FIFTY-FOURTH

ANNUAL REPORT

OF THE

NATIONAL LABOR RELATIONS BOARD

FOR THE FISCAL YEAR

ENDED SEPTEMBER 30

1989

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UNITED STATES GOVERNMENT PRINTING OFFICE
WASHINGTON, D.C. 20402 • 1991

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

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[1] Recess appointment effective November 22, 1988.
[2] Acting Chief Counsel.

LETTER OF TRANSMITTAL

NATIONAL LABOR RELATIONS BOARD,
Washington, D.C., May 6, 1991.

SIR: As provided in Section 3(c) of the Labor Management Relations Act, 1947, I submit the Fifty-Fourth Annual Report of the National Labor Relations Board for the fiscal year ended September 30, 1989.

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.

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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 1989, 40,878 cases were received by the Board.

The public filed 32,401 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 8093 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 384 amendment to certification and unit clarification cases.

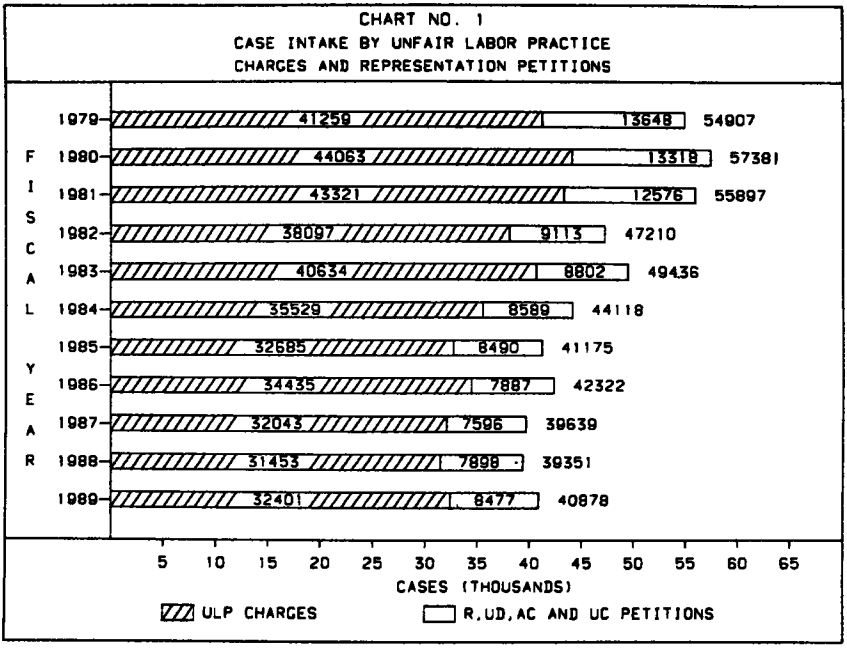
After the initial flood of charges and petitions, the flow narrows because the great majority of the newly filed cases are resolved—and quickly—in NLRB's national network of field offices by dismissals, withdrawals, agreements, and settlements.

At the end of fiscal year 1989, the five-member Board was composed of Chairman James M. Stephens and Members Mary Miller Cracraft, John E. Higgins, Jr., and Dennis M. Devaney; one seat was vacant. Joseph E. DeSio served as Acting General Counsel.

Statistical highlights of NLRB's casehandling activities in fiscal 1989 include:

- The NLRB conducted 4413 conclusive representation elections among some 239,934 employee voters, with workers choosing labor unions as their bargaining agents in 46.7 percent of the elections.
- Although the Agency closed 37,993 cases, 24,581 cases were pending in all stages of processing at the end of the fiscal year. The closings included 29,910 cases involving unfair labor practice charges and 7567 cases affecting employee representation and 516 related cases.

- Settlements, avoiding formal litigation while achieving the goal of equitable remedies in unfair labor practice situations, numbered 9180.
- The amount of $58,057,778 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 4508 offers of job reinstatements, with 3388 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 3851 complaints, setting the cases for hearing.
- NLRB's corps of administrative law judges issued 713 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 which are filed in the NLRB's Regional, Subregional, and Resident Offices, which numbered 52 during fiscal year 1989.

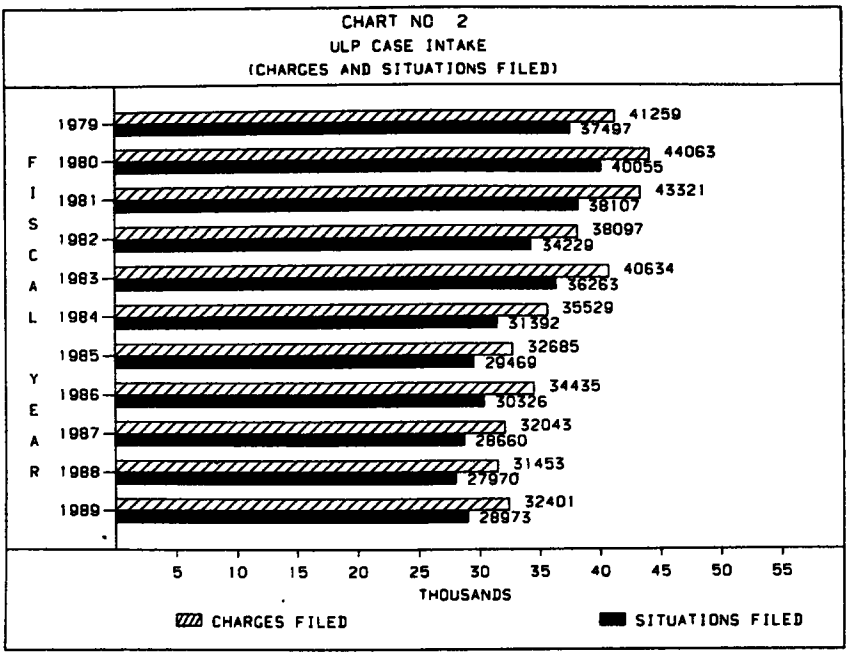
The Act's unfair labor practice provisions place certain restrictions on actions of employers and labor organizations in their relations with employees, as well as with each other. Its election provisions provide mechanics for conducting and certifying results of representation elections to determine 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 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.

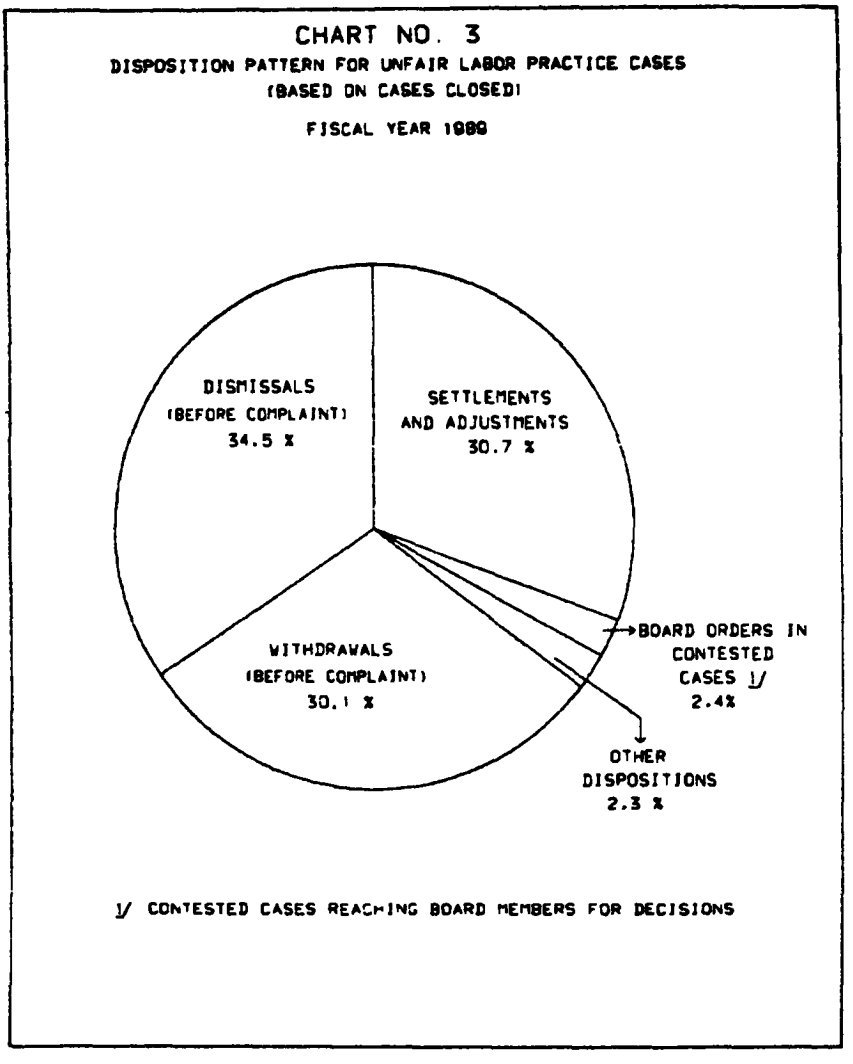
All cases coming to the NLRB begin their processing in the Regional Offices. Regional Directors, in addition to processing unfair labor practice cases in the initial stages, also have the authority to investigate representation petitions, to determine units of employees appropriate for collective-bargaining 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 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 3 percent of the cases go through to Board decision.

In fiscal year 1989, 32,401 unfair labor practice charges were filed with the NLRB, an increase of 3 percent from the 31,453 filed in fiscal year 1988. In situations in which related charges are counted as a single unit, there was a 4-percent increase from the preceding fiscal year. (Chart 2.)

Alleged violations of the Act by employers were filed in 21,046 cases, about 5 percent less than the 22,266 of 1988. Charges against unions increased 18 percent to 10,813 from 9148 in 1988.

There were 88 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 11,567 such charges in 55 percent of the total charges that employers committed violations.

Refusal to bargain was the second largest category of allegations against employers, comprising 9479 charges, in 45 percent of the total charges. (Table 2.)

Of charges against unions, the majority (7575) alleged illegal restraint and coercion of employees, about 70 percent. There were 1725 charges against unions for illegal secondary boycotts and jurisdictional disputes, an increase of 57 percent from the 1096 of 1988.

There were 1250 charges (about 12 percent) of illegal union discrimination against employees, an increase of 7 percent from the 1171 of 1988. There were 263 charges that unions picketed illegally for recognition or for organizational purposes, compared with 248 charges in 1988. (Table 2.)

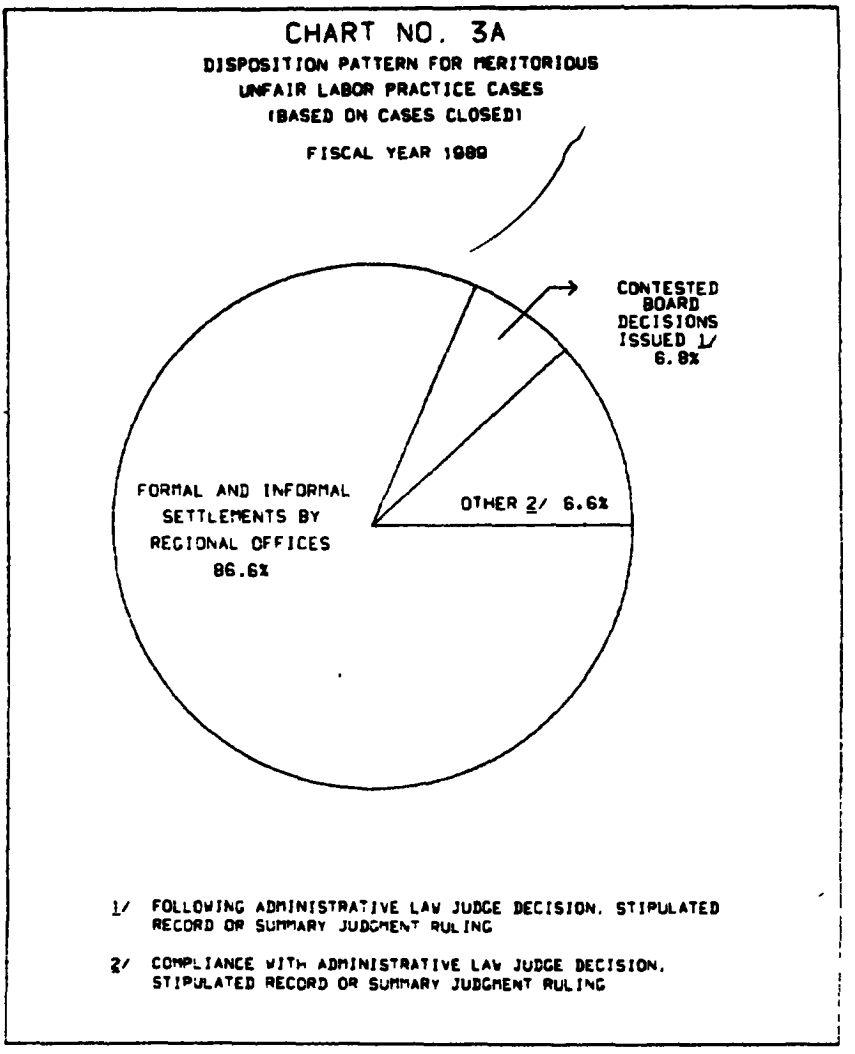
In charges filed against employers, unions led with 68 percent of the total. Unions filed 15,203 charges and individuals filed 7142.

Concerning charges against unions, 6537 were filed by individuals, or 66 percent of the total of 9968. Employers filed 3277 and other unions filed the 154 remaining charges.

In fiscal year 1989, 29,910 unfair labor practice cases were closed. About 95 percent were closed by NLRB Regional Offices, virtually the same as in 1988. During the fiscal year, 30.7 percent of the cases were settled or adjusted before issuance of administrative law judges' decisions, 30.1 percent were withdrawn before complaint, and 34.5 percent were administratively dismissed.

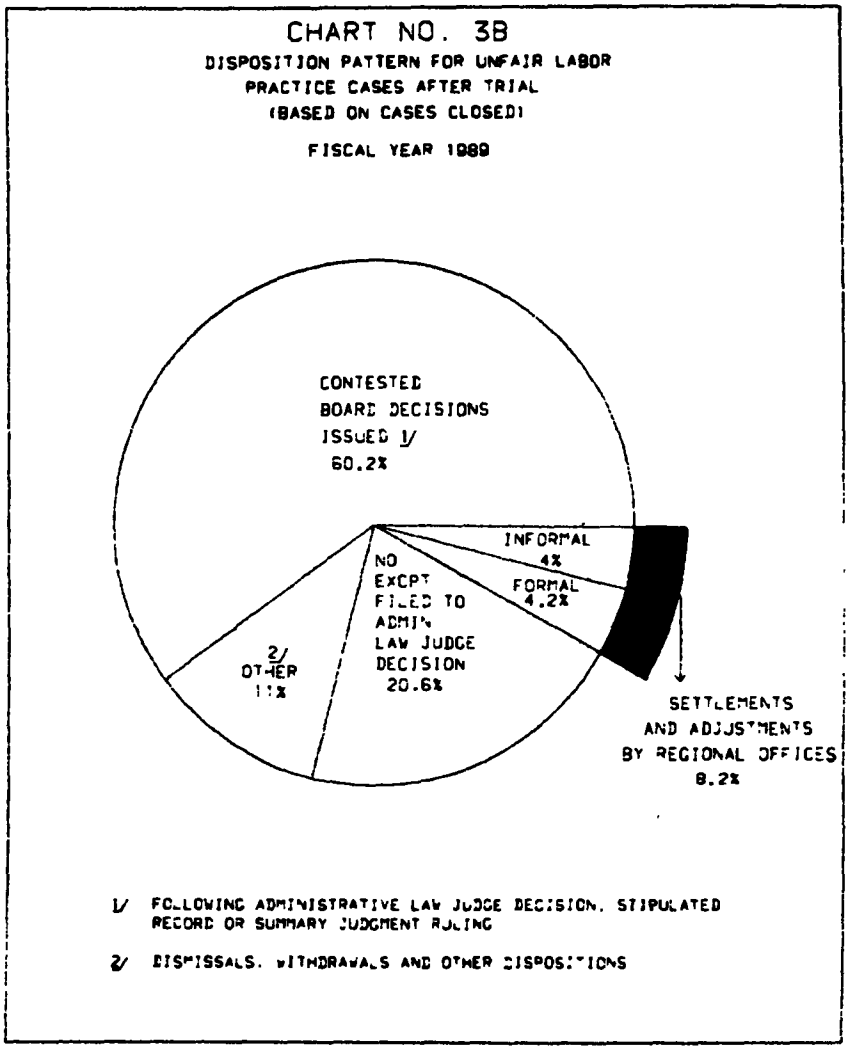
In evaluation of the Regional workload, the number of unfair labor practice charges found to have merit is important—the higher the merit factor the more litigation required. In fiscal year 1989, 37 percent of the unfair labor practice cases were found to have merit, no change from 1988.

When the Regional Offices determine that charges alleging unfair labor practices have merit, attempts at voluntary resolution are stressed—to improve labor-management relations and to



reduce NLRB litigation and related casehandling. Settlement efforts have been successful to a substantial degree. In fiscal year 1989, precomplaint settlements and adjustments were achieved in 6582 cases, or 21.3 percent of the charges. In 1988 the percentage was 22.

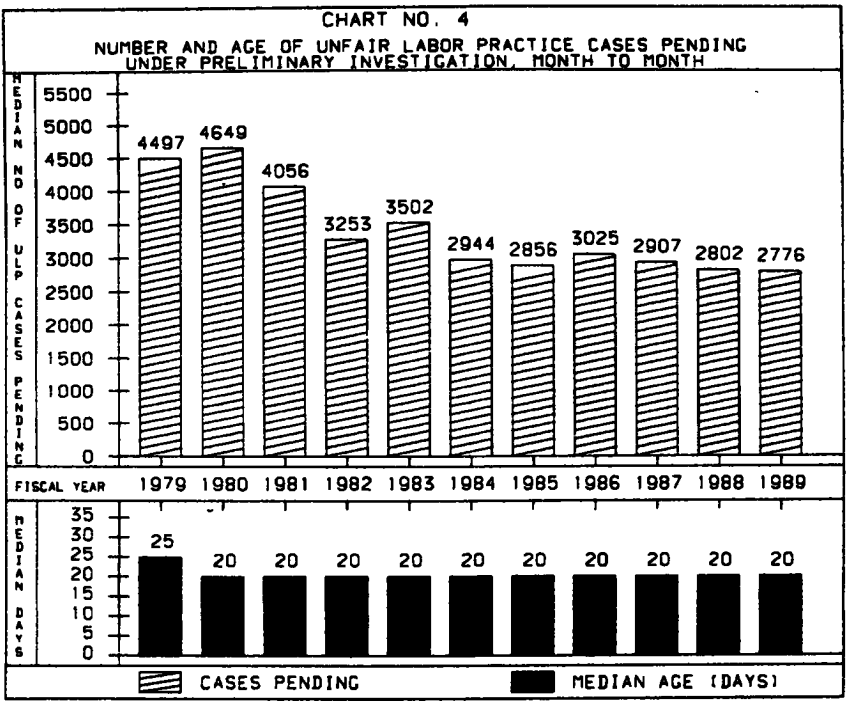
Cases of merit not settled by the Regional Offices produce formal complaints, issued on behalf of the General Counsel. This action schedules hearings before administrative law judges. During 1989, 3851 complaints were issued, compared with 3450 in the preceding fiscal year. (Chart 6.)



Of complaints issued, 80 percent were against employers, 19 percent against unions, and 1 percent against both employers and unions.

NLRB Regional Offices processed cases from filing of charges to issuance of complaints in a median of 45 days. The 45 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 713 decisions in 1050 cases during 1989. They conducted 585 initial hearings,



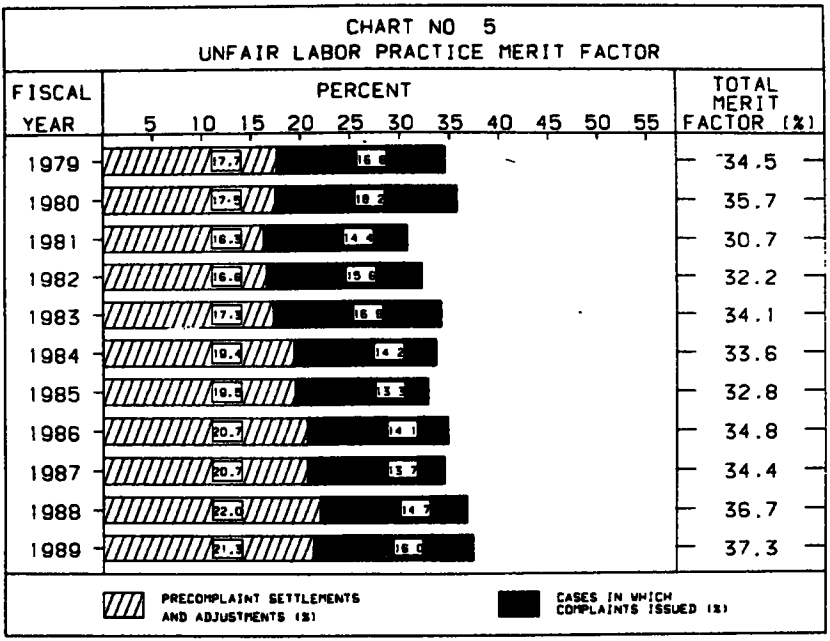
and 38 additional hearings in supplemental matters. (Chart 8 and Table 3A.)

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 year 1989, the Board issued 650 decisions in unfair labor practice cases contested as to the law or the facts—572 initial decisions, 28 backpay decisions, 13 determinations in jurisdictional work dispute cases, and 37 decisions on supplemental matters. Of the 572 initial decision cases, 512 involved charges filed against employers and 60 had union respondents.

For the year, the NLRB awarded backpay of $57.6 million. (Chart 9.) Reimbursement for unlawfully exacted fees, dues, and fines added another $475,467. Backpay is lost wages caused by unlawful discharge and other discriminatory action detrimental to employees, offset by earnings elsewhere after the discrimination. About 4508 employees were offered reinstatement, and 75 percent accepted.

At the end of fiscal 1989, there were 21,260 unfair labor practice cases being processed at all stages by the NLRB, compared with 18,769 cases pending at the beginning of the year.



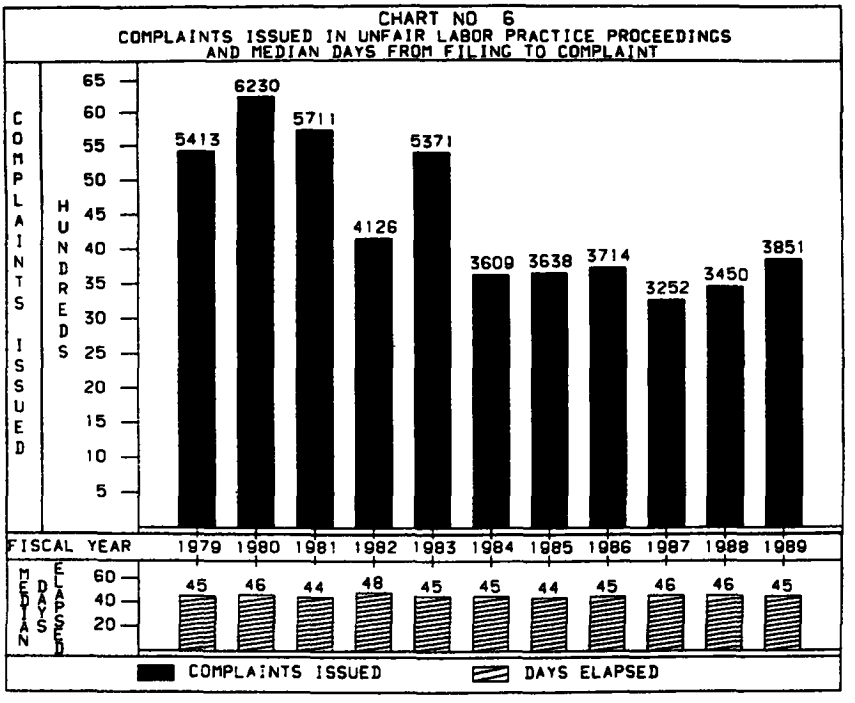
2. Representation Cases

The NLRB received 8477 representation and related case petitions in fiscal 1989, compared with 7898 such petitions a year earlier.

The 1989 total consisted of 6686 petitions that the NLRB conduct secret-ballot elections where workers select or reject unions to represent them in collective bargaining; 1222 petitions to decertify existing bargaining agents; 185 deauthorization petitions for referendums on rescinding a union's authority to enter into union-shop contracts; and 352 petitions for unit clarification to determine whether certain classifications of employees should be included in or excluded from existing bargaining units. Additionally, 32 amendment of certification petitions were filed.

During the year, 8083 representation and related cases were closed, compared with 7611 in fiscal 1988. Cases closed included 6390 collective-bargaining election petitions; 1177 decertification election petitions; 159 requests for deauthorization polls; and 357 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



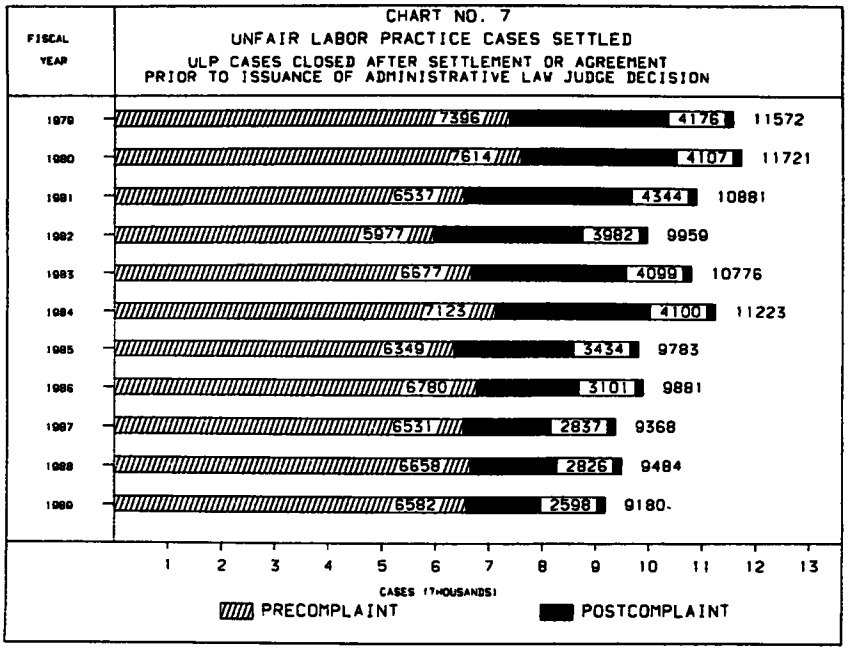
agreements are encouraged by the Agency. In 15.8 percent of representation cases closed by elections, balloting was ordered by NLRB Regional Directors following hearing on points in issue. In eight cases the Board directed elections after transfers of cases from the Regional Office. (Table 10.) There were five cases that resulted in expedited elections pursuant to the Act's 8(b)(7)(C) provisions pertaining to picketing.

3. Elections

The NLRB conducted 4413 conclusive representation elections in cases closed in fiscal 1989, compared with the 4153 such elections a year earlier. Of 273,775 employees eligible to vote, 239,934 cast ballots, virtually 9 of every 10 eligible.

Unions won 2059 representation elections, or 46.7 percent. In winning majority designation, labor organizations earned bargaining rights or continued as employee representatives for 110,037 workers. The employee vote over the course of the year was 116,948 for union representation and 122,986 against.

The representation elections were in two categories—the 3791 collective-bargaining elections in which workers chose or voted down labor organizations as their bargaining agents, plus the 622 decertification elections determining whether incumbent unions would continue to represent employees.

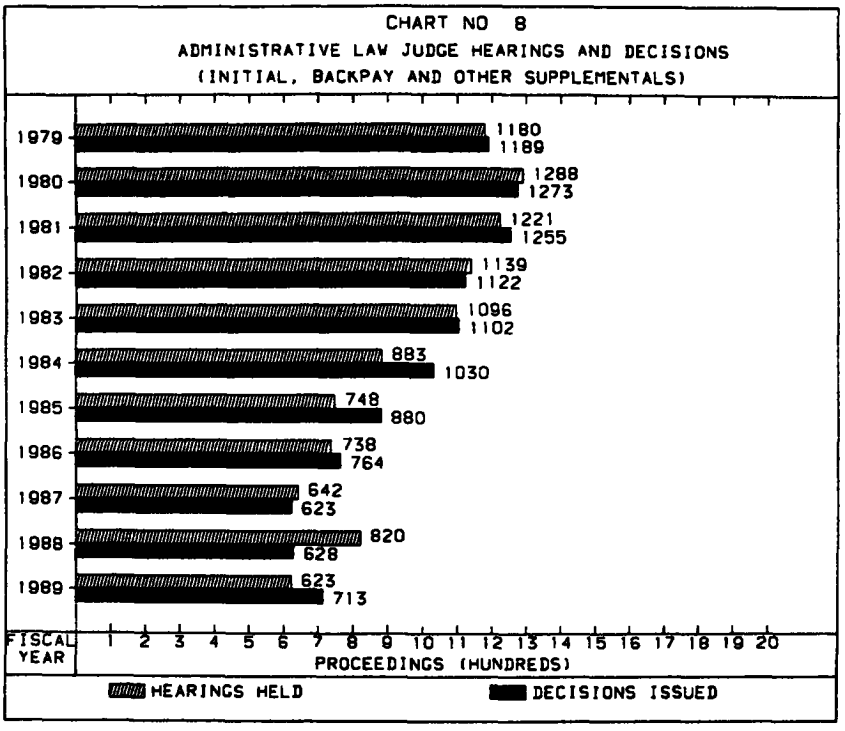


There were 4262 select-or-reject-bargaining-rights (one union on ballot) elections, of which unions won 1935, or 45.4 percent. In these elections, 98,037 workers voted to have unions as their agents, while 120,338 employees voted for no representation. In appropriate bargaining units of employees, the election results provided union agents for 86,440 workers. In NLRB elections the majority decides the representational status for the entire unit.

There were 151 multiunion elections, in which 2 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 1 of the unions in 124 elections, or 82.1 percent.

As in previous years, labor organizations lost decertification elections by a substantial percentage. The decertification results brought continued representation by unions in 181 elections, or 29.1 percent, covering 11,328 employees. Unions lost representation rights for 14,809 employees in 441 elections, or 70.9 percent. Unions won in bargaining units averaging 63 employees, and lost in units averaging 34 employees. (Table 13.)

Besides the conclusive elections, there were 153 inconclusive representation elections during fiscal year 1989 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 41 referendums, or 49 percent, while they maintained the right in the other 43 polls which covered 3472 employees. (Table 12.)

For all types of elections in 1989, the average number of employees voting, per establishment, was 54, virtually the same as in 1988. About 74 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 1638 decisions concerning allegations of unfair labor practices and questions relating to employee representation. This total compared with the decisions rendered during fiscal year 1988.

A breakdown of Board decisions follows:

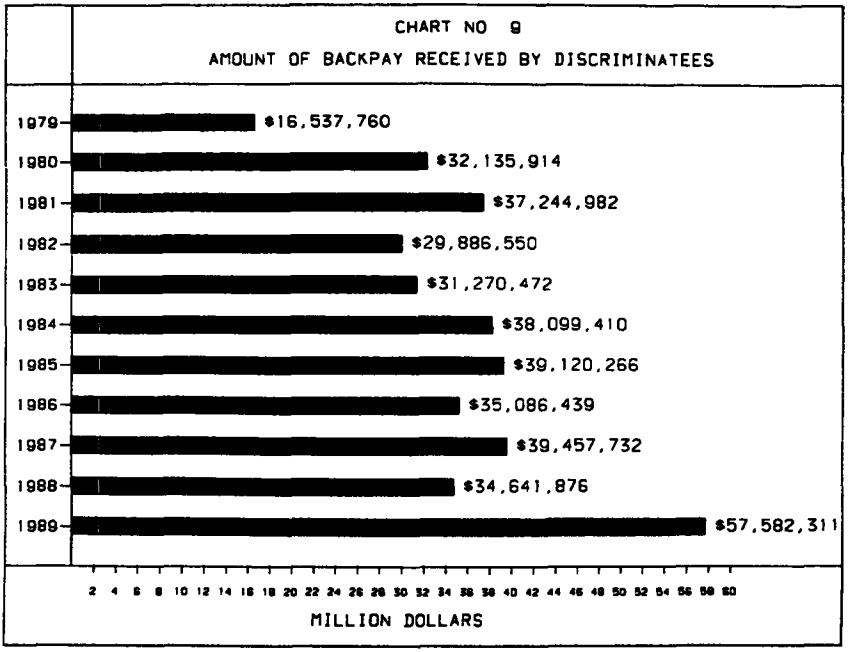


CHART NO 9
AMOUNT OF BACKPAY RECEIVED BY DISCRIMINATEES
1979 $16,537,760
1980 $32,135,914
1981 $37,244,982
1982 $29,886,550
1983 $31,270,472
1984 $38,099,410
1985 $39,120,266
1986 $35,086,439
1987 $39,457,732
1988 $34,641,876
1989 $57,582,311
2 4 6 8 10 12 14 16 18 20 22 24 26 28 30 32 34 36 38 40 42 44 46 48 50 52 54 56 58 60
MILLION DOLLARS

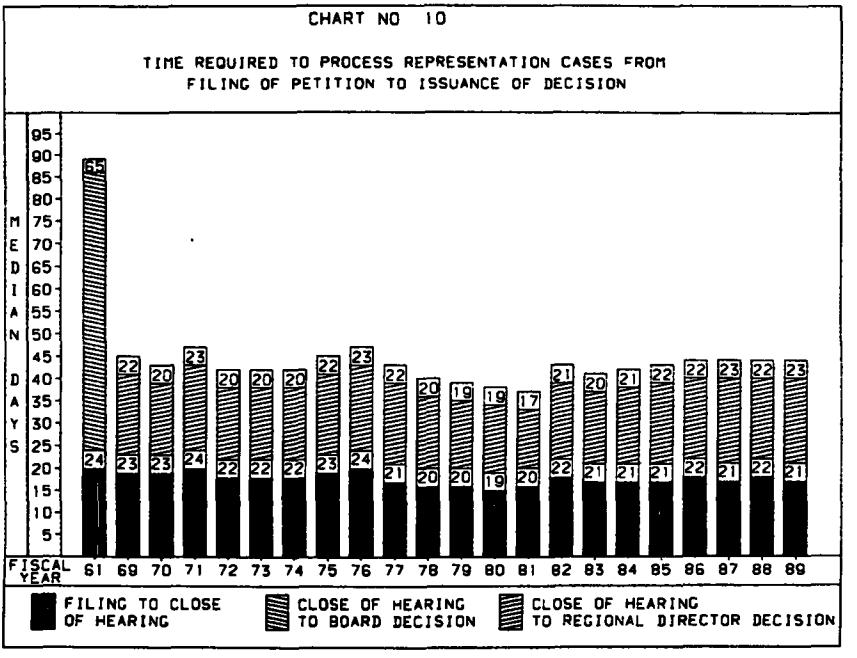
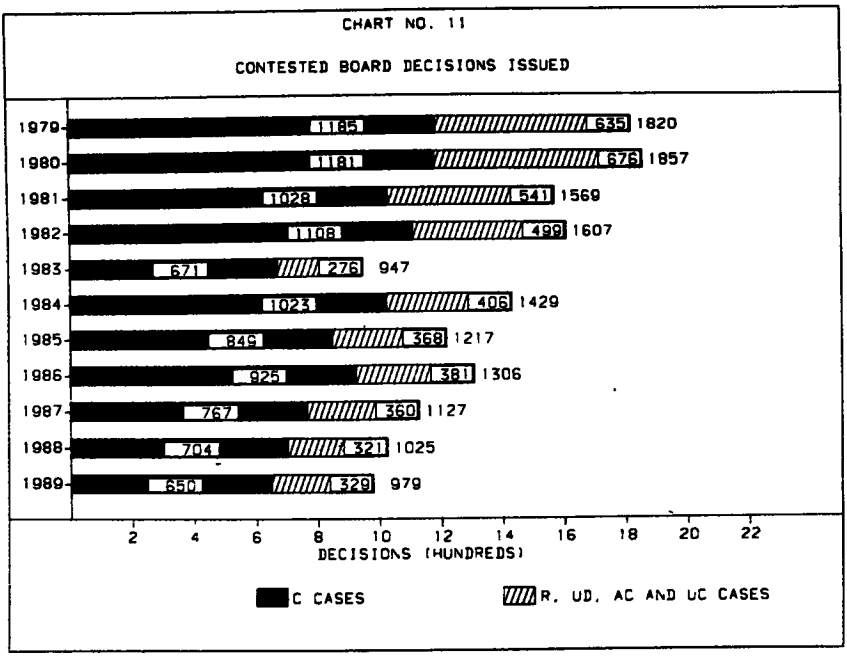


CHART NO 10
TIME REQUIRED TO PROCESS REPRESENTATION CASES FROM FILING OF PETITION TO ISSUANCE OF DECISION
MEDIAN DAYS
95 90 85 80 75 70 65 60 55 50 45 40 35 30 25 20 15 10 5
FISCAL YEAR
61 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89
65 24 22 23 20 23 20 24 23 22 20 24 20 22 20 23 22 21 20 20 19 19 19 20 17 22 21 20 21 21 22 21 22 22 22 21 23 21 22 22 23 21
FILING TO CLOSE OF HEARING
CLOSE OF HEARING TO BOARD DECISION
CLOSE OF HEARING TO REGIONAL DIRECTOR DECISION



Total Board decisions		1,638
Contested decisions		979
Unfair labor practice decisions		650
Initial (includes those based on stipulated record)	572	
Supplemental	37	
Backpay	28	
Determinations in jurisdictional disputes	13	
Representation decisions		322
After transfer by Regional Directors for initial decision	4	
After review of Regional Director decisions	62	
On objections and/or challenges	256	
Other decisions		7
Clarification of bargaining unit	4	

Amendment to certification	0	
Union-deauthorization	3	
Noncontested decisions		659
Unfair labor practice	257	
Representation	398	
Other (UD only)	4	

The majority (60 percent) of Board decisions resulted from cases contested by the parties as to the facts and/or application of the law. (Tables 3A, 3B, and 3C.)

In fiscal 1989 about 7 percent of all meritorious charges and 60 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 1366 decisions in fiscal 1989, compared with 1567 in 1988. (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 713 decisions and conducted 623 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 year 1989, 180 cases involving the NLRB were decided by the United States courts of appeals compared with 166 in fiscal year 1988. Of these, 87.2 percent were won by NLRB in whole or in part compared to 81.3 percent in fiscal year 1988; 4.5 percent were remanded entirely compared with 4.8 percent in fiscal year 1988; and 8.3 percent were entire losses compared with 13.9 percent in fiscal year 1988.

b. The Supreme Court

In fiscal 1989, there were no Board cases decided by the Supreme Court. The Board participated as amicus in one case and the Board's position prevailed in that case.

c. Contempt Actions

In fiscal 1989, 113 cases were referred to the contempt section for consideration of contempt action. There were 28 contempt

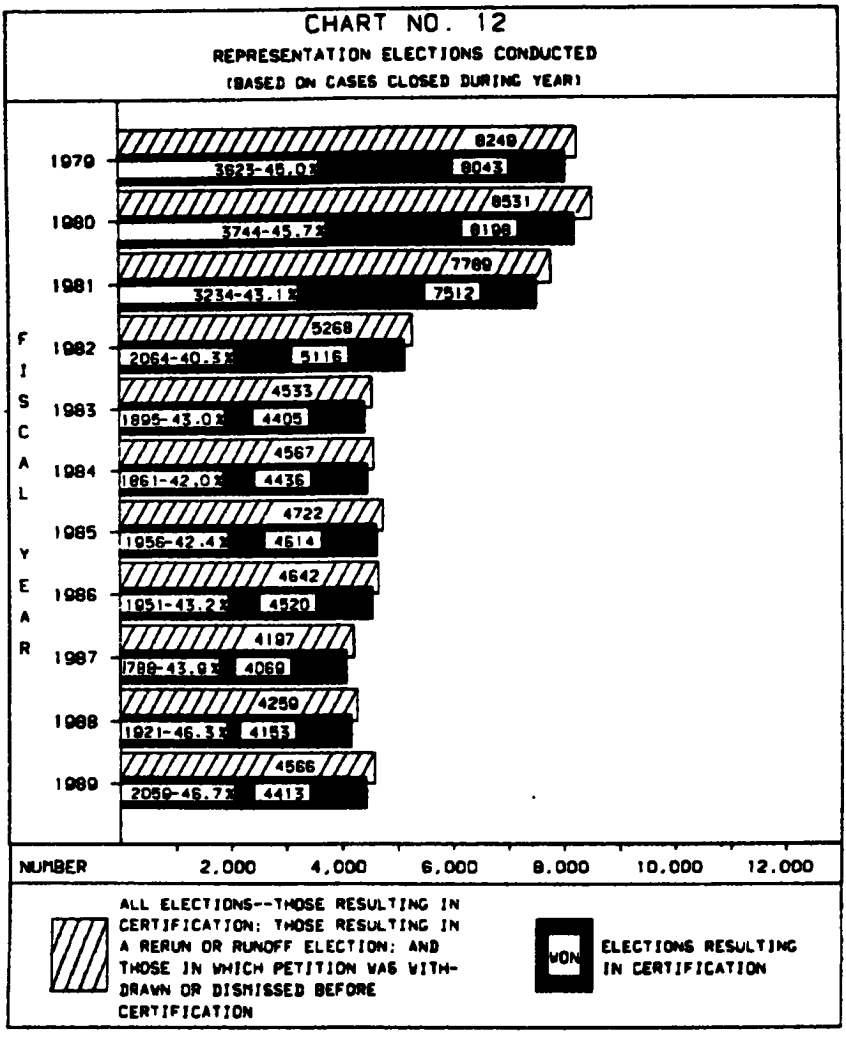
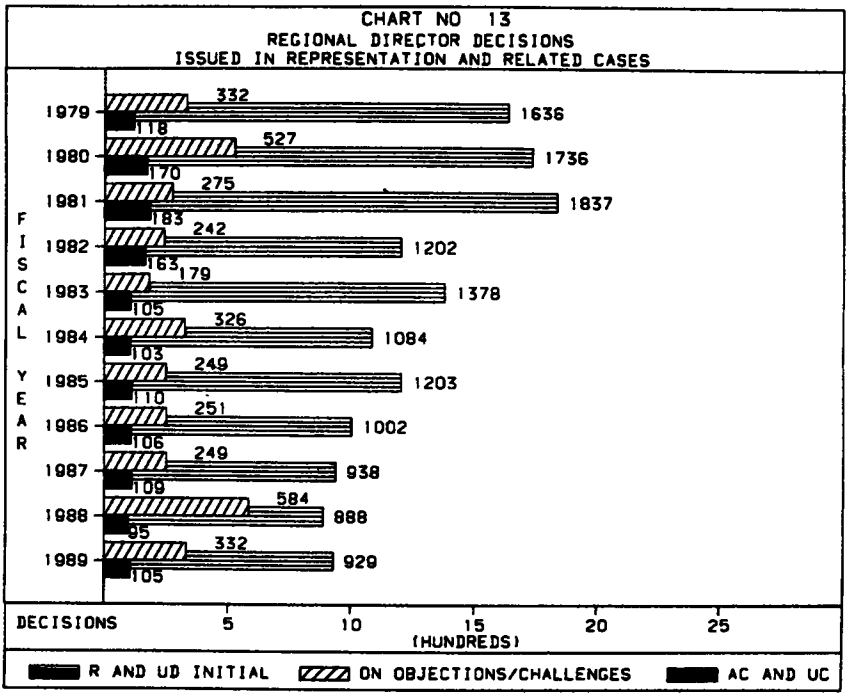


CHART NO. 12
REPRESENTATION ELECTIONS CONDUCTED
(BASED ON CASES CLOSED DURING YEAR)
FISCAL YEAR
1979
8249
3623-46.0%
8043
1980
8531
3744-45.7%
8198
1981
7789
3234-43.1%
7512
1982
5268
2064-40.3%
5116
1983
4533
1895-43.0%
4405
1984
4567
1861-42.0%
4436
1985
4722
1956-42.4%
4614
1986
4642
1951-43.2%
4520
1987
4197
1788-43.9%
4069
1988
4250
1921-46.3%
4153
1989
4566
2059-46.7%
4413
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



proceedings instituted. There were 17 contempt adjudications awarded in favor of the Board; 3 cases in which the court directed compliance without adjudication; there were no cases in which the petition was withdrawn or denied.

d. Miscellaneous Litigation

There were 46 additional cases involving miscellaneous litigation decided by appellate, district, and bankruptcy courts. The NLRB's position was upheld in 40 cases. (Table 21.)

e. Injunction Activity

The NLRB sought injunctions pursuant to Section 10(j) and 10(l) in 71 petitions filed with the U.S. district courts, compared with 69 in fiscal year 1988. (Table 20.) Injunctions were granted in 31, or 78 percent, of the 40 cases litigated to final order.

NLRB injunction activity in district courts in 1989:

Granted	31
Denied	9
Withdrawn	1
Dismissed	1
Settled or placed on court's inactive lists	18

Awaiting action at end of fiscal year 16

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

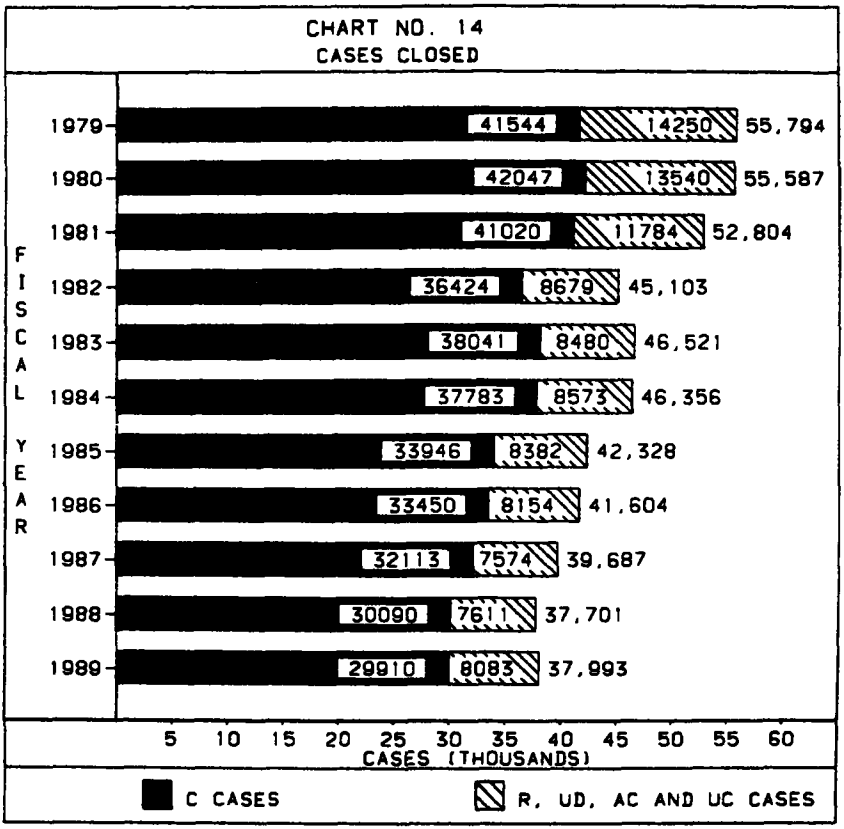
1. Voter Eligibility of Locked-Out Employees and Their Replacements

In *Harter Equipment,*[1] the Board concluded that only employees who were employed in the bargaining unit at the time of an employer's lockout in support of its bargaining demands, and not the employees hired to replace them, were eligible to vote in a decertification election. Although 5 years had elapsed since the petition requesting an election had been filed, there was no evidence or allegation that any of the locked-out employees abandoned their jobs. Moreover, the locked-out employees, unlike strikers, "were not and could not lawfully be, permanently replaced." Therefore, it would be inconsistent with the Act to disenfranchise the locked-out employees. As for the replacements, the employer had locked out the entire bargaining unit for its failure to agree with the employer's bargaining proposal, not merely the particular employees who made up the unit at the time. Therefore their replacements, "regardless of their number," were "necessarily *temporary* replacements for the locked-out bargaining unit" (emphasis added), and thus ineligible to vote.

2. "Closely Related" Test for 8(a)(1) Complaint Allegations

In *Nickles Bakery of Indiana,*[2] the Board reexamined its prior holdings and held that 8(a)(1) complaint allegations must be "closely related" to the allegations or subject matter set forth in the underlying unfair labor practice charge. The Board, overruling contrary precedent, held that the boilerplate "other acts" language printed on the standard Board charge form is not sufficient, standing alone, to support any and all 8(a)(1) complaint allegations. Under this approach, all complaint allegations will be

[1] 293 NLRB No. 79 (Chairman Stephens and Members Johansen and Cracraft).
[2] 296 NLRB No. 118 (Chairman Stephens and Members Cracraft, Higgins, and Devaney).



evaluated to determine whether they are "closely related" to the underlying charge by considering whether the complaint allegation and charge allegation involve the same legal theory and whether the complaint allegation and charge allegation arise from the same factual circumstances or sequence of events. Additionally, the Board may consider whether a respondent would raise similar defenses to both allegations.

3. Eligibility of Supervisors to Vote in Internal Union Elections

In *Power Piping Co.*,[3] the Board affirmed the approach taken in *Nassau & Suffolk Contractors' Assn.*[4] to determine whether an employer unlawfully interferes with the administration of a union in violation of Section 8(a)(2) by permitting its supervisors to vote in an internal union election. Although in cases following *Nassau & Suffolk* the inquiry often was limited to whether the

[3] 291 NLRB No. 80 (Chairman Stephens and Members Cracraft and Higgins).
[4] 118 NLRB 174 (1957).

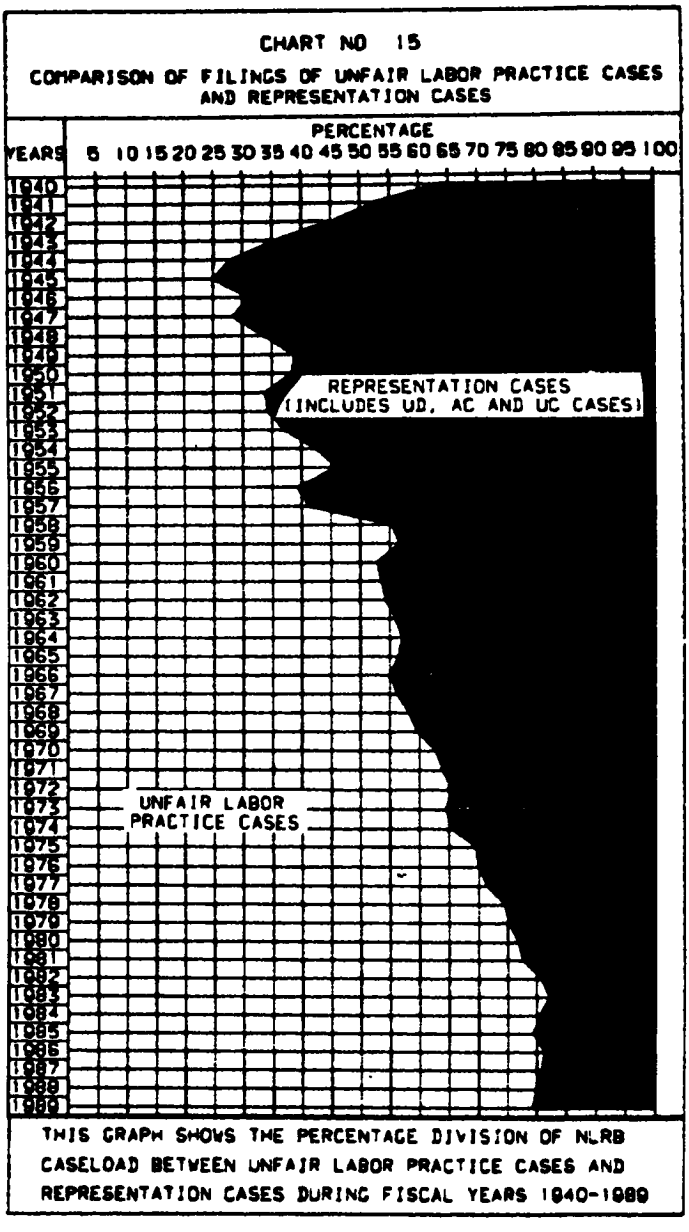


CHART NO 15
COMPARISON OF FILINGS OF UNFAIR LABOR PRACTICE CASES AND REPRESENTATION CASES
YEARS
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REPRESENTATION CASES (INCLUDES UD, AC AND UC CASES)
UNFAIR LABOR PRACTICE CASES
THIS GRAPH SHOWS THE PERCENTAGE DIVISION OF NLRB CASELOAD BETWEEN UNFAIR LABOR PRACTICE CASES AND REPRESENTATION CASES DURING FISCAL YEARS 1940-1989

supervisor was "high level or low level," the Board emphasized that *Nassau & Suffolk* itself required the determination to be made on a case-by-case basis with no one factor being determinative. The Board further held that an employer can only be held liable for intraunion conduct of supervisors if the employer "encouraged, authorized or ratified" the supervisors' activities or "acted in such manner as to lead employees reasonably to believe" that the supervisors were acting for and on behalf of management. The Board also cited with approval the following considerations set forth in the decision of the Court of Appeals for the District of Columbia Circuit in *Plumbers Local 636 (Detroit Plumbing) v. NLRB*:[5] (1) the nature of the supervisory position; (2) the apparent permanence of the supervisory position; and (3) the extent to which the position is properly included in or excluded from the bargaining unit. These considerations, "although not intended to be all-inclusive," will serve as a guide in determining the lawfulness or unlawfulness of supervisory participation in internal union affairs.

4. No-Strike Provisions and Sympathy Strikes

In *Indianapolis Power Co. (Indianapolis Power II)*,[6] the Board, on remand from the United States Court of Appeals for the District of Columbia Circuit, clarified its prior holding that a broad no-strike clause prohibits all strikes, including sympathy strikes, unless the contract or extrinsic evidence demonstrates the parties intended otherwise. The Board emphasized that construction of a broad no-strike provision turns on the parties' actual intent with consideration to be given to the parties' bargaining history and past practice. Further, broad no-strike language does not establish an irrebuttable presumption that sympathy strikes are included within the scope of a no-strike clause. After examining the parties' bargaining history and past conduct, a panel majority concluded that the evidence in this case established that the parties had consistently disagreed over the sympathy strike issue and, therefore, there was no waiver of the employees' right to participate in sympathy strikes. Accordingly, the Board found that the employer violated Section 8(a)(1) and (3) of the Act by disciplining employees for exercising that right.

Applying *Indianapolis Power II* to *Arizona Public Service Co.*,[7] on remand from the Ninth Circuit Court of Appeals, the Board found that the parties did not intend their no-strike clause to encompass sympathy strikes. The parties' bargaining history indicated that the employer recognized there was no agreement that sympathy strikes were covered by the no-strike clause. Moreover, the employer's repeated acquiescence to sympathy strikes indicated that such strikes were not prohibited. Member Johan-

[5] 287 F.2d 354, 362 (1961).
[6] 291 NLRB No. 145 (Chairman Stephens and Member Cracraft; Member Johansen concurring).
[7] 292 NLRB No. 144 (Chairman Stephens and Member Cracraft; Member Johansen concurring).

sen, concurring with Chairman Stephens and Member Cracraft, noted that "there is no showing of mutual intent to include sympathy strikes" within the no-strike clause.

In light of *Indianapolis Power II* and *Arizona Public Service Co.*, the Board reconsidered its prior holding in *Food & Commercial Workers Local 1439 (Rosauer's Supermarkets).*[8] Relying on the parties' intent, bargaining history, and the narrow language of their no-strike clause, the Board found that the parties' no-strike clause did not bar sympathy strikes. The Board, therefore, held that the union did not violate Section 8(b)(1)(A) of the Act by threatening unit employees with disciplinary action for refusing to participate in a sympathy strike.

5. Drug and Alcohol Testing is Mandatory Subject of Bargaining

In a pair of related cases decided during this period, *Johnson-Bateman Co.*[9] and *Star Tribune,*[10] the Board held that drug and alcohol testing of current employees is a mandatory subject of bargaining, but that testing of job applicants is not. In *Johnson-Bateman Co.*, the Board found that testing of current employees is germane to the working environment because such testing is "most closely analogous" to physical examination and polygraph testing, both of which are mandatory subjects of bargaining. The Board further found that the testing requirement was outside the scope of "managerial decisions which lie at the core of entrepreneurial control" because the requirement does not involve the "commitment of investment capital and cannot otherwise be characterized as a decision taken with a view toward changing the scope or nature of Respondent's enterprise." In *Star Tribune,* the Board found that testing of job applicants is not a mandatory subject of bargaining. Job applicants are not employees under the Act. There is no relationship between the employer and the applicant as the applicant performs no services for the employer, is paid no wages, and is under no restrictions as to other employment or activities. Nor does the testing of job applicants "vitally" affect employment conditions of bargaining unit employees.

6. Subcontracting Decision is Mandatory Subject of Bargaining

In *Storer Cable TV of Texas,*[11] the Board found that an employer unlawfully failed to bargain with the union over a decision to subcontract cable installation and reconnection work. The Board concluded that the company's decision is a mandatory subject of bargaining under either the "two-factor" or "two-step" test set forth in *Otis Elevator Co.*[12] Applying the two-factor

[8] 293 NLRB NO. 4 (Chairman Stephens and Members Johansen and Cracraft).

[9] 295 NLRB No. 26 (Chairman Stephens and Members Cracraft, Higgins, and Devancey; Member Johansen dissenting in part).

[10] 295 NLRB No. 63 (Members Johansen, Cracraft, Higgins, and Devaney; Chairman Stephens concurring in part).

[11] 295 NLRB No. 34 (Chairman Stephens and Members Johansen and Cracraft).

[12] 269 NLRB 891 (1984).

test, the Board found that the decision to subcontract turned on labor costs and did not alter the nature or direction of employer's business as the employer continued to provide the same installation and reconnection services to its customers. The Board reached the same conclusion under the two-step test, determining that the decision to subcontract was amenable to resolution through the bargaining process because the union could have offered alternatives such as wage reductions or expansion of the scope of the employee's duties. The Board added that the benefits of resolution through the bargaining process outweighed any burdens placed on the employer.

D. Financial Statement

The obligations and expenditures of the National Labor Relations Board for the fiscal year ended September 30, 1989, are as follows:

Personnel compensation[13]	$93,045,892
Personnel benefits	14,730,386
Benefits for former personnel	27,596
Travel and transportation of persons	3,770,810
Transportation of things	200,777
Rent, communications, and utilities	18,942,831
Printing and reproduction	433,503
Other services	4,871,650
Supplies and materials	648,392
Equipment	1,456,907
Insurance claims and indemnities	128,498
Total obligations and expenditures	$137,257,242

[13] Includes $326,000 for reimbursables.

II

NLRB Jurisdiction

The Board's jurisdiction under the Act, regarding 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. Claim of Changed Circumstances

In *Princeton Health Care Center*,[6] a panel majority of the Board determined that it would continue to assert jurisdiction

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[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] 294 NLRB No. 47 (Members Johansen and Cracraft; Chairman Stephens dissenting).

over the respondent, notwithstanding the latter's claim of "changed circumstances" that purportedly affected the Board's jurisdiction.

While this case was before the U.S. Court of Appeals for the Fourth Circuit, the respondent filed a motion to remand it to the Board for reconsideration. The respondent contended that its new management agreement with Princeton Community Hospital, an alleged political subdivision within Section 2(2) of the Act, deprived the Board of jurisdiction over it. The court remanded the case to the Board for further proceedings.

Members Johansen and Cracraft determined that the Board should continue to assert jurisdiction over the respondent because the Board not only had statutory jurisdiction over the respondent, but it also had discretionary jurisdiction at the time of the unfair labor practices, and at the time of the underlying Board Order.[7] The majority stated that the Board would continue to assert jurisdiction over the respondent "for the purposes of enforcing, and ensuring compliance with, the Order already entered." Finally, Members Johansen and Cracraft noted that, at the time of the unfair labor practices in this case, "the Respondent *did not* contest the Board's jurisdiction over it but, in fact, had assented to it."

