622	605	1	1	14	1	365	348	3	4	5	5
Other remedies	0	0	0	0	0	0	0	0	0	0	0	0	0
B. By number of employees affected:													
Employees offered reinstatement, total	4,179	4,179	3,601	54	0	314	210	—	—	—	—	—	—
Accepted	2,789	2,789	2,515	39	0	149	86	—	—	—	—	—	—
Declined	1,390	1,390	1,086	15	0	165	124	—	—	—	—	—	—
Employees placed on preferential hiring list	249	249	196	2	0	22	29	0	0	0	0	0	0
Hiring hall rights restored	56	—	—	—	—	—	—	56	45	0	0	11	0
Objections to employment withdrawn	25	—	—	—	—	—	—	25	25	0	0	0	0

Table 4.—Remedial Actions Taken in Unfair Labor Practice Cases Closed, Fiscal Year 1988[1]—Continued

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
Employees receiving backpay:													
From either employer or union	17,628	17,487	14,415	502	7	1,490	1,073	141	106	14	0	18	3
From both employer and union	10	9	8	1	0	0	0	1	1	0	0	0	0
Employees reimbursed for fees, dues, and fines:													
From either employer or union	1,593	568	286	0	25	212	45	1,025	993	2	0	21	9
From both employer and union	0	0	0	0	0	0	0	0	0	0	0	0	0
C. By amounts of monetary recovery, total	$35,014,701	$33,920,098	$20,520,469	$878,271	$8,532	$7,108,591	$5,404,235	$1,094,603	$348,740	$182,739	$6,600	$456,130	$100,394
Backpay (includes all monetary payments except fees, dues, and fines)	34,641,876	33,737,888	20,404,999	871,950	2,762	7,070,599	5,387,578	903,988	198,114	182,651	0	428,371	94,852
Reimbursement of fees, dues, and fines	372,825	182,210	115,470	6,321	5,770	37,992	16,657	190,615	150,626	88	6,600	27,759	5,542

[1] See Glossary of terms for definitions. Data in this table are based on unfair labor practice cases that were closed during fiscal year 1988 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 1988[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	1,493	1,186	895	285	4	2	0	0	0	283	219	14	50	7	2	15
Tobacco manufacturers	14	12	3	9	0	0	0	0	0	2	2	0	0	0	0	0
Textile mill products	172	137	109	24	3	0	0	0	1	33	31	0	2	1	0	1
Apparel and other finished products made from fabric and similar materials	298	255	196	58	1	0	0	0	0	42	31	1	10	0	0	1
Lumber and wood products (except furniture)	439	324	275	47	0	0	0	0	2	113	85	7	21	1	0	1
Furniture and fixtures	421	330	272	57	0	1	0	0	0	85	60	10	15	4	0	2
Paper and allied products	534	459	368	86	4	0	0	0	1	66	49	3	14	2	1	6
Printing, publishing, and allied products	865	714	548	147	8	11	0	0	0	130	93	2	35	3	0	18
Chemicals and allied products	629	502	417	75	6	3	0	0	1	107	68	4	35	5	2	13
Petroleum refining and related industries	195	161	126	22	12	0	1	0	0	28	18	1	9	2	0	4
Rubber and miscellaneous plastic products	350	270	214	55	1	0	0	0	0	76	57	1	18	3	0	1
Leather and leather products	73	63	53	10	0	0	0	0	0	8	5	0	3	1	0	1
Stone, clay, glass, and concrete products	752	588	439	129	12	6	0	0	2	157	114	14	29	2	1	4
Primary metal industries	983	857	613	236	4	3	0	0	1	119	79	3	37	4	1	2
Fabricated metal products (except machinery and transportation equipment)	1,297	1,052	811	216	15	7	0	0	3	231	161	14	56	4	3	7
Machinery (except electrical)	1,134	897	683	206	7	0	1	0	0	221	167	5	49	5	1	10
Electrical and electronic machinery, equipment, and supplies	773	656	498	155	3	0	0	0	0	107	81	5	21	3	0	7
Aircraft and parts	413	388	234	154	0	0	0	0	0	24	24	0	0	0	0	1
Ship and boat building and repairing	181	156	98	54	4	0	0	0	0	23	20	0	3	0	1	1
Automotive and other transportation equipment	1,046	912	592	313	6	0	1	0	0	122	94	6	22	6	1	5
Measuring, analyzing, and controlling instruments; photographic, medical, and optical goods, watches and clocks	227	181	157	24	0	0	0	0	0	41	29	2	10	1	1	3
Miscellaneous manufacturing industries	784	610	379	202	16	9	1	0	3	162	129	8	25	7	2	3
Manufacturing	13,073	10,710	7,980	2,564	106	42	4	0	14	2,180	1,616	100	464	61	16	106

Table 5.—Industrial Distribution of Cases Received, Fiscal Year 1988[1]—Continued

Industrial group[2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Metal mining	74	63	52	10	1	0	0	0	0	8	6	0	2	0	1	2
Coal mining	486	464	381	64	14	0	1	0	4	21	16	0	5	0	0	1
Oil and gas extraction	38	22	17	5	0	0	0	0	0	14	11	0	3	0	2	0
Mining and quarrying of nonmetallic minerals (except fuels)	136	116	92	14	6	2	1	0	1	19	13	1	5	0	1	0
Mining	734	665	542	93	21	2	2	0	5	62	46	1	15	0	4	3
Construction	4,824	3,594	1,910	909	462	149	15	0	149	1,212	1,055	104	53	5	0	13
Wholesale trade	2,223	1,660	1,249	352	38	6	6	0	9	527	394	25	108	11	3	22
Retail trade	3,272	2,524	1,895	551	33	6	1	0	38	693	456	57	180	19	1	35
Finance, insurance, and real estate	666	508	386	95	21	3	0	0	3	148	122	6	20	2	1	7
U.S. Postal Service	1,962	1,961	1,395	565	1	0	0	0	0	1	1	0	0	0	0	0
Local and suburban transit and interurban highway passenger transportation	434	313	240	70	2	0	0	0	1	113	96	1	16	4	0	4
Motor freight transportation and warehousing	2,093	1,596	1,217	326	42	3	1	0	7	479	399	19	61	4	1	13
Water transportation	307	290	154	114	16	4	1	0	1	15	8	1	6	0	0	2
Other transportation	314	239	168	62	6	1	2	0	0	70	59	3	8	2	0	3
Communication	826	659	445	206	5	3	0	0	0	143	91	2	50	7	0	17
Electric, gas, and sanitary services	782	585	435	130	12	5	0	0	3	166	140	3	23	5	4	22
Transportation, communication, and other utilities	4,756	3,682	2,659	908	83	16	4	0	12	986	793	29	164	22	5	61
Hotels, rooming houses, camps, and other lodging places	697	585	421	149	13	1	1	0	0	106	82	7	17	3	0	3
Personal services	266	185	143	40	1	0	1	0	0	78	43	8	27	3	0	0
Automotive repair, services, and garages	356	237	172	59	5	0	0	0	1	117	89	7	21	1	0	1
Motion pictures	279	249	119	127	2	1	0	0	0	27	21	2	4	2	0	1
Amusement and recreation services (except motion pictures)	540	480	260	212	5	3	0	0	0	57	41	4	12	1	0	2
Health services	2,342	1,761	1,477	235	9	3	0	37	0	510	412	13	85	13	2	56
Educational services	243	172	143	28	1	0	0	0	0	61	52	4	5	0	0	10
Membership organizations	523	485	202	258	18	3	1	0	3	29	24	1	4	0	0	9
Business services	1,384	1,084	778	270	21	6	2	0	7	284	246	9	29	10	1	5
Miscellaneous repair services	123	94	71	22	0	1	0	0	0	27	19	2	6	0	1	1
Legal services	29	20	18	2	0	0	0	0	0	8	7	0	1	0	0	1
Museums, art galleries, and botanical and zoological gardens	9	5	4	1	0	0	0	0	0	3	2	1	0	1	0	0

Table 5.—Industrial Distribution of Cases Received, Fiscal Year 1988[1]—Continued

Industrial group[2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Social services	238	149	127	21	0	1	0	0	0	77	65	2	10	5	0	7
Miscellaneous services	307	282	71	203	2	1	0	0	5	24	18	2	4	0	1	0
Services	7,336	5,788	4,006	1,627	77	20	5	37	16	1,408	1,121	62	225	39	5	96
Public administration	505	361	244	103	9	1	2	0	2	131	96	8	27	6	2	5
Total, all industrial groups	39,351	31,453	22,266	7,767	851	245	39	37	248	7,348	5,700	392	1,256	165	37	348

[1] See Glossary of terms for definitions.
[2] Source: Standard Industrial Classification, Statistical Policy Division, Office of Management and Budget, Washington, D.C., 1972.

Table 6A.—Geographic Distribution of Cases Received, Fiscal Year 1988[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	105	79	69	10	0	0	0	0	0	25	16	1	8	1	0	0
New Hampshire	67	54	46	6	2	0	0	0	0	13	10	0	3	0	0	0
Vermont	37	28	22	6	0	0	0	0	0	8	6	0	2	0	0	1
Massachusetts	1,093	904	646	161	53	35	1	3	5	169	140	3	26	3	0	17
Rhode Island	183	152	123	24	3	1	0	1	0	26	23	0	3	0	0	5
Connecticut	636	528	405	110	6	2	0	4	1	96	75	8	13	5	0	7
New England	2,121	1,745	1,311	317	64	38	1	8	6	337	270	12	55	9	0	30
New York	3,495	2,846	1,781	937	64	32	4	7	21	588	485	23	80	13	1	47
New Jersey	1,479	1,177	857	258	41	15	0	1	5	275	224	10	41	9	1	17
Pennsylvania	2,591	2,160	1,614	423	74	33	5	5	6	392	300	18	74	10	6	23
Middle Atlantic	7,565	6,183	4,252	1,618	179	80	9	13	32	1,255	1,009	51	195	32	8	87
Ohio	2,412	1,936	1,496	366	54	1	1	1	17	437	337	13	87	19	2	18
Indiana	1,390	1,169	809	291	47	10	3	0	9	198	142	8	48	11	1	11
Illinois	2,451	1,858	1,252	481	70	28	2	1	24	575	473	46	56	6	0	12
Michigan	2,224	1,757	1,324	384	31	4	0	1	13	433	348	16	69	9	1	24
Wisconsin	837	657	482	152	14	4	0	0	5	168	122	5	41	3	2	7
East North Central	9,314	7,377	5,363	1,674	216	47	6	3	68	1,811	1,422	88	301	48	6	72
Iowa	323	214	158	44	9	2	0	0	1	107	84	6	17	0	0	2
Minnesota	527	356	261	65	25	3	0	0	2	160	124	5	31	2	0	9
Missouri	1,256	1,024	687	241	57	19	3	1	16	218	143	15	60	6	1	7
North Dakota	25	16	12	4	0	0	0	0	0	9	7	0	2	0	0	0
South Dakota	42	31	25	6	0	0	0	0	0	11	6	3	2	0	0	0
Nebraska	123	95	60	19	7	0	0	0	9	27	21	2	4	0	0	1
Kansas	225	160	118	35	4	1	0	0	2	62	49	3	10	0	3	0
West North Central	2,521	1,896	1,321	414	102	25	3	1	30	594	434	34	126	8	4	19
Delaware	114	96	40	49	7	0	0	0	0	16	12	0	4	0	0	2
Maryland	709	615	407	193	11	2	0	0	2	88	72	2	14	2	1	3

Table 6A.—Geographic Distribution of Cases Received, Fiscal Year 1988[1]—Continued

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
District of Columbia	244	207	162	43	1	0	0	0	1	26	24	0	2	2	0	9
Virginia	575	504	383	111	6	2	1	0	1	70	53	3	14	0	0	1
West Virginia	563	499	391	92	10	0	0	0	6	59	47	2	10	2	1	2
North Carolina	405	353	279	74	0	0	0	0	0	48	41	1	6	0	0	4
South Carolina	156	121	86	35	0	0	0	0	0	35	28	2	5	0	0	0
Georgia	626	513	381	128	3	1	0	0	0	111	92	6	13	0	1	1
Florida	1,012	837	569	260	8	0	0	0	0	169	150	2	17	0	0	6
South Atlantic	4,404	3,745	2,698	985	46	5	1	0	10	622	519	18	85	6	3	28
Kentucky	647	534	441	83	4	3	0	0	3	107	79	3	25	2	0	4
Tennessee	790	657	558	89	9	1	0	0	0	129	105	7	17	0	1	3
Alabama	474	364	294	60	2	2	0	0	6	107	86	0	21	0	0	3
Mississippi	210	175	153	20	0	0	0	2	0	34	31	0	3	1	0	0
East South Central	2,121	1,730	1,446	252	15	6	0	2	9	377	301	10	66	3	1	10
Arkansas	177	134	115	18	0	0	0	0	1	37	26	0	11	0	0	6
Louisiana	237	200	157	39	2	0	0	0	2	35	30	1	4	0	1	1
Oklahoma	243	192	151	41	0	0	0	0	0	50	37	5	8	0	1	0
Texas	1,136	980	660	307	11	0	2	0	0	149	103	6	40	0	1	6
West South Central	1,793	1,506	1,083	405	13	0	2	0	3	271	196	12	63	0	3	13
Montana	174	111	91	12	4	2	0	0	2	57	37	6	14	5	0	1
Idaho	79	63	53	9	0	1	0	0	0	16	7	0	9	0	0	0
Wyoming	53	45	39	4	2	0	0	0	0	7	6	0	1	0	0	1
Colorado	582	474	349	114	11	0	0	0	0	96	72	3	21	1	4	7
New Mexico	160	121	78	42	0	0	0	1	0	33	27	1	5	2	2	2
Arizona	472	332	245	82	3	0	0	0	2	137	109	9	19	0	1	2
Utah	116	80	61	14	1	1	0	0	3	32	29	1	2	0	2	2
Nevada	531	462	201	249	2	1	1	1	7	67	60	3	4	0	0	2
Mountain	2,167	1,688	1,117	526	23	5	1	2	14	445	347	23	75	8	9	17

