

TWENTY-SEVENTH
ANNUAL REPORT
OF THE
NATIONAL LABOR
RELATIONS BOARD

FOR THE FISCAL YEAR
ENDED JUNE 30

1962

DEPARTMENT OF
LABOR RELATIONS BOARD

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LETTER OF TRANSMITTAL

NATIONAL LABOR RELATIONS BOARD,
Washington, D.C., January 9, 1963.

SIR: As provided in section 3(c) of the Labor Management Relations Act, 1947, I submit herewith the Twenty-seventh Annual Report of the National Labor Relations Board for the fiscal year ended June 30, 1962, and, under separate cover, lists containing the cases heard and decided by the Board during this fiscal year, and the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board.

Respectfully submitted.

FRANK W. McCULLOCH, *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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NATIONAL LABOR RELATIONS BOARD

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Operations in Fiscal Year 1962

1. Summary

Fiscal 1962 was the busiest year in the history of the National Labor Relations Board, and a year of significant decisions in the administration and enforcement of the National Labor Relations Act.

The Agency was called upon to process an unprecedented caseload. Since fiscal 1957, the number of unfair labor practice charges filed with the NLRB and the number of petitions for employee representation elections submitted to the Agency have nearly doubled.

Despite the record workload of almost 25,000 new cases during the year, procedural changes in casehandling and intensified staff effort brought an overall reduction in case backlog.

The NLRB went through its first full year under a major revision in case-processing procedure, authorized by Congress, to speed decisions in requests for collective-bargaining elections. The delegation to the 28 regional directors of decision-making powers in contested representation cases, which previously had been exercised only by the five-member Board in Washington, proved highly successful. Processing time was cut in half, and the Board Members were able to reduce substantially the number of cases pending their decision.

The Board is composed of Chairman Frank W. McCulloch of Illinois and Members Philip Ray Rodgers of Maryland, Boyd Leedom of South Dakota, John H. Fanning of Rhode Island, and Gerald A. Brown of California. Mr. Stuart Rothman of Minnesota is General Counsel.

a. Outstanding Case Decisions

Moving into a new area of adjudicative action, in accord with a ruling by the Supreme Court, the Board began awarding work assignments sought by competing groups of employees in jurisdictional disputes which caused or threatened strikes. These decisions were the first of their kind in Board history.

The Board issued a number of important rulings under varied factual circumstances interpreting key sections of the Act, especially provisions in the 1959 amendments dealing with hot cargo contracts, secondary boycotts, and organizational and recognitional picketing.

During the year, the Board handed down landmark decisions involving the duty to bargain, employer and union conduct in employee election campaigning, units of workers deemed appropriate for collective bargaining, union security agreements, contracts serving as bars to elections, consumer picketing and handbilling, and NLRB jurisdiction.

And, in a series of actions, the Board sharpened its remedies in cases where it finds that workers have been fired or otherwise discriminated against in violation of the Act. By majority vote, the Board began adding 6 percent interest in computing reimbursement payments it orders for employees suffering income losses through unlawful discharge from their jobs. Such interest is assessed against the party—employer, union, or both—found responsible for the unlawful action. In an allied development, the General Counsel obtained the first Federal court order in Board history reinstating dischargees in a manufacturing plant pending litigation of an unfair labor practice case alleging that the group had been fired in violation of the Act.

The Act which the NLRB administers—the Nation's principal labor relations law—covers virtually all interstate commerce except railroads and airlines. The statute basically guarantees the rights of employees to organize, encourages collective bargaining, and underscores the interdependence of management, employees, and labor organizations by prohibiting specified unfair labor practices by employers or unions in their relations with one another. Seeking to foster industrial peace, the Act's announced purpose is to "promote the full flow of commerce . . ." and to "protect the rights of the public in connection with labor disputes affecting commerce."

In its statutory assignment, the NLRB has two main functions: (1) to prevent and remedy unfair labor practices and (2) to determine by conducting secret-ballot elections whether workers wish to have representatives for collective bargaining in appropriate employee units.

The NLRB does *not* act on its own motion in either function. The Agency processes only those charges of unfair practices and those petitions for determination of representatives which are brought to its regional offices by employers, employees, or unions.

b. Record Case-Processing Activity

The public during the fiscal year originated cases in the regional offices and utilized the processes of the Agency with unprecedented frequency. This triggered record activity in many areas of performance throughout the NLRB. For example:

- More new cases were filed—24,848—than ever before. Unfair labor practice charges totaled a record 13,479; representation petitions were a record 11,369.
- More cases were handled to conclusion—25,027—than ever before by decision, settlement, withdrawal, or dismissal. Of the total, 13,319 were unfair labor practice cases, and 11,708 were representation cases and union shop deauthorization polls.
- More collective-bargaining elections were conducted—7,355—than ever before. Unions won 59 percent of them.
- More decisions were issued in all types of cases—3,600 decisions involving 4,391 cases—than ever before. In contested unfair labor practice cases, where the facts or the principles of law were disputed, the Board Members handed down a record 645 decisions compared with 425 such decisions the preceding year. The 645 decisions involved 1,139 cases.
- More formal complaints in unfair labor practice cases were issued by the General Counsel—1,470 complaints involving 2,030 cases—than ever before. For a complaint to issue, an investigation must show the charge to have merit.
- More settlements of unfair labor practice charges were concluded—2,752—than ever before. The General Counsel emphasizes settlement efforts before litigating meritorious complaint cases.
- More backpay was collected—\$1,751,910—for employees unlawfully discharged than in any fiscal year but one. Job reinstatement was offered to 2,465 discriminatees, a near-record number.

In this year of greatest operational activity—with a record number of cases received and a record number closed—the NLRB ended the fiscal period with a pending workload of 6,704 cases in all stages of processing. This was 3 percent less than the 6,883-case backlog at the conclusion of the previous fiscal year. The backlog of contested cases pending at the Board in Washington was reduced to 488, down 52 percent from the 1,009-case backlog at the end of fiscal 1961.

c. Other Developments

Under direction of the General Counsel, the regional offices instituted a nationwide basic educational program to create better understanding of what the Act requires, and to reduce violations of the

Act. The program was designed to improve communications between this Agency and labor and management on the local level. The rights and obligations of employees, employers, and labor organizations were explained, along with the role of the NLRB in its administration of the statute. Some 35 conferences were conducted, attended by representatives of unions, employers, educational institutions, other Government agencies with industrial relations responsibilities, and community groups.

Two new publications were issued—"NLRB Election Report," published monthly, and a detailed pamphlet, "What You Should Know About the Regional Offices of the National Labor Relations Board."

The monthly publication lists the outcome of all employee collective-bargaining elections conducted by the Agency. It also contains statistical summaries of results.

The guide to utilizing the facilities of the regional offices is the booklet publication of an address by General Counsel Rothman.

In Congress a reorganization plan for the NLRB proposed by President John F. Kennedy was defeated in the House of Representatives. Reorganization Plan No. 5 would have authorized a delegation of decision-making powers to NLRB trial examiners in unfair labor practice cases, with appeal on limited grounds to the five-member Board. The delegation would have been similar to the decision-making authority delegated to regional directors which was put into effect with congressional approval for representation cases.

During the year, a House Labor Subcommittee, of which Representative Roman C. Pucinski of Illinois was chairman, reported on its 8-week study of NLRB operations.

The majority report of the study group called, among other things, for adoption of new administrative techniques to speed up the Board's operations, improved remedies, more realistic bargaining units, and greater use by the Agency of its injunction-requesting powers when confronted with situations such as "flagrant and aggravated acts of picket line force and violence, the situations of repeated discharge of union adherents, the situations where employers or unions flagrantly refuse to bargain in good faith, and the situations wherein the employer threatens to intimidate his employees by closing the plant or shifting work to affiliated factories."