In dissent, Chairman Stephens stated that he regarded the issue of whether the respondent is an employer under Section 2(2) to be one of statutory, not discretionary, jurisdiction. Because matters going to the Board's subject matter jurisdiction under the Act may be raised at any time, he said he would remand the case to an administrative law judge for a determination of the character of the respondent and, "if it is found to be an exempt entity, a further determination concerning the extent of its control over the working conditions of the unit employees at issue here."

B. Political Subdivision

In *St. Paul Ramsey Medical Center*,[8] the Board issued an advisory opinion finding that the medical center was not an exempt "political subdivision" under Section 2(2) of the Act. Therefore, the Board advised the parties that it would assert jurisdiction over the center, a full-service health care, hospital, and education and research facility.

All parties agreed, and the Board found, that the medical center was an exempt political subdivision prior to 1986. At that time, the medical center was managed and operated by a county commission created by an act of the state legislature. Among other things, the act provided that the commission would be composed of 15 members, 4 of whom were members of the board of the local county commissioners and the remaining 11 of

[7] 285 NLRB 1016 (1987).

[8] 291 NLRB No. 114 (Chairman Stephens and Members Johansen, Cracraft, and Higgins).

whom were citizens appointed by the board of the local county commissioners. The act also provided that the commission's employees would be subject to the county's civil service personnel laws, and that the commission's meetings, which were required to be open to the public, would be considered to be "meetings of a public body."

However, in 1986, the state legislature repealed that act and passed a new one. This new act contained various provisions that relaxed many of the previous ties between the medical center and the county commission. It also provided that the nonprofit corporation set up to operate the center was not a "public employer" and that its employees were not "public employees."

The Board found that such provisions in the new act clearly indicated that the State intended to "privatize" the daily operations of the medical center. While the medical center retained or acquired certain public characteristics under various other provisions of the new act, the Board found these characteristics insufficient on balance to establish that the center was intended to be an administrative arm of the State.

Accordingly, the Board advised the parties that, based on the facts presented, it would assert jurisdiction over the medical center.

III

NLRB Procedure

A. The 10(b) Period for Filing Charge

In *Chemung Contracting Corp.*,[1] the Board held, contrary to the administrative law judge, that the union's charge alleging that the respondent joint employers had violated Section 8(a)(5) by implementing unilateral changes in the terms and conditions of employment for employees who returned to work during a strike was time barred by Section 10(b) of the Act.

The evidence showed that after the most recent collective-bargaining agreement between the respondent and the union had expired, the parties were unable to agree on a successor contract. During the strike that followed, the respondent ceased paying into fringe benefit and welfare funds established by the expired contract and made changes in the employees' fringe benefit and health insurance programs with the result in some instances that wages were increased to compensate for the absence of pension contributions. At the hearing, the union's business manager admitted that he knew that the respondent had made these unilateral changes at least 10 months before the union filed its unfair labor practice charge.

Based on the testimony of the union's business manager, the judge found that the union clearly knew of the respondent's failure to contribute to the various fringe benefit funds before the 10(b) period commenced. Nevertheless, the judge concluded that the respondent's 10(b) argument lacked merit. Citing *Farmingdale Iron Works*,[2] the judge noted that, although pre-10(b) acts cannot be the basis for finding a violation, each act of prohibited conduct occurring within the 6-month limitations period constitutes "a separate and distinct substantive violation in its own right."

In disagreeing with the judge, the Board noted that the General Counsel can rely on pre-10(b) evidence as "background" without running afoul of that provision. However, it added, the General Counsel is barred from issuing any complaint in which the operative events establishing the violation occurred more than 6

[1] 291 NLRB No. 123 (Chairman Stephens and Members Johansen and Cracraft).

[2] 249 NLRB 98 (1980), enfd. mem. 661 F.2d 910 (2d Cir. 1981).

months before the unfair labor practice charge had been filed and served.[3]

In the instant case, however, the Board noted that the operative facts establishing the violation occurred outside the 10(b) period and that it was precluded from deciding the underlying substantive legal issues. As the Board explained (291 NLRB No. 123, slip op. at 6):

> [I]t is clear that outside the 10(b) period the Respondent unequivocally repudiated its obligation to make contributions into the trust funds and the Union knew of this action. The Respondent at no time since has resumed making such payments. Furthermore, the Respondent has not engaged in any conduct, nor have there been any intervening circumstances that can be construed as inconsistent with the Respondent's initial actions.

Thus, the Board found that the judge's reliance on *Farmingdale Iron Works*, above, was misplaced. It stressed that in *Farmingdale*, a charge regarding the employer's failure to make periodic fringe benefit fund payments was filed during the term of an existing collective-bargaining agreement requiring such payments. Although the employer's initial failure to make the required payments occurred more than 6 months before the charge was filed in that case, the Board held that each subsequent failure to make the contractually required monthly benefit fund payments constituted a separate and distinct violation of the employer's bargaining obligation. Thus, to make out a prima facie case of an 8(a)(5) violation in *Farmingdale*, the Board stated that the General Counsel "did not need to reach beyond the 10(b) period for evidence; the employer's benefit payment obligation (i.e., the rates specified in the existing contract) and its breaches of that obligation were all apparent from documentary and testimonial evidence within that period."

However, in *Chemung*, there was no such evidence within the 10(b) period on which to predicate a violation because both the circumstances that created the employer's obligation to make fringe benefit fund payments and those that gave notice to the union of the employer's repudiation of that obligation occurred more than 6 months before the union filed its charge.

Accordingly, the Board concluded that, unlike the situation in *Farmingdale*, this case presented no "separate and distinct" violations provable by evidence within the 10(b) period.

In *Kanakis Co.*,[4] a panel majority of the Board held that a respondent's fraudulent concealment of evidence from the General Counsel during the investigation of a charge may toll the 10(b) period and warrant the subsequent reinstatement of a dismissed charge. The panel majority therefore rejected the administrative

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[3] See *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960), the leading case on the meaning of the 6-month limitations period of Sec. 10(b).

[4] 293 NLRB No. 50 (Members Johansen, Cracraft, and Higgins; Chairman Stephens dissenting).

law judge's conclusion that the 6-month limitations period of Section 10(b) may be tolled only when the charging party lacks notice of the operative facts because of the respondent's fraudulent concealment.

The respondent company and the union were parties to a collective-bargaining agreement requiring the respondent to use the union hiring hall as its exclusive source for painters. In January 1982, Charles D. Frankenfield, a painter, filed an unfair labor practice charge alleging that he was fired by the Kanakis Company at the request of Robert Delker, a union business agent. According to Frankenfield, the company's president, Pelekanakis, told him when he was fired that agent Delker had threatened that the union would refer no more painters to Kanakis unless the company fired Frankenfield. Frankenfield filed a timely charge against the company in June 1982. During the investigation of that charge, Pelekanakis signed an affidavit swearing that Frankenfield was laid off for economic reasons and denying that the union had requested Frankenfield's layoff or that he had told Frankenfield it had. Relying on the employer's testimony, the Regional Director dismissed Frankenfield's charge in July 1982 for lack of evidence.

In 1985, union business agent Delker was tried and convicted in Federal district court on multiple criminal charges involving extortion and fraud. The respondent's president testified in that proceeding that agent Delker had insisted he fire Frankenfield, and confessed that he had earlier lied about the matter to the Board. When Frankenfield learned about Pelekanakis' testimony from a newspaper article, he requested that the Board reopen his charge. After further investigation, the Regional Director revoked the earlier dismissal letter, and issued a complaint against the respondent company in November 1985.

The judge found the complaint in this case was barred by Section 10(b) because there had been no fraudulent concealment of the operative facts from the charging party, even though the respondent had presented perjured testimonial evidence to the General Counsel to induce dismissal of the charge. The judge interpreted statements in *Ducane Heating Corp.*[5] and *Winer Motors,*[6] describing examples of special circumstances where the 10(b) period would be tolled, such as fraudulent concealment from a charging party, to require dismissal of the complaint. However, neither of those cases involved fraudulent concealment.

Unlike the judge, the majority held that Section 10(b) may be equitably tolled where, as here, the General Counsel has dismissed a timely charge based on perjured testimony. As the majority noted:

[5] 273 NLRB 1389, 1390–1391 (1985), enfd. mem. 785 F.2d 304 (4th Cir. 1986).
[6] 265 NLRB 1457, 1459 (1982).

> There is no question that the Respondent here perpetrated a fraud against the General Counsel by giving perjured evidence during the investigation with the intent of inducing the General Counsel to dismiss the charge. This fraud was carried out by the Respondent's highest official and involved the central operative facts being investigated. Further, the Respondent's fraud succeeded in accomplishing its goal—the dismissal of the charge here. Such conduct demonstrates a contempt for the Board's processes that cannot be condoned. Refusing to toll the 10(b) period here would simply allow the Respondent to profit from its perjury and misconduct in deceiving the Board and encourage others to similarly abuse the Board's processes. Further, we are unwilling to penalize the Charging Party by depriving him of any remedy in this situation where he has complied with the procedural requirements for filing a charge and then supported it with evidence that makes out a violation.

Accordingly, the majority reinstated the dismissed charge and remanded the case to the judge for a decision on the merits.

In dissent, Chairman Stephens warned that the majority's decision "extends the doctrine of fraudulent concealment to an unprecedented, and in my view unwarranted, extent." He noted that the Board's prior cases permitting equitable tolling of the 10(b) limitations period all involved the charging party's, not the General Counsel's, lack of knowledge of the facts constituting the violation because of the respondent's prevarication or its concealment of relevant information.

Chairman Stephens would have found that "Section 10(b) itself is structured in such a way as to give the General Counsel every opportunity to make a thorough investigation before disposing of the charge." Given the opportunity of wide investigation, "it seems not only fair, but also in keeping with the finality afforded by a limitations statute, that in cases like this one, once an investigation is completed, an evaluation of the evidence is made, and the case is closed, the General Counsel should not be allowed so easily to revisit the matter," the Chairman concluded. He went on to find the majority's justifications unpersuasive, particularly the majority's dismissal as dicta of the discussion of fraudulent concealment in *Ducane* and *Winer Motors.*

B. Section 102.69(a)

In *Public Storage,*[7] the Board found that the Regional Director erred in rescinding a Certification of Results because the petitioner failed to receive a letter from the Regional Director informing it about obligations under Section 102.69(a) of the Rules and Regulations.

[7] 295 NLRB No. 115 (Chairman Stephens and Members Cracraft and Higgins; Member Devaney dissenting).

On November 16, 1988, the petitioner filed timely election objections. By letter sent by certified mail, the Regional Director requested that the petitioner submit evidence in support of its objections by November 23, 1988. The letter further advised that the failure to provide such evidence would result in the objections being overruled.

On the petitioner's failure to respond to the Regional Director's letter, the Regional Director issued a Supplemental Report and Decision on Objection that noted the petitioner's failure to comply with the request to provide evidence within the time allowed, overruled the objections, and issued a Certification of Results. On receipt of a letter from the petitioner advising that it had never received the Region's letter or any other notice that its evidence was due, the Regional Director issued a Second Supplemental Decision in which he rescinded the Certification of Results and issued a notice of hearing in connection with the objections. The employer filed a request for special permission to appeal the Regional Director's action.

In granting the employer's appeal and reinstating the certification of results, the Board noted that the Regional Director's notification of "reminder" of the petitioner's obligation to submit evidence in support of its objections "[W]ithin 7 days after the filing of objections, or such additional time as the Regional Director may allow," is not required by the Rules, but rather is undertaken as a matter of courtesy. The Board held that in these circumstances the petitioner's failure to receive the Regional Director's letter does not relieve its obligation to comply with Section 102.69(a) of the Board's Rules and Regulations.

In dissent, Member Devaney would not reverse the Regional Director's decision to consider the petitioner's objections because, in his view, Section 102.69(a) permits the Regional Director to extend the time for submitting evidence in support of a party's objections. In these circumstances, Member Devaney "would not countermand the Regional Director's exercise of his discretion" in accepting Petitioner's evidence in support of its objections.

C. Non-Board Settlement

In *Auto Bus, Inc.*,[8] the Board held that, where a non-Board settlement agreement results in the withdrawal of a charge, the Regional Director does not become an "official party" to that agreement merely by approving the withdrawal request. Thus, the Regional Director is not estopped from subsequently issuing a complaint based on new charges alleging the same conduct as the previously withdrawn charges.

[8] 293 NLRB No. 106 (Members Johansen, Cracraft, and Higgins).

After a complaint issued alleging that the respondent violated Section 8(a)(1) and (3), the respondent and the charging party union entered into an informal agreement. The union then requested withdrawal of its charges, and the Regional Director approved that request and dismissed the extant complaint.

Before the settlement agreement was signed, the union filed—and later withdrew without prejudice—another charge alleging that the respondent violated Section 8(a)(3) by discharging an employee. The substance of this charge was later timely refiled. The union also filed an amended charge that included the 8(a)(1) allegations of threats and promises of benefit that had previously been withdrawn as a result of the settlement agreement between the parties. These charges formed the basis for the instant complaint.

The respondent filed a motion to dismiss the complaint, asserting that certain allegations were part of a previous charge and complaint that was settled between the parties and approved by the Regional Director. The Associate Chief Administrative Law Judge granted the motion, finding that there had been a settlement agreement sanctioned by the Regional Director, compliance by the respondent, and no subsequent alleged unfair labor practices. The judge found that the Regional Director had to be aware of the nature of the non-Board settlement, so that, in effect, "the Regional Director was a party to the withdrawal of the charge and the 'settlement' of this case" and was therefore estopped from litigating the allegations that were contained in the first complaint.

Thereafter, the General Counsel filed a request for special permission to appeal the judge's order. In granting that request, the Board concluded that the judge erred in dismissing certain complaint allegations because it found that this case was "squarely controlled" by *Quinn Co.*[9] The judge in *Quinn* noted that (id. at 799):

> In the absence of a Regional Director signing or approving a settlement agreement, any such agreement between a charging party and a respondent which resulted in the withdrawal of the charge is viewed by the Board as a private arrangement which does not estop the Regional Director from proceeding on any new charges alleging the same conduct as the withdrawn charges.

Here, as in *Quinn*, the Regional Director did not sign or approve the non-Board settlement agreement. Thus, this was a private arrangement between the parties that did not estop the Regional Director from proceeding on any new charges alleging the same conduct as the withdrawn charges. The fact that a Board agent was involved in the parties' settlement negotiations

[9] 273 NLRB 795 (1984).

that let to the withdrawal of the charge was immaterial, according to the Board, since the Regional Director was not an official party to the non-Board adjustment.

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. Unit Clarification

In *Baltimore Sun Co.*,[1] the Board considered the question of whether a unit clarification petition filed by the employer during the term of its contract with the union was timely filed. Although the Board does not usually consider unit clarification petitions filed during the term of a contract that clearly defines the bargaining unit, the Board found that the employer's petition fell

[1] 296 NLRB No. 131 (Chairman Stephens and Members Cracraft and Devaney).

within the exception announced in *St. Francis Hospital.*[2] In that case the Board stated that when parties cannot agree on a disputed classification but do not want to pursue the issue at the expense of reaching an agreement, "the Board will entertain a petition filed shortly after the contract is executed, absent an indication that the petitioner abandoned its request in exchange for some concession in negotiations."

The employer and the union were parties to a collective-bargaining agreement effective May 1, 1987, to April 30, 1990. They began bargaining over a new contract in February 1987. At the second negotiating session, the employer proposed to exclude several positions, including the ones in dispute, from the bargaining unit.

When the employer made its proposal, it informed the union "that if we are not able to negotiate these exclusions we are going to the Board . . . to file a unit clarification petition." At the fourth and final negotiating session in late May 1987, the union offered to agree to the exclusion of certain classifications in return for certain concessions. The employer rejected the union's proposal as too expensive. The employer contended that at this time it specifically told the union it was reserving its right to take the matter to the Board while the union asserted that the employer stated that it was "dropping" its proposal to exclude the seven disputed classifications.

At this last session the parties reached agreement on a new contract and agreed to incorporate the relevant provision from the previous contract in the new contract. The issue of the seven disputed positions was not raised again until the employer filed its unit clarification petition on September 17, 1987.

The Regional Director dismissed the petition on the ground that no "independent evidence" existed that the employer had reserved its right to go to the Board. The Regional Director inferred from the parties' inclusion of the prior provision in the new contract that the employer had abandoned its intention to go to the Board. In addition, the Regional Director found the petition untimely because the employer did not file it until over 3 months after agreement was reached on a new contract.

In reversing the Regional Director, the Board found that the employer had reserved its right to go to the Board at the second negotiating session and had not abandoned that position. The Board found that the employer was not required to renew its position, once made, at the last negotiating session. In addition, the Board found that the Regional Director erred in inferring from the inclusion of the prior provision in the new contract that the employer had abandoned its position. As the Board noted, "the inclusion of that provision in the present agreement may be read to signify only that the [e]mployer did not want the unit issue to

[2] 282 NLRB 950 (1987).

delay agreement on a new contract." Finally, the Board noted that *St. Francis Hospital* does not require a party to supply "independent evidence" (i.e., documentary evidence) that it has reserved its right to go to the Board.

Regarding the timeliness issue, the Board first noted that the Regional Director took as the relevant time period the period between the date agreement was reached on a new contract and the date the petition was filed, a period of over 3 months. In *St. Francis Hospital*, however, the relevant time period was that between the date the contract was executed and the date the petition was filed, a period of 7 weeks.

In the present case the employer filed its petition 11 weeks after the contract was executed. Although it noted that the employer filed its petition 4 weeks after the petition was filed in *St. Francis Hospital*, the Board decided that that case "should not be construed as setting a precise or outer time limit for the filing of such petitions" and concluded "that the period of 11 weeks also falls within the 'shortly after' limitation set forth in *St. Francis Hospital*."

In concluding that the petition was timely filed, the Board also noted that there was no evidence that the union had been disadvantaged by the employer's delay in filing its petition.

In *Dennison Mfg. Co.*,[3] the Board reversed a Regional Director's decision and dismissed a union's petition for clarification of the bargaining unit, finding that it was inappropriate to accrete a newly created position of boiler room "shredder/sorting floor operator" into an existing unit of skilled employees working throughout the facility.

The union represents 95 employees in the "plant facilities and maintenance departments" at the employer's vast paper products manufacturing facility. The unit includes a variety of skilled classifications, among which are machinist, diemaker, carpenter, millwright, electrician, welder, pattern maker, plumber, pipefitter, steamfitter, various repairmen, and firemen. Although diverse in their specialties, these individuals all share some type of skill, requiring training, experience, and/or licensing, which distinguishes them from most of the employer's 2000 other employees.

In large part, unit members perform their jobs throughout the facility, wherever and whenever their particular skills are required. Firemen, however, are located together in a separate powerhouse building, operating boilers that provide heat for the entire facility.

When a new paper-burning-type boiler was added in the powerhouse, the need arose for a method of ensuring that no noncombustible materials were intermingled with the burnable waste needed to fuel the boiler. To accomplish this, the employer: (1) implemented a waste separation system at the plant floor level,

[3] 296 NLRB No. 134 (Chairman Stephens and Members Cracraft and Higgins).

providing separate containers for combustible and noncombustible materials, and (2) created a new powerhouse job classification, the shredder/sorting floor operator, whose duties include receiving the collected paper waste, operating machinery to remove any noncombustible materials remaining in the collected waste, and feeding this refined waste into the shredder.

The union petitioned for unit clarification, asserting that the shredder/sorting employees should be accreted into the existing unit. Focusing on the location of the work, the operational integration of the sorting and shredding process with the operation of the boiler, the close, regular contact among all powerhouse employees, their common supervision, and evidence of unit personnel performing shredder/sorting duties, the Regional Director determined that accretion was appropriate.

The Board disagreed, finding that the factors relied on by the Regional Director—which essentially derive from the fact that the duties of the shredder/sorting employees are performed in the powerhouse—are overridden by other evidence establishing that there is little practical community of interest between the disputed employees and those comprising the unit. With regard to functional integration, the disputed employees perform work that is more closely associated with nonunit work (the collection and separation of materials needed to fuel the boiler) than it is with unit work (the operation of the boiler). Unit employees do not typically have close working contracts with other unit employees; in fact, the diversity of unit members' specialties is such that they more regularly work among nonunit employees throughout the employer's facility. Instead, specialized skills and abilities provide the unit's most distinguishing characteristic. These skill levels, with commensurate differences in rates of pay, demonstrate the most striking disparity between the unit members and the shredder/sorting floor operators. Illustrative of their skills disparity is that job interchange among powerhouse employees is solely one-way, i.e., unit personnel are capable of performing and have performed shredder/sorting work, but shredder/sorting operators are neither equipped nor authorized to perform unit members' duties.

Applying the restrictive policy applicable to questions of accretion, the Board concluded that the "overwhelming community of interest"[4] standard necessary to warrant the inclusion of the disputed employees in this case had not been met.

B. Supervisory Status

In *Detroit College of Business*,[5] the Board found that coordinators whom the college deans had appointed to run various aca-

[4] *Safeway Stores*, 256 NLRB 918 (1981).

[5] 296 NLRB No. 40 (Chairman Stephens and Members Cracraft and Higgins).

demic departments at the school were supervisors even though their supervisory duties were exercised over nonunit employees and such duties occupied less than 50 percent of their worktime. Accordingly, the coordinators were excluded from the bargaining unit.

The Board reversed the Regional Director who found that since the coordinators devoted a majority of their worktime to teaching and exercised only occasional supervisory authority over nonunit faculty, he was precluded by the decision in *Adelphi University*[6] from finding the coordinators supervisors within the meaning of the Act. The Board noted first that the coordinators exercised Section 2(11) hiring authority with regard to part-time faculty members and effectively recommended their discharge, retention, or transfer.

Contrary to the Regional Director, the Board found that these supervisory duties were not exercised sporadically but constituted regular and frequent portions of their overall job responsibilities. With regard to the Regional Director's reliance on *Adelphi University*, the Board stated that that decision has mistakenly been cited in subsequent cases as establishing a rule that persons who spend less than 50 percent of their time supervising nonunit employees are not supervisors.

Rejecting such a shorthand approach, the Board held that to ascertain whether an individual's exercise of supervisory authority over employees outside the unit warrants his exclusion as a supervisor, a complete examination of all the relevant factors must be made to determine the nature of the individual's alliance with management. Those factors include, but are not limited to, the business of the employer, the duties of the individuals exercising supervisory authority and those of the bargaining unit employees, the particular supervisory functions being exercised, the degree of control being exercised over the nonunit employees, and the relative amount of interest the individuals at issue have in furthering the policies of the employer as opposed to those of the bargaining unit in which they would be included.

The Board emphasized that although time spent in performance of supervisory duties will remain relevant to the analysis, consideration of this factor will no longer rely on a rule that draws the line for finding supervisory status at individuals whose supervisory duties require 50 percent or more of their time.

Applying these principles, the Board held that the coordinators' supervision of the part-time nonunit faculty, even though constituting only 25 percent of their duties, was part and parcel of their primary work product rather than an ancillary part of their duties. They were hired both to perform professional teaching services *and* to hire and evaluate the faculty. Concluding that these supervisory duties so allied the coordinators with manage-

[6] 195 NLRB 639 (1972).

ment as to establish a differentiation between them and other unit employees, the Board excluded them from the unit.

C. Scope of University Unit

In determining the appropriate scope of a bargaining unit at a college or a university, the Board examines prior bargaining history, centralization of management (especially with respect to labor relations), employee interchange, interdependence of facilities, differences or similarities of skills and functions, and geographic locations.

Applying these factors in *University of Hartford*,[7] a panel majority of the Board held that the petitioned-for unit of the employer's building service (custodial) and groundskeeping employees was an appropriate unit for collective bargaining.

The employer had contended that the petitioned-for unit was too limited in scope, and that the only appropriate unit was a universitywide, nonacademic unit that would include all its clerical and technical employees, skilled tradesmen, and powerplant employees (approximately 225), in addition to the approximately 80 unskilled maintenance employees in the unit sought by the petitioner.

Chairman Stephens and Member Cracraft found that, although the petitioned-for unit constitutes neither an entire maintenance department nor a grouping with a core of craft-type employees who themselves may constitute a separate appropriate unit,[8] the unit includes all employees doing custodial and groundskeeping work throughout the employer's 200-acre, 43-building facility, regardless of their administrative departmental classification.[9] The majority noted that these employees have separate immediate supervision by the managers of their respective sections within the employer's operations department; they have only minimal work-related contact with the employer's skilled employees in the same department (i.e., tradesmen and powerplant specialists or utility service employees) and with the employer's other nonprofessional employees; and there has been little or no interchange or transfer into or out of the included job classifications.[10] The majority found that the other employees whom the employer would include in the unit do not share a community of interest

[7] 295 NLRB No. 79 (Chairman Stephens and Member Cracraft; Member Johansen dissenting).

[8] See *California Institute of Technology*, 192 NLRB 582 (1971); *University of Rochester*, 222 NLRB 532 (1976). But compare, *Duke University*, 227 NLRB 1627 (1977).

[9] See *Harrah's Club*, 187 NLRB 810 (1971).

[10] The majority noted that *Harvard College*, 269 NLRB 821 (1984) (*Harvard II*), does not preclude a finding that this unit is appropriate, although it consists of only a portion of the employer's unskilled employees, as this unit is campuswide in scope as to all employees in the same classifications.

Further, although in *Harrah's Club*, above, the Board held that the smallest appropriate unit had to include all employees engaged in cleaning and repair functions, given the different nature of the operation in that case, the majority did not view the inclusion of the various types of repair employees there as mandating the inclusion of this employer's specialized technicians.

with the petitioned-for employees as would mandate their inclusion in the unit.

In dissent, Member Johansen would have found that the petitioned-for unit is too limited in scope to constitute an appropriate unit for collective bargaining. In his view, the unit must include the employer's other general maintenance employees in its operations department—the skilled tradesmen—who share a substantial community of interest with the petitioned-for employees because of the service and maintenance duties they all perform throughout the university. Such a unit would be consistent with the typical "blue collar" units the Board more often finds appropriate,[11] Member Johansen explained.

D. Retrieval of Ballots

In *K. Van Bourgondien & Sons*,[12] the panel majority adopted an administrative law judge's finding that a Board agent's retrieving a ballot from the ballot box to have it placed in a challenged ballot envelope was not conduct warranting setting aside the election.

During the representation election, a challenged voter placed her marked ballot in the ballot box instead of returning it to the Board agent to put in a challenged ballot envelope. The Board agent was able to retrieve the ballot from the top of the pile of ballots through the slot in the box. The voter was able to identify the ballot as hers because of a folded corner, confirmed it was marked the way she had voted, and placed it in the challenged ballot envelope, which was then sealed and deposited in the ballot box. No one saw how the ballot was marked except the voter.

The judge found the Board agent's reaction to this situation was reasonable. The agent was faced with the choice of the voter improperly placing her ballot directly in the ballot box or of trying to retrieve the ballot. The judge found that the agent did retrieve the voter's ballot and placed it in the challenged ballot envelope where it belonged.

The panel majority declined to adopt a per se rule regarding retrieval of ballots and concluded on the basis of the facts here that the balloting process was not compromised. Accordingly, the majority adopted the judge's recommendation to overrule the objection.

Member Johansen dissented. Citing *Jakel, Inc.*,[13] he stated that "the spectacle of a Board agent fishing in the ballot box for a ballot requires the election be set aside."

In *Jakel, Inc.*,[14] the Board affirmed the Regional Director's decision setting aside the election results and directing a rerun

[11] See *Georgetown University*, 200 NLRB 215 (1972).
[12] 294 NLRB No. 16 (Chairman Stephens and Member Cracraft; Member Johansen dissenting).
[13] 293 NLRB No. 72 (Chairman Stephens and Members Johansen, Cracraft, Higgins, and Devaney).
[14] Ibid.

election based on the Board agent's misconduct during the election.

At the polling place, a data entry clerk employed by the employer was told by the Board agent that she could vote in the ongoing election. The election was being conducted among all the employer's employees at its Palestine, Illinois facility, excluding office clerical and professional employees, among others. As the employee was depositing her ballot in the ballot bag, the union's observer advised the Board agent that the clerk should have voted by challenged ballot because it was not clear whether she should be excluded from the unit as an office clerical employee. The Board agent observed a ballot, believed to be that of the employee, at the top of the ballot bag. (The ballot had not fallen completely through the opening in the ballot bag.) The Board agent unsuccessfully attempted to retrieve the ballot by pulling it through the slot on top of the bag. As a result, the Board agent reached into the bag and removed the ballot, which was shown to the employee, who identified the ballot as hers. The Board agent then tore the ballot into pieces, and placed those pieces into a challenged ballot envelope and marked "spoiled" on the envelope. The employee was given a second ballot, which was placed in a challenged ballot envelope after the employee had voted. The employee's challenged ballot was one of three challenges, which were sufficient in number to affect the results of the election. (The tally of ballots showed that 40 of the 82 employees voting in the election cast ballots for the petitioner union, while 42 employees voted against the union.)

The Regional Director concluded that the Board agent's conduct of removing the ballot from the bag "compromised the integrity of the election process and constituted conduct which would destroy confidence in the Board's election process." Because it could not be determined with reasonable accuracy whose ballot was extracted from the bag, and because the employee's challenged ballot was one of three challenges that were sufficient to affect the results of the election, the Regional Director ordered the election set aside and a new election run.

The full Board affirmed the Regional Director's decision sustaining the union's objection to the conduct of the election.

E. Preelection Grant of Benefit

In *Mailing Services,*[15] the Board held that a union's announcement and subsequent provision of free medical screenings to employees at the employer's factory within days of the representation election impaired employees' exercise of free choice. Consequently, the Board directed that the election be set aside and a second election held.

[15] 293 NLRB No. 58 (Chairman Stephens and Members Johansen and Higgins).

Three days before the end of a vigorous election campaign, the union announced it would make available free medical screenings for high blood pressure, cholesterol level, lung function, and diabetes to all employees at the employer's factory. The announcement bore the heading, "*FIRST UNION BENEFIT!!*" It further stated, "Please take advantage of your first union benefit. It's for your health." The following day, only 2 days before the election, an estimated 80 employees availed themselves of the screenings, which were offered in vans bearing the union's logo. Although there was no requirement that an employee demonstrate preelection support for the union to receive the medical screenings, it was clear that the union was conferring this benefit in order to gain employees' favor in the upcoming election.

The Board relied on *Wagner Electric Corp.*[16] and *McCarty Processors*[17] in concluding that the union's offer of free medical screenings impermissibly tainted employee choice. It surmised that recipients of the screenings would feel obligated to favor the union in the election. Citing *Primco Casting Corp.*,[18] the Board noted that it was not condemning the "Union's efforts to make itself 'more attractive as a candidate for election,'"[19] but that the Board was requiring that the union's "methods of self-enhancement exclude the direct conferral of substantial benefits on its target audience during the critical period."

F. Agent's Premature Disclosure

In *Kleen Brite Laboratories*,[20] the Board held that a Board agent's premature disclosure to one party of the unit decision in a representation case did not impugn the Board's neutrality or affect the outcome of the election.

On June 9, 1988, after the decision had been mailed to both parties, a member of the Regional Office staff, in response to a telephone inquiry by the union, disclosed that the decision found that the bargaining unit sought by the union was an appropriate one. There was no evidence that any unit employee was told about the premature disclosure of the unit decision.

The union printed and distributed a handbill notifying employees of the favorable ruling. Thereafter, on June 10, the union received its copy of the decision. The employer, who did not receive a copy of the decision until June 13, contacted the Acting Regional Director, who, without indicating the result, acknowledged that it was against Board practice to reveal the contents of a decision except by serving all parties with a copy of the decision at the same time and in the same manner.

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[16] 167 NLRB 532, 533 (1967).
[17] 286 NLRB 703 (1987).
[18] 174 NLRB 244, 245 (1969).
[19] Ibid.
[20] 292 NLRB No. 75 (Chairman Stephens and Members Johansen and Cracraft).

The Board applied the principles of *Athbro Precision Engineering Corp.*,[21] in which the Board stated that it must maintain and protect the integrity and neutrality of its procedures. In that case, the Board said it would set aside an election if a Board agent conducting an election commits an act "which tends to destroy confidence in the Board's election process, or which could reasonably be interpreted as impugning the election standards" the Board seeks to maintain.

In the instant case, the Board distinguished *Athbro* and concluded: "Although we do not condone the premature disclosure, we find that it neither impugned the Board's neutrality nor affected the outcome of the election." Thus, the Board noted that the unit determination was already a "fait accompli" and that the decision had already been mailed when the disclosure occurred. Further, the disclosure occurred a month before the balloting and employees did not learn of the disclosure.

G. No-Electioneering Zone Misconduct

In *Pepsi-Cola Bottling Co.*,[22] a panel majority of the Board set aside an election based on the conduct of union supporters in the no-electioneering zone during the election.

The election, which resulted in a tally of ballots showing 50 for and 49 against Local Lodge 10, International Association of Machinists, was conducted in the employer's lunchroom, and the voting line extended into the aisleway outside the lunchroom. A group of 15 to 20 employees, wearing shirts and caps bearing the union's logo, formed lines on both sides of the aisleway perpendicular to the voting line, leaving their formation one or two at a time to enter the other line of employees waiting to vote and then returning to the lines of union supporters. Both before and after the polls opened, the union supporters clapped, chanted, cheered, and made prounion remarks to employees passing between their lines until the employer asked them some 15 to 25 minutes after the polls were opened to leave the area if they had voted. The group of union supporters then left the plant.

The hearing officer concluded that the group of union supporters did not engage in objectionable conduct. Among other things, he found that the supporters were not union agents, and that even if their remarks did constitute electioneering, the remarks were "brief, as opposed to sustained conversations, and were not made to potential voters within the described no-electioneering zone while the polls were open."

Under the particular circumstances of this case, the panel majority found that, although the union supporters were not agents of the union, their conduct interfered with the election. Accord-

[21] 166 NLRB 966 (1967), vacated sub nom. *Electrical Workers IUE v. NLRB*, 67 LRRM 2361 (D.C.D.C. 1968), acquiesced in 171 NLRB 21 (1968), enfd. 423 F.2d 573 (1st Cir. 1970).

[22] 291 NLRB No. 93 (Chairman Stephens and Member Johansen; Member Cracraft dissenting).

ing to the majority, "[c]ritical to this finding is our finding, contrary to the hearing officer, that the union supporters engaged in this conduct in an area encompassed within the no-electioneering area." In the absence of a designation of the no-electioneering area by the Board agent, the hearing officer had included in the no-electioneering area only the lunchroom where the polling actually took place and the area outside the doorway to the lunchroom where employees lined up to vote. However, he apparently ignored the fact that in the immediately adjacent area of the aisleway, in clear view of the other employees and within 10 to 15 feet of them, the union supporters were themselves waiting to vote, albeit in different lines. Thus, the majority concluded that there was "no logical or meaningful distinction between these areas of the aisleway" and that "as employees waited to vote in both areas, both areas were encompassed within the no-electioneering area."

In assessing the conduct of the union supporters within this no-electioneering area, the majority, citing *E. A. Nord Co.*,[23] concluded:

> Under these circumstances, we attach greater significance to the boisterous, prounion conduct of the group of union supporters, comprising one-fifth of the eligible voters. This conduct continued unabated throughout the first 15 to 25 minutes of the election in front of employees in line to vote, and its effects were magnified by the line formation of the union supporters, which forced all employees walking down the aisleway, including those going to vote, to walk between the lines of the union supporters and be subjected to their chants, cheers, and other antics. In these circumstances, especially when the election results were so close, we do not view the election as reflecting the free choice of the employees.

Accordingly, the majority set aside the election and directed that a new election be held.

In dissent, Member Cracraft distinguished *Nord*, above, and said that she would not have set aside the election. She agreed with the hearing officer that the voting area was limited to the lunchroom where the polling actually took place and the area immediately outside the lunchroom where employees lined up to vote. She noted that the union supporters' conduct took place in an area that had not been designated as a no-electioneering area by the Board agent and that no electioneering occurred in the voting area itself. Under these circumstances, Member Cracraft concluded that "the conduct engaged in by the prounion employees in this case, when analyzed under the third-party standard, was not so coercive and disruptive as to require setting aside the election."

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[23] 276 NLRB 1418, 1425–1426 (1985).

H. Voting Rights

Economic strikers may lose their status as employees for voting purposes under Section 9(c)(3) of the Act if: (1) prior to the election, the employee obtains permanent employment elsewhere; or (2) the employer eliminates the employee's job for misconduct rendering him or her unsuitable for reemployment.

In *Lamb-Grays Harbor Co.*,[24] the Board reaffirmed the standard set forth in *Kable Printing Co.*[25] regarding the eligibility of economic strikers to vote in representation elections where the strikers' jobs have been eliminated. Thus, the Board said it will examine the underlying cause for the elimination of the strikers' positions to ensure that the employer eliminated their jobs for reasons "not predicated wholly on considerations flowing from the strike itself."

In so doing, the Board declined to apply the standard set forth in *K & W Trucking*,[26] as the union had urged, adding that the latter case contained an inadvertent misstatement of the rule laid down in *Kable*. Consequently, the Board corrected *K & W Trucking* to the extent that it set forth a standard that was inconsistent with the one set forth in *Kable*.

By permitting strikers to vote when wholly strike-related reasons result in the elimination of their jobs, the Board noted that it was merely carving out a narrow exception to the general rule that employees who have no reasonable expectation of future employment are ineligible to vote in representation elections. In this regard, it reasoned as follows:

> When, on the one hand, employees' jobs are eliminated for reasons wholly relating to a strike, their return remains possible depending on whether the union wins the election and the parties negotiate an end to the strike. If so, it is entirely possible, if not likely, that the strike-related reasons will disappear and the employees' services will again be necessary. By contrast, where an employer eliminates the strikers' jobs for reasons that are not wholly strike related, and no unfair labor practice charge has been filed, the strikers' chances of recall would appear minimal because the non-strike-related reason(s) for eliminating the jobs will continue beyond the strike's end.

In this case, Chairman Stephens and Members Johansen and Cracraft found that the employer's decision to discontinue manufacturing operations at its Hoquiam, Washington plant was primarily based on legitimate business concerns unrelated to the ongoing economic strike, including the loss of three significant contracts, increased competition during the previous year, and the underutilization of its facilities. The evidence also established that

[24] 295 NLRB No. 40 (Chairman Stephens and Members Johansen and Cracraft).
[25] 238 NLRB 1092 (1978).
[26] 267 NLRB 68 (1983).

the employer did not intend to resume manufacturing operations at the Hoquiam facility. At most, the absence of a strike might have delayed the implementation or completion of the reorganization for as much as 6 months, but it would not have altered the employer's decision to discontinue manufacturing at Hoquiam.

Consequently, the Board concluded that the 47 strikers whose jobs had been eliminated for economic reasons were ineligible to vote and sustained the challenges to their ballots.

In *St. Joe Minerals Corp.*,[27] the Board was presented with the question of whether under Section 9(c)(3) the presence of 35 crossovers who abandoned an economic strike and returned to work extinguished the voting rights of a corresponding number of the next senior employees who remained on strike.

The judge found, and the Board agreed, that during the term of the strike the employer reorganized its mining operations, resulting in the elimination of over 200 unit jobs. The Board further agreed with the judge that the elimination of these jobs was predicated on valid economic reasons that were unrelated to the strike[28] and permanently contracted the bargaining unit to 70 positions.

One week prior to the anniversary date of the strike, a decertification election was held in which all the ballots were challenged. During the subsequent hearing, the parties voluntarily resolved most of the challenges except for those concerning the 35 replaced employees who remained on strike. With respect to them, the judge held that the guarantee of voting rights to replaced strikers in Section 9(c)(3) had only been held to apply to the circumstances where employees hired during a strike as permanent replacements were not unit members at the time the strike began. The judge thereby rejected the union's position that the existence of the 35 crossovers preserved voting rights, on a one-for-one basis, in those who remained on strike. The Board disagreed with the judge's rationale on this issue.

The Board noted that Section 9(c)(3), by its own terms, preserves full voting rights to strikers who are not entitled to reinstatement and that this section and its legislative history have been construed to mean that permanently replaced strikers generally retain their right to vote in an election conducted within 12 months after the commencement of an economic strike.[29] Further, the Board said it could find nothing in the language or legislative history of the section to support the judge's conclusion that this right is forfeited when replacement is accomplished with bargaining unit personnel. Accordingly, the Board held that all replaced strikers, regardless of whether they were replaced by

[27] 295 NLRB No. 59 (Chairman Stephens and Members Johansen and Higgins).

[28] See, e.g., *Lamb-Grays Harbor Co.*, 295 NLRB No. 40 (Chairman Stephens and Members Johansen and Cracraft).

[29] See, e.g., *W. Wilton Wood, Inc.*, 127 NLRB 1675, 1677 (1960).

unit or nonunit employees, remained eligible to vote for 1 year after the strike began.

Applying its holding to the stipulated facts that 19 of the 35 crossovers returned to the same or substantially similar jobs that they held prior to the strike, the Board concluded that the crossovers did not replace any of the employees who remained on strike. Hence, the voting rights of 19 corresponding strikers were extinguished. The Board emphasized that economic strikers' voting eligibility rights are governed by its interpretation of Section 9(c)(3) and, thus, are independent of such strikers' reinstatement rights under *Laidlaw Corp.*[30]

On the other hand, the Board determined that the status of the remaining 16 crossovers who returned to jobs different from those they held before the strike was similar to that of a new hire or nonunit transferee specifically hired as a permanent replacement to fill the position left open by a continuing striker. As such, the Board found that 16 additional senior strikers replaced by the crossovers retained their voting eligibility. Accordingly, it ordered that the ballots cast by any of these eligible striking employees be opened and counted.

I. Showing of Interest

In *Dart Container Corp.*,[31] the Board held that the date of a showing of interest on a representation petition could be established by affidavit, as well as by the more traditional method of individually dated signatures.

For the showing of interest supporting a decertification petition, the employee-petitioner submitted a list of signatures on the petition stating that the undersigned employees no longer wished to be represented by the union. Neither the petition nor the individual signatures on the petition were dated. Rather than submit a dated showing of interest, as requested by a Board agent, the petitioner offered to provide a signed document attesting that the signatures were recently provided. However, the Board agent refused that offer.

Thereafter, the Regional Director administratively dismissed the decertification petition, on the grounds that the petitioner had failed to submit a dated showing of interest in a timely manner as required by the Board's Casehandling Manual.

Noting that in most representation cases the precise date of signing of the showing of interest is not as critical as the date of the filing of the petition or the date of the submission of the showing of interest, the Board found in any event that an affidavit could be "even more reliable than a dated signature." The Board therefore decided that Section 11028.5 of its Casehandling

[30] 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969).

[31] 294 NLRB No. 63 (Members Johansen, Cracraft, Higgins, and Devaney; Chairman Stephens concurring).

Manual should be revised, that the petition in this case should be reinstated, and that the petitioner should be given an opportunity to provide an affidavit verifying the dates on which employees signed the showing of interest.[32]

Chairman Stephens, concurring, noted that a representation petition bearing only one date at the top of a signatory page is acceptable under the provisions of the current Casehandling Manual. He therefore agreed with the result in this case. However, the Chairman expressed the hope that the Board's decision here would not "transform what is a rare instance of submitting an undated showing of interest into the prevailing practice." He cautioned that, if the Board should find itself expending too many resources investigating questions regarding the currency of showings of interest in the future, then the Board should revisit this area of its practice and procedures.

J. Filing Deadline

In *Kano Trucking Service,*[33] a panel majority of the Board held that evidence in support of objections to a representation election received after the filing deadline should be accepted in the circumstances of this case.

The employer, who had timely filed objections to conduct affecting the results of the election, was asked to submit evidence in support of its objections by the close of business on Friday, September 30, 1988. The employer's attorney engaged a messenger service about 1 hour and 15 minutes before the Subregional Office's closing time on the due date. The correctly addressed envelope containing the evidence was to be delivered to the Subregional Office, which is about a quarter of a mile from the employer's attorney's office. The evidence was not received in the Subregional Office until the next business day, Monday, October 3. The Acting Regional Director recommended that the objections be dismissed because the evidence in support of the objections had not been timely received and no special circumstances warranted extending the deadline.

Thereafter, the employer filed exceptions with the Board, contesting, among other things, the finding that its evidence was not received until October 3.

In a written statement submitted by the employer, the messenger stated that the destination of the evidence was the "U.S. Department of Labor in the Federal Building." The messenger stated that she arrived at the Federal Building on the due date about 10 minutes before the Subregional Office was to close; that she went upstairs; and after knocking several times with no answer, she slipped the evidence under the door. It could not be determined from the record whether the messenger had deliv-

[32] Accord: *Phillips Petroleum Co.*, 46 LRRM 1558 (1960).
[33] 295 NLRB No. 58 (Members Cracraft and Higgins; Member Johansen dissenting).

ered the evidence to the Department of Labor or had simply made a misstatement, since the Acting Regional Director's report stated that the Subregional Office was staffed until after the close of business on September 30.

The majority, in deciding to accept the employer's evidence, distinguished this case from cases involving the late receipt of objections. They noted that receipt of objections on the due date is a necessity for timely filing, but that evidence in support of objections need only be postmarked prior to the due date to be considered as timely filed. Further, a Regional Director has discretion to extend the due date for receiving evidence in support of objections.

The majority also distinguished *Star Video Entertainment L.P.*,[34] relied on by the Acting Regional Director, stating that the objecting party in that case "had not even attempted to comply substantially" with the filing requirements of the Board's Rules and Regulations, because it did not submit specific evidence in support of its objections until several days after an extended deadline.

The majority also found that the Acting Regional Director's report on objections lacked sufficient details of the Subregional Office's closing on the due date and of the circumstances under which the evidence was received by the Subregional Office. Therefore, they stated that "any doubts that remain due to this lack of details . . . must be resolved in favor of the Employer."

Member Johansen, in dissent, noted that in *Star Video*, above, the Board made clear that it intended to apply its rules "as strictly to the receipt of evidence in support of objections as to the receipt of the objections themselves." He further noted that the employer failed to establish that it had met the deadline for submitting its evidence and that timely filing could have been ensured by giving the evidence to the messenger service earlier in the day or by delivering the evidence to the Subregional Office personally. Member Johansen stated that the purpose of the Board's rules is "to provide a definitive standard for determining the timeliness of receipt of documents." He warned that the majority, by making an exception not specified in those rules, is "setting the stage for returning to the 'sometimes-yes, sometimes-no, sometimes-maybe policy of due dates'[35] that the revised Rules had eliminated."

K. Certification Pending Resolution of Conflict of Interest

In *Garrison Nursing Home*,[36] a panel majority of the Board directed that, in the event the petitioning union had won a repre-

[34] 290 NLRB No. 119 (Aug. 31, 1988).
[35] See *NLRB v. Washington Star Co.*, 732 F.2d 974 (D.C. Cir. 1984).
[36] 293 NLRB No. 11 (Chairman Stephens and Members Johansen and Cracraft).

sentation election, certification should be withheld until the union's executive director resigned his position or divested himself of a financial relationship with the employer that created a conflict of interest.

Dave Giessinger was the sole stockholder of a company that owned the Garrison Nursing Home until December 1985, when the facility was sold to the employer. A year later, the petitioner was incorporated by its executive director, Giessinger. At the time of the hearing in this case, Giessinger was the holder of the employer's promissory note for $220,000 arising from the sale of the facility. The note was not secured by any specific assets, and the employer was entitled to an offset of some $77,000, the terms of which were still being negotiated. The employer contended that this financial relationship created a conflict of interest on Giessinger's part that precluded certification of the union.[37]

The Board agreed. It found that the financial relationship between Giessinger and the employer was "fraught with the possibility that negotiations between them concerning the payment of the note, including the terms of the offset, might affect the collective-bargaining process." The Board reasoned that the employer would be in a position to offer more or less attractive terms regarding the application of the offset, depending on how tractable Giessinger proved to be in collective bargaining, and that Giessinger would therefore be in a position in which he might be tempted to subordinate the employees' interests to his own financial considerations. Thus, the Board found it inappropriate to certify the union as long as Giessinger occupied a position in which such a conflict could arise.

Nevertheless, the Board found that the union was not "absolutely foreclosed" from representing the employer's employees because of Giessinger's conflict of interest. Instead, relying on *Harlem River Consumers Cooperative*,[38] it directed the Regional Director to count the ballots cast in the election and, if the union received a majority of the votes cast, to withhold certification "until he is satisfied that within a reasonable time, not to exceed 6 months, Giessinger ha[d] relinquished any position with [the union] that would enable him to pursue his own interests at the expense of those of the employees." However, it added, if Giessinger had terminated his financial relationship with the employer within that time, his holding any position with the union would not preclude the union's certification.

To limit the period of uncertainty concerning when the employees would gain union representation, and in the interest of concluding the proceedings, the panel majority required Gies-

[37] The employer also contended that Giessinger had other conflicts of interest arising from his affiliation with other entities in the health care industry. The Board disagreed, finding that neither Giessinger nor the organizations with which he was then involved were suppliers to, customers of, or competitors with the employer.

[38] 191 NLRB 314, 319 (1971).

singer to divest himself of his financial relationship with the employer (or the union to divest itself of Giessinger) within 6 months or the petition in this case would be dismissed. In the interim, if an otherwise valid petition should be filed by any other union seeking to represent the employer's employees, that petition should be dismissed, the majority noted.

Member Johansen, in a partial dissent, would not have placed a time limit on the resolution of Giessinger's conflict of interest. As noted by the majority, he said, the Board in *Harlem River*, above, indicated that it lacks statutory competence to direct a blanket disqualification of a union seeking to represent an employer's employees because of the personal activities of the union's agent. Member Johansen read this to mean that the Board lacks authority to direct a blanket disqualification at any time, including after a reasonable period of time. Thus, he would have dismissed the existing petition if any otherwise valid petition should be filed.

L. Eligibility of Locked-Out Employees

In *Harter Equipment*,[39] the Board held that only the five locked-out employees were eligible to vote in a decertification election, even though 5 years had elapsed since the petition requesting an election had been filed. Thus, the 17 employees who were hired to "replace" the locked-out employees were ineligible to vote.

In December 1981, after 2 months of negotiations, the employer locked out its employees in order to put pressure on the union to agree to contract terms favorable to the employer. In mid-January 1982, the employer commenced hiring temporary employees.[40] A decertification petition was filed in November 1983, and in November 1986 a hearing was conducted to determine whether an election should be held and, if so, which employees were eligible to vote—the locked-out employees and/or the employer's then-current work force. At the time the petition was filed, the locked-out bargaining unit had been replaced by 12 employees. However, at the time of the hearing, the number of persons working in bargaining unit positions had increased to 17.

In concluding that only the five locked-out employees were eligible to vote, the Board noted that "there is no evidence or even an allegation that any of these five employees has abandoned his job," and that "it would be inconsistent with the Act and the decision in *Harter* [*I*] to disenfranchise these employees." The Board found that because the employer locked out the bargain-

[39] 293 NLRB No. 79 (Chairman Stephens and Members Johansen and Cracraft).

[40] In a prior decision, the Board found that because no specific proof of antiunion motivation was presented, the employer did not violate Sec. 8(a)(3) and (1) by hiring temporary replacements in order to engage in business operations during the lockout. *Harter Equipment*, 280 NLRB 597 (1986) (*Harter I*), review denied sub nom. *Operating Engineers Local 825 v. NLRB*, 829 F.2d 458 (3d Cir. 1987).

ing unit employees in support of its bargaining demands, the locked-out employees "were not, and could not lawfully be, permanently replaced."

Noting that an "essential aspect of the *Harter* [*I*] finding was that the Employer locked out the *bargaining unit* for its failure to agree to the Employer's offer," the Board concluded that "those hired into the unit jobs during the lockout are necessarily temporary replacements for the locked-out bargaining unit." The Board therefore found that the 17 replacement employees were ineligible to vote.

M. Postelection Challenge

In *Pay N' Save Stores,*[41] a panel majority held that a resolution of the status of determinative challenged ballots was necessary before determining whether the deauthorization election should be set aside and a new election held.

The tally of ballots showed 42 for and 28 against withdrawing the authority of Food and Commercial Workers Local 1001 to require, under its agreement with the employer, that membership in the union be a condition of employment, with 5 challenged ballots. The tally included one vote cast by an ineligible voter who had the identical surname and first initial by which an eligible voter was identified on the *Excelsior* list. The former's ineligibility was not determined until the subsequent vote was cast by the similarly named eligible voter, who was permitted to vote unchallenged. The Regional Director reasoned that the ineligible voter's ballot would be determinative only if three or more of the five challenged ballots were found eligible and were "yes" votes. As a hearing on challenged ballots might not resolve the matter, the Regional Director concluded that a rerun election was necessary.

Contrary to the Regional Director, the majority found that the proper procedure was to resolve the status of the challenged ballots first. In the circumstances, the majority noted, a resolution of the challenged ballots might render a second election unnecessary.

In a footnote, Member Johansen noted that he would overrule as a postelection challenge the petitioner's objection alleging that the ineligible voter was allowed to cast a ballot without challenge. The Board does not permit challenges in the form of "objections" after the election.

Noting that the restriction on consideration of postelection challenges is to be applied "fairly and equitably in light of the realities involved," Chairman Stephens and Member Cracraft concluded that the petitioner's objection should not be overruled as a postelection challenge. In this regard, they noted that this

[41] 291 NLRB No. 135 (Chairman Stephens and Members Johansen and Cracraft).

was not a case where a party attempted to use an objection in place of a challenge it could have made because the irregularity was not discovered until the improper ballot had been commingled in the ballot box. Under such circumstances, the majority held that the prohibition against postelection challenges should not be applied.

N. The 9(a) Collective-Bargaining Relationship

In *J & R Tile*,[42] the Board held that the contract between the construction industry employer and the union constituted an 8(f) agreement under the criteria established by the Board's decision in *John Deklewa & Sons*,[43] and, therefore, did not bar the employer's RM petition.

Raymond Kotara, the employer's president, had been employed by Aetna Enterprises, the predecessor company, and had been a member of the union. After the present employer commenced business, Kotara met with Gibbon, the union's business representative, who asked Kotara to sign a contract. At that meeting, Gibbon told the employer's president that all the former Aetna employees, who had been covered by the union's collective-bargaining agreement with Aetna and who were going to become his employees, belonged to the union. Gibbon did not produce any authorization cards, or offer to substantiate his claim. According to Gibbon's testimony, no such proof was necessary because both he and Kotara were aware that "everybody was in the Union." Kotara testified similarly, adding, "we decided that we were going to be a union contractor. So we just went in and signed it [a collective-bargaining agreement]."

The Board recognizes that a union's demand to execute a collective-bargaining agreement with a construction industry employer could be ambiguous because the union could be seeking either an 8(f) or a 9(a) relationship. Thus, to establish a voluntary, 9(a) relationship in the construction industry, there must be evidence that the union unequivocally demanded recognition as the affected employees' 9(a) representative, and that the employer unequivocally accepted the union's demand as such.

In the instant case, Chairman Stephens and Member Cracraft first concluded that the evidence was insufficient to establish that the relationship between the predecessor employer and the union was entered into pursuant to Section 9(a) of the Act and, therefore, there was no continuing presumption of the union's majority status. They then noted that neither the fact that Aetna's former employees were union members, nor the fact that the successor employer may have had personal knowledge of its employees' union membership, was sufficient to establish a 9(a) collective-bargaining relationship, even in a right-to-work state

[42] 291 NLRB No. 144 (Chairman Stephens and Member Cracraft; Member Johansen dissenting).
[43] 282 NLRB 1375 (1987).

where unions cannot exact dues or an amount equivalent to dues from bargaining unit employees.

Noting that Kotara simply decided that the employer was going to be a union contractor, the majority concluded that the union failed to establish that it clearly and unequivocally demanded recognition as the 9(a) representative of the employer's employees. Accordingly, they further concluded that the contract between the union and the employer did not bar the RM petition that was filed during the term of the parties' 8(f) agreement.

Member Johansen, dissenting, believed that the evidence established that the parties had a 9(a) relationship. He noted that all employees were known by Gibbon and Kotara to be members of the union and, therefore, there was no question in either Gibbon's or Kotara's mind that the union represented a majority of the employer's employees. He further noted that this was not a case where the union's demand to execute a collective-bargaining agreement was surrounded with ambiguity. Rather, he added, the union unequivocally demanded recognition as the employees' 9(a) representative and the employer accepted it as such.

O. Recognition Bar Rule

Rollins Transportation System[44] addresses the situation in which two or more labor organizations compete simultaneously to represent a group of currently unrepresented employees. In *Rollins*, a panel majority of the Board held that an employer's voluntary and lawful recognition of one union will not act to bar a petition filed by a rival. Instead, the petition will be valid and the Board will sponsor an election.

In *Rollins*, locals of the International Brotherhood of Teamsters and the Marine Engineers Beneficial Association (MEBA) conducted overlapping organizing campaigns. The employer recognized the MEBA affiliate shortly before the Teamsters local petitioned the Board for an election. MEBA contended that the Teamsters' petition was barred by the grant of recognition because the employer was unaware of the Teamsters' drive at the time. This argument highlighted some confusion in Board precedent about whether an employer's lack of awareness of a second organizing campaign at the time it recognizes a competing union should dictate a bar to the second union's petition. *Rollins* puts this uncertainty to rest, finding that the question of employer knowledge is irrelevant.

In doing so, Chairman Stephens and Member Higgins endorsed the rule of *Sound Contractors*,[45] which established a recognition bar where "the Employer extended recognition in good faith on the basis of a previously demonstrated majority and at a

[44] 296 NLRB No. 108 (Chairman Stephens and Member Higgins; Member Cracraft dissenting).
[45] 162 NLRB 364 (1966).

time when *only that union was actively engaged in organizing* the unit employees. 162 NLRB at 365." (Emphasis added.) *Rollins* expresses the corollary of that rule: "where, as here, there are simultaneous campaigns, and the second, unrecognized, union files a petition, the recognition is ineffective as a bar and an election is required." Because "paramount concern" when there are competing organizing drives "must be the employees' right to select among [the competitors] or indeed to choose none," the employer's knowledge of the second drive is immaterial.

The majority noted that a recognition bar in such a setting endangers the employees' Section 7 rights to "a Board-supervised arena in which to weigh the contestants' positions and render their decision." "To hold otherwise," they concluded, "would be to impose a collective-bargaining representative on the employees on the basis of the employer's action [i.e., recognition] rather than the employees' free choice."

In dissent, Member Cracraft advocated extending to this representation case a rule developed in the unfair labor practice context. The dissent would have accorded an employer's valid recognition of one rival union "bar quality" if granted before a second union files a petition. "In these circumstances," wrote Member Cracraft, "I would find that the Employer's lawful, good-faith recognition of the Intervenor resolved any question concerning representation and barred any rival petition for a reasonable period of time."

P. The 3-Day Posting Rule

In *Smith's Food & Drug*,[46] the Board set aside an election because the Board's official notices of election were not posted 3 full days prior to the election as required by Section 103.20 of the Board's Rules and Regulations. The Board stated that the rule establishing a specific length of time for posting was meant to clarify to the parties their responsibilities and obligations with respect to notice posting and to discourage unnecessary and time-consuming litigation on this issue. Accordingly, the Board found that the employer's arguments concerning its good faith and the number of employees who actually voted—whatever their merit under case law prior to the Board's adoption of the rule—did not constitute grounds for excusing compliance with the rule.

Q. Excelsior Rule

In *Thrifty Auto Parts*,[47] the Board held that the omission of the names of 2 out of a total of 21, or 9.5 percent of the eligible

[46] 295 NLRB No. 105 (Chairman Stephens and Members Cracraft and Higgins).
[47] 295 NLRB No. 134 (Chairman Stephens and Members Cracraft and Devaney).

voters' names from the eligibility list, did not constitute substantial compliance with the *Excelsior* rule[48] and thus warranted setting the election aside.