Table 6A.—Geographic Distribution of Cases Received, Fiscal Year 1988[1]—Continued

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
Washington	894	642	460	155	17	1	1	0	8	234	143	28	63	9	0	9
Oregon	527	357	255	69	22	5	0	2	4	158	107	18	33	7	0	5
California	5,302	4,127	2,598	1,271	149	31	15	4	59	1,098	834	89	175	30	2	45
Alaska	138	104	70	31	1	0	0	0	2	33	25	6	2	0	0	1
Hawaii	174	117	87	21	4	2	0	0	3	48	46	0	2	5	0	4
Guam	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Pacific	7,035	5,347	3,470	1,547	193	39	16	6	76	1,571	1,155	141	275	51	2	64
Puerto Rico	295	224	194	28	0	0	0	2	0	62	45	2	15	0	1	8
Virgin Islands	15	12	11	1	0	0	0	0	0	3	2	1	0	0	0	0
Outlying areas	310	236	205	29	0	0	0	2	0	65	47	3	15	0	1	8
Total, all States and areas	39,351	31,453	22,266	7,767	851	245	39	37	248	7,348	5,700	392	1,256	165	37	348

[1] See Glossary of terms for definitions.
[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 1988[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	636	528	405	110	6	2	0	4	1	96	75	8	13	5	0	7
Maine	105	79	69	10	0	0	0	0	0	25	16	1	8	1	0	0
Massachusetts	1,093	904	646	161	53	35	1	3	5	169	140	3	26	3	0	17
New Hampshire	67	54	46	6	2	0	0	0	0	13	10	0	3	0	0	0
Rhode Island	183	152	123	24	3	1	0	1	0	26	23	0	3	0	0	5
Vermont	37	28	22	6	0	0	0	0	0	8	6	0	2	0	0	1
Region I	2,121	1,745	1,311	317	64	38	1	8	6	337	270	12	55	9	0	30
Delaware	114	96	40	49	7	0	0	0	0	16	12	0	4	0	0	2
New Jersey	1,479	1,177	857	258	41	15	0	1	5	275	224	10	41	9	1	17
New York	3,495	2,846	1,781	937	64	32	4	7	21	588	485	23	80	13	1	47
Puerto Rico	295	224	194	28	0	0	0	2	0	62	45	2	15	0	1	8
Virgin Islands	15	12	11	1	0	0	0	0	0	3	2	1	0	0	0	0
Region II	5,398	4,355	2,883	1,273	112	47	4	10	26	944	768	36	140	22	3	74
District of Columbia	244	207	162	43	1	0	0	0	1	26	24	0	2	2	0	9
Maryland	709	615	407	193	11	2	0	0	2	88	72	2	14	2	1	3
Pennsylvania	2,591	2,160	1,614	423	74	33	5	5	6	392	300	18	74	10	6	23
Virginia	575	504	383	111	6	2	1	0	1	70	53	3	14	0	0	1
West Virginia	563	499	391	92	10	0	0	0	6	59	47	2	10	2	1	2
Region III	4,682	3,985	2,957	862	102	37	6	5	16	635	496	25	114	16	8	38
Alabama	474	364	294	60	2	2	0	0	6	107	86	0	21	0	0	3
Florida	1,012	837	569	260	8	0	0	0	0	169	150	2	17	0	0	6
Georgia	626	513	381	128	3	1	0	0	0	111	92	6	13	0	1	1
Kentucky	647	534	441	83	4	3	0	0	3	107	79	3	25	2	0	4
Mississippi	210	175	153	20	0	0	0	2	0	34	31	0	3	1	0	0
North Carolina	405	353	279	74	0	0	0	0	0	48	41	1	6	0	0	4

Table 6B.—Standard Federal Administrative Regional Distribution of Cases Received, Fiscal Year 1988[1]—Continued

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
South Carolina	156	121	86	35	0	0	0	0	0	35	28	2	5	0	0	0
Tennessee	790	657	558	89	9	1	0	0	0	129	105	7	17	0	1	3
Region IV	4,320	3,554	2,761	749	26	7	0	2	9	740	612	21	107	3	2	21
Illinois	2,451	1,858	1,252	481	70	28	2	1	24	575	473	46	56	6	0	12
Indiana	1,390	1,169	809	291	47	10	3	0	9	198	142	8	48	11	1	11
Michigan	2,224	1,757	1,324	384	31	4	0	1	13	433	348	16	69	9	1	24
Minnesota	527	356	261	65	25	3	0	0	2	160	124	5	31	2	0	9
Ohio	2,412	1,936	1,496	366	54	1	1	1	17	437	337	13	87	19	2	18
Wisconsin	837	657	482	152	14	4	0	0	5	168	122	5	41	3	2	7
Region V	9,841	7,733	5,624	1,739	241	50	6	3	70	1,971	1,546	93	332	50	6	81
Arkansas	177	134	115	18	0	0	0	0	1	37	26	0	11	0	0	6
Louisiana	237	200	157	39	2	0	0	0	2	35	30	1	4	0	1	1
New Mexico	160	121	78	42	0	0	0	1	0	33	27	1	5	2	2	2
Oklahoma	243	192	151	41	0	0	0	0	0	50	37	5	8	0	1	0
Texas	1,136	980	660	307	11	0	2	0	0	149	103	6	40	0	1	6
Region VI	1,953	1,627	1,161	447	13	0	2	1	3	304	223	13	68	2	5	15
Iowa	323	214	158	44	9	2	0	0	1	107	84	6	17	0	0	2
Kansas	225	160	118	35	4	1	0	0	2	62	49	3	10	0	3	0
Missouri	1,256	1,024	687	241	57	19	3	1	16	218	143	15	60	6	1	7
Nebraska	123	95	60	19	7	0	0	0	9	27	21	2	4	0	0	1
Region VII	1,927	1,493	1,023	339	77	22	3	1	28	414	297	26	91	6	4	10
Colorado	582	474	349	114	11	0	0	0	0	96	72	3	21	1	4	7
Montana	174	111	91	12	4	2	0	0	2	57	37	6	14	5	0	1
North Dakota	25	16	12	4	0	0	0	0	0	9	7	0	2	0	0	0
South Dakota	42	31	25	6	0	0	0	0	0	11	6	3	2	0	0	0
Utah	116	80	61	14	1	1	0	0	3	32	29	1	2	0	2	2
Wyoming	53	45	39	4	2	0	0	0	0	7	6	0	1	0	0	1

Table 6B.—Standard Federal Administrative Regional Distribution of Cases Received, Fiscal Year 1988[1]—Continued

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
Region VIII	992	757	577	154	18	3	0	0	5	212	157	13	42	6	6	11
Arizona	472	332	245	82	3	0	0	0	2	137	109	9	19	0	1	2
California	5,302	4,127	2,598	1,271	149	31	15	4	59	1,098	834	89	175	30	2	45
Hawaii	174	117	87	21	4	2	0	0	3	48	46	0	2	5	0	4
Guam	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Nevada	531	462	201	249	2	1	1	1	7	67	60	3	4	0	0	2
Region IX	6,479	5,038	3,131	1,623	158	34	16	5	71	1,350	1,049	101	200	35	3	53
Alaska	138	104	70	31	1	0	0	0	2	33	25	6	2	0	0	1
Idaho	79	63	53	9	0	1	0	0	0	16	7	0	9	0	0	0
Oregon	527	357	255	69	22	5	0	2	4	158	107	18	33	7	0	5
Washington	894	642	460	155	17	1	1	0	8	234	143	28	63	9	0	9
Region X	1,638	1,166	838	264	40	7	1	2	14	441	282	52	107	16	0	15
Total, all States and areas	39,351	31,453	22,266	7,767	851	245	39	37	248	7,348	5,700	392	1,256	165	37	348

[1] See Glossary of terms for definitions.
[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 1988[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	30,090	100.0	0.0	21,156	100.0	7,436	100.0	958	100.0	236	100.0	32	100.0	37	100 0	235	100.0
Agreement of the parties	9,390	31.2	100.0	7,363	34.8	1,388	18 6	513	53 5	2	0.8	12	37.5	14	37.8	98	41 7
Informal settlement	9,142	30.4	97 4	7,255	34.2	1,324	17.8	451	47.0	2	0.8	12	37.5	14	37.8	84	35 7
Before issuance of complaint	6,564	21.8	69.9	5,166	24.4	966	12.9	350	36.5	(2)	0.0	9	28.1	8	21.6	65	27.6
After issuance of complaint, before opening of hearing	2,540	8.4	27.1	2,063	9.7	350	4.7	98	10.2	1	0 4	3	9 3	6	16 2	19	8 0
After hearing opened, before issuance of administrative law judge's decision	38	0 1	0.4	26	0.1	8	0.1	3	0.3	1	0.4	0	0.0	0	0.0	0	0.0
Formal settlement	248	0.8	2.6	108	0.5	64	0.8	62	6.4	0	0.0	0	0 0	0	0.0	14	5 9
After issuance of complaint, before opening of hearing	195	0.6	2 1	65	0.3	55	0.7	62	6.4	0	0.0	0	0.0	0	0.0	13	5.5
Stipulated decision	41	0 1	0.4	30	0.1	3	0.0	8	0.8	0	0.0	0	0.0	0	0.0	0	0.0
Consent decree	154	0.5	1.6	35	0.1	52	0.6	54	5.6	0	0 0	0	0 0	0	0.0	13	5.5
After hearing opened	53	0.2	0.6	43	0.2	9	0 1	0	0 0	0	0.0	0	0.0	0	0.0	1	0.4
Stipulated decision	6	0.0	0.1	6	0 0	0	0.0	0	0.0	0	0.0	0	0 0	0	0.0	0	0 0
Consent decree	47	0 2	0.5	37	0.1	9	0.1	0	0.0	0	0.0	0	0.0	0	0.0	1	0.4
Compliance with	797	2.6	100 0	638	3.0	130	1.7	18	1.8	4	1.6	1	3.1	0	0.0	6	2.5
Administrative law judge's decision	10	0.0	1 3	5	0 0	5	0.0	0	0.0	0	0 0	0	0 0	0	0 0	0	0 0
Board decision	535	1.8	67.1	433	2.0	86	1.1	11	1.1	1	0.4	1	3.1	0	0.0	3	1.2
Adopting administrative law judge's decision (no exceptions filed)	183	0.6	23 0	144	0.6	33	0 4	3	0.3	1	0.4	0	0 0	0	0.0	2	0 8
Contested	352	1 2	44.2	289	1.3	53	0.7	8	0.8	0	0 0	1	3.1	0	0.0	1	0.4
Circuit court of appeals decree	239	0.8	30 0	187	0.8	39	0.5	7	0 7	3	1.2	0	0.0	0	0.0	3	1.2

Table 7.—Analysis of Methods of Disposition of Unfair Labor Practice Cases Closed, Fiscal Year 1988[1]—Continued

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
Supreme Court action	13	0.0	1.6	13	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Withdrawal	9,440	31.4	100.0	6,863	32.4	2,169	29.1	311	32.4	1	0.4	10	31.2	16	43.2	70	29.7
Before issuance of complaint	9,202	30.6	97.5	6,676	31.5	2,137	28.7	298	31.1	(2)	0.0	8	25.0	15	40.5	68	28.9
After issuance of complaint, before opening of hearing	218	0.7	2.3	175	0.8	26	0.3	11	1.1	1	0.4	2	6.2	1	2.7	2	0.8
After hearing opened, before administrative law judge's decision	20	0.1	0.2	12	0.0	6	0.0	2	0.2	0	0.0	0	0.0	0	0.0	0	0.0
After administrative law judge's decision, before Board decision	0	0.0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
After Board or court decision	0	0.0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Dismissal	10,161	33.8	100.0	6,232	29.4	3,736	50.2	116	12.1	0	0.0	9	28.1	7	18.9	61	25.9
Before issuance of complaint	9,902	32.9	97.5	6,020	28.4	3,693	49.6	115	12.0	(2)	0.0	9	28.1	6	16.2	59	25.1
After issuance of complaint, before opening of hearing	63	0.2	0.6	54	0.2	9	0.1	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
After hearing opened, before administrative law judge's decision	7	0.0	0.1	6	0.0	1	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
By administrative law judge's decision	0	0.0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
By Board decision	179	0.6	1.8	144	0.6	31	0.4	1	0.1	0	0.0	0	0.0	1	2.7	2	0.8
Adopting administrative law judge's decision (no exceptions filed)	10	0.0	0.1	7	0.0	2	0.0	1	0.1	0	0.0	0	0.0	0	0.0	0	0.0
Contested	169	0.6	1.7	137	0.6	29	0.3	0	0.0	0	0.0	0	0.0	1	2.7	2	0.8
By circuit court of appeals decree	10	0.0	0.1	8	0.0	2	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
By Supreme Court action	0	0.0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
(k) actions (see Table 7A for details of dispositions)	229	0.8	0.0	0	0.0	0	0.0	0	0.0	229	97.0	0	0.0	0	0.0	0	0.0
Otherwise (compliance with order of administrative law judge or Board not achieved—firm went out of business)	73	0.2	0.0	60	0.2	13	0.1	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0

[1] See Table 8 for summary of disposition by stage. See Glossary of terms for definitions.
[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 1988[1]

Method and stage of disposition	Number of cases	Percent of total closed
Total number of cases closed before issuance of complaint	229	100.0
Agreement of the parties—informal settlement	91	39 7
Before 10(k) notice	71	31.0
After 10(k) notice, before opening of 10(k) hearing	19	8.3
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	1	0 4
Compliance with Board decision and determination of dispute	3	1.3
Withdrawal	91	39.7
Before 10(k) notice	75	32.8
After 10(k) notice, before opening of 10(k) hearing	11	4.8
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	5	2.2
After Board decision and determination of dispute	0	0.0
Dismissal	44	19.2
Before 10(k) notice	36	15.7
After 10(k) notice, before opening of 10(k) hearing	5	2.2
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	1	0.4
By Board decision and determination of dispute	2	0 9

[1] See Glossary of terms for definitions.