The Pucinski Committee said Congress should make the Board's orders self-enforcing, with provision for contempt penalties for deliberate delays by unions or companies in complying with the orders in the absence of petition for judicial review. The group also said the Board should disbar lawyers from practice before the NLRB who advise their clients to commit unfair labor practices.

Following the House Subcommittee report and the earlier recommendations of the special advisory panel headed by Archibald Cox to the Senate Labor and Public Welfare Committee, the NLRB stepped up its requests for injunctions in unfair labor practice cases under the discretionary authority granted by section 10(j) of the Act.

Late in the fiscal year, Representatives Phil M. Landrum of Georgia and Robert P. Griffin of Michigan criticized Board decisions in floor speeches. Later, four other members of the House Committee on Education and Labor, Representatives James O'Hara of Michigan, Frank Thompson of New Jersey, Clem Miller of California, and Pucinski, took the House floor to defend NLRB decisions.

Representative Pucinski said his examination of decisions in a large number of cases disclosed "a pattern whereby the NLRB attempts to effectuate the policies of Congress by a careful application of the law to the varying factual situations, the close borderline situations, which daily confront the Board. I am satisfied from studying the record of the Board during the past year that it is in fact carrying out the admonition of my committee voiced after our investigation."

At yearend, the Agency had 28 regional offices, 2 subregional offices, and 6 resident offices; the NLRB staff totaled 707 in Washington and 1,227 in the field.

2. Operational Highlights

Greater workload and increased work output formed the keystone of NLRB operations during fiscal 1962.

New records were established in cases filed, cases closed, complaints issued, decisions handed down, settlements achieved, and elections conducted.

a. Case Intake

In fiscal 1957 the NLRB received 13,356 cases of all types. It was the third year of approximately the same size case intake. Since then, in 5 years of steady increase, the total reached 24,848 cases in fiscal 1962—13,479 charges of unfair labor practice and 11,369 petitions for representation elections and union shop deauthorization polls.

General Counsel Rothman predicts the case intake will climb to nearly 50,000 by 1972.

The 13,479 separate charges filed in NLRB regional offices represent 11,877 unfair labor practice situations. A situation is composed of one or more related charges processed as a single unit of work. For example, several workers fired from their jobs at a single plant file charges individually alleging unlawful discrimination because of their union activity, and these are handled as one unfair practice situation.

As shown in charts 1 and 1A, case intake by situations and petitions has been rising approximately 10 percent per year.

Chart 1

CASE INTAKE BY UNFAIR LABOR PRACTICE SITUATIONS AND REPRESENTATION PETITIONS

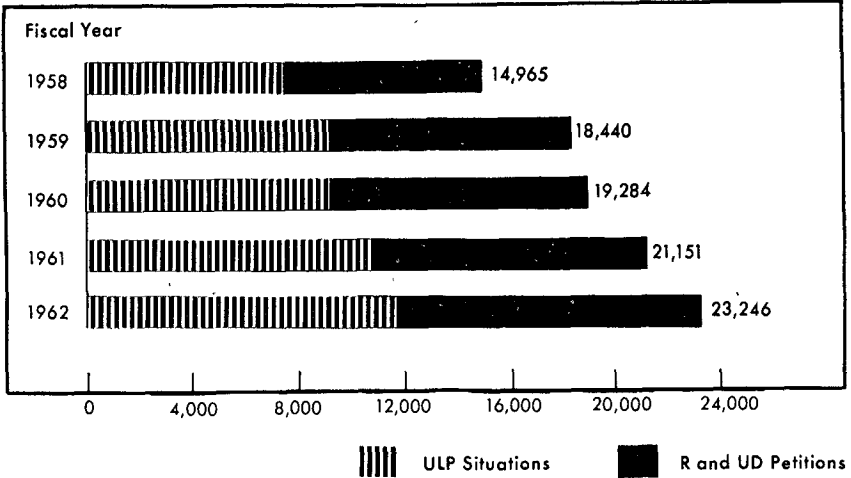
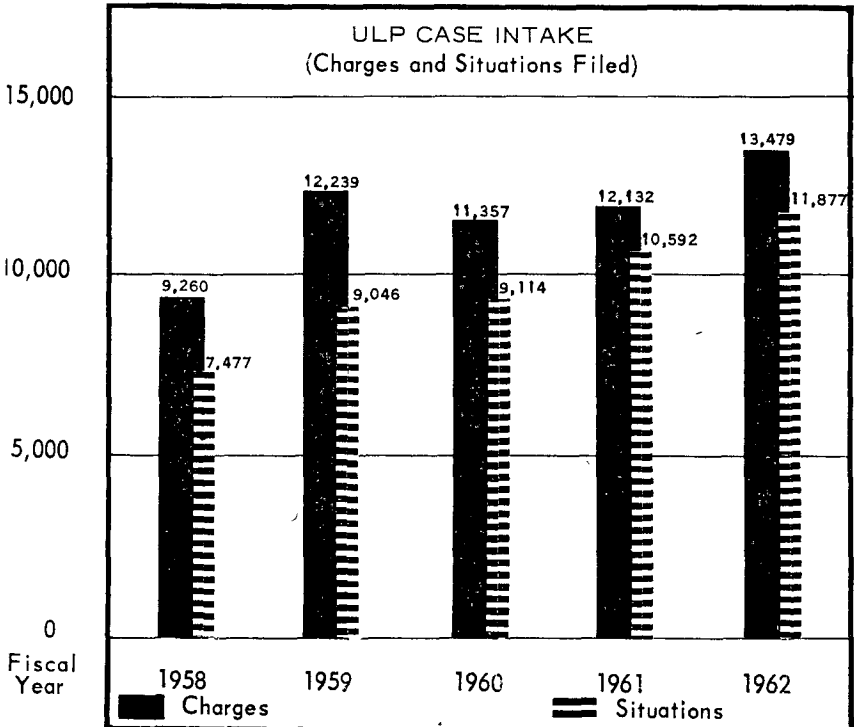


Chart 1A



b. Unfair Labor Practice Charges

For the last 5 fiscal years unfair labor practice charges have outnumbered representation petitions, reversing a 17-year pattern in the years 1941 through 1957. The plurality of unfair charges appears firmly established. However, since the spectacular rise in charges began in fiscal 1958 the character of the unfair practice caseload has undergone a marked change.

Individual filings first skyrocketed to a majority of all unfair labor practice cases—58 percent in 1958 and 59 percent in 1959—only to subside during the last 3 years. In fiscal 1962 the percentage of cases filed by employers and by unions increased, while filings by individuals declined to 40 percent. This recent decreasing proportion of cases filed by individuals explains why unfair labor practice situations have increased at a greater rate than unfair labor practice charges.

Coincident with this development was a notable alteration in the pattern of the type of unfair practice alleged.

The most common charge against employers in fiscal 1962 continued to be that of illegally discharging or otherwise discriminating against employees because of their union activities or because of their lack of union membership. Illegal discrimination was alleged in 75 percent of the 9,231 unfair practice charges filed against employers.

However, a marked increase has been observed during the 5-year period in charges that employers refused to bargain in good faith with representatives of their employees. The proportion of such cases has risen from 17 percent in fiscal 1958 to 25 percent in fiscal 1962.

A change also has occurred in the nature of charges alleging unfair labor practice violations by unions.

During the last 5 years a substantial increase occurred in the number of charges filed against unions alleging violations of secondary boycott provisions of the Act. These charges in fiscal 1962 were 25 percent of all unfair labor practice allegations filed against labor organizations. This was 50 percent more than the percentage of such charges in 1958.

Even so, the two allegations most frequently brought against labor organizations continue to be illegal restraint or coercion of employees in the exercise of their rights to engage in union activity or to refrain from it, and discrimination against employees because of their lack of union membership. These accusations were present in 48 and 40 percent, respectively, of the 4,198 cases filed against unions. The percentages total more than 100 percent because a single charge may contain more than one allegation.