The hearing officer concluded that the omission of the two names from the list did not warrant setting the election aside for two reasons: (1) because, of the two employees whose names were omitted, one had received a written communication from the union prior to the election and the other had a brief conversation with the union's business agent in which the union had an opportunity to inform him of campaign issues; and (2) because the names were not omitted from the list due to either gross negligence or bad faith.

The Board disagreed with the hearing officer's conclusion and noted that, while the *Excelsior* rule is not to be applied mechanically, substantial compliance is required. The Board also noted that, by omitting a substantial number of voters' names from the eligibility list, an employer can defeat the very purpose of the *Excelsior* rule: "to further 'the fair and free choice of bargaining representatives . . . by encouraging an informed employee electorate and by allowing unions the right to access to employees that management already possesses.'"[49]

In this regard, the Board noted that it is well established that the issue of a union's actual access to employees or the extent to which employees are aware of the election issues and arguments are not litigable matters in applying the *Excelsior* rule when there are omissions from the eligibility list. Rather, the Board presumes that an employer's failure to provide a substantially complete eligibility list has a prejudicial effect on the election and does not inquire regarding whether a union may have obtained some additional names and addresses of eligible employees or whether omitted employees might have garnered sufficient information about the issues to make an intelligent choice.[50]

Similarly, the issue of whether the omissions were the result of bad faith or mere inadvertence does not influence the calculation regarding whether compliance has been substantial.[51] Evidence of bad faith and actual prejudice is unnecessary because the *Excelsior* rule is prophylactic: the potential harm from list omission is deemed sufficiently great to warrant a strict rule that encourages conscientious efforts to comply.

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[48] 156 NLRB 1236 (1966).

[49] *EDM of Texas*, 245 NLRB 934, 940 (1979) (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969)).

[50] *Sonfarrel, Inc.*, 188 NLRB 969, 970 (1971).

[51] *Gamble Robinson Co.*, 180 NLRB 532 (1970).

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 1989 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), 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. Access Under *Jean Country*

In *Trident Seafoods Corp.*,[1] the Board, using a *Jean Country*[2] analysis, held that the respondent violated Section 8(a)(1) of the

[1] 293 NLRB No. 125 (Chairman Stephens and Members Johansen and Cracraft).

[2] 291 NLRB No. 4 (Sept. 27, 1988). In *Jean Country*, the Board, clarifying its analytical approach to access issues, concluded that the availability of reasonable alternative means of communication must be considered in every access case in conjunction with consideration of the Sec. 7 rights and property rights involved.

Act by dening union agents access to its property for the purpose of organizing employees.

The respondent operates a salmon cannery in South Naknek, Alaska, which can be reached only by air or boat. Employees live and eat on the company premises. The canning season lasts 6 weeks, the last 4 of which the employees are inaccessible because they work 12–16 hours per day. During the first 2 weeks of the season, employees may leave the company premises to go into town. Mail is distributed to employees by the respondent and delivery is sporadic. Although the property is posted against trespassing, unauthorized visitors routinely enter the property without registering.

The union advised the respondent when it would arrive to meet with employees and, on arrival, during the first 2 weeks of the season, the union agents were denied access to the property. The administrative law judge found the Section 7 right to be compelling and the property right to be weak. The judge also found the union had no reasonable alternative means of communication.

The Board agreed with the judge's assessment of the Section 7 and property rights. In reanalyzing the alternative means of communication, the Board found that the union's failure to investigate a possible meeting site in South Naknek was not fatal to its case. Because the mail was delivered erratically, the union could not assume that employees would be adequately informed of a meeting in town. Therefore, such an alternative is unreasonable.

The Board also found that obtaining an employee list would not have been a reasonable alternative when the employees are seasonal, there is a high rate of employee turnover, and the employees are widely dispersed during the off-season. Accordingly, it found a greater impairment to the Section 7 right by denying access than to the property right by granting access.

In *Tecumseh Foodland*,[3] a panel majority of the Board held that a food store that precluded a union from placing a group of five nonemployee handbillers and pickets at an entrance area to its store, and also prohibited handbillers from standing in the center of driveways into its parking lot, did not violate Section 8(a)(1) of the Act.

The respondent's premises had previously been occupied by a Kroger grocery store whose employees had been represented by the union. Shortly after the respondent opened with a new complement of employees, the union began consumer handbilling to advise customers that this was a nonunion store and appeal to them to shop at listed union stores. Four of the handbillers also wore area standards picket signs.

The store has an 11-foot-wide opening from a covered sidewalk fronting the building into an 11- by 21-foot entrance area in

[3] 294 NLRB No. 37 (Members Johansen and Higgins; Member Cracraft dissenting).

which the store's doors are located. The handbillers were standing on each side of the opening into the entrance area. After one of the store's owners received customer complaints and told the handbillers that they would have to leave, the handbillers and pickets moved out to the parking lot entrances. They then distributed handbills at the edges and in the center of the driveway entrances.

On a subsequent occasion the respondent's owner told the pickets that they could not stand in the middle of the driveways because they were blocking traffic coming into his place of business. The union thereafter continued picketing in public areas and on the respondent's property near the entrances, but ceased attempting to distribute handbills.

A panel majority of Members Johansen and Higgins found that the respondent was not required to surrender access to its property without limitation to nonemployees whose numbers and location would tend to impede the access of patrons to its store. The union could just as effectively have communicated its message to the customers, the majority found, by locating one or two pickets to distribute handbills near the store's doors or perhaps by having them distributed at some other location on the property.

The majority concluded that the manner in which the union exercised its Section 7 right impermissibly interfered with the respondent's private property right to have its store's entrance be free and uncongested, and because the union could effectively communicate its message in a less physically obtrusive way, the respondent did not violate Section 8(a)(1) by ordering the pickets and handbillers to leave the areas near the store's entrance and in the middle of its driveways.

In balancing the Section 7 and property rights under the Board's *Jean Country*[4] rationale, the majority found the reasonable likelihood that patrons would have difficulty in gaining access to the store due to the number and location of the pickets and handbillers at the store's only entrance to exceed that infringement of the respondent's property rights that is necessary in order to accommodate the exercise of rights guaranteed by Section 7. While some yielding of a property right may be required to avoid destruction of a Section 7 right, that required yielding should not be more than is necessary, the majority said.

Member Cracraft, dissenting, stated that she was unable to conclude that the manner in which the union exercised its Section 7 right diminished that right to such an extent that it was outweighed by the respondent's property interest. She would find that the respondent violated the Act by ordering the pickets and handbillers to leave the area near the store's entrance. Absent direct evidence that interference with ingress or egress

[4] 291 NLRB No. 4 (Sept. 27, 1988).

actually occurred, she would not find that the union impermissibly interfered with the respondent's private property right.

The majority's statement that the union could just as effectively have communicated its message by locating fewer pickets near the store's doors or by having the handbills distributed at some other location on the property Member Cracraft found illusory and not a reasonable alternative means, since the union was ordered off the property without distinction for where the individuals were standing and without specifically being told that picketer/handbiller density was the cause of the ejection. She observed that the manner in which a clearly protected Section 7 right is exercised should only be relied on to countenance an employer's total exclusion of the exercise of that right in exceptional circumstances and then only based on direct evidence, neither of which she found present here.

In *Hardee's Food Systems*,[5] the Board, using a *Jean Country*[6] analysis, held that the respondent did not violate Section 8(a)(1) of the Act by excluding union handbillers from the parking lots surrounding three of its restaurants.

The union had an area standards dispute with a nonunion contractor renovating the respondent's Brazil, Indiana restaurant. The union handbilled the Brazil restaurant and then expanded the handbilling to include the respondent's three restaurants in Terre Haute, Indiana, 15 miles from Brazil. The respondent had the police remove the handbillers from the Terre Haute sites. The administrative law judge found both the Section 7 and property rights were weak. The judge dismissed the complaint because, although he found perimeter handbilling was not a reasonable alternative means of communication, the General Counsel failed to prove that using the mass media was not a reasonable alternative.

The Board, reanalyzing the case under *Jean Country*, agreed with the judge's findings on the strength of the Section 7 and property rights, and on the unreasonableness of perimeter handbilling. Citing *Jean Country* and disagreeing with the judge concerning mass media, the Board stated that this case "is not one of the rare exceptions in which use of the mass media must be disproved as an alternative means."

The Board held that when a union has primary and secondary targets at numerous locations, access need not be granted simply because there are not reasonable alternatives at all the locations. It found that access at the Brazil restaurant afforded the union reasonable means of airing its area standards dispute. In balancing the infringement on the opposing rights caused by the grant or denial of access, the Board concluded: "Requiring that access be granted to numerous properties owned by a secondary em-

[5] 294 NLRB No. 48 (Chairman Stephens and Members Higgins and Devaney).
[6] 291 NLRB No. 4 (Sept. 27, 1988).

ployer, regardless of their connection to the activities of the primary employer, is not a reasonable accommodation of the conflicting rights."

Applying the *Jean Country*[7] analysis in *Federated Department Stores,*[8] the Board affirmed the judge's conclusion that the respondent did not violate the Act by denying the union access to handbill on its property.

The union in this case commenced a handbilling campaign at the "grand opening" of two new retail department stores of the respondent in West Palm Beach, Florida. The handbillers consisted of nonemployee union officials and union members and their families who stationed themselves on sidewalks adjacent to the front entrances of the stores, in the parking lots, and along access roadways.

The handbills informed the public that the stores' nonunion construction contractors had not paid wages and benefits commensurate with area standards and asked for a total consumer boycott of the respondent until it promised to use labor contractors in the future who pay fair wages and benefits. Simultaneously with the handbilling, the union rented billboards appealing to the public not to patronize the respondent and three other businesses. There was no evidence about efforts to conduct the union's campaign at sites where the primary employers were present.

At both locations the handbillers were threatened with legal action if they did not leave respondent's property. The union moved to public sites alongside respondent's property, which bordered major thoroughfares, but these sites proved to be ineffective because as a result of rapidly moving traffic few cars stopped to accept handbills.

The judge found that although an object of the handbilling was to secure an agreement that the respondent would build future stores with union labor and that such an agreement violated Section 8(e), truthful handbilling about the dispute was protected by the publicity proviso to Section 8(b)(4). Nevertheless, he concluded that because the union's object was to secure an unlawful hot cargo agreement, the handbilling ranked "near the bottom of the spectrum" of protected union activities and was entitled to less weight than the respondent's property interest. The judge also stated that the General Counsel's failure to demonstrate that the union could not have effectively engaged in primary economic activity against the nonunion contractors further weakened the union's Section 7 right, requiring it to yield to the respondent's property interest.

In affirming the judge's dismissal of the complaint, the Board assumed for the purpose of discussion that the union's activity

[7] 291 NLRB No. 4 (Sept. 27, 1988).

[8] 294 NLRB No. 49 (Chairman Stephens and Members Johansen and Devaney).

was protected handbilling for area standards and did not have an object of seeking an agreement proscribed by Section 8(e). Analyzing first the respondent's property interest, the Board noted that each store was a freestanding structure owned by the respondent, situated alone on its own parking lot provided for the respondent's customers. Neither store shared its sidewalk, parking lot, or access roads with the customers of any other merchant. Although both stores were retail operations generally open to the public without restriction, there was no evidence that the respondent invited the public onto its premises for any purpose other than to purchase goods. Under *Jean Country*,[9] the Board found that the respondent was asserting a substantial private property interest when it excluded the union handbillers.

By contrast, the Board found the union was engaged in area standards activity that, though protected, is not on the stronger end of the spectrum of Section 7 rights. Further diminishing its weight in this case was the fact that the union's activity was secondary and maintenance of construction workers' area standards had no potential to benefit the respondent's retail store employees. The Board held that the union's Section 7 interests were diluted by its decision to handbill at the completed stores of the neutral respondent rather than at current sites being visited by the primary nonunion contractors with which it had an area standards dispute.

In response to the contention that, because area standards activity is protected, the union may handbill the respondent's customers, the Board noted that *Jean Country* expressly rejected this claim by making clear that a union's own definition of the audience it seeks is not necessarily controlling. Specifically, "a claim that the union's intended audience consists of the customers of *every* establishment that has even a remote connection to that target employer will not necessarily warrant access to any and all sites at which such customers may be found, even if access to private property might be necessary to reach the customers at *one* such site."[10] This was especially true in *Federated* because the union's intended audience was the clientele of a neutral employer that had no apparent ongoing connection with the primary nonunion contractors. In sum, the Board found that the union's right to engage in secondary area standards handbilling at the respondent's stores ranked at the lower end of the spectrum of Section 7 rights.

Finally, considering the question of reasonable alternative means as required under *Jean Country*, the Board agreed that, vis-a-vis the respondent, no reasonable alternative means of communication were available, both because handbilling on public property adjacent to the respondent's stores was unsafe and inef-

[9] 291 NLRB No. 4 (Sept. 27, 1988).
[10] Id. at 6.

fective, and because the use of billboards was too expensive and limited in availability. However, the Board emphasized that analyzing reasonable alternatives also requires an inquiry whether the union could have effectively communicated elsewhere its protest against the primary nonunion employers.[11] Here, there was no proof that the union could not have effectively engaged in primary activity at the places of business of the nonunion contractors, at their ongoing contruction projects, or even at the premises of secondary employers that had a current connection with them.

In light of the absence of proof that no reasonable alternative means existed for the union to engage in area standards protests against primary employers, the Board concluded that the degree of impairment to the relatively weak Section 7 right if access to the respondent's property should be denied was less substantial than the degree of impairment to the respondent's property interest if access was granted.[12] Accordingly, the complaint against the respondent for denying the union access to its property was dismissed.

In *Chugach Alaska Fisheries*,[13] the Board found that the respondents could lawfully deny nonemployee union organizers access to their fish canneries, but that respondents must grant the union reasonable access to the employee bunkhouses and campsites on their property.

During the peak canning season between late June to August 1981, the respondents employ about 550 employees, about 135 of whom are local residents. The rest are transients who live in bunkhouses, campers, and tents on the respondents' property. During a peak season, the employees typically work 16 or 17 hours a day, 7 days a week, and, in many cases, employees leave company premises only once or twice a week during 1-hour meal breaks. Rain is heavy and often continuous during the season. Time off is usually unscheduled. There are cubbyhole mailboxes in the canneries, but some employees receive their mail in town. There is a weekly newspaper and local radio service. Television is limited to a scanner service. The employees who live on the respondents' property are permitted to have social guests, but despite repeated requests for access to employees on respondents' premises during nonworking hours and in nonworking areas, union organizers were not permitted on the respondents' property before a Board-conducted election in 1981.

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[11] Citing *Hardee's Food Systems*, 294 NLRB No. 48, and *Homart Development Co.*, 286 NLRB 714 (1987).

[12] Member Johansen noted that in considering the alternative-means factor he would not rely on the General Counsel's failure to show that the union could not have engaged in primary activity as a substitute for handbilling the respondent's customers. Rather, in view of the union's minimal Sec. 7 interest, with due consideration to the alternative-means factor, and in view of the substantial property interest being asserted, Member Johansen agreed with his colleagues that the union was lawfully denied access to the respondent's property.

[13] 295 NLRB No. 8 (Chairman Stephens and Members Cracraft and Higgins).

The Board applied the analysis set forth in *Jean Country*[14] and found that alternative means of communication with these employees were limited because of the long hours of work, the unpredictability of when time off will be scheduled, the shortness of the season, the transient nature of the work force, and the rainy conditions. It concluded that the degree of impairment of the Section 7 organizing right if access were denied outweighed the degree of impairment of the private property right if reasonable access were granted to the employee bunkhouses and campsites.

In denying the union access to the nonwork areas of the canneries, the Board held that the Section 7 organizing right would suffer little impairment because the access it was granting to the employee living areas constituted adequate alternative means of communication with the transient employees. It further found that effective means of communication with the local residents already existed because they were available all year long and worked only part time during the nonpeak season.

In *Lechmere, Inc.*,[15] the Board held that nonemployee union organizers were entitled to access to the parking lot adjacent to the respondent's store where there were no reasonable, effective, alternative means available for the union to communicate its message to the respondent's employees.

The Board based its finding that the respondent violated Section 8(a)(1) of the Act by denying the union organizers access to its parking lot on the analysis set forth in *Jean Country*.[16] The Board found that the respondent's property right was relatively substantial but noted that the parking lot was open to the public. The respondent shared ownership of the parking lot with a strip of 13 stores; customers and employees of all the stores used the parking lot.

The Board also found that the Section 7 right was relatively strong, since the right to organize is the core purpose of the Act. Furthermore, because the union's attempts to distribute handbills in the parking lot neither disrupted the respondent's business nor inconvenienced its customers, the Section 7 right was worthy of protection against substantial impairment.

Moreover, the Board held that there were no reasonable, effective, alternative means available for the union to communicate its message to the respondent's employees. Placing advertisements in local newspapers was expensive and ineffective given that many employees might never receive, purchase, or read these local newspapers, or be exposed to them only occasionally.

Seeking names and addresses from the motor vehicle registry with license plate numbers observed in the parking lot was similarly flawed, the Board concluded. Employees of the respond-

[14] 291 NLRB No. 4 (Sept. 27, 1988).
[15] 295 NLRB No. 15 (Members Johansen, Higgins, and Devaney).
[16] 291 NLRB No. 4 (Sept. 27, 1988).

ent's store indeed parked in the parking lot, but so did customers of the respondent's store and customers and employees of the strip of stores. Furthermore, even were the license plate numbers of employees' cars easily discernible, employees might use cars not registered in their names, might carpool together, might use alternative means of transportation, might park elsewhere, and part-time employees might not use the parking lot at those times shortly before and after the store's designated opening hours.

Furthermore, the union organizers could not safely and effectively use the 10-foot-wide strip of public property abutting the turnpike at the access to the parking lot. The turnpike was a four-lane highway with a 50-mph speed limit in a commercial area with more than minimal traffic. There was no traffic signal or stop sign at the turnpike entrance to the parking lot, which, of course, was used not only by the respondent's employees, but also by the respondent's customers and the employees and customers of the strip of stores.

The Board therefore found that although the respondent's property interest would suffer some impairment by granting the union organizers access to the parking lot, such impairment would not be substantial in light of the union's unobtrusive manner in distibuting leaflets and the public's access to the parking lot. By contrast, in the absence of reasonable alternative means of communication, the Section 7 right would be substantially impaired without permitting the union organizers to distribute leaflets on the parking lot. The Board summarized: ". . . the degree of impairment of the Union's Section 7 right if its agents were denied access to the Respondent's parking lot to distribute organizational literature outweighs the degree of impairment of the Respondent's property right if access were granted."

In *Sentry Markets*,[17] a Board panel found that the respondent violated Section 8(a)(1) of the Act by prohibiting the union from handbilling at the storefront sidewalk near the respondent's customer doors.

Representing production and maintenance employees of Patrick Cudahy, Inc., a producer of pork products, the union commenced a strike against Cudahy, contending that it was protesting certain unfair labor practices. In support of this strike, striking Cudahy employees engaged in consumer handbilling at the Sentry store, which sold Cudahy products and is one of the largest stores in an open strip shopping center.

The handbills described the nature of the union's dispute with Cudahy; asked customers not to purchase Cudahy products; stated that the union did not have a dispute with the respondent and, therefore, was not asking customers to boycott the store, but to boycott only certain products; and listed the products

[17] 296 NLRB No. 5 (Chairman Stephens and Members Cracraft and Devaney).

made by Cudahy and the packaging code by which they could be identified.

Applying a *Jean Country*[18] accommodation analysis, and relying on the Supreme Court's 1964 *Tree Fruits* decision[19] that peaceful "struck product" consumer handbilling is protected activity under Section 7, the Board found that by engaging in peaceful handbilling in support of its primary dispute with Cudahy, the union asserted a relatively strong Section 7 right.

Finding that the respondent has a legitimate property interest because it has a leasehold interest in and controls the use of the store, storefront sidewalk, and parking lot, the Board further found that the limited presence of the Salvation Army on the premises during the holiday season did not significantly diminish the strength of the property right asserted.

Turning to alternative means, the Board held that picketing and handbilling on public property near the entrance to the shopping center was not a reasonable alternative because the General Counsel had shown that handbilling at that location was ineffective and unsafe, and that the alternatives suggested by the respondent—newspaper advertising, direct mail, and hand delivery in neighborhoods—would move the union's message too far in time and distance from the point of purchase. Accommodating the private property and Section 7 rights pursuant to *Jean Country*, the Board concluded that the Section 7 right outweighed the private property right, and that the Union was entitled to handbill at the storefront sidewalk near the respondent's customer doors.

2. Access to Employer Premises

In *C. E. Wylie Construction Co.*,[20] the Board adopted, under a somewhat altered rationale, the administrative law judge's finding that the employer violated Section 8(a)(1) by denying access to its construction jobsite.

The unions involved had contracts with the employer's subcontractors that contained access clauses.[21] The union business agents sought access to check for safety and to service their members who were working on the jobsite. The employer refused them access because it saw no reason to permit access.

The judge found that the employer had at least constructive knowledge of the access clauses in the contracts. The judge harmonized the tests laid down in *Villa Avila*,[22] *Fairmont Hotel*,[23]

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[18] 291 NLRB No. 4 (Sept. 27, 1988).

[19] *NLRB v. Tree Fruits*, 377 U.S. 58 (1964).

[20] 295 NLRB No. 119 (Chairman Stephens and Members Cracraft and Higgins).

[21] One contract contained an access clause. The other provided that outside its jurisdiction the local agreement's working conditions would govern. The local agreement contains an access clause.

[22] 253 NLRB 76 (1980).

[23] 282 NLRB 139 (1986). The Board's decision does not mention this case.

and *Jean Country*.[24] He read *Villa Avila* to stand for the proposition that in situations like this one, the Section 7 rights underlying the unions' request for access are quite substantial, taking into consideration particularly the need of union business agents to make safety inspections under their contracts with the subcontractors.

The judge weighed these rights against the employer's right to make reasonable rules governing access and against the employer's property right. The former he found to be negated by the lack of notice and the use of the rules as a pretense. The latter he found to be insubstantial because the employer had admitted unionized subcontractors on site, and the unions have a contractual right of access.

The Board agreed, and mentioned that the employer has a property right because the property owner delegated to the employer the right to refuse access. The Board also said that "in *Villa Avila*, the significance of the contracts was the enhancement their access provisions imparted to the Section 7 rights involved in weighing those rights against the respondents' respective property rights."[25]

In harmonizing *Villa Avila* with *Jean Country*, the judge noted the primacy given in *Jean Country* to the consideration of alternative means of communication. He found there is no alternative to an unannounced on-site safety check by a union business representative and that when contracts contain access provisions, access is necessary to investigate complaints regarding contract compliance. The Board agreed, noting that the analysis of *Villa Avila* and *Jean Country* and the analysis here begin with the balancing test in *NLRB v. Babcock & Wilcox Co.*[26]

3. "Closely Related" Test

In *Nickles Bakery of Indiana*,[27] the Board held that complaint allegations alleging violations of Section 8(a)(1) must be closely related to the allegations or subject matter set forth as the basis for the underlying charge. The Board, overruling contrary precedent, held that the catchall language preprinted on the charge form, "[b]y the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act," will no longer be sufficient on its own to support 8(a)(1) complaint allegations.

The complaint, alleging only that the respondent violated Section 8(a)(1) by maintaining an improper no-solicitation rule, was based on a charge alleging only 8(a)(3) conduct related to disciplinary action taken by the respondent against the charging

[24] 291 NLRB No. 4 (Sept. 27, 1988).
[25] Id., slip op. at 2 fn. 3.
[26] 351 U.S. 105 (1956).
[27] 296 NLRB No. 118 (Chairman Stephens and Members Cracraft, Higgins, and Devaney).

party. The respondent contended in its Motion for Summary Judgment that the charge was improperly enlarged.

The Board clarified the case law in this area in light of *G. W. Galloway Co. v. NLRB*[28] and *Redd-I, Inc.*,[29] and found "no sufficient basis in law or policy for continuing to exempt 8(a)(1) complaint allegations from the requirements of the traditional 'closely related' test."

To determine whether such a complaint allegation is closely related to the underlying charge, the Board will look first at whether the complaint allegation and charge allegation involve the same legal theory. Second, the Board will look at whether the complaint allegation and charge allegation arise from the same factual circumstances or sequence of events. Finally, the Board may look at whether a respondent would raise similar defenses to both allegations. The Board, in light of its decision overruling precedent, remanded the case to the Regional Director to determine whether the complaint allegation is closely related to the charge allegation.

4. Retaliatory Lawsuit

In *Phoenix Newspapers*,[30] a panel majority of the Board held that, under the U.S. Supreme Court's standard in *Bill Johnson's Restaurants v. NLRB*,[31] the employer's filing and pursuing of a state court lawsuit against the union and its officers violated Section 8(a)(1) of the Act because the suit was without merit and the employer had a retaliatory motive in filing it.

On April 1, 1980, the employer filed a lawsuit for libel, conspiracy, and tortious interference with business relationships against the union, its officers, and a representative of the international union. In October 1982 the state superior court granted summary judgment in favor of the union defendants and dismissed the employer's complaint.

The suit was based on a report in the union's own internal newsletter describing the basis for an unfair labor practice charge of unlawful surveillance of, and retaliation against, union supporters, which the union had then recently filed against the employer. The article stated that the charge was based in part on alleged evidence that the employer had prepared a "hit list" of union activists to be targeted for discharge or other retaliation and that the employer had tapped the telephone of at least one union officer. According to the employer's publisher, the employer filed its lawsuit because the union's unfair labor practice charge did not itself specifically allege that the employer had engaged in wiretapping, and because the employer believed that

[28] 856 F.2d 275 (D.C. Cir. 1988).
[29] 290 NLRB No. 140 (Sept. 16, 1988).
[30] 294 NLRB No. 3 (Chairman Stephens and Member Johansen; Member Cracraft dissenting in relevant part).
[31] 461 U.S. 731 (1983).

the article, indicating that the employer would be or had been charged by the union with wiretapping, impugned the credibility of the employer's newspaper in the eyes of the community and could "dry up" the employer's confidential sources.

Considering the merits of the suit to be irrelevant to the unfair labor practice proceeding, the administrative law judge found, based on the reasons given by the publisher for filing the suit, that the suit had been filed in good faith. According to the judge's analysis, this finding of good faith established both a reasonable basis for the employer's filing the suit and a lack of retaliatory motive on the employer's part. The judge concluded that the employer did not violate Section 8(a)(1) by filing its suit against the union defendants.

The majority found that the judge's analysis and conclusion were contrary to *Bill Johnson's*, which issued subsequent to the judge's decision. The majority noted that in *Bill Johnson's*, the Supreme Court stated that where a state court judgment goes against an employer, the Board may proceed to resolve the unfair labor practice based on that lawsuit, and that the Board may consider the lawsuit's lack of merit as one factor in deciding whether the suit was motivated by retaliatory purposes.[32]

The majority found that both requirements of *Bill Johnson's*—a meritless suit and a retaliatory motive—were present. With regard to the first, the majority found that "the summary judgment in favor of the union defendants . . . constituted an adjudication establishing that the suit involving the union defendants lacked merit." With regard to the second, the majority found that, because the lawsuit was based on the union's written communication to employees concerning unfair labor practices that the union's officers believed, in good faith, had been committed, the lawsuit was in "retaliation" for that communication. The majority found that the union's written communication was concerted conduct, and was protected by the Act. And, the majority stated, even if the article failed to distinguish precisely between the contents of the actual charge and the union's stated basis for the charge, "it cannot be said that the article was so reckless or maliciously untrue as to lose the Act's protection." The majority concluded that, because the lawsuit was "unequivocally aimed directly at protected concerted activity," the employer's motivation in filing the suit was retaliatory.

In her dissent, Member Cracraft found that the employer's lawsuit did not violate Section 8(a)(1) because it was not filed for a retaliatory motive. Member Cracraft stated that the majority "appear to equate the filing of a lawsuit as a result of protected activity with filing of a lawsuit in retaliation for that protected activity." Member Cracraft took the view that retaliation "in a legal sense" was not established by the fact that the respondent's

[32] 461 U.S. at 747.

lawsuit followed the union's protected activity and might not have otherwise occurred. For this reason, she did not reach the issue of whether the suit lacked merit.

B. Employer Assistance to Labor Organization

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

In *Power Piping Co.*,[33] the Board considered the issue of whether and under what circumstances an employer interferes with the administration of a union in violation of Section 8(a)(2) by permitting its supervisors to vote in an internal union election.

The respondent, a subcontractor on a construction project, agreed to be bound by the terms and conditions of the collective-bargaining agreement between the union and a contractors' association for the work performed on the project site. Pursuant to an exclusive hiring hall arrangement, the respondent contacted the union and requested the referral of skilled pipefitters to perform work on the project. The first union referral was hired by the respondent as a general foreman. All other employees referred by the union were hired as journeymen, and some were later promoted to foremen or general foremen. As jobs were completed and the employee complement diminished, these foremen and general foremen reverted back to journeyman status or their employment with the respondent was terminated. The collective-bargaining agreement specified the number of foremen and general foremen who were to work on each project. It also set forth the wages and benefits for the classifications of general foreman and foreman, which were included in the bargaining unit. The parties stipulated that the persons occupying these classifications are supervisors within the meaning of Section 2(11).

On December 28, 1984, the union conducted an internal election in which three supervisors, two of whom were foremen and one a general foreman, voted. None of the three had ever held union office, either elected or appointed, nor were any of them candidates for any position in the 1984 union election.

The judge, relying on *Nassau & Suffolk Contractors' Assn.*[34] and *Three Hundred South Grand Co.*,[35] concluded that "a violation of . . . the Act occurs when high level supervisors vote in an internal union election. There is no requirement that the company have knowledge that their high level supervisors voted or that their actions be authorized or ratified in order to constitute a violation of the Act."

In disagreeing with the judge, the Board noted initially that its inquiry in *Nassau & Suffolk*, above, involved "a complete exami-

[33] 291 NLRB No. 80 (Chairman Stephens and Members Cracraft and Higgins).
[34] 118 NLRB 174 (1957).
[35] 257 NLRB 1397 (1981).

nation of all the factors present," but that the inquiry in subsequent cases shifted "to a review restricted to a determination of whether the supervisor in question is high level or low level." However, it added:

> We reject such a limited analysis. As the Board made clear in *Nassau*, because supervisors who are union members can be expected to "owe allegiance at least as much to the Union as to their employers," it cannot automatically be assumed that their statements or actions as to intraunion matters represent the view and interests of their employers. . . . The assumption is of even more doubtful validity when the supervisors are members of the bargaining unit, with an interest in the contractual conditions their union negotiates for them; and it can hardly be assumed that this allegiance to the union loses all force simply because a supervisor is high level rather than low level. Thus, an employer is properly held liable for the strictly intraunion conduct of its supervisors only if it is clear, on the basis of an examination of all the circumstances, that the employer "encouraged, authorized or ratified" the supervisory activities or "acted in such manner as to lead employees reasonably to believe" that the supervisors were acting for and on behalf of management. [Citations omitted.]

The Board, therefore, reaffirmed the analysis set forth in its *Nassau & Suffolk* decision, overruling prior cases to the extent that they were inconsistent with this analysis.[36] In doing so, the Board emphasized that this analysis must be conducted on a case-by-case basis, and that no one factor would be determinative. It also cited with approval the considerations set forth in the decision of the Court of Appeals for the District of Columbia Circuit in *Plumbers Local 636 (Detroit Plumbing Contractors) v. NLRB*.[37] Those considerations, "although not intended to be all-inclusive, will generally serve as a guide in determining the lawfulness or unlawfulness of the supervisory participation in internal union affairs," the Board added.

In the instant case, the Board concluded that the three supervisors' mere act of voting in the internal union election was not attributable to the respondent. Further, there was "no allegation that the respondent encouraged, authorized, or ratified their conduct." Given the fact that the supervisors were referred from the union and the fact that they would eventually return to it for another referral as journeymen, as well as their inclusion in the unit, their coverage by the collective-bargaining agreement, and

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[36] See, e.g., *Three Hundred South Grand Co.*, 257 NLRB 1397 (1981); *Schwenk Inc.*, 229 NLRB 640 (1977); *A. L. Mechling Barge Lines*, 197 NLRB 592, 597 (1972); *Banner Yarn Dyeing Corp.*, 139 NLRB 1018, 1019 fn. 1 (1962); *National Gypsum Co.*, 139 NLRB 916 (1962); *Anchorage Businessmen's Assn.*, 124 NLRB 662 (1959).

[37] 287 F.2d 354, 362 (1961). In that case, the considerations enumerated by the court generally pertain to the nature and permanence of the supervisory position, and the extent to which this position is properly included in or excluded from the bargaining unit.

their exercise of relatively few managerial functions, the Board concluded that other employees could not reasonably believe that the three supervisors were acting for or on behalf of management when they voted in the internal union election. For these reasons, it found that the respondent had not violated the Act, and dismissed the complaint in its entirety.

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

1. Striker Reinstatement

In *C-Line Express*,[38] the Board reversed an administrative law judge's finding that certain unfair labor practices committed by an employer during an economic strike converted the strike into an unfair labor practice strike.

The employer in the case had, following the onset of an economic strike, threatened certain strikers with discharge, informed them that it would not sign a contract with the union, and unlawfully refused to furnish the union with certain relevant information. In finding that no conversion occurred here, the Board noted that the mere commission of unfair labor practices during an economic strike will not automatically convert it into an unfair labor practice strike. The General Counsel must instead show that the employer's unlawful conduct was a factor (not necessarily the sole or predominant one) that caused a prolongation of the work stoppage. In establishing a causal link between the employer's misconduct and the strike, the Board relies on both objective and subjective considerations. As the Board noted (slip op. at 2–3):

> In many cases, the record will afford the Board an opportunity to evaluate the employees' knowledge of, and subjective reactions to, an employer's unlawful conduct in order to confirm that it interfered with a settlement of the strike and thus prolonged the work stoppage. However, the presence or absence of evidence of such subjective motivations has not always been the sine qua non for determining whether there has been a conversion. Certain types of unfair labor practices by their nature will have a reasonable tendency to prolong the strike and therefore afford a sufficient and independent basis

[38] 292 NLRB No. 63 (Chairman Stephens and Members Johansen and Cracraft).

for finding conversion. The most notable examples typically involve an unlawful withdrawal of recognition, which may be accompanied by a course of other unlawful conduct including withdrawal of contract proposals, refusals to meet and bargain, and recognition of another union. The common thread running through these cases is the judgment of the Board that the employer's conduct is likely to have significantly interrupted or burdened the course of the bargaining process. Thus, when an employer has unlawfully withdrawn recognition from the bargaining representative or engaged in bad-faith bargaining during an economic strike, and it appears from the record that such unlawful conduct necessarily prolonged the strike, the Board has found that the economic strike has converted to an unfair labor practice strike. [Fns. omitted.]

Regarding the state of mind of the strikers in this case, the Board found a lack of evidence that they were motivated to prolong their strike by the 8(a)(1) coercive statements of the employer's two coowners to several of the strikers on the picket line. Further, it found no record evidence to indicate that the strikers were even aware of the employer's unlawful refusal to comply with the union's information request, or to show that the strike was motivated by anything other than the parties' inability to reach agreement during a lawful bargaining impasse.

The Board also found that, as an objective matter, the employer's unlawful conduct was not of such frequency or magnitude to have prolonged the strike. In this regard, it noted that the General Counsel did not argue that the employer's coercive statements to employees reflected a serious intent to refuse to bargain, and no bad-faith bargaining claim was either alleged or proven. Similarly, there was no evidence that the employer's coowners tried to make good on their threats to discharge certain employees during the strike. Finally, concerning the union's information request, the Board noted that, while the information was clearly relevant to the union in exercising its responsibilities as the employees' bargaining representative, the information "was not germane to the issues that stood in the way of the parties reaching agreement on a contract." Thus, in the absence of any evidence that this was known to the strikers or that it was linked to an issue that was proving to be an obstacle in negotiations, the Board declined to assume that the employer's denial of the information request prolonged the strike.

The Board thus concluded that the General Counsel had not sustained the burden of showing a causal nexus between the employer's unfair labor practices and the continuation of the strike.

In *Mike Yurosek & Son, Inc.*,[39] the Board reversed the administrative law judge and found that the respondent did not violate

[39] 295 NLRB No. 35 (Chairman Stephens and Member Johansen; Member Cracraft dissenting in part).

Section 8(a)(3) and (1) of the Act by recalling permanent replacements before former strikers.

The respondent, a seasonal operator, recalled employees by seniority from permanent and probationary seniority lists. During the 1986 season, several employees engaged in an economic strike and the respondent hired permanent replacements. When the season ended, the permanent replacements were placed on the probationary list. After resuming operations, the respondent, pursuant to its past practice, first recalled by seniority former strikers and permanent replacements who were actively working at the end of the previous season. The respondent next began recalling by seniority former strikers not previously recalled.

The judge concluded that the respondent violated Section 8(a)(3) and (1) by granting permanent replacements superseniority over unreinstated strikers and not recalling former strikers to vacancies created by the layoffs of permanent replacements. The judge found that employees placed on the probationary list had no seniority rights and thus recalling the permanent replacements ahead of unreinstated strikers on the seniority list denied the former strikers their seniority rights. The judge also concluded that the layoffs of the permanent replacements did not fall within the *Bancroft*[40] exceptions where vacancies do not occur when layoffs are of short duration, due to a shortage of materials, or caused by an act of God. The judge finally determined that the seasonal nature of the respondent's business did not serve as a legitimate business purpose for reducing the former strikers' recall rights.

The Board disagreed with the judge's reasoning that only *Bancroft*-type layoffs will permit the recall of permanent replacements before unreinstated strikers as this rationale failed to properly take into account "the employer's right to replace economic strikers and to assure the replacements of the permanency of their positions." Thus, in determining whether the layoffs created vacancies to which the former strikers were entitled to return, the Board applied its *Aqua-Chem*[41] test to ascertain whether the General Counsel had met her burden of showing that permanent replacements had no reasonable expectancy of recall.

Applying the *Aqua-Chem* factors, which include the length and circumstances of the layoffs and the respondent's past practice and future plans, the Board concluded that the permanent replacements had a reasonable expectancy of being recalled for the following season. It found that the length and circumstances of the layoffs as well as the respondent's future plans were definite and predictable based on the respondent's seasonal operation. The Board also noted the respondent's past practice of recalling employees working at the end of the previous season before

[40] *Bancroft Cap Co.*, 245 NLRB 547 (1979).
[41] *Aqua-Chem, Inc.*, 288 NLRB No. 121 (May 26, 1988).

hiring anew in concluding that no vacancies were created by the layoffs.

Member Johansen, concurring in the result, found that the respondent met its burden of showing that the permanent replacements had a reasonable expectation of recall for the new season.[42]

The Board also agreed with the judge that the respondent violated Section 8(a)(3) and (1) by failing to offer unreinstated striker Mercedes Holquin a substantially equivalent position. Member Cracraft, dissenting, stated that Holquin had effectively terminated her employment with the respondent by indicating her desire to quit.

In *Cornell Iron Works*,[43] the Board held that reinstatement and backpay is an appropriate remedy for the respondent's unlawful conduct of discharging employee Austin because: (1) he engaged in a lawful strike—even though Austin had engaged in one incident of misconduct—and (2) the respondent failed to demonstrate that it would have discharged Austin for the one incident of misconduct alone. The Board rejected the administrative law judge's recommendation that Austin not be reinstated or awarded backpay because, in his opinion, Austin's one incident of misconduct would have been sufficient alone for his lawful discharge and therefore reinstatement or backpay would constitute a windfall.

Austin was discharged for two incidents that occurred while he was on picket line duty: blocking a Federal Express truck attempting to enter the respondent's building and placing a board with nails under the respondent's truck as it was entering the plant.

The judge found that the facts did not support the respondent's contention that Austin deliberately prevented a Federal Express truck from entering the respondent's premises and, on a credibility determination, the judge also found that Austin kicked the nail board under the rear tires of the respondent's truck.

The respondent's treasurer testified that the employer's decision to discharge Austin was based on a combination of the Federal Express truck and nail board incidents. The judge found that the respondent made no distinction between the two reasons stated for Austin's discharge, and that the respondent failed to demonstrate that it would have discharged Austin for the nail board incident alone.

Although finding that the respondent had violated Section 8(a)(3) and (1) by discharging Austin, however, the judge recommended that the respondent not be ordered to reinstate Austin or pay him any backpay. The judge based this recommendation on the sole proven incident of Austin's strike misconduct, that is, the nail board incident. The judge found that such misconduct

[42] See Member Johansen's concurrence in *Aqua-Chem*, supra, slip op. at 13.

[43] 296 NLRB No. 81 (Chairman Stephens and Members Cracraft and Devaney).

"would have been sufficient alone for his lawful discharge [and] to order reinstatement and a backpay award . . . would constitute a windfall to a serious wrongdoer and would not advance the remedial purposes of the Act, including the protection of the right of strikers while discouraging strike misconduct."

The Board concluded that the respondent should be ordered to provide a full remedy for its unlawful conduct. The Board noted that the respondent did not view the nail board incident by itself as sufficient to warrant discharge. The Board further noted that the respondent never contended to the judge that even if he found the alleged violation, Austin should be denied reinstatement and backpay solely because of the nail board incident. The Board found, in these circumstances, that it was not appropriate for the judge to substitute his judgment for that of the respondent's, citing *Owens Illinois.*[44] Finally, the Board stated that the judge's recommended remedy left the respondent's unlawful conduct unremedied and thus did not effectuate the purposes of the Act.

2. Denial of Seniority

In *Manitowoc Engineering Co.*,[45] the Board found that an employer and a union violated the Act by maintaining and applying certain contract clauses that provided seniority benefits to an employee who returned to the bargaining unit after a period of nonunit employment, where such benefits were granted only if the employee satisfied some obligation to the union while working outside the unit.

The parties' collective-bargaining agreement provided that employees transferred or promoted out of the bargaining unit could return to the unit with accrued seniority if they obtained a withdrawal card from the union or maintained their membership in the union. Employee Ruppelt left the unit to take a supervisory position. The union denied him a withdrawal card, and he did not pay dues. Years later, the employer removed him from the supervisory job and returned him to the bargaining unit. Pursuant to the union's complaints that Ruppelt did not have seniority and could not go to work in the unit, the employer laid him off.

The Board reasoned that Section 8(a)(3) requires a two-pronged inquiry: "first, whether the clause treats employees differently with respect to an employment condition on the basis of union membership and, second, whether that different treatment encourages union membership."[46] It then reasoned that, if both questions are answered in the affirmative, then the Board would also have to determine whether the differential treatment that tends to encourage union activity is justified by the policies of the Act.

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[44] 290 NLRB No. 155 (Sept. 22, 1988).

[45] 291 NLRB No. 122 (Chairman Stephens and Members Johansen, Cracraft, and Higgins).

[46] Id., slip op. at 11.

In the instant case, the Board found that the clause at issue discriminated among employees returning to the unit by granting seniority to those who maintained their union membership during their nonunit employment and denying it to those who did not. In conditioning such a valuable employment condition on an employee's fulfilling a union obligation, the clause "clearly and inherently encourages individuals to participate in a union activity—the payment of union dues while they are not being represented by the Union—that they otherwise would not be inclined, let alone required, to engage in,"[47] the Board concluded.

Thus, the Board found that Ruppelt was discriminatorily denied seniority and reemployment in the bargaining unit because he failed to fulfill union obligations while he was a supervisor and under no contractual obligation to maintain his union membership as a condition of employment. The Board next found that this disparate treatment was not justified by the policies of the Act because it did not further the effective administration of bargaining agreements between the parties. Instead, the Board explained, "[i]t is simply a means by which the Union is allowed to collect dues from individuals it does not represent in exchange for permitting those individuals to retain seniority they have already earned against the day they may have to seek reemployment in the unit."[48]

3. Sympathy Strikes

In *Indianapolis Power Co.*,[49] the Board accepted a remand from the United States Court of Appeals for the District of Columbia Circuit[50] for further consideration of certain evidence that the Board had not addressed in its initial decision in this case.[51]

The Board had initially determined that the company did not violate Section 8(a)(1) and (3) by suspending and threatening to discharge an employee who refused to cross a stranger picket line because the collective-bargaining agreement contained a broad no-strike clause. In construing the clause, the Board, overruling contrary precedent, stated as follows:

> If a collective-bargaining agreement prohibits strikes, we shall read the prohibition plainly and literally as prohibiting all strikes, including sympathy strikes. If, however, the contract or extrinsic evidence demonstrates that the parties intended to exempt sympathy strikes, we shall give the parties' intent controlling weight.[52]

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[47] Id., slip op. at 12.
[48] Id., slip op. at 13–14.
[49] 291 NLRB No. 145 (Chairman Stephens and Member Cracraft; Member Johansen concurring).
[50] *Electrical Workers IBEW Local 1395 v. NLRB*, 797 F.2d 1027 (1986).
[51] 273 NLRB 1715 (1985).
[52] Id.

After examining the parties' bargaining history and conduct, the Board concluded that the evidence was insufficient to overcome the no-strike provision's clear waiver of employees' right to participate in sympathy strikes. Consequently, the Board held that the company was free to discipline employees covered by the no-strike provision for refusing to cross a third-party picket line and for refusing to perform their assigned work.

The District of Columbia Circuit agreed with the Board that the no-strike clause and the contract as a whole, standing alone, would be sufficient to waive employees' right to honor third-party picket lines. However, the court noted that extrinsic evidence left unaddressed by the Board arguably established an intent to exclude sympathy strikes from the reach of the parties' no-strike clause, and the court therefore remanded the case to the Board for further consideration of the parties' bargaining history.

On remand, a panel majority of the Board reaffirmed the original decision's rationale that a broad no-strike clause prohibits all strikes, including sympathy strikes. However, the majority clarified that rationale by pointing out that, as the District of Columbia Circuit had observed, construction of a broad no-strike provision turns on the parties' actual intent, and broad no-strike language does not establish an irrebutable presumption that sympathy strikes are included within its scope. If extrinsic evidence, such as the parties' bargaining history and past practice, shows that the parties did not intend to prohibit sympathy strikes, that intent will receive controlling weight. Thus, analysis of extrinsic evidence constitutes an integral part of construing the parties' intent underlying a general no-strike provision in a collective-bargaining agreement.

Applying those principles to the facts of this case, the majority found that the parties had for many years disagreed over whether their no-strike provision encompassed sympathy strikes. Because the union had consistently insisted that sympathy strikes remained outside the provision's coverage, and the company had consistently insisted that the provision banned sympathy strikes, the majority concluded that the parties had agreed to disagree over the sympathy strike issue, and that, accordingly, there was no waiver of employees' right to participate in sympathy strikes. The majority therefore held that the company violated Section 8(a)(1) and (3) by levying discipline against an employee who exercised that right.

Member Johansen, concurring, agreed with the result but disagreed with the majority's analysis of the waiver issue. He would have resolved any ambiguity concerning a waiver of the employees' right to engage in sympathy strikes against finding that the right had been waived. In his view, a broad no-strike clause, standing alone, is insufficient to constitute a clear and unmistak-

able waiver under the test set forth in *Metropolitan Edison.*[53] He noted that the majority purported to rely on a standard requiring the union to show that, by negotiating a broad no-strike clause, the parties did not intend to waive the right to engage in sympathy strikes. Member Johansen therefore questioned "how allocating the burden in this manner can be reconciled with the demanding standard [of *Metropolitan Edison*] that requires that the union's intent to waive a statutory right must affirmatively be demonstrated clearly and unmistakably."

In the instant case, Member Johansen noted, the parties' agreement to disagree over whether their no-strike language encompassed sympathy strikes would seem to be insufficient to rebut the majority's presumption that a broad no-strike provision includes sympathy strikes. According to Member Johansen, such a result "can only derive from application of the clear and unmistakable waiver standard" of *Metropolitan Edison,* above, and not from the application of the analysis set forth in the original *Indianapolis Power* decision.

In *Arizona Public Service Co.,*[54] the Board accepted a remand from the Ninth Circuit[55] as the law of the case and decided to reverse its prior decision.[56]

In its original decision, the Board found that the respondent did not violate Section 8(a)(3) by suspending eight employees because they engaged in a sympathy strike. The Board reasoned that the parties' contract banned unauthorized work stoppages, that the sympathy strike was unauthorized, and that the company was free to levy discipline against employees who participated in unauthorized strikes because the contract expressly permitted such action. In a footnote, the Board cited *Indianapolis Power Co.,*[57] which held that a broad no-strike clause prohibits all strikes, including sympathy strikes, unless the contract or extrinsic evidence shows that the parties intended otherwise.

The Ninth Circuit remanded the case for further consideration of evidence bearing on the parties' actual intent concerning the scope of the no-strike provision, including the contract as a whole, the law regarding no-strike provisions when the contract was last ratified, bargaining history, and the parties' past practice under the contract.

On remand, a panel majority of the Board (Chairman Stephens and Member Cracraft) held that the parties' general no-strike clause facially encompassed all strikes, including sympathy strikes, but concluded that the parties' bargaining history and past practice evidenced an intent to exclude sympathy strikes.

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

[54] 292 NLRB No. 144 (Chairman Stephens and Member Cracraft; Member Johansen concurring).

[55] *Electrical Workers IBEW Local 387 v. NLRB,* 788 F.2d 1412 (1986).

[56] 273 NLRB 1757 (1985).

[57] *Indianapolis Power I,* remanded sub nom. *Electrical Workers IBEW Local 1395 v. NLRB,* 797 F.2d 1027 (D.C. Cir. 1986), decision on remand 291 NLRB No. 145 (*Indianapolis Power II*).

The majority relied on contract proposals from the company that would have prohibited sympathy strikes as evidence that the company recognized there was no agreement that the no-strike clause covered sympathy strikes. They also relied on the company's past practice of tolerating sympathy strikes until the incident in question occurred. Following the court's instruction to examine Board law at the time the parties last ratified the no-strike language, the majority also found that, under then-existing law, a broad no-strike clause was insufficient to waive the right to engage in sympathy strikes. Accordingly, the majority held that the company violated Section 8(a)(3) and (1) by disciplining employees because they exercised that right.

Member Johansen, concurring, said he disagreed with the majority's application of the *Indianapolis Power* standard, and referred to his concurrence in *Indianapolis Power II*.[58] He stressed that, in agreeing with his colleagues on the result here, the state of Board law at the time of the parties' last contract ratification should be given compelling weight in determining the parties intent underlying a broad no-strike clause. Citing *Metropolitan Edison Co. v. NLRB*,[59] Member Johansen concluded that there was no showing of mutual intent to include sympathy strikes under the contractual no-strike clause and thus no showing that the union clearly and unmistakably waived the right to engage in sympathy strikes.

4. Layoff of Union Supporters

In *National Fabricators*,[60] the Board adopted the administrative law judge's findings that the employer violated Section 8(a)(3) and (1) of the Act by laying off seven employees because it had feared they would honor a union picket line.

Approximately a week before an anticipated union picket line at the employer's operations, an employee layoff became necessary there. The employer's superintendent admitted that he selected the seven alleged discriminatees for layoff because of his fear that they would honor the union picket line. The judge found that picket activity and assertions by employees that they may honor a picket line constitute both protected and union activities. He therefore found the employer's layoff selections were unlawful.

In its exceptions, the employer, claiming that its conduct was analogous to the exercise of its right to obtain permanent replacements for economic strikers or its right to lock out employees, argued that its actions were lawful and that the layoffs had not been motivated by antiunion animus, but were supported by legitimate business considerations. The Board rejected the employer's argument. In doing so, Chairman Stephens and Member

[58] Supra, slip op. at 10–12.
[59] 460 U.S. 693, 708 (1983).
[60] 295 NLRB No. 126 (Chairman Stephens and Members Cracraft and Devaney).

Devaney found that the employer's asserted business justification was neither legitimate nor substantial. In this respect, they observed that "there [was] no indication that the continued operation of [the employer's] business necessitated that it utilize a discriminatory criterion for laying off employees."

D. Employer Discrimination for Backpay Testimony

In *American Pacific Concrete Pipe*,[61] the Board held that an employer violated Section 8(a)(4) of the Act by filing a state court lawsuit against a discriminatee involved in a prior Board proceeding.

In the prior case,[62] the Board found the employer's refusal to recall employee Donald Roland violated Section 8(a)(3) and (1), and ordered the employer to reinstate Roland with backpay. The General Counsel issued an amended backpay specification seeking $41,602 for Roland. At a meeting between representatives of the employer and the union, Roland agreed to waive his make-whole claim against the employer in exchange for a payment of $20,000. The General Counsel, who did not participate in reaching this settlement agreement, continued to pursue Roland's backpay claim. The employer filed a civil complaint against Roland alleging that he breached the settlement agreement by instructing the Board attorney to pursue the backpay specification and by fraudulently inducing the employer to pay him $20,000 by misrepresenting that he would release the employer from any backpay claims.

The administrative law judge applied the principles set forth in *Bill Johnson's Restaurants v. NLRB*,[63] and found that the record evidence did not establish a retaliatory motive for the respondent's suit. Instead, he found that, even though the General Counsel's pursuit of Roland's backpay claim "triggered" the respondent's suit, the "real motivating element" for the suit was the respondent's perception that Roland breached the private settlement agreement. The judge then determined that it was unnecessary to decide whether the employer's suit lacked a reasonable basis in fact or law. Accordingly, he concluded that the employer did not violate the Act by bringing a state court suit against Roland.

The Board found that the judge erred in several respects. Initially, it found that the Board's jurisdiction to decide backpay claims preempted the respondent's suit pertaining to the same matter. Therefore, *Bill Johnson's Restaurants* did not apply to this case, the Board concluded. Finally, noting that the employer surprised Roland with news of the suit on the day of the backpay hearing, that the suit did not include the union that had signed

[61] 292 NLRB No. 133 (Chairman Stephens and Members Johansen and Cracraft).
[62] 262 NLRB 1223 (1982), enfd. mem. 709 F.2d 1514 (9th Cir. 1983).
[63] 461 U.S. 731 (1983).

the settlement agreement, that Roland was a chief witness in the backpay proceeding, and that the suit sought punitive damages, the Board concluded that the respondent filed the lawsuit with an intent to retaliate against Roland for testifying or participating in the backpay proceedings. Accordingly, the Board found that the employer violated Section 8(a)(4) and (1) by filing the lawsuit against Roland. To remedy this misconduct, the Board ordered the employer to withdraw the lawsuit, and to make Roland whole for all legal and other expenses he incurred in defending himself against the employer's lawsuit.

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. Mandatory Subject of Bargaining

In *Johnson-Bateman Co.*,[64] the Board majority held that drug and alcohol testing of current employees who have been injured in workplace accidents is a mandatory subject of bargaining; that the union had not waived its right to bargain about this subject; and that the employer violated Section 8(a)(5) and (1) of the Act by unilaterally implementing such a testing program without providing the union with advance notice and an opportunity to bargain about it.

The majority applied the principles set forth in *Ford Motor Co. v. NLRB*,[65] and found that drug and alcohol testing of current employees is "plainly germane to the 'working environment'" and is not among those "managerial decisions which lie at the core of entrepreneurial control." Regarding the first factor—germane to the working environment—the majority found that drug and alcohol testing of current employees was most closely analogous to physical examinations and polygraph testing, both of which are mandatory subjects of bargaining.[66]

Regarding the second factor—beyond the scope of managerial decisions that lie at the core of entrepreneurial control—the majority found that drug and alcohol testing of current employees is beyond that scope for the same reasons that the Board majority in *Medicenter* found that polygraph testing was beyond that

[64] 295 NLRB No. 26 (Chairman Stephens and Members Cracraft, Higgins, and Devaney; Member Johansen dissenting in part).

[65] 441 U.S. 488 (1979).

[66] *Lockheed Shipbuilding Co.*, 273 NLRB 171, 177 (1984) (physical examinations); *Medicenter, Mid-South Hospital*, 221 NLRB 670 (1975) (polygraph testing).

scope: it was not entrepreneurial in character; it was not fundamental to the basic direction of the enterprise; it impinged more than indirectly on employment security; and it constituted a change in an important facet of the workaday life of the employees.

The majority went on to find that the contractual management-rights clause did not constitute a waiver by the union of its right to bargain about the drug and alcohol testing requirement; that the issue presented was not solely a matter of contract interpretation; that the bargaining history of the collective-bargaining agreement did not establish that drug and alcohol testing was discussed in negotiations; and that neither a prior arbitration award nor the parties' past practice of union acquiescence in the employer's unilateral changes in work rules and unilateral implementation of a drug and alcohol testing requirement for job applicants constituted a waiver by the union of its right to bargain about such testing of current employees who are injured in workplace accidents.

Member Johansen, dissenting in part, agreed with the majority that drug and alcohol testing of current employees is a mandatory subject of bargaining. However, he found that the union waived its right to bargain about this matter by its agreement to the contractual management-rights clause, which permitted, inter alia, the employer unilaterally to implement work rules, and also by its repeated acquiescence in the employer's unilateral implementation of numerous other work rules.

Member Johansen found the drug and alcohol testing requirement for employees injured in workplace accidents to be a work rule within the meaning of the management-rights clause, and that the employer was therefore permitted by contract as well as by past practice unilaterally to implement the drug and alcohol testing requirement.

In *Star Tribune*,[67] the Board held that drug and alcohol testing of applicants for employment is not a mandatory subject of bargaining and that therefore the employer did not violate Section 8(a)(5) and (1) of the Act by unilaterally implementing a drug and alcohol testing policy for prospective employees. The Board further concluded, however, that the employer violated Section 8(a)(5) and (1) in its denial of the union's request for information relating to the policy.

The Board concluded that the Supreme Court's discussion in *Allied Chemical & Alkali Workers (Pittsburgh Plate Glass) v. NLRB*, 404 U.S. 157 (1971), concerning the mandatory bargaining obligation under the Act does not support a finding that preemployment drug and alcohol testing is a mandatory subject. In *Pittsburgh Plate Glass*, the Court held that the retirement bene-

[67] 295 NLRB No. 63 (Members Johansen, Cracraft, Higgins, and Devaney; Chairman Stephens concurring in part).

fits of retired unit employees are not encompassed within the statutory duty to bargain about the terms and conditions of employment of the employer's employees because retirees are not "employees" of the employer, nor do changes in retirees' benefits "vitally affect" the terms and conditions of active unit employees.

Applying the Court's analysis in *Pittsburgh Plate Glass* to the present case, the Board concluded that applicants for employment are not "employees" within the meaning of the collective-bargaining obligations of the Act. Applicants for employment do not fall within the ordinary meaning of an employer's "employees." Applicants perform no services for the employer, are paid no wages, and are under no restrictions regarding other employment or activities. The Board noted that in this case there was no relationship between the employer and an applicant, unlike the intermittent employment situation found in the hiring hall line of cases in which the Board has found an obligation to bargain about the establishment of a hiring hall and the process by which applicants are employed.[68]

The Board further concluded that the "vitally affects" test for finding an obligation to bargain about matters affecting individuals outside the bargaining unit had not been met. It reasoned that the fact that applicant testing will affect the composition of the bargaining unit did not, standing alone, support the conclusion that it vitally affects the terms and conditions of employment of unit employees.

The Board noted that any applicant qualification could be subject to this argument. There had been no showing that as a result of this policy less qualified individuals had been hired. It also rejected as speculative the contentions that individuals who fail or refuse to take a drug test would vitally affect the work force or quality of work, that unit employees have had future job opportunities diminished, that the reputation of the newspaper has changed, or that the reputations of unit employees have been adversely affected by the institution of the applicant drug and alcohol testing policy.

Notwithstanding the holding that drug and alcohol testing of applicants for employment is not a mandatory subject of bargaining, the Board found that the employer violated Section 8(a)(5) and (1) by refusing to furnish the union with information concerning the drug and alcohol testing of applicants for unit positions. The union had requested: the names, addresses, and telephone numbers of all prospective employees who had been extended tentative or firm offers of employment for unit positions since the implementation of the drug testing program; the identity of applicants who had been required to undergo a preemployment medical examination or a drug and alcohol screen; the iden-

[68] See *Associated General Contractors*, 143 NLRB 409 (1963), enfd. 349 F.2d 449 (5th Cir. 1965).

tity of applicants who had refused to submit to a screen; and whether the reason for not hiring an individual was due to or related to a refusal to submit to a drug and alcohol test, or issues related to drug and alcohol testing.