Table 8.—Disposition by Stage of Unfair Labor Practice Cases Closed, Fiscal Year 1988[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	30,090	100.0	21,156	100.0	7,436	100 0	958	100.0	236	100.0	32	100.0	37	100.0	235	100.0
Before issuance of complaint	25,897	86 1	17,862	84.4	6,796	91.4	763	79.6	229	97.0	26	81.3	29	78 4	192	81.7
After issuance of complaint, before opening of hearing	3,016	10.0	2,357	11.1	440	5 9	171	17 8	2	0.8	5	15.6	7	18.9	34	14 5
After hearing opened, before issuance of administrative law judge's decision	118	0.4	87	0.4	24	0.3	5	0.5	1	0.4	0	0.0	0	0.0	1	0.4
After administrative law judge's decision, before issuance of Board decision	10	0 0	5	0.0	5	0.1	0	0.0	0	0.0	0	0.0	0	0 0	0	0 0
After Board order adopting administrative law judge's decision in absence of exceptions	219	0.8	174	0 9	38	0 5	4	0.4	1	0.4	0	0.0	0	0.0	2	0.9
After Board decision, before circuit court decree	568	1 9	463	2.2	92	1.2	8	0.8	0	0.0	1	3.1	1	2.7	3	1.3
After circuit court decree, before Supreme Court action	249	0.8	195	0 9	41	0.6	7	0 7	3	1.3	0	0.0	0	0 0	3	1.3
After Supreme Court action	13	0.0	13	0.1	0	0.0	0	0 0	0	0.0	0	0.0	0	0.0	0	0.0

[1] See Glossary of terms for definitions.

Table 9.—Disposition by Stage of Representation and Union Deauthorization Cases Closed, Fiscal Year 1988[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	7,110	100 0	5,451	100.0	395	100.0	1,264	100.0	156	100.0
Before issuance of notice of hearing	2,427	34.1	1,574	28.9	198	50.1	655	51 8	114	73.1
After issuance of notice, before close of hearing	3,680	51.8	3,049	55 9	148	37.5	483	38.2	6	3.8
After hearing closed, before issuance of decision	72	1.0	57	1.0	9	2 3	6	0.5	0	0.0
After issuance of Regional Director's decision	904	12.7	749	13.7	37	9.4	118	9.3	35	22.4
After issuance of Board decision	27	0.4	22	0 4	3	0.8	2	0.2	1	0.6

[1] See Glossary of terms for definitions.

Table 10.—Analysis of Methods of Disposition of Representation and Union Deauthorization Cases Closed, Fiscal Year 1988[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	7,110	100.0	5,451	100.0	395	100.0	1,264	100.0	156	100.0
Certification issued, total	4,351	61.2	3,495	64.1	160	40 5	696	55.1	84	53 8
After:										
Consent election	75	1.1	53	1 0	1	0.3	21	1.7	5	3.2
Before notice of hearing	31	0 4	21	0 4	0	0.0	10	0.8	5	3.2
After notice of hearing, before hearing closed	43	0.6	31	0.6	1	0.3	11	0.9	0	0 0
After hearing closed, before decision	1	0.0	1	0.0	0	0.0	0	0 0	0	0.0
Stipulated election	3,573	50.3	2,870	52.7	127	32.2	576	45.6	45	28.8
Before notice of hearing	1,164	16.4	826	15.2	65	16.5	273	21.6	43	27.6
After notice of hearing, before hearing closed	2,392	33.6	2,031	37.3	60	15 2	301	23.8	2	1.3
After hearing closed, before decision	17	0.2	13	0.2	2	0.5	2	0.2	0	0.0
Expedited election	12	0.2	7	0.1	5	1.3	0	0.0	0	0.0
Regional Director-directed election	688	9.7	563	10.3	27	6.8	98	7.8	34	21 8
Board-directed election	3	0.0	2	0 0	0	0.0	1	0.1	0	0.0
By withdrawal, total	2,276	32.0	1,731	31.8	176	44 6	369	29 2	65	41.7
Before notice of hearing	983	13.8	661	12.1	93	23 5	229	18.1	60	38 5
After notice of hearing, before hearing closed	1,136	16.0	937	17 2	72	18.2	127	10.0	4	2.6
After hearing closed, before decision	53	0.7	42	0.8	7	1 8	4	0.3	0	0.0
After Regional Director's decision and direction of election	100	1.4	88	1 6	3	0.8	9	0.7	1	0.6
After Board decision and direction of election	4	0.1	3	0.1	1	0.3	0	0 0	0	0.0
By dismissal, total	483	6.8	225	4 1	59	14.9	199	15 7	7	4.5
Before notice of hearing	238	3.3	60	1.1	35	8.9	143	11.3	6	3.8
After notice of hearing, before hearing closed	108	1.5	49	0.9	15	3.8	44	3.5	0	0.0
After hearing closed, before decision	1	0.0	1	0.0	0	0.0	0	0.0	0	0.0
By Regional Director's decision	117	1.6	99	1.8	7	1.8	11	0 9	0	0.0
By Board decision	19	0.3	16	0.3	2	0.5	1	0 1	1	0.6

[1] See Glossary of terms for definitions.

Table 10A.—Analysis of Methods of Disposition of Amendment of Certification and Unit Clarification Cases Closed, Fiscal Year 1988

	AC	UC
Total, all	30	315
Certification amended or unit clarified	8	60
Before hearing	0	0
By Regional Director's decision	0	0
By Board decision	0	0
After hearing	8	60
By Regional Director's decision	8	60
By Board decision	0	0
Dismissed	10	80
Before hearing	3	14
By Regional Director's decision	3	14
By Board decision	0	0
After hearing	7	66
By Regional Director's decision	6	66
By Board decision	1	0
Withdrawn	12	175
Before hearing	12	175
After hearing	0	0

Table 11.—Types of Elections Resulting in Certification in Cases Closed, Fiscal Year 1988[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	4,239	71	3,456	14	688	10
Eligible voters	248,854	2,034	193,275	1,597	51,704	244
Valid votes	218,014	1,731	171,139	1,483	43,560	101
RC cases:						
Elections	3,377	46	2,766	9	550	6
Eligible voters	208,394	1,304	160,607	752	45,514	217
Valid votes	183,237	1,099	142,492	688	38,883	75
RM cases:						
Elections	132	1	107	0	20	4
Eligible voters	3,044	4	2,602	0	411	27
Valid votes	2,614	3	2,231	0	354	26
RD cases:						
Elections	644	18	538	4	84	0
Eligible voters	32,254	538	26,847	813	4,056	0
Valid votes	28,241	460	23,827	764	3,190	0
UD cases:						
Elections	86	6	45	1	34	—
Eligible voters	5,162	188	3,219	32	1,723	—
Valid votes	3,922	169	2,589	31	1,133	—

[1] See Glossary of terms for definitions.

Table 11A.—Analysis of Elections Conducted in Representation Cases Closed, Fiscal Year 1988

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	4,259	16	90	4,153	3,483	16	90	3,377	132	0	0	132	644	0	0	644
Rerun required	—	—	67	—	—	—	67	—	—	—	0	—	—	—	0	—
Runoff required	—	—	23	—	—	—	23	—	—	—	0	—	—	—	0	—
Consent elections	65	0	0	65	46	0	0	46	1	0	0	1	18	0	0	18
Rerun required	—	—	0	—	—	—	0	—	—	—	0	—	—	—	0	—
Runoff required	—	—	0	—	—	—	0	—	—	—	0	—	—	—	0	—
Stipulated elections	3,517	16	90	3,411	2,872	16	90	2,766	107	0	0	107	538	0	0	538
Rerun required	—	—	67	—	—	—	67	—	—	—	0	—	—	—	0	—
Runoff required	—	—	23	—	—	—	23	—	—	—	0	—	—	—	0	—
Regional Director-directed	654	0	0	654	550	0	0	550	20	0	0	20	84	0	0	84
Rerun required	—	—	0	—	—	—	0	—	—	—	0	—	—	—	0	—
Runoff required	—	—	0	—	—	—	0	—	—	—	0	—	—	—	0	—
Board-directed	13	0	0	13	9	0	0	9	0	0	0	0	4	0	0	4
Rerun required	—	—	0	—	—	—	0	—	—	—	0	—	—	—	0	—
Runoff required	—	—	0	—	—	—	0	—	—	—	0	—	—	—	0	—
Expedited—Sec. 8(b)(7)(C)	10	0	0	10	6	0	0	6	4	0	0	4	0	0	0	0
Rerun required	—	—	0	—	—	—	0	—	—	—	0	—	—	—	0	—
Runoff required	—	—	0	—	—	—	0	—	—	—	0	—	—	—	0	—

[1] The total of representation elections resulting in certification excludes elections held in UD cases which are included in the totals in Table 11

Table 11B.—Representation Elections in Which Objections and/or Determinative Challenges Were Ruled On in Cases Closed, Fiscal Year 1988

	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	4,259	323	7.6	148	3.5	92	2.2	415	9 7	240	5.6
By type of case.											
In RC cases	3,483	287	8.2	124	3.6	85	2.4	372	10.7	209	6.0
In RM cases	132	10	7.6	9	6.8	1	0.8	11	8.3	10	7.6
In RD cases	644	26	4.0	15	2 3	6	0 9	32	5.0	21	3 3
By type of election.											
Consent elections	65	3	4 6	2	3.1	0	0.0	3	4.6	2	3.1
Stipulated elections	3,517	211	6.0	118	3 4	85	2.4	296	8.4	203	5.8
Expedited elections	10	1	10 0	1	10.0	1	10.0	2	20 0	2	20.0
Regional Director-directed elections	654	103	15.7	27	4 1	6	0.9	109	16.7	33	5.0
Board-directed elections	13	5	38 5	0	0.0	0	0.0	5	38.5	0	0.0

[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 1988[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	450	100.0	185	41.1	248	55.1	17	3.8
By type of case:								
RC cases	402	100.0	172	42.8	214	53.2	16	4.0
RM cases	12	100.0	2	16.7	10	83.3	0	0.0
RD cases	36	100.0	11	30.6	24	66.7	1	2.7
By type of election:								
Consent elections	3	100.0	3	100.0	0	0.0	0	0.0
Stipulated elections	328	100.0	133	40.6	186	56.7	9	2.7
Expedited elections	2	100.0	0	0.0	0	0.0	2	100.0
Regional Director-directed elections	112	100.0	48	42.9	58	51.7	6	5.4
Board-directed elections	5	100.0	1	20.0	4	80.0	0	0.0

[1] See Glossary of terms for definitions.
[2] Objections filed by more than one party in the same cases are counted as one.

Table 11D.—Disposition of Objections in Representation Cases Closed, Fiscal Year 1988[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	450	35	415	311	74.9	104	25.1
By type of case:							
RC cases	402	30	372	276	74.2	96	25.8
RM cases	12	1	11	9	81.8	2	18.2
RD cases	36	4	32	26	81.2	6	18.8
By type of election:							
Consent elections	3	0	3	2	66.7	1	33.3
Stipulated elections	328	32	296	214	72.3	82	27.7
Expedited elections	2	0	2	2	100.0	0	0.0
Regional Director-directed elections	112	3	109	90	82.6	19	17.4
Board-directed elections	5	0	5	3	60.0	2	40.0

[1] See Glossary of *terms* for definitions
[2] See Table 11E for rerun elections held after objections were sustained. In 37 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 1988[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	64	100.0	17	26.6	47	73.4	28	43.8
By type of case:								
RC cases	54	100.0	14	25.9	40	74.1	24	44.4
RM cases	4	100.0	1	25.0	3	75.0	1	25.0
RD cases	6	100.0	2	33.3	4	66.7	3	50.0
By type of election:								
Consent elections	2	100.0	1	50.0	1	50.0	0	0.0
Stipulated elections	49	100.0	13	26.5	36	73.5	22	44.9
Expedited elections	0	—	0	—	0	—	0	—
Regional Director-directed elections	10	100.0	2	20.0	8	80.0	5	50.0
Board-directed elections	3	100.0	1	33.3	2	66.7	1	33.3

[1] See Glossary of terms for definitions

[2] More than 1 rerun election was conducted in 3 cases, however, only the final election is included in this table.