Fifty charges alleging hot cargo contract violations were filed against unions and employers jointly.

c. Processing of Unfair Labor Practice Cases

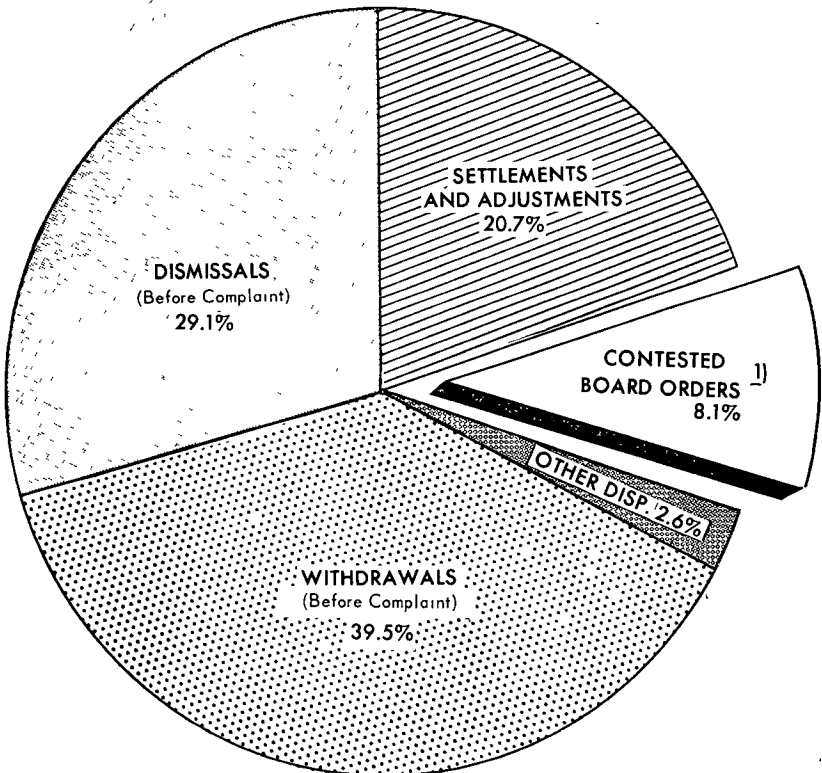
The statute gives the General Counsel the sole and independent responsibility for investigating charges of unfair labor practices, issuing complaints, and prosecuting cases where investigation shows evidence of violations of the Act.

The great bulk of unfair labor practice cases are handled to conclusion in various stages of processing in the regional offices where they are filed, and do not reach the Board Members in Washington for their decision.

Chart 2

DISPOSITION PATTERN FOR UNFAIR LABOR PRACTICE CASES

(BASED ON CASES CLOSED)



1) CASES REACHING BOARD MEMBERS FOR DECISIONS.

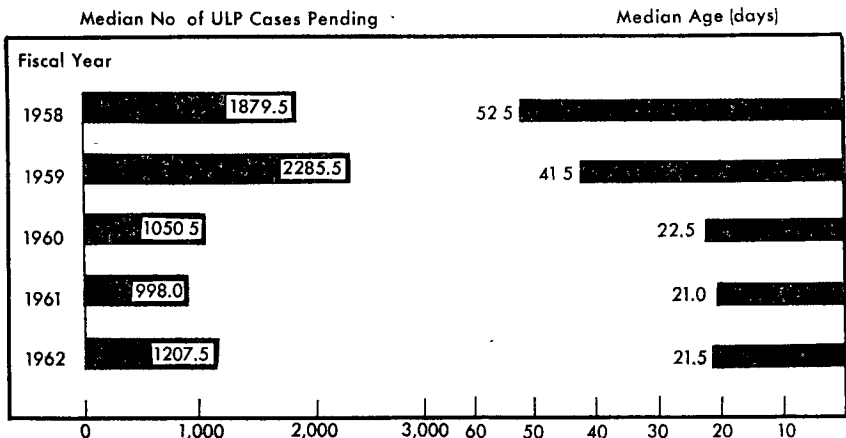
Chart 2 shows that approximately 9 of 10 cases are closed by dismissal or withdrawal of charges, or settlement of the dispute after investigation discloses the charge has merit. Dismissals by regional directors may be appealed to the General Counsel in Washington.

Litigation of the remaining cases annually brings hundreds of the more complex ones before the Board.

Regional staffs conduct a thorough inquiry into circumstances prompting the filing of a charge, beginning the investigation within 7 days after the written allegation is submitted and devoting about 3 weeks to the process of on-the-scene interviews with fellow workers, supervisors, company or union officials or both, and in a number of instances obtaining affidavits to piece together information relating to the case.

Chart 3 shows that the median age of unfair labor practice cases under investigation remained stable for the third year despite the uninterrupted rise in the total number of cases. The General Counsel's program of completing investigations in a shorter time has also resulted in reduction of the number of cases awaiting and undergoing investigation.

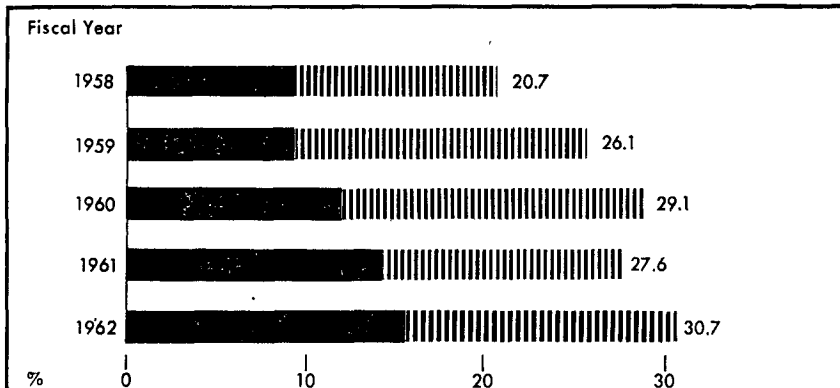
Chart 3
NUMBER AND AGE OF UNFAIR LABOR PRACTICE CASES PENDING UNDER
PRELIMINARY INVESTIGATION, MONTH TO MONTH



In fiscal 1962 the percentage of unfair labor practice charges found to be meritorious rose to 30.7 percent, as shown in chart 4. Meritorious charges are those in which investigation discloses probable violation of the Act. Unless the unfair labor practice is remedied through settlement or informal agreement of the parties to the case, the charge must go to hearing before a trial examiner and, in a majority of instances, on to the Board Members for decision.

Chart 4

UNFAIR LABOR PRACTICE MERIT FACTOR



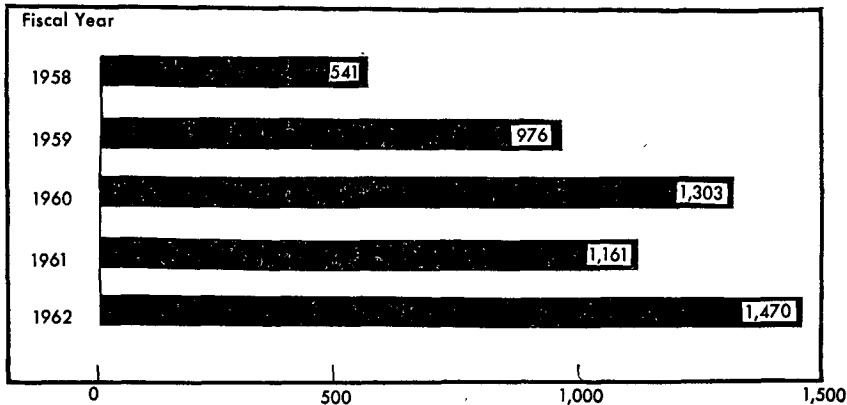
Pre-Complaint Settlements and Adjustments
 Cases in which Complaints Issued

	1958	1959	1960	1961	1962
Pre-Complaint Settlements and Adjustments (Percent)	9.7	9.7	11.9	14.1	15.3
Cases in Which Complaints Issued (Percent)	11.0	16.4	17.2	13.5	15.4
Total Merit Factor (Percent)	20.7	26.1	29.1	27.6	30.7

An all-time high of 1,470 complaints was issued by regional directors in the name of the General Counsel during the year, as shown in chart 5. The total was 27 percent more than in fiscal 1961.