The union requested this information pursuant to a pending grievance relating to the employer's unilateral implementation of the applicant drug testing program, which alleged violations of several contractual provisions, including the nondiscrimination provisions of the parties' collective-bargaining agreement. In particular the union was concerned about possible sexual discrimination.

The Board stated that elimination of actual or suspected hiring discrimination is a mandatory subject of bargaining[69] and noted that the Board has held that information concerning applicants for union-represented positions is necessary and relevant to a union's performance of its bargaining obligation with respect to eliminating discriminatory employment practices.[70] The Board reasoned that a union's legitimate efforts to seek elimination of discrimination in the employment relationship would be severely impeded if it were required to wait until the hiring process is complete and the employment relationship has begun before investigating actual or suspected hiring discrimination. Thus, the Board concluded that information concerning actual or suspected discrimination in the hiring process is necessary and relevant to the union's performance of its statutory duties.

In his concurrence, the Chairman states in finding that discrimination in hiring is a mandatory subject of bargaining, the Board is not finding that a union in any sense represents the interests of employment applicants. In the Chairman's view, "a prohibition of hiring discrimination is a mandatory subject only insofar as it may prevent practices that are likely to result in a partly or wholly segregated bargaining unit that is the product of hiring discrimination."[71] The Chairman would not "agree that a conclusion that nondiscrimination clauses are mandatory bargaining subjects means that a hiring practice or requirement, or any change in such practices or requirements, is automatically a mandatory subject of bargaining simply on a bare claim that it *might* lead to a work force from which a class based on race, sex, religion, or national origin is largely excluded or on the theory that because hiring practices generally may be used to discriminate, the union therefore has the right to bargain about all of them in order to insure that they do not."[72]

The Chairman emphasized that under *Pittsburgh Plate Glass* "it is clearly necessary to show that the proposed action to be taken

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[69] *Jubilee Mfg. Co.*, 202 NLRB 272 (1973), affd. sub nom. *Steelworkers*, 504 F.2d 271 (D.C. Cir. 1974).

[70] See, e.g., *East Dayton Tool & Die Co.*, 239 NLRB 141 (1978).

[71] 295 NLRB No. 63, slip op. at 27–28.

[72] Id., slip op. at 28–29.

with respect to nonunit employees 'vitally affects' the terms and conditions of current employees before it will be considered a mandatory subject of bargaining."[73]

2. Impasse Issues

In *Toledo Blade Co.*,[74] the Board held that an employer may lawfully insist as a condition of consummating any collective-bargaining agreement that the agreement contain a provision waiving the union's right to participate in the employer's negotiations with individual bargaining unit members on early retirement and separation incentives. The majority found that the contractual provision in dispute was a mandatory subject of bargaining, noting that the specific subject matter of the provision—retirement and separation incentives—has been held to be a mandatory subject of bargaining.[75]

In negotiations for a collective-bargaining agreement to succeed the expired agreement, the employer insisted that it would not sign a new agreement unless it contained the following clause:

> The Company shall have the right to offer other retirement and/or separation incentives in amounts, under terms and conditions, and for periods of time that the Company shall in its sole discretion deem appropriate, and the Union waives the right to raise a dispute or arbitrate with respect thereto.

The majority stated that although the provision would require the union to waive its statutory right to act as exclusive collective-bargaining representative for any affected employee in the area of retirement/separation incentives, the inclusion of such a waiver provision did not "transform" it from a mandatory to a permissive subject of bargaining. The majority concluded that the proposal was similar in effect to other waiver-of-bargaining clauses such as certain management-rights and zipper clauses that have been held to be mandatory subjects of bargaining.[76]

The Board majority stated that the proposal would allow the employer to deal directly with unit employees in the area of retirement/separation incentives, hence involving a waiver of statutory rights in a narrow area. The majority noted that the clause gave the employer the right only to *offer* retirement or separation incentives. The employees enjoyed lifetime job guarantees and retirement or separation incentives could not be forced on them.

Chairman Stephens dissenting concluded that the proposal in dispute involved a nonmandatory subject of bargaining. He dis-

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[73] Id., slip op. at 29.

[74] 295 NLRB No. 68 (Members Johansen and Cracraft; Chairman Stephens dissenting).

[75] *Baltimore News American*, 230 NLRB 216, 217–218 (1977), enfd. as modified 590 F.2d 554 (4th Cir. 1979); *A. S. Abell Co.*, 230 NLRB 17, 18 (1977), enfd. as modified 590 F.2d 554 (4th Cir. 1979).

[76] *NLRB v. American National Insurance Co.*, 343 U.S. 395, 409 (1952); *NLRB v. Tomco Communications*, 567 F.2d 871 (9th Cir. 1978).

agreed with the majority position that the "specific subject" of the clause at issue was simply retirement incentives, finding that "the clause does not simply reserve to the Respondent the unilateral discretion to devise an individually tailored package of benefits that is payable to an employee who is eligible for retirement. Rather it would shove the Union aside and establish a regime of direct negotiation one-on-one with employees themselves."[77]

The Chairman stated that the union's ability to exercise its responsibilities as exclusive bargaining representative would be undercut both because an eligible employee would be deprived of the benefit of the union's negotiating clout and its expertise in evaluating the merits and advisability of a retirement offer, and the union could not effectively monitor the incentive program from the standpoint of its impact on the pool of financial resources available to the unit as a whole.

Contrary to the majority, the Chairman found that the disputed clause was different from the management-functions clause considered in *American National Insurance*, supra, which contemplated initial unilateral action by the employer, but did not involve one-on-one negotiations with the employees with the door shut to union participation of any sort. He concluded that the employer's insistence on this proposal, which involved a nonmandatory subject of bargaining by virtue of the fact that the employer sought to compel the union's acceptance of its displacement as bargaining representative in the area of retirement and/or separation incentives, violated Section 8(a)(5) and (1).

In *Colorado Ute Electric Assn.*,[78] the Board held that although the employer had lawfully insisted to impasse on a proposal to implement merit wage increases, the employer violated Section 8(a)(5) and (1) of the Act by unilaterally granting merit wage increases to employees without offering to bargain with the union over the timing and amounts of the increases.

During midterm contract negotiations, the employer insisted to impasse that employees be eligible for wage increases on the basis of merit, that merit be defined as "individual performance" and "contribution on the job," and that merit increases be granted at times and amounts determined solely by management. The parties' current collective-bargaining agreement provided for wage rates for each job classification with progression steps based on tenure. The union insisted on across-the-board wage increases for unit employees and rejected the employer's merit wage proposals.

The Board agreed with the judge's conclusion that the employer did not fail or refuse to bargain in good faith by insisting to impasse on its merit wage proposal. It concluded that the employer was free to insist to impasse as a condition to agreement

[77] 295 NLRB No. 68, slip op. at 18.

[78] 295 NLRB No. 67 (Members Johansen and Cracraft; Chairman Stephens concurring).

on any wage terms that the union agree to waive the statutory right to bargain concerning the merit pay program; however, once having failed to secure such agreement and reaching impasse, the employer was not free to proceed with implementation of its final offer as if the employer had successfully secured the union's waiver.

The Board found that having reached impasse, the employer was free to consider employees for merit increases and to base its consideration on the criteria mentioned above, for neither of these aspects of its proposal involved the waiver of a statutory right. Employees have no statutory right to be awarded wage increases only on the basis of tenure rather than merit, nor do they have a statutory right not to have merit increases based on these two criteria.

The Board concluded, however, that the employees' bargaining representative does have the right to be consulted over the timing and amounts of merit increases before they are granted. Accordingly, having failed to secure a waiver of the union's statutory right to bargain over the merit increases' timing and amounts, the employer was not free to grant increases without consulting with the union about these matters, and its unilateral granting of merit increases violated Section 8(a)(5).

3. Refusal to Execute Contract

In *Chambersburg County Market*,[79] the Board reversed the administrative law judge and held that a charge alleging an unlawful refusal to execute a bargaining contract is cognizable only when filed within 6 months of the time at which the charging party is on notice of an initial refusal to execute. The judge had relied on the "continuing violation" theory of *Torrington Construction Co.*,[80] in which the Board held that a charge is timely filed under Section 10(b) of the Act if brought within 6 months of *any* refusal to execute a contract, even when the initial refusal to execute occurred outside the 10(b) period.

Following voluntary recognition, the respondent and the union negotiated an initial collective-bargaining agreement in November 1985. In November and December 1985, however, the respondent unequivocally refused to execute and implement the contract. The unfair labor practice charge was filed on July 21, 1986. The judge found a union demand to abide by the contract on January 22, 1986, a date within the 10(b) period. The judge found that the 1985 refusals to execute the contract were not justified and, relying on *Torrington Construction Co.*, concluded that the 1985 unfair labor practice enabled him also to find a January 1986 continuing violation.

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[79] 293 NLRB No. 78 (Chairman Stephens and Members Johansen, Cracraft, and Higgins).
[80] 235 NLRB 1540 (1978).

The Board considered the dual policies underlying Section 10(b) as set forth in *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*[81] and decided to adhere strictly to the 10(b) limitation. The Board thus held that continued adherence to the continuing violation theory would vitiate the policies of (1) barring stale litigation under such circumstances that a respondent is denied a reasonable opportunity to prepare a defense, and (2) strengthening and defending the stability of bargaining relationships by ensuring that parties in a collective-bargaining relationship are able at all times to assess their obligations to each other expeditiously and with reasonable certainty. Accordingly, the Board overruled *Torrington Construction Co.* and similar cases to the extent they find that a refusal to execute a bargaining agreement constitutes a continuing violation.

In *Sacramento Union*,[82] the Board adopted an administrative law judge's finding that the respondent violated Section 8(a)(5) and (1) of the Act by refusing to execute a written contract embodying its agreement reached with the union, despite the respondent's contention that it withdrew its proposal before the agreement was ratified by the union's membership.

On the commencement of negotiations over a successor contract, the union's negotiators informed the respondent's negotiators that they had the authority from the international union to negotiate a contract, subject to final agreement by its members. After several months of bargaining, the respondent presented its final contract offer to the union with two conditions: that the union's negotiating committee recommend ratification of the contract to its membership and that the ratification vote take place no later than July 31, 1983. After receiving the respondent's consent to a ratification date of August 7, the union negotiators agreed on July 20 to all the terms and conditions of the respondent's final offer, including the ratification conditions.

On August 3, the respondent, anticipating substantial financial liability from an unrelated civil suit, requested from the union an extension of the ratification vote for another week. The union agreed. On August 11, after having reached a settlement in its civil litigation, the respondent notified the union that it was withdrawing "the labor contract provisions previously offered" to the union. The union membership ratified the contract on August 18, but the respondent refused to execute the contract.

The judge found that the parties entered into a binding agreement on July 20. The judge concluded that ratification was not a binding condition precedent to the existence of the contract because it was never proposed as an express term of the contract. Rather, the union's statement at the outset of negotiations that any contract reached would be submitted to the membership for

[81] 362 U.S. 411, 419 (1960).

[82] 296 NLRB No. 65 (Members Cracraft, Higgins, and Devaney; Chairman Stephens concurring).

ratification was a self-imposed requirement, and the union "was always at liberty to change its position on ratification and conclude a signed agreement with the Respondent." Moreover, the conditions concerning ratification placed on the respondent's final offer related only to the respondent's recognition of the union's self-imposed ratification requirement and did not constitute a condition precedent to the existence of the contract. Thus, the judge concluded that on July 20, when the union negotiators unconditionally accepted the respondent's final offer, a binding agreement was reached, and the respondent was obligated to execute a contract embodying that agreement.

The Board majority adopted the judge's findings and conclusions. In a separate concurrence, Chairman Stephens expressed a "different rationale" for finding the violation, contending that the judge's reasoning did not adequately come "to grips with how several Board relevant precedents . . . might just as well warrant a dismissal of the complaint on the facts of this case." According to the Chairman, varying Board precedents treat employee ratification "as falling into one of two categories: (1) a condition tantamount to acceptance that must occur before a binding contract is created . . .; or, (2) a condition embodied in a binding contract that must occur before the performance obligations arise . . . ." It was not necessary, however, to clarify the law in this case because the "central question is whether the Respondent had the power to withdraw its consent to the negotiated agreement before the members ratified it," and according to the Chairman, "[u]nder other settled principles of law, not considered by the judge, it is not necessary to find that the collective-bargaining agreement itself came into legal existence as a predicate for holding that the Employer here could not withdraw its consent."

Rather, the Chairman found that, as of July 20, the respondent "objectively manifested its intention to assent" to a contract based on its final offer to the union, and that it was "only reasonable to imply from these circumstances a commitment on the Employer's part to hold its contract offer open until the agreed-on time for ratification has run." Thus, because the respondent was obligated not to withdraw its offer and the union members timely ratified the contract, the Chairman found that the respondent was required to execute the contract.

4. Hard v. Surface Bargaining

In *Commercial Candy Vending Division*,[83] a panel majority reversed the administrative law judge's finding that an employer had engaged in bargaining without an intention of reaching agreement, in violation of Section 8(a)(5) and (1). The respondent

[83] 294 NLRB No. 82 (Chairman Stephens and Member Johansen; Member Higgins dissenting in part).

met with the union on six occasions over 4 months, after which the employees went out on strike. After 3 weeks, the employees decided to end the strike and accept the respondent's final offer; however, the respondent refused to accept the employees' unconditional offers to return to work.

A primary area of dispute was the respondent's wage proposal, which would change the method of compensation from an hourly wage to a base-plus-commission formula. The union remained firm in its opposition to the new system, and the respondent was equally committed to making the change. Although the administrative law judge faulted the respondent for its failure to engage in "salesmanship" of its proposal, the Board noted that the union never requested information about the proposal or supporting data for the respondent's belief that increased earnings for employees would result under the new system.

The Board concluded that "the Respondent's position on wages cannot fairly be said to have been calculated to avoid reaching agreement with the Union." (Id., slip op. at 4.)

The Board examined the respondent's contract proposals seriatim, as well as its movement on the union's proposals, and determined that the totality of the respondent's conduct fell short of establishing surface bargaining, and could at most be considered hard bargaining. The respondent had modified, redrafted, and withdrawn proposals in response to concerns expressed by the union, and had offered legitimate business justifications in support of changes it was seeking.

The Board dismissed the 8(a)(5) allegations and reversed the judge's finding that striking employees had been engaged in an unfair labor practice strike. It found those employees had engaged in an economic strike, and thus were not entitled to reinstatement on their unconditional offer to return to work. Accordingly, the 8(a)(3) allegations, which were based on the respondent's refusal to reinstate them, were also dismissed.

Member Higgins' partial dissent was based on his agreement with the judge that the respondent's conduct, when viewed in its entirety, revealed that it had no intention of reaching any agreement with the union.

5. Refusal of Plant Access

In *American National Can Co.*,[84] the Board held that the employer violated Section 8(a)(5) and (1) of the Act by refusing the union's request for access to the plant to measure heat levels in the workplace. As a threshold matter, the Board held that the dispute between the parties over the employer's refusal to grant the union access to the plant to take heat measurements was not appropriate for deferral to the parties' contractual grievance and arbitration procedures.

[84] 293 NLRB No. 110 (Chairman Stephens and Members Johansen and Cracraft).

Under the collective-bargaining agreement, the union had the right to visit the plant in matters pertaining to grievances or complaints arising out of questions concerning the application or interpretation of the contract. The contract also provided that employees were entitled to additional relief time where heat or cold conditions warranted it. Finally, the contract required the employer to provide adequate heat, light, and ventilation and to continue its best efforts to devise systems to control job hazards that employees may be subject to at their workplace.

The union requested the employer's permission to monitor temperatures in the plant at various places, dates, and times, with a "wet bulb thermometer," for the purpose of determining whether the employer was in compliance with the contractual provisions regarding heat relief and on-the-job health protection. The employer refused the union's request for access, asserting that it was the employer's responsibility, not the union's, to monitor heat conditions and to determine when heat relief was warranted.

The union filed a grievance alleging that the employer was in violation of the heat relief provisions of the contract. The grievance was denied at the prearbitral steps in the procedure. The union then filed an unfair labor practice charge alleging that the employer had violated Section 8(a)(5) and (1) by failing and refusing to allow the union reasonable access to the plant, as requested, for the purpose of gathering information otherwise unavailable to the union regarding health and safety conditions inside the plant. At the unfair labor practice hearing, the employer offered to proceed directly to arbitration on the question of whether it was in compliance with the heat relief provisions of the contract and, in conjunction with that question, whether it was in compliance with the access provisions of the contract.

In declining to defer, the Board found that deferral under the circumstances would create the risk of a two-stage proceeding, of a type generally disfavored by the Board, involving first a resolution of the union's claim for access to the plant and then, if the union were successful in getting access, and subsequent to its acquisition of heat data, a separate proceeding to resolve the heat relief issue. Citing *General Dynamics Corp.*,[85] the Board stated that it has generally refused to defer issues that would result in a two-tiered system requiring a union to file a grievance to obtain information potentially relevant to its processing of a second, underlying grievance. In the case at hand, the Board found that, notwithstanding the employer's willingness to arbitrate the denial-of-access allegation in conjunction with the heat relief grievance, it was clear that in order for the union to proceed to arbitration on the heat relief grievance, it would separately and preliminarily have to find out the actual heat conditions in the

[85] 268 NLRB 1432 fn. 2 (1984).

plant, which information the union could obtain, under the circumstances, only through access to the plant. Thus, the Board found that under the employer's proposal the parties would necessarily first have to arbitrate separately the denial-of-access dispute in order to determine whether the union would be permitted access to the plant to take heat measurements. Thus, resolution of the preliminary dispute over access to the plant would not simultaneously resolve the underlying heat relief dispute.

The Board did not find that the issue should have been treated differently on the grounds that it involved a request for access to obtain information rather than a simple request for information itself. The Board noted that although in *Holyoke Water Power Co.*,[86] it had rejected the analogy it had previously drawn between (1) requests for access to an employer's premises to obtain information and (2) requests for information itself. In the case at hand the inquiry was not into the nature of the respective substantive rights involved in those two types of requests, but rather focused on the ancillary procedural issue of whether it is appropriate to defer to arbitration a matter involving entitlement to information when another dispute between the parties may be dependent on that information. The Board found that the principles it normally applied in refusing to defer requests-for-information cases to contractual grievance-arbitration provisions were equally applicable to the question of whether to defer requests-for-access-to-obtain-information cases.

Consequently, it found the instant allegation of unlawful denial of access to the plant to take heat measurements to be unsuitable for deferral. The Board went on to find that the union was entitled to the heat information and that, under the principles set forth in *Holyoke Water Power*, supra, the union was entitled to access to the plant in order to obtain the information.

6. Duty to Furnish Information

In *Blue Diamond Co.*,[87] the Board majority adopted the judge's conclusion that the respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide the names of the employees of two other companies, H & K Equipment Company, Inc. (H & K) and E & M Express, Inc. (E & M), to which the union suspected the respondent was diverting bargaining unit work.

The Board agreed with the judge that because there is an objective factual basis for the union to believe that bargaining unit work was being performed by the employees of E & M and H & K, and that E & M and H & K together with the respondent might constitute a single employer, the names of the E & M and

[86] 273 NLRB 1369 (1985), enfd. 778 F.2d 49 (1st Cir. 1985).

[87] 295 NLRB No. 111 (Members Cracraft and Higgins; Chairman Stephens, concurring and dissenting in part).

H & K employees are "legitimate sources from which further information can be sought relating to the possible grievance."

A union is not required to establish in advance exactly how the information these employees might provide would be helpful in pursuing a possible grievance, nor is it necessary to establish that these employees have access to "insider" information, the Board held. Rather, the union's request for information is merely part of an investigatory process through which it determines whether there exists a basis for a grievance against the respondent.

Although Chairman Stephens agreed with the finding that the respondent unlawfully delayed in furnishing information to the union concerning the structure, operations, and interrelationship between itself and H & K and E & M, the Chairman dissented from the finding that the respondent violated the Act by refusing to furnish the union the names and addresses of the employees of H & K and E & M, and asserted that this "seems little more than a fishing expedition in which the fish appear to be the employees and not their employers or the Respondent."

In so finding, the Chairman noted that the union has failed to sustain its burden of establishing the relevance of the requested information in that the union does not explain how such information would be helpful in pursuing a grievance. Neither the union nor the General Counsel has come forward with evidence that would indicate that the employees of these two companies have knowledge that would aid the union, and the reliability of any information supplied by these employees is suspect absent evidence indicating they have access to inside information concerning the corporate affairs of their employers.

7. Notification of Plant Shutdown

In *Stevens Pontiac-GMC*,[88] a panel majority of the Board held that "when an employer notifies a recognized union of action requiring the employer, on demand, to engage in bargaining, the employer also must inform the union of any practices [of the employer] making receipt of a demand by a reasonable method of reply unlikely. Otherwise, the employer must . . . [alter] its practices . . . to ensure that any reply sent by that method is received."

On or about December 16, 1987, the employer, by certified letter, notified the union that it anticipated ceasing operations and terminating its unit employees by December 31, 1987. The employer offered to engage in "effects bargaining." The letterhead listed the employer's address. About December 18, 1987, the union requested, by certified letter, effects bargaining. The union's letter was sent to the address printed on the employer's letterhead. Notices informing the employer that a certified letter

[88] 295 NLRB No. 66 (Members Johansen and Higgins; Member Cracraft dissenting).

was available for pickup were placed in the employer's post office box. The letter was returned to the union marked "unclaimed." The union received the letter about January 8, 1988.

On or about December 31, 1987, the employer ceased operations and terminated its unit employees. The employer asserted that its policy was not to accept certified or registered mail unless sent by its manufacturer or by a Government agency. The union made no other attempt to contact the employer.

The majority noted that when an employer has instituted a policy of refusing registered or certified mail to avoid requests for recognition and bargaining, the Board has held that refusal of mail containing those requests constitutes a refusal to bargain.[89] However, refusal of registered or certified mail without knowledge that it contained such a demand did not constitute a refusal to bargain.[90]

The majority also noted that most of the cases regarding this issue (see fns. 89 and 90) concerned an initial demand for recognition and bargaining. Thus, the union in those cases had the responsibility of communicating its demands to the employer. Here, however, the employer had a duty to communicate to the union its decision to cease operations and to terminate the unit employees, and to afford the union an opportunity to negotiate. Thus, the majority reasoned, that to allow the employer to use its internal practices to claim nonreceipt of the demand would render the employer's duty to afford the union an opportunity to negotiate meaningless.

The majority noted that in the case of an employer soon to be ceasing operations, time lost in communicating a reply refused by the employer will result in loss of union bargaining power. Further, the employer has knowledge of its own policies and thus its burden of informing the union of those are minimal.

The majority rejected the employer's argument that the union had waived its bargaining rights by not following up on the initial demand. The majority reasoned that, "[i]ts letter of demand having been rejected, the Union was under no further obligation to communicate a demand."[91]

Accordingly, the majority held that the employer violated Section 8(a)(5) and (1) by refusing to bargain in good faith with the union concerning the effects of its decision to cease operations and terminate unit employees.

Member Cracraft, in dissent, stated that the employer did not refuse to bargain with the union but "at all times it stood ready to engage" in bargaining. She noted that the employer's letter to

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[89] See *Honda of San Diego*, 254 NLRB 1248, 1268 (1981); *Wayne Trophy Corp.*, 236 NLRB 299, 309–310 (1978); *Regal Aluminum*, 171 NLRB 1403, 1411–1412 (1968), enfd. 436 F.2d 525 (8th Cir. 1971); *City Electric Co.*, 164 NLRB 844, 848 (1967).

[90] *NLRB v. Quick Shop Markets*, 416 F.2d 601, 606 (7th Cir. 1969); *Circle K Corp.*, 173 NLRB 713, 722–724 (1968); *Filler Products v. NLRB*, 376 F.2d 369, 380–381 (4th Cir. 1967).

[91] Citing *City Electric Co.*, 164 NLRB 844 (1967).

the union did not specify the manner of response and contained the employer's telephone number as well as its address. She also pointed out that the union did not follow up on its demand to engage in effects bargaining.

8. Wage Reopener Strike Protected

In *Hydrologics, Inc.*,[92] the Board applied the rationale used in a companion case, *Speedrack, Inc.*,[93] and held that a wage reopener strike, called after the union filed the appropriate notice required by Section 8(d)(3) of the Act, was protected and did not constitute a breach of the no-strike clause in the parties' contract.

The pertinent facts of this case can be summarized as follows. By letter dated February 23, 1981, the union requested wage negotiations pursuant to the wage reopener provision of the contract. The parties' negotiations commenced on March 26. On March 31 the union notified the Federal Mediation and Conciliation Service of the proposed wage modifications. On May 8 the employer stood firm on its final proposal. This proposal was subsequently rejected by the union, and the employees went out on strike on May 11 until May 21. On May 13 and 20, the employer rescinded the entire contract and, shortly thereafter, stopped enforcing the union-security clause and no longer withheld and transmitted to the union dues from employee paychecks as required by the checkoff provision.

The judge found, inter alia, that the employee strike of May 11 violated the no-strike provision of the contract and permitted the employer to rescind the contract on May 13 and make certain unilateral changes in the contract's union-security and checkoff provisions. Although he found that the sympathy strike cases involving no-strike clauses are distinguishable from the instant one, the judge applied the analysis used in those cases, and found that the broadly worded no-strike clause covered the reopener strike in the absence of any extrinsic evidence that would explain, modify, or negate the language of the wage reopener and no-strike provisions. In his view, the no-strike clause constituted a "clear and unmistakable" waiver of the employees' right to strike.

In reversing the judge's finding that the strike was unprotected and that the employer was permitted to rescind the contract and make certain unilateral changes, the Board determined that the judge's analysis incorrectly minimized the significance of *NLRB v. Lion Oil Co.*,[94] and, as a result, was not consistent with the

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[92] 293 NLRB No. 129 (Chairman Stephens and Members Cracraft and Higgins).

[93] 293 NLRB No. 128 (Chairman Stephens and Members Johansen and Cracraft). In this case the administrative law judge found that the employer violated Sec. 8(a)(5) and (1) when it implemented wage reductions, without the consent of the union, after bargaining to impasse over wages. The Board reversed the judge and dismissed the complaint.

[94] 352 U.S. 282 (1957). In *Lion Oil*, the union timely invoked a contractual provision to reopen and negotiate changes in the contract. When those negotiations proved unsuccessful, an employee strike

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policies underlying Section 8(d). The Board then concluded that "in the absence of language that the parties intend to include reopener strikes within their no-strike clause, parties intend to have the same economic weapons available in the reopener context as are available at the termination of their contract, at least with respect to proposals encompassed within the reopening." Thus, the Board "reject[ed] the notion that a broadly worded no-strike clause, which does not address the reopener situation, but rather speaks in terms of what is to happen while the contract is in effect, applies to subjects on which the contract is, at least for a certain period, effectively terminated."

9. Lockout Without Timely 8(d) Notice

In *Bi-County Beverage Distributors*,[95] the Board found that the respondents' shutdown of operations during negotiations with the union constituted a lockout in support of their bargaining position and that the lockout was unlawful because the respondents failed to comply with the requirements of Section 8(d) of the Act.

The respondents and the union had been parties to a series of collective-bargaining agreements. After several bargaining sessions for a new agreement, the respondents presented the union with their "final proposal," stating that the proposal would be "null and void" if not accepted by the union within 48 hours. That same evening the respondents decided to shut down their businesses the next day and posted a notice to their employees. The notice stated that, in the absence of an agreement with the union, the respondents were not willing to allow the employees to work and that when the new contract was reached, the employees would be notified when to report to work. Thereafter, the employees were not allowed to work for a week. During the shutdown, the respondents notified the Federal Mediation and Conciliation Service and the state labor department that the parties "are currently involved in the negotiation of a successor labor agreement; the previous agreement having expired."

Crediting the respondents' testimony that the shutdown was motivated by a lack of work and the possibility of a strike and the resulting potential for violence and sabotage, the administrative law judge concluded that the shutdown was not "an effort to gain a collective-bargaining advantage for the Respondent over the Union," but rather "was for the purpose of avoiding an unprofitable period of work resulting from lack of customer orders and anticipated losses evolving from probable strike violence."

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began and the employer subsequently discharged the strikers. The Board found that the strike was not in breach of the contract and the employer's discharge of the strikers was unlawful. The court upheld the Board's determination that the reopener strike was protected.

[95] 291 NLRB No. 81 (Chairman Stephens and Members Johansen and Higgins).

The Board, although accepting the judge's credibility resolutions, rejected his conclusion and found that the shutdown constituted a lockout in support of the respondents' bargaining position. It noted that both the timing of the shutdown and the wording of the notice posted by the respondents strongly indicated that the shutdown "was implemented primarily to bring pressure on the Union to accept the Respondent Employers' final offer." The Board also noted that the respondents admitted that the shutdown was prompted by their fears of a strike and possible strike violence, "further evidencing that the shutdown was not related solely to the lack of customer orders but rather to the status and posture of negotiations." The Board concluded that "even though the Respondent Employers were concerned about the imbalance in inventory, the shutdown would not have occurred without the Respondent Employers' desire to bring pressure on the Union in support of their bargaining position" and that the shutdown "constituted a lockout as contemplated by the Supreme Court in *American Ship Building Co. v. NLRB.*"[96]

The Board further found that the respondents were the initiating party desiring to terminate the 1984–1987 collective-bargaining agreement, thereby obligating them to satisfy the notice requirements specified in Section 8(d). Because the first notification the respondents sent to the Federal Mediation and Conciliation Service and the appropriate state agency was 2 days after the lockout had commenced, the Board concluded that the respondents failed to give the required 30-day notice to Federal and state agencies prior to a strike or lockout as set forth in Section 8(d)(3) and (4). Accordingly, the Board found that the respondents violated Section 8(a)(5) and (1) by locking out their employees without having complied with the requirements of Section 8(d).

10. Transfer of Local Jurisdiction

In *Royal Iolani Apartment Owners,*[97] a panel majority adopted the administrative law judge's finding that the employer violated Section 8(a)(5) by refusing to recognize and bargain with the Hotel Employees and Restaurant Employees Union Local 5, AFL–CIO, as the Board-certified representative of the employer's employees. Thus, the majority agreed with the judge that the employer was obligated to bargain with Local 5 despite Local 5's anticipatory announcement of a never-completed transfer of its representative duties to Culinary and Service Employees Union, Local 555.

On November 24, 1982, Local 5 was certified as the bargaining representative of the respondent's employees. Shortly thereafter, Local 5's parent international union instructed it to transfer the

[96] 380 U.S. 300 (1965).
[97] 292 NLRB No. 19 (Chairman Stephens and Member Higgins; Member Johansen dissenting).

employer's employees to Local 555 pursuant to a prior jurisdictional understanding. On February 17, 1983, Local 5 told the employer that it had coordinated a transfer of the employer's employees to Local 555 and that Local 555 would soon contact the employer to begin negotiations. Eight days later, Local 555 informed the employer that it had jurisdiction over the employer's employees and expressed an intent to begin negotiations. By letter dated March 14, the employer informed Local 5 that, in view of Local 5's "abandonment" of the bargaining unit and the fact that its employees had not selected Local 555 as their representative, the employer had no duty to bargain with either union. Local 5 made no direct response to the employer's letter.

On April 1, the employer's unit employees voted against transferring to Local 555. Local 5 had not turned over any dues or other business records of the employer's employees to Local 555. Also in April, Local 5 processed at least one grievance for an employee of the employer. On June 7, Local 5 sent the employer a letter requesting negotiations. On June 27, the employer again replied that it was refusing to bargain with Local 5 because Local 5 had disclaimed interest in the employer's employees when it transferred jurisdiction over them to Local 555.

The judge noted that when the employer was notified of the planned transfer of its employees to another union, Local 5 had only initiated a process that was never completed because the unit employees voted against the transfer. Thus, the judge found that there were no unusual circumstances to rebut the presumption that the certified union's majority status continued for 1 year from the date of certification. Accordingly, she found that the employer violated Section 8(a)(5) by refusing to negotiate with the union.

A panel majority found this case to be distinguishable from *Sisters of Mercy Health Corp.*,[98] which issued subsequent to the judge's decision. In that case, the Board found that an employer was not obligated to bargain with a local union that had disclaimed interest in representing unit employees and had attempted to transfer jurisdiction over the bargaining unit to another local. In *Sisters of Mercy*, the majority noted, the disclaimer by the longstanding incumbent union was induced by a petition signed by a majority of unit employees stating that they no longer wanted to be represented by the incumbent. Moreover, the union in that case never acted inconsistently with its disclaimer.

In the present case, by contrast, the majority noted that Local 5 engaged in acts inconsistent with its purported disclaimer. Consequently, when Local 5 reasserted its representative status and requested bargaining on June 21, it had not followed through on its premature disclaimer, but instead had acted as if it were still

[98] 277 NLRB 1353 (1985).

the employees' representative. Further, the majority found that there was no evidence that the employer protested against dealing with Local 5 as the employees' grievance representative in April or that the employer had relied to its detriment on a belief that Local 5 had fully and effectively disclaimed representation of the employer's unit employees. Therefore, when the employer received Local 5's June 21 letter expressing a readiness to represent the unit employees, the employer was under a duty at the very least to ascertain whether the "transfer" of jurisdiction to Local 555 had been consummated. Accordingly, the majority found that the employer violated Section 8(a)(5) when it summarily rejected Local 5's bargaining request on June 27.

In his dissenting opinion, Member Johansen said he would not assert jurisdiction for the reasons set forth in the dissent in *Imperial House Condominium.*[99]

11. Failure to Remit Pension Contributions

In *Nick Robilotto, Inc.*,[100] a panel majority granted the General Counsel's Motion for Summary Judgment against the employer, finding that the employer's failure to pay pension contributions in accordance with its collective-bargaining agreement constituted an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) and Section 8(d).

The employer admitted that it had owed the contractually required contributions since December 17, 1987, but submitted in its answer that it was suffering cash flow problems due to delays in receiving payments from its contractors. The employer stated that it expected to clear up the back contributions within 45 days. The majority held these defenses inadequate, noting that Section 8(a)(5) and Section 8(d) prohibit an employer that is party to an extant collective-bargaining agreement from modifying the terms and conditions of employment established by that agreement without obtaining the consent of the union. The majority also noted that if a temporary failure to make contractually required payments later became permanent, it would be difficult to determine when a cause of action for contract repudiation accrued, because the charging party would not know how long to wait before filing a charge without risking dismissal on the grounds that the 6-month limitations period of Section 10(b) had already expired.

In dissent, Member Johansen said he would have followed his dissent in *General Split Corp.*,[101] by declining to make an unfair labor practice finding. He would have found the employer guilty at most of a breach of contract, since, far from repudiating the contract, the employer acknowledged the contractual obligation.

[99] 279 NLRB 1225 (1986).
[100] 292 NLRB No. 139 (Chairman Stephens and Member Higgins; Member Johansen dissenting).
[101] 284 NLRB 418 (1987).

12. Non-Board Settlement Breach

In *Milk Marketing*,[102] a panel majority of the Board held that the mere breach of a non-Board settlement agreement did not constitute an independent refusal to bargain in violation of Section 8(a)(5) in the circumstances here.

In 1979, Milk Marketing, Inc. (MMI) decided to close and sell its Cincinnati, Ohio plant to Meyer Dairy Company (Meyer). At that time, MMI was bound to a collective-bargaining agreement with Local 98, Milk and Ice Cream Drivers and Dairy Employees Union, which also bound successors to its terms. Consistent with that successor clause, MMI and Meyer executed a sales agreement binding Meyer to "all obligations to be performed by either [MMI or its wholly owned subsidiary] after the closing date" under its collective-bargaining agreement with the union. Shortly after the sale, when Meyer laid off employees in derogation of seniority and then suspended operations at the plant, the union pursued claims against Meyer under the bargaining agreement's successor clause and negotiated a settlement of those claims with Meyer. The union also pursued termination and vacation pay claims against MMI, which became the subject of unfair labor practice charges when MMI resisted the bargaining demands. On the day the complaint based on those charges went to a hearing, MMI and the union entered into a non-Board settlement agreement under which MMI agreed to bargain with the union over "the effects of divesting itself of all of its business operations previously conducted" at the Cincinnati plant. Two months later, MMI reneged on that agreement and the union filed the charge in this case.

An administrative law judge found that MMI had no statutory obligation to bargain over the effects of the plant's sale because all decisions curtailing unit work were made by Meyer and not by MMI. He found, however, that, by breaching the non-Board settlement agreement in which it had agreed to bargain over the effects of the sale, MMI committed an independent violation of Section 8(a)(5).

Members Johansen and Higgins disagreed with the administrative law judge's finding that the mere breach of the non-Board settlement was an independent violation in the circumstances of this case. "[W]e do not perceive any purpose of the Act that requires the Board to insist that a settlement agreement of this nature be honored," the majority stated. MMI had neither rejected the principle of collective bargaining nor "in any general way [had it] rejected bargaining with the collective-bargaining representative of the employees," the majority continued. Though recognizing that MMI had refused to engage in effects bargaining, the majority observed that its refusal was over a subject about which it either had no obligation or had satisfied its obligation.

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[102] 292 NLRB No. 11 (Members Johansen and Higgins; Member Cracraft dissenting).

Rather than predicate an independent violation on the respondent's failure to honor the settlement agreement, the majority stated "we believe that the better course here is to disregard the settlement agreement and to resolve the matter based on whether [MMI has] an obligation to bargain about the divestiture" of the Cincinnati plant. Agreeing with the judge that there was no such obligation under the Act, the panel majority dismissed the complaint.

Member Cracraft, dissenting, found that under the Fourth Circuit Court of Appeals' holding in *Poole Foundry & Machine Co. v. NLRB*,[103] which was relied on by the judge, "the settlement agreement itself forms the basis for the bargaining obligation and a respondent cannot successfully defend on the ground that the underlying charge, which gave rise to the settlement agreement, was without merit." The dissent noted that, while the *Poole* decision involved a Board settlement, the doctrine has been extended to non-Board settlements such as the one MMI executed. Not passing on the legality of MMI's presettlement conduct, Member Cracraft concluded that under *Poole*, MMI's refusal to comply with the settlement agreement constituted an independent unfair labor practice.

13. Subcontracting Unit Work

In *Storer Cable TV of Texas*,[104] the Board found that an employer's decision to subcontract cable installation and reconnection work, and to discharge five employees then performing the installation work, was a mandatory subject of bargaining. The panel concluded that the employer's failure to give the union notice of this decision or the opportunity to bargain over this decision, as well as its effects, therefore violated Section 8(a)(5) and (1) of the Act.

The employer, which provided cable television service to residential subscribers, decided to initiate a marketing program that was expected to increase significantly the amount of installation work that the employer was performing. A study that the employer had commissioned indicated that it would be significantly cheaper to use outside contractors to perform the installation and reconnection work than it would be to hire additional installers.

After receiving the study, the employer decided that it would use contractors to handle not only the additional work expected to be generated by the marketing campaign, but also the installation work then being performed by its installers. Without providing notice to the union that represented its installers or giving the union the opportunity to bargain over its actions, the employer subcontracted all of its installation and reconnection work and discharged five employees then performing that work.

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[103] 192 F.2d 740 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952).

[104] 295 NLRB No. 34 (Chairman Stephens and Members Johansen and Cracraft).

Assuming arguendo that the decision was motivated by business considerations, the panel determined that the decision was a mandatory subject of bargaining under either the "two-factor" or "two-step" test set forth in *Otis Elevator Co.*[105] Applying the two-factor test (whether the decision turned on a change in the nature or direction of the business, or whether it turned on labor costs), the panel found that the decision to use subcontractors did not alter the nature of the employer's business because the employer continued to provide the same installation and reconnection services for its customers. Further, the Board found that the decision turned primarily on labor costs because the costs associated with retaining the employees, in lieu of using subcontractors, involved primarily the payment of the employees' salaries and benefits.

Reaching the same conclusion under the two-step test: (1) whether the decision was amenable to resolution through the bargaining process, and (2) if so, whether the benefit for labor-management relations outweighed the burden placed on management, the panel first noted that the Supreme Court had found that the decision to subcontract unit work was amenable to resolution through bargaining in *Fibreboard Corp. v. NLRB*[106] and *First National Maintenance Corp. v. NLRB.*[107] The panel then concluded that the benefit for the bargaining process outweighed the burden placed on the employer because the decision to subcontract unit work did not involve extensive commitment of capital on the employer's part, and was not precipitated by a need for speed and flexibility or confidentiality.

In order to remedy the violation found, the panel ordered the employer to bargain on request with the union concerning the decision and to reinstate the five discharged employees with full backpay pursuant to *Lapeer Foundry & Machine.*[108] It said the employer had not shown that such a remedy would be unduly burdensome.

14. Contract-Bar Rule

In *El Torito-La Fiesta Restaurants,*[109] the Board applied its contract-bar rule and reaffirmed an earlier decision[110] on remand from the Ninth Circuit[111] that the respondent unlawfully withdrew recognition from the union during the midterm of a collective-bargaining agreement. The respondent had temporarily shut down operations and reopened at the same site with a new work force. After reopening, the respondent refused to honor its collective-bargaining agreement with the union.

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[105] 269 NLRB 891 (1984).
[106] 379 U.S. 203, 211 (1964).
[107] 452 U.S. 666, 680 (1981).
[108] 289 NLRB No. 126 (July 20, 1988).
[109] 295 NLRB No. 56 (Chairman Stephens and Members Johansen and Cracraft).
[110] 284 NLRB 518 (1987).
[111] 852 F.2d 571 (1988).

In requiring the Board to clarify its rationale for finding that the respondent had violated the Act, the court stated that "the Board has in the past recognized an exception to the contract bar rule: The employer shut down operations pending a major renovation of the restaurant and reopened later with almost entirely new employees."

On remand, the Board found that this exception does not apply to temporary closing cases where employees have a reasonable expectation of reemployment and therefore the bargaining unit remains intact. The Board also declined to analogize the instant matter to relocation cases where an existing contract will remain in effect only if the "transferees from the old plant constitute a substantial percentage . . . of the new plant employee complement." The Board noted that, unlike a reopening at the same site, "a relocation, by definition, involves a new work situs and a greater likelihood of significant changes in the composition of the work force." The Board concluded that "industrial stability" would be better served by requiring the respondent to honor the agreement. "Otherwise, employers could readily escape their collective-bargaining obligations without justification by merely instituting a temporary shutdown of operations," it stated.

15. Failure to Reinstate

In *U.S. Marine Corp.*,[112] the Board panel adopted an administrative law judge's findings that a successor employer violated Section 8(a)(5) of the Act by refusing to recognize and bargain in good faith with the union that represented the predecessor employer's employees. The panel, however, reversed the judge and found that the respondent employer's failure to rehire 34 former employees of the predecessor employer violated Section 8(a)(3) and (1). The panel concluded that the respondent fabricated an estimate of its full employee complement and then unlawfully failed to hire the 34 employees in order to keep the number of former employees of the predecessor employer that it hired below 50 percent of the figure that purportedly represented the full complement of employees to be attained, and on which the employer based its refusal to recognize the union.

In addition to the remedy recommended by the judge, a panel majority (Chairman Stephens and Member Johansen) ordered the respondent to rescind all adverse unilateral changes and to reinstitute the terms and conditions of employment that were in effect when the predecessor ceased doing business. The majority held that, in accord with *Love's Barbeque Restaurant*,[113] absent its unlawful purpose, the respondent would have retained substantially all the predecessor's employees, and therefore the re-

[112] 293 NLRB No. 81 (Chairman Stephens and Member Johansen; Member Cracraft dissenting in part).

[113] 245 NLRB 78 (1979), enfd. in relevant part sub nom. *Kallman v. NLRB*, 640 F.2d 1094 (9th Cir. 1981).

spondent was not entitled to set initial terms of employment without first consulting with the union.

In dissent, Member Cracraft stated that she would not require the respondent to reinstate the predecessor's terms of employment on due-process grounds. Member Cracraft pointed out that the complaint did not allege that the respondent violated the Act in setting the employees' initial terms and conditions of employment and she found that this issue was not fully litigated.

In response to Member Cracraft, the majority stated that requiring the respondent to restore the predecessor's terms and conditions of employment does not violate any principles of due process because this is strictly a remedial matter that does not have to be specifically alleged. The majority added that "[t]he *Love's Barbeque* remedy that we order here does not require a specific complaint allegation that the Respondents made unlawful unilateral changes when they began their operations. Nor must this remedy rest on a separate finding that the Respondents committed a separate unfair labor practice by unilaterally changing employment terms. The illegality of such changes is subsumed in the broader 8(a)(5) and (3) allegations and violations involved in this case."

The panel majority concluded that the respondent forfeited any right it may have had as a successor to impose initial terms when it embarked on its deliberate scheme to avoid bargaining with the union by its discriminatory hiring practices. Finally, the majority stated that Member Cracraft had failed to show how the respondent had been prejudiced by the General Counsel's failure to allege specifically that the respondent was not entitled to establish initial terms and conditions of employment.

16. Reasonable Doubt Standard

In *Texas Petrochemicals Corp.*,[114] a panel majority of the Board explained the basis for the Board's continued adherence to the "reasonable doubt" standard for when an employer may lawfully poll its employees about their continued support for an incumbent union. Under this standard, an employer may conduct such a poll when it has sufficient objective considerations on which to a base a reasonable doubt about the union's continued support by a majority of the represented employees. The panel majority also held that an employer who decides to conduct such a poll must provide the union with reasonable advance notice of the time and place of the poll, and must conduct it in accordance with the procedural guidelines set forth in *Struksnes Construction Co.*[115]

The employer had received numerous written reports from supervisors recounting expressions of varying degrees of dissatis-

[114] 296 NLRB No. 136 (Members Cracraft and Higgins; Chairman Stephens concurring).
[115] 165 NLRB 1062 (1967).

faction with or opposition to the union on the part of 23 of the 103 employees in the unit. Without notifying the union in advance, the employer conducted a poll to determine whether a majority of the unit employees still wanted to be represented by the union. Just prior to the start of the polling, the employer was presented with a petition signed by 35 employees (8 of whom were also among the 23 employees named in the supervisors' written reports described above) stating that the signers felt that union representation was no longer necessary and would prove to be detrimental in many areas and asking that a vote be taken to substantiate the union's claim of representation. The poll began immediately thereafter, and was conducted fairly. On the question of whether the employees wanted the union to represent them, 35 voted yes, 50 voted no, 1 ballot was void, and 17 employees did not vote. The employer notified the union and the employees that the latter had voted not to have the union represent them, and that the employer was withdrawing recognition from the union.

The majority upheld the administrative law judge's finding that the employer had violated Section 8(a)(5) and (1) of the Act by polling and subsequently withdrawing recognition, on the grounds that it did not have sufficient objective considerations on which to base a reasonable doubt about the union's continued majority status so as to legitimize its polling and subsequent withdrawal of recognition.

In applying its "reasonable doubt" standard for polling, the majority acknowledged that three circuit courts of appeals had rejected it. The majority continued to adhere to the "reasonable doubt" standard on the grounds that it was, and should be, the same standard as applied to employer petitions (i.e., RM petitions) for Board-conducted elections under Section 9(c)(1)(B) to determine whether an incumbent union continues to have majority support.

Thus, the majority held that because employer-conducted polls and Board-conducted RM elections had the same purpose (to determine the degree of support for an incumbent union) and the same potential consequences (loss of representational status for the union, and loss of representation for the employees), the standards under which such polls and elections can be conducted should also be the same.

The majority also held that the "reasonable doubt" standard for polling was more consistent with the Act's principal purpose and primary goal of achieving industrial and workplace stability in collective-bargaining relationships than the less stringent standard for polling applied by the three circuit courts that had rejected the Board's standard.

In his concurring opinion, Chairman Stephens agreed that the employer had unlawfully polled its employees, but regarding the standard to be applied, he generally agreed with the Fifth, Sixth,

and Ninth Circuit Courts of Appeals that at least so long as Board law permits an employer to withdraw recognition from an incumbent union on a basis other than the union's loss of an employee-initiated decertification election, the standard for permitting an employer to take the grave step of withdrawing recognition should be more rigorous than the standard for permitting an employer to determine in a noncoercive manner whether its objectively based grounds for concluding that the union has suffered a significant loss of support in fact reflect an actual loss of majority.

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."[116] During the 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 *Communications Workers Local 6320 (Ad/Vent)*,[117] the Board reversed the administrative law judge and found that the union did not violate Section 8(b)(1)(A) of the Act by treating charging party Gertrude Smith's grievance in a perfunctory manner and arbitrarily failing to process the grievance.

Smith, a Detroit account executive, worked under a collective-bargaining agreement requiring that grievances be filed within 45 days with the employer's management in Chicago. After 5 p.m. on the last day of the filing period, Smith presented her discharge grievance to Steward Allesia Daniels in Detroit. Daniels informed Smith that both her grievance and a discharge griev-

[116] *Scofield v. NLRB*, 394 U.S. 423, 429 (1969); *NLRB v. Shipbuilders*, 391 U.S. 418 (1968).
[117] 294 NLRB No. 68 (Chairman Stephens and Members Johansen and Cracraft).

ance filed earlier that day by another account executive were untimely and would not be processed. Smith admitted that she knew of the 45-day grieving period.

The judge found that the union violated Section 8(b)(1)(A) by failing to explain why Smith's grievance was unacceptable except that it was untimely. The judge noted that Smith presented her grievance before the 45-day deadline and that the grievance could have been sent by telegraph or other device enabling timely delivery. The judge also found that because another unit employee who was discharged under similar circumstances as Smith was reinstated, Smith's grievance had arguable validity.

The Board disagreed with the judge and found that the Act "does not require a union to resort to extraordinary measures to process grievances." The Board noted that the General Counsel had failed to show that the union "normally enlisted special means to ensure the timeliness of grievances." The Board also found that Smith's grievance received impartial treatment by the union and that it showed no hostility towards Smith.

2. Discipline Over Sympathy Strike

In *Food & Commercial Workers Local 1439 (Rosauer's Supermarkets)*,[118] the Board reversed itself and held that a union did not violate Section 8(b)(1)(A) of the Act by threatening unit employees with discipline if they refused to participate in a sympathy strike. Relying on its *Indianapolis Power* rule,[119] the Board noted that a broad no-strike clause should be interpreted as including sympathy strikes within its prohibition, unless the contract as a whole or extrinsic evidence establishes that the parties intended otherwise.

The union represented employees of the employer in separate meat and food units. After employees in the food unit went on strike, the union wrote letters to meat unit employees stating that they were subject to various forms of discipline if they crossed the third-party picket line. The Board initially held that the parties' contract governing the meat unit contained a no-strike provision banning all strikes, including sympathy strikes; that neither the contract nor extrinsic evidence established that the parties intended otherwise; and that, consequently, the union violated Section 8(b)(1)(A) by threatening to discipline meat unit employees who refused to honor the food unit employees' picket line.[120]

However, the Board later reconsidered its decision in this case in light of its analysis of no-strike provisions in *Indianapolis Power II* and the Ninth Circuit's remand of *Electrical Workers IBEW Local 387 v. NLRB*.[121] On reconsideration, the Board initially

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[118] 293 NLRB No. 4 (Chairman Stephens and Members Johansen and Cracraft).

[119] *Indianapolis Power Co.*, 273 NLRB 1715 (1985) (*Indianapolis Power I*), remanded 797 F.2d 1027 (D.C. Cir. 1986), decision on remand 291 NLRB No. 145 (*Indianapolis Power II*).

[120] 275 NLRB 30 (1985).

[121] 788 F.2d 1412 (1986), remanding 273 NLRB 1757 (1985).

concluded that the parties' actual intent with respect to sympathy strikes was ambiguous and, thus, insufficient to bar such strikes. Further, the bargaining history suggested that the no-strike provision was not intended to bar sympathy strikes. The Board therefore found that there was no clear and unmistakable waiver of the meat unit employees' right to engage in a sympathy strike. Hence, the union did not unlawfully threaten them with discipline for refusing to exercise that right.

3. Participation in Nonunit Work

In *Paperworkers Local 5 (International Paper)*,[122] the Board held that two unions, which threatened to, and did, discipline their members in an attempt to coerce them into leaving nonunit jobs and returning to unit work, did not violate Section 8(b)(1)(A) because the members' participation in nonunit work was voluntary.

At its Ticonderoga, New York plant, International Paper (IP) had a policy of inviting employees represented by the unions to occupy temporarily certain nonunit positions. Early in 1987, in response to IP's lockout of unionized employees at its Mobile, Alabama plant, the unions tried to persuade their members to step down from their temporary nonunit jobs and return to the unit. The unions' actions apparently were taken to make it more difficult for IP to transfer salaried personnel from Ticonderoga to its plants where labor disputes were in progress. When their exhortations proved less than completely successful, the unions threatened to discipline members who did not return to the unit, and actually did fine at least two employees who remained in nonunit jobs.

The Board agreed with the General Counsel and IP that the unions' actions would have violated Section 8(b)(1)(A) if participation, or even continued participation, by union members in nonunit employment had been mandatory. In that case, the unions' threats and actual discipline would have constituted an attempt to modify unilaterally the employees' terms and conditions of employment, as well as an attempt to coerce the employees into taking part in an unlawful partial strike and a strike in violation of the no-strike clause of the collective-bargaining agreement.

The Board found, however, that both initial and continued participation in nonunit employment was wholly voluntary on the part of the employees. Consequently, the unions' actions had not been intended to change the employees' conditions of employment because the employees were free to refuse or to step down from the nonunit jobs at any time. Similarly, the refusal to perform work that was not mandatory could not be considered a strike or a partial strike, and thus the unions, in attempting to

[122] 294 NLRB No. 84 (Chairman Stephens and Members Johansen and Cracraft).

induce such refusals, had not sought to coerce their members into engaging in unprotected activity. Accordingly, the Board found that the unions had not acted unlawfully.[123]

4. Preferential Seniority Rights

In *Teamsters Local 896 (Anheuser-Busch)*,[124] the Board was asked to decide whether the respondent union violated Section 8(b)(1)(A) and (2) of the Act by invoking a provision of its applicable collective-bargaining agreement giving permanent employees laid off by other brewers, who have contracts with the respondent, a preferential seniority right to work for Anheuser-Busch instead of temporary employees whose job security would otherwise have entitled them to work.

The employer and the General Counsel argued that because Anheuser-Busch was no longer a member of a multiemployer bargaining unit, the bumping preference was unlawfully based on union considerations. A Board panel disagreed, finding that the stipulated record did not establish that the contractual seniority bumping preference, on its face or as applied, violates Section 8(b)(1)(A) and (2).

The Board found no evidence that the continuation of the preference in the more than 15 years since Anheuser-Busch withdrew from the multiemployer bargaining unit has actually resulted in any discrimination against any employee or hiring hall applicant on the basis of nonunion or nonunit status. The contractual bumping preference did not discriminate on the basis of union membership. Although the preference entailed a credit for work experience with employers having a contract with the respondent, the challenged preference differs significantly from union signatory employment preferences previously found unlawful by the Board because it does not prevent a job applicant from obtaining initial employment unless he had prior union signatory employment; it does not create a general referral class preference based exclusively on work experience under union signatory and union-security conditions; it does not preclude anyone from achieving permanent employee status; and it does not permit one permanent employee to bump another permanent employee on the basis of nonunion experience. Thus, the bumping right is arguably skill based and cannot be secured or avoided merely by joining the union or working for union signatories. Rather, individuals claiming the preference must also have worked a specific length of time to secure permanent employee status *and* thereafter have been laid off by a signatory employer. Thus, the challenged seniority preference is capable of an inter-

[123] In finding that the unions did not violate the Act by attempting to keep their members from voluntarily participating in nonunit work, the Board overruled *Electrical Workers IBEW (New England Telephone)*, 236 NLRB 1209 (1978), enfd. 599 F.2d 5 (1st Cir. 1979), and other cases to the extent they suggest the contrary.

[124] 296 NLRB No. 132 (Members Cracraft, Higgins, and Devaney).

pretation that it is a lawful seniority-based contractual right and the Board, in fact, previously deferred to an arbitral determination upholding a nearly identical preference in a contract between Anheuser-Busch and another Teamsters local.

Furthermore, the Board concluded that even if incidental elements of discrimination and encouragement of union membership were present, it is highly speculative to suggest that such discrimination would encourage brewery workers to restrict their work experience to union signatories. In any event, multiemployer considerations carrying over from the defunct multiemployer unit fully justified any incidental, potentially discriminatory feature. In this regard, the Board observed that the former members of the multiemployer bargaining association have each agreed to retain identical and reciprocal multiemployer seniority, vacation, and supplemental unemployment benefit provisions in their separate contracts with the respondent that originated during industrywide collective bargaining as a means of preserving seniority-based benefits in the California brewing industry and of providing work opportunities for a pool of experienced brewery workers. Because there was no indication that the demise of the formal multiemployer unit or the mere passage of time vitiated the original purpose of the bumping right, and in the absence of any discriminatory application of the agreement, the Board found no basis for inferring that the seniority preference was established or exists for an improper discriminatory motive. Accordingly, the Board dismissed the 8(b)(1)(A) and (2) complaint.

5. Discipline Against Supervisor-Members

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 "[i]t 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 *Carpenters (Concourse Construction)*,[125] the Board held that the union did not violate Section 8(b)(1)(B) by fining two supervisor-members for crossing and working behind a picket line for a nonunion general contractor. The Board found that while the respondent, through its use of informational picketing and fining any members who crossed the picket line, may have held a long-range recognitional objective, there was insufficient evidence, under the standards of *Royal Electric*[126] to establish that it had a current recognitional objective.

The Board applied the standards set forth in *Royal Electric*, which was decided subsequent to the judge's decision in this

[125] 296 NLRB No. 67 (Chairman Stephens and Members Cracraft and Higgins).
[126] *NLRB v. Electrical Workers IBEW Local 340 (Royal Electric)*, 481 U.S. 573 (1987).

case, in which the Supreme Court carefully defined the prerequisites necessary for a finding that a union violated Section 8(b)(1)(B). The Court held that "union discipline directed at supervisor-members without Section 8(b)(1)(B) duties, working for employers with whom the union neither has nor seeks a collective-bargaining relationship, cannot and does not adversely affect the performance of Section 8(b)(1)(B) duties."

Rejecting the Board's reservoir doctrine, the Court first concluded that in order to find an 8(b)(1)(B) violation, a supervisor must actually possess grievance adjustment or collective-bargaining responsibilities, and a union must either have or be seeking a collective-bargaining relationship with the employer. The Board found that it is evident from the entire thrust of the Court's opinion that the phrase "seeking a collective-bargaining relationship" is to be interpreted restrictively. There must be evidence not only of an actual intent to seek recognition, but the union must *currently* be seeking recognition, and it is insufficient that a union might seek to establish a collective-bargaining relationship sometime in the unspecified future.

In *Concourse*, the Board found that the union's actions did not establish a sufficiently current recognitional objective such that the company might be coerced by the respondent's action in fining its supervisor-members. The respondent picketed the employer's complex by carrying signs stating "[p]ublic information . . . [the Company] does not have a contract with . . . [the Union]." The signs themselves, while reflecting a general recognitional objective, do not demand recognition.

The picketing was not accompanied by any other conduct that would reflect a recognitional objective, i.e., the respondent made no statement of interest to or demand for recognition on the employer, nor did it engage in any of the types of activity that would establish that it was currently seeking recognition. In view of the Board's findings with respect to the picket line and the absence of a current recognitional objective, the Board concluded that there was no basis for imputing such an objective merely because the respondent fined its members for crossing that picket line. It therefore dismissed the complaint against the respondent.

G. 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. Identification of Primary Employer

In *Iron Workers Local 433 (United Steel)*,[127] a Board panel held on remand that the union's failure to identify on its picket signs the employer with which it had a dispute supported a finding that its picketing had an illegal secondary objective.

The general contractor had subcontracted installation work to a nonunion company. On hearing rumors that the union was upset that the installation work was being done by a nonunion company (the primary), the general contractor sent the union a telegram stating that it would set up a reserve gate system and that the primary was being assigned to gate 1. When the pickets arrived at gate 1, they found a sign stating that certain specified employers were assigned to use that gate, while all other employers were directed to use gate 2. The primary was not one of the employers specified as being assigned to gate 1. The picketers picketed both gates at the jobsite with signs that did not identify the contractor with whom the union had a dispute.