Table 12.—Results of Union-Shop Deauthorization Polls in Cases Closed, Fiscal Year 1988

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	
		Number	Percent of total	Number	Percent of total		Resulting in deauthorization		Resulting in continued authorization				Number	Percent of total eligible
							Number	Percent of total	Number	Percent of total				
Total	86	48	55.8	38	44.2	5,162	2,300	44.6	2,862	55.4	3,922	76.0	1,983	38.4
AFL–CIO unions	59	28	47.5	31	52 5	4,066	1,706	42.0	2,360	58.0	3,044	74.9	1,480	36.4
Teamsters	19	13	68 4	6	31.6	642	215	33.5	427	66 5	510	79.4	206	32.1
Other national unions	2	2	100 0	0	0.0	162	162	100.0	0	0.0	114	70.4	114	70.4
Other local unions	6	5	83.3	1	16.7	292	217	74.3	75	25.7	254	87.0	183	62 7

[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 1988[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	2,471	46.6	1,151	1,151	—	—	—	1,320	161,943	58,363	58,363	—	—	—	103,580
Teamsters	1,204	39.8	479	—	479	—	—	725	44,032	16,119	—	16,119	—	—	27,913
Other national unions	111	51.4	57	—	—	57	—	54	6,962	2,279	—	—	2,279	—	4,683
Other local unions	202	49.0	99	—	—	—	99	103	12,810	5,949	—	—	—	5,949	6,861
1-union elections	3,988	44.8	1,786	1,151	479	57	99	2,202	225,747	82,710	58,363	16,119	2,279	5,949	143,037
AFL–CIO v. AFL–CIO	21	66.7	14	14	—	—	—	7	1,747	976	976	—	—	—	771
AFL–CIO v Teamsters	29	55.2	16	5	11	—	—	13	2,063	572	43	529	—	—	1,491
AFL–CIO v. National	11	81.8	9	5	—	4	—	2	792	466	328	—	138	—	326
AFL–CIO v. Local	61	93.4	57	20	—	—	37	4	6,567	6,206	1,920	—	—	4,286	361
Teamsters v. National	5	100.0	5	—	2	3	—	0	413	413	—	52	361	—	0
Teamsters v. Local	12	91.7	11	—	5	—	6	1	562	523	—	210	—	313	39
Teamsters v Teamsters	2	100.0	2	—	2	—	—	0	58	58	—	58	—	—	0
National v. Local	8	87.5	7	—	—	4	3	1	1,559	1,534	—	—	843	691	25
Local v. Local	11	81.8	9	—	—	—	9	2	1,289	690	—	—	—	690	599
2-union elections	160	81.3	130	44	20	11	55	30	15,050	11,438	3,267	849	1,342	5,980	3,612
AFL–CIO v AFL–CIO v. Teamsters	1	100.0	1	1	0	—	—	0	45	45	45	0	—	—	0
AFL–CIO v. Teamsters v. National	1	100.0	1	1	0	0	—	0	587	587	587	0	0	—	0
AFL–CIO v Teamsters v. Local	2	100.0	2	1	0	—	1	0	895	895	820	0	—	75	0
AFL–CIO v. National v. Local	1	100.0	1	1	—	0	0	0	1,368	1,368	1,368	—	0	0	0
3 (or more)-union elections	5	100.0	5	4	0	0	1	0	2,895	2,895	2,820	0	0	75	0
Total representation elections	4,153	46.3	1,921	1,199	499	68	155	2,232	243,692	97,043	64,450	16,968	3,621	12,004	146,649

Table 13.—Final Outcome of Representation Elections in Cases Closed, Fiscal Year 1988[1]—Continued

Participating unions	Total elections[2]	Elections won by unions						Elections in which no representative chosen	Employees eligible to vote						In elections where no representative chosen
		Percent won	Total won	AFL–CIO unions	Teamsters	Other national unions	Other local unions		Total	In elections won	In units won by				
											AFL–CIO unions	Teamsters	Other national unions	Other local unions	
B. Elections in RC cases															
AFL–CIO	1,995	50.9	1,015	1,015	—	—	—	980	136,036	49,590	49,590	—	—	—	86,446
Teamsters	974	43.4	423	—	423	—	—	551	38,286	13,751	—	13,751	—	—	24,535
Other national unions	90	56.7	51	—	—	51	—	39	6,390	2,022	—	—	2,022	—	4,368
Other local unions	167	53.3	89	—	—	—	89	78	10,486	5,488	—	—	—	5,488	4,998
1-union elections	3,226	48.9	1,578	1,015	423	51	89	1,648	191,198	70,851	49,590	13,751	2,022	5,488	120,347
AFL–CIO v. AFL–CIO	20	65.0	13	13	—	—	—	7	1,591	820	820	—	—	—	771
AFL–CIO v. Teamsters	27	51.9	14	4	10	—	—	13	1,980	489	30	459	—	—	1,491
AFL–CIO v. National	11	81.8	9	5	—	4	—	2	792	466	328	—	138	—	326
AFL–CIO v. Local	54	92.6	50	19	—	—	31	4	6,220	5,859	1,898	—	—	3,961	361
Teamsters v. National	5	100.0	5	—	2	3	—	0	413	413	—	52	361	—	0
Teamsters v. Local	12	91.7	11	—	5	—	6	1	562	523	—	210	—	313	39
Teamsters v. Teamsters	1	100.0	1	—	1	—	—	0	10	10	—	10	—	—	0
National v. Local	7	100.0	7	—	—	4	3	0	1,534	1,534	—	—	843	691	0
Local v. Local	10	80.0	8	—	—	—	8	2	1,244	645	—	—	—	645	599
2-union elections	147	80.3	118	41	18	11	48	29	14,346	10,759	3,076	731	1,342	5,610	3,587
AFL–CIO v. Teamsters v. National	1	100.0	1	1	0	0	—	0	587	587	587	0	0	—	0
AFL–CIO v. Teamsters v. Local	2	100.0	2	1	0	—	1	0	895	895	820	0	—	75	0
AFL–CIO v. National v. Labor	1	100.0	1	1	—	0	0	0	1,368	1,368	1,368	—	0	0	0
3 (or more)-union elections	4	100.0	4	3	0	0	1	0	2,850	2,850	2,775	0	0	75	0
Total RC elections	3,377	50.3	1,700	1,059	441	62	138	1,677	208,394	84,460	55,441	14,482	3,364	11,173	123,934

Table 13.—Final Outcome of Representation Elections in Cases Closed, Fiscal Year 1988[1]—Continued

Participating unions	Total elections[2]	Elections won by unions						Elections in which no representative chosen	Employees eligible to vote							In elections where no representative chosen
		Percent won	Total won	AFL–CIO unions	Teamsters	Other national unions	Other local unions		Total	In elections won	In units won by					
											AFL–CIO unions	Teamsters	Other national unions	Other local unions		
C. Elections in RM cases																
AFL–CIO	76	15.8	12	12	—	—	—	64	1,724	354	354	—	—	—	1,370
Teamsters	42	33.3	14	—	14	—	—	28	773	367	—	367	—	—	406
Other national unions	1	100.0	1	—	—	1	—	0	19	19	—	—	19	—	0
Other local unions	6	50.0	3	—	—	—	3	3	301	123	—	—	—	123	178
1-union elections	125	24.0	30	12	14	1	3	95	2,817	863	354	367	19	123	1,954
AFL–CIO v. Teamsters	1	100.0	1	1	0	—	—	0	13	13	13	0	—	—	0
AFL–CIO v. Local	3	100.0	3	1	—	—	2	0	96	96	22	—	—	74	0
Teamsters v. Teamsters	1	100.0	1	—	1	—	—	0	48	48	—	48	—	—	0
National v. Local	1	0.0	0	—	—	0	0	1	25	0	—	—	0	0	25
2-union elections	6	83 3	5	2	1	0	2	1	182	157	35	48	0	74	25
AFL–CIO v. AFL–CIO v. Teamsters	1	100.0	1	1	0	—	—	0	45	45	45	0	—	—	0
3 (or more) union elections	1	100.0	1	1	0	0	0	0	45	45	45	0	0	0	0
Total RM elections	132	27.3	36	15	15	1	5	96	3,044	1,065	434	415	19	197	1,979
D. Elections in RD cases																
AFL–CIO	400	31.0	124	124	—	—	—	276	24,183	8,419	8,419	—	—	—	15,764
Teamsters	188	22.3	42	—	42	—	—	146	4,973	2,001	—	2,001	—	—	2,972
Other national unions	20	25.0	5	—	—	5	—	15	553	238	—	—	238	—	315
Other local unions	29	24.1	7	—	—	—	7	22	2,023	338	—	—	—	338	1,685
1-union elections	637	27.9	178	124	42	5	7	459	31,732	10,996	8,419	2,001	238	338	20,736
AFL–CIO v. AFL–CIO	1	100.0	1	1	—	—	—	0	156	156	156	—	—	—	0
AFL–CIO v. Teamsters	1	100.0	1	0	1	—	—	0	70	70	0	70	—	—	0
AFL–CIO v. Local	4	100.0	4	0	—	—	4	0	251	251	0	—	—	251	0
Local v. Local	1	100.0	1	—	—	—	1	0	45	45	—	—	—	45	0

Table 13.—Final Outcome of Representation Elections in Cases Closed, Fiscal Year 1988[1]—Continued

Participating unions	Total elections[2]	Elections won by unions						Elections in which no representative chosen	Employees eligible to vote						In elections where no representative chosen
		Percent won	Total won	AFL–CIO unions	Teamsters	Other national unions	Other local unions		Total	In elections won	In units won by				
											AFL–CIO unions	Teamsters	Other national unions	Other local unions	
2-union elections	7	100.0	7	1	1	0	5	0	522	522	156	70	0	296	0
Total RD elections	644	28.7	185	125	43	5	12	459	32,254	11,518	8,575	2,071	238	634	20,736

[1] See Glossary of terms for definitions.

[2] Includes each unit in which a choice regarding 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 1988[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	143,115	33,415	33,415	—	—	—	16,851	31,428	31,428	—	—	—	61,421
Teamsters	38,499	9,394	—	9,394	—	—	4,242	7,728	—	7,728	—	—	17,135
Other national unions	6,184	1,368	—	—	1,368	—	637	1,420	—	—	1,420	—	2,759
Other local unions	10,844	3,597	—	—	—	3,597	1,482	1,954	—	—	—	1,954	3,811
1-union elections	198,642	47,774	33,415	9,394	1,368	3,597	23,212	42,530	31,428	7,728	1,420	1,954	85,126
AFL–CIO v. AFL–CIO	1,524	711	711	—	—	—	109	267	267	—	—	—	437
AFL–CIO v. Teamsters	1,876	416	74	342	—	—	95	499	172	327	—	—	866
AFL–CIO v. National	608	349	194	—	155	—	12	110	29	—	81	—	137
AFL–CIO v. Local	5,774	5,027	1,916	—	—	3,111	424	144	68	—	—	76	179
Teamsters v. National	376	264	—	32	232	—	112	0	—	0	0	—	0
Teamsters v. Local	501	462	—	204	—	258	8	4	—	1	—	3	27
Teamsters v. Teamsters	49	49	—	49	—	—	0	0	—	0	—	—	0
National v Local	1,354	1,306	—	—	878	428	28	5	—	—	3	2	15
Local v. Local	994	471	—	—	—	471	10	165	—	—	—	165	348
2-union elections	13,056	9,055	2,895	627	1,265	4,268	798	1,194	536	328	84	246	2,009
AFL–CIO v. AFL–CIO v. Teamsters	37	37	23	14	—	—	0	0	0	0	—	—	0
AFL–CIO v. AFL–CIO v. National	469	295	286	0	9	—	174	0	0	0	0	—	0
AFL–CIO v Teamsters v. Local	814	802	512	9	—	281	12	0	0	0	—	0	0
AFL–CIO v. National v. Local	1,074	1,071	898	—	168	5	3	0	0	—	0	0	0
3 (or more)-union elections	2,394	2,205	1,719	23	177	286	189	0	0	0	0	0	0
Total representation elections	214,092	59,034	38,029	10,044	2,810	8,151	24,199	43,724	31,964	8,056	1,504	2,200	87,135

Table 14.—Valid Votes Cast in Representation Elections, by Final Results of Election, in Cases Closed, Fiscal Year 1988[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	
B. Elections in RC cases													
AFL–CIO	120,403	28,382	28,382	—	—	—	14,005	27,017	27,017	—	—	—	50,999
Teamsters	33,411	8,052	—	8,052	—	—	3,499	6,928	—	6,928	—	—	14,932
Other national unions	5,708	1,207	—	—	1,207	—	578	1,349	—	—	1,349	—	2,574
Other local unions	8,922	3,308	—	—	—	3,308	1,363	1,392	—	—	—	1,392	2,859
1-union elections	168,444	40,949	28,382	8,052	1,207	3,308	19,445	36,686	27,017	6,928	1,349	1,392	71,364
AFL–CIO v. AFL–CIO	1,386	574	574	—	—	—	108	267	267	—	—	—	437
AFL–CIO v. Teamsters	1,805	350	64	286	—	—	90	499	172	327	—	—	866
AFL–CIO v. National	608	349	194	—	155	—	12	110	29	—	81	—	137
AFL–CIO v. Local	5,468	4,756	1,827	—	—	2,929	389	144	68	—	—	76	179
Teamsters v. National	376	264	—	32	232	—	112	0	—	0	0	—	0
Teamsters v Local	501	462	—	204	—	258	8	4	—	1	—	3	27
Teamsters v. Teamsters	8	8	—	8	—	—	0	0	—	0	—	—	0
National v. Local	1,334	1,306	—	—	878	428	28	0	—	—	0	0	0
Local v. Local	950	427	—	—	—	427	10	165	—	—	—	165	348
2-union elections	12,436	8,496	2,659	530	1,265	4,042	757	1,189	536	328	81	244	1,994
AFL–CIO v Teamsters v. National	469	295	286	0	9	—	174	0	0	0	0	—	0
AFL–CIO v. Teamsters v. Local	814	802	512	9	—	281	12	0	0	0	—	0	0
AFL–CIO v. National v. Local	1,074	1,071	898	—	168	5	3	0	0	—	0	0	0
3 (or more)-union elections	2,357	2,168	1,696	9	177	286	189	0	0	0	0	0	0
Total RC elections	183,237	51,613	32,737	8,591	2,649	7,636	20,391	37,875	27,553	7,256	1,430	1,636	73,358

Table 14.—Valid Votes Cast in Representation Elections, by Final Results of Election, in Cases Closed, Fiscal Year 1988[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	1,465	199	199	—	—	—	115	266	266	—	—	—	885
Teamsters	716	238	—	238	—	—	115	87	—	87	—	—	276
Other national unions	17	16	—	—	16	—	1	0	—	—	0	—	0
Other local unions	225	86	—	—	—	86	16	15	—	—	—	15	108
1-*union elections*	2,423	539	199	238	16	86	247	368	266	87	0	15	1,269
AFL–CIO v. Teamsters	10	10	10	0	—	—	0	0	0	0	—	—	0
AFL–CIO v. Local	83	73	23	—	—	50	10	0	0	—	—	0	0
AFL–CIO v. Teamsters	41	41	—	41	—	—	0	0	—	0	—	—	0
National v. Local	20	0	—	—	0	0	0	5	—	—	3	2	15
2-union elections	154	124	33	41	0	50	10	5	0	0	3	2	15
AFL–CIO v. AFL–CIO v. Teamsters	37	37	23	14	—	—	0	0	0	0	—	—	0
3 (or more)-union elections	37	37	23	14	0	0	0	0	0	0	0	0	0
Total RM elections	2,614	700	255	293	16	136	257	373	266	87	3	17	1,284
D. Elections in RD cases													
AFL–CIO	21,247	4,834	4,834	—	—	—	2,731	4,145	4,145	—	—	—	9,537
Teamsters	4,372	1,104	—	1,104	—	—	628	713	—	713	—	—	1,927
Other national unions	459	145	—	—	145	—	58	71	—	—	71	—	185
Other local unions	1,697	203	—	—	—	203	103	547	—	—	—	547	844
1-union elections	27,775	6,286	4,834	1,104	145	203	3,520	5,476	4,145	713	71	547	12,493
AFL–CIO v. AFL–CIO	138	137	137	—	—	—	1	0	0	—	—	—	0
AFL–CIO v. Teamsters	61	56	0	56	—	—	5	0	0	0	—	—	0
AFL–CIO v. Local	223	198	66	—	—	132	25	0	0	—	—	0	0

Table 14.—Valid Votes Cast in Representation Elections, by Final Results of Election, in Cases Closed, Fiscal Year 1988[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	
AFL–CIO v. Local	44	44	—	—	—	44	0	0	—	—	—	0	0
2-union elections	466	435	203	56	0	176	31	0	0	0	0	0	0
Total RD elections	28,241	6,721	5,037	1,160	145	379	3,551	5,476	4,145	713	71	547	12,493

[1] See Glossary of terms for definitions.