Chart 5

COMPLAINTS ISSUED IN UNFAIR LABOR PRACTICE PROCEEDINGS

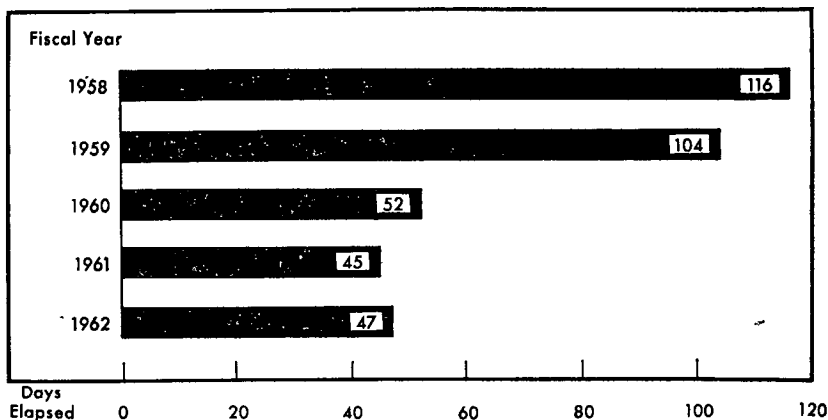


In issuing a complaint, regional directors have a time objective of 45 days from the filing of the unfair labor practice charge. This contemplates a 15-day period following determination that the charge has merit to give parties to the case an opportunity to adjust the case voluntarily and remedy the violation without invoking the formal process of trial and decision.

Although regional directors had the added responsibility of deciding contested representation cases during the fiscal year, as well as a larger number of charges to process, they issued unfair labor practice complaints in the median time of 47 days. This represented an increase of 2 days over 1961, but was an improvement of more than 2 months over the median time in 1958, as shown in chart 6.

Chart 6

MEDIAN DAYS FROM FILING OF CHARGE TO ISSUANCE OF COMPLAINT



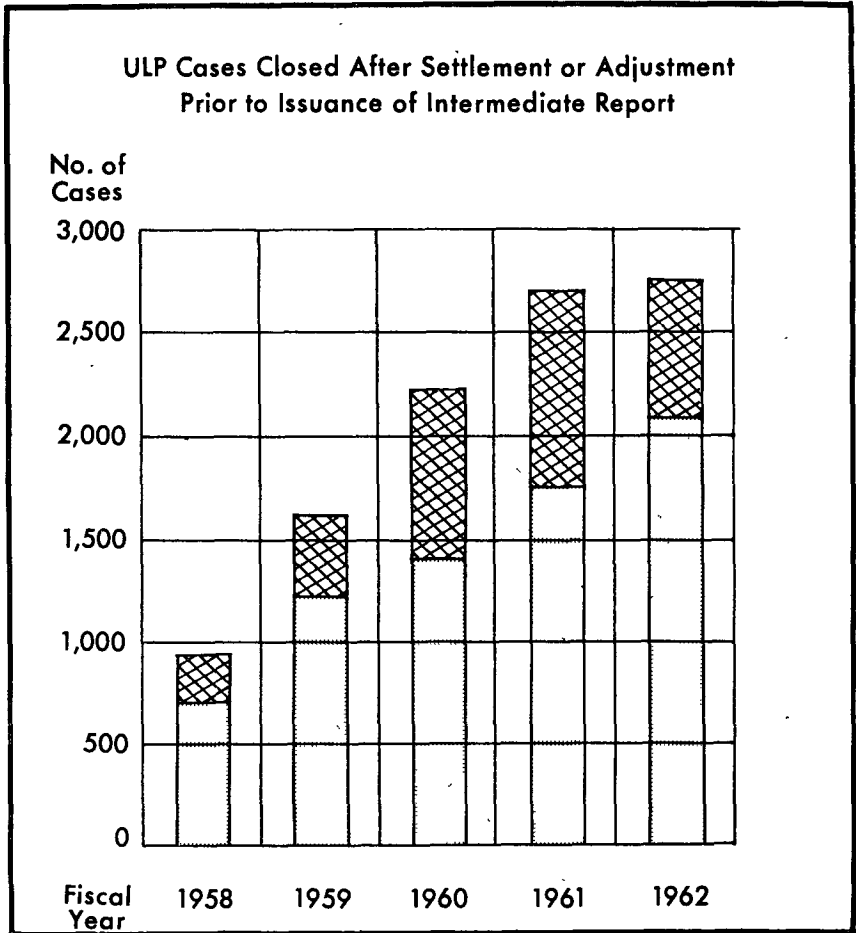
The upward trend in settlements and adjustments of meritorious unfair labor practice cases was maintained during 1962, as displayed in chart 7.

A record total of 2,752 settlements and adjustments was attained in response to the General Counsel's continuing emphasis on efforts by regional directors to work out voluntary agreements in labor-management disputes where feasible as an important contribution to industrial peace. For the first time precomplaint agreements topped the 2,000 mark in 1 year.

A settlement is a voluntary agreement to remedy a violation entered into by the Office of the General Counsel and the parties to a case. An adjustment is a settlement reached by the parties outside NLRB processes, with participation and approval of the General Counsel.

Chart 7

UNFAIR LABOR PRACTICE CASES SETTLED



Pre-Complaint
 Post-Complaint

<u>F.Y.</u>	<u>Pre-Complaint</u>	<u>Post-Complaint</u>	<u>Total</u>
1958	725	262	987
1959	1,238	352	1,590
1960	1,480	748	2,228
1961	1,693	1,038	2,731
1962	2,008	744	2,752

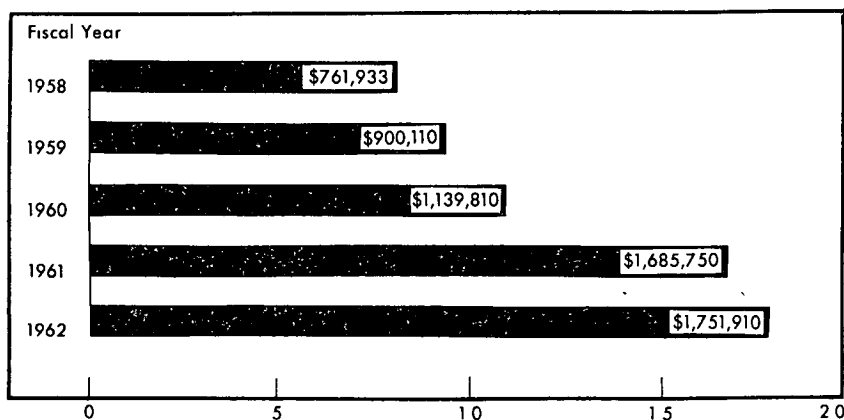
Progress in compliance is reflected in the amount of backpay received by unlawfully discharged employees and the number of these discriminatees offered reinstatement by employers to the same or equivalent positions.

During fiscal 1962 backpay reimbursements of lost wages totaled \$1,751,910, an amount exceeded only in one previous year. A near-record 2,465 dischargees were offered reinstatement. As exhibited by chart 8, there has been an annual increase in collections of backpay for discriminatees.

Under the NLRB definition, backpay is the difference between the sum a worker would have earned had he not been discharged illegally and what he earned or should have earned in interim employment elsewhere. The dischargee must make a diligent effort to obtain alternative work to be eligible for full backpay.