In its initial decision in this case, the Board found that the union violated Section 8(b)(4)(i) and (ii)(B) by picketing the jobsite at gate 1, a gate reserved for neutrals, with picket signs that did not identify the primary employer.[128] On appeal, the Ninth Circuit disagreed with the Board's finding that gate 1 had been reserved for neutral contractors, but left for the Board's determination on remand whether the union's failure to identify on its picket signs the employer with which it had a dispute would support a finding that the union's picketing had an illegal secondary objective.[129]

On remand, the Board applied the common situs picketing criteria set forth in *Sailors Union (Moore Dry Dock)*,[130] and found that the union's failure to comply with one of the criteria, i.e., that the picketing discloses clearly that the dispute is with the primary employer, established a presumption that an object of the union's picketing was to enmesh neutrals in its labor dispute with the primary employer. The union offered no evidence to rebut the presumption, but argued instead that because the general contractor, by its telegram to the union, established gate 1 as a reserved gate, gate 1 was no longer a common situs, but rather the situs of the primary dispute, and therefore the union had no obligation to identify the employer with whom it had a dispute.

The Board rejected that argument, relying on the fact that the union did not limit its picketing to the gate that it asserts was reserved solely for the primary, but rather picketed at both gates,

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[127] 293 NLRB No. 74 (Chairman Stephens and Members Johansen and Cracraft).
[128] 280 NLRB 1325 (1986).
[129] *NLRB v. Iron Workers Local 433*, 850 F.2d 551 (9th Cir. 1988).
[130] 92 NLRB 547, 549 (1950).

with knowledge that there were other employers on the construction site who were using the gates at which the union was picketing. The Board therefore found that the picketing was conducted at a common jobsite and that the union's failure to identify the primary employer established, in the absence of any evidence to the contrary, that the union picketed the jobsite with an unlawful secondary objective.

2. Time-In-Lieu Claims

In *Longshoremen ILWU Local 151 (Port Townsend)*,[131] a panel majority held, contrary to the administrative law judge, that the respondent union's filing of arguably meritorious grievances seeking in lieu of pay before the Board made its 10(k) determination did not violate Section 8(b)(4)(ii)(D) of the Act. The majority stressed that, subsequent to the issuance of the judge's decision, the Board in *Longshoremen ILWU Local 7 (Georgia-Pacific)*,[132] reconsidered its earlier decision in that case[133] to the extent it held that a union violates Section 8(b)(4)(ii)(D) by filing pre-10(k) grievances. The majority found that the reasoning of *Georgia-Pacific II* was fully applicable to the case before it.

Furthermore, since it agreed with the judge that the respondent's other alleged unlawful conduct, standing alone, did not rise to the level of an 8(b)(4)(D) violation, the majority therefore found that a violation of Section 8(b)(4)(ii)(D) had not been established and that the complaint should be dismissed. In view of its decision, the majority further concluded, contrary to the Board's decision in the underlying 10(k) proceeding,[134] that there was no reasonable cause to believe that Section 8(b)(4)(ii)(D) had been violated. Accordingly, the majority also vacated the Board's earlier Decision and Determination of Dispute, and quashed the notice of hearing.

In so concluding, the majority noted that, given the change in the law reflected in *Georgia-Pacific II*, the underlying dispute that triggered the 10(k) mechanism would not have done so at the time of its decision. The majority therefore found that it would not effectuate the purposes and policies of the Act to find that the respondent's in lieu of claims filed subsequent to the 10(k) award violated Section 8(b)(4)(ii)(D). It further noted that Board orders are not self-enforcing, and that, until such orders are enforced by a United States court of appeals, no penalties are incurred for disobeying them.

Chairman Stephens, dissenting in part, agreed with the majority that the decision in *Georgia-Pacific II* resolved the issue of the lawfulness of the time-in-lieu claims filed prior to the underlying 10(k) award. He noted, however, that at the time the award was

[131] 294 NLRB No. 52 (Members Johansen and Cracraft; Chairman Stephens dissenting in part).
[132] 291 NLRB No. 13 (Sept. 30, 1988).
[133] 273 NLRB 363 (1984).
[134] 271 NLRB 354 (1984).

issued and until such time as it might be vacated either actually or effectively by the Board or a reviewing court, the award would take precedence over any inconsistent arbitral award.

Chairman Stephens found that the respondent therefore was precluded, in the interim, from filing contractual time-in-lieu claims in conflict with it. Accordingly, under principles established in *Longshoremen ILWU Local 32 (Weyerhaeuser Co.)*, 271 NLRB 759 (1984), and left intact in *Georgia-Pacific II*, he would have found that the respondent's time-in-lieu claims that it filed subsequent to the Board's 10(k) award violated Section 8(b)(4)(ii)(D).

H. Remedial Order Provisions

1. Visitatorial Clause

In *299 Lincoln Street, Inc.*,[135] a panel majority of the Board issued a narrow visitatorial clause[136] limited to information relevant to the respondent's claim that it had ceased operations and that another corporation was operating the facility where the unfair labor practices occurred. Member Johansen dissented in part.

The Board agreed with the administrative law judge that the respondent employer had engaged in widespread misconduct in an effort to chill its employees' union organizing activities. Because such employer misconduct, according to the Board, fell into "at least the second category" of cases described in *Gissel*,[137] the Board concluded that a bargaining order was warranted. The General Counsel had also requested that a broad visitatorial clause be granted in light of the employer's serious 8(a)(1), (3), and (5) violations. However, the panel majority denied that request.

In this regard, the majority stressed that, in denying the General Counsel's request in *Cherokee Marine Terminal*[138] to have broad visitatorial clauses routinely included in the Board's remedial orders, the Board noted that it would "continue to grant visitatorial rights, on a case-by-case basis, when the equities demonstrate a likelihood that a respondent will fail to cooperate or otherwise attempt to evade compliance." Although the Board declined to grant a broad visitatorial clause in that case, it noted that it would be willing to make this additional means of obtaining information available to the General Counsel "in cases in which it appears possible that the respondent may not cooperate

[135] 292 NLRB No. 32 (Chairman Stephens and Members Cracraft and Higgins; Member Johansen dissenting in part).

[136] Such a clause would permit the Board to examine the books and records of a respondent, and to take statements from its officers and employees for the purpose of determining or securing compliance with a court-enforced Board order.

[137] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[138] 287 NLRB 1080 (1988).

in providing relevant evidence unless given specific, sanction-backed directions to do so."

In the instant case, the majority did not believe that the General Counsel had established the conditions set out in *Cherokee Marine Terminal* to support the granting of a broad visitatorial clause.

The majority found, however, that nothing in *Cherokee Marine Terminal* foreclosed the Board from issuing narrow remedial visitatorial provisions tailored to the facts of a particular case where warranted. While noting that the Board has broad discretion in fashioning remedial provisions, the majority held that a narrow visitatorial clause was warranted in this case in light of the employer's assertion that it had ceased operations at the facility where the violations occurred and that it was no longer the employer of the employees working there. The majority concluded that the narrow visitatorial clause would enable the Board to determine the identity and circumstances of the employer of the unit employees at the compliance stage of this proceeding.

In his partial dissent, Member Johansen stated that, while he agreed with the substantive findings his colleagues had made, he would not grant a visitatorial clause of any kind in this case. He emphasized that the employer's proffer regarding its cessation of operations at the facility where the unlawful conduct occurred did not establish the necessary "likelihood that the Respondent will attempt to evade compliance" with the Board's Order. Thus, in Member Johansen's view, the conditions warranting a visitatorial clause, as set out in *Cherokee Marine Terminal*, had not been met in this case.

2. Ambiguous Authorization Cards

In *Nissan Research & Development*,[139] the Board found the authorization cards distributed by the union and signed by all the unit employees were ambiguous and did not clearly establish that the union represented a majority of the employees and thus were insufficient as a basis for the issuance of a *Gissel* bargaining order.[140]

The cards in *Nissan* were printed on both sides. The front of the card stated, "I hereby authorize the United Steelworkers of America, AFL–CIO–CLC to represent me in collective bargaining" and included spaces for the signer's name, address, telephone number, employer, job title, department, office location, date, and signature. In the lower right-hand corner of the front of the card, in parentheses, was the word "over."

The back of the card stated:

Dear Employee

[139] 296 NLRB No. 80 (Chairman Stephens and Member Higgins; Member Cracraft dissenting in part).

[140] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

The purpose of signing this Authorization Card is to have the United States Government (the National Labor Relations Board) conduct a Secret Ballot Election for all eligible employees at your place of work.

The signed Authorization Card is not an application for membership in the Office, Technical and Professional Division of the United Steelworkers of America.

By Federal Law 30% of all eligible employees must sign Authorization Cards in order to have the Government conduct a Secret Ballot Election to determine if a majority of the eligible employees at your place of work desire Union Representation.

The signed Authorization Cards are kept confidential. Your employer will not know that you signed an Authorization Card unless you tell him.

At the time the cards were solicited, the following oral representations were made to the employees by the union proponents: "Signing the card was in effect to get the ball rolling so they could petition for an election"; "they needed to have the cards signed before they could petition to have an election"; "the purpose of signing the card was just to have an election started" (this statement was subsequently contradicted on cross-examination); and "it would look good if a majority signed cards so they could petition the Board to hold an election." All six unit employees signed the cards.

The Board found that the authorization cards were ambiguous and that the solicitors' solicitations of the employees did not remove the card's ambiguity. The Board determined that the ambiguous nature of the cards did not indicate majority support of the union and invalidated the cards as a basis for a *Gissel* bargaining order.

In her dissent, Member Cracraft found the cards unambiguous dual-purpose cards that authorized the union to act as the employees' collective-bargaining representative rather than solely to request an election. She found the cards evidenced majority support and, based on the unfair labor practices committed by the employer, she recommended a bargaining order.

3. Remedy for Pattern of Misconduct

In *Massachusetts Coastal Seafoods*,[141] the Board issued a remedial bargaining order where an employer, right from the very start of its employees' organizational campaign, engaged in a pattern of misconduct designed to intimidate the employees in their support for union representation.

The Board found that the employer made repeated threats of plant closure and job loss, coercively interrogated employees, implemented more onerous working conditions, and refused to

[141] 293 NLRB No. 47 (Chairman Stephens and Members Johansen and Cracraft).

reinstate unfair labor practice strikers after their unconditional offer to return to work. While the original threats of plant closure were made not only prior to the critical preelection period, but also prior to the employees' signing authorization cards for the union, the employer committed additional unfair labor practices, including 8(a)(3) violations, after the signing of the authorization cards and the end of the strike. Moreover, many of these unlawful acts, which affected virtually the entire unit, were committed by the employer's owner and top management official. Thus, notwithstanding the fact that the initial threats of plant closure did not destroy employee support for the union, the Board concluded that the employer's subsequent unlawful acts "not only evidence the [employer's] continuing resolve to retaliate against the employees for their union activities but serve to render slight the likelihood that a free election" could be conducted.

However, the Board declined to issue a certification of representative in the event that the tally of ballots was to show that the union won the representation election. In setting aside the election, the Board reasoned that the misconduct of the union and various striking employees, and the likely effect of that conduct on the election process, made a certification of representative inappropriate.

The Board found no conflict between its refusal to certify the union and its decision to grant a bargaining order, on the grounds that the union achieved majority status among the unit employees, as represented by their signed authorization cards, prior to any objectionable conduct by the union during the critical preelection period. "Thus, while the Union's conduct may have interfered with the employees' exercising a free choice in the election, no such stigma attaches to the Union's achievement of majority status among the unit employees, as represented by authorization cards. The cards and hence the Union's majority standing were obtained free of union restraint and coercion," the Board explained.

Further, it noted that here, as in *New Fairview Hall Convalescent Home*,[142] there were only a few instances of misconduct by the union and 2 of the 35 strikers against a background of frequent, serious unfair labor practices by the respondent.

As the Board noted, the practical effect of its decision was to require the respondent to bargain with the union for a reasonable time, but not to give the union the extended protection provided by a certification year.

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[142] 206 NLRB 688, 689 (1973), enfd. 520 F.2d 1316 (2d Cir. 1975), cert. denied 423 U.S. 1053 (1976).

4. Remedy for Eliminating Shift

In *Fast Food Merchandisers,*[143] a panel majority of the Board held that a *Transmarine Corp.*[144] limited backpay remedy was the appropriate remedy for an employer's unlawful failure to notify and bargain with the union concerning its decision to discontinue a work shift and discharge the employees working on the shift.

The employer distributes food and other products to Hardee's restaurants from warehouse distribution centers. In 1980, it opened a new distribution center in Jacksonville, Florida, to service existing restaurants in Florida and new restaurants it contemplated would open there. As a corollary matter, the employer transferred Florida distribution routes previously serviced by its LaGrange, Georgia distribution facility to the Jacksonville facility. Due to the transfer of work from LaGrange, the employer eliminated the third shift there and discharged shift employees.

The three-member panel affirmed the administrative law judge's finding that the decision to eliminate the third shift and discharge the shift's employees was a mandatory subject of bargaining and that the employer violated Section 8(a)(5) by failing to bargain about it. However, the panel majority reasoned that the employer's decision to eliminate the third shift was a "direct result" of the decision to open the Jacksonville facility and transfer work there and, thus, was an "effect" of a decision that was entrepreneurial in nature. Relying on *Litton Business Systems,*[145] the majority, therefore, concluded that effects bargaining concerning the employee layoffs and a corresponding limited backpay order, rather than the make-whole relief recommended by the judge, were an appropriate remedy for the violation found.

Member Cracraft found that the decision to eliminate the shift and discharge the LaGrange employees was not so linked with the decision to open the Jacksonville facility as to constitute an effect of it. Although the employer's decision to lay off employees resulted from its decision to open a new facility, "there were various options other than the layoff of third-shift employees available to the Respondent, and the layoff decision was a separate decision, related to, but not mandated by, the entrepreneurial decision," she concluded. Thus, Member Cracraft said she agreed with the judge that the employer had a duty to bargain over its decision to lay off the third-shift employees because the decision was "definitely within the realm of the employer-employee relationship and a mandatory subject of bargaining indeed."

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[143] 291 NLRB No. 121 (Chairman Stephens and Member Johansen; Member Cracraft concurring and dissenting in part).

[144] 170 NLRB 389 (1968).

[145] 286 NLRB 817 (1987).

Citing *Lapeer Foundry & Machine*,[146] and other cases in which make-whole relief had been ordered to remedy economically motivated decisions to lay off employees, Member Cracraft said she would have adopted the judge's recommended order and directed the employer to reestablish the third shift and to pay full backpay to the affected employees.

5. Reinstatement and Backpay Issues

In *Super One Foods, #601*,[147] the Board found that an employee was unlawfully discharged for discussing salaries. The respondent asserted that the discriminatee should be denied the traditional remedies because he took information from his manager's desk and showed the information to other employees.

The majority noted that the information at issue was located on the manager's desk top and was seen by the discriminatee when he entered the office in the routine course of his work. The majority further noted that, at the time the discriminatee acquired the wage information, the respondent was actively enforcing its unlawful policy of prohibiting employees from discussing wages. Thus, the majority held that the existence of such a rule must be taken into account in examining employees' efforts to exercise their statutory right to determine and discuss their wages.

Finding it significant that the written company policy relied on by the respondent to establish that the discriminatee's conduct constitutes grounds for dismissal was the same rule it relied on to support its unlawful policy of prohibiting wage discussions, the majority concluded that the respondent had not established a legitimate basis for applying its rule to the discriminatee's conduct so as to bar reinstatement with full backpay.

Chairman Stephens, dissenting, would modify the remedial portion of the order to allow, at the compliance stage, for consideration of the discriminatee's reinstatement and backpay rights. He noted that the Board has curbed traditional remedies where a respondent subsequently acquired knowledge of employee misconduct that would warrant discharge for cause if the employer demonstrated that the conduct was disqualifying and that it was not of the sort the employer had tolerated in the past. Contrary to the majority, he concluded that the respondent should be given the opportunity to demonstrate that under preexisting company policy, applied evenhandedly, the discriminatee's alleged misconduct would have resulted in termination.

In *Sentry Armored Courier Corp.*,[148] a panel majority of the Board ordered the respondent to "make whole" one of its part-time employees for the loss of wages and legal fees he incurred as a direct result of his being suspended from employment by his

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[146] 289 NLRB No. 126 (July 20, 1988).

[147] 294 NLRB No. 34 (Members Johansen, Cracraft, and Higgins; Chairman Stephens dissenting in part).

[148] 293 NLRB No 12 (Chairman Stephens and Members Johansen and Higgins).

full-time employer, the New York City Transit Authority. The respondent had retaliated against its part-time employee, Charles Slates, for filing unfair labor practice charges with the Board. The respondent's retaliatory action consisted, in part, of reporting to the Authority that Slates had allegedly abused the use of sick leave by working for the respondent on days for which he collected sick leave pay from the Authority.

In ordering the remedy, the Board concurred with the administrative law judge that, because Slates had not been found in the Authority's disciplinary proceedings to have committed fraudulent and criminal acts within the meaning of *Professional Ambulance Service,*[149] but merely to have violated the Authority's work rules and regulations, the respondent had unlawfully retaliated against Slates under the principles of *Sure-Tan, Inc. v. NLRB.*[150]

Chairman Stephens would have limited the remedy to reimbursement for legal fees Slates incurred in defending himself during the Authority's disciplinary proceedings, so that Slates would not be entirely free from bearing the costs of his misdeeds. The Chairman suggested that to require the respondent to pay Slates' legal fees, which amounted to $4500 plus interest, would alone serve as a sufficient disincentive to the respondent's engaging in future unlawful conduct.

In addition to reimbursing Slates for the legal expenses he incurred, Members Johansen and Higgins found that the respondent should be held liable for Slates' lost wages, which amounted to $2,860.20, plus interest, because they were "directly attributable to the Respondent's unlawful conduct, which [was] the only conduct before the Board." They did not perceive any conflict between the Board and the Authority in requiring the respondent to compensate Slates for the loss of pay he suffered as a result of the Authority's disciplinary action. In this regard, the majority noted that the discipline imposed on Slates by the Authority "is separate and distinct," since the Board's backpay award neither lessens nor nullifies Slates' suspension or the potential for the Authority to impose more severe measures against Slates in the future if he conducts himself in a manner that warrants further disciplinary action.

The majority also found that the backpay remedy did not contravene public policy. Instead, the remedy enabled the Board and the Authority to carry "out their respective functions and . . . [apply] their respective sanctions against different parties in order to effectuate their respective interests or mandates."

In *Iron Workers Local 373 (Building Contractors),*[151] the Board held that, in a backpay proceeding against a union that had dis-

[149] 232 NLRB 1141 (1977).

[150] 467 U.S. 883 (1984).

[151] 295 NLRB No. 71 (Chairman Stephens and Member Johansen; Member Devaney dissenting in part).

criminated against nonmembers in its hiring hall operations, backpay should not be assessed for discrimination occurring after the hearing in the unfair labor practice case unless the Board's order in the unfair labor practice provides for make-whole relief for future violations. The panel majority also found that, when the rules of the hiring hall require applicants to be present in the hall to be eligible for referral, it is the General Counsel's burden to show that the discriminatees were present when out-of-order referrals took place in order for the discriminatees to qualify for backpay.

The union had been found to have discriminated against nonmembers during the period ending February 24, 1977. However, although the backpay specification alleged no new violations since that time, it nonetheless claimed backpay through the end of 1979. The administrative law judge approved that formulation, both because he found certain language in the Board's Order to indicate that backpay could be assessed for later events and because the Board typically finds that backpay accrues until the respondent has complied with the Board's Order.

The Board reversed. It noted first that the Board usually does not allow additional unfair labor practices to be tried in compliance proceedings. Instead, if additional violations have occurred, new charges may be filed or, if the Board's order has been enforced, contempt proceedings may be brought against the respondent.

The Board explained that it had departed from its usual practice by providing specifically for make-whole relief for violations occurring after the hearing in the unfair labor practice case.[152] Contrary to the judge, it found that no such provision had been made in the order in the underlying cases and, moreover, that the specification alleged no specific acts of discrimination following the earlier hearings.[153]

The Board also distinguished this case, in which backpay was claimed for any nonmember only for calendar quarters in which he was "passed over" in favor of at least one member—i.e., in which backpay continued to accrue only as long as additional acts of discrimination continued to occur—from cases involving unlawful terminations, in which the adverse effects of a single unlawful action continue until they are corrected, and in which backpay therefore accrues until the discriminatee is offered reinstatement.

The panel majority further held that, because the General Counsel had failed to demonstrate, in the great majority of instances, that the nonmembers were present in the hiring hall—and thus eligible for referrals—when they were "passed over,"

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[152] See *Operating Engineers Local 925 (Manta, Inc.)*, 168 NLRB 818 (1967).

[153] The Board distinguished *NLRB v. Operating Engineers Local 925*, 460 F.2d 589 (5th Cir. 1972), in which the court approved the trial of additional unfair labor practices in compliance proceedings, in part because specific additional violations had been alleged in the backpay specification.

she had not established those individuals' eligibility for backpay.[154] The majority rejected the judge's reasoning that, because the union's records did not indicate whether an applicant was present when his name was not called, it could be inferred that a nonmember was present on those occasions.

Member Devaney, in partial dissent, would not have placed on the General Counsel the burden of proving the discriminatees' presence in the hiring hall, because the Board had not made that requirement explicit in the underlying cases. He also found that the Board had, at least implicitly, rejected the majority's position in a recent case.[155] Member Devaney further considered it to have been futile for the discriminatees to shape the union's hiring hall on the days they were "passed over."

6. Restoration of Status Quo Ante

In cases involving an employer's discriminatory relocation of operations, it is the Board's usual practice to order the employer to restore the operation in question and to reinstate all employees whose employment has been discriminatorily terminated, unless the respondent employer can demonstrate that restoration of the status quo ante would be an inappropriate remedy. However, a question has arisen in some cases as to the kind of proof that the Board has required of respondents. In some cases, for example, the Board has required proof that restoration of the status quo ante would be "unduly burdensome";[156] while in others, it has required a demonstration that restoration would endanger the respondent's "continued viability";[157] and in still other cases, it has used both phrases seemingly interchangeably.[158]

In one case decided last year, the Board clarified the standard for determining whether an employer that has transferred operations and laid off employees in violation of Section 8(a)(3) should be required to restore the operations and reinstate the employees as a remedy for its misconduct. In *Lear Siegler, Inc.*,[159] the Board held that the employer should be required to show that a restoration order would be unduly burdensome, rather than that such a remedy would endanger the employer's continued viability.

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[154] The majority relied on *Iron Workers Local 433 (AGC of California)*, 228 NLRB 1420 (1977), enfd. 600 F.2d 770 (9th Cir. 1979), cert. denied 445 U.S. 915 (1979).

[155] *Iron Workers Local 480 (Building Contractors)*, 286 NLRB 1328 (1987), enfd. mem. 862 F.2d 309 (3d Cir).

[156] See, e.g., *Woodline Motor Freight*, 278 NLRB 1141, 1142 (1986), enfd. in relevant part 843 F.2d 285 (8th Cir. 1988); *B&P Trucking*, 279 NLRB 693, 703 fn. 3 (1986); *Purolator Armored*, 268 NLRB 1268, 1269 (1984), enfd. 764 F.2d 1423 (11th Cir. 1985); *Great Chinese American Sewing Co.*, 227 NLRB 1670 (1977), enfd. 578 F.2d 251 (9th Cir. 1978).

[157] See, e.g., *Service Merchandise Co.*, 278 NLRB 185, 188 (1986); *Hood Industries*, 248 NLRB 597 fn. 3 (1980); *R&H Masonry Supply*, 238 NLRB 1044 fn. 3 (1978), enf. denied in relevant part 627 F.2d 1013 (9th Cir. 1980).

[158] See, e.g., *Hood Industries*, 273 NLRB 1587, 1588 (1985); *Rebel Coal Co.*, 259 NLRB 258 fn. 2 (1981).

[159] 295 NLRB No. 83 (Chairman Stephens and Members Cracraft and Devaney).

The Board's decision to apply only the unduly burdensome test was based in part on that standard's longstanding use and acceptance by the courts, and in part on the Board's perception that the "continued viability standard was too stringent, particularly for multifacility employers." Under the latter standard, for example, an employer with several plants might be required to operate an unprofitable facility indefinitely, simply because it could cross-subsidize the unprofitable operation with profits from other plants without threatening its continued existence.

Applying the unduly burdensome test to the facts in *Lear Siegler*, the Board agreed with the administrative law judge that, on the record developed at the hearing, a restoration order was appropriate. That evidence showed that the employer had ceased production at its Hermansville, Michigan plant on June 27, 1986; transferred production to its West Chicago, Illinois facility; subcontracted the Hermansville plant's warehousing functions; and indefinitely laid off its full-time production employees at Hermansville because of their actions in seeking union representation. At the hearing, an employer official admitted that most of the employer's equipment remained at the Hermansville facility, and that production could be resumed at that facility if employees and material were available. The employer did not offer to show that it would be unprofitable to restore the Hermansville operation.

However, 5 months after the hearing, the employer moved to reopen the record so that it might introduce evidence that it claimed would prove restoration to be improper. The Board, like the judge, denied the employer's motion, stating that the employer could introduce such evidence in compliance proceedings, provided the evidence had not been available at the time of the earlier hearing. In doing so, the Board acknowledged that this approach of allowing the appropriateness of reinstatement to be decided in compliance proceedings has met with mixed reviews in the courts of appeals.

In those other cases, however, the Board had unequivocally ordered reinstatement and did not allow the respondents to introduce during the compliance proceedings evidence bearing on the appropriateness of the remedy. Thus, the Board explained, the courts "may have been concerned that if such noncontingent orders were enforced, the Board might ignore all evidence of the inappropriateness of reinstatement, and bring contempt proceedings against the respondents based on the literal terms of the orders." In contrast, it added, the order here "expressly provides that the respondent may introduce such evidence; the clear implication is that if the Respondent can demonstrate that restoration of its Hermansville operation would be unduly burdensome, restoration will not be required" under the Board's Order in this case.

7. Notice of Union Violations

In *Meat Packers (Hormel & Co.)*,[160] a Board panel agreed with the administrative law judge that the respondent union had violated Section 8(b)(1)(A) by threatening, harassing, and intimidating employees; by disrupting another union's meeting and impeding access of employees to the meeting; and by assaulting an official and member of the other union.

To remedy these violations, the judge ordered the respondent to cease and desist from its unlawful conduct and to inform employees and members of their Section 7 rights by posting a notice at its offices and meeting halls frequented by its members. He also ordered the respondent to sign and mail to the Regional Director copies of the notice for posting at the premises of the employer, Geo. A. Hormel & Company, and at the Austin Labor Center, where the charging party, United Food and Commercial Workers Local P-9, has its offices.

Local P-9, which continues to represent the Hormel employees, urged that the Board require publication of the notice in a local Austin, Minnesota newspaper or require a mailing of the notice to all members of both unions and to all those on a preferential hiring list at Hormel. Local P-9 contended that a special remedy was warranted because the respondent had failed to post a notice as required in a previous case[161] because it has no office or meeting hall where notices can be posted, and because the violations found were the second series of violations committed by the respondent within a 6-month period.

To ensure that the notice would be disseminated to all affected employees, the Board modified the judge's recommended Order. The Board directed the respondent to mail copies of the notice to each of its members and to all employees on the Hormel preferential hiring list in the event it is determined at the compliance stage of the proceeding that the respondent does not have its own office or meeting place at which to post the notice. However, it found that Hormel's current employees and Local P-9 members will be adequately apprised of the notice by provisions in the judge's recommended Order requiring the respondent to mail signed copies of the notice to the Regional Director for posting at the premises of the employer and the charging party union. With these additional provisions, the Board found publication of the notice in a local newspaper unnecessary.

I. Equal Access to Justice Act

The Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, and the Board's Rules promulgated thereunder,[162] permit eligible

[160] 291 NLRB No. 65 (Chairman Stephens and Members Johansen and Cracraft).
[161] *Meat Packers (Hormel & Co.)*, 287 NLRB 720 (1987).
[162] Board Rules and Regulations, Secs. 102.143 through 102.155.

parties that prevail in litigation before the Agency and over the Agency in Federal court, in certain circumstances, to recover litigation fees and expenses from the Agency. Section 504(a)(1) provides that "an agency that conducts an adversary adjudication is required to award to a prevailing party fees and other expenses incurred by the party . . . unless the adjudicative officer of the agency finds that the position of the agency . . . was substantially justified or that special circumstances make an award unjust." Section 504(a)(2) provides that within 30 days of a final disposition of the case, a party seeking an award must file with the Agency an application that shows that the party prevailed and is eligible under the Act to receive the award, itemizes the amount sought, and alleges that the position of the Agency was not substantially justified.

In *Euell Elevator Co.*,[163] a panel majority of the Board dismissed an application for an award under the Equal Access to Justice Act (EAJA) based on its finding that the General Counsel acted with substantial justification throughout the unfair labor practice proceeding. The applicant, Euell Elevator Co., had argued, inter alia, that it was entitled to an EAJA award because the alter ego allegation in the General Counsel's complaint had no evidentiary support and because the charge in the underlying case was time barred by Section 10(b) of the Act.

Regarding the alter ego issue, the majority concluded that the General Counsel was substantially justified in issuing the complaint. While noting that in the underlying case the Board did not find that Euell Elevator was the alter ego of T. E. Elevator as the General Counsel had alleged, the majority stressed that the Board had recognized "that there are many similarities between these business enterprises."[164] Thus, based on the Board's analysis there, the majority rejected the applicant's contention that the General Counsel should have dismissed the charge alleging that Euell Elevator, as an alter ego, violated Section 8(a)(5) by refusing to bargain with the union.

Regarding the 10(b) affirmative defense, which the Board had not passed on in the underlying case,[165] the majority initially noted that the contract between the union and T. E. Elevator, the alleged predecessor, had expired less than 6 months before the filing of the charge. Based on *Farmingdale Iron Works*,[166] the majority found, contrary to the judge, that the issuance of the complaint was substantially justified in that the applicant, if it were an alter ego of T. E. Elevator, was arguably liable at least for fringe benefit payments that accrued between the beginning of the 10(b) period and the expiration of the contract. The majority stressed that it was immaterial that the General Counsel had

[163] 291 NLRB No. 151 (Chairman Stephens and Member Johansen; Member Cracraft dissenting).
[164] 268 NLRB 1461 (1984).
[165] Id. at fn. 2.
[166] 249 NLRB 98 (1980).

failed to allege in the more broadly drafted complaint the precise violation that could be established under *Farmingdale*. The majority also emphasized that the applicant's refusal to make fringe benefit contributions, if found to be unlawful, would not have constituted a de minimis violation.

Member Cracraft, dissenting, would have found that the General Counsel was not substantially justified in issuing a complaint and litigating the case. She agreed with the judge that the General Counsel was obligated to conduct a more detailed 10(b) investigation than was demonstrated.

In *Van Der Vaart, Inc.*,[167] the Board denied the respondent's petition for an increase in the maximum $75-per-hour rate provided under the Equal Access to Justice Act (EAJA) and the Board's Rules.

The respondent alleged that an increase was warranted for two reasons: (1) because there had been a 26.6-percent rise in the cost of living since the effective date of EAJA's enactment in 1981; and (2) because the General Counsel's actions in pursuing the underlying unfair labor practice complaint and refusing to stipulate to certain facts regarding which the respondent's attorney was a necessary witness forced the respondent to hire a second law firm at higher rates.

The Board found that neither reason was sufficient to justify an increase. Noting that Congress itself had not increased the $75 rate when it reenacted EAJA in 1985, the Board held that a 26.6-percent rise in the cost of living was not alone sufficient to justify an increase. As for the respondent's allegation that it was forced to hire a second law firm at higher rates, the Board held that this did not, without more, constitute a "special factor" justifying an increase under EAJA because the respondent failed to specify what necessitated the payment of the higher rates to the second law firm.

In *Pacific Coast Metal Trades Council (Foss Shipyard)*,[168] the Board dismissed an application for fees under EAJA, finding that the aggregrated net worth of unions comprising the applicant trades councils was such that the applicants exceeded the net worth standard for EAJA eligibility.[169]

In the underlying unfair labor practice case, the General Counsel had alleged that the applicants had violated Section 8(b)(3) of the Act by refusing to execute a previously agreed-on collective-bargaining agreement with the employer. The Board agreed with the administrative law judge's dismissal of the complaint.[170] The trades councils then filed an application for fees under EAJA.

The Board reversed the administrative law judge's finding that the trades councils were eligible for an award.[171] The Board

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[167] 296 NLRB No. 99 (Chairman Stephens and Members Higgins and Devaney).
[168] 295 NLRB No. 24 (Chairman Stephens and Members Johansen and Devaney).
[169] 5 U.S.C. § 504 (1980), as amended Pub. L. 99-80, 99 Stat. 183 (Aug. 5, 1985).
[170] 260 NLRB 1117 (1982).
[171] 271 NLRB 1165 (1984).

first determined that the trades councils were creatures of their affiliated local unions and, secondly, that the trades councils were substantially, if not completely, dependent on their members for their financial support. Therefore, the Board remanded the following evidentiary issues to the judge for further findings: (1) whether the trades councils did in fact derive a majority of their financial support, either directly or indirectly, from their members; and (2) whether the Board's principle of aggregation of constituent members' net worth should apply in determining the trades councils' eligibility for an award under EAJA.

The Board adopted the judge's second supplemental decision, in which he concluded, from previous record evidence, that the trades councils derived 100 percent of their revenue from their members by virtue of a per capita tax on their member locals and a flat monthly fee from their member trades councils. Because the trades councils failed to respond sufficiently to the judge's evidentiary requests, the judge found that they had not established their eligibility for an EAJA award and dismissed the application.

The Board agreed, holding, contrary to the trades councils' contentions, that the initial burden of proving eligibility for an EAJA award is on the applicant because it alone possesses the financial and other necessary data needed by the judge to determine if the application meets EAJA's standards.[172] The Board noted that only when an applicant has proven its eligibility does the burden shift to the Government to prove that its action was "reasonable or substantially justified" or "that special circumstances" make an award unjust. At that point the Government is the party in control of the evidence needed to prove the reasonableness of its action.[173]

The Board stated that where trades councils, as creatures of their constituent locals and councils, derive substantially all of their financial support from those constituents and where trades councils, in turn, provide their member constituents with collective-bargaining representation, their structure and function is analogous to that of a multiemployer association whose members' assets and net worth are aggregated with the association's for the purpose of determining the association's eligibility for an EAJA award, especially where the association is controlled directly or indirectly by its members.

The Board determined that the trades councils, as collective-bargaining representatives, could not exist alone without their member local unions and affiliated councils and that the nexus for finding the requisite control depended on the degree of finan-

[172] See the Board's Rules and Regulations, Sec. 102.143 et seq. and Sec. 102.147(f).

[173] See Equal Access to Justice: Hearings on S. 265 Before the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 96th Cong., 2d sess., Ser. No. 62-23-28 (1980) (testimony of Senator DeConcini). See also *United Church Board for World Ministries v. SEC*, 649 F.Supp. 492, 496-497 (D.D.C. 1986).

cial support received from each member organization and the bargaining function performed by the trades councils on behalf of its members.

The Board noted that even though the trades councils also belonged to international unions, it was illogical to expect that an exception to Section 102.143(g) of the Board's Rules and Regulations regarding aggregation of net worth of applicants and their member entities would exist for them. Therefore, the Board concluded that aggregation of the net worth of the trades councils' member local unions and affiliated councils' net worth was appropriate for determining the trades councils' EAJA eligibility.

In *Dame & Sons Construction Co.*,[174] the Board held that an EAJA[175] applicant's entry into a non-Board settlement agreement precluded its being a prevailing party in its dispute with the Board.[176] Therefore, the applicant was not entitled to reimbursement of its legal costs incurred in defending the underlying unfair labor practice complaint.

The complaint had alleged that the applicant had unlawfully interrogated an employee concerning his membership in Carpenters Local 978; promised an employee benefits, including permanent employment, if the employee refrained from engaging in activity in support of the union; threatened an employee with layoff or discharge if the employee continued activities in support of the union; and laid off Mike Andrews because he had joined the union.

After the complaint issued, on March 18, 1988, the parties entered into an agreement approved by the Acting Regional Director whereby the representation election was set aside in favor of a rerun election, and the remaining disputes were submitted to the parties' grievance-arbitration procedure. Three days later, the Acting Regional Director issued an order withdrawing the complaint and notice of hearing on the grounds that the underlying dispute might be resolved through grievance-arbitration. The Acting Regional Director also notified the parties that the withdrawal of the complaint did not preclude its subsequent reissuance should circumstances so warrant.

The employer-applicant and the union subsequently entered into a non-Board settlement agreement. Pursuant to this agreement, the applicant paid Andrews $800 and the union withdrew the representation petition and the unfair labor practice charges. The next day, May 25, 1988, the Regional Director notified the parties that the charges had been withdrawn with approval. On June 23, 1988, the applicant filed an EAJA application for an

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[174] 292 NLRB No. 118 (Chairman Stephens and Members Johansen and Cracraft).

[175] Equal Access to Justice Act, Pub. L. 99-80, 99 Stat. 183 (1985).

[176] See 5 U.S.C. § 504(a)(1) of the EAJA, which provides:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative . . . position of the agency as party to the proceeding was substantially justified or that special circumstances make an award unjust.

award of fees. The General Counsel moved to dismiss the application on the grounds that it was untimely, the non-Board settlement agreement precluded the applicant's being a prevailing party in the dispute, and the application failed to substantiate adequately the applicant's eligibility for an award and its legal fees and expenses.

Initially, the Board said it was unable to find that the settlement agreement was favorable to either of the parties. It noted that their intents, strengths and weaknesses, and willingness to yield during the negotiations were known only to themselves. What resulted from the negotiations was a compromise with "something for everyone," it explained. Therefore, the withdrawal of the charges was "an element of a compromise" rather than a "unilateral release of the Applicant from all obligations claimed in the complaint." Indeed, pursuant to the agreement, the applicant incurred financial responsibilities that it would not have had if the complaint had been dismissed. Furthermore, the settlement precluded finding a winner or a loser. Consequently, the Board said, neither the Government nor the applicant prevailed. Rather, the negotiations that produced the settlement agreement indicated that "a prime purpose of the Act, the promotion of collective bargaining, was well served." Under these circumstances, the Board concluded that the applicant was not a prevailing party within the meaning of the EAJA.

The Board also found that the Regional Director's withdrawal of the complaint pending the outcome of the parties' grievance-arbitration procedure was not a final order terminating the proceeding for the purposes of filing an EAJA application.[177] This withdrawal and the related explication letter from the Acting Regional Director notified the parties that the charges were merely in abeyance pending the grievance-arbitration proceeding, that the matters in dispute were yet to be resolved, and that the complaint might subsequently reissue. Therefore, there was a continuing dispute that was resolved only when the Regional Director notified the parties of the approved withdrawal of the charges because of their settlement agreement. This notification indicated the termination of the unfair labor practice proceeding for the purposes of filing the EAJA application. Thus, the Board explained, the application must be regarded as timely.

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[177] Sec. 102.148(a) of the Board's Rules and Regulations states:

> An [EAJA] application may be filed after entry of the final order establishing that the applicant has prevailed in an adversary adjudication proceeding or in a significant and discrete substantive portion of that proceeding, but in no case later than 30 days after the entry of the Board's final order in that proceeding.

Sec. 102.148(d) further specifies as follows:

> For purposes of this section the withdrawal of a complaint by a Regional Director . . . shall be treated as a final order . . . .

VI

Supreme Court Litigation

During fiscal year 1989, the Board participated as amicus curiae in one case arising under the Railway Labor Act (RLA),[1] but implicating the law developed under the NLRA regarding the reinstatement rights of former strikers.

In *Trans World Airlines v. Independent Federation of Flight Attendants* (IFFA),[2] the Supreme Court[3] held that the RLA does not require an employer, at the end of an economic strike, to displace employees who worked during the strike in order to reinstate full-term strikers with greater seniority. The relevant facts are as follows:

During a strike by its flight attendants after failed contract negotiations, TWA continued operations by utilizing flight attendants who chose not to strike or abandoned the strike before its end (crossovers), and by hiring permanent replacements. When the strike ended, TWA filled existing vacancies with the most senior full-term strikers, who were reinstated with their prestrike seniority unimpaired. However, in accordance with its preannounced policy, TWA refused to displace either new hire replacements or junior crossovers to make room for more senior unreinstated strikers.[4]

In a suit brought by IFFA, the district court held that TWA was not required to displace junior crossovers or fully trained replacements.[5] The Eighth Circuit affirmed regarding the newly hired employees but, based on its reading of NLRA precedents, held that full-term strikers were entitled to displace crossovers with less seniority. The Supreme Court granted certiorari only on the crossover issue and reversed.

The Court found it appropriate to turn to NLRA precedents for guidance regarding the reinstatement rights of RLA strikers. It observed that it had first held in *Mackay Radio*,[6] and repeated-

[1] 45 U.S.C. § 151 et seq.

[2] 109 S.Ct. 1225, revg. 819 F.2d 839 (8th Cir. 1987).

[3] Justice O'Connor delivered the opinion of the Court. Separate dissenting opinions were filed by Justice Brennan, joined by Justice Marshall, and by Justice Blackmun, joined in part by Justice Brennan.

[4] TWA agreed to place the unreinstated strikers on a preferential hiring list and to reinstate them in seniority order, as vacancies arose. By May 1988, 2 years after the end of the strike, over 1000 of some 5000 full-term strikers had been reinstated. 109 S.Ct. at 1229.

[5] The district court found that newly hired employees who had not completed flight attendant training when the strike ended were not permanent replacements.

[6] *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

ly confirmed, that an employer may refuse to reinstate employees who have engaged in an economic strike "when the jobs claimed by the strikers are occupied by workers hired as permanent replacements during the strike in order to continue operations." 109 S.Ct. at 1230.[7] And it concluded that the *Mackay Radio* rule, which concededly protected newly hired permanent replacements, also justified TWA's refusal to displace the junior crossovers.

The Court found no basis in its decision in *NLRB v. Erie Resistor*[8] for distinguishing between replacements and crossovers. In that case, the Court noted, it had struck down an employer's award of 20 years' superseniority to newly hired replacements and crossovers because "[s]uper-seniority affects the tenure of all strikers [who] will at best return to their jobs with seniority inferior to that of the replacements and of those who left the strike," and it "creates a cleavage in the plant continuing long after the strike is ended" between those employees "who stayed with the union and those who returned before the end of the strike and thereby gained extra seniority." 109 S.Ct. at 1231.[9] By contrast, in this case, "the reinstated full-term strikers lost no seniority either in absolute or relative terms." Ibid.[10]

The Court rejected IFFA's contention that a continuing "cleavage" in the work force would result from the inability of full-term strikers to return to desirable domicile assignments that had been filled during the strike by junior crossovers. It noted that "[b]oth the RLA and the NLRA protect an employee's right to choose not to strike . . . and, thereby, protect employees' rights to 'the benefit of their individual decisions not to strike . . . .'" 109 S.Ct. at 1232.[11] To protect permanent replacements but require the displacement of junior crossovers, the Court said, "would have the effect of penalizing those who decided not to strike in order to benefit those who did." The Court added: "Because permanent replacements need not be discharged at the conclusion of a strike in which the union has been unsuccessful, a certain number of prestrike employees will find themselves without work. We see no reason why those employees who chose not to gamble on the success of the strike should suffer the consequences when the gamble proves unsuccessful." Id. at 1233.

Finally, the Court declined to find in the RLA any limitations on an employer's right to self-help beyond those imposed by the NLRA. It observed that in contrast to the NLRA, which limits

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[7] Quoting from *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 (1967).

[8] 373 U.S. 221 (1963).

[9] Quoting from *Erie Resistor*, 373 U.S. at 230-231.

[10] The Court explained that, unlike the situation in *Erie Resistor*, in any future reduction in force at TWA, reinstated full-term strikers could displace more junior crossovers as though there had been no strike and, in bidding for future vacancies or desirable flight schedules, would maintain their seniority-based bidding priority over new hires and crossovers. 109 S.Ct. at 1231.

[11] Quoting from the dissenting opinion of Justice Brennan, 109 S.Ct. at 1238 fn. 4.

secondary strike activity, the RLA is "wholly inexplicit as to the scope of allowable self-help," and that it had previously "read the RLA to provide greater avenues of self-help to parties that have exhausted the statute's 'virtually endless' . . . dispute resolution mechanisms than would be available under the NLRA." 109 S.Ct. at 1233, 1235.[12] In light of the RLA's silence, the Court "hesitate[d] to imply limitations on all but those forms of self-help that strike a fundamental blow to union or employer activity and the collective-bargaining process itself." Id. at 1235. It concluded that TWA's policy of guaranteeing crossovers the same protections lawfully applied to new hires was not inconsistent with the prestrike collective-bargaining agreement, which did not provide for reinstating strikers according to seniority, and it was not inherently destructive of union activity. That the policy "had the effect of encouraging prestrike workers to remain on the job . . . or to abandon the strike . . . before all vacancies were filled was an effect of the exercise of TWA's peaceful economic power . . . that [it] was . . . free to deploy" once the parties had exhausted the RLA's dispute resolution procedures. Ibid.

[12] Quoting from *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 391 (1969), and *Burlington Northern Railroad Co. v. Maintenance of Way Employees*, 481 U.S. 429, 447–448 (1987).

VII

Enforcement Litigation

A. Jurisdiction

The Board's statutory jurisdiction does not extend to "any state or political subdivision thereof."[1] In *Res-Care, Inc.*,[2] and *Long Stretch Youth Home*,[3] the Board affirmed and clarified its decision in *National Transportation Service*,[4] which had articulated a test for when the Board should assert jurisdiction over an employer with close ties to an exempt Government entity. The focus of the Board's inquiry is on the employer's ability to engage in "meaningful bargaining"—particularly with respect to economic topics—in light of the constraints that the exempt entity has imposed on the employer's control over its employees' terms and conditions of employment. In three cases last year the Seventh Circuit rejected a variety of challenges to the Board's application of this test and upheld the Board's assertion of jurisdiction over employers who were funded and regulated by exempt Government entities.

In *NLRB v. Parents & Friends of the Specialized Living Center*,[5] a not-for-profit corporation operated an intermediate care facility for retarded adults and received virtually all its funding from the State. State regulations placed a cap on the total amount of unit wages and on the dollar value of fringe benefits. State regulation also extended to staffing levels, minimum job qualifications, training procedures, written personnel policies, and annual physical exams. On the other hand, the center had "substantial and significant discretion" over the allocation of funds and benefits within the budget dictated by the State. In addition, the center was free to make individual hiring, firing, and disciplinary decisions and had developed personnel requirements and policies over and above those promulgated by the State. On these facts, the court agreed with the Board that the employer was able to "engage in meaningful collective bargaining" with respect to economic as well as other terms and conditions of employment.

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[1] 29 U.S.C. § 152(2).
[2] 280 NLRB 670 (1986).
[3] 280 NLRB 678 (1986).
[4] 240 NLRB 565 (1979).
[5] 879 F.2d 1442 (7th Cir.).

In *Staff Builders Services v. NLRB*,[6] the employer, a for-profit corporation, provided "homemaker" services to the elderly and disabled under contracts with several state agencies. While no state regulation specified the amount of wages and fringe benefits the employer could pay its homemakers, the employer was required each year to file a contract proposal that included detailed wage data for which, once the State accepted the proposal, the employer would be held "accountable." The court agreed with the Board that this language might well prevent the employer from reducing employee compensation but that it did not foreclose the employer from agreeing with a bargaining agent's request that it pay more.

In *NLRB v. Potential School for Exceptional Children*,[7] a nonprofit corporation received state funds to operate a special education and therapy program for children. The school had recently been placed on probation because of the poor quality of the records its employees had prepared for submission to the supervising agency. The school argued that its control over its labor relations was preempted by state authority because the State could terminate its contract if its employees failed to comply with any state standards. The court rejected the argument, noting that the school exercised final authority over the hiring and firing of employees, and that it could "discharge employees if it found their performance inadequate and a threat to future funding."

In contrast, the D.C. Circuit, in *Hicks v. NLRB*,[8] remanded to the Board its determination to take jurisdiction over an employer that provided research-related services for a Federal agency. In the court's view, a Government regulation allowed the agency to refuse to compensate the employer for wage increases given pursuant to collective bargaining even if the extra money was derived from economies in the nonwage costs, so that there was no overall increase in the employer's claim for compensation. The court noted that in *Res-Care* a comparable regulation had persuaded the Board to decline jurisdiction on the ground that the employer was left with insufficient bargaining scope with respect to economic matters. The court rejected two Board counterarguments—first, that the Government's contracting officer would be likely to approve any reasonable wage increase and, second, that the employer could always finance the increase out of its profits. The court noted that the same arguments had been made to, and were rejected by, the Board in *Res-Care*. The court therefore remanded the case so that the Board could take action "consistent with its existing precedents."

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[6] 879 F.2d 1484 (7th Cir.).
[7] 883 F.2d 560 (7th Cir.).
[8] 880 F.2d 1396.

B. Definition of Employee

Section 2(3) of the Act (29 U.S.C. § 152(3)) provides that the "term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise . . . ." In *H. B. Zachry Co. v. NLRB*,[9] the Fourth Circuit rejected the Board's longstanding position that a paid union organizer is a bona fide "employee" within the meaning of Section 2(3). *Zachry* also held, contrary to the Board, that proof of full-time paid union organizer status is, on its face, a valid defense to a discrimination charge. The court therefore agreed with the employer that it could lawfully refuse to hire a journeyman welder of conceded competence because that welder was a paid, full-time, professional union organizer.

Critical to the court's decision was the parties' stipulation that, if hired, the union organizer would have remained an employee of the union and would have been subject to supervision by the union even during the precise hours he was to work for Zachry. Taking "the plain meaning" of the term "employee" to be "a person who while on the job works under the direction of a single employer," the court concluded that the statutory term "plainly does not contemplate someone working for two different employers at the same time and for the same working hours" (886 F.2d at 73).

The court buttressed its argument by reference to the statutory policy of maintaining a fair balance of the respective rights of employees, employers, and unions in the organizational context. The court reasoned that the rule of *NLRB v. Babcock & Wilcox Co.*[10] would be weakened if paid union officials could command access to an employer's property merely by declaring themselves job applicants; it suggested that employers should have the same right to eject union employees who were not bona fide applicants as retail stores have to eject organizers from the selling area who are not bona fide customers.

The court also expressed concern that treating paid union organizers as statutory employees would distort the representation process and interfere with employee free choice because a person in the pay of the union might cast the decisive vote in a Board election.

In addition to finding that the paid union organizer was not a statutory employee, the court also found that the Board had not established that he was discriminated against for union activity (as opposed to his having an ongoing employment relationship with another employer). The court reasoned that "[a] decision to hire only those applicants who will, without question, answer to only one employer is so peculiarly a matter of management pre-

[9] 886 F.2d 70.
[10] 351 U.S. 105 (1956).

rogative, that it must be protected as an employer's right as long as it is not applied in a manner which discriminates against union employees" (886 F.2d at 75). In the absence of proof that Zachry had ever hired another person simultaneously employed elsewhere, the court declined to find prohibited discrimination.

In indicating the limits of its holding, the court stated that it was upholding "the employer's right to reject a job applicant simultaneously paid and supervised by another employer" and was not presented with a true "moonlighting" situation or a case of "a company that has a policy of accepting applicants already fully employed, yet then rejects an applicant because he is fully employed by a union." Ibid.

C. Protected Activity

Sections 7 and 8(a)(1) of the Act bar employers from interfering with employees' rights "to engage in . . . concerted activities for . . . mutual aid or protection . . . ." In *NLRB v. J. Weingarten*,[11] the Supreme Court upheld, as deriving from "a permissible construction of 'concerted activities for . . . mutual aid or protection,'" the Board's determination that an employer violated Section 8(a)(1) by refusing to allow an employee, who was suspected of theft, the presence of his union representative at an investigatory interview. In the first of a series of subsequent cases, the Board was presented with the question whether the so-called *Weingarten* rights should be extended to nonunion employees who have no union representative. In *Materials Research Corp.*,[12] the Board initially answered the question in the affirmative, holding that an employer violates Section 8(a)(1) by denying to an unrepresented employee the presence of a fellow employee during an investigatory interview. Relying on that holding, the Board in *E. I. du Pont & Co. (Du Pont I)* found unlawful the discharge, by his employer, of employee Slaughter, who was not represented by a union, when he refused to attend an investigatory interview unless he was "accompanied" by a person of his own choosing.[13] The Board thereafter reconsidered this question in *Sears, Roebuck & Co.*, and concluded, contrary to its earlier holding, that the Act "compelled" denial of *Weingarten* rights to nonunion employees.[14] After the Board obtained a remand of Slaughter's case and dismissed it on this ground, Slaughter again appealed, and the Third Circuit again remanded (*Slaughter v. NLRB*),[15] stating that the Board's conclusion that the denial of rights to nonunion employees was compelled, conflicted with the court's holding in *Du Pont I* that extension of *Weingarten* was "at

[11] 420 U.S. 251 (1975).
[12] 262 NLRB 1010 (1982).
[13] 262 NLRB 1028 (1982), affd. 724 1061 (3d Cir. 1983).
[14] 274 NLRB 230 (1985).
[15] 794 F.2d 120 (1986).

least permissible."[16] On remand, the Board reaffirmed its earlier holding, but did so on the ground, not that it was compelled to do so by the Act, but that denial of *Weingarten* rights to nonunion employees represented a reasonable accommodation between the competing interests of employees and employers (*E. I. du Pont & Co.*).[17]

During the past year, Slaughter's appeal from the Board's dismissal was once more presented to the Third Circuit (*Slaughter v. NLRB*).[18] This time the court upheld as "a reasonable interpretation of the Act" the Board's conclusion that Section 7 did not grant *Weingarten* rights to nonunion employees. The court stated that, "The Board, with its considerable expertise in labor relations, is better equipped than this Court to determine what reasonable interpretation of § 7 of the Act will best promote its purpose of insuring employees' rights to joint action and collective bargaining, as well as that of promoting industrial peace."[19]

D. The Bargaining Obligation

1. Effect of Hiring Replacements on Employer's Ability to Withdraw Recognition During or After a Strike

The question of how to count strike replacements when an employer asserts a good-faith doubt of majority status is one that the Board has struggled with over the years and that has divided the courts of appeals.[20] In 1987, the Board undertook a thoroughgoing reexamination of the issue in *Station KKHI*.[21] There, the Board overruled prior authority and held that no presumption is warranted regarding the extent of union support among strike replacements. Rejecting on evidentiary and policy grounds both a presumption of support and the contrary presumption of nonsupport, the Board held that it would "review the facts of each case" and "require 'some further evidence of union non-support' before concluding that an employer's claim of good-faith doubt of the union's majority is sufficient to rebut the overall presumption of continuing majority status."[22]

Three cases reaching the courts of appeals this year squarely raised the question of the validity of the Board's new rule. In the first, *Curtin Matheson Scientific v. NLRB*,[23] a divided panel of the Fifth Circuit rejected the Board's analysis. The court reasoned that *Station KKHI* was "operationally" the same rule as the Board's prior *Pennco* rule, which the court had previously

[16] Id. at 128.
[17] 289 NLRB No. 81 (June 30, 1988).
[18] 876 F.2d 11 (1989).
[19] Id. at 13.
[20] See, e.g., *Pennco, Inc.*, 250 NLRB 716 (1980), enfd. 684 F.2d 340 (6th Cir. 1982), cert. denied 459 U.S. 994 (1982); *National Car Rental System v. NLRB*, 594 F.2d 1203 (8th Cir. 1979).
[21] 284 NLRB 1339 (1987).
[22] Id. at 1344–1345, quoting from the Sixth Circuit's decision in *NLRB v. Pennco*, 684 F.2d at 343.
[23] 859 F.2d 362.

declined to apply.[24] The court held that where "a substantial percentage of the bargaining unit employees is replaced on the same day, and the striker replacements cross a picket line, violent or not, to report to work each day, the Company is justified in counting the striker replacements as employees whom they doubt support the Union."[25] The dissenting judge would have approved the Board's new rule and enforced the Board's order. The Board's petition for rehearing was denied. On June 26, 1989, the United States Supreme Court granted the Board's petition for a writ of certiorari.

In the next case, *Hajoca Corp. v. NLRB*,[26] the Third Circuit approved the Board's *Station KKHI* rule. Noting the Fifth Circuit's decision, the court nevertheless held that the Board's test "makes eminent good sense."[27] The court considered the evidentiary and policy grounds underlying the Board's rule and also noted that the Board's new rule harmonized with circuit law.[28] Regarding the evidence, the court affirmed the Board's view that negative comments by replacements concerning the strike reflected a dissatisfaction with the decision to strike, and not necessarily with the union, and that replacements' statements might well reflect their need for work, rather than their union sympathies.[29]

In the third case, *Bickerstaff Clay Products Co. v. NLRB*,[30] the Eleventh Circuit approved the Board's *Station KKHI* rule but declined to enforce the Board's order. Disagreeing with the Fifth Circuit, the court held that the Fifth Circuit's prior precedent did not mandate a rejection of *Station KKHI*. Nevertheless, the court held that on the particular facts presented, the employer had established a good-faith doubt of the union's majority.

In addition to the hiring of replacements, the court noted that the employer had come forward with evidence of strike violence against the replacements, employee dissatisfaction with the union, significant numbers of resignations from the union and dues-checkoff authorization withdrawals, internal difficulties within the union, and a significant period of union inactivity.[31] The union unsuccessfully sought Supreme Court review.

2. Duty to Bargain About a Decision to Close or Relocate an Operation

In *Otis Elevator Co.*,[32] the Board considered the extent of an employer's obligation to bargain about decisions such as partial closing or relocation of operations that have a direct impact on employment but are focused on concerns apart from the employ-

[24] Id. at 367. See *NLRB v. Randle-Eastern Ambulance Service*, 584 F.2d 720 (5th Cir. 1978).
[25] 859 F.2d at 367.
[26] 872 F.2d 1169.
[27] Id. at 1175.
[28] Ibid.
[29] Ibid.
[30] 871 F.2d 980.
[31] Id. at 985–987.
[32] 269 NLRB 891 (1984).

ment relationship, usually the profitability of operations. The four participating Board members wrote three separate opinions, none of which commanded a majority. In a case decided by the District of Columbia Circuit during the past year,[33] the question arose again. The employer in that case had a contract with the union that called for several wage increases during the contract term. After suffering multimillion dollar losses each year for several years and being informed by the banks that had financed its operations that they would provide no further credit, the employer announced that it would close its hog kill and cut operations, which were obsolete and were responsible for most of the employer's losses. However, the employer offered to continue these operations if the union agreed to a wage freeze for the remainder of the contract term. After the union refused, the employer, instead of closing the hog kill and cut operations, transferred them to a more modern and efficient plant that it had purchased. In subsequent negotiations about the possible transfer of other operations to this plant, the employer failed to furnish certain information that the union had requested. The employer stated during these negotiations that the wage freeze it had previously requested would have been insufficient to prevent closure of the entire plant. The union ultimately agreed to a reduction in wages and benefits, but the plant was closed anyway a year later.

The Board dismissed the complaint, finding that the employer had not violated Section 8(a)(5) because the decision to relocate the hog kill and cut operations turned on the infeasibility, due to lack of financing and the availability of a more modern and efficient plant, of continuing the work at the existing location, rather than on labor costs, and was therefore not a mandatory subject of bargaining under any of the varing standards set forth by the Board members in *Otis Elevator*. In reviewing this holding, the court held that each of the separate approaches in *Otis Elevator* "gives at least a plausible reading" to the Supreme Court decision in *First National Maintenance Corp. v. NLRB*.[34] However, the court concluded that the Board had not adequately explained its application of *Otis* to the facts of this case. The court viewed subsequent Board decisions as making the actual motivation for the relocation critical and noted that the Board had made no findings whether labor costs or other factors had in fact motivated the decision to relocate in this case. The court also criticized the Board for failing to come to terms with the significant differences between the various opinions in *Otis*. It urged the Board to attempt to establish, by majority decision, a standard for determining when a management decision is a mandatory subject of bargaining, and added that, in the absence of a majority standard, the Board must explain in each case why each of the *Otis* ap-

[33] *Food & Commercial Workers Local 150-A v. NLRB*, 880 F.2d 1422 (D.C. Cir.), remanding sub nom. *Dubuque Packing Co.*, 287 NLRB 499 (1987).