Table 15A.—Geographic Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1988

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	15	10	6	1	3	0	5	558	531	296	214	25	57	0	235	402
New Hampshire	9	1	1	0	0	0	8	806	753	298	135	163	0	0	455	73
Vermont	4	1	0	0	0	1	3	386	333	135	105	4	5	21	198	28
Massachusetts	89	47	27	16	2	2	42	6,285	5,398	2,536	1,989	264	144	139	2,862	2,562
Rhode Island	20	9	6	1	1	1	11	2,085	1,846	847	654	163	18	12	999	532
Connecticut	61	34	13	13	2	6	27	2,267	2,075	1,105	378	281	190	256	970	1,341
New England	198	102	53	31	8	10	96	12,387	10,936	5,217	3,475	900	414	428	5,719	4,938
New York	313	156	106	29	1	20	157	17,490	13,607	7,300	4,576	1,279	141	1,304	6,307	9,080
New Jersey	146	66	40	17	2	7	80	8,934	7,471	3,780	2,282	745	109	644	3,691	3,710
Pennsylvania	256	105	71	23	3	8	151	14,350	12,691	6,188	3,836	920	184	1,248	6,503	5,542
Middle Atlantic	715	327	217	69	6	35	388	40,774	33,769	17,268	10,694	2,944	434	3,196	16,501	18,332
Ohio	250	107	66	30	8	3	143	16,112	14,672	7,199	5,170	1,178	481	370	7,473	5,853
Indiana	122	63	38	19	1	5	59	6,396	6,144	3,016	2,081	597	58	280	3,128	2,687
Illinois	260	126	69	30	10	17	134	10,643	9,377	4,939	2,454	817	886	782	4,438	4,594
Michigan	253	122	77	31	9	5	131	14,557	12,585	5,928	4,520	955	138	315	6,657	5,477
Wisconsin	100	52	34	16	0	2	48	6,220	5,608	2,625	1,704	672	26	223	2,983	1,880
East North Central	985	470	284	126	28	32	515	53,928	48,386	23,707	15,929	4,219	1,589	1,970	24,679	20,491
Iowa	71	40	25	12	0	3	31	1,602	1,344	699	417	263	0	19	645	677
Minnesota	105	48	29	14	0	5	57	5,047	4,396	2,011	1,249	625	0	137	2,385	1,663
Missouri	147	60	39	17	2	2	87	7,049	6,264	2,458	1,973	442	11	32	3,806	2,080
North Dakota	5	5	5	0	0	0	0	110	103	71	71	0	0	0	32	110
South Dakota	8	4	4	0	0	0	4	563	540	241	239	2	0	0	299	69
Nebraska	23	11	5	6	0	0	12	667	621	271	190	81	0	0	350	178
Kansas	35	15	10	5	0	0	20	2,002	1,699	671	333	212	0	126	1,028	399
West North Central	394	183	117	54	2	10	211	17,040	14,967	6,422	4,472	1,625	11	314	8,545	5,176

Table 15A.—Geographic Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1988—Continued

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		
Delaware	6	2	1	1	0	0	4	390	366	172	119	53	0	0	194	135
Maryland	37	15	9	2	1	3	22	2,447	2,139	869	316	87	211	255	1,270	438
District of Columbia	9	6	5	0	0	1	3	544	428	264	161	1	0	102	164	295
Virginia	45	23	15	7	1	0	22	4,049	3,712	1,664	1,322	302	39	1	2,048	1,848
West Virginia	48	22	12	7	2	1	26	2,621	2,414	1,123	953	115	50	5	1,291	900
North Carolina	45	20	9	11	0	0	25	7,200	6,577	2,706	2,390	221	95	0	3,871	2,101
South Carolina	21	5	4	1	0	0	16	1,928	1,778	743	654	89	0	0	1,035	418
Georgia	61	33	27	3	1	2	28	7,008	6,337	2,693	2,188	269	4	232	3,644	2,432
Florida	103	38	31	4	1	2	65	4,987	4,755	2,130	1,571	435	8	116	2,625	1,748
South Atlantic	375	164	113	36	6	9	211	31,174	28,506	12,364	9,674	1,572	407	711	16,142	10,315
Kentucky	62	26	10	14	1	1	36	4,703	4,368	2,076	1,393	278	215	190	2,292	1,600
Tennessee	92	39	21	14	0	4	53	12,812	12,096	5,341	4,397	704	0	240	6,755	4,297
Alabama	71	32	24	2	0	6	39	4,439	4,006	2,017	1,572	101	39	305	1,989	1,829
Mississippi	28	19	15	3	1	0	9	4,654	4,174	2,316	2,047	155	94	20	1,858	3,040
East South Central	253	116	70	33	2	11	137	26,608	24,644	11,750	9,409	1,238	348	755	12,894	10,766
Arkansas	23	11	10	1	0	0	12	2,895	2,607	1,212	1,159	53	0	0	1,395	386
Louisiana	19	13	8	4	0	1	6	796	641	372	228	82	0	62	269	453
Oklahoma	29	16	14	2	0	0	13	1,735	1,635	834	708	44	82	0	801	1,093
Texas	98	47	27	10	0	10	51	8,562	7,591	3,667	2,096	546	0	1,025	3,924	3,554
West South Central	169	87	59	17	0	11	82	13,988	12,474	6,085	4,191	725	82	1,087	6,389	5,486
Montana	32	14	12	2	0	0	18	1,080	878	357	216	48	93	0	521	236
Idaho	17	10	8	1	0	1	7	437	370	219	149	40	0	30	151	292
Wyoming	5	2	1	0	0	1	3	800	721	359	33	0	156	170	362	335
Colorado	52	23	15	5	1	2	29	2,446	2,102	916	670	109	5	132	1,186	732
New Mexico	17	7	4	2	0	1	10	1,104	1,040	496	319	87	0	90	544	423
Arizona	48	27	21	6	0	0	21	3,124	2,515	1,159	1,029	121	9	0	1,356	1,125
Utah	17	3	1	2	0	0	14	703	620	212	172	40	0	0	408	36

Table 15A.—Geographic Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1988—Continued

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		
Nevada	29	14	8	4	0	2	15	927	777	476	271	148	0	57	301	542
Mountain	217	100	70	22	1	7	117	10,621	9,023	4,194	2,859	593	263	479	4,829	3,721
Washington	138	56	31	21	0	4	82	4,756	3,904	1,952	1,035	625	150	142	1,952	2,089
Oregon	89	35	24	6	0	5	54	4,397	3,872	1,959	1,437	151	38	333	1,913	2,023
California	540	241	142	77	8	14	299	24,297	20,453	10,252	6,051	3,140	388	673	10,201	12,240
Alaska	18	9	7	2	0	0	9	624	502	265	205	60	0	0	237	355
Hawaii	27	14	6	0	7	1	13	1,356	1,144	580	294	55	190	41	564	414
Guam	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Pacific	812	355	210	106	15	24	457	35,430	29,875	15,008	9,022	4,031	766	1,189	14,867	17,121
Puerto Rico	32	16	5	5	0	6	16	1,644	1,429	720	245	253	0	222	709	681
Virgin Islands	3	1	1	0	0	0	2	98	83	23	23	0	0	0	60	16
Outlying Areas	35	17	6	5	0	6	18	1,742	1,512	743	268	253	0	222	769	697
Total, all States and areas	4,153	1,921	1,199	499	68	155	2,232	243,692	214,092	102,758	69,993	18,100	4,314	10,351	111,334	97,043

[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 1988

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	11	7	3	1	3	0	4	281	267	151	69	25	57	0	116	222
New Hampshire	7	1	1	0	0	0	6	775	730	298	135	163	0	0	432	73
Vermont	4	1	0	0	0	1	3	386	333	135	105	4	5	21	198	28
Massachusetts	83	45	25	16	2	2	38	6,076	5,212	2,451	1,905	263	144	139	2,761	2,418
Rhode Island	16	8	5	1	1	1	8	1,968	1,738	822	633	159	18	12	916	518
Connecticut	57	33	12	13	2	6	24	2,197	2,005	1,072	352	279	190	251	933	1,296
New England	178	95	46	31	8	10	83	11,683	10,285	4,929	3,199	893	414	423	5,356	4,555
New York	277	150	104	27	1	18	127	15,378	12,076	6,814	4,185	1,246	138	1,245	5,262	8,904
New Jersey	130	62	36	17	2	7	68	8,409	7,008	3,504	2,015	736	109	644	3,504	3,381
Pennsylvania	213	97	65	21	3	8	116	13,031	11,536	5,763	3,552	792	172	1,247	5,773	5,089
Middle Atlantic	620	309	205	65	6	33	311	36,818	30,620	16,081	9,752	2,774	419	3,136	14,539	17,374
Ohio	206	96	59	27	7	3	110	14,804	13,480	6,682	4,832	1,021	459	370	6,798	5,269
Indiana	97	50	30	15	0	5	47	5,355	5,148	2,533	1,767	486	0	280	2,615	2,141
Illinois	238	118	67	27	9	15	120	10,043	8,903	4,679	2,366	760	858	695	4,224	4,236
Michigan	218	113	70	30	8	5	105	13,007	11,243	5,289	4,041	819	114	315	5,954	4,796
Wisconsin	78	45	30	13	0	2	33	4,485	4,060	1,978	1,250	487	26	215	2,082	1,469
East North Central	837	422	256	112	24	30	415	47,694	42,834	21,161	14,256	3,573	1,457	1,875	21,673	17,911
Iowa	63	40	25	12	0	3	23	1,287	1,079	660	394	247	0	19	419	677
Minnesota	91	45	28	13	0	4	46	4,749	4,126	1,894	1,164	613	0	117	2,232	1,608
Missouri	100	48	29	15	2	2	52	5,220	4,671	1,739	1,324	372	11	32	2,932	1,093
North Dakota	4	4	4	0	0	0	0	99	92	65	65	0	0	0	27	99
South Dakota	6	4	4	0	0	0	2	188	184	96	94	2	0	0	88	69
Nebraska	20	11	5	6	0	0	9	633	587	262	190	72	0	0	325	178
Kansas	31	14	9	5	0	0	17	1,656	1,412	575	295	154	0	126	837	377
West North Central	315	166	104	51	2	9	149	13,832	12,151	5,291	3,526	1,460	11	294	6,860	4,101

Table 15B.—Geographic Distribution of Collective-Bargaining Elections Held in Cases Closed, Fiscal Year 1988—Continued

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		
Delaware	4	2	1	1	0	0	2	353	333	159	111	48	0	0	174	135
Maryland	35	15	9	2	1	3	20	2,406	2,100	856	314	76	211	255	1,244	438
District of Columbia	8	5	4	0	0	1	3	489	375	229	126	1	0	102	146	240
Virginia	39	20	12	7	1	0	19	2,657	2,473	1,237	895	302	39	1	1,236	1,637
West Virginia	44	21	12	6	2	1	23	2,555	2,357	1,105	941	109	50	5	1,252	890
North Carolina	40	19	9	10	0	0	21	6,472	5,888	2,427	2,119	213	95	0	3,461	2,084
South Carolina	18	4	3	1	0	0	14	1,709	1,575	641	552	89	0	0	934	281
Georgia	52	25	21	2	1	1	27	6,261	5,703	2,331	1,872	246	4	209	3,372	1,700
Florida	94	35	29	3	1	2	59	4,663	4,433	1,997	1,472	401	8	116	2,436	1,498
South Atlantic	334	146	100	32	6	8	188	27,565	25,237	10,982	8,402	1,485	407	688	14,255	8,903
Kentucky	52	23	9	12	1	1	29	3,551	3,270	1,536	914	217	215	190	1,734	1,185
Tennessee	82	34	19	12	0	3	48	11,012	10,367	4,689	3,858	636	0	195	5,678	3,936
Alabama	60	30	22	2	0	6	30	3,768	3,419	1,781	1,338	101	37	305	1,638	1,773
Mississippi	26	18	14	3	1	0	8	4,437	3,981	2,213	1,944	155	94	20	1,768	2,832
East South Central	220	105	64	29	2	10	115	22,768	21,037	10,219	8,054	1,109	346	710	10,818	9,726
Arkansas	18	8	7	1	0	0	10	1,819	1,657	772	729	43	0	0	885	247
Louisiana	17	12	8	3	0	1	5	584	450	290	228	49	0	13	160	385
Oklahoma	27	15	13	2	0	0	12	1,680	1,593	815	689	44	82	0	778	1,045
Texas	70	40	24	10	0	6	30	5,661	5,094	2,625	1,763	423	0	439	2,469	3,067
West South Central	132	75	52	16	0	7	57	9,744	8,794	4,502	3,409	559	82	452	4,292	4,744
Montana	26	12	10	2	0	0	14	965	769	304	163	48	93	0	465	214
Idaho	11	6	5	0	0	1	5	273	224	131	86	15	0	30	93	143
Wyoming	5	2	1	0	0	1	3	800	721	359	33	0	156	170	362	335
Colorado	45	20	13	5	1	1	25	2,217	1,891	822	612	92	5	113	1,069	594
New Mexico	12	6	3	2	0	1	6	864	811	430	253	87	0	90	381	382
Arizona	39	23	18	5	0	0	16	2,529	2,015	904	809	95	0	0	1,111	783
Utah	15	3	1	2	0	0	12	643	582	208	168	40	0	0	374	36