Chart 8

AMOUNT OF BACKPAY RECEIVED BY DISCRIMINATEES



Cases in which complaints issue and settlement efforts are unsuccessful go to hearing before NLRB trial examiners. These officials from the vantage of personal observation determine credibility of witnesses, often a key point, make findings of fact, and submit reports and recommendations. Their role is vital in the adjudication of contested unfair labor practice cases.

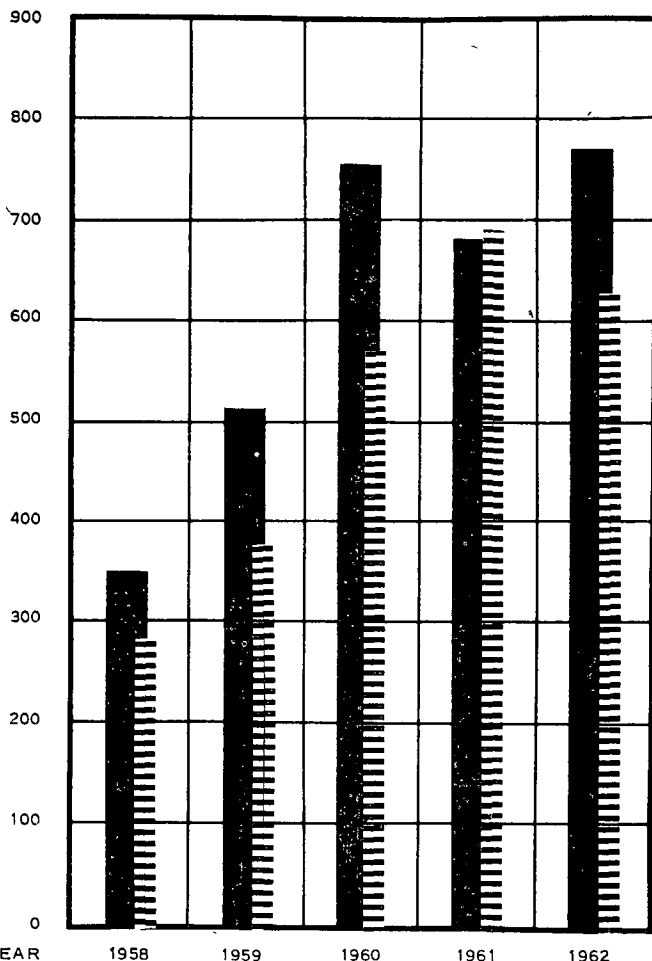
In fiscal 1962 trial examiners conducted 773 hearings in 1,305 cases and issued 623 intermediate reports and recommended orders in 989 cases, as shown in chart 9.

Unless the parties file exceptions to the findings and recommendations within 20 days, the trial examiner's order is made that of the Board. When exceptions are filed, the case goes to the Board for review and decision.

In 181 cases which went to formal hearing during the year, the trial examiners' findings and recommendations were not contested. These comprised 18 percent of the cases in which reports were issued.

Chart 9
TRIAL EXAMINER HEARINGS AND
INTERMEDIATE REPORTS
 (PROCEEDINGS)

PROCEEDINGS



HEARINGS HELD

IR'S ISSUED

353

289

513

382

759

572

690

692

773

623

d. Processing of Representation Cases

Shortly before the start of fiscal 1962 the processing of petitions for employee bargaining rights elections underwent a major change. Under permissive legislation that amended the basic statute, the 5 Board Members delegated to the 28 regional directors powers and responsibilities to decide contested representation cases, subject to review by the Board on limited grounds. The regional directors were authorized to send up any novel and difficult cases they believed the Board should rule upon.

The regional directors issued 1,924 decisions in 2,038 representation cases during the fiscal year. In these cases, the regional directors ruled on such issues as the existence of a "question concerning representation" which must be found before an election can be directed, the determination of employee units appropriate for collective bargaining, and voting eligibility of certain employees.

In the 2,038 contested cases, elections were directed in 1,836 and petitions dismissed in the other 202.

From its backlog of cases reaching it prior to the delegation, the Board directed elections in 577 cases and dismissed 141 petitions.

The delegated decision-making powers supplemented those already possessed by the regional directors in processing uncontested representation cases. Some 5,323 representation cases resulted in agreements by the parties for employee elections.

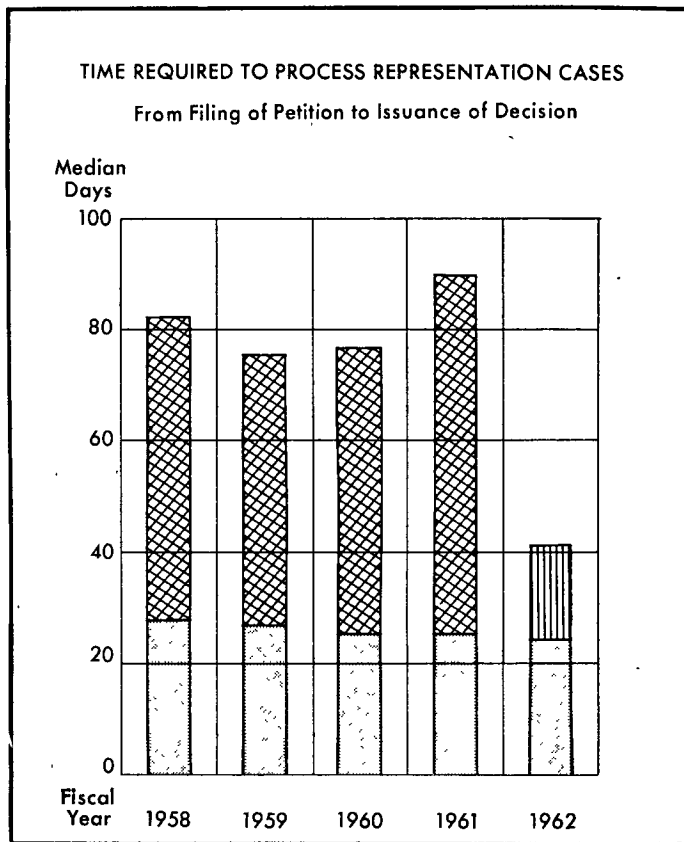
The delegation brought threefold benefit. It found general acceptance on the part of the labor organizations and the employers involved. It brought a significant speedup in representation case processing. And it made possible a rapid reduction in the backlog of all types of cases before the Board.

In more than 80 percent of the 2,038 contested cases, there was no petition for review by the Board of the directors' original decisions. Review was sought in 19.6 percent. It was granted by the Board in 13 percent of the requests, or approximately 3 percent of the total number of original decisions by the regional directors.

The delegation cut the average time from the filing of the petition to the ordering of an election from 89 to 41 days, as shown in chart 10.

Relieving the Board Members of the necessity of deciding the bulk of the contested representation cases, the delegation was a principal factor in the substantial cutback in the caseload awaiting Board consideration and decision. See chart 11. It should not be overlooked, moreover, that even with the delegation the Board Members passed on some 400 requests for review, decided approximately 150 complex cases referred by the regional directors, and ruled nearly 300 times on objections to election conduct and challenged ballots.