[34] 452 U.S. 666 (1981).

proaches would lead to the same result. Thus, one member in *Otis* would have required bargaining when the decision was "amenable to resolution through collective bargaining,"[35] while another member would have required bargaining if, in addition, the benefit for the collective-bargaining process outweighed the burden that a bargaining requirement would place on the conduct of the business.[36] In the present case, according to the court, the Board had not explained why the decision to relocate was not amenable to bargaining or why the burdens of bargaining over the decision outweighed any conceivable benefits. In addition, the Board had not explained the apparent inconsistency between its decision here and other decisions issued subsequent to *Otis*. Accordingly, the court remanded the case to the Board for further proceedings. The court also directed the Board, if it concluded on remand that the relocation was not a mandatory subject of bargaining, to address the question whether the employer, having sought midterm concessions on mandatory subjects of bargaining, was obligated to bargain in good faith on those issues.

E. Responsibilities of Successors

The Sixth Circuit was presented with two cases this year that raised new questions concerning a successor's liability for the unfair labor practices of its predecessor. In *Golden State Bottling Co. v. NLRB*,[37] the Supreme Court approved the Board's imposition of liability on an employer to remedy the unfair labor practices committed by a predecessor employer where there is substantial continuity of business operation between the predecessor and successor employers and where the successor had knowledge of the unfair labor practices before acquiring the business. The first case before the Sixth Circuit addressed the issue of knowledge. In *St. Marys Foundry Co.*,[38] the court rejected the argument that a successor employer can be charged with knowledge of the predecessor's unfair labor practices only if charges had been filed alleging such conduct to be unlawful before it acquired the predecessor's business. The court instead agreed with the Board that liability may appropriately be placed on a successor employer that had notice of the conduct later alleged to violate the Act and an appreciation of the significance of that conduct. Imposition of successor liability does not work an unfair hardship, the court concluded, where the successor had knowledge that the predecessor was engaging in conduct that could lead to a finding of an unfair labor practice and could have covered the risk in its bargaining for purchase of the business.

[35] *Otis Elevator*, 269 NLRB at 900 (Member Zimmerman concurring in part and dissenting in part).
[36] Id. at 897 (Member Dennis concurring).
[37] 414 U.S. 168 (1973).
[38] 860 F.2d 679 (6th Cir.)

In a second case, *Mine Workers Local 5741 v. NLRB*,[39] the court enforced a Board order imposing remedial liability on a local union as the successor to another now-defunct local union. The court approved the Board's application of the *Golden State* doctrine to unions as a reasonable exercise of its broad remedial discretion. In this case, the court found numerous indicia of continuity between the two locals, including the transfer of employees to the new local without interruption in their work, the continuation without interruption of the checkoff and transmission of dues, and the continued processing of grievances and administration of the contract. In addition, the new local admittedly had knowledge of the unremedied unfair labor practices when it assumed representation of the members. The court acknowledged that the union's knowledge "may be" less significant than knowledge by a successor employer because the union—unlike an employer—may not have voluntarily chosen to become a successor. However, it concluded that the Board reasonably struck the balance to serve the public's interest in seeing that the policies of the Act are carried out. District Judge Duggan, dissenting, concluded that a successor cannot equitably be held liable in the absence of a knowing, voluntary assumption of a predecessor's debt. Because the union here was under a legal obligation to accept the former members of the old local into its membership, Judge Duggan found it "unjust" to burden the successor with the financial obligations of the predecessor.

F. Work Jurisdictional Disputes

Section 8(b)(4)(ii)(D) of the Act prohibits a union from coercing an employer "where . . . an object [of its conduct] is . . . forcing . . . any employer to assign particular work to employees [the union represents] rather than to employees in another [union]." Whenever an apparently meritorious 8(b)(4)(D) charge is filed, Section 10(k) of the Act requires the Board to suspend proceedings on the charge, to "hear and determine" which of the competing unions is entitled to the disputed work, and to assign that work to one of the competing unions.[40] Once the Board obtains jurisdiction over a work assignment dispute and decides the dispute, the Board's decision is the final resolution of the matter, precluding any enforcement of a contrary arbitration decision, whether the remedy is an actual award of the disputed work or an award of damages for the loss of the disputed work.[41] In *Longshoremen ILWU Local 32 (Weyerhaeuser Co.)*,[42] the Board

[39] 865 F.2d 733 (6th Cir.).

[40] *NLRB v. Plasterers Local 79 (Texas State Tile)*, 404 U.S. 116, 123–124 (1971).

[41] *Carey v. Westinghouse*, 375 U.S. 261, 272 (1964).

[42] 271 NLRB 759 (1984), enfd. sub nom. *Longshoremen Local 32 v. Pacific Maritime*, 773 F.2d 1012 (9th Cir. 1985), cert. denied 476 U.S. 1158 (1986).

held that a union violates Section 8(b)(4)(ii)(D) by pressing a contractual grievance to obtain time-in-lieu payments for disputed work that its members did not perform because the employer, consistent with the Board's prior 10(k) award, assigned that work to another group of employees whom the union does not represent.

ILWU Local 32 challenged that holding again in a similar case before the District of Columbia Circuit.[43] The court rejected the union's contention that the filing of a time-in-lieu grievance to challenge Sea-Land's assignment of certain container-handling work outside the marine container yard to its Teamsters-represented employees—consistent with the Board's prior 10(k) award—was not coercion within the meaning of Section 8(b)(4)(D).[44] The court viewed the union's contention as "implictly rais[ing] the issue of which source of law takes precedence: the Board's authority under [S]ection 10(k) or the ILWU's rights under its contract?" and held, in agreement with the Board, that "the [S]ection 10(k) award trumps the collective bargaining agreement."[45] After Sea-Land assigned the disputed work to the Teamsters pursuant to the Board's 10(k) award, the ILWU obtained a favorable arbitration award against Sea-Land for wages its members lost when they did not perform that work. The Board concluded that the ILWU's conduct was a collateral attack on its 10(k) award and, therefore, unlawful coercion. The court agreed that "the Board's interpretation [of Section 8(b)(4)(D)] is indeed reasonable; it may even be inevitable."[46] As the court explained, if the ILWU "were entitled to assert contract claims against Sea-Land, in contravention of the Board's [S]ection 10(k) award, the very purpose of [S]ection 10(k)—to authorize the Board to resolve the jurisdictional dispute—would be totally frustrated. . . . [W]hatever the union's motivation and no matter how persuasive its contractual case, a union cannot force an employer to choose between a Board [S]ection 10(k) award and a squarely contrary contract claim."[47]

[43] *Longshoremen ILWU Local 32 v. NLRB*, 884 F.2d 1407.
[44] Id. at 1413–1414.
[45] Id. at 1413.
[46] Id. at 1414.
[47] Ibid.

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 year 1989, the Board filed a total of 48 petitions for temporary relief under the discretionary provisions of Section 10(j): 39 against employers and 9 against labor organizations. Of these numbers, together with petitions authorized in the prior year, injunctions were granted in 24 cases and denied in 4 cases. Of the remaining cases, 10 were settled prior to court action, 1 was withdrawn based on changed circumstances, and 15 remained pending further proceedings at the end of the fiscal year.

Injunctions were granted against employers in 17 cases, and against labor organizations in 7 cases. The cases against employers involved a variety of violations, including interference with nascent organizational campaigns, undermining an incumbent union, a successor employer's refusal to recognize and bargain with an incumbent union, and several instances where an employer's cessation of operations necessitated an injunction to sequester assets to protect an eventual Board backpay remedy. The cases against unions involved serious picket line misconduct, a threat of mass picketing directed against a health care institution, and unlawful internal union discipline.

Several district court cases decided during the past year were of particular interest.

In *Hirsch v. Electroloy Co.*,[1] the district court granted 10(j) relief and enjoined a manufacturing employer from interfering with a union's organizational handbilling both on public property and on the private property driveway entrance to the employer's facility. Based on evidence that the union's handbilling on public property was causing traffic hazards, and consistent with the test used by the Board to balance private property rights and Section

[1] Civil No. 89-2164 (E.D. Pa.), appeal pending No. 89-1537 (3d Cir.).

7 rights,[2] the district court essentially granted the union limited access to the employer's private property driveway entrance for the purpose of engaging in protected activities.[3]

Several cases decided in the report period involved serious employer unfair labor practices designed to destroy a union's organizational campaign that had been successful in obtaining a majority of union authorization cards. In such cases where we concluded that the employer's violations precluded a fair Board election, we sought interim remedial bargaining orders under *Gissel*,[4] consistent with well-established 10(j) precedent in the circuit courts.[5] In *Gottfried v. Purity Systems*[6] and *D'Amico v. Cox Creek Refining Co.*,[7] the district courts granted interim *Gissel* bargaining orders, as well as affirmative orders reinstating alleged discriminatees.[8]

One case decided during the year involved serious employer violations aimed at undermining an incumbent union. In *NLRB v. Blue Square II, Inc.*,[9] the district court ordered the interim restoration of relocated bargaining unit work and the reinstatement of some 18 employees who, the court found reasonable cause to believe, had been discriminatorily laid off when the employer relocated unit work outside the bargaining unit in order to coerce employees into repudiating the incumbent union. The court also ordered the employer to cease and desist from implementing unilateral changes in employee working conditions and imposing more onerous working conditions on employees because of their union membership and activities.

Another case in which 10(j) injunctive relief was sought dealt with several employers' alleged refusal to bargain in good faith, which had caused an ongoing unfair labor practice strike. In *Silverman v. Reinauer Transportation*,[10] the district court found reasonable cause to believe that the employers' proposal during contract negotiations to change the scope of the parties' historical bargaining unit was a permissive subject of collective bargaining, and that their insistence to impasse on obtaining the new unit description clause constituted a refusal to bargain in good faith,

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[2] *Jean Country*, 291 NLRB No. 4 (Sept. 27, 1988).

[3] See generally *Eisenberg v. Holland Rantos Co.*, 583 F.2d 100 (3d Cir. 1978) (affirming 10(j) injunction granting economic strikers right to picket their employer on private property in an industrial park), discussed in 43 NLRB Ann. Rep. 201–202 (1978).

[4] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[5] See, e.g., *Seeler v. Trading Port, Inc.*, 517 F.2d 33 (2d Cir. 1975); *Levine v. C & W Mining Co.*, 610 F.2d 432 (6th Cir. 1979); *Asseo v. Pan American Grain Co.*, 805 F.2d 23 (1st Cir. 1986). See generally 52 NLRB Ann. Rep. 149–150 (1987) and 51 NLRB Ann. Rep. 172 fn. 14 (1986).

[6] 129 LRRM 2836 (W.D. Mich.).

[7] 719 F.Supp. 403 (D.Md.), appeal pending No. 89-2427 (4th Cir.).

[8] In *D'Amico v. Cox Creek Refining Co.*, supra, the number of reinstated discriminatees totaled about 73 employees. In *Gottfried v. Purity Systems*, 129 LRRM at 2841, the court held that the statutory rights of the alleged discriminatees to reinstatement outweighed the job rights of the replacements, relying on *Maram v. Universidad Interamericana*, 722 F.2d 953, 959–960 (1st Cir. 1983), discussed in 49 NLRB Ann. Rep. 139–140 (1984).

[9] Civil Action No. 89-C-0536-S (N.D. Ala.).

[10] 130 LRRM 2505 (S.D.N.Y.), affd. mem. 880 F.2d 1319 (2d Cir.).

which caused the employees' ongoing strike.[11] The district court under Section 10(j) ordered the employers to cease insisting in bargaining on obtaining the new unit description clause, and affirmatively to reinstate all the strikers on their unconditional offer to return to work, displacing if necessary any replacement workers. On appeal the Second Circuit Court of Appeals affirmed the decision and order of the district court in an unpublished opinion.

In *Asseo v. Worldwide Management Corp.*,[12] the district court found reasonable cause to believe that the employer had discriminatorily refused to offer jobs to predecessor employees because of their union membership or because of its desire to avoid becoming a *Burns*[13] successor with a statutory obligation to recognize the predecessor employer's union. The court further concluded that but for the employer's discriminatory hiring policy, a majority of its work force would have been composed of predecessor employees. Based on cases such as *Love's Barbeque Restaurant v. NLRB*,[14] the court concluded that the employer was a successor employer that was obligated both to offer jobs to the predecessor employees who were improperly denied offers of employment and to recognize the union. Determining that such relief was required pending completion of the Board's administrative process to protect against a frustration of the Act's remedial purposes, the court entered an order providing for such interim relief.[15] The court also ordered a restoration of the predecessor's working conditions pending the bargaining between the parties.[16]

Several cases decided during the fiscal year dealt with union picket line misconduct. One of these cases, *Clark v. Mine Workers*,[17] involved a situation where the affected employer had obtained state court injunctive relief against the union's alleged misconduct, including subsequent state court contempt adjudications. Based on its conclusion that the union's picket line misconduct was continuing despite the parties' state court litigation and the presence of state police, the district court concluded that it would be proper to exercise its jurisdiction under Section 10(j) to enjoin the ongoing violations.[18]

One case decided in the report period involved a labor organization that was bringing unlawful internal union discipline

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[11] The district court relied on cases such as *Douds v. Longshoremen ILA (New York Shipping)*, 241 F.2d 278 (2d Cir. 1957), and *Newspaper Printing Corp. v. NLRB*, 625 F.2d 956, 964 (10th Cir. 1980), cert. denied 450 U.S. 911 (1981).

[12] 706 F.Supp. 116 (D.P.R.).

[13] *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

[14] 640 F.2d 1094 (9th Cir. 1981).

[15] The court also rejected a "hiatus of operations" defense raised by the employer, 706 F.Supp. at 127–128.

[16] See *Love's Barbeque Restaurant v. NLRB*, supra at 1102–1103; *Shortway Suburban Lines*, 286 NLRB 323, 327 (1987), enfd. mem. 862 F.2d 309 (3d Cir.).

[17] 714 F.Supp. 791 (W.D.Va.).

[18] Id. at 793.

against a member because of his resort to the processes of the Board. In *Pascarell v. Sheet Metal Workers Local 22*,[19] the district court found reasonable cause to believe that the union had brought internal union charges against a member, and had fined him, because the member had testified in a Board representation proceeding adversely to the union's interests. The court enjoined the internal union discipline pending Board decision in the case based on its conclusion that there was evidence that other union members had been inhibited from participating in the Board's proceedings because of the union's disciplinary actions at issue, and that the union had intended to "send a message" to its members through its internal union charges.

Finally, several cases were decided during the fiscal year involving the sequestration of assets where the respondent's cessation of operations threatened to frustrate the Board's ultimate backpay order.[20] In one of the cases, *Schaub, Jr. v. Brewery Products*,[21] the court found reasonable cause to believe that the employer had committed violations giving rise to a Board backpay obligation, and that the employer's cessation of operations and apparent sale of all its assets threatened to frustrate the Board's backpay order. In order to preserve the status quo and prevent a possible dissipation of the assets, the court issued an injunction sequestering about $83,000 of the employer's assets pending completion of the Board's administrative proceedings. The employer had argued that the amount of money that the Regional Director sought to sequester was excessive. However, in the absence of evidence specifically limiting the employer's backpay liability, the court found the amount sought by the Board to be a "satisfactorily close approximation of respondent's potential liability."

Some of the circuit court litigation during the past year focused on the "just and proper" prong of a 10(j) analysis.

In *Scott v. Bi-Fair Market*,[22] the Ninth Circuit reversed a district court's refusal to grant affirmative relief in a case involving a successor's failure to hire the predecessor's employees. El Farra was the purchaser of a grocery store that, under previous ownership, had a longstanding collective-bargaining relationship with the union. It took over the store with no hiatus in operations but hired none of the predecessor's employees. Instead it ran blind ads for applicants and conducted the interviews from which it selected its employees. It did not notify the predecessor's employees of this opportunity to apply. The Regional Director's petition alleged that this and other conduct demonstrated reasonable cause to believe that El Farra had discriminatorily refused to hire the predecessor's employees; that, absent such dis-

[19] Civil Action No. 89-104 (D.N.J.).

[20] See generally *Kobell v. Menard Fiberglass Products*, 678 F.Supp. 1155, 1166-1167 (W.D.Pa. 1988), discussed in 53 NLRB Ann. Rep. 151 (1988).

[21] 715 F.Supp. 829 (E.D.Mich.).

[22] 863 F.2d 670.

crimination, a majority of its work force would have been comprised of the predecessor's employees; that El Farra was a successor within the meaning of the Act and was therefore required to recognize and bargain with the union; and that in view of El Farra's discriminatory refusal to hire the predecessor's work force, El Farra violated the Act by establishing terms and conditions of employment without bargaining with the Union.[23] The petition sought an order directing El Farra to offer employment to all the predecessor's employees, to recognize and bargain with the Union, to restore the working conditions in effect when it took over the store, and to bargain with the Union about any proposed changes. The district court agreed that there was reasonable cause to believe El Farra violated the Act as alleged and it directed El Farra to cease and desist from further discrimination against the predecessor's employees and to fill any future vacancies with the predecessor's employees. It refused, however, to order El Farra to displace employees hired by El Farra to make room for the predecessor's employees and it refused to order El Farra to recognize and bargain with the union. In the district court's view, such additional relief was not appropriate because the Regional Director had not proved the violations alleged by a preponderance of the evidence.

The Ninth Circuit reversed, holding that once the district concluded that there was reasonable cause to believe the employer had violated the Act as alleged and that injunctive relief was just and proper, it erred in holding the Board to a higher standard of proof on the merits in order to obtain affirmative relief. The circuit court concluded that the relief to be provided must be consistent with the statutory purpose and should be modeled on the relief already approved by the circuit in *Love's Barbeque Restaurant*. Accordingly, it reversed and remanded with instructions to grant the relief the Board had sought.

In *Fleischut v. Nixon Detroit Diesel*,[24] another case involving a district court's refusal to grant affirmative injunctive relief, the Sixth Circuit concluded that the district court had failed to focus on whether the relief requested was necessary to preserve the remedial powers of the Board, and reversed and remanded for further consideration under the appropriate standard. In that case, in the first bargaining session after the union was certified as the bargaining representative of the company's employees, the company took the position that a group of employees, in existence at the time of the election, was not part of the certified unit. The company adhered to this position through several months of bargaining. In protest of this and other unfair labor practices, the employees engaged in a 6-week strike. On their offer to return to work, the company refused to reinstate the strikers, claiming

[23] See, e.g., *Love's Barbeque Restaurant v. NLRB*, 640 F.2d 1094 (9th Cir. 1981).
[24] 859 F.2d 26.

they had been permanently replaced. The Regional Director filed a 10(j) petition alleging that there was reasonable cause to believe the company violated Section 8(a)(1), (3), and (5) of the Act and sought a preliminary injunction requiring the company, among other things, to offer interim reinstatement to the unfair labor practice strikers and certain other named employees and to recognize and bargain with the union as the representative of all the employees in the certified unit, including the disputed group. The district court found reasonable cause to believe the company had violated the Act as alleged and entered a cease-and-desist order effective only until the date of the hearing before the administrative law judge, not until the issuance of the Board's decision and order as requested. In addition, the court refused to grant the affirmative relief requested by the Regional Director.

On the Board's appeal, the circuit court found that the district court abused its discretion in limiting the injunctive relief. Having found reasonable cause to believe the company had violated the Act, the circuit held that the district court was required to consider whether interim injunctive relief was necessary to preserve the remedial power of the Board. The circuit court concluded that the district court failed to carry out this task where it did not "discuss nor explicitly determine whether the failure to grant the affirmative relief was likely to prevent the Board from proper and complete exercise of its remedial powers" and where, although the district court's factual findings were not clearly erroneous, they did not "substantially relate to the conclusion reached—the impropriety of affirmative relief." (859 F.2d at 30–31.) Accordingly, the circuit court reversed the order below insofar as it limited the relief sought by the Regional Director and remanded for the district court "to specifically enumerate its reasons for finding reinstatement injunctive relief to be or not be just and proper in light of the District Court's finding that reasonable cause did exist for the Director to seek relief under section 10(j) of the Act." (Id. at 31.) Without deciding the propriety of a reinstatement order, the circuit court noted that the status quo to be restored in a 10(j) proceeding is that existing before the commission of the alleged unfair labor practices. Thus, even if an interim reinstatement order would require the displacement of replacement employees, reinstatement would be necessary to restore the previolation status quo, and thus would be appropriate if otherwise shown to be "just and proper." (859 F.2d at 30, fn. 3.) The circuit court further held that the "'immediacy' of the hearing date before the Board . . . in and of itself, is not a sufficient ground" to deny affirmative relief and directed that the injunction should be amended to extend to the termination of the Board proceedings.

On remand, the district court again denied the affirmative relief requested by the Board and the Board again appealed (Docket No. 89–5174). In the interim, the company began volun-

tarily to undertake all the actions sought by the Board in the 10(j) petition. Accordingly, the parties agreed to modify the district court injunction to reflect the company's conduct and the Board thereupon dismissed its appeal.

In *Szabo v. P*I*E Nationwide*,[25] the company appealed from an injunction directing it to offer interim reinstatement to an employee whom the Regional Director alleged had been discharged in retaliation for having participated in a Board backpay proceeding. That proceeding was to resolve the company's liability for backpay for having discharged the same employee 5 years previously when the company learned he had filed unfair labor practice charges against a previous employer.

On appeal, the company conceded there was reasonable cause to believe it had violated the Act as alleged, but argued that the injunction should not have been granted because interim reinstatement was not "just and proper." The Board argued that the nature of the violation and the widespread knowledge of the employer's conduct among the employees warranted the inference that employees would be chilled from filing charges with the Board or participating in Board proceedings. It further argued that a Board order in due course could not fully cure this effect because, in the interim, the statute of limitations would have run on potential charges and, further, employees might be permanently discouraged from resorting to the Board if they knew they would have to wait a prolonged period before obtaining effective relief from company retaliation.

The circuit court agreed that interim relief may be warranted in cases involving discharges in retaliation for filing charges with the Board, but held that an injunction was not warranted in the circumstances of this case. It concluded that absent allegations that the company "regularly terminated employees who filed grievances with the NLRB or intended to embark upon this kind of behavior in the future, . . . the NLRB's fear [that employees will be chilled] is mere speculation at best." It discounted the Board's reliance on other employees' knowledge of the situation as a circumstance warranting injunctive relief. It noted that the discharged employee, rather than the employer, had told his coworkers about his discharge. "Injunctive relief," the court concluded, "should turn upon the employer's actions, not the employees' words." Accordingly, because the circuit court found no evidence that employees were afraid to resort to the Board, it reversed the district court.

In *Kinney v. Pioneer Press*,[26] a decision issued 6 weeks after *P*I*E*, the Seventh Circuit abandoned the traditional two-pronged "reasonable cause" and "just and proper" analysis for 10(j) cases. This case reached the court on the Board's appeal,

[25] 878 F.2d 207 (7th Cir.)
[26] 881 F.2d 485.

the district court having found both that there was not reasonable cause to believe that the company had unlawfully withdrawn recognition from the union and otherwise violated the Act, and also that, in any event, 10(j) relief was not just and proper in the circumstances. The circuit court vacated and remanded for consideration under the principles announced in its opinion.

First, the court noted that although the language of Section 10(l) establishes the "reasonable cause" test, the phrase is not included in Section 10(j). The court also noted the difference between the two provisions in the Board's discretion to seek relief. That is, Section 10(l) requires the Board to seek relief with respect to alleged violations covered thereunder; Section 10(j) merely grants the Board the power to seek relief with respect to other types of violations. In view of these differences, the court concluded that "reasonable cause" is not a factor to be considered in 10(j) cases.[27] In the court's view, a district court should focus rather on whether injunctive relief is "just and proper." That inquiry, the court asserted, is guided by "traditional equitable principles" that require the district court to balance the competing claims of injury along with the Regional Director's likelihood of success on the merits. As enunciated in cases cited by the court, when a public agency seeks a preliminary injunction the court must (1) determine the likelihood that the petitioner will succeed on the merits and (2) balance the equities, keeping in mind that while private concerns may be considered, public equities must receive far greater weight. *FTC v. World Travel Brokers*, 861 F.2d 1020, 1029 (7th Cir. 1988). The greater the likelihood of success on the merits, the less harm the petitioner need show in relation to the harm the defendant will suffer for an injunction to be warranted. *FTC v. Elders Grain*, 868 F.2d 901, 903 (7th Cir.).[28]

Regarding the propriety of injunctive relief in the case before it, the court rejected the district court's reasoning that 10(j) relief "is reserved for more serious and extraordinary circumstances than presented here," noting that "no rule of law [so] limits injunctive relief." 881 F.2d at 493. The court stated, "[i]f Pioneer has wrongly refused to recognize and bargain with Local 71, is ripping down union communications and punishing its workers

[27] As the court recognized, its view that the standards for relief under Secs. 10(j) and 10(l) differ is at variance with language in its own prior decisions and the views of other circuit courts. See 881 F.2d at 491–493. The court noted that it had circulated its opinion to all active circuit judges and no judge in regular active service requested a hearing en banc. Id. at 493 fn. 4.

[28] At fn. 3 of its opinion, 881 F.2d at 490, the court cites the traditional four factors that a party seeking preliminary injunctive relief must demonstrate: (1) no adequate remedy at law, (2) irreparable harm in the absence of an injunction exceeding the irreparable harm the other side will suffer if the injunction issues, (3) a reasonable likelihood of winning on the merits, and (4) harm to the public interest stemming from the injunction that is tolerable in light of the benefits achieved by the relief. Elsewhere (881 F.2d at 491, 493, 494), the court indicates that the standard it deems applicable to 10(j) proceedings is that governing equitable cases filed by public agencies. Cases cited by the court state that the traditional test quoted in fn. 3 is modified when the petitioner is a public agency. The public agency petitioner need not demonstrate irreparable injury (nor, presumably, no adequate remedy at law). *FTC v. World Travel Brokers*, 861 F.2d at 1029.

for union-related activities, the court should enjoin these activities." Ibid. At the same time, it noted, "[f]ailure to establish irreparable injury and probability of success on the merits dooms [a] request for an injunction." Id. at 494. Finally, the circuit court concluded that the district court had failed to make the necessary findings with respect to these matters. Accordingly, it remanded the matter to the district court "for a fresh analysis of the Board's case under the traditional standards used in injunctive cases filed by public officials, which we recently addressed in *Elders Grain*[29] and *World Travel Brokers*."[30] 881 F.2d at 494. As of the end of the fiscal year, the case was pending before the district court on remand.

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), (B), and (C),[31] or Section 8(b)(7),[32] and against an employer or union charged with a violation of Section 8(e),[33] 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.[34] 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

[29] *FTC v. Elders Grain*, supra.

[30] *FTC v. World Travel Brokers*, supra.

[31] Sec. 8(b)(4)(A), (B), and (C), as enacted by the Labor Management Relations Act of 1947, prohibited certain types of secondary strikes and boycotts, strikes to compel employers or self-employed persons to join labor or employer organizations, and strikes against Board certifications of bargaining representatives. These provisions were enlarged by the 1959 amendments of the Act (Title VII of Labor-Management Reporting and Disclosure Act) to prohibit not only strikes and the inducement 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 where an object was to compel an employer to enter into a hot cargo agreement declared unlawful in another section of the Act (Sec. 8(e)).

[32] Sec. 8(b)(7), incorporated in the Act by the 1959 amendments, makes organizational or recognitional picketing under certain circumstances an unfair labor practice.

[33] 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.

[34] Sec. 8(b)(4)(D) was enacted as part of the Labor Management Relations Act of 1947.

granted. Such ex parte relief, however, may not extend beyond 5 days.

In this report period, the Board filed 47 petitions for injunctions under Section 10(l). Of the total caseload, comprised of this number together with 2 cases pending at the beginning of the period, 12 cases were settled, 1 was dismissed, 1 was continued in an inactive status, 1 was withdrawn, and 8 were pending court action at the close of the report year. During this period, 24 petitions went to final order, the courts granting injunctions in 16 cases and denying them in 8 cases. Injunctions were issued in 34 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 three cases involving jurisdictional disputes in violation of Section 8(b)(4)(D). Injunctions were also issued in four cases to proscribe alleged recognitional or organizational picketing in violation of Section 8(b)(7).

Of the eight cases in which injunctions were denied, all involved secondary picketing activity by labor organizations.

One appellate decision of particular interest was the Sixth Circuit's reversal and remand of a district court decision described in the 1988 Annual Report. *Gottfried v. Sheet Metal Workers Local 80 (Limbach Co.)*.[35] In that case the Regional Director's 10(l) petition alleged that the union disclaimed interest in representing the employees of Limbach, and encouraged its members not to work for Limbach, in furtherance of a dispute it had with a Florida corporation wholly owned by the same parent corporation that owned Limbach. In our view, because the Florida corporation was a separate employer within the meaning of the Act, the Union's pressure against Limbach had a secondary object proscribed by Section 8(b)(4)(B) of the Act. The district court had denied the petition for an injunction, concluding that even if the Union's action against Limbach was for the purpose of accomplishing objectives elsewhere against a separate employer, the Union was nonetheless privileged to renounce its 8(f) relationship with Limbach on expiration of the parties' labor agreement. In this regard, the court relied on *John Deklewa & Sons, Inc.*[36]

On appeal, the Sixth Circuit rejected the district court's approach to the case. It reiterated its prior holdings that in passing on a 10(l) petition, a district court "is not required—and, indeed, is not authorized—to make a final determination as to the merits of the underlying unfair labor practice charge. . . . [T]he Regional Director need not convince the court of the validity of the Board's theory of liability as long as the theory is substantial

[35] 876 F.2d 1245 (6th Cir. 1989) (rehearing en banc denied).

[36] 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988)

and not frivolous." 876 F.2d at 1248 (citations omitted). Thus, the court concluded, "Unless the theory of liability is frivolous, the court's power to grant interim relief is undeniable." (Ibid.) The court found no grounds for concluding that the Board's theory was frivolous. In its view, the Board did not decide in *Deklewa* or in *Yellowstone Plumbing*[37] whether *Deklewa* authorizes a party to an 8(f) relationship to "repudiate the bargaining relationship where the object of the repudiation is one forbidden by the National Labor Relations Act itself[.]" 876 F.2d at 1249. Because of the posture of the case on appeal, the court assumed that the object of the Union's termination of its bargaining relationship with Limbach was to coerce the Florida company to recognize the Union. If such was the Union's object, the court noted, "we find it hard to see why the regional director is not correct in suggesting that the unions were violating the secondary boycott provisions of the National Labor Relations Act." Id. at 1250. Finally, the court noted that even if the Board should ultimately determine that the union had not violated the Act by its conduct, "that would not in itself suggest that the district court never possessed authority to issue a preliminary injunction." (Ibid.) Concluding that the Regional Director's theory of the case was sufficiently substantial to give the district court jurisdiction to consider the petition for interim relief, the circuit court reversed and remanded the case.

[37] 286 NLRB 993 (1987).

IX

Contempt Litigation

One recurrent problem in contempt cases involving unlawful reserve gate picketing is that evidence of "gate contamination" begins to surface for the first time during discovery proceedings. Much of this evidence is produced seemingly as an afterthought by the respondent union and, though it can sometimes be excluded at trial on hearsay or other grounds, it often proves troublesome to the Board, resulting occasionally in our having to withdraw contempt allegations concerning one or more jobsites. A novel solution to this problem was incorporated into a contempt settlement in a recent hotly contested contempt proceeding brought by the Board against the Philadelphia Building and Construction Trades Council (3d Cir. No. 88–3495). The settlement contained some conventional remedies imposed on recidivist violators—a substantial fine was assessed against the BCTC and prospective fines against BCTC were increased to $100,000 per violation and $10,000 per day—but the settlement also provided some novel remedies that are intended to curb future improper reserve gate picketing. According to the settlement BCTC must:

- Instruct all business representatives and pickets that in the event contamination of the neutral gate is observed, documentation of such contamination must be secured and communicated, in writing, to the primary employer. The primary employer shall thereafter be given 36 hours to remedy the contamination and reestablish the gates, during which time no neutral gate picketing may occur.
- Take steps to assure that no neutral gate picketing shall commence unless and until the chief officer of BCTC (business manager) visits the affected jobsite and approves neutral gate picketing in writing.
- Take steps to assure that no picketing at all shall occur unless a BCTC business representative is present on the picket line. If the BCTC business representative is required to leave the site, the picket line must be pulled.

Two cases involving alter ego and successor issues processed during the fiscal year are also of some interest. In *NLRB v. Peng Teng*, No. 86–4044 (2d Cir.), the Board alleged that a restaurant formed at a different location (J. Sung Dynasty) was the alter ego of the respondent named in the underlying case (Peng Teng)

and thereby liable to pay backpay owed by Peng Teng resulting from Peng Teng's prior unfair labor practices. The Board also named individual officers of both corporations as contemnors. Although backpay had not yet been liquidated, the Board argued that a supplemental backpay judgment was not required because the parties had agreed on the amounts owed. See *NLRB v. Gentzler Tool & Die*, 126 LRRM 3318, 3326–3327 (S.M. Rept.), affd. 126 LRRM 3360 (6th Cir. 1987); *Fleming v. Warshawsky*, 123 F.2d 622, 625 (7th Cir. 1941). After extensive discovery and pretrial proceedings, the parties entered into a settlement agreement, calling for backpay payments in installments over a 5-month period and totaling $760,000. Personal guarantees for the backpay were given by the named individual officer-respondents. Payments were made in full and on a timely basis.

In *NLRB v. Laborers*, 882 F.2d 949 (5th Cir.), the court, reversing the Special Master, found that Local 350 was the successor to Local 38 and therefore liable to pay a liquidated backpay judgment owed by Local 38, and that the Laborers and a named vice president of the International were also in civil contempt for having aided and abetted Local 38's avoidance of the judgment. Specifically, the court found that Local 38 filed for Chapter 7 bankruptcy because of the court's December 17, 1984 backpay judgment and that simultaneously therewith, and in response to the pending bankruptcy, the International created a new local (Local 350) and transferred to it the membership of Local 38 as well as the right to administer contracts previously administered by Local 38; that there was a substantial overlap of officers, agents, and employees between the two locals; and that the two locals had the same work jurisdiction and were governed by the same local constitution.

In finding Local 350 to be the successor of Local 38, the court distinguished prior cases,[1] which held that successorship determinations must be made by the Board in the first instance, not in contempt proceedings, stating that this case fell within the "clear case" exception to that doctrine (882 F.2d at 953). In concluding that the International and its vice president were aiders and abetters to the contumacy, the court noted that although the ultimate decision to file for bankruptcy was made by Local 38, the International was aware of and could have overruled this decision under powers invested to it by the International constitution. It further rejected Respondents' contention that unlawful acts had to have been committed in order to establish a conspiracy, ruling that even in the absence of such unlawful acts, "it is contempt to act solely for the purpose of evading a judgment" (882 F.2d at 954). Finally, it rejected the contention that the Board was es-

[1] *NLRB v. Gamco Industries*, 820 F.2d 289 (9th Cir. 1987); *Great Lakes Chemical Corp. v. NLRB*, 746 F.2d 334 (6th Cir. 1984).

topped from attacking the Local 38 bankruptcy because it had not raised this issue before the bankruptcy court.

The court held that by aiding and abetting Local 38's avoidance of the judgment, the International and its vice president became jointly and severally liable for the amount of damages resulting from the contumacious conduct. It ordered the parties to bargain in good faith to determine this amount and held open the possibility of a supplemental hearing before a Special Master if the issue was not resolved voluntarily.

X

Special and Miscellaneous Litigation

A. Litigation Involving the Board's Jurisdiction

In *Conger v. Electrical Workers IBEW Local 199*,[1] the District Court for the Middle District of Florida dismissed a request for declaratory relief, ruling that it lacked subject matter jurisdiction to review a Board representation determination. The Board had found that a newly hired group of business technicians and warehousemen were accreted, or absorbed, into an existing bargaining unit at United Telephone Company of Florida subsequent to the disbanding of the employing subsidiary. An employee group filed suit seeking a declaration that, inter alia, the Board had violated their constitutional fifth amendment due-process right by conducting the representation proceedings without granting them notice and an opportunity to be heard. The employees also averred that the Board's decision accreting these employees into an existing bargaining unit violated their rights under Section 7 of the Act to refrain from compulsory unionization, as well as their first amendment rights of free association. In granting the Board's motion to dismiss, the court observed that Board discretion in determining an appropriate bargaining unit is normally not reviewable unless it is related to a final order in an unfair labor practice action. The court pointed out that Section 7 rights are limited by the principle of exclusive representation as set forth at Section 9(a) of the Act. Regarding the first amendment argument, the court noted that the Board's decision does not require the employees to become members of the union. It then concluded that on the basis of the principle of majority rule, combined with the union's corresponding duty of fair representation, the first amendment claim fails. As a final matter, the court rejected the fifth amendment allegation finding no invasion of a property or liberty interest protected by a guarantee of due process.

Teamsters Local 776 v. Rite Aid Corp.[2] presented conflicting Board and arbitral decisions in a representation dispute. The employer Rite Aid had consolidated at a new location certain job functions previously done at regional facilities. Employees repre-

[1] Case No. 88-143 Civ-FTM-10(c).
[2] Civil No. 89-0015 (M.D.Pa.).

sented by Teamsters Local 776 (who had previously performed the work) were transferred to other jobs within the Teamsters unit at the regional facility, and the work at the new centralized facility was performed by newly hired unrepresented employees. The arbitrator upheld the resulting grievances, finding that Rite Aid had violated the union's collective-bargaining agreement by failing to apply it to the new employees. Rite Aid thereupon filed a unit clarification petition with the Board, which subsequently ruled that the newly hired employees were not part of the Teamsters bargaining unit. Prior to the issuance of the Board decision, the union sought judicial enforcement of the arbitration award. Relying on *Carey v. Westinghouse Electric Corp.*,[3] the court held that the superior authority of the Board takes precedence over an arbitration award. The court also noted with approval the Board's longstanding refusal to defer to arbitration proceedings on issues of representation, including issues of accretion and appropriate bargaining units. The court rejected the union's attempt to distinguish *Carey* by asserting that the underlying dispute was decided on contractual grounds and hence did not involve a representation issue. The court found the dispute raised representational issues; it refused to enforce the conflicting arbitration award, and dismissed the union's complaint.

In *Goethe House New York v. NLRB*,[4] the Second Circuit reversed a district court order enjoining a Board representation election. The employer was under contract with the foreign office of the Federal Republic of Germany "to promote German culture around the world." All funding came directly from the West German government. The foreign office regulated the number, wages, and duties of the employees. District 65, UAW filed a petition with the Board seeking to represent a unit encompassing non-German national employees,[5] specifically a proposed unit comprised of a bookkeeper, assistant librarian, administrative assistant, secretary, messenger, custodian, and a maintenance worker. The Board rejected Goethe House's assertion that the Board was without jurisdiction under the Foreign Sovereign Immunities Act (FSIA) of 1976 and ordered a representation election be conducted. The Board decided that the employer's total budget of $1 million in the United States and the nature of its operations (which were similar to a library, foundation, or educational institution) demonstrated a "substantial" effect on commerce and established jurisdiction under Section 2(6) and (7) of the Act. The Board also rejected Goethe House's claim that its status as a foreign instrumentality excluded it from coverage under the Act, ruling that the employer did not come within any express statutory exclusion within Section 2(2) of the Act. The

[3] 375 U.S. 261 (1964).
[4] 869 F.2d 75.
[5] German citizens were represented by a German union under German law.

Board found controlling its decision in *State Bank of India I*,[6] in which the Board considered both the policy of the Act and public policy with respect to foreign sovereign immunity and found no justification to decline jurisdiction over an employer that is an "'instrumentality' of a foreign state . . . in cases affecting employees in our own country whose employer engages in commercial activity which meets the Board's jurisdictional standards for such enterprises."

Goethe House filed a complaint in district court against the Board, claiming that the Board had exceeded its statutory authority by exercising jurisdiction over Goethe House, and that the Board's action was contrary to the FSIA. A preliminary injunction was granted by the district court enjoining the Board from conducting an election. The court based its jurisdiction on *McCulloch v. Sociedad Nacional de Marineros*[7] finding a conflict between the Board's acts and the "German government's employment objectives in implementing cultural foreign policy." The Second Circuit reversed, finding that the district court lacked jurisdiction to enjoin the Board proceeding. The court of appeals quickly disposed of Goethe House's reliance on *Leedom v. Kyne*,[8] finding that the *Kyne* exception to the rule of nonreview applies only when the Board violates a specific provision of the NLRA, and that no such showing was made here. The court observed that in *McCulloch*, district court jurisdiction was found when the Board ordered an election where an American union sought certification as the representative of almost exclusively Honduran crewmembers represented by a Honduran union on ships owned by a Honduran corporation. The Second Circuit ruled that because the union in this case was not attempting to organize German employees, and that a union certification would not encroach on the membership of the German union, nor violate German law, *McCulloch* was inapplicable. The Second Circuit further commented that it failed to see how certification of the UAW would impede Goethe House's "implementation of West German cultural policy." The final feature of this case that the court found distinguishes it from *Kyne* and *McCulloch* is that in those decisions the lawsuit was union initiated, while here the action was filed by Goethe House. The Second Circuit noted that Goethe House can always obtain indirect review of the representation decision by refusing to bargain with the union if it is certified and then seeking review in a court of appeals under Section 10(f) of the Act. Thus, because the employer can ultimately seek indirect review, there was no "warrant" for the district court to engage in such an extraordinary assertion of its authority over the Board.

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[6] 229 NLRB 838, 842 (1977).
[7] 372 U.S. 10 (1963).
[8] 358 U.S. 184 (1958).

B. Rulemaking Litigation

In a decision later reversed on appeal, *American Hospital Assn. v. NLRB*,[9] the District Court for the Northern District of Illinois reviewed the Board's Final Rule[10] defining appropriate bargaining units in the health care industry, and enjoined the Rule from taking effect. The Rule establishes that, absent extraordinary circumstances, the eight units appropriate for the purposes of collective bargaining in acute-care hospitals are registered nurses, physicians, all other professionals, technical employees, skilled maintenance workers, business office clericals, service and other nonprofessional employees except guards, and guards.

After examining the statutory language and legislative history of the Labor Act, the district court held that the Board "is not foreclosed from rule-making in fulfilling its 9(b) charge" to "decide [the appropriate unit] in each case." However, the district court concluded that the Board lacked authority to craft a rule that "predetermines units" in the health care industry because of the congressional admonition against undue proliferation of bargaining units in that industry. The district court understood the congressional admonition to mean that "when the Board takes action or crafts policy with respect to bargaining units involving health care employees, it must use the means least likely to cause unit proliferation to achieve their objective." Although the district court agreed with the Board that the eight units are appropriate and in many instances may match the natural divisions among the employees in health care institutions, it added that it could envision hospitals in which a smaller number of units would be "equally reasonable." The district court concluded that the Rule "encourages, and perhaps coerces, fragmentation of the labor force within particular health care facilities." Accordingly, the district court held that the Board's Rule was inconsistent with Congress' intent to avoid undue proliferation because, in the district court's view, the Rule mandates "automatic fragmentation of the workforce into eight units" in a unique industry "where the employees' work environment varies widely."

On appeal, the Seventh Circuit issued a decision to vacate the preliminary injunction with direction to enter judgment for the Board. The court of appeals initially observed that, in making unit determinations, the precise balance among competing interests is not spelled out in the statute; "it is for the Board to decide." The court concluded, moreover, that the Board's rulemaking power in Section 6 of the Act is sufficiently broad to include authority to determine appropriate units in the acute-care hospital industry. Although Section 9(b) requires the Board to

[9] 718 F.Supp. 704, reversed 899 F.2d 651 (7th Cir. 1990).
[10] 54 F.R. 16336–16348.

decide the appropriate unit "in each case," the court found that expression not clearly defined in the Act, and held that "case" can be an industry or, as here, a subset or submarket of an industry; it need not be a dispute between a particular employer and union. In view of the legislative history of the Act, the court concluded that the "in each case" proviso appears to mean only that unit determination is a task for the Board rather than for either Congress or the employees themselves. The court also looked at the proviso in the committee reports accompanying the 1974 amendments to the Act, which cautioned the Board to give due consideration to preventing proliferation of bargaining units in the health care industry. The court rejected the suggestion that the congressional admonition must defeat the Board's Rule, noting that "proliferation" had always been used in reference to finer divisions of the health care work force than the eight in the rule under challenge. The court further observed that the only alternative rule proposed by the hospital industry would be one that did no more than restate the minimum of three units (professional, nonprofessional, and guards) required by the Act. The court thus upheld the Board's Rule finding that the Board had done a responsible job in weighing the conflicting interests, and that there are no statutory obstacles to its application to the hospital industry.

C. FOIA Litigation

In *Alan P. Strang v. Rosemary Collyer*,[11] the district court granted the General Counsel's Motion for Summary Judgment, finding that the documents Strang sought under the Freedom of Information Act (FOIA)[12] are privileged from disclosure under the deliberative process privilege and the work product protection incorporated in exemption 5 of the FOIA. The court noted that Strang sought "all notes, documents, memoranda, reports, transcripts, correspondence and other tangible materials relating to the General Counsel's position with regard to the . . . petition for certiorari in *Communications Workers v. Beck*."[13] The court then ruled, contrary to Strang's contention, that there are no material facts in dispute and that the *Vaughn* index of documents withheld is sufficiently specific to overcome the Board's burden of demonstrating the applicability of the claimed exemptions. On the merits, the court held that the requested materials, including the underlying legal research and memoranda concerning changes made in the draft of the Board's amicus brief, the interagency and intraagency memoranda, and the notes of meetings are all predecisional and deliberative and accordingly are exempt from disclosure under the FOIA. In so deciding, the court found

[11] 710 F.Supp 9 (D.D.C.), affd. 899 F.2d 1268 (D.C. Cir. 1990).
[12] 5 U.S.C. § 552.
[13] 108 S.Ct. 2641 (1989).

that the drafts and related material are predecisional in that "they show the shaping of the Board's position regarding the petition for certiorari in the *Beck* case." The court also viewed the Board members' analyses of the issues and their recommendations regarding the position to be taken by the Board in *Beck* to be "predecisional in that they were prepared before a final position was taken by the NLRB and before a first draft of the Board's *amicus* brief was composed." Further, the court stated that the requested drafts and related material are exempt as deliberative because "they reflect the agency's decision-making process and their disclosure would injure the quality of agency decisions." Indeed, the court found that "[g]iven their role in the NLRB's decision making process [the] memoranda are exactly the type of records the deliberative process privilege was intended to protect." Finally, the notes taken at meetings were found to reveal the exchange of opinions among the agency personnel and to be "part of the deliberative process in arriving at the final position taken in the *Beck* case." The court, therefore, found that the Board had met its burden in establishing that the documents were exempt under the deliberative process privilege.

The court next held that the meeting notes, the intraoffice memoranda, and the handwritten documents containing legal research were also exempt as attorney work product. Because the "purpose of the meetings was to formulate and prepare the position of the NLRB in response to the Supreme Court's request," the notes taken in the meetings reflecting the agency's litigation strategy and the intraoffice memoranda prepared in contemplation of the litigation were determined to be protected from disclosure as work product. In addition, the court held that the handwritten notes of legal research are similarly exempt because they show the shaping of the Board's legal theories and were developed in contemplation of litigation.

D. Miscellaneous Litigation

In *Sheet Metal Workers Local 20 v. Baylor Heating*,[14] the Seventh Circuit affirmed the district court's order enforcing an arbitration award obtained pursuant to an interest arbitration clause in an 8(f) prehire agreement. The award required a construction industry employer to sign a new agreement with terms similar to the old contract. The court of appeals initially determined that there existed district court jurisdiction over the disputed arbitration award because the case was "primarily contractual" in that it involved the company's contractual duty to arbitrate. It also granted the Board's motion to intervene on appeal, noting that there was pending before the Board related unfair labor practice charges on the issue of whether the union violated the Act by

[14] 877 F.2d 547.

enforcing the interest arbitration clause. The court recognized that there might be a conflict between a court and a Board decision in these circumstances. However, the court found it imperative to avoid further delay in resolving the labor dispute, and denied the Board's request for a stay of the appeal until the Board could conclude its proceeding. The court next looked to the terms of the original prehire contract to decide whether the parties' dispute was arbitrable. The relevant clause provided that "any controversy or dispute arising out of the failure of the parties to negotiate a renewal of this Agreement" could be submitted to arbitration. The court concluded that the matter was arbitrable because the company's actions in unilaterally repudiating the agreement and refusing to negotiate a renewal fell within the scope of the broad language of the contract.

Further, the court rejected the company's argument that the interest arbitration clause is "void . . . and unenforceable" because it is contrary to national labor policy as set forth in *Deklewa*.[15] The court found that *Deklewa* did not control an "analysis of the validity of this interest arbitration clause" because *Deklewa* set forth the Federal labor policy of when a party may terminate an 8(f) agreement and "did not . . . involve the interpretation of an interest arbitration clause." The court acknowledged that the Board wanted the court to stay its hand "precisely because the Board wanted to consider the effect of an interest arbitration clause on *Deklewa*." However, the court concluded that it was unnecessary to determine whether *Deklewa* expresses the current law governing repudiation of prehire agreements. "Neither *Higdon*[16] nor *Deklewa* control when the parties voluntarily agree to a broad interest arbitration clause with an automatic renewal provision." The court held that there was no public policy that "prevents employers and unions from voluntarily agreeing to include an interest arbitration clause in a prehire agreement," and "[no] public policy prohibits an arbitrator from enforcing such a . . . clause." The court thus enforced the arbitrator's award in light of the contract's automatic renewal provisions and the broad interest arbitration clause. However, it also affirmed the district court's conclusion that the arbitrator was prohibited from imposing an interest arbitration clause on the parties "against their will" in the new contract.

The issue on appeal in *NLRB v. Florida Department of Business Regulation*[17] was whether the district court properly granted an order sought by the Board enjoining the State's Department of Business Regulation from prohibiting a union representing the jai alai players from striking without honoring the State's 15-day notice provision. The Eleventh Circuit affirmed the district

[15] *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 109 S.Ct. 222.

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

[17] 868 F.2d 391 (11th Cir.).

court, concluding that Section 7 of the Act encompasses the right to strike and therefore preempts the States from regulating the strike conduct of groups over which the NLRB has asserted jurisdiction, jai alai players being such a group. The court concluded that because the notice provision effectively eliminated the players' right to strike, it was in direct conflict with Section 7 of the Act and, therefore, was preempted. The court also found that because there was no evidence of actual or threatened imminent public harm by the strikers, the State's police power to enjoin a strike was not applicable.

In *Boilermakers Local 6 v. NLRB*,[18] the General Counsel had moved to withdraw an administrative unfair labor practice complaint after a hearing had opened before an administrative law judge, but before evidence (other than the formal papers) had been submitted to the administrative law judge. The judge denied the motion to withdraw and the Board reversed, concluding that neither the administrative law judge nor the Board has the authority to review the General Counsel's decision to withdraw a complaint after the hearing has commenced but before evidence has been introduced on the merits. The union charging party sought review of the Board's decision in the Ninth Circuit under Section 10(f) of the Act. The court initially noted that the Board did not review the merits of the administrative law judge's decision, but held instead that the General Counsel's decision to withdraw the complaint was an act of nonreviewable prosecutorial discretion under Section 3(d) of the Act. The court further observed the settled principle that the Board is entitled to deference with regard to its interpretation of the NLRA, as long as its interpretation is rational and consistent with the statute. The court of appeals found instructive its prior holding in *Machinists (Lockheed Missiles) v. Lubbers*,[19] "strongly suggest[ing]" that the General Counsel always exercises nonreviewable prosecutorial discretion where, as here, he withdraws a complaint because he no longer believes the evidence supports that complaint. The court also found persuasive the Supreme Court's ruling in *Cuyahoga Valley Railway Co. v. United Transportation Union*[20] that the Secretary of Labor enjoys nonreviewable prosecutorial discretion to withdraw a citation even after the Occupational Safety and Health (OSH) Commission has commenced a hearing. The Ninth Circuit found that reasoning applicable here inasmuch as the division between the Board and the General Counsel parallels that between the OSH Commission and the Secretary of Labor. Finally, the court noted that the Board's ruling was consistent with the congressional policy underlying the Labor Act favoring the prosecutorial independence of the Board's General Counsel and disfavoring use of the NLRB as a forum for private two-party

[18] No. 87-7494 (9th Cir.).
[19] 681 F.2d 598 (9th Cir. 1982), cert. denied 459 U.S. 1201 (1983).
[20] 474 U.S. 3 (1985).

litigation. Accordingly, for all these reasons, the court dismissed the union's petition to review.

In another case[21] the Iowa Child Support Recovery Unit (CSRU) served the Board with a notice of garnishment in order to obtain backpay for a discriminatee's asserted delinquent child support payments. After removing the dispute to Federal district court, the Board moved to dismiss the state law garnishment, asserting that the award of backpay was not a private judgment, and the Board had not consented to garnishment. The district court recognized that there existed a significant interest in ensuring satisfaction of child support obligations. Nevertheless, the court found that the Federal interest in the efficacy of the Board's compliance procedures prevails especially where, as here, the CSRU will be free to garnish the award after it has been paid over to the recipient. The court also noted settled law that Board backpay awards do not become the property of the discriminatee until he or she actually receives it, and that NLRB awards are meant to effectuate a public, not a private, interest. The court thus dismissed the garnishment, being persuaded that the Board had not waived its sovereign immunity to allow garnishment actions against its awards, and in view of the unique function such remedies serve in furthering the public interest.

E. Bankruptcy Litigation

In *In re Brinke Transportation*,[22] the trustee in a Chapter 7 liquidation objected to the priority claim of the Board for backpay owed by the debtor. The trustee sought to have the Board's claim expunged as overlapping claims of other creditors, or at least denied priority status for distribution. The bankruptcy court agreed with the Board that a substantial part of its claim was entitled to administrative priority pursuant to Section 503(b)(1)(A) of the Bankruptcy Code because that backpay for the debtor's unfair labor practice conduct fell within the "actual, necessary costs and expenses of preserving the estate." The court initially recognized that costs must generally be incurred by the debtor postpetition in order for them to constitute administrative priority claims. Although the actual unfair labor practice conduct in this case commenced prepetition, the court held that "the consideration for backpay liability is tendered on a daily basis, so that the courts apportion administrative priority to all backpay liability incurred after the petition is filed." The court also granted the Board's request for priority for part of its backpay remedy pursuant to Sections 507(a)(3) and 507(a)(4) of the Code relating to lost wages of those employees who worked for the debtor shortly before the petition was filed and for contributions to the employee benefit plan arising from services rendered within 180

[21] *Lenz v. Lenz*, No. C-89-4010 (N.D.Ia.).
[22] Case No. 87-03785 (Bankr.D.N.J.).

days of the petition in bankruptcy. The court ordered that the claims of the Board be liquidated by the Board with final payment to be made under the court's supervision and that, to the extent that claims of other creditors were duplicative of Board claims, the other parties' claims were stricken leaving only the Board claims on behalf of the employees. On appeal, in an unpublished opinion, the U.S. District Court for the District of New Jersey affirmed the decision of the bankruptcy court.[23]

In *In re Goodman*,[24] the General Counsel issued unfair labor practice complaints against James Goodman and Goodman Automatic Sprinkler Corp. alleging them as alter egos and successors of two defunct companies that violated the NLRA. Goodman obtained an order from the Bankruptcy Court for the Western District of New York prohibiting the Board from proceeding on the ground that Goodman had been discharged under Chapter 7 of the Bankruptcy Code under the "fresh start" policy of 11 U.S.C. § 727. On appeal, the district court ruled that Goodman would not be shielded from liability under the NLRA if he was an alter ego and, further, that the case should be remanded to the bankruptcy court on the issue of whether Goodman and Goodman Sprinkler were, in fact, alter egos to the defunct companies that committed the unfair labor practices. The Board appealed contending that it has primary jurisdiction over the successorship issue. The Second Circuit considered the issue of whether the Board or the bankruptcy court should decide Goodman's alter ego status under the NLRA. The court first held that Goodman's Chapter 7 discharge does not protect him from NLRA liability if he and Goodman Sprinkler are found to be successors or alter egos of the defunct companies. It was noted that Goodman Sprinkler did not independently obtain a discharge in bankruptcy, and that the Board was pursuing Goodman only for conduct engaged in *after* his discharge. Moreover, the court of appeals found that the Board has primary jurisdiction over the successorship issue and, accordingly, the bankruptcy court lacked jurisdiction to decide the issue. The court found that the case did not fall within the "collateral issue" exception to the Board's primary jurisdiction because no independent Federal remedy existed in bankruptcy to which the successorship issue was collateral. Because the scope of Goodman's discharge was already decided, no bankruptcy issue depended on resolution of the successorship status. Accordingly, the court of appeals ordered that the Board proceeding be allowed to go forward.

In *In re Shortway Northstar*,[25] the debtor objected to the claim of the Board and moved that it be expunged. The debtor also contended that liquidation by the Board of the claim would unduly delay confirmation of the plan and, accordingly, that it

[23] No. 89-1778 (D.N.J.).
[24] 873 F.2d 598 (2d Cir.).
[25] 99 B.R. 555 (Bankr. S.D.N.Y.).

would be less expensive and time consuming for the bankruptcy court to liquidate the Board's claim. The debtor asserted that unless the bankruptcy court liquidated the Board's claim the debtor's reorganization would fail. The bankruptcy court held, pursuant to the doctrine of primary jurisdiction, that the Board is the entity empowered by Congress to determine the appropriate remedy to cure violations of the National Labor Relations Act. In so holding, the court followed the Supreme Court's decision in *Nathanson v. NLRB*,[26] that the Board is the exclusive forum for liquidating claims for backpay under the Labor Act and that the Board should have a "reasonable time" to effect such liquidation.[27] The bankruptcy court further held that the reasonable time would not be shortened to accommodate the timetable of the debtor's plan stating "[t]he Board's functions are not to be taken so lightly. A debtor should not be able to structure its plan negotiations so that the Congressional mandate is incapable of being performed."[28] The court also noted that it would be an abuse of discretion for it to attempt to resolve issues before the Board because of the danger that bankruptcy court estimation of the Board's claim could lead to a result inconsistent with the Board's resolution of the same issues. Accordingly, the court stayed the debtor's objection to the Board's proof of claim and ordered that the Board be given a reasonable time to liquidate the disputed claim.

[26] 344 U.S. 25, 30 (1952).
[27] Id. at 30.
[28] 99 B.R. at 561.