Table 15B.—Geographic Distribution of Collective-Bargaining Elections Held in Cases Closed, Fiscal Year 1988—Continued

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		
Nevada	27	14	8	4	0	2	13	875	728	465	265	143	0	57	263	542
Mountain	180	86	59	20	1	6	94	9,166	7,741	3,623	2,389	520	254	460	4,118	3,029
Washington	102	48	23	21	0	4	54	3,560	2,961	1,573	693	602	136	142	1,388	1,661
Oregon	67	33	22	6	0	5	34	3,991	3,540	1,867	1,386	127	38	316	1,673	1,994
California	451	213	125	67	7	14	238	21,249	17,810	8,874	4,989	2,865	347	673	8,936	10,247
Alaska	18	9	7	2	0	0	9	624	502	265	205	60	0	0	237	355
Hawaii	26	14	6	0	7	1	12	1,345	1,136	577	294	55	187	41	559	414
Guam	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Pacific	664	317	183	96	14	24	347	30,769	25,949	13,156	7,567	3,709	708	1,172	12,793	14,671
Puerto Rico	27	15	5	4	0	6	12	1,317	1,135	605	245	145	0	215	530	511
Virgin Islands	2	0	0	0	0	0	2	82	68	12	12	0	0	0	56	0
Outlying Areas	29	15	5	4	0	6	14	1,399	1,203	617	257	145	0	215	586	511
Total, all States and areas	3,509	1,736	1,074	456	63	143	1,773	211,438	185,851	90,561	60,811	16,227	4,098	9,425	95,290	85,525

[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 1988

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	4	3	3	0	0	0	1	277	264	145	145	0	0	0	119	180
New Hampshire	2	0	0	0	0	0	2	31	23	0	0	0	0	0	23	0
Vermont	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Massachusetts	6	2	2	0	0	0	4	209	186	85	84	1	0	0	101	144
Rhode Island	4	1	1	0	0	0	3	117	108	25	21	4	0	0	83	14
Connecticut	4	1	1	0	0	0	3	70	70	33	26	2	0	5	37	45
New England	20	7	7	0	0	0	13	704	651	288	276	7	0	5	363	383
New York	36	6	2	2	0	2	30	2,112	1,531	486	391	33	3	59	1,045	176
New Jersey	16	4	4	0	0	0	12	525	463	276	267	9	0	0	187	329
Pennsylvania	43	8	6	2	0	0	35	1,319	1,155	425	284	128	12	1	730	453
Middle Atlantic	95	18	12	4	0	2	77	3,956	3,149	1,187	942	170	15	60	1,962	958
Ohio	44	11	7	3	1	0	33	1,308	1,192	517	338	157	22	0	675	584
Indiana	25	13	8	4	1	0	12	1,041	996	483	314	111	58	0	513	546
Illinois	22	8	2	3	1	2	14	600	474	260	88	57	28	87	214	358
Michigan	35	9	7	1	1	0	26	1,550	1,342	639	479	136	24	0	703	681
Wisconsin	22	7	4	3	0	0	15	1,735	1,548	647	454	185	0	8	901	411
East North Central	148	48	28	14	4	2	100	6,234	5,552	2,546	1,673	646	132	95	3,006	2,580
Iowa	8	0	0	0	0	0	8	315	265	39	23	16	0	0	226	0
Minnesota	14	3	1	1	0	1	11	298	270	117	85	12	0	20	153	55
Missouri	47	12	10	2	0	0	35	1,829	1,593	719	649	70	0	0	874	987
North Dakota	1	1	1	0	0	0	0	11	11	6	6	0	0	0	5	11
South Dakota	2	0	0	0	0	0	2	375	356	145	145	0	0	0	211	0
Nebraska	3	0	0	0	0	0	3	34	34	9	0	9	0	0	25	0
Kansas	4	1	1	0	0	0	3	346	287	96	38	58	0	0	191	22
West North Central	79	17	13	3	0	1	62	3,208	2,816	1,131	946	165	0	20	1,685	1,075

Table 15C.—Geographic Distribution of Decertification Elections Held in Cases Closed, Fiscal Year 1988—Continued

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		
Delaware	2	0	0	0	0	0	2	37	33	13	8	5	0	0	20	0
Maryland	2	0	0	0	0	0	2	41	39	13	2	11	0	0	26	0
District of Columbia	1	1	1	0	0	0	0	55	53	35	35	0	0	0	18	55
Virginia	6	3	3	0	0	0	3	1,392	1,239	427	427	0	0	0	812	211
West Virginia	4	1	0	1	0	0	3	66	57	18	12	6	0	0	39	10
North Carolina	5	1	0	1	0	0	4	728	689	279	271	8	0	0	410	17
South Carolina	3	1	1	0	0	0	2	219	203	102	102	0	0	0	101	137
Georgia	9	8	6	1	0	1	1	747	634	362	316	23	0	23	272	732
Florida	9	3	2	1	0	0	6	324	322	133	99	34	0	0	189	250
South Atlantic	41	18	13	4	0	1	23	3,609	3,269	1,382	1,272	87	0	23	1,887	1,412
Kentucky	10	3	1	2	0	0	7	1,152	1,098	540	479	61	0	0	558	415
Tennessee	10	5	2	2	0	1	5	1,800	1,729	652	539	68	0	45	1,077	361
Alabama	11	2	2	0	0	0	9	671	587	236	234	0	2	0	351	56
Mississippi	2	1	1	0	0	0	1	217	193	103	103	0	0	0	90	208
East South Central	33	11	6	4	0	1	22	3,840	3,607	1,531	1,355	129	2	45	2,076	1,040
Arkansas	5	3	3	0	0	0	2	1,076	950	440	430	10	0	0	510	139
Louisiana	2	1	0	1	0	0	1	212	191	82	0	33	0	49	109	68
Oklahoma	2	1	1	0	0	0	1	55	42	19	19	0	0	0	23	48
Texas	28	7	3	0	0	4	21	2,901	2,497	1,042	333	123	0	586	1,455	487
West South Central	37	12	7	1	0	4	25	4,244	3,680	1,583	782	166	0	635	2,097	742
Montana	6	2	2	0	0	0	4	115	109	53	53	0	0	0	56	22
Idaho	6	4	3	1	0	0	2	164	146	88	63	25	0	0	58	149
Wyoming	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Colorado	7	3	2	0	0	1	4	229	211	94	58	17	0	19	117	138
New Mexico	5	1	1	0	0	0	4	240	229	66	66	0	0	0	163	41
Arizona	9	4	3	1	0	0	5	595	500	255	220	26	9	0	245	342
Utah	2	0	0	0	0	0	2	60	38	4	4	0	0	0	34	0

Table 15C.—Geographic Distribution of Decertification Elections Held in Cases Closed, Fiscal Year 1988—Continued

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		
Nevada	2	0	0	0	0	0	2	52	49	11	6	5	0	0	38	0
Mountain	37	14	11	2	0	1	23	1,455	1,282	571	470	73	9	19	711	692
Washington	36	8	8	0	0	0	28	1,196	943	379	342	23	14	0	564	428
Oregon	22	2	2	0	0	0	20	406	332	92	51	24	0	17	240	29
California	89	28	17	10	1	0	61	3,048	2,643	1,378	1,062	275	41	0	1,265	1,993
Alaska	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Hawaii	1	0	0	0	0	0	1	11	8	3	0	0	3	0	5	0
Guam	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Pacific	148	38	27	10	1	0	110	4,661	3,926	1,852	1,455	322	58	17	2,074	2,450
Puerto Rico	5	1	0	1	0	0	4	327	294	115	0	108	0	7	179	170
Virgin Islands	1	1	1	0	0	0	0	16	15	11	11	0	0	0	4	16
Outlying Areas	6	2	1	1	0	0	4	343	309	126	11	108	0	7	183	186
Total, all States and areas	644	185	125	43	5	12	459	32,254	28,241	12,197	9,182	1,873	216	926	16,044	11,518

[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 1988

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	173	76	41	30	1	4	97	12,982	11,689	5,428	3,964	1,152	64	248	6,261	4,843
Tobacco manufacturers	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Textile mill products	23	9	7	2	0	0	14	3,621	3,427	1,648	1,464	184	0	0	1,779	1,650
Apparel and other finished products made from fabric and simular materials	28	13	9	3	0	1	15	3,370	3,003	1,490	1,116	177	0	197	1,513	2,031
Lumber and wood products (except furniture)	77	34	23	8	1	2	43	5,725	5,342	2,489	2,191	208	35	55	2,853	2,290
Furniture and fixtures	58	24	21	3	0	0	34	5,164	4,645	2,317	2,002	214	67	34	2,328	2,254
Paper and allied products	50	24	14	7	0	3	26	2,388	2,200	1,085	700	221	0	164	1,115	1,197
Printing, publishing, and allied products	89	40	26	9	1	4	49	5,071	4,538	1,954	1,321	392	21	220	2,584	1,757
Chemicals and allied products	65	26	17	7	2	0	39	3,244	3,058	1,448	1,171	192	22	63	1,610	1,154
Petroleum refining and related industries	16	7	3	3	0	1	9	694	658	411	284	111	3	13	247	505
Rubber and miscellaneous plastic products	53	19	15	2	0	2	34	5,848	5,378	2,285	1,889	163	29	204	3,093	1,323
Leather and leather products	3	0	0	0	0	0	3	374	319	122	28	0	0	94	197	0
Stone, clay, glass, and concrete products	99	40	16	11	0	13	59	4,377	3,981	2,190	656	647	34	853	1,791	2,295
Primary metal industries	89	37	31	4	2	0	52	5,459	4,622	1,837	1,438	361	33	5	2,785	1,420
Fabricated metal products (except machinery and transportation equipment)	165	61	45	11	1	4	104	14,587	13,352	5,762	4,745	533	317	167	7,590	4,369
Machinery (except electrical)	145	59	47	8	0	4	86	12,446	11,455	5,097	4,396	431	22	248	6,358	4,291
Electrical and electronic machinery, equipment, and supplies	69	29	21	3	1	4	40	11,119	10,395	4,545	3,974	235	185	151	5,850	3,155
Aircraft and parts	91	49	29	13	5	2	42	10,279	9,431	4,579	3,150	732	238	459	4,852	3,863
Ship and boat building and repairing	9	3	3	0	0	0	6	866	798	316	270	0	26	20	482	371
Automotive and other transportation equipment	13	9	8	1	0	0	4	773	747	326	281	33	12	0	421	374
Measuring, analyzing, and controlling instruments; photographic, medical, and optical goods; watches and clocks	26	5	3	2	0	0	21	2,364	2,171	786	625	67	73	21	1,385	276
Miscellaneous manufacturing industries	161	65	33	20	4	8	96	8,655	7,330	3,564	1,936	1,068	367	193	3,766	4,119
Manufacturing	1,502	629	412	147	18	52	873	119,406	108,539	49,679	37,601	7,121	1,548	3,409	58,860	43,537
Metal mining	3	1	1	0	0	0	2	130	126	41	41	0	0	0	85	4
Coal mining	16	5	1	0	2	2	11	1,532	1,380	785	6	0	419	360	595	680
Oil and gas extraction	11	4	2	0	0	2	7	620	557	236	99	4	0	133	321	146

Table 16.—Industrial Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1988—Continued

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		
Mining and quarrying of nonmetallic minerals (except fuels)	12	3	1	0	2	0	9	369	333	108	51	15	42	0	225	59
Mining	42	13	5	0	4	4	29	2,651	2,396	1,170	197	19	461	493	1,226	889
Construction	365	214	182	14	7	11	151	8,834	6,840	3,820	3,197	266	92	265	3,020	4,900
Wholesale trade	337	122	51	58	6	7	215	14,998	13,434	5,987	3,241	1,797	171	778	7,447	4,708
Retail trade	396	141	85	47	2	7	255	15,160	13,106	6,183	3,940	1,379	33	831	6,923	5,701
Finance, insurance, and real estate	86	57	52	2	0	3	29	1,493	1,323	718	604	65	0	49	605	712
U.S. Postal Service	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Local and suburban transit and interurban highway passenger transportation	77	49	24	22	0	3	28	6,510	5,505	2,920	1,496	1,165	0	259	2,585	3,139
Motor freight transportation and warehousing	257	122	16	101	2	3	135	8,024	6,963	3,778	668	2,323	649	138	3,185	3,682
Water transportation	11	3	1	1	0	1	8	216	182	68	31	20	5	12	114	69
Other transportation	33	17	8	9	0	0	16	1,922	1,709	871	605	257	9	0	838	1,159
Communication	104	44	37	5	1	1	60	3,189	2,940	1,369	1,158	164	13	34	1,571	1,241
Electric, gas, and sanitary services	106	53	30	16	2	5	53	4,560	4,169	1,931	1,253	277	124	277	2,238	1,274
Transportation, communication, and other utilities	588	288	116	154	5	13	300	24,421	21,468	10,937	5,211	4,206	800	720	10,531	10,564
Hotels, rooming houses, camps, and other lodging places	56	29	18	5	3	3	27	3,137	2,396	1,287	651	289	111	236	1,109	1,353
Personal services	38	19	10	6	3	0	19	1,496	1,313	656	520	106	30	0	657	818
Automotive repair, services, and garages	81	38	14	24	0	0	43	1,969	1,658	809	410	394	0	5	849	876
Motion pictures	8	5	4	0	0	1	3	426	342	218	191	6	0	21	124	321
Amusement and recreation services (except motion pictures)	20	7	5	2	0	0	13	671	533	248	139	109	0	0	285	387
Health services	342	184	129	15	11	29	158	35,297	29,257	14,569	10,194	1,356	783	2,236	14,688	15,042
Educational services	32	19	10	1	2	6	13	1,787	1,587	942	440	48	40	414	645	1,148
Membership organizations	9	6	4	0	0	2	3	246	184	98	68	0	0	30	86	105
Business services	159	97	67	14	7	9	62	6,603	5,393	3,139	1,641	693	245	560	2,254	3,826
Miscellaneous repair services	17	9	5	4	0	0	8	795	756	350	254	95	0	1	406	228

Table 16.—Industrial Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1988—Continued

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		
Museums, art galleries, botanical and zoological gardens	1	1	1	0	0	0	0	11	7	7	7	0	0	0	0	11
Legal services	3	3	3	0	0	0	0	79	68	42	42	0	0	0	26	79
Social services	41	26	18	2	0	6	15	2,469	2,083	1,148	837	103	0	208	935	905
Miscellaneous services	16	9	4	3	0	2	7	666	524	343	207	45	0	91	181	442
Services	823	452	292	76	26	58	371	55,652	46,101	23,856	15,601	3,244	1,209	3,802	22,245	25,541
Public administration	14	5	4	1	0	0	9	1,077	885	408	401	3	0	4	477	491
Total, all industrial groups	4,153	1,921	1,199	499	68	155	2,232	243,692	214,092	102,758	69,993	18,100	4,314	10,351	111,334	97,043

[1] Source: Standard Industrial Classification, Statistical Policy Division, Office of Management and Budget, Washington, D.C., 1972.