Chart 10



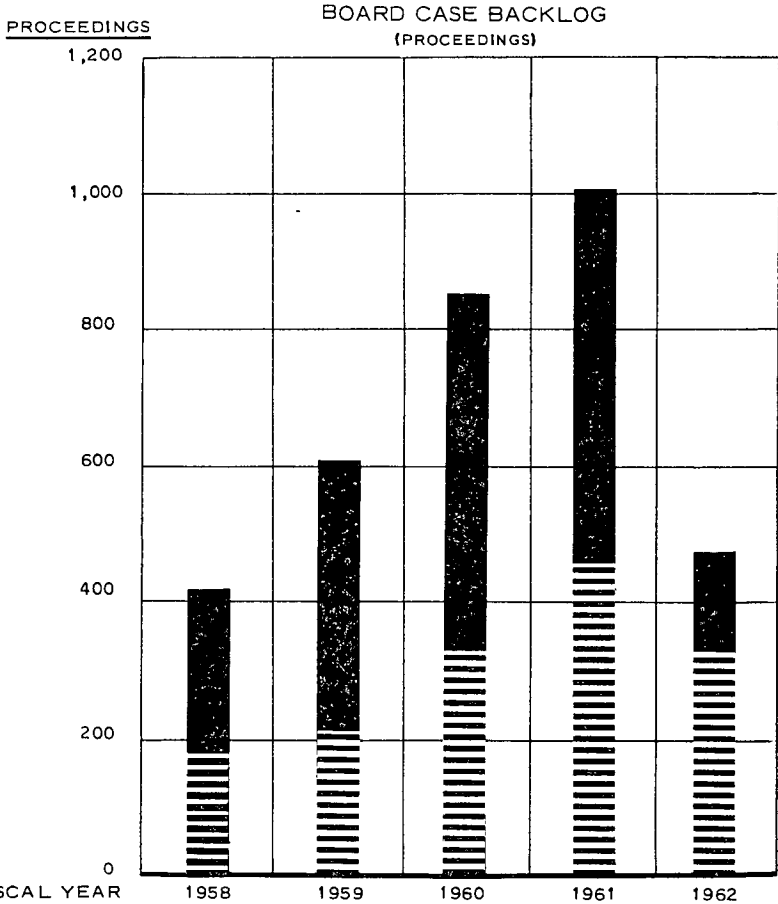
- Filing to Close of Hearing
- Close of Hearing to Board Decision
- Close of Hearing to Regional Director Decision



<u>F.Y.</u>	<u>Filing to Close of Hearing</u>	<u>Close of Hearing to Board Decision</u>	<u>Close of Hearing to Regional Director Decision</u>
1958	28	54	-
1959	28	49	-
1960	24	54	-
1961	24	65	-
1962	23	-	18

e. Elections

The NLRB conducted 7,355 collective-bargaining elections, a record number for any fiscal year, as shown in chart 12. The total increased 13 percent from 1961. Some 5,255 elections were held by voluntary agreement of the parties.

Chart 11



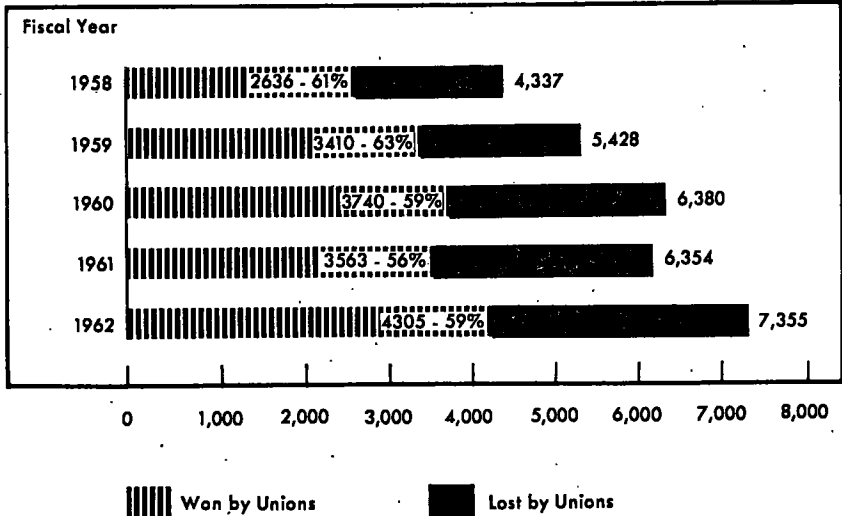
PROCEEDINGS		1958	1959	1960	1961	1962
	C	199	210	330	460	323
	R	222	399	522	549	165
TOTALS		421	609	852	1,009	488

Employees selected collective-bargaining agents in 4,305 elections, or 59 percent. This was a 3-percent gain by labor organizations since the preceding fiscal year when the unions' 56-percent winning average was their historical low mark in Board elections.

As a result of the elections, bargaining agents were chosen to represent units totaling 305,976 employees, or 57 percent of those eligible to vote. This compares with 51 percent in 1961.

There were 536,047 employees eligible to vote, with 90 percent casting valid ballots. The number of eligible voters rose 19 percent from 1961. Of the 482,558 employees casting valid ballots in Board elections, 299,547, or 62 percent, voted for representation.

Chart 12
COLLECTIVE BARGAINING ELECTIONS HELD
 No. and Percent



f. Decisions and Court Litigation

Eclipsing past records, the NLRB issued 3,600 decisions during the year in 4,391 cases of all types, as shown in chart 13. Of this total, 1,676 decisions involving 2,353 cases were issued by the Board Members and 1,924 decisions involving 2,038 cases by the regional directors.

The Board cases included 1,857 brought up on contest over either the facts or the application of the law. Of these, 1,139 were decisions in unfair labor practice cases and 718 in representation cases. The Board's remaining decisions were in 496 uncontested cases.

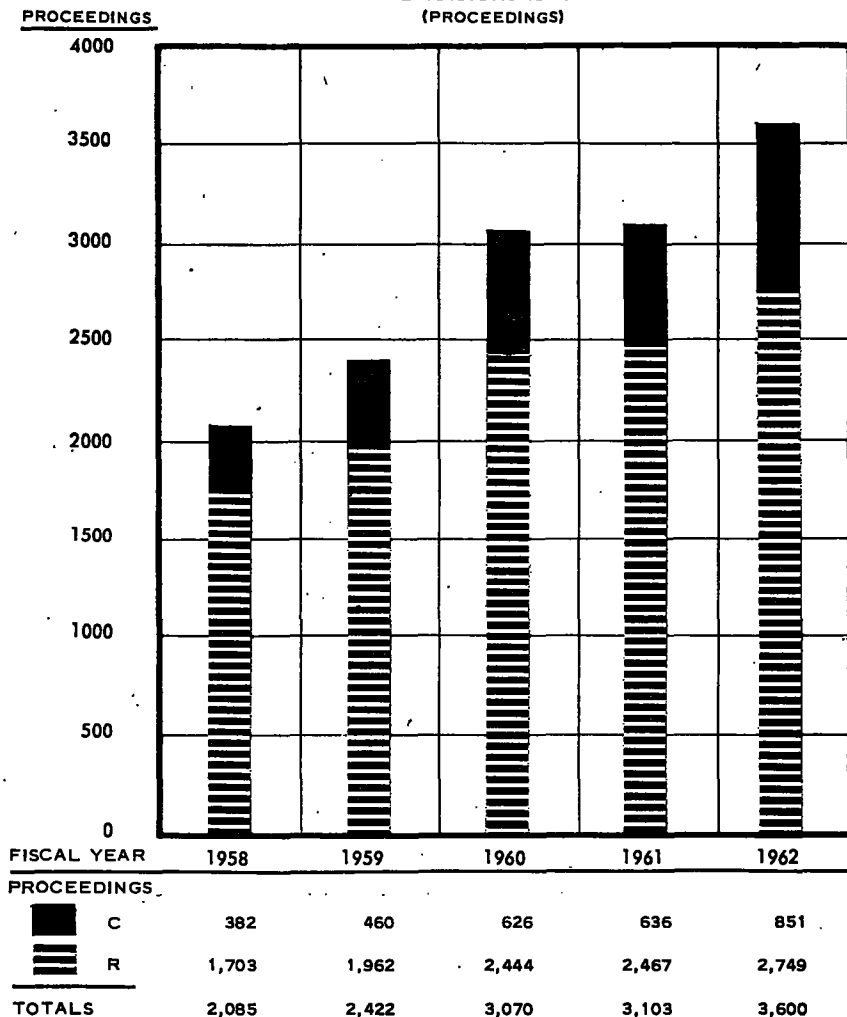
Of the 1,139 contested unfair labor practice cases, 783, or 69 percent, involved charges against employers; 356, or 31 percent, involved charges against unions. The Board found violations in 887 cases, or 78 percent.