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 1989[1]

	Total	Identification of filing party					
		AFL-CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
All cases							
Pending October 1, 1988	*21,696	9,002	2,214	788	1,351	6,771	1,570
Received fiscal 1989	40,878	15,136	4,189	1,023	1,645	15,083	3,802
On docket fiscal 1989	62,574	24,138	6,403	1,811	2,996	21,854	5,372
Closed fiscal 1989	37,993	14,379	4,029	851	1,651	14,140	2,943
Pending September 30, 1989	24,581	9,759	2,374	960	1,345	7,714	2,429
Unfair labor practice cases[2]							
Pending October 1, 1988	*18,769	7,666	1,669	739	1,117	6,293	1,285
Received fiscal 1989	32,401	10,768	2,562	861	1,172	13,679	3,359
On docket fiscal 1989	51,170	18,434	4,231	1,600	2,289	19,972	4,644
Closed fiscal 1989	29,910	10,289	2,405	720	1,192	12,805	2,499
Pending September 30, 1989	21,260	8,145	1,826	880	1,097	7,167	2,145
Representation cases[3]							
Pending October 1, 1988	*2,668	1,276	528	46	221	422	175
Received fiscal 1989	7,908	4,227	1,588	146	418	1,219	310
On docket fiscal 1989	10,576	5,503	2,116	192	639	1,641	485
Closed fiscal 1989	7,567	3,957	1,587	118	417	1,176	312
Pending September 30, 1989	3,009	1,546	529	74	222	465	173
Union-shop deauthorization cases							
Pending October 1, 1988	*56	—	—	—	—	56	—
Received fiscal 1989	185	—	—	—	—	185	—
On docket fiscal 1989	241	—	—	—	—	241	—
Closed fiscal 1989	159	—	—	—	—	159	—
Pending September 30, 1989	82	—	—	—	—	82	—
Amendment of certification cases							
Pending October 1, 1988	*19	12	1	0	4	0	2
Received fiscal 1989	32	16	4	0	10	0	2
On docket fiscal 1989	51	28	5	0	14	0	4
Closed fiscal 1989	34	19	4	0	8	0	3
Pending September 30, 1989	17	9	1	0	6	0	1
Unit clarification cases							
Pending October 1, 1988	*184	48	16	3	9	0	108
Received fiscal 1989	352	125	35	16	45	0	131
On docket fiscal 1989	536	173	51	19	54	0	239
Closed fiscal 1989	323	114	33	13	34	0	129
Pending September 30, 1989	213	59	18	6	20	0	110

[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 higher figures than reported pending September 30, 1988, 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 1989[1]

	Total	Identification of filing party					
		AFL-CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
CA cases							
Pending October 1, 1988	*14,955	7,523	1,656	729	1,080	3,967	0
Received fiscal 1989	22,345	10,692	2,541	839	1,131	7,142	0
On docket fiscal 1989	37,300	18,215	4,197	1,568	2,211	11,109	0
Closed fiscal 1989	20,987	10,133	2,387	695	1,142	6,630	0
Pending September 30, 1989	16,313	8,082	1,810	873	1,069	4,479	0
CB cases							
Pending October 1, 1988	*3,166	132	13	9	22	2,325	665
Received fiscal 1989	7,940	50	16	8	19	6,537	1,310
On docket fiscal 1989	11,106	182	29	17	41	8,862	1,975
Closed fiscal 1989	7,403	128	15	11	26	6,174	1,049
Pending September 30, 1989	3,703	54	14	6	15	2,688	926
CC cases							
Pending October 1, 1988	*364	3	0	0	10	1	350
Received fiscal 1989	1,471	6	1	13	12	0	1,439
On docket fiscal 1989	1,835	9	1	13	22	1	1,789
Closed fiscal 1989	923	7	0	12	12	1	891
Pending September 30, 1989	912	2	1	1	10	0	898
CD cases							
Pending October 1, 1988	*115	5	0	0	2	0	108
Received fiscal 1989	254	13	2	0	5	0	234
On docket fiscal 1989	369	18	2	0	7	0	342
Closed fiscal 1989	251	14	2	0	7	0	228
Pending September 30, 1989	118	4	0	0	0	0	114
CE cases							
Pending October 1, 1988	*40	2	0	0	2	0	36
Received fiscal 1989	88	4	1	0	1	0	82
On docket fiscal 1989	128	6	1	0	3	0	118
Closed fiscal 1989	69	5	1	0	0	0	63
Pending September 30, 1989	59	1	0	0	3	0	55
CG cases							
Pending October 1, 1988	*11	0	0	0	0	0	11
Received fiscal 1989	40	1	0	0	0	0	39
On docket fiscal 1989	51	1	0	0	0	0	50
Closed fiscal 1989	21	0	0	0	0	0	21
Pending September 30, 1989	30	1	0	0	0	0	29
CP cases							
Pending October 1, 1988	*118	1	0	1	1	0	115
Received fiscal 1989	263	2	1	1	4	0	255
On docket fiscal 1989	381	3	1	2	5	0	370
Closed fiscal 1989	256	2	0	2	5	0	247
Pending September 30, 1989	125	1	1	0	0	0	123

[1] See Glossary of terms for definitions.

* Revised, reflects higher figures than reported pending September 30, 1988, 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 1989[1]

	Total	Identification of filing party					
		AFL–CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
RC cases							
Pending October 1, 1988	*2,066	1,273	527	46	219	1	—
Received fiscal 1989	6,376	4,227	1,588	145	416	0	—
On docket fiscal 1989	8,442	5,500	2,115	191	635	1	—
Closed fiscal 1989	6,078	3,957	1,587	118	416	0	—
Pending September 30, 1989	2,364	1,543	528	73	219	1	—
RM cases							
Pending October 1, 1988	*175	—	—	—	—	—	175
Received fiscal 1989	310	—	—	—	—	—	310
On docket fiscal 1989	485	—	—	—	—	—	485
Closed fiscal 1989	312	—	—	—	—	—	312
Pending September 30, 1989	173	—	—	—	—	—	173
RD cases							
Pending October 1, 1988	*427	3	1	0	2	421	—
Received fiscal 1989	1,222	0	0	1	2	1,219	—
On docket fiscal 1989	1,649	3	1	1	4	1,640	—
Closed fiscal 1989	1,177	0	0	0	1	1,176	—
Pending September 30, 1989	472	3	1	1	3	464	—

[1] See Glossary of terms for definitions.

* Revised, reflects higher figures than reported pending September 30, 1988, 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 1989

	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	22345	100.0
8(a)(1)	3450	15.4
8(a)(1)(2)	227	1.0
8(a)(1)(3)	8248	36.9
8(a)(1)(4)	165	0.7
8(a)(1)(5)	6796	30.4
8(a)(1)(2)(3)	219	1.0
8(a)(1)(2)(4)	9	0.0
8(a)(1)(2)(5)	102	0.5
8(a)(1)(3)(4)	535	2.4
8(a)(1)(3)(5)	2257	10.1
8(a)(1)(4)(5)	25	0.1
8(a)(1)(2)(3)(4)	13	0.1
8(a)(1)(2)(3)(5)	145	0.6
8(a)(1)(2)(4)(5)	4	0.0
8(a)(1)(3)(4)(5)	116	0.5
8(a)(1)(2)(3)(4)(5)	34	0.2
Recapitulation[1]		
8(a)(1)[2]	22345	100.0
8(a)(2)	753	3.4
8(a)(3)	11567	51.8
8(a)(4)	901	4.0
8(a)(5)	9479	42.4
B. Charges filed against unions under Sec. 8(b)		
Subsections of Sec. 8(b): Total cases	9928	100.0
8(b)(1)	6130	61.7
8(b)(2)	99	1.0
8(b)(3)	247	2.5
8(b)(4)	1725	17.4
8(b)(5)	5	0.1
8(b)(6)	5	0.1
8(b)(7)	263	2.6
8(b)(1)(2)	1064	10.7
8(b)(1)(3)	288	2.9
8(b)(1)(5)	4	0.0
8(b)(1)(6)	6	0.1
8(b)(2)(3)	5	0.1
8(b)(2)(5)	2	0.0
8(b)(2)(6)	1	0.0
8(b)(1)(2)(3)	66	0.7
8(b)(1)(2)(5)	2	0.0
8(b)(1)(2)(6)	6	0.1
8(b)(1)(3)(6)	5	0 1
8(b)(2)(3)(5)	1	0.0
8(b)(1)(2)(3)(5)	1	0.0
8(b)(1)(2)(3)(6)	3	0.0
Recapitulation[1]		
8(b)(1)	7575	76.3
8(b)(2)	1250	12.6
8(b)(3)	616	6.2
8(b)(4)	1725	17.4
8(b)(5)	15	0.2
8(b)(6)	26	0.3
8(b)(7)	263	2.6

Table 2.—Types of Unfair Labor Practices Alleged, Fiscal Year 1989—Continued

	Number of cases showing specific allegations	Percent of total cases
B1 Analysis of 8(b)(4)		
Total cases 8(b)(4)	1725	100.0
8(b)(4)(A)	87	5.0
8(b)(4)(B)	1304	75.6
8(b)(4)(C)	7	0.4
8(b)(4)(D)	254	14.7
8(b)(4)(A)(B)	63	3.7
8(b)(4)(A)(C)	2	0.1
8(b)(4)(B)(C)	5	0.3
8(b)(4)(A)(B)(C)	3	0.2
Recapitulation[1]		
8(b)(4)(A)	155	9.0
8(b)(4)(B)	1375	79.7
8(b)(4)(C)	17	1.0
8(b)(4)(D)	254	14.7
B2. Analysis of 8(b)(7)		
Total cases 8(b)(7)	263	100.0
8(b)(7)(A)	46	17.5
8(b)(7)(B)	19	7.2
8(b)(7)(C)	183	69.6
8(b)(7)(A)(B)	1	0.4
8(b)(7)(A)(C)	13	4.9
8(b)(7)(A)(B)(C)	1	0.4
Recapitulation[1]		
8(b)(7)(A)	61	23.2
8(b)(7)(B)	21	8.0
8(b)(7)(C)	197	74.9
C. Charges filed under Sec. 8(e)		
Total cases 8(e)	88	100.0
Against unions alone	85	96.6
Against employers alone	3	3.4
D. Charges filed under Sec. 8(g)		
Total cases 8(g)	40	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 1989[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	37	33	—	—	—	33	—	—	—	—	—	—	—
Complaints issued	4,921	3,851	3,027	350	158	—	1	6	2	23	42	49	193
Backpay specifications issued	120	115	90	15	10	—	0	0	0	0	0	0	0
Hearings completed, total	725	635	513	66	6	12	0	1	0	7	5	14	11
Initial ULP hearings	675	597	479	62	6	12	0	1	0	7	5	14	11
Backpay hearings	35	26	24	2	0	—	0	0	0	0	0	0	0
Other hearings	15	12	10	2	0	—	0	0	0	0	0	0	0
Decisions by administrative law judges, total	1,050	713	574	89	7	—	2	1	0	4	7	13	16
Initial ULP decisions	994	674	540	84	7	—	2	1	0	4	7	13	16
Backpay decisions	32	26	24	2	0	—	0	0	0	0	0	0	0
Supplemental decisions	24	13	10	3	0	—	0	0	0	0	0	0	0
Decisions and orders by the Board, total	1,113	907	728	80	14	13	2	2	0	2	17	39	10
Upon consent of parties:													
Initial decisions	89	48	32	10	4	—	0	0	0	0	0	0	2
Supplemental decisions	0	0	0	0	0	—	0	0	0	0	0	0	0
Adopting administrative law judges' decisions (no exceptions filed):													
Initial ULP decisions	256	208	158	28	2	—	1	0	0	2	6	10	1
Backpay decisions	1	1	1	0	0	—	0	0	0	0	0	0	0
Contested:													
Initial ULP decisions	659	573	475	36	6	13	0	1	0	0	11	28	3
Decisions based on stipulated record	17	12	9	2	0	—	0	1	0	0	0	0	0
Supplemental ULP decisions	45	37	26	3	2	—	1	0	0	0	0	1	4
Backpay decisions	46	28	27	1	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 1989[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	1,200	1,150	955	45	150	5
Initial hearings	1,015	989	851	29	109	5
Hearings on objections and/or challenges	185	161	104	16	41	0
Decisions issued, total	1,032	982	812	58	112	13
By Regional Directors	959	916	765	51	100	13
Elections directed	860	820	688	44	88	13
Dismissals on record	99	96	77	7	12	0
By Board	73	66	47	7	12	0
Transferred by Regional Directors for initial decision	4	4	4	0	0	0
Elections directed	3	3	0	0	0	0
Dismissals on record	1	1	0	0	0	0
Review of Regional Directors' decisions: Requests for review received	500	484	401	37	46	5
Withdrawn before request ruled upon	3	3	2	0	1	0
Board action on request ruled upon, total	394	356	294	33	29	3
Granted	48	42	27	6	9	0
Denied	330	302	260	24	18	3
Remanded	16	12	7	3	2	0
Withdrawn after request granted, before Board review	1	1	0	1	0	0
Board decision after review, total	69	62	43	7	12	0
Regional Directors' decisions:						
Affirmed	34	32	25	3	4	0
Modified	17	17	9	2	6	0
Reversed	18	13	9	2	2	0
Outcome:						
Election directed	49	44	31	5	8	0
Dismissals on record	20	18	12	2	4	0

Table 3B.—Formal Actions Taken in Representation and Union Deauthorization Cases, Fiscal Year 1989[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	1,057	979	808	44	127	14
By Regional Directors	342	325	265	16	44	7
By Board	715	654	543	28	83	7
In stipulated elections	663	607	504	25	78	7
No exceptions to Regional Directors' reports	414	398	344	14	40	4
Exceptions to Regional Directors' reports	249	209	160	11	38	3
In directed elections (after transfer by Regional Director)	52	47	39	3	5	0
Review of Regional Directors' supplemental decisions:						
Request for review received	203	194	175	5	14	0
Withdrawn before request ruled upon	1	1	1	0	0	0
Board action on request ruled upon, total	206	186	166	7	13	0
Granted	26	26	23	1	2	0
Denied	177	159	142	6	11	0
Remanded	3	1	1	0	0	0
Withdrawn after request granted, before Board review	0	0	0	0	0	0
Board decision after review, total	0	0	0	0	0	0
Regional Directors' decisions:						
Affirmed	0	0	0	0	0	0
Modified	0	0	0	0	0	0
Reversed	0	0	0	0	0	0

[1] See Glossary of terms for definitions.

Table 3C.—Formal Actions Taken in Amendment of Certification and Unit Clarification Cases, Fiscal Year 1989[1]

Types of formal actions taken	Cases in which formal actions taken	Formal actions taken by type of case	
		AC	UC
Hearings completed	107	5	97
Decisions issued after hearing	115	5	105
By Regional Directors	110	5	100
By Board	6	0	5
Transferred by Regional Directors for initial decision	3	0	2
Review of Regional Directors' decisions:			
Requests for review received	13	1	16
Withdrawn before request ruled upon	0	0	0
Board action on requests ruled upon, total	16	1	14
Granted	8	1	7
Denied	8	0	7
Remanded	0	0	0
Withdrawn after request granted, before Board review	0	0	0
Board decision after review, total	2	0	2
Regional Directors' decisions:			
Affirmed	1	0	1
Modified	1	0	1
Reversed	0	0	0

[1] See Glossary of terms for definitions.

Table 4.—Remedial Actions Taken in Unfair Labor Practice Cases Closed, Fiscal Year 1989[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]9,978	—	—	—	—	—	—	—	—	—	—	—	—
Notice posted	2,960	2,340	1,648	105	8	385	194	620	488	32	2	80	18
Recognition or other assistance withdrawn	25	25	21	0	0	2	2	—	—	—	—	—	—
Employer-dommated union disestablished	11	11	10	0	0	1	0	—	—	—	—	—	—
Employees offered reinstatement	1,888	1,888	1,318	113	5	296	156	—	—	—	—	—	—
Employees placed on preferential hiring list	764	764	553	47	2	108	54	—	—	—	—	—	—
Hiring hall rights restored	150	—	—	—	—	—	—	150	121	4	1	17	7
Objections to employment withdrawn	142	—	—	—	—	—	—	142	114	4	1	17	6
Picketing ended	254	—	—	—	—	—	—	254	251	0	0	3	0
Work stoppage ended	40	—	—	—	—	—	—	40	38	0	0	2	0
Collective bargaining begun	2,879	2,670	2,422	33	4	127	84	209	206	0	0	3	0
Backpay distributed	3,185	2,854	2,390	77	6	248	133	331	258	11	22	32	8
Reimbursement of fees, dues, and fines	1,372	1,085	854	48	3	114	66	287	235	7	22	18	5
Other conditions of employment improved	177	0	0	0	0	0	0	177	176	0	0	0	1
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	4,508	4,508	3,303	93	3	701	408	—	—	—	—	—	—
Accepted	3,388	3,388	2,402	59	0	593	334	—	—	—	—	—	—
Declined	1,120	1,120	901	34	3	108	74	—	—	—	—	—	—
Employees placed on preferential hiring list	583	583	556	10	0	17	0	0	0	0	0	0	0
Hiring hall rights restored	940	—	—	—	—	—	—	940	859	0	0	0	81
Objections to employment withdrawn	16	—	—	—	—	—	—	16	12	0	0	0	4

Table 4.—Remedial Actions Taken in Unfair Labor Practice Cases Closed, Fiscal Year 1989[1]—Continued

Action taken	Total all	Remedial action taken by—											
		Employer						Union					
			Pursuant to—						Pursuant to—				
		[2]Total	Agreement of parties		Recommendation of administrative law judge	Order of—		Total	Agreement of parties		Recommendation of administrative law judge	Order of—	
			Informal settlement	Formal settlement		Board	Court		Informal settlement	Formal settlement		Board	Court
Employees receivmg backpay:													
From either employer or union	19,096	18,888	12,695	395	4	1,560	4,234	208	181	5	0	16	6
From both employer and union	70	68	7	0	0	1	60	2	1	0	0	1	0
Employees reimbursed for fees, dues, and fines:													
From either employer or union	1,048	456	354	1	0	96	5	592	266	0	0	326	0
From both employer and union	152	75	75	0	0	0	0	77	77	0	0	0	0
C. By amounts of monetary recovery, total	$58,057, 778	$57,393,614	$32,879,903	$1,261,264	$150,042	$6,734,491	$16,367,914	$664,164	$209,302	$19,100	0	$150,188	$285,574
Backpay (includes all monetary payments except fees, dues, and fines)	57,582,311	57,003,048	32,797,755	1,237,070	150,042	6,452,618	16,365,563	579,263	156,270	19,100	0	118,319	285,574
Reimbursement of fees, dues, and fines	475,467	390,566	82,148	24,194	0	281,873	2,351	84,901	53,032	0	0	31,869	0

[1] See Glossary of terms for definitions. Data in this table are based on unfair labor practice cases that were closed during fiscal year 1980 after the company and/or union had satisfied all remedial action requirements.

[2] A single case usually results in more than one remedial action; therefore, the total number of actions exceeds the number of cases involved.

Table 5.—Industrial Distribution of Cases Received, Fiscal Year 1989[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	1,587	1,278	927	335	7	4	3	0	2	284	225	8	51	5	0	20
Tobacco manufacturers	8	6	1	5	0	0	0	0	0	2	2	0	0	0	0	0
Textile mill products	243	196	161	32	2	0	1	0	0	46	41	1	4	1	0	0
Apparel and other finished products made from fabric and similar materials	287	236	180	54	1	1	0	0	0	48	37	1	10	1	0	2
Lumber and wood products (except furniture)	418	312	258	51	2	1	0	0	0	99	68	7	24	4	0	3
Furniture and fixtures	330	277	221	56	0	0	0	0	0	49	42	0	7	3	0	1
Paper and allied products	527	461	360	96	4	1	0	0	0	61	52	0	9	2	0	3
Printing, publishing, and allied products	960	747	592	152	2	1	0	0	0	178	128	6	44	8	2	25
Chemicals and allied products	674	562	442	109	10	1	0	0	0	102	70	3	29	3	1	6
Petroleum refining and related industries	161	121	81	31	8	0	1	0	0	37	28	0	9	0	1	2
Rubber and miscellaneous plastic products	439	343	288	54	0	1	0	0	0	91	77	0	14	3	0	2
Leather and leather products	93	71	58	13	0	0	0	0	0	21	17	1	3	0	0	1
Stone, clay, glass, and concrete products	737	582	439	115	16	1	2	0	9	146	107	9	30	7	1	1
Primary metal industries	1,192	1,020	718	297	3	2	0	0	0	164	129	3	32	3	1	4
Fabricated metal products (except machinery and transportation equipment)	1,276	1,035	766	233	22	8	3	0	3	225	166	9	50	8	2	6
Machinery (except electrical)	1,085	890	653	209	19	5	0	0	4	187	139	7	41	3	0	5
Electrical and electronic machinery, equipment, and supplies	737	639	445	189	5	0	0	0	0	93	71	2	20	3	0	2
Aircraft and parts	441	408	242	163	1	2	0	0	0	28	27	0	1	1	0	4
Ship and boat building and repairing	227	205	118	85	2	0	0	0	0	21	15	1	5	0	0	1
Automotive and other transportation equipment	1,030	912	544	359	6	1	0	0	2	111	89	4	18	5	0	2
Measuring, analyzing, and controlling instruments; photographic, medical, and optical goods, watches and clocks	205	158	116	36	4	2	0	0	0	46	42	0	4	0	0	1
Miscellaneous manufacturing industries	335	245	162	70	10	3	0	0	0	84	61	4	19	3	0	3
Manufacturing	12,992	10,704	7,772	2,744	124	34	10	0	20	2,123	1,633	66	424	63	8	94

Table 5.—Industrial Distribution of Cases Received, Fiscal Year 1989[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	66	47	41	6	0	0	0	0	0	17	12	1	4	0	1	1
Coal mining	1,398	1,372	584	268	498	8	3	0	11	26	18	2	6	0	0	0
Oil and gas extraction	39	27	22	2	3	0	0	0	0	10	9	0	1	0	0	2
Mining and quarrying of nonmetallic minerals (except fuels)	157	122	85	14	18	1	0	0	4	34	24	4	6	0	0	1
Mining	1,660	1,568	732	290	519	9	3	0	15	87	63	7	17	0	1	4
Construction	5,526	3,839	2,101	893	516	151	45	0	133	1,659	1,530	71	58	4	4	20
Wholesale trade	2,311	1,696	1,290	366	27	5	0	0	8	575	449	23	103	17	0	23
Retail trade	3,061	2,330	1,732	494	58	3	3	0	40	676	459	46	171	31	0	24
Finance, insurance, and real estate	699	543	385	115	31	10	0	0	2	136	105	3	28	4	0	16
U.S. Postal Service	1,912	1,908	1,351	557	0	0	0	0	0	3	2	0	1	1	0	0
Local and suburban transit and interurban highway passenger transportation	544	383	299	79	4	0	0	0	1	152	132	2	18	4	1	4
Motor freight transportation and warehousing	2,264	1,757	1,259	449	30	5	5	0	9	493	412	24	57	8	1	5
Water transportation	369	344	219	99	14	1	10	0	1	23	17	0	6	0	0	2
Other transportation	329	243	156	71	11	3	1	0	1	81	66	3	12	1	0	4
Communication	943	779	541	218	14	4	1	0	1	153	116	4	33	1	1	9
Electric, gas, and sanitary services	774	592	443	123	23	1	0	0	2	161	146	3	12	3	0	18
Transportation, communication, and other utilities	5,223	4,098	2,917	1,039	96	14	17	0	15	1,063	889	36	138	17	3	42
Hotels, rooming houses, camps, and other lodging places	722	578	423	137	16	1	0	0	1	129	101	7	21	4	2	9
Personal services	280	193	168	24	1	0	0	0	0	82	52	4	26	5	0	0
Automotive repair, services, and garages	342	208	157	50	1	0	0	0	0	126	93	4	29	2	1	5
Motion pictures	225	193	116	64	4	2	1	0	6	30	21	2	7	2	0	0
Amusement and recreation services (except motion pictures)	379	319	190	118	7	0	2	0	2	58	45	2	11	0	0	2
Health services	2,359	1,694	1,350	288	13	3	0	40	0	563	441	23	99	21	7	74
Educational services	228	173	144	25	2	2	0	0	0	50	42	1	7	0	0	5
Membership organizations	712	635	249	349	17	6	3	0	11	57	39	3	15	3	0	17
Business services	1,558	1,214	865	298	27	13	2	0	9	321	272	9	40	6	5	12
Miscellaneous repair services	157	126	96	26	3	0	0	0	1	30	24	0	6	1	0	0
Legal services	45	29	22	6	1	0	0	0	0	16	14	0	2	0	0	0
Museums, art galleries, and botanical and zoological gardens	13	10	7	3	0	0	0	0	0	3	2	0	1	0	0	0

Table 5.—Industrial Distribution of Cases Received, Fiscal Year 1989[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	276	192	170	22	0	0	0	0	0	81	65	3	13	2	0	1
Miscellaneous services	113	94	62	24	7	0	1	0	0	18	17	0	1	0	0	1
Services	7,409	5,658	4,019	1,434	99	27	9	40	30	1,564	1,228	58	278	46	15	126
Public administration	85	57	46	8	1	1	1	0	0	22	18	0	4	2	1	3
Total, all industrial groups	40,878	32,401	22,345	7,940	1,471	254	88	40	263	7,908	6,376	310	1,222	185	32	352

[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 1989[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	101	84	73	11	0	0	0	0	0	16	9	1	6	1	0	0
New Hampshire	75	54	47	5	2	0	0	0	0	19	14	0	5	1	0	1
Vermont	53	45	39	5	0	1	0	0	0	8	5	2	1	0	0	0
Massachusetts	1,183	1,006	697	217	65	22	0	2	3	155	120	4	31	2	0	20
Rhode Island	161	127	92	18	16	1	0	0	0	29	25	0	4	1	0	4
Connecticut	701	615	449	155	4	4	0	0	3	77	60	2	15	3	0	6
New England	2,274	1,931	1,397	411	87	28	0	2	6	304	233	9	62	8	0	31
New York	4,112	3,223	2,082	929	111	45	6	26	24	820	731	22	67	23	1	45
New Jersey	1,524	1,197	775	302	72	29	6	2	11	305	248	12	45	9	2	11
Pennsylvania	2,604	2,061	1,397	474	143	32	4	0	11	516	429	15	72	13	1	13
Middle Atlantic	8,240	6,481	4,254	1,705	326	106	16	28	46	1,641	1,408	49	184	45	4	69
Ohio	2,288	1,838	1,352	365	96	7	8	2	8	416	325	18	73	10	7	17
Indiana	1,248	1,041	755	246	29	6	2	0	3	189	146	11	32	8	0	10
Illinois	2,637	2,096	1,335	528	178	14	4	0	37	520	416	19	85	13	1	7
Michigan	2,327	1,884	1,393	423	44	9	0	0	15	401	306	11	84	14	0	28
Wisconsin	931	706	520	158	17	7	0	0	4	205	157	12	36	10	1	9
East North Central	9,431	7,565	5,355	1,720	364	43	14	2	67	1,731	1,350	71	310	55	9	71
Iowa	299	198	148	46	4	0	0	0	0	98	75	3	20	0	3	0
Minnesota	607	408	264	107	23	6	0	0	8	191	140	9	42	1	0	7
Missouri	1,627	1,110	732	261	59	15	24	1	18	508	454	11	43	7	0	2
North Dakota	39	14	13	1	0	0	0	0	0	23	18	0	5	0	0	2
South Dakota	37	27	23	4	0	0	0	0	0	9	8	0	1	0	0	1
Nebraska	311	279	243	28	3	1	0	0	4	32	24	1	7	0	0	0
Kansas	259	206	143	57	2	0	0	0	4	51	42	1	8	0	0	2
West North Central	3,179	2,242	1,566	504	91	22	24	1	34	912	761	25	126	8	3	14
Delaware	76	59	44	15	0	0	0	0	0	14	13	0	1	1	0	2
Maryland	618	514	339	146	17	1	9	0	2	99	81	2	16	3	0	2
District of Columbia	176	148	118	24	5	1	0	0	0	23	20	0	3	0	0	5

Table 6A.—Geographic Distribution of Cases Received, Fiscal Year 1989[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
Virginia	490	410	335	62	12	1	0	0	0	76	62	2	12	0	0	4
West Virginia	1,042	968	427	261	263	5	3	0	9	71	56	4	11	0	0	3
North Carolina	413	354	300	53	1	0	0	0	0	57	45	0	12	0	1	1
South Carolina	188	156	122	34	0	0	0	0	0	30	23	5	2	1	0	1
Georgia	564	476	335	136	5	0	0	0	0	84	74	1	9	1	0	3
Florida	964	792	586	202	2	1	0	0	1	167	143	2	22	1	1	3
South Atlantic	4,531	3,877	2,606	933	305	9	12	0	12	621	517	16	88	7	2	24
Kentucky	709	610	428	108	69	5	0	0	0	93	71	6	16	2	0	4
Tennessee	750	634	516	116	2	0	0	0	0	111	93	5	13	0	1	4
Alabama	458	370	284	64	18	0	0	0	4	82	69	1	12	0	0	6
Mississippi	257	222	182	40	0	0	0	0	0	35	32	0	3	0	0	0
East South Central	2,174	1,836	1,410	328	89	5	0	0	4	321	265	12	44	2	1	14
Arkansas	192	152	126	25	1	0	0	0	0	35	31	1	3	0	0	5
Louisiana	274	235	173	55	5	2	0	0	0	38	29	0	9	0	0	1
Oklahoma	266	214	184	29	0	0	0	0	1	47	41	2	4	1	0	4
Texas	1,000	805	555	246	3	0	1	0	0	184	146	4	34	2	3	6
West South Central	1,732	1,406	1,038	355	9	2	1	0	1	304	247	7	50	3	3	16
Montana	191	110	83	21	6	0	0	0	0	71	48	8	15	6	0	4
Idaho	98	59	56	3	0	0	0	0	0	39	31	1	7	0	0	0
Wyoming	58	45	38	5	0	0	0	2	0	13	11	0	2	0	0	0
Colorado	529	451	325	113	7	0	2	0	4	76	51	5	20	1	0	1
New Mexico	149	130	90	40	0	0	0	0	0	18	11	1	6	0	1	0
Arizona	414	324	217	101	2	1	0	0	3	85	71	7	7	0	1	4
Utah	131	87	75	9	2	0	1	0	0	41	36	2	3	0	1	2
Nevada	439	380	238	108	14	7	2	0	11	58	47	5	6	0	1	0
Mountain	2,009	1,586	1,122	400	31	8	5	2	18	401	306	29	66	7	4	11

Table 6A.—Geographic Distribution of Cases Received, Fiscal Year 1989[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	878	632	440	151	24	3	4	0	10	222	155	10	57	6	2	16
Oregon	487	321	246	64	7	0	1	0	3	146	83	14	49	8	0	12
California	5,229	4,023	2,579	1,240	118	25	6	3	52	1,111	884	65	162	31	4	60
Alaska	121	76	50	24	1	0	0	0	1	43	38	1	4	0	0	2
Hawaii	280	230	112	85	16	3	5	0	9	44	38	0	6	2	0	4
Guam	6	1	1	0	0	0	0	0	0	5	5	0	0	0	0	0
Pacific	7,001	5,283	3,428	1,564	166	31	16	3	75	1,571	1,203	90	278	47	6	94
Puerto Rico	283	184	159	20	3	0	0	2	0	88	76	2	10	3	0	8
Virgin Islands	24	10	10	0	0	0	0	0	0	14	10	0	4	0	0	0
Outlying areas	307	194	169	20	3	0	0	2	0	102	86	2	14	3	0	8
Total, all States and areas	40,878	32,401	22,345	7,940	1,471	254	88	40	263	7,908	6,376	310	1,222	185	32	352

[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 1989[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	701	615	449	155	4	4	0	0	3	77	60	2	15	3	0	6
Maine	101	84	73	11	0	0	0	0	0	16	9	1	6	1	0	0
Massachusetts	1,183	1,006	697	217	65	22	0	2	3	155	120	4	31	2	0	20
New Hampshire	75	54	47	5	2	0	0	0	0	19	14	0	5	1	0	1
Rhode Island	161	127	92	18	16	1	0	0	0	29	25	0	4	1	0	4
Vermont	53	45	39	5	0	1	0	0	0	8	5	2	1	0	0	0
Region I	2,274	1,931	1,397	411	87	28	0	2	6	304	233	9	62	8	0	31
Delaware	76	59	44	15	0	0	0	0	0	14	13	0	1	1	0	2
New Jersey	1,524	1,197	775	302	72	29	6	2	11	305	248	12	45	9	2	11
New York	4,112	3,223	2,082	929	111	45	6	26	24	820	731	22	67	23	1	45
Puerto Rico	283	184	159	20	3	0	0	2	0	88	76	2	10	3	0	8
Virgin Islands	24	10	10	0	0	0	0	0	0	14	10	0	4	0	0	0
Region II	6,019	4,673	3,070	1,266	186	74	12	30	35	1,241	1,078	36	127	36	3	66
District of Columbia	176	148	118	24	5	1	0	0	0	23	20	0	3	0	0	5
Maryland	618	514	339	146	17	1	9	0	2	99	81	2	16	3	0	2
Pennsylvania	2,604	2,061	1,397	474	143	32	4	0	11	516	429	15	72	13	1	13
Virginia	490	410	335	62	12	1	0	0	0	76	62	2	12	0	0	4
West Virginia	1,042	968	427	261	263	5	3	0	9	71	56	4	11	0	0	3
Region III	4,930	4,101	2,616	967	440	40	16	0	22	785	648	23	114	16	1	27
Alabama	458	370	284	64	18	0	0	0	4	82	69	1	12	0	0	6
Florida	964	792	586	202	2	1	0	0	1	167	143	2	22	1	1	3
Georgia	564	476	335	136	5	0	0	0	0	84	74	1	9	1	0	3
Kentucky	709	610	428	108	69	5	0	0	0	93	71	6	16	2	0	4
Mississippi	257	222	182	40	0	0	0	0	0	35	32	0	3	0	0	0
North Carolina	413	354	300	53	1	0	0	0	0	57	45	0	12	0	1	1

Table 6B.—Standard Federal Administrative Regional Distribution of Cases Received, Fiscal Year 1989[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	188	156	122	34	0	0	0	0	0	30	23	5	2	1	0	1
Tennessee	750	634	516	116	2	0	0	0	0	111	93	5	13	0	1	4
Region IV	4,303	3,614	2,753	753	97	6	0	0	5	659	550	20	89	5	3	22
Illinois	2,637	2,096	1,335	528	178	14	4	0	37	520	416	19	85	13	1	7
Indiana	1,248	1,041	755	246	29	6	2	0	3	189	146	11	32	8	0	10
Michigan	2,327	1,884	1,393	423	44	9	0	0	15	401	306	11	84	14	0	28
Minnesota	607	408	264	107	23	6	0	0	8	191	140	9	42	1	0	7
Ohio	2,288	1,838	1,352	365	96	7	8	2	8	416	325	18	73	10	7	17
Wisconsin	931	706	520	158	17	7	0	0	4	205	157	12	36	10	1	9
Region V	10,038	7,973	5,619	1,827	387	49	14	2	75	1,922	1,490	80	352	56	9	78
Arkansas	192	152	126	25	1	0	0	0	0	35	31	1	3	0	0	5
Louisiana	274	235	173	55	5	2	0	0	0	38	29	0	9	0	0	1
New Mexico	149	130	90	40	0	0	0	0	0	18	11	1	6	0	1	0
Oklahoma	266	214	184	29	0	0	0	0	1	47	41	2	4	1	0	4
Texas	1,000	805	555	246	3	0	1	0	0	184	146	4	34	2	3	6
Region VI	1,881	1,536	1,128	395	9	2	1	0	1	322	258	8	56	3	4	16
Iowa	299	198	148	46	4	0	0	0	0	98	75	3	20	0	3	0
Kansas	259	206	143	57	2	0	0	0	4	51	42	1	8	0	0	2
Missouri	1,627	1,110	732	261	59	15	24	1	18	508	454	11	43	7	0	2
Nebraska	311	279	243	28	3	1	0	0	4	32	24	1	7	0	0	0
Region VII	2,496	1,793	1,266	392	68	16	24	1	26	689	595	16	78	7	3	4
Colorado	529	451	325	113	7	0	2	0	4	76	51	5	20	1	0	1
Montana	191	110	83	21	6	0	0	0	0	71	48	8	15	6	0	4
North Dakota	39	14	13	1	0	0	0	0	0	23	18	0	5	0	0	2
South Dakota	37	27	23	4	0	0	0	0	0	9	8	0	1	0	0	1
Utah	131	87	75	9	2	0	1	0	0	41	36	2	3	0	1	2
Wyoming	58	45	38	5	0	0	0	2	0	13	11	0	2	0	0	0

Table 6B.—Standard Federal Administrative Regional Distribution of Cases Received, Fiscal Year 1989[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	985	734	557	153	15	0	3	2	4	233	172	15	46	7	1	10
Arizona	414	324	217	101	2	1	0	0	3	85	71	7	7	0	1	4
California	5,229	4,023	2,579	1,240	118	25	6	3	52	1,111	884	65	162	31	4	60
Hawaii	280	230	112	85	16	3	5	0	9	44	38	0	6	2	0	4
Guam	6	1	1	0	0	0	0	0	0	5	5	0	0	0	0	0
Nevada	439	380	238	108	14	7	2	0	11	58	47	5	6	0	1	0
Region IX	6,368	4,958	3,147	1,534	150	36	13	3	75	1,303	1,045	77	181	33	6	68
Alaska	121	76	50	24	1	0	0	0	1	43	38	1	4	0	0	2
Idaho	98	59	56	3	0	0	0	0	0	39	31	1	7	0	0	0
Oregon	487	321	246	64	7	0	1	0	3	146	83	14	49	8	0	12
Washington	878	632	440	151	24	3	4	0	10	222	155	10	57	6	2	16
Region X	1,584	1,088	792	242	32	3	5	0	14	450	307	26	117	14	2	30
Total, all States and areas	40,878	32,401	22,345	7,940	1,471	254	88	40	263	7,908	6,376	310	1,222	185	32	352

[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 1989[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	29,910	100.0	0.0	20,987	100.0	7,403	100.0	923	100 0	251	100.0	69	100.0	21	100 0	256	100.0
Agreement of the parties	9,071	30.3	100.0	7,280	34.6	1,235	16.6	444	48.1	2	0.7	13	18.8	9	42.8	88	34 3
Informal settlement	8,941	29.9	98.6	7,186	34.2	1,216	16.4	427	46.2	2	0.7	13	18.8	9	42.8	88	34 3
Before issuance of complaint	6,473	21.6	71 4	5,100	24.3	937	12.6	353	38.2	[2]	—	10	14 4	8	38.0	65	25.3
After issuance of complaint, before opening of hearing	2,421	8 1	26.7	2,049	9.7	278	3.7	69	7.4	1	0.3	3	4.3	1	4.7	20	7.8
After hearing opened, before issuance of administrative law judge's decision	47	0.2	0.5	37	0.1	1	0.0	5	0.5	1	0.3	0	—	0	—	3	1.1
Formal settlement	130	0.4	1.4	94	0.4	19	0.2	17	1.8	0	—	0	—	0	—	0	—
After issuance of complaint, before opening of hearing	80	0.3	0.9	50	0.2	15	0 2	15	1.6	0	—	0	—	0	—	0	—
Stipulated decision	18	0.1	0.2	14	0.0	3	0.0	1	0.1	0	—	0	—	0	—	0	—
Consent decree	62	0.2	0.7	36	0.1	12	0.1	14	1 5	0	—	0	—	0	—	0	—
After hearing opened	50	0.2	0.6	44	0.2	4	0.0	2	0.2	0	—	0	—	0	—	0	—
Stipulated decision	11	0.0	0.1	8	0.0	3	0.0	0	—	0	—	0	—	0	—	0	—
Consent decree	39	0.1	0.4	36	0.1	1	0.0	2	0.2	0	—	0	—	0	—	0	—
Compliance with	798	2.7	100.0	669	3.1	114	1.5	8	0.8	2	0.7	3	4.3	0	—	2	0.7
Administrative law judge's decision	28	0.1	3.5	4	0.0	24	0.3	0	—	0	—	0	—	0	—	0	—
Board decision	524	1.8	65.7	441	2.1	70	0.9	7	0.7	2	0.7	3	4.3	0	—	1	0.3
Adopting administrative law judge's decision (no exceptions filed)	222	0.7	27.8	200	0.9	18	0.2	3	0.3	0	—	0	—	0	—	1	0 3
Contested	302	1.0	37.8	241	1.1	52	0.7	4	0.4	2	0.7	3	4.3	0	—	0	—

Table 7.—Analysis of Methods of Disposition of Unfair Labor Practice Cases Closed, Fiscal Year 1989[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
Circuit court of appeals decree	238	0.8	29.8	216	1.0	20	0.2	1	0.1	0	—	0	—	0	—	1	0.3
Supreme Court action	8	0 0	1.0	8	0.0	0	—	0	—	0	—	0	—	0	—	0	—
Withdrawal	9,190	30.7	100.0	6,591	31.4	2,156	29.1	317	34.3	0	—	35	50.7	9	42.8	82	32.0
Before issuance of complaint	8,917	29.8	97.1	6,374	30.4	2,110	28.5	312	33.8	([2])	—	34	49.2	9	42.8	78	30.4
After issuance of complaint, before opening of hearing	255	0 9	2.8	208	0.9	38	0.5	5	0.5	0	—	1	1.4	0	—	3	1.1
After hearing opened, before administrative law judge's decision	15	0.1	0.2	7	0 0	7	0 0	0	—	0	—	0	—	0	—	1	0 3
After administrative law judge's decision, before Board decision	3	0.0	0.0	2	0.0	1	0.0	0	—	0	—	0	—	0	—	0	—
After Board or court decision	0	—	0 0	0	—	0	—	0	—	0	—	0	—	0	—	0	—
Dismissal	10,539	35.2	100.0	6,380	30.3	3,897	52.6	154	16.6	4	1.5	18	26.0	3	14.2	83	32.4
Before issuance of complaint	10,270	34 3	97 4	6,178	29.4	3,845	51 9	147	15 9	([2])	—	18	26.0	3	14.2	79	30.8
After issuance of complaint, before opening of hearing	64	0.2	0.6	52	0.2	8	0.1	3	0.3	1	0.3	0	—	0	—	0	—
After hearing opened, before administrative law judge's decision	2	0.0	0.0	1	0.0	0	—	0	—	1	0.3	0	—	0	—	0	—
By administrative law judge's decision	14	0.0	0.1	14	0.0	0	—	0	—	0	—	0	—	0	—	0	—
By Board decision	179	0.6	1.7	125	0.5	44	0.5	4	0.4	2	0.7	0	—	0	—	4	1.5
Adopting administrative law judge's decision (no exceptions filed)	22	0.1	0.2	10	0 0	12	0.1	0	—	0	—	0	—	0	—	0	—
Contested	157	0.5	1.5	115	0 5	32	0.4	4	0.4	2	0.7	0	—	0	—	4	1.5
By circuit court of appeals decree	10	0.0	0.1	10	0.0	0	—	0	—	0	—	0	—	0	—	0	
By Supreme Court action	0	—	0.0	0	—	0	—	0	—	0	—	0	—	0	—	0	—
10(k) actions (see Table 7A for details of dispositions)	243	0 8	0.0	0	—	0	—	0	—	243	96.8	0	—	0	—	0	—
Otherwise (compliance with order of administrative law judge or Board not achieved—firm went out of business)	69	0.2	0.0	67	0.3	1	0 0	0	—	0	—	0	—	0	—	1	0.3

[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 1989[1]

Method and stage of disposition	Number of cases	Percent of total closed
Total number of cases closed before issuance of complaint	243	100.0
Agreement of the parties—informal settlement	109	44.9
Before 10(k) notice	93	38.3
After 10(k) notice, before opening of 10(k) hearing	14	5.8
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	2	0.8
Compliance with Board decision and determination of dispute	0	0.0
Withdrawal	78	32.1
Before 10(k) notice	66	27.1
After 10(k) notice, before opening of 10(k) hearing	7	2.9
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	5	2.1
After Board decision and determination of dispute	0	0.0
Dismissal	56	23.0
Before 10(k) notice	46	18 9
After 10(k) notice, before opening of 10(k) hearing	7	2.9
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	2	0.8
By Board decision and determination of dispute	1	0.4

[1] See Glossary of terms for definitions.

Table 8.—Disposition by Stage of Unfair Labor Practice Cases Closed, Fiscal Year 1989[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	29,910	100.0	20,987	100.0	7,403	100.0	923	100.0	251	100.0	69	100.0	21	100.0	256	100.0
Before issuance of complaint	25,903	86.6	17,652	84.2	6,892	93.1	812	88.0	243	96.8	62	89.9	20	95.2	222	86.7
After issuance of complaint, before opening of hearing	2,820	9.4	2,359	11.2	339	4.6	92	10.0	2	0.8	4	5.8	1	4.8	23	9.0
After hearing opened, before issuance of administrative law judge's decision	114	0.4	89	0 4	12	0.2	7	0.8	2	0.8	0	—	0	—	4	1.6
After administrative law judge's decision, before issuance of Board decision	45	0.2	20	0.1	25	0.3	0	—	0	—	0	—	0	—	0	—
After Board order adopting administrative law judge's decision in absence of exceptions	244	0.8	210	1.0	30	0.4	3	0.3	0	—	0	—	0	—	1	0.4
After Board decision, before circuit court decree	513	1.7	410	2 0	84	1.1	8	0.9	4	1.6	3	4.3	0	—	4	1.6
After circuit court decree, before Supreme Court action	263	0.9	239	1.1	21	0.3	1	0.1	0	—	0	—	0	—	2	0.7
After Supreme Court action	8	0.0	8	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 1989[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	7,567	100.0	6,078	100.0	312	100.0	1,177	100.0	159	100.0
Before issuance of notice of hearing	2,597	34.3	1,816	29.9	168	53.8	613	52.1	123	77.4
After issuance of notice, before close of hearing	3,905	51.6	3,375	55.5	93	29.8	437	37.1	11	6.9
After hearing closed, before issuance of decision	98	1.3	66	1.1	12	3.8	20	1.7	0	0.0
After issuance of Regional Director's decision	938	12.4	796	13.1	39	12.5	103	8.8	25	15.7
After issuance of Board decision	29	0.4	25	0.4	0	0.0	4	0.3	0	0.0

[1] See Glossary of terms for definitions.

Table 10.—Analysis of Methods of Disposition of Representation and Union Deauthorization Cases Closed, Fiscal Year 1989[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	7,567	100.0	6,078	100.0	312	100.0	1,177	100.0	159	100.0
Certification issued, total	4,491	59.3	3,711	61 1	139	44.6	641	54.5	85	53.5
After-										
Consent election	83	1.1	62	1.0	4	1.3	17	1.4	3	1.9
Before notice of hearing	44	0.6	29	0.5	3	1 0	12	1.0	3	1.9
After notice of hearing, before hearing closed	39	0.5	33	0.5	1	0.3	5	0.4	0	0.0
After hearing closed, before decision	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Stipulated election	3,697	48.9	3,051	50.2	104	33.3	542	46.0	57	35.8
Before notice of hearing	1,220	16.1	889	14.6	56	17.9	275	23.4	53	33.3
After notice of hearing, before hearing closed	2,440	32.2	2,137	35.2	44	14.1	259	22.0	4	2.5
After hearing closed, before decision	37	0.5	25	0.4	4	1.3	8	0.7	0	0.0
Expedited election	5	0.1	1	0.0	4	1.3	0	0.0	0	0.0
Regional Director-directed election	698	9.2	589	9.7	27	8.7	82	7.0	25	15.7
Board-directed election	8	0.1	8	0.1	0	0.0	0	0.0	0	0.0
By withdrawal, total	2,700	35.7	2,198	36.2	118	37.8	384	32.6	62	39.0
Before notice of hearing	1,148	15.2	849	14.0	69	22.1	230	19.5	57	35.8
After notice of hearing, before hearing closed	1,357	17.9	1,185	19.5	38	12.2	134	11.4	5	3.1
After hearing closed, before decision	59	0.8	40	0 7	7	2.2	12	1.0	0	0.0
After Regional Director's decision and direction of election	122	1.6	111	1.8	4	1 3	7	0.6	0	0.0
After Board decision and direction of election	14	0.2	13	0.2	0	0 0	1	0.1	0	0.0
By dismissal, total	376	5.0	169	2.8	55	17.6	152	12.9	12	7 5
Before notice of hearing	181	2.4	48	0.8	37	11.9	96	8.2	10	6.3
After notice of hearing, before hearing closed	68	0.9	20	0.3	9	2.9	39	3.3	2	1.3
After hearing closed, before decision	2	0.0	1	0.0	1	0.3	0	0.0	0	0.0
By Regional Director's decision	118	1.6	96	1.6	8	2.6	14	1.2	0	0.0
By Board decision	7	0.1	4	0.1	0	0.0	3	0.3	0	0.0

[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 1989

	AC	UC
Total, all	30	317
Certification amended or unit clarified	13	42
Before hearing	0	0
By Regional Director's decision	0	0
By Board decision	0	0
After hearing	13	42
By Regional Director's decision	13	42
By Board decision	0	0
Dismissed	5	97
Before hearing	0	3
By Regional Director's decision	0	3
By Board decision	0	0
After hearing	5	94
By Regional Director's decision	5	93
By Board decision	0	1
Withdrawn	12	178
Before hearing	12	178
After hearing	0	0

Table 11.—Types of Elections Resulting in Certification in Cases Closed, Fiscal Year 1989[1]

Type of case	Type of election					
	Total	Consent	Stipulated	Board-directed	Regional Director-directed	Expedited elections under 8(b)(7)(C)
All types, total:						
Elections	4,497	84	3,699	8	701	5
Eligible voters	279,062	2,876	213,236	2,197	60,645	108
Valid votes	244,220	2,344	188,251	2,079	51,507	39
RC cases:						
Elections	3,670	61	3,030	8	571	0
Eligible voters	243,045	2,204	184,912	2,197	53,732	0
Valid votes	213,206	1,812	163,662	2,079	45,653	0
RM cases:						
Elections	121	4	88	0	24	5
Eligible voters	4,593	207	2,851	0	1,427	108
Valid votes	4,025	156	2,555	0	1,275	39
RD cases:						
Elections	622	16	526	0	80	0
Eligible voters	26,137	215	21,996	0	3,926	0
Valid votes	22,703	157	19,220	0	3,326	0
UD cases:						
Elections	84	3	55	0	26	—
Eligible voters	5,287	250	3,477	0	1,560	—
Valid votes	4,286	219	2,814	0	1,253	—

[1] See Glossary of terms for definitions.

Table 11A.—Analysis of Elections Conducted in Representation Cases Closed, Fiscal Year 1989

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	4,566	65	88	4,413	3,809	61	78	3,670	125	2	2	121	632	2	8	622
Rerun required	—	—	77	—	—	—	70	—	—	—	1	—	—	—	6	—
Runoff required	—	—	11	—	—	—	8	—	—	—	1	—	—	—	2	—
Consent elections	84	2	1	81	64	2	1	61	4	0	0	4	16	0	0	16
Rerun required	—	—	1	—	—	—	1	—	—	—	0	—	—	—	0	—
Runoff required	—	—	0	—	—	—	0	—	—	—	0	—	—	—	0	—
Stipulated elections	3,758	52	62	3,644	3,136	49	57	3,030	89	1	0	88	533	2	5	526
Rerun required	—	—	55	—	—	—	52	—	—	—	0	—	—	—	3	—
Runoff required	—	—	7	—	—	—	5	—	—	—	0	—	—	—	2	—
Regional Director-directed	708	10	23	675	599	9	19	571	26	1	1	24	83	0	3	80
Rerun required	—	—	19	—	—	—	16	—	—	—	0	—	—	—	3	—
Runoff required	—	—	4	—	—	—	3	—	—	—	1	—	—	—	0	—
Board-directed	10	1	1	8	10	1	1	8	0	0	0	0	0	0	0	0
Rerun required	—	—	1	—	—	—	1	—	—	—	0	—	—	—	0	—
Runoff required	—	—	0	—	—	—	0	—	—	—	0	—	—	—	0	—
Expedited—Sec. 8(b)(7)(C)	6	0	1	5	0	0	0	0	6	0	1	5	0	0	0	0
Rerun required	—	—	1	—	—	—	0	—	—	—	1	—	—	—	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 1989

	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	4,566	432	9 5	176	3.9	104	2.3	536	11.7	280	6.1
By type of case:											
In RC cases	3,809	365	9 6	143	3.8	89	2.3	454	11.9	232	6.1
In RM cases	125	15	12.0	10	8.0	5	4.0	20	16 0	15	12.0
In RD cases	632	52	8.2	23	3.6	10	1.6	62	9.8	33	5.2
By type of election:											
Consent elections	84	9	10.7	9	10.7	2	2.4	11	13 1	11	13.1
Stipulated elections	3,758	319	8.5	133	3.5	83	2.2	402	10.7	216	5.7
Expedited elections	6	0	0 0	0	0 0	0	0.0	0	0.0	0	0.0
Regional Director-directed elections	708	100	14.1	34	4.8	17	2.4	117	16.5	51	7.2
Board-directed elections	10	4	4.0	0	0.0	2	2.0	6	6.0	2	2.0

[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 1989[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	601	100.0	195	32.4	368	61.2	38	6.4
By type of case:								
RC cases	513	100.0	173	33.7	321	62.5	19	3.8
RM cases	20	100.0	4	20.0	11	55.0	5	25.0
RD cases	68	100.0	18	26.5	36	52.9	14	20.6
By type of election:								
Consent elections	12	100.0	5	41.7	6	50.0	1	8.3
Stipulated elections	447	100.0	140	31.3	281	62.9	26	5 8
Expedited elections	0	—	0	—	0	—	0	—
Regional Director-directed elections	136	100.0	49	36.0	76	55.9	11	8.1
Board-directed elections	6	100.0	1	16.7	5	83.3	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 1989[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	601	65	536	409	76.3	127	23.7
By type of case:							
RC cases	513	59	454	344	75.8	110	24.2
RM cases	20	0	20	17	85.0	3	15.0
RD cases	68	6	62	48	77.4	14	22.6
By type of election:							
Consent elections	12	1	11	7	63.6	4	36.4
Stipulated elections	447	45	402	312	77.6	90	22.4
Expedited elections	0	0	0	0	—	0	—
Regional Director-directed elections	136	19	117	86	73.5	31	26.5
Board-directed elections	6	0	6	4	66.7	2	33.3

[1] See Glossary of terms for definitions.
[2] See Table 11E for rerun elections held after objections were sustained. In 53 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 1989[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	70	100.0	21	30.0	49	70.0	34	48.6
By type of case:								
RC cases	54	100.0	18	33.3	36	66 7	29	53.7
RM cases	4	100.0	0	0.0	4	100.0	0	0.0
RD cases	12	100.0	3	25.0	9	75.0	5	41.7
By type of election:								
Consent elections	2	100.0	0	0.0	2	100.0	0	0.0
Stipulated elections	46	100.0	15	32.6	31	67.4	24	52.2
Expedited elections	0	—	0	—	0	—	0	—
Regional Director-directed elections	16	100.0	4	25.0	12	75.0	7	46.7
Board-directed elections	6	100.0	2	33.3	4	66.7	3	50.0

[1] See Glossary of terms for definitions.
[2] More than 1 rerun election was conducted in 7 cases; however, only the final election is included in this table.