Table 17.—Size of Units in Representation Elections in Cases Closed, Fiscal Year 1988[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 of size class	Number	Percent by size class
A. Certification elections (RC and RM)														
Total RC and RM elections	211,438	3,509	100.0	0.0	1,074	100 0	456	100.0	63	100.0	143	100.0	1,773	100.0
Under 10	4,380	788	22.5	22.5	274	25 5	151	33.1	18	28.6	20	14.0	325	18.3
10 to 19	9,760	693	19.7	42.2	217	20.2	128	28.1	16	25.4	23	16.0	309	17.4
20 to 29	10,747	442	12.6	54 8	143	13.3	44	9.6	5	7.9	20	14.0	230	13.0
30 to 39	9,780	285	8 1	62.9	82	7.6	26	5.7	2	3 2	11	7.7	164	9.3
40 to 49	9,508	215	6.1	69.0	62	5.7	28	6.1	4	6.3	13	9.1	108	6.1
50 to 59	9,061	168	4.8	73.8	46	4.2	19	4.2	3	4 8	4	2.8	96	5 4
60 to 69	9,260	144	4.1	77.9	56	5.2	9	2.0	3	4.8	6	4.2	70	4.0
70 to 79	6,419	87	2.5	80.4	30	2.8	4	0.9	2	3.1	7	4 9	44	2.5
80 to 89	6,601	78	2.2	82.6	22	2 0	6	1.3	1	1 6	1	0.7	48	2 7
90 to 99	6,015	64	1.8	84.4	19	1.8	8	1.8	0	0.0	2	1.4	35	2.0
100 to 109	5,750	55	1.6	86.0	13	1 2	4	0.9	1	1 6	1	0.7	36	2.0
110 to 119	7,573	66	1.9	87.9	17	1.6	9	2.0	3	4.8	3	2.1	34	1.9
120 to 129	4,464	36	1 0	88.9	13	1 2	1	0.2	0	0.00.0	1	0.7	21	1.2
130 to 139	3,481	26	0.7	89.6	4	0.4	3	0.7	0	0.00.0	5	3.5	14	0.8
140 to 149	3,316	23	0 7	90.3	5	0.5	4	0.9	0	0.00.0	3	2.1	11	0.6
150 to 159	4,923	32	0.9	91.2	7	0.7	2	0.4	0	0 00.0	2	1.4	21	1.2
160 to 169	4,592	28	0.8	92 0	3	0.3	0	0.00 0	0	0.00.0	3	2.1	22	1 2
170 to 179	4,370	25	0 7	92.7	4	0.4	0	0.00.0	2	3.1	1	0.7	18	1.0
180 to 189	4,024	22	0.6	93.3	2	0.2	1	0.2	0	0 00 0	0	0.00.0	19	1.1
190 to 199	3,302	17	0.5	93 8	4	0.4	0	0.00 0	0	0.00.0	1	0.7	12	0 7
200 to 299	24,738	101	2 9	96.7	23	2.1	6	1 3	1	1.6	8	5 6	63	3.6
300 to 399	17,137	51	1.5	98.2	9	0.8	1	0.2	1	1 6	6	4.2	34	1.9
400 to 499	10,089	23	0 7	98 9	7	0.7	0	0.00 0	0	0.00.0	1	0.7	15	0 8
500 to 599	4,439	8	0 2	99.1	3	0.3	1	0.2	0	0.00 0	0	0 00.0	4	0.2
600 to 799	9,366	14	0.4	99 5	4	0.4	1	0.2	1	1.6	0	0.00.0	8	0.5
800 to 999	9,531	11	0 3	99.8	4	0.4	0	0.00 0	0	0.00.0	1	0 7	6	0 3
1,000 to 1,999	8,812	7	0.2	100 0	1	0.1	0	0.00.0	0	0.00.0	0	0.00.0	6	0.3

Table 17.—Size of Units in Representation Elections in Cases Closed, Fiscal Year 1988[1]—Continued

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 of size class	Number	Percent by size class
B. Decertification elections (RD)														
Total RD elections	32,254	644	100.0	0.00.0	125	100.0	43	100.0	5	100.0	12	100.0	459	100.0
Under 10	979	165	25.6	25 6	6	4.8	6	14.0	0	0.00 0	1	8.3	152	33.1
10 to 19	1,884	136	21.1	46.7	17	13.6	9	20.7	1	20.0	1	8.3	108	23.5
20 to 29	2,093	85	13.2	59.9	17	13.6	6	14.0	0	0.00.0	2	16.8	60	13.1
30 to 39	1,974	57	8.9	68.8	15	12 0	3	7.0	1	20.0	1	8 3	37	8.1
40 to 49	1,769	40	6.2	75.0	17	13.6	1	2.3	0	0.00.0	3	25.1	19	4.1
50 to 59	1,239	23	3 6	78.6	10	8.0	3	7.0	2	40.0	0	0.00.0	8	1 7
60 to 69	1,541	24	3.7	82.3	9	7 2	3	7.0	0	0.00.0	1	8.3	11	2.4
70 to 79	1,342	18	2.8	85.1	3	2.4	2	4.7	1	20.0	1	8.3	11	2.4
80 to 89	1,429	17	2.6	87.7	3	2.4	3	7.0	0	0 00.0	0	0.00.0	11	2.4
90 to 99	1,147	12	1.9	89 6	4	3.2	2	4.7	0	0.00.0	0	0.00 0	6	1.3
100 to 109	1,232	12	1 9	91.5	5	4.0	2	4 7	0	0.00.0	1	8.3	4	0.9
110 to 119	792	7	1.1	92.6	1	0.8	0	0.00.0	0	0.00.0	0	0 00.0	6	1.3
120 to 129	504	4	0.6	93.2	3	2.4	0	0 00.0	0	0.00.0	0	0.00.0	1	0.2
130 to 139	400	3	0.5	93.7	1	0.8	0	0.00 0	0	0.00.0	0	0.00.0	2	0.4
140 to 149	571	4	0.6	94 3	0	0.00.0	0	0.00.0	0	0.00.0	1	8.3	3	0.7
150 to 159	919	6	1 0	95.3	5	4.0	1	2.3	0	0.00.0	0	0.00.0	0	0 00.0
160 to 169	327	2	0.3	95.6	0	0.00 0	1	2.3	0	0.00.0	0	0.00.0	1	0.2
170 to 199	1,290	7	1.1	96.7	1	0.8	1	2.3	0	0.00.0	0	0.00.0	5	1.1
200 to 299	2,029	8	1.2	97.9	5	4.0	0	0.00 0	0	0.00.0	0	0.00.0	3	0.7
300 to 499	3,374	8	1.2	99.1	3	2.4	0	0.00.0	0	0.00.0	0	0 00 0	5	1 1
500 to 799	1,205	2	0.3	99 4	0	0.00.0	0	0.00.0	0	0.00.0	0	0 00.0	2	0.4
800 and over	4,214	4	0 6	100.0	0	0.00.0	0	0 00.0	0	0 00.0	0	0.00.0	4	0.9

[1] See Glossary of terms for definitions.

Table 18.—Distribution of Unfair Labor Practice Situations Received, by Number of Employees in Establishments, Fiscal Year 1988[1]

Size of establishment (number of employees)	Total number of situations	Total		Type of situations																	
				CA		CB		CC		CD		CE		CG		CP		CA–CB combinations		Other C combinations	
		Percent of all situations	Cumulative percent of all situations	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class
Total	27,970	100.0	—	19,594	100.0	6,108	100.0	679	100.0	184	100.0	30	100.0	33	100.0	196	100.0	1,058	100.0	88	100.0
Under 10	7,666	27.4	27.4	4,985	25.4	1,993	32.6	291	42.9	75	40.8	12	40.0	7	21.2	71	36.2	208	19 7	24	27.3
10–19	2,357	8.4	35.8	1,832	9 3	312	5.1	82	12 1	34	18.5	3	10.0	0	0.0	38	19 4	42	4.0	14	15.9
20–29	1,696	6 1	41.9	1,301	6.6	256	4.2	55	8.1	10	5.4	2	6 7	1	3.0	22	11.2	41	3 9	8	9.1
30–39	1,333	4.8	46 7	979	5.0	227	3 7	49	7.2	8	4.3	3	10.0	1	3.0	15	7.7	45	4.3	6	6.8
40–49	954	3.4	50.1	749	3.8	142	2.3	22	3.2	3	1.6	0	0 0	0	0 0	5	2.6	25	2.4	8	9.1
50–59	1,115	4 0	54 1	807	4.1	201	3 3	38	5.6	13	7.1	3	10 0	0	0.0	9	4.6	41	3.9	3	3.4
60–69	739	2 6	56.7	582	3.0	112	1.8	7	1.0	1	0.5	1	3.3	3	9.1	3	1.5	28	2.6	2	2.3
70–79	668	2 4	59 1	526	2 7	110	1 8	7	1.0	0	0.0	0	0 0	1	3.0	6	3.1	16	1.5	2	2.3
80–89	467	1.7	60.8	383	2 0	66	1.1	3	0.4	0	0.0	0	0.0	0	0.0	2	1.0	12	1.1	1	1.1
90–99	301	1.1	61.9	249	1 3	37	0.6	2	0.3	2	1.1	0	0 0	0	0.0	2	1.0	9	0.9	0	0.0
100–109	1,382	4.9	66.8	986	5 0	299	4.9	22	3.2	3	1 6	2	6.7	2	6.1	5	2.6	58	5.5	5	5.7
110–119	177	0.6	67.4	149	0 8	21	0.3	1	0.1	1	0 5	0	0.0	0	0.0	0	0.0	5	0.5	0	0 0
120–129	394	1.4	68.8	301	1.5	66	1.1	4	0 6	1	0 5	0	0.0	4	12 1	2	1.0	15	1.4	1	1.1
130–139	192	0.7	69.5	154	0.8	21	0.3	3	0.4	0	0 0	0	0.0	0	0 0	1	0.5	13	1.2	0	0.0
140–149	121	0.4	69.9	92	0.5	26	0.4	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	3	0.3	0	0.0
150–159	527	1.9	71.8	374	1.9	120	2.0	3	0 4	1	0 5	0	0.0	0	0.0	2	1.0	26	2.5	1	1.1
160–169	150	0.5	72.3	122	0.6	20	0.3	2	0.3	1	0 5	0	0.0	0	0.0	0	0.0	4	0.4	1	1.1
170–179	139	0.5	72.8	110	0.6	22	0.4	1	0.1	0	0 0	0	0.0	1	3.0	0	0.0	4	0.4	1	1.1
180–189	155	0.6	73.4	131	0.7	16	0.3	2	0.3	0	0 0	0	0.0	0	0.0	1	0.5	5	0.5	0	0.0
190–199	61	0.2	73.6	54	0 3	5	0.1	1	0.1	0	0 0	0	0.0	0	0.0	0	0.0	1	0.1	0	0.0
200–299	1,556	5.6	79.2	1,111	5 7	339	5.6	14	2.1	6	3 3	2	6.7	0	0.0	3	1.5	79	7.5	2	2.3
300–399	1,013	3.6	82.8	640	3 3	283	4.6	19	2.8	7	3 8	1	3.3	0	0.0	1	0.5	62	5.9	0	0.0
400–499	628	2.2	85.0	446	2 3	139	2.3	8	1.2	0	0 0	0	0.0	0	0.0	0	0.0	33	3.1	2	2.3
500–599	608	2.2	87.2	392	2 0	165	2.7	7	1.0	4	2 2	0	0.0	0	0.0	2	1 0	37	3.5	1	1.1
600–699	311	1.1	88.3	222	1.1	63	1.0	3	0.4	2	1.1	0	0.0	1	3.0	2	1.0	18	1.7	0	0 0
700–799	183	0.7	89.0	111	0.6	57	0.9	2	0 3	0	0.0	0	0.0	0	0.0	0	0.0	13	1 2	0	0.0
800–899	177	0.6	89.6	108	0.6	54	0.9	2	0 3	1	0.5	0	0.0	1	3.0	0	0.0	11	1.0	0	0.0
900–999	104	0.4	90.0	72	0.4	24	0.4	3	0.4	0	0.0	0	0.0	0	0.0	0	0.0	5	0.5	0	0.0
1,000–1,999	1,188	4.2	94.2	737	3.8	359	5 9	11	1.6	2	1.1	1	3.3	6	18.2	1	0.5	67	6.3	4	4.5
2,000–2,999	560	2.0	96.2	323	1.6	180	2.9	9	1.3	4	2.2	0	0.0	2	6.1	1	0.5	40	3.8	1	1.1
3,000–3,999	258	0 9	97.1	132	0.7	104	1.7	0	0.0	3	1.6	0	0.0	1	3.0	0	0.0	18	1.7	0	0.0

Table 18.—Distribution of Unfair Labor Practice Situations Received, by Number of Employees in Establishments, Fiscal Year 1988[1]—Continued

Size of establishment (number of employees)	Total number of situations	Total		Type of situations																	
				CA		CB		CC		CD		CE		CG		CP		CA–CB combinations		Other C combinations	
		Percent of all situations	Cumulative percent of all situations	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class
4,000–4,999	160	0.6	97.7	78	0.4	68	1 1	0	0 0	0	0.0	0	0.0	0	0.0	0	0.0	14	1.3	0	0.0
5,000–9,999	373	1.3	99.0	215	1.1	115	1.9	2	0.3	1	0.5	0	0 0	1	3 0	0	0.0	38	3.6	1	1.1
Over 9,999	257	0.9	99 9	141	0.7	86	1.4	4	0.6	1	0.5	0	0.0	1	3.0	2	1.0	22	2.1	0	0.0

[1] See Glossary of Terms for definitions

[2] Based on revised situation count which absorbs companion cases, cross-filing, and multiple filings as compared to situations shown in charts 1 and 2 of Chapter 1, which are based on single and multiple filings of same type of case.