In 654, or 84 percent of the 783 cases against employers, the Board found violations. In these cases, the Board ordered 2,100 employees reinstated and awarded backpay to 2,354 employees. The Board ordered a discontinuance of illegal assistance or domination of labor organizations in 109 cases. In 157 cases the employer was ordered to bargain collectively.

In 334 cases against unions, the Board found violations in 233, or 70 percent. In 60 cases the Board ordered cessation of illegal secondary boycotts. In 45 cases the Board ordered unions to cease requiring employers to extend illegal assistance. In 34 cases the Board found illegal discharge of employees, and ordered backpay to 135 employees. In the cases involving 79 of these employees found to be entitled to backpay, the employer, who made the illegal discharge, and the union, which instigated it, were held jointly liable.

Chart 13

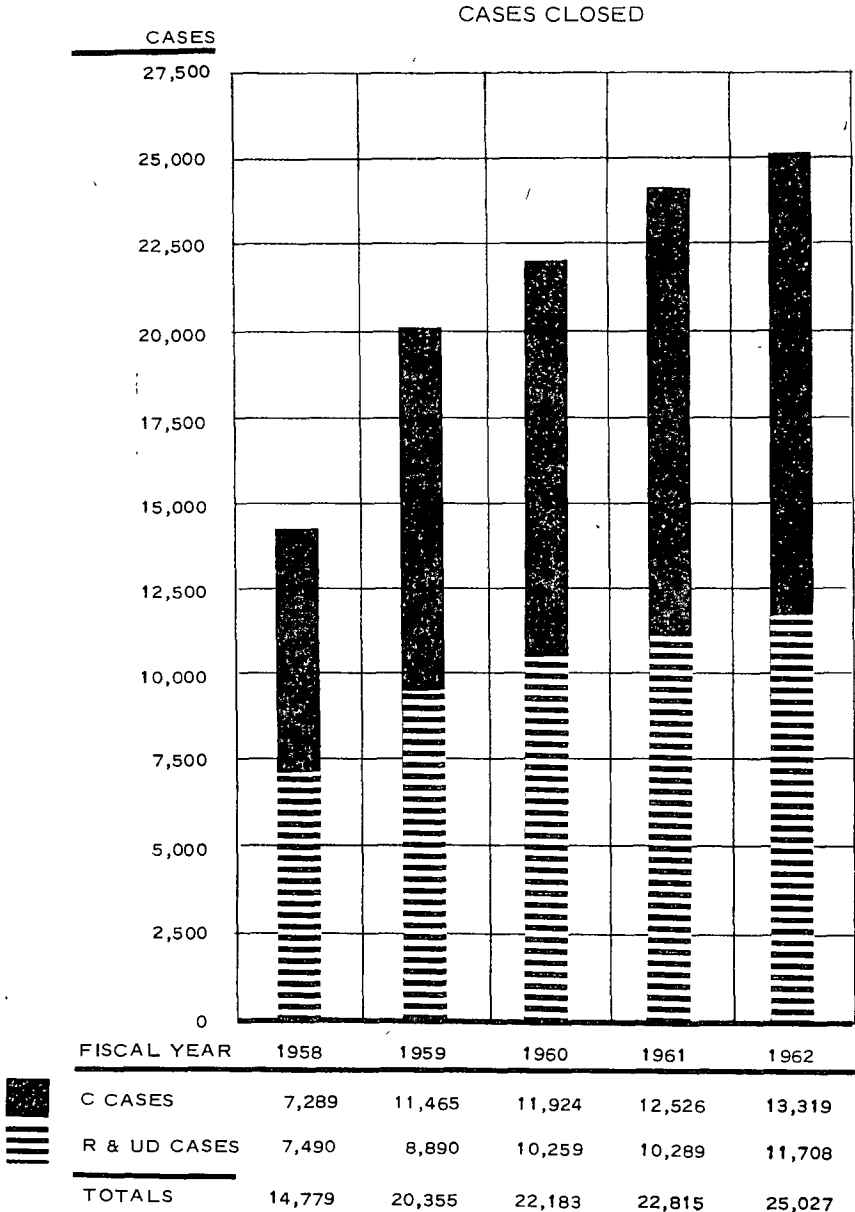
DECISIONS ISSUED
(PROCEEDINGS)



The record output of decisions combined with the work of the field staff in concluding cases without formal action enabled the Agency to set a new record in cases closed during any one fiscal year. See chart 14.

This effort outdistanced—slightly—the high tide of incoming cases and left the NLRB at year's end with 3 percent fewer cases in all stages of processing.

Chart 14



Since NLRB orders in unfair labor practice cases are not self-enforcing under the Act, the Agency is active in enforcement and review litigation before the U.S. court of appeals, more so than any other Federal administrative agency. The NLRB also is a frequent litigant before the Supreme Court.

The Division of Litigation in the Office of the General Counsel is responsible for handling all court litigation involving the NLRB.

During the fiscal year, the Supreme Court handed down decisions in eight cases involving Board orders. In each of these decisions the NLRB position was wholly or partially sustained. Six Board orders were enforced in full and two were remanded to the court below.

The proportion of successful litigation in the 11 circuits of the U.S. courts of appeals reached 75 percent of cases won in whole or in part. The courts of appeals reviewed 148 Board orders this year; 107 were enforced in full and with modification; 4 were partially enforced and partially remanded to the Board; 14 were remanded to the Board; and 23 orders were set aside.

In recent years enforcement litigation has spiraled rapidly, as has injunction litigation in the U.S. district courts. For the fifth consecutive year, petitions for injunctions reached an all-time high. U.S. district courts granted NLRB-requested injunctions in 85 percent of the contested cases litigated to final order. Eighty-seven injunction petitions were granted, 15 were denied. Another 197 petitions were settled or placed on the court's inactive dockets, and 8 petitions were awaiting action at the end of the fiscal year.

3. Decisional Highlights

The Board issued a number of decisions during the year which dealt with important labor relations issues. Some of these decisions reaffirmed existing Board case doctrine which was challenged. Others established precedents when cases brought into issue new statutory provisions. And still other decisions set forth modified applications of the Board law where a backlog of experience or changing economic conditions called for a reevaluation of applicable law.

Chapter III on Representation Cases and chapter IV on Unfair Labor Practices discuss in detail all decisional developments of the fiscal year. The following summarizes briefly leading cases in a few areas of significant decisional activity of the Board.

a. Hot Cargo Contracts

For the first time since the 1959 enactment of the "hot cargo" amendments to the Act, the Board passed on a number of unfair labor practice cases in which it applied the literal language of the statute

or interpreted the legislative intent to specific situations relating to contract clauses in which an employer agrees to refuse to handle the products of another employer or to cease doing business with him.

The Board held unanimously in the *American Feed Company* case, 133 NLRB 214, that there was illegality in signing an employer-union agreement containing a hot cargo provision even without evidence of any request or attempt by the union to enforce it. "The legislative history," the Board said, "rather clearly shows that the Congress was intent upon banning the entry into such contracts, thereby freeing the employer from such pressures and coercion as a union might exert to obtain contractual assent to prospective secondary boycotts."

The Board next came to grips with hot cargo agreements signed prior to enactment of the prohibitory provision of the statute but kept in effect thereafter. A board majority found a violation under these circumstances in companion cases at mid-year, *Greater St. Louis Automotive Trimmers*, 134 NLRB 1354, enforced 277 F. 2d 458 (C.A. 8) and 134 NLRB 1363. The two cases involved subcontracting clauses, which the Board unanimously held to be unlawful because they "limited the persons with whom the employer can do business." Noting that many labor-management agreements include provisions restricting or prohibiting subcontracting of work which ordinarily is performed by employees in the bargaining unit, the Board did not rule "whether such contract clauses were lawful or unlawful."