Table 12.—Results of Union-Shop Deauthorization Polls in Cases Closed, Fiscal Year 1989

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	84	41	48.8	43	51.2	5,287	1,815	34.3	3,472	65.7	4,286	81.1	1,553	29.4
AFL–CIO unions	57	30	52.6	27	47.4	3,973	1,431	36.0	2,542	64.0	3,253	81.9	1,203	30.3
Teamsters	18	9	50.0	9	50.0	637	174	27.3	463	72.7	564	88.5	144	22.6
Other national unions	3	0	0.0	3	100.0	145	0	0.0	145	100.0	79	54.5	0	0.0
Other local unions	6	2	33.3	4	66.7	532	210	39.5	322	60.5	390	73.3	206	38.7

[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 1989[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	2,693	47.6	1,281	1,281	—	—	—	1,412	168,322	61,044	61,044	—	—	—	107,278
Teamsters	1,266	39.6	501	—	501	—	—	765	61,300	16,140	—	16,140	—	—	45,160
Other national unions	76	48 7	37	—	—	37	—	39	5,305	2,369	—	—	2,369	—	2,936
Other local unions	227	51.1	116	—	—	—	116	111	12,571	6,887	—	—	—	6,887	5,684
1-union elections	4,262	45 4	1,935	1,281	501	37	116	2,327	247,498	86,440	61,044	16,140	2,369	6,887	161,058
AFL–CIO v. AFL–CIO	32	75.0	24	24	—	—	—	8	9,835	8,669	8,669	—	—	—	1,166
AFL–CIO v. Teamsters	20	75.0	15	5	10	—	—	5	1,419	856	178	678	—	—	563
AFL–CIO v. National	12	83.3	10	4	—	6	—	2	2,482	2,472	495	—	1,977	—	10
AFL–CIO v. Local	44	88.6	39	13	—	—	26	5	7,224	6,770	3,891	—	—	2,879	454
Teamsters v. National	2	100.0	2	—	1	1	—	0	82	82	—	70	12	—	0
Teamsters v. Local	18	88.9	16	—	7	—	9	2	1,291	1,260	—	941	—	319	31
Teamsters v. Teamsters	3	33.3	1	—	1	—	—	2	60	13	—	13	—	—	47
National v. Local	11	72.7	8	—	—	6	2	3	2,388	1,979	—	—	1,769	210	409
National v. National	1	100.0	1	—	—	1	—	0	34	34	—	—	34	—	0
Local v. Local	6	100.0	6	—	—	—	6	0	364	364	—	—	—	364	0
2-union elections	149	81.9	122	46	19	14	43	27	25,179	22,499	13,233	1,702	3,792	3,772	2,680
AFL–CIO v. AFL–CIO v Local	1	100.0	1	1	—	—	0	0	424	424	424	—	—	0	0
AFL–CIO v. Local v. Local	1	100.0	1	0	—	—	1	0	674	674	0	—	—	674	0
3 (or more)-union elections	2	100.0	2	1	0	0	1	0	1,098	1,098	424	0	0	674	0
Total representation elections	4,413	46.7	2,059	1,328	520	51	160	2,354	273,775	110,037	74,701	17,842	6,161	11,333	163,738

Table 13.—Final Outcome of Representation Elections in Cases Closed, Fiscal Year 1989[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	2,255	51.6	1,164	1,164	—	—	—	1,091	147,908	53,245	53,245	—	—	—	94,663
Teamsters	1,041	41 8	435	—	435	—	—	606	55,627	13,955	—	13,955	—	—	41,672
Other national unions	64	53.1	34	—	—	34	—	30	4,610	1,869	—	—	1,869	—	2,741
Other local unions	178	55.6	99	—	—	—	99	79	10,427	5,861	—	—	—	5,861	4,566
1-union elections	3,538	49.0	1,732	1,164	435	34	99	1,806	218,572	74,930	53,245	13,955	1,869	5,861	143,642
AFL–CIO v. AFL–CIO	28	71.4	20	20	—	—	—	8	9,485	8,319	8,319	—	—	—	1,166
AFL–CIO v. Teamsters	17	70.6	12	5	7	—	—	5	967	404	178	226	—	—	563
AFL–CIO v National	12	83.3	10	4	—	6	—	2	2,482	2,472	495	—	1,977	—	10
AFL–CIO v. Local	37	86.5	32	10	—	—	22	5	6,460	6,006	3,495	—	—	2,511	454
Teamsters v. National	2	100.0	2	—	1	1	—	0	82	82	—	70	12	—	0
Teamsters v. Local	15	93.3	14	—	7	—	7	1	1,194	1,171	—	941	—	230	23
Teamsters v. Teamsters	2	50.0	1	—	1	—	—	1	20	13	—	13	—	—	7
National v. Local	11	72.7	8	—	—	6	2	3	2,388	1,979	—	—	1,769	210	409
National v. National	1	100.0	1	—	—	1	—	0	34	34	—	—	34	—	0
Local v. Local	5	100.0	5	—	—	—	5	0	263	263	—	—	—	263	0
2-union elections	130	80.8	105	39	16	14	36	25	23,375	20,743	12,487	1,250	3,792	3,214	2,632
AFL–CIO v. AFL–CIO v. Local	1	100.0	1	1	—	—	0	0	424	424	424	—	—	0	0
AFL–CIO v. Local v. Local	1	100 0	1	0	—	—	1	0	674	674	0	—	—	674	0
3 (or more)-union elections	2	100.0	2	1	0	0	1	0	1,098	1,098	424	0	0	674	0
Total RC elections	3,670	50.1	1,839	1,204	451	48	136	1,831	243,045	96,771	66,156	15,205	5,661	9,749	146,274
C. Elections in RM cases															
AFL–CIO	70	30.0	21	21	—	—	—	49	2,795	912	912	—	—	—	1,883
Teamsters	35	22.9	8	—	8	—	—	27	662	73	—	73	—	—	589
Other national unions	3	33.3	1	—	—	1	—	2	123	25	—	—	25	—	98
Other local unions	6	33.3	* 2	—	—	—	2	4	151	66	—	—	—	66	85

Table 13.—Final Outcome of Representation Elections in Cases Closed, Fiscal Year 1989[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	
1-union elections	114	28.1	32	21	8	1	2	82	3,731	1,076	912	73	25	66	2,655
AFL–CIO v. AFL–CIO	3	100.0	3	3	—	—	—	0	328	328	328	—	—	—	0
AFL–CIO v. Teamsters	3	100.0	3	0	3	—	—	0	452	452	0	452	—	—	0
Teamsters v. Local	1	100.0	1	—	0	—	1	0	82	82	—	0	—	82	0
2-union elections	7	100.0	7	3	3	0	1	0	862	862	328	452	0	82	0
Total RM elections	121	32.2	39	24	11	1	3	82	4,593	1,938	1,240	525	25	148	2,655
D Elections in RD cases															
AFL–CIO	368	26.1	96	96	—	—	—	272	17,619	6,887	6,887	—	—	—	10,732
Teamsters	190	30.5	58	—	58	—	—	132	5,011	2,112	—	2,112	—	—	2,899
Other national unions	9	22.2	2	—	—	2	—	7	572	475	—	—	475	—	97
Other local unions	43	34.9	15	—	—	—	15	28	1,993	960	—	—	—	960	1,033
1-union elections	610	28.0	171	96	58	2	15	439	25,195	10,434	6,887	2,112	475	960	14,761
AFL–CIO v. AFL–CIO	1	100.0	1	1	—	—	—	0	22	22	22	—	—	—	0
AFL–CIO v. Local	7	100.0	7	3	—	—	4	0	764	764	396	—	—	368	0
Teamsters v. Local	2	50.0	1	—	0	—	1	1	15	7	—	0	—	7	8
Teamsters v. Teamsters	1	0.0	0	—	0	—	—	1	40	0	—	0	—	—	40
Local v. Local	1	100.0	1	—	—	—	1	0	101	101	—	—	—	101	0
2-union elections	12	83.3	10	4	0	0	6	2	942	894	418	0	0	476	48
Total RD elections	622	29.1	181	100	58	2	21	441	26,137	11,328	7,305	2,112	475	1,436	14,809

[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 1989[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	149,008	34,883	34,883	—	—	—	16,887	33,233	33,233	—	—	—	64,005
Teamsters	54,150	9,537	—	9,537	—	—	4,611	12,510	—	12,510	—	—	27,492
Other national unions	4,651	1,396	—	—	1,396	—	617	854	—	—	854	—	1,784
Other local unions	10,566	4,148	—	—	—	4,148	1,527	1,476	—	—	—	1,476	3,415
1-union elections	218,375	49,964	34,883	9,537	1,396	4,148	23,642	48,073	33,233	12,510	854	1,476	96,696
AFL–CIO v. AFL–CIO	8,199	7,005	7,005	—	—	—	235	341	341	—	—	—	618
AFL–CIO v. Teamsters	1,249	704	240	464	—	—	53	172	88	84	—	—	320
AFL–CIO v. National	1,935	1,794	703	—	1,091	—	132	6	4	—	2	—	3
AFL–CIO v. Local	5,732	4,681	2,859	—	—	1,822	713	116	66	—	—	50	222
Teamsters v. National	70	56	—	44	12	—	14	0	—	0	0	—	0
Teamsters v. Local	1,127	1,060	—	567	—	493	39	10	—	8	—	2	18
Teamsters v. Teamsters	59	12	—	12	—	—	0	18	—	18	—	—	29
National v. Local	1,808	1,404	—	—	942	462	40	165	—	—	1	164	199
National v. National	34	33	—	—	33	—	1	0	—	—	0	—	0
Local v. Local	328	324	—	—	—	324	4	0	—	—	—	0	0
2-union elections	20,541	17,073	10,807	1,087	2,078	3,101	1,231	828	499	110	3	216	1,409
AFL–CIO v. AFL–CIO v. Local	388	383	275	—	—	108	5	0	0	—	—	0	0
AFL–CIO v. Local v. Local	630	627	206	—	—	421	3	0	0	—	—	0	0
3 (or more)-union elections	1,018	1,010	481	0	0	529	8	0	0	0	0	0	0
Total representation elections	239,934	68,047	46,171	10,624	3,474	7,778	24,881	48,901	33,732	12,620	857	1,692	98,105

Table 14.—Valid Votes Cast in Representation Elections, by Final Results of Election, in Cases Closed, Fiscal Year 1989[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	131,404	30,502	30,502	—	—	—	14,488	29,988	29,988	—	—	—	56,426
Teamsters	49,119	8,192	—	8,192	—	—	3,909	11,771	—	11,771	—	—	25,247
Other national unions	4,067	1,152	—	—	1,152	—	456	799	—	—	799	—	1,660
Other local unions	8,653	3,537	—	—	—	3,537	1,223	1,130	—	—	—	1,130	2,763
1-union elections	193,243	43,383	30,502	8,192	1,152	3,537	20,076	43,688	29,988	11,771	799	1,130	86,096
AFL–CIO v. AFL–CIO	7,881	6,752	6,752	—	—	—	170	341	341	—	—	—	618
AFL–CIO v. Teamsters	817	273	155	118	—	—	52	172	88	84	—	—	320
AFL–CIO v. National	1,935	1,794	703	—	1,091	—	132	6	4	—	2	—	3
AFL–CIO v. Local	5,109	4,084	2,529	—	—	1,555	687	116	66	—	—	50	222
Teamsters v. National	70	56	—	44	12	—	14	0	—	0	0	—	0
Teamsters v. Local	1,035	975	—	538	—	437	39	8	—	8	—	0	13
Teamsters v. Teamsters	19	12	—	12	—	—	0	0	—	0	—	—	7
National v. Local	1,808	1,404	—	—	942	462	40	165	—	—	1	164	199
National v. National	34	33	—	—	33	—	1	0	—	—	0	—	0
Local v. Local	237	235	—	—	—	235	2	0	—	—	—	0	0
2-union elections	18,945	15,618	10,139	712	2,078	2,689	1,137	808	499	92	3	214	1,382
AFL–CIO v. AFL–CIO v. Local	388	383	275	—	—	108	5	0	0	—	—	0	0
AFL–CIO v. Local v. Local	630	627	206	—	—	421	3	0	0	—	—	0	0
3 (or more)-union elections	1,018	1,010	481	0	0	529	8	0	0	0	0	0	0
Total RC elections	213,206	60,011	41,122	8,904	3,230	6,755	21,221	44,496	30,487	11,863	802	1,344	87,478
C. Elections in RM cases													
AFL–CIO	2,414	528	528	—	—	—	254	422	422	—	—	—	1,210
Teamsters	588	51	—	51	—	—	20	165	—	165	—	—	352
Other national unions	100	8	—	—	8	—	0	33	—	—	33	—	59
Other local unions	117	35	—	—	—	35	3	24	—	—	—	24	55

Table 14.—Valid Votes Cast in Representation Elections, by Final Results of Election, in Cases Closed, Fiscal Year 1989[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	
1-union elections	3,219	622	528	51	8	35	277	644	422	165	33	24	1,676
AFL–CIO v. AFL–CIO	296	233	233	—	—	—	63	0	0	—	—	—	0
AFL–CIO v. Teamsters	432	431	85	346	—	—	1	0	0	0	—	—	0
Teamsters v. Local	78	78	—	28	—	50	0	0	—	0	—	0	0
2-union elections	806	742	318	374	0	50	64	0	0	0	0	0	0
Total RM elections	4,025	1,364	846	425	8	85	341	644	422	165	33	24	1,676
D. Elections in RD cases													
AFL–CIO	15,190	3,853	3,853	—	—	—	2,145	2,823	2,823	—	—	—	6,369
Teamsters	4,443	1,294	—	1,294	—	—	682	574	—	574	—	—	1,893
Other national unions	484	236	—	—	236	—	161	22	—	—	22	—	65
Other local unions	1,796	576	—	—	—	576	301	322	—	—	—	322	597
1-union elections	21,913	5,959	3,853	1,294	236	576	3,289	3,741	2,823	574	22	322	8,924
AFL–CIO v. AFL–CIO	22	20	20	—	—	—	2	0	0	—	—	—	0
AFL–CIO v. Local	623	597	330	—	—	267	26	0	0	—	—	0	0
Teamsters v. Local	14	7	—	1	—	6	0	2	—	0	—	2	5
Teamsters v. Teamsters	40	0	—	0	—	—	0	18	—	18	—	—	22
Local v. Local	91	89	—	—	—	89	2	0	—	—	—	0	0
2-union elections	790	713	350	1	0	362	30	20	0	18	0	2	27
Total RD elections	22,703	6,672	4,203	1,295	236	938	3,319	3,761	2,823	592	22	324	8,951

[1] See Glossary of terms for definitions.

Table 15A.—Geographic Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1989

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	8	2	2	0	0	0	6	6,983	5,875	5,647	5,646	1	0	0	228	6,803
New Hampshire	14	8	4	2	0	2	6	1,418	1,312	390	360	24	0	6	922	118
Vermont	3	2	1	1	0	0	1	173	145	85	77	8	0	0	60	155
Massachusetts	102	48	35	12	0	1	54	7,670	6,756	3,134	2,813	289	5	27	3,622	4,583
Rhode Island	15	8	6	2	0	0	7	608	560	325	267	41	6	11	235	409
Connecticut	50	17	11	3	0	3	33	1,609	1,443	667	463	131	0	73	776	661
New England	192	85	59	20	0	6	107	18,461	16,091	10,248	9,626	494	11	117	5,843	12,729
New York	334	171	121	27	3	20	163	18,807	15,365	8,705	4,828	1,294	1,340	1,243	6,660	9,980
New Jersey	159	74	47	15	0	12	85	9,192	7,621	4,146	2,772	717	89	568	3,475	4,209
Pennsylvania	277	121	70	35	4	12	156	14,369	12,886	5,715	3,834	1,207	177	497	7,171	3,672
Middle Atlantic	770	366	238	77	7	44	404	42,368	35,872	18,566	11,434	3,218	1,606	2,308	17,306	17,861
Ohio	252	99	63	27	6	3	153	13,120	11,938	5,495	3,674	1,039	503	279	6,443	4,477
Indiana	137	59	37	19	2	1	78	7,448	7,161	3,089	2,186	793	38	72	4,072	1,858
Illinois	300	134	82	27	8	17	166	12,814	11,108	5,154	2,535	1,441	492	686	5,954	4,680
Michigan	256	122	81	36	3	2	134	14,690	12,885	5,826	4,546	1,008	115	157	7,059	5,465
Wisconsin	119	64	46	16	0	2	55	5,432	4,590	2,467	1,661	671	5	130	2,123	2,671
East North Central	1,064	478	309	125	19	25	586	53,504	47,682	22,031	14,602	4,952	1,153	1,324	25,651	19,151
Iowa	58	32	21	6	0	5	26	1,745	1,605	867	593	108	0	166	738	975
Minnesota	126	50	26	16	0	8	76	7,063	6,012	3,111	2,115	515	0	481	2,901	2,943
Missouri	201	109	77	25	5	2	92	9,255	7,345	3,784	3,086	517	127	54	3,561	4,053
North Dakota	12	6	5	1	0	0	6	129	123	56	31	12	0	13	67	37
South Dakota	7	4	4	0	0	0	3	250	222	121	120	1	0	0	101	81
Nebraska	17	11	8	2	1	0	6	1,507	1,261	700	437	36	227	0	561	1,286
Kansas	40	21	12	8	0	1	19	2,182	1,986	915	635	200	0	80	1,071	955
West North Central	461	233	153	58	6	16	228	22,131	18,554	9,554	7,017	1,389	354	794	9,000	10,330

Table 15A.—Geographic Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1989—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	14	6	2	4	0	0	8	988	940	352	237	115	0	0	588	159
Maryland	56	32	16	13	0	3	24	2,272	1,860	964	361	428	0	175	896	1,100
District of Columbia	14	7	5	0	0	2	7	286	238	131	93	16	0	22	107	149
Virginia	48	18	14	1	0	3	30	3,820	3,366	1,660	1,339	84	0	237	1,706	1,381
West Virginia	43	21	14	7	0	0	22	3,652	3,506	1,559	1,365	194	0	0	1,947	764
North Carolina	37	12	8	4	0	0	25	6,811	6,395	2,488	1,152	1,336	0	0	3,907	704
South Carolina	25	15	11	3	0	1	10	3,610	3,345	1,734	1,440	268	0	26	1,611	2,040
Georgia	57	28	22	3	0	3	29	6,840	6,447	2,670	2,455	68	0	147	3,777	1,487
Florida	89	43	29	10	0	4	46	7,306	7,026	3,677	1,645	1,210	0	822	3,349	3,186
South Atlantic	383	182	121	45	0	16	201	35,585	33,123	15,235	10,087	3,719	0	1,429	17,888	10,970
Kentucky	72	20	14	5	0	1	52	5,920	5,509	2,201	1,574	490	102	35	3,308	1,021
Tennessee	69	29	24	4	0	1	40	8,924	8,505	3,452	3,127	279	0	46	5,053	2,004
Alabama	63	31	25	3	3	0	32	5,205	4,800	2,249	1,968	161	80	40	2,551	2,193
Mississippi	29	15	11	2	0	2	14	3,525	3,262	1,536	1,416	44	0	76	1,726	1,991
East South Central	233	95	74	14	3	4	138	23,574	22,076	9,438	8,085	974	182	197	12,638	7,209
Arkansas	26	12	8	4	0	0	14	2,663	2,419	1,160	1,091	69	0	0	1,259	805
Louisiana	29	10	7	2	0	1	19	1,817	1,607	823	720	70	0	33	784	673
Oklahoma	34	8	3	5	0	0	26	2,875	2,739	1,090	921	169	0	0	1,649	408
Texas	107	60	41	10	1	8	47	6,557	5,985	3,263	2,147	519	14	583	2,722	2,831
West South Central	196	90	59	21	1	9	106	13,912	12,750	6,336	4,879	827	14	616	6,414	4,717
Montana	27	12	10	1	0	1	15	614	561	216	179	17	0	20	345	216
Idaho	24	10	10	0	0	0	14	642	483	242	230	12	0	0	241	295
Wyoming	8	1	0	1	0	0	7	673	641	249	53	63	132	1	392	105
Colorado	44	14	11	3	0	0	30	2,830	2,535	981	544	403	34	0	1,554	542
New Mexico	13	7	7	0	0	0	6	448	326	178	165	13	0	0	148	279
Arizona	66	42	29	12	1	0	24	3,038	2,226	1,140	844	230	9	57	1,086	1,524
Utah	15	7	4	3	0	0	8	651	578	285	217	68	0	0	293	356

Table 15A.—Geographic Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1989—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	44	22	12	9	0	1	22	2,712	1,727	996	815	152	0	29	731	1,482
Mountain	241	115	83	29	1	2	126	11,608	9,077	4,287	3,047	958	175	107	4,790	4,799
Washington	128	59	32	21	1	5	69	5,195	4,512	2,061	1,379	376	172	134	2,451	1,983
Oregon	93	42	20	14	0	8	51	4,372	3,629	1,731	973	353	38	367	1,898	1,865
California	532	250	149	85	10	6	282	35,735	30,125	13,855	6,941	5,582	420	912	16,270	14,416
Alaska	24	11	8	2	1	0	13	1,470	1,288	652	533	83	36	0	636	747
Hawaii	27	18	9	4	2	3	9	973	831	448	200	52	170	26	383	788
Guam	2	0	0	0	0	0	2	43	38	10	10	0	0	0	28	0
Pacific	806	380	218	126	14	22	426	47,788	40,423	18,757	10,036	6,446	836	1,439	21,666	19,799
Puerto Rico	56	27	7	5	0	15	29	4,284	3,821	2,270	867	267	0	1,136	1,551	2,297
Virgin Islands	11	8	7	0	0	1	3	560	465	226	223	0	0	3	239	175
Outlying Areas	67	35	14	5	0	16	32	4,844	4,286	2,496	1,090	267	0	1,139	1,790	2,472
Total, all States and areas	4,413	2,059	1,328	520	51	160	2,354	273,775	239,934	116,948	79,903	23,244	4,331	9,470	122,986	110,037

[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 1989

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	5	2	2	0	0	0	3	6,881	5,791	5,618	5,617	1	0	0	173	6,803
New Hampshire	11	7	3	2	0	2	4	920	866	240	210	24	0	6	626	102
Vermont	3	2	1	1	0	0	1	173	145	85	77	8	0	0	60	155
Massachusetts	82	43	31	11	0	1	39	7,295	6,442	3,022	2,707	283	5	27	3,420	4,452
Rhode Island	13	8	6	2	0	0	5	588	541	318	267	40	0	11	223	409
Connecticut	44	17	11	3	0	3	27	1,471	1,315	644	455	116	0	73	671	661
New England	158	79	54	19	0	6	79	17,328	15,100	9,927	9,333	472	5	117	5,173	12,582
New York	302	163	117	24	3	19	139	17,987	14,668	8,353	4,648	1,214	1,340	1,151	6,315	9,687
New Jersey	140	68	43	15	0	10	72	7,842	6,455	3,461	2,346	589	89	437	2,994	3,532
Pennsylvania	243	114	68	33	4	9	129	13,385	12,028	5,355	3,597	1,162	175	421	6,673	3,237
Middle Atlantic	685	345	228	72	7	38	340	39,214	33,151	17,169	10,591	2,965	1,604	2,009	15,982	16,456
Ohio	212	91	60	22	6	3	121	11,952	10,887	5,022	3,465	785	493	279	5,865	4,140
Indiana	118	54	35	17	2	0	64	6,927	6,656	2,890	2,025	769	38	58	3,766	1,755
Illinois	269	126	77	26	8	15	143	11,938	10,302	4,834	2,355	1,372	491	616	5,468	4,409
Michigan	216	106	72	29	3	2	110	12,587	11,184	4,877	3,786	819	115	157	6,307	4,262
Wisconsin	105	63	45	16	0	2	42	4,918	4,121	2,245	1,466	644	5	130	1,876	2,490
East North Central	920	440	289	110	19	22	480	48,322	43,150	19,868	13,097	4,389	1,142	1,240	23,282	17,056
Iowa	48	29	19	6	0	4	19	1,516	1,384	765	558	100	0	107	619	834
Minnesota	107	45	24	14	0	7	62	6,326	5,364	2,800	1,937	472	0	391	2,564	2,754
Missouri	173	100	72	22	5	1	73	7,712	6,264	3,352	2,702	489	127	34	2,912	3,626
North Dakota	11	6	5	1	0	0	5	119	114	53	28	12	0	13	61	37
South Dakota	7	4	4	0	0	0	3	250	222	121	120	1	0	0	101	81
Nebraska	15	10	8	2	0	0	5	1,039	871	473	437	36	0	0	398	825
Kansas	36	19	11	7	0	1	17	2,115	1,924	882	612	190	0	80	1,042	900
West North Central	397	213	143	52	5	13	184	19,077	16,143	8,446	6,394	1,300	127	625	7,697	9,057

Table 15B.—Geographic Distribution of Collective-Bargaining Elections Held in Cases Closed, Fiscal Year 1989—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	13	5	2	3	0	0	8	917	872	301	237	64	0	0	571	88
Maryland	50	30	16	11	0	3	20	2,143	1,743	906	360	394	0	152	837	1,040
District of Columbia	13	6	4	0	0	2	7	275	227	125	87	16	0	22	102	138
Virginia	41	16	13	1	0	2	25	3,475	3,037	1,533	1,270	83	0	180	1,504	1,260
West Virginia	37	21	14	7	0	0	16	3,554	3,409	1,537	1,345	192	0	0	1,872	764
North Carolina	32	11	7	4	0	0	21	6,698	6,291	2,459	1,126	1,333	0	0	3,832	664
South Carolina	24	15	11	3	0	1	9	3,602	3,337	1,733	1,439	268	0	26	1,604	2,040
Georgia	51	25	20	3	0	2	26	6,093	5,755	2,315	2,199	54	0	62	3,440	1,047
Florida	77	38	25	9	0	4	39	6,294	6,029	3,259	1,266	1,171	0	822	2,770	2,604
South Atlantic	338	167	112	41	0	14	171	33,051	30,700	14,168	9,329	3,575	0	1,264	16,532	9,645
Kentucky	65	19	13	5	0	1	46	5,685	5,302	2,064	1,446	482	101	35	3,238	891
Tennessee	64	27	22	4	0	1	37	8,554	8,157	3,330	3,024	260	0	46	4,827	1,846
Alabama	58	30	24	3	3	0	28	4,631	4,325	2,037	1,757	160	80	40	2,288	1,936
Mississippi	27	14	10	2	0	2	13	3,071	2,833	1,324	1,204	44	0	76	1,509	1,647
East South Central	214	90	69	14	3	4	124	21,941	20,617	8,755	7,431	946	181	197	11,862	6,320
Arkansas	24	11	7	4	0	0	13	2,327	2,124	1,015	946	69	0	0	1,109	764
Louisiana	24	8	6	1	0	1	16	1,504	1,310	681	656	7	0	18	629	550
Oklahoma	30	7	3	4	0	0	23	2,730	2,611	1,050	905	145	0	0	1,561	399
Texas	88	52	38	9	1	4	36	5,668	5,181	2,852	2,029	508	14	301	2,329	2,419
West South Central	166	78	54	18	1	5	88	12,229	11,226	5,598	4,536	729	14	319	5,628	4,132
Montana	21	11	9	1	0	1	10	426	388	158	121	17	0	20	230	200
Idaho	19	9	9	0	0	0	10	458	338	180	168	12	0	0	158	236
Wyoming	6	1	0	1	0	0	5	620	595	239	44	63	132	0	356	105
Colorado	31	10	8	2	0	0	21	2,453	2,204	853	448	371	34	0	1,351	393
New Mexico	10	6	6	0	0	0	4	335	216	135	122	13	0	0	81	259
Arizona	60	38	27	11	0	0	22	2,710	1,931	988	743	213	0	32	943	1,300
Utah	13	6	3	3	0	0	7	532	478	223	155	68	0	0	255	252

Table 15B.—Geographic Distribution of Collective-Bargaining Elections Held in Cases Closed, Fiscal Year 1989—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	40	19	12	7	0	0	21	2,558	1,581	900	815	72	0	13	681	1,336
Mountain	200	100	74	25	0	1	100	10,092	7,731	3,676	2,616	829	166	65	4,055	4,081
Washington	99	52	28	18	1	5	47	3,578	3,088	1,451	861	299	172	119	1,637	1,379
Oregon	67	37	19	10	0	8	30	3,665	3,020	1,508	852	313	38	305	1,512	1,802
California	437	218	128	74	10	6	219	32,316	27,328	12,583	6,032	5,252	418	881	14,745	12,615
Alaska	23	11	8	2	1	0	12	1,460	1,278	652	533	83	36	0	626	747
Hawaii	25	17	9	3	2	3	8	947	807	435	199	40	170	26	372	771
Guam	2	0	0	0	0	0	2	43	38	10	10	0	0	0	28	0
Pacific	653	335	192	107	14	22	318	42,009	35,559	16,639	8,487	5,987	834	1,331	18,920	17,314
Puerto Rico	50	24	7	4	0	13	26	3,865	3,435	2,070	867	165	0	1,038	1,365	1,941
Virgin Islands	10	7	6	0	0	1	3	510	419	199	196	0	0	3	220	125
Outlying Areas	60	31	13	4	0	14	29	4,375	3,854	2,269	1,063	165	0	1,041	1,585	2,066
Total, all States and areas	3,791	1,878	1,228	462	49	139	1,913	247,638	217,231	106,515	72,877	21,357	4,073	8,208	110,716	98,709

[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 1989

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	3	0	0	0	0	0	3	102	84	29	29	0	0	0	55	0
New Hampshire	3	1	1	0	0	0	2	498	446	150	150	0	0	0	296	16
Vermont	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Massachusetts	20	5	4	1	0	0	15	375	314	112	106	6	0	0	202	131
Rhode Island	2	0	0	0	0	0	2	20	19	7	0	1	6	0	12	0
Connecticut	6	0	0	0	0	0	6	138	128	23	8	15	0	0	105	0
New England	34	6	5	1	0	0	28	1,133	991	321	293	22	6	0	670	147
New York	32	8	4	3	0	1	24	820	697	352	180	80	0	92	345	293
New Jersey	19	6	4	0	0	2	13	1,350	1,166	685	426	128	0	131	481	677
Pennsylvania	34	7	2	2	0	3	27	984	858	360	237	45	2	76	498	435
Middle Atlantic	85	21	10	5	0	6	64	3,154	2,721	1,397	843	253	2	299	1,324	1,405
Ohio	40	8	3	5	0	0	32	1,168	1,051	473	209	254	10	0	578	337
Indiana	19	5	2	2	0	1	14	521	505	199	161	24	0	14	306	103
Illinois	31	8	5	1	0	2	23	876	806	320	180	69	1	70	486	271
Michigan	40	16	9	7	0	0	24	2,103	1,701	949	760	189	0	0	752	1,203
Wisconsin	14	1	1	0	0	0	13	514	469	222	195	27	0	0	247	181
East North Central	144	38	20	15	0	3	106	5,182	4,532	2,163	1,505	563	11	84	2,369	2,095
Iowa	10	3	2	0	0	1	7	229	221	102	35	8	0	59	119	141
Minnesota	19	5	2	2	0	1	14	737	648	311	178	43	0	90	337	189
Missouri	28	9	5	3	0	1	19	1,543	1,081	432	384	28	0	20	649	427
North Dakota	1	0	0	0	0	0	1	10	9	3	3	0	0	0	6	0
South Dakota	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Nebraska	2	1	0	0	1	0	1	468	390	227	0	0	227	0	163	461
Kansas	4	2	1	1	0	0	2	67	62	33	23	10	0	0	29	55
West North Central	64	20	10	6	1	3	44	3,054	2,411	1,108	623	89	227	169	1,303	1,273

Table 15C.—Geographic Distribution of Decertification Elections Held in Cases Closed, Fiscal Year 1989—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	1	1	0	1	0	0	0	71	68	51	0	51	0	0	17	71
Maryland	6	2	0	2	0	0	4	129	117	58	1	34	0	23	59	60
District of Columbia	1	1	1	0	0	0	0	11	11	6	6	0	0	0	5	11
Virginia	7	2	1	0	0	1	5	345	329	127	69	1	0	57	202	121
West Virginia	6	0	0	0	0	0	6	98	97	22	20	2	0	0	75	0
North Carolina	5	1	1	0	0	0	4	113	104	29	26	3	0	0	75	40
South Carolina	1	0	0	0	0	0	1	8	8	1	1	0	0	0	7	0
Georgia	6	3	2	0	0	1	3	747	692	355	256	14	0	85	337	440
Florida	12	5	4	1	0	0	7	1,012	997	418	379	39	0	0	579	582
South Atlantic	45	15	9	4	0	2	30	2,534	2,423	1,067	758	144	0	165	1,356	1,325
Kentucky	7	1	1	0	0	0	6	235	207	137	128	8	1	0	70	130
Tennessee	5	2	2	0	0	0	3	370	348	122	103	19	0	0	226	158
Alabama	5	1	1	0	0	0	4	574	475	212	211	1	0	0	263	257
Mississippi	2	1	1	0	0	0	1	454	429	212	212	0	0	0	217	344
East South Central	19	5	5	0	0	0	14	1,633	1,459	683	654	28	1	0	776	889
Arkansas	2	1	1	0	0	0	1	336	295	145	145	0	0	0	150	41
Louisiana	5	2	1	1	0	0	3	313	297	142	64	63	0	15	155	123
Oklahoma	4	1	0	1	0	0	3	145	128	40	16	24	0	0	88	9
Texas	19	8	3	1	0	4	11	889	804	411	118	11	0	282	393	412
West South Central	30	12	5	3	0	4	18	1,683	1,524	738	343	98	0	297	786	585
Montana	6	1	1	0	0	0	5	188	173	58	58	0	0	0	115	16
Idaho	5	1	1	0	0	0	4	184	145	62	62	0	0	0	83	59
Wyoming	2	0	0	0	0	0	2	53	46	10	9	0	0	1	36	0
Colorado	13	4	3	1	0	0	9	377	331	128	96	32	0	0	203	149
New Mexico	3	1	1	0	0	0	2	113	110	43	43	0	0	0	67	20
Arizona	6	4	2	1	1	0	2	328	295	152	101	17	9	25	143	224
Utah	2	1	1	0	0	0	1	119	100	62	62	0	0	0	38	104

Table 15C.—Geographic Distribution of Decertification Elections Held in Cases Closed, Fiscal Year 1989—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	4	3	0	2	0	1	1	154	146	96	0	80	0	16	50	146
Mountain	41	15	9	4	1	1	26	1,516	1,346	611	431	129	9	42	735	718
Washington	29	7	4	3	0	0	22	1,617	1,424	610	518	77	0	15	814	604
Oregon	26	5	1	4	0	0	21	707	609	223	121	40	0	62	386	63
California	95	32	21	11	0	0	63	3,419	2,797	1,272	909	330	2	31	1,525	1,801
Alaska	1	0	0	0	0	0	1	10	10	0	0	0	0	0	10	0
Hawaii	2	1	0	1	0	0	1	26	24	13	1	12	0	0	11	17
Guam	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Pacific	153	45	26	19	0	0	108	5,779	4,864	2,118	1,549	459	2	108	2,746	2,485
Puerto Rico	6	3	0	1	0	2	3	419	386	200	0	102	0	98	186	356
Virgin Islands	1	1	1	0	0	0	0	50	46	27	27	0	0	0	19	50
Outlying Areas	7	4	1	1	0	2	3	469	432	227	27	102	0	98	205	406
Total, all States and areas	622	181	100	58	2	21	441	26,137	22,703	10,433	7,026	1,887	258	1,262	12,270	11,328

[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 1989

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	203	97	40	47	1	9	106	16,645	14,534	7,428	4,038	2,103	149	1,138	7,106	7,179
Tobacco manufacturers	2	1	1	0	0	0	1	277	272	113	36	77	0	0	159	67
Textile mill products	33	13	5	4	1	3	20	6,365	6,003	2,349	1,986	210	95	58	3,654	863
Apparel and other finished products made from fabric and similar materials	22	11	5	2	0	4	11	3,616	3,324	1,663	1,333	102	0	228	1,661	1,837
Lumber and wood products (except furniture)	70	31	21	7	0	3	39	6,597	5,981	2,922	2,188	532	52	150	3,059	2,773
Furniture and fixtures	40	14	9	5	0	0	26	3,978	3,618	1,627	1,119	492	0	16	1,991	917
Paper and allied products	51	24	20	3	0	1	27	3,777	3,590	1,760	1,518	116	5	121	1,830	1,708
Printing, publishing, and allied products	112	56	38	9	0	9	56	4,994	4,590	2,246	1,335	496	0	415	2,344	2,434
Chemicals and allied products	65	20	16	2	0	2	45	7,948	7,367	3,041	1,909	1,013	2	117	4,326	1,265
Petroleum refining and related industries	29	16	9	5	0	2	13	1,492	1,361	641	358	148	8	127	720	807
Rubber and miscellaneous plastic products	67	19	18	1	0	0	48	9,076	8,426	3,188	2,284	838	0	66	5,238	1,092
Leather and leather products	10	6	5	1	0	0	4	746	676	345	311	34	0	0	331	520
Stone, clay, glass, and concrete products	100	43	15	20	0	8	57	5,369	4,925	2,622	985	1,031	43	563	2,303	2,282
Primary metal industries	102	44	31	10	2	1	58	10,144	9,318	4,122	3,411	552	114	45	5,196	2,656
Fabricated metal products (except machinery and transportation equipment)	152	60	42	11	4	3	92	9,672	8,718	3,944	2,772	800	114	258	4,774	3,881
Machinery (except electrical)	139	60	44	14	0	2	79	9,704	9,057	3,858	3,429	304	32	93	5,199	2,453
Electrical and electronic machinery, equipment, and supplies	75	30	21	6	0	3	45	8,024	7,252	3,062	2,587	321	37	117	4,190	2,057
Aircraft and parts	74	37	27	9	1	0	37	9,467	8,940	4,226	3,624	376	86	140	4,714	3,779
Ship and boat building and repairing	15	7	5	1	0	1	8	7,483	6,297	5,809	5,773	19	0	17	488	6,855
Automotive and other transportation equipment	11	6	5	1	0	0	5	975	866	382	379	3	0	0	484	439
Measuring, analyzing, and controlling instruments; photographic, medical, and optical goods; watches and clocks	36	16	11	3	0	2	20	2,949	2,767	1,301	913	293	0	95	1,466	916
Miscellaneous manufacturing industries	79	29	23	4	0	2	50	7,115	6,234	2,532	2,023	351	0	158	3,702	1,203
Manufacturing	1,487	640	411	165	9	55	847	136,413	124,116	59,181	44,311	10,211	737	3,922	64,935	47,983
Metal mining	11	2	1	1	0	0	9	1,468	1,391	391	348	9	34	0	1,000	21
Coal mining	13	5	0	0	5	0	8	661	618	263	14	0	248	1	355	125
Oil and gas extraction	4	3	3	0	0	0	1	74	71	37	37	0	0	0	34	31

Table 16.—Industrial Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1989—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)	14	6	4	2	0	0	8	939	894	371	198	41	132	0	523	198
Mining	42	16	8	3	5	0	26	3,142	2,974	1,062	597	50	414	1	1,912	375
Construction	500	291	254	28	3	6	209	14,579	10,239	6,048	5,275	582	37	154	4,191	7,868
Wholesale trade	356	142	62	69	3	8	214	18,496	16,492	7,196	3,646	2,748	148	654	9,296	5,620
Retail trade	392	153	105	37	0	11	239	14,057	12,221	5,704	3,282	1,403	18	1,001	6,517	5,203
Finance, insurance, and real estate	71	45	39	4	0	2	26	2,919	2,689	1,408	1,294	81	0	33	1,281	1,470
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	84	49	27	17	2	3	35	5,646	4,658	2,620	1,631	821	54	114	2,038	3,674
Motor freight transportation and warehousing	306	132	14	99	8	11	174	10,716	9,303	4,666	907	3,053	306	400	4,637	4,917
Water transportation	10	1	0	0	1	0	9	322	299	105	41	0	64	0	194	38
Other transportation	55	22	11	10	0	1	33	3,359	2,945	1,464	818	560	0	86	1,481	1,441
Communication	100	38	35	1	0	2	62	2,630	2,335	869	752	87	4	26	1,466	621
Electric, gas, and sanitary services	116	51	40	10	0	1	65	6,333	5,825	2,268	1,762	422	0	84	3,557	1,184
Transportation, communication, and other utilities	671	293	127	137	11	18	378	29,006	25,365	11,992	5,911	4,943	428	710	13,373	11,875
Hotels, rooming houses, camps, and other lodging places	70	34	29	3	1	1	36	4,676	3,950	1,925	1,614	126	149	36	2,025	2,037
Personal services	48	25	10	14	0	1	23	1,414	1,229	654	316	302	0	36	575	749
Automotive repair, services, and garages	82	37	17	18	0	2	45	1,873	1,688	860	393	395	0	72	828	1,012
Motion pictures	16	7	6	0	0	1	9	639	494	189	104	0	0	85	305	123
Amusement and recreation services (except motion pictures)	34	18	14	1	2	1	16	1,916	1,492	601	409	98	17	77	891	610
Health services	296	157	105	10	9	33	139	27,943	22,910	12,503	7,051	1,010	2,215	2,227	10,407	14,767
Educational services	32	17	9	4	0	4	15	4,691	4,174	2,128	1,931	125	0	72	2,046	4,050
Membership organizations	15	11	6	0	0	5	4	191	156	97	65	0	0	32	59	136
Business services	195	114	80	16	8	10	81	6,978	5,619	3,008	2,019	524	166	299	2,611	3,612
Miscellaneous repair services	21	7	5	2	0	0	14	657	622	256	227	28	0	1	366	88

Table 16.—Industrial Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1989—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	4	3	3	0	0	0	1	170	153	74	22	52	0	0	79	45
Legal services	6	5	4	0	0	1	1	54	51	26	22	0	0	4	25	38
Social services	53	30	24	5	0	1	23	2,860	2,328	1,455	1,183	250	0	22	873	1,866
Miscellaneous services	7	4	3	1	0	0	3	454	427	225	71	152	2	0	202	119
Services	879	469	315	74	20	60	410	54,516	45,293	24,001	15,427	3,062	2,549	2,963	21,292	29,252
Public administration	15	10	7	3	0	0	5	647	545	356	160	164	0	32	189	391
Total, all industrial groups	4,413	2,059	1,328	520	51	160	2,354	273,775	239,934	116,948	79,903	23,244	4,331	9,470	122,986	110,037

[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 1989[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	247,638	3,791	100.0	—	1,228	100.0	462	100.0	49	100.0	139	100.0	1,913	100.0
Under 10	4,625	840	22.2	22.2	310	25.2	148	32.0	7	14.3	21	15.1	354	18.5
10 to 19	10,813	773	20.4	42.6	263	21.4	124	26.8	11	22.4	25	18.0	350	18.3
20 to 29	11,379	472	12.5	55.1	173	14.1	56	12.1	4	8.2	16	11.5	223	11.6
30 to 39	10,090	296	7.8	62.9	84	6.8	32	6.9	4	8.2	11	8.0	165	8.6
40 to 49	9,673	219	5.8	68.7	66	5.4	23	5.0	4	8.2	16	11.5	110	5.8
50 to 59	9,534	175	4.6	73 3	63	5.1	11	2.4	3	6.2	6	4.3	92	4.8
60 to 69	8,727	136	3.6	76.9	43	3.5	10	2.2	0	—	3	2.2	80	4.2
70 to 79	8,817	119	3.1	80.0	36	2.9	10	2.2	0	—	5	3.6	68	3.6
80 to 89	8,121	96	2.5	82.5	31	2.5	8	1.7	1	2.0	5	3.6	51	2.7
90 to 99	8,300	88	2.3	84.8	25	2.0	5	1.1	5	10.3	5	3.6	48	2.5
100 to 109	6,559	63	1.7	86.5	18	1.4	5	1.1	0	—	1	0.7	39	2.0
110 to 119	5,374	47	1.2	87.7	14	1.1	5	1.1	1	2.0	2	1.4	25	1.3
120 to 129	4,841	39	1.0	88.7	8	0.7	0	—	0	—	3	2.2	28	1.5
130 to 139	6,709	50	1.3	90.0	7	0.6	0	—	1	2.0	6	4.3	36	1.9
140 to 149	4,793	33	0.9	90.9	7	0.6	4	0 9	1	2.0	2	1.4	19	1.0
150 to 159	3,707	24	0.6	91.5	7	0.6	1	0.2	0	—	0	—	16	0.8
160 to 169	4,459	27	0.7	92.2	5	0.4	2	0.4	1	2.0	1	0.7	18	0.9
170 to 179	3,520	20	0.5	92.7	6	0.5	1	0.2	0	—	0	—	13	0.7
180 to 189	4,596	25	0.7	93.4	8	0.7	2	0.4	0	—	0	—	15	0.8
190 to 199	3,708	19	0.5	93.9	7	0.6	1	0.2	1	2.0	1	0.7	9	0.5
200 to 299	24,830	102	2.6	96.5	23	1.8	9	2.0	1	2.0	6	4.3	63	3.3
300 to 399	15,734	46	1.2	97.7	10	0.8	5	1 1	2	4.1	0	—	29	1.5
400 to 499	11,722	26	0.7	98.4	7	0.6	0	—	0	—	1	0.7	18	0.9
500 to 599	9,678	18	0.5	98.9	2	0.2	0	—	0	—	0	—	16	0.8
600 to 799	10,772	16	0.4	99.3	1	0.1	0	—	0	—	3	2.2	12	0.6
800 to 999	5,222	6	0.2	99.5	1	0.1	0	—	0	—	0	—	5	0.3
1,000 to 1,999	16,528	12	0.3	99.8	1	0.1	0	—	2	4.1	0	—	9	0.5
2,000 to 2,999	4,698	2	0.1	99.9	0	—	0	—	0	—	0	—	2	0.1
3,000 to 9,999	10,109	2	0.1	100.0	2	0.2	0	—	0	—	0	—	0	—

Table 17.—Size of Units in Representation Elections in Cases Closed, Fiscal Year 1989[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	26,137	622	100.0	—	100	100.0	58	100.0	2	100.0	21	100.0	441	100.0
Under 10	1,096	190	30.5	30.5	7	7.0	19	32.8	0	—	1	4.8	163	37.0
10 to 19	1,804	130	20.9	51.4	19	19.0	11	19.1	1	50.0	2	9.5	97	22.0
20 to 29	1,697	71	11.4	62.8	16	16.0	6	10.3	0	—	3	14.2	46	10.4
30 to 39	1,276	38	6.1	68.9	7	7.0	4	6.9	0	—	1	4.8	26	5.8
40 to 49	1,925	44	7.1	76.0	10	10.0	4	6.9	0	—	1	4.8	29	6.5
50 to 59	1,484	27	4.3	80.3	9	9.0	3	5.2	0	—	3	14.2	12	2.7
60 to 69	1,289	20	3.2	83.5	7	7.0	1	1.7	0	—	1	4.8	11	2.5
70 to 79	1,031	14	2.3	85.8	0	—	2	3.4	0	—	0	—	12	2.7
80 to 89	922	11	1.8	87.6	1	1.0	0	—	0	—	1	4.8	9	2.0
90 to 99	1,132	12	1 9	89.5	3	3.0	1	1.7	0	—	2	9.5	6	1.4
100 to 109	1,349	13	2.1	91.6	3	3.0	2	3.4	0	—	2	9.5	6	1.4
110 to 119	805	7	1.1	92.7	1	1.0	3	5.2	0	—	1	4.8	2	0.5
120 to 129	493	4	0.6	93.3	1	1.0	0	—	0	—	0	—	3	0.7
130 to 139	942	7	1.1	94.4	3	3 0	0	—	0	—	2	9.5	2	0.5
140 to 149	284	2	0.3	94.7	1	1.0	0	—	0	—	0	—	1	0.2
150 to 159	468	3	0.5	95.2	0	—	0	—	0	—	1	4.8	2	0.5
160 to 169	657	4	0.6	95.8	1	1.0	1	1.7	0	—	0	—	2	0.5
170 to 199	928	5	0.8	96.6	1	1.0	1	1.7	0	—	0	—	3	0.7
200 to 299	2,574	10	1.8	98.4	5	5.0	0	—	0	—	0	—	5	1.1
300 to 499	3,431	9	1.4	99.8	4	4.0	0	—	1	50.0	0	—	4	0.9
500 to 799	550	1	0.2	100.0	1	1.0	0	—	0	—	0	—	0	—

[1] See Glossary of terms for definitions.

Table 18.—Distribution of Unfair Labor Practice Situations Received, by Number of Employees in Establishments, Fiscal Year 1989[1]

Size of establishment (number of employees)	Total number of situations	Total		Type of situations																	
				CA		CB		CC		CD		CE		CG		CP		CA–CB combinations		Other C combinations	
		Percent of all situations	Cumulative percent of all situations	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class
Total	[2]28,793	100.0	——	19,858	100.0	6,340	100.0	920	100.0	207	100.0	60	100.0	39	100.0	223	100.0	970	100.0	176	100.0
Under 10	8,036	27.9	27.9	5,106	25.7	2,097	33.1	341	37.1	92	44.4	28	46.7	9	23.1	97	43.5	201	20.7	65	36.9
10–19	2,245	7.8	35.7	1,738	8.8	259	4.1	113	12.3	23	11.1	12	20.0	0	——	37	16.6	49	5.1	14	8.0
20–29	1,847	6.4	42.1	1,442	7.3	249	3.9	53	5.8	20	9.7	5	8.3	0	——	14	6.3	45	4.6	19	10.8
30–39	1,224	4.3	46.4	911	4.6	202	3.2	44	4.8	6	2.9	0	——	1	2.6	8	3.6	40	4.1	12	6.8
40–49	979	3.4	49.8	726	3.7	174	2.7	25	2.7	12	5.8	0	——	0	——	9	4.0	25	2.6	8	4.5
50–59	1,158	4.0	53.8	875	4.4	188	3.0	41	4.5	6	2.9	2	3.3	0	——	8	3.6	36	3 7	2	1 1
60–69	701	2.4	56.2	540	2.7	116	1.8	11	1.2	1	0.5	1	1.7	0	——	4	1.8	21	2.2	7	4 0
70–79	685	2.4	58.6	525	2.6	105	1.7	19	2.1	2	1.0	0	——	1	2.6	6	2.7	23	2.4	4	2 3
80–89	527	1.8	60.4	419	2.1	67	1.1	9	1.0	8	3 9	0	——	1	2.6	2	0.9	19	2.0	2	1.1
90–99	363	1.3	61.7	289	1.5	53	0.8	7	0.8	2	1 0	0	——	0	——	2	0.9	10	1.0	0	——
100–109	1,287	4.5	66.2	837	4.2	318	5.0	42	4.6	8	3.9	1	1.7	1	2.6	13	5.8	62	6.4	5	2.8
110–119	212	0.7	66.9	171	0.9	31	0.5	2	0.2	0	——	0	——	2	5.1	1	0.4	5	0.5	0	——
120–129	379	1.3	68.2	282	1.4	72	1.1	12	1.3	1	0.5	1	1.7	0	——	1	0.4	9	0.9	1	0.6
130–139	222	0.8	69.0	183	0.9	31	0.5	2	0.2	2	1.0	0	——	0	——	3	1.3	1	0.1	0	——
140–149	131	0.5	69.5	101	0.5	22	0.3	4	0.4	0	——	0	——	0	——	1	0.4	1	0.1	2	1.1
150–159	545	1.9	71.4	355	1.8	153	2.4	14	1.5	2	1.0	2	3.3	0	——	0	——	17	1.8	2	1.1
160–169	152	0.5	71.9	114	0.6	34	0.5	0	——	0	——	0	——	0	——	0	——	3	0.3	1	0.6
170–179	167	0.6	72.5	127	0.6	30	0.5	3	0 3	0	——	0	——	0	——	0	——	6	0.6	1	0.6
180–189	136	0.5	73.0	115	0.6	14	0.2	2	0.2	1	0.5	0	——	0	——	0	——	4	0.4	0	——
190–199	54	0.2	73.2	46	0.2	4	0.1	2	0 2	0	——	0	——	0	——	0	——	2	0.2	0	——
200–299	1,556	5.4	78.6	1,095	5.5	323	5.1	51	5.5	6	2.9	2	3.3	2	5.1	6	2.7	57	5.9	14	8.0
300–399	1,115	3.9	82.5	746	3.8	265	4.2	26	2.8	4	1.9	0	——	1	2.6	2	0.9	63	6.5	8	4.5
400–499	684	2.4	84.9	475	2.4	162	2.6	12	1.3	0	——	0	——	2	5.1	5	2.2	26	2.7	2	1.1
500–599	608	2.1	87.0	404	2.0	165	2.6	9	1.0	1	0.5	1	1.7	0	——	1	0.4	26	2.7	1	0.6
600–699	341	1.2	88.2	254	1.3	66	1.0	6	0.7	2	1.0	4	6.7	2	5.1	0	——	7	0.7	0	——
700–799	248	0.9	89.1	172	0.9	58	0.9	3	0.3	1	0.5	0	——	1	2.6	0	——	13	1.3	0	——
800–899	234	0.8	89.9	150	0.8	64	1.0	5	0.5	0	——	0	——	2	5.1	1	0.4	12	1.2	0	——
900–999	130	0.5	90.4	89	0.4	30	0.5	2	0.2	0	——	0	——	1	2.6	0	——	7	0.7	1	0.6
1,000–1,999	1,209	4.2	94.6	678	3.4	413	6.5	30	3.3	2	1.0	1	1.7	4	10.3	2	0.9	77	7.9	2	1.1
2,000–2,999	520	1.8	96.4	306	1.5	171	2.7	8	0.9	3	1.4	0	——	3	7.7	0	——	27	2.8	2	1.1
3,000–3,999	333	1.2	97.6	164	0.8	138	2.2	2	0.2	2	1.0	0	——	1	2.6	0	——	25	2.6	1	0.6

Table 18.—Distribution of Unfair Labor Practice Situations Received, by Number of Employees in Establishments, Fiscal Year 1989[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	130	0.5	98.1	73	0.4	43	0.7	0	—	0	—	0	—	0	—	0	—	14	1.4	0	—
5,000–9,999	367	1.3	99.4	221	1.1	117	1.8	5	0.5	0	—	0	—	2	5.1	0	—	22	2.3	0	—
Over 9,999	268	0.9	100.0	129	0.6	106	1.7	15	1.6	0	—	0	—	3	7.7	0	—	15	1.5	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 1989; and Cumulative Totals, Fiscal Years 1936–1989

	Fiscal Year 1989									July 5, 1935–Sept. 30, 1989	
	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	204	178	23	0	3	—	—	—	—	—	—
On petitions for review and/or enforcement	180	162	15	0	3	100.0	100.0	—	100.0	9,838	100.0
Board orders affirmed in full	140	127	10	0	3	78.4	66.7	—	100.0	6,413	65.2
Board orders affirmed with modification	11	8	3	0	0	4.9	20.0	—	0.0	1,384	14.1
Remanded to Board	8	8	0	0	0	4.9	0.0	—	0 0	484	4.9
Board orders partially affirmed and partially remanded	6	4	2	0	0	2.5	13.3	—	0.0	186	1.9
Board orders set aside	15	15	0	0	0	9.3	0.0	—	0.0	1,371	13.9
On petitions for contempt	24	16	8	0	0	100.0	100 0	—	—	—	—
Compliance after filing of petition, before court order	3	2	1	0	0	12.5	12 5	—	—	—	—
Court orders holding respondent in contempt	17	12	5	0	0	75.0	62.5	—	—	—	—
Court orders denying petition	1	1	0	0	0	6.3	0.0	—	—	—	—
Court orders directing compliance without contempt adjudication	3	1	2	0	0	6.3	25.0	—	—	—	—
Contempt petitions withdrawn without compliance	0	0	0	0	0	0.0	0.0	—	—	—	—
Proceedings decided by U.S. Supreme Court[3]	0	0	0	0	0	—	—	—	—	247	100.0
Board orders affirmed in full	0	0	0	0	0	—	—	—	—	148	59.9
Board orders affirmed with modification	0	0	0	0	0	—	—	—	—	18	7.3
Board orders set aside	0	0	0	0	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 one case.

Table 19A.—Proceedings Decided by Circuit Courts of Appeals on Petitions for Enforcement and/or Review of Board Orders, Fiscal Year 1989, Compared With 5-Year Cumulative Totals, Fiscal Years 1984 Through 1988[1]

Circuit courts of appeals (headquarters)	Total fiscal year 1989	Total fiscal years 1984–1988	Affirmed in full				Modified				Remanded in full				Affirmed in part and remanded in part				Set aside			
			Fiscal year 1989		Cumulative fiscal years 1984–1988		Fiscal Year 1989		Cumulative fiscal years 1984–1988		Fiscal Year 1989		Cumulative fiscal years 1984–1988		Fiscal Year 1989		Cumulative fiscal years 1984–1988		Fiscal Year 1989		Cumulative fiscal years 1984–1988	
			Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total all circuits	180	1,200	140	77.8	878	73.2	11	6.1	87	7.2	8	4.5	78	6.5	6	3.3	20	1.7	15	8.3	137	11.4
1. Boston, MA	3	35	2	66.7	25	71.4	0	—	1	2.9	1	33.3	1	2.9	0	—	0	—	0	—	8	22.8
2. New York, NY	25	104	23	92.0	76	73.1	1	4.0	8	7.7	1	4.0	4	3.8	0	—	1	1.0	0	—	15	14.4
3. Phila., PA	25	123	23	92.0	103	83.7	1	4.0	7	5.7	1	4.0	7	5.7	0	—	0	—	0	—	6	4 9
4. Richmond, VA	9	86	6	66.7	62	72.1	1	11.1	8	9.3	0	—	3	3.5	1	11.1	2	2.3	1	11.1	11	12.8
5. New Orleans, LA	12	92	8	66.8	67	72.8	1	8.3	9	9 8	1	8 3	5	5.4	1	8.3	2	2.2	1	8.3	9	9.8
6. Cincinnati, OH	37	203	24	64.9	145	71.4	3	8.1	18	8.9	2	5.4	7	3.4	1	2.7	5	2.5	7	18.9	28	13.8
7. Chicago, IL	13	120	12	92.3	80	66.7	0	—	12	10.0	0	—	9	7.5	0	—	1	0.8	1	7 7	18	15.0
8. St. Louis, MO	11	75	6	54.5	56	74.7	3	27.3	6	8.0	0	—	4	5 3	0	—	1	1.3	2	18.2	8	10.7
9. San Francisco, CA	15	232	13	86.6	180	77.6	0	—	9	3.9	0	—	22	9.5	1	6.7	3	1.3	1	6 7	18	7.7
10. Denver, CO	4	26	4	100.0	19	73.1	0	—	2	7.7	0	—	1	3.8	0	—	0	—	0	—	4	15.4
11. Atlanta, GA	10	35	9	90.0	28	80.0	0	—	2	5.7	0	—	1	2.9	0	—	0	—	1	10.0	4	11.4
Washington, DC	16	69	10	62.4	37	53.7	1	6.3	5	7.2	2	12.5	14	20.3	2	12.5	5	7.2	1	6.3	8	11.6

[1] Percentages are computed horizontally by current fiscal year and total fiscal years.

Table 20.—Injunction Litigation Under Sections 10(e), 10(j), and 10(l), Fiscal Year 1989

	Total proceedings	Injunction proceedings		Total dispositions	Disposition of injunctions						Pending in district court Sept. 30, 1989
		Pending in district court Oct. 1, 1988	Filed in district court fiscal year 1989		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	29	3	26	21	15	1	5	0	0	0	8
8(a)(1)	3	0	3	3	2	0	1	0	0	0	0
8(a)(1)(3)	7	0	7	2	1	0	1	0	0	0	5
8(a)(1)(5)	2	1	1	2	0	1	1	0	0	0	0
8(a)(1)(2)(3)	1	0	1	0	0	0	0	0	0	0	1
8(a)(1)(3)(4)	2	0	2	2	2	0	0	0	0	0	0
8(a)(1)(3)(5)	4	2	2	3	1	0	2	0	0	0	1
8(a)(1)(3)(4)(5)	1	0	1	0	0	0	0	0	0	0	1
8(b)(1)	9	0	9	9	9	0	0	0	0	0	0
Under Sec. 10(l) total	47	2	45	39	16	8	12	1	1	1	8
8(b)(4)(A); 8(e)	1	0	1	1	1	0	0	0	0	0	0
8(b)(4)(B)	34	2	32	28	10	8	8	1	0	1	6
8(b)(4)(B)(D)	2	0	2	1	0	0	1	0	0	0	1
8(b)(4)(D)	5	0	5	5	3	0	1	0	1	0	0
8(b)(7)(A)	1	0	1	1	1	0	0	0	0	0	0
8(b)(7)(B)	2	0	2	2	0	0	2	0	0	0	0
8(b)(7)(C)	1	0	1	1	1	0	0	0	0	0	0
8(e)	1	0	1	0	0	0	0	0	0	0	1

[1] In courts of appeals.

Table 21.—Special Litigation Involving NLRB; Outcome of Proceedings in Which Court Decisions Issued in Fiscal Year 1989

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	46	40	6	18	16	2	25	21	4	3	3	0
NLRB-initiated actions or interventions	9	8	1	5	4	1	4	4	0	0	0	0
To enforce subpoena	3	3	0	1	1	0	2	2	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 other statutes	4	4	0	2	2	0	2	2	0	0	0	0
To stay collateral action	2	1	1	2	1	1	0	0	0	0	0	0
Action by other parties	37	32	5	13	12	1	21	17	4	3	3	0
To review settlement agreements	0	0	0	0	0	0	0	0	0	0	0	0
To review nonfinal orders	0	0	0	0	0	0	0	0	0	0	0	0
To restrain NLRB from	8	6	2	3	3	0	3	1	2	2	2	0
Proceeding with 10(e) application	0	0	0	0	0	0	0	0	0	0	0	0
Proceeding in R case	3	2	1	2	2	0	1	0	1	0	0	0
Proceeding in unfair labor practice case	4	4	0	1	1	0	1	1	0	2	2	0
Enforcing subpoena	0	0	0	0	0	0	0	0	0	0	0	0
Other application of Rule	1	0	1	0	0	0	1	0	1	0	0	0
To compel NLRB to	26	23	3	10	9	1	16	14	2	0	0	0
Take action in C case	0	0	0	0	0	0	0	0	0	0	0	0
Issue complaint or prosecute complaint	12	12	0	3	3	0	9	9	0	0	0	0
Take action in R case	3	3	0	1	1	0	2	2	0	0	0	0
Comply with Freedom of Information Act (FOIA)[1]	3	2	1	0	0	0	3	2	1	0	0	0
Other—Pay fees under Equal Access to Justice Act	6	5	1	6	5	1	0	0	0	0	0	0
Comply with subpoena	2	1	1	0	0	0	2	1	1	0	0	0

Table 21.—Special Litigation Involving NLRB; Outcome of Proceedings in Which Court Decisions Issued in Fiscal Year 1989—Continued

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
Other	3	3	0	0	0	0	2	2	0	1	1	0
Objection to Board's proof of claim	1	1	0	0	0	0	0	0	0	1	1	0
Pay fees under FOIA	1	1	0	0	0	0	1	1	0	0	0	0
Turn over backpay to third party	1	1	0	0	0	0	1	1	0	0	0	0

[1] FOIA cases are categorized regarding court determination dependmg on whether NLRB substantially prevailed.

Table 22.—Advisory Opinion Cases Received, Closed, and Pending, Fiscal Year 1989[1]

	Total	Number of cases			
		Identification of petitioner			
		Employer	Union	Courts	State boards
Pending October 1, 1988	1	0	0	0	1
Received fiscal 1989	6	6	0	0	0
On docket fiscal 1989	7	6	0	0	1
Closed fiscal 1989	6	5	0	0	1
Pending September 30, 1989	1	1	0	0	0

[1] See Glossary of terms for definitions.

Table 22A.—Disposition of Advisory Opinion Cases, Fiscal Year 1989[1]

Action taken	Total cases closed
	6
Board would assert jurisdiction	4
Board would not assert jurisdiction	0
Unresolved because of insufficient evidence submitted	0
Dismissed	2
Withdrawn	0

[1] See Glossary of terms for definitions.

Table 23.—Time Elapsed for Major Case Processing Stages Completed, Fiscal Year 1989; and Age of Cases Pending Decision, September 30, 1989

Stage	Median days
I Unfair labor practice cases:	
A. Major stages completed—	
1. Filing of charge to issuance of complaint	45
2. Complaint to close of hearing	133
3. Close of hearing to issuance of administrative law judge's decision	153
4. Administrative law judge's decision to issuance of Board decision	259
5. Filing of charge to issuance of Board decision	736
B. Age[1] of cases pending administrative law judge's decision, September 30, 1989	339
C. Age[1] of cases pending Board decision, September 30, 1989	738
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	13
3. Close of hearing to—	
Board decision issued	256
Regional Director's decision issued	23
4. Filing of petition to—	
Board decision issued	268
Regional Director's decision issued	45
B. Age[2] of cases pending Board decision, September 30, 1989	685
C. Age[2] of cases pending Regional Director's decision, September 30, 1989	73

[1] From filing of charge.
[2] From filing of petition.

Table 24.—NLRB Activity Under the Equal Access to Justice Act, Fiscal Year 1989

I. Applications for fees and expenses before the NLRB:	
A. Filed with Board	11
B. Hearings held	0
C. Awards ruled on:	
1. By administrative law judges.	
Granting	1[1]
Denying	17
2. By Board:	
Granting	3
Denying	21[*]
D. Amount of fees and expenses in cases ruled on by Board:	
Claimed	$430,526.66
Recovered	$40,534.24
II. Applications for fees and expenses before the circuit courts of appeals:	
A. Awards ruled on:	
Granting	2
Denying	4
B. Amounts of fees and expenses recovered pursuant to court award	$43,956.70
III. Applications for fees and expenses before the district courts:	
A. Awards ruled on:	
Granting	0
Denying	0
B. Amounts of fees and expenses recovered pursuant to court award	0

[1] These 18 cases do not include 5 EAJA cases which administrative law judges' settled without conducting a hearing.
[*] In one instance, three applications were received in a consolidated proceeding.

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