Table 19.—Litigation for Enforcement and/or Review of Board Orders, Fiscal Year 1988; and Cumulative Totals, Fiscal Years 1936–1988

	Fiscal year 1988									July 5, 1935–Sept. 30, 1988	
	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	193	164	25	2	2	—	—	—	—	—	—
On petitions for review and/or enforcement	166	143	19	2	2	100.0	100.0	100.0	100.0	9,658	100.0
Board orders affirmed in full	125	108	14	1	2	75 5	73 6	50.0	100.0	6,273	65.0
Board orders affirmed with modification	9	7	1	1	0	4.9	5 3	50.0	0.0	1,373	14.2
Remanded to Board	8	5	3	0	0	3.5	15.8	0.0	0.0	476	4 9
Board orders partially affirmed and partially remanded	1	1	0	0	0	0 7	0.0	0.0	0.0	180	1.9
Board orders set aside	23	22	1	0	0	15.4	5.3	0.0	0.0	1,356	14.0
On petitions for contempt	27	21	6	0	0	100 0	100.0	—	—	—	—
Compliance after filing of petition, before court order	6	5	1	0	0	23.8	16 7	—	—	—	—
Court orders holding respondent in contempt	16	11	5	0	0	52.4	83.3	—	—	—	—
Court orders denying petition	0	0	0	0	0	0.0	0.0	—	—	—	—
Court orders directing compliance without contempt adjudication	3	3	0	0	0	14 3	0 0	—	—	—	—
Contempt petitions withdrawn without compliance	2	2	0	0	0	9.5	0.0	—	—	—	—
Proceedings decided by U.S Supreme Court[3]	2	0	1	0	1	—	100.0	—	100.0	247	100.0
Board orders affirmed in full	1	0	0	0	1	—	—	—	100.0	148	59.9
Board orders affirmed with modification	0	0	0	0	0	—	—	—	—	18	7.3
Board orders set aside	1	0	1	0	0	—	100.0	—	—	43	17 4
Remanded to Board	0	0	0	0	0	—	—	—	—	19	7.7
Remanded to court of appeals	0	0	0	0	0	—	—	—	—	16	6.5
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 of terms for definitions

[2] A proceeding in which the Board had entered an order dismissing the complaint and the charging party appealed such dismissal in the courts of appeals.

[3] The Board appeared as "amicus curiae" in 2 cases.

Table 19A.—Proceedings Decided by Circuit Courts of Appeals on Petitions for Enforcement and/or Review of Board Orders, Fiscal Year 1988, Compared With 5-Year Cumulative Totals, Fiscal Years 1983 Through 1987[1]

Circuit courts of appeals (headquarters)	Total fiscal year 1988	Total fiscal years 1983–1987	Affirmed in full				Modified				Remanded in full				Affirmed in part and remanded in part				Set aside			
			Fiscal year 1988		Cumulative fiscal years 1983–1987		Fiscal year 1988		Cumulative fiscal years 1983–1987		Fiscal year 1988		Cumulative fiscal years 1983–1987		Fiscal year 1988		Cumulative fiscal years 1983–1987		Fiscal year 1988		Cumulative fiscal years 1983–1987	
			Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total all circuits	166	1,372	125	75 3	990	72.2	9	5.4	105	7.6	8	4.8	90	6 5	1	0.6	31	2.3	23	13.9	156	11.4
1. Boston, MA	8	39	7	87.5	29	74.3	0	—	1	2.6	0	—	1	2.6	0	—	1	2.6	1	12.5	7	17.9
2. New York, NY	15	118	9	60.0	88	74.6	2	13.3	8	6.8	0	—	4	3.4	0	—	3	2.5	4	26.7	15	12.7
3. Phila., PA	19	139	18	94.7	114	82.0	0	—	9	6.5	0	—	8	5.8	0	—	2	1.4	1	5.3	6	4.3
4. Richmond, VA	15	93	8	53.3	66	70.9	1	6.7	10	10.8	1	6.7	4	4.3	0	—	3	3.2	5	33.3	10	10.8
5. New Orleans, LA	8	110	6	75.0	81	73.6	0	—	10	9.1	0	—	6	5.5	0	—	3	2.7	2	25.0	10	9.1
6. Cincinnati, OH	32	214	26	81.3	145	67.8	4	12.5	19	8.9	0	—	9	4.2	0	—	6	2.8	2	6.2	35	16.3
7. Chicago, IL	13	141	7	53.8	87	61.7	0	—	16	11.3	2	15.4	11	7.8	1	7.7	0	—	3	23.1	27	19 2
8. St. Louis, MO	6	90	3	50.0	70	77.8	1	16.7	8	8.9	0	—	5	5.5	0	—	1	1.1	2	33.3	6	6.7
9. San Francisco, CA	31	269	26	83.9	204	75.8	0	—	15	5.6	5	16 1	22	8.2	0	—	5	1.9	0	—	23	8.5
10 Denver, CO	3	32	3	100.0	24	75.0	0	—	2	6.3	0	—	2	6.3	0	—	0	—	0	—	4	12.4
11. Atlanta, GA[2]	6	53	5	83.3	41	77.3	0	—	3	5.7	0	—	2	3.8	0	—	0	—	1	16.7	7	13.2
Washington, DC	10	74	7	70.0	41	55.4	1	10.0	4	5.4	0	—	16	21.6	0	—	7	9.5	2	20.0	6	8.1

[1] Percentages are computed horizontally by current fiscal year and total fiscal years.
[2] Commenced operations October 1, 1981.

Table 20.—Injunction Litigation Under Sections 10(e), 10(j), and 10(l), Fiscal Year 1988

	Total proceedings	Injunction proceedings		Total dispositions	Disposition of injunctions						Pending in district court Sept. 30, 1988
		Pending in district court Oct. 1, 1987	Filed in district court fiscal year 1988		Granted	Denied	Settled	Withdrawn	Dismissed	Inactive	
Under Sec. 10(e) total	[1]0	0	0	0	0	0	0	0	0	0	0
Under Sec. 10(j) total	26	9	17	23	11	5	5	0	2	0	3
8(a)(1)	0	0	0	0	0	0	0	0	0	0	0
8(a)(1)(3)	5	3	2	5	1	0	3	0	1	0	0
8(a)(1)(5)	8	0	8	6	1	3	2	0	0	0	2
8(a)(1)(3)(4)	3	0	3	3	2	0	0	0	1	0	0
8(a)(1)(3)(5)	8	4	4	7	7	0	0	0	0	0	1
8(b)(1)	2	2	0	2	0	2	0	0	0	0	0
Under Sec. 10(l) total	66	14	52	64	14	3	43	2	2	0	2
8(b)(4)(A)	1	1	0	1	1	0	0	0	0	0	0
8(b)(4)(A)(B)	2	0	2	2	0	0	2	0	0	0	0
8(b)(4)(B)	41	11	30	39	7	1	31	0	0	0	2
8(b)(4)(D)	12	0	12	12	4	0	6	2	0	0	0
8(b)(7)(A)	3	0	3	3	2	0	1	0	0	0	0
8(b)(7)(B)	2	0	2	2	0	0	2	0	0	0	0
8(b)(7)(C)	5	2	3	5	0	2	1	0	2	0	0

[1] In courts of appeals.

Table 21.—Special Litigation Involving NLRB; Outcome of Proceedings in Which Court Decisions Issued in Fiscal Year 1988

Type of litigation	Number of proceedings											
	Total—all courts			In courts of appeals			In district courts			In bankruptcy courts		
	Number decided	Court determination		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		Upholding Board position	Contrary to Board position
Totals—all types	43	37	6	21	18	3	18	17	1	4	2	2
NLRB-initiated actions or interventions	2	2	0	1	1	0	1	1	0	0	0	0
To enforce subpoena	1	1	0	1	1	0	0	0	0	0	0	0
To defend Board's jurisdiction	0	0	0	0	0	0	0	0	0	0	0	0
To prevent conflict between NLRA and Bankruptcy Code	1	1	0	0	0	0	1	1	0	0	0	0
Action by other parties	41	35	6	20	17	3	17	16	1	4	2	2
To review non-final orders	16	14	2	5	5	0	8	7	1	3	2	1
To restrain NLRB from	0	0	0	0	0	0	0	0	0	0	0	0
Proceeding in R case	8	8	0	5	5	0	3	3	0	0	0	0
Proceeding in unfair labor practice case	7	5	2	0	0	0	5	4	1	2	1	1
Enforcing subpoena	1	1	0	0	0	0	0	0	0	1	1	0
To compel NLRB to	25	21	4	15	12	3	9	9	0	1	0	1
Issue complaint	13	13	0	7	7	0	6	6	0	0	0	0
Take action in R case	1	1	0	1	1	0	0	0	0	0	0	0
Comply with Freedom of Information Act[1]	4	3	1	2	1	1	2	2	0	0	0	0
Pay fees under Equal Access to Justice Act	5	3	2	5	3	2	0	0	0	0	0	0
Pay Fees under FOIA	1	1	0	0	0	0	1	1	0	0	0	0
Other	1	0	1	0	0	0	0	0	0	0	0	0
Objection to Board's Proof of Claim	1	0	1	0	0	0	0	0	0	1	0	1

[1] FOIA cases are categorized regarding court determination depending on whether NLRB substantially prevailed.

Table 22.—Advisory Opinion Cases Received, Closed, and Pending, Fiscal Year 1988[1]

	Total	Number of cases			
		Identification of petitioner			
		Employer	Union	Courts	State boards
Pending October 1, 1987	1	1	0	0	0
Received fiscal 1988	6	5	0	0	1
On docket fiscal 1988	7	6	0	0	1
Closed fiscal 1988	6	6	0	0	0
Pending September 30, 1988	1	0	0	0	1

[1] See Glossary of terms for definitions.

Table 22A.—Disposition of Advisory Opinion Cases, Fiscal Year 1988[1]

Action taken	Total cases closed
	6
Board would assert jurisdiction	1
Board would not assert jurisdiction	0
Unresolved because of insufficient evidence submitted	0
Dismissed	3
Withdrawn	2

[1] See Glossary of terms for definitions.

Table 23.—Time Elapsed for Major Case Processing Stages Completed, Fiscal Year 1988; and Age of Cases Pending Decision, September 30, 1988

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	127
3. Close of hearing to issuance of administrative law judge's decision	139
4. Administrative law judge's decision to issuance of Board decision	395
5. Filing of charge to issuance of Board decision	762
B. Age[1] of cases pending administrative law judge's decision, September 30, 1988	391
C. Age[1] of cases pending Board decision, September 30, 1988	611
II. Representation cases.	
A. Major stages completed—	
1. Filing of petition of notice of hearing issued	8
2. Notice of hearing to close of hearing	14
3. Close of hearing to—	
Board decision issued	233
Regional Director's decision issued	22
4. Filing of petition to—	
Board decision issued	304
Regional Director's decision issued	45
B. Age[2] of cases pending Board decision, September 30, 1988	190
C. Age[2] of cases pending Regional Director's decision, September 30, 1988	57

[1] From filing of charge.
[2] From filing of petition.

Table 24.—NLRB Activity Under the Equal Access to Justice Act, Fiscal Year 1988

I. Applications for fees and expenses before the NLRB:	
A. Filed with Board	22
B. Hearings held	1
C. Awards ruled on.	
1. By administrative law judges.	
Granting	3
Denying	[1]6
2. By Board.	
Granting	5
Denying	3
D Amount of fees and expenses in cases ruled on by Board:	
Claimed	$107,774 00
Recovered	$106,042.00
II. Applications for fees and expenses before the circuit courts of appeals:	
A. Awards ruled on:	
Granting	2
Denying	3
B. Amounts of fees and expenses recovered pursuant to court award	$70,952.37
III Applications for fees and expenses before the District Courts:	
A. Awards ruled on:	
Granting	1
Denying	0
B. Amounts of fees and expenses recovered pursuant to court award	$2,750.00

[1] These 9 (nine) cases do not include 1 (one) EAJA case SBHO by ALJ.

☆ U S GOVERNMENT PRINTING OFFICE 1989— 237 - 816 / Q