Late in the fiscal year, the Board handed down decisions in three cases in which the legality of varied subcontracting clauses was challenged on hot cargo grounds.

In *San Joaquin Valley Shippers*, 137 NLRB No. 75, the Board found unlawful a contract provision in which the employer agreed not to do business with contractors who violated the union contract nor to contract with independent truckers not in good standing with the union.

In *Sunrise Transportation*, 137 NLRB No. 98, the Board refused to accept a contract clause which allowed the employer to subcontract only to other employers who have agreements with the contracting union.

In *Dan McKinney Co.*, 137 NLRB No. 74, the Board struck down a clause that barred a wholesaler from discharging employees or otherwise discriminating against them for refusing to perform work for retailers not under union contract. The contractual provision was not saved, the Board held, by its allowing emergency deliveries to such retailers if they were not involved in a labor controversy. In its opinion, the Board said, "We see no real distinction between a contract which prohibits an employer from requiring that his employees

do certain work and one prohibiting an employer from discharging his employees for refusing to perform such work. . . . Congress, in banning all hot cargo clauses, was intent on reaching every device, no matter how disguised, which, fairly considered, is tantamount to an agreement to cease doing business for an unlawful reason.”

The Board left open, through a footnote in the *Dan McKinney* case, whether a clause may lawfully protect employees from discharge for refusing to cross a picket line of another employer.

b. Duty To Bargain

A Board majority decided that the agency shop is a lawful form of union security contract and is a mandatory subject of collective bargaining. *General Motors Corporation*, 133 NLRB 451. Under an agency shop, nonunion employees are required as a condition of employment to pay to the union sums usually equal to fees and dues paid by union members. After the close of the fiscal year, the case was carried to the Supreme Court from an adverse decision by the U.S. Court of Appeals for the Sixth Circuit.

In *Town & Country Manufacturing Company, Inc.*, 136 NLRB 1022, a Board majority held that an economic decision to contract out work must be discussed by an employer with the representative of the employees to be affected. The majority said, “[T]he elimination of [bargaining] unit jobs, albeit for economic reasons, is a matter within the statutory phrase ‘other terms and conditions of employment’ and is a mandatory subject of collective bargaining.” This case was taken to the U.S. court of appeals on a petition for review.

The Board unanimously ruled in *Arlington Asphalt Company*, 136 NLRB 742, that an employer may not require collective bargaining on its request that a union post an indemnity bond to guarantee the employer against losses resulting from jurisdictional disputes.

In *Detroit Resilient Floor Decorators Local No. 2265*, 136 NLRB 769, the Board held that a union cannot insist, to a point of impasse, that an employer contribute to an industry promotion fund, because this subject is outside the employment relationship and is not a mandatory subject of bargaining.

The Board in *Sidele Fashions, Inc.*, 133 NLRB 547, held that an employer violated his duty to bargain and unlawfully discriminated against his employees by shutting down his plant and moving it to another State and by discharging his workers as a means of forcing the union to accept his contract proposals.

By refusing to sign an agreed-upon contract until the common employer came to terms with a sister local at another of its plants, a certified union local and its international were held by the Board to have

refused to fulfill their statutory bargaining obligations, *Standard Oil Company*, 137 NLRB No. 68. The Board asserted the refusal to sign was a device intended to increase the bargaining power of the other local.

c. Jurisdictional Disputes

Opening a new chapter in NLRB jurisprudence, the Board issued its first decisions assigning specific types of work to one of two groups of workers competing for the same jobs. At the outset the Board emphasized that it was awarding the work to a "group of employees performing a type of work" rather than to a particular union or to members of that union.

Three decisions and work awards, issued simultaneously in the latter half of the fiscal year, were the vanguard of 20 issued during the period. In *J. A. Jones Construction Company*, 135 NLRB 1402, electricians, instead of machinists, were awarded the work of operating electric overhead cranes in a machine shop. In *Frank P. Badolato & Son*, 135 NLRB 1392, laborers, rather than engineers, were awarded the work of starting, stopping, oiling, greasing, and making minor repairs to plaster mixers and power applicators for a plastering contractor. In *P. Lorillard Company*, 135 NLRB 1382, tobacco production worker "fixers," rather than machinists, were awarded the work of operating, adjusting, and maintaining automatic cigaret packaging machines.

In all jurisdictional dispute cases decided during the year, the Board made work awards to employees to whom the employers had given the assignments, although the Board noted in the *Jones* case that the employer's action would be only one of several factors it would take into consideration. Instead of formulating general rules, the Board specified it would decide each case on its own facts, considering "all relevant factors in determining who is entitled to the work in dispute." The Board cited as examples "the skills and work involved, certification by the Board, company and industry practice, agreements between unions and between employers and unions, awards of arbitrators, joint boards and the AFL-CIO in the same or related cases, the assignment made by the employer, and the efficient operation of the employer's business."

In embarking on this new decisional endeavor, the Board responded to a Supreme Court opinion in the *CBS* case, *N.L.R.B. v. Radio & Television Broadcast Engineers*, 364 U.S. 573, that the Act requires the Board to make an affirmative award of work in jurisdictional disputes involving strikes or threats of strikes, unless there is a voluntary means to adjust the issue and the employer and labor groups agree to be bound by it.

d. Bargaining Units

The Board reviewed and revised several of its rules applicable to the appropriateness of bargaining units of employees, including those for technical employees, truckdrivers, and insurance agents.

In *Sheffield Corporation*, 134 NLRB 1101, the Board took judicial notice that the placement problem of white-collar technical employees is becoming increasingly important due to automation advances and development of push-button production techniques. In revising a prior practice of automatically excluding technical employees from a unit of production and maintenance personnel when their placement is in dispute, the Board pointed to the steady increase in many industries in the number of "technical" who perform essentially production work.

The Board said that in processing representation election cases involving the question whether "technical" be included in voting units of production and maintenance workers, it will consider factors such as similarity of skills and job functions, common supervision, contract and/or interchange with other employees, and history of bargaining relationships.

In *Kalamazoo Paper Box*, 136 NLRB 134, a Board majority noted it no longer will automatically give truckdrivers a separate unit, but sometimes may group them with production and maintenance personnel. In *E. H. Koester Bakery Co.*, 136 NLRB 1006, a Board majority said it no longer will automatically include truckdrivers in more comprehensive industrial-type production and maintenance units when there is a dispute on placement, there is no bargaining history, and no union seeks to represent them separately. In *Plaza Provision Company (P.R.)*, 134 NLRB 910, a majority of the Board permitted separation of truckdrivers from those who are both drivers and salesmen.

The majority specified that the Board will look to job classification content rather than label and will give strong weight to a determination of truckdrivers' "community of interest."

In *Quaker City Life Insurance Company*, 134 NLRB 960, a Board majority ordered an election in a citywide unit of insurance agents because of the autonomous day-to-day operations of the district office located in the city and the absence of any administrative subdivision between the home office and the district office. In its decision, the Board replaced its 1944 rule of denying units of insurance agents less than statewide or companywide in scope.

e. Conduct Affecting Elections

The Board during the fiscal period increased the protection surrounding the freedom of employees' choice in elections to determine their collective-bargaining representative.

By unanimous vote, the Board lengthened the period during which unions and employers must meet electioneering standards. In the *Ideal Electric and Manufacturing Company* case, 134 NLRB 1275, the Board announced that in contested representation cases it will inspect a longer preelection period when objectionable campaign conduct is alleged. The period ends with the voting, but under the new rule begins when the petition for an election is filed instead of when the election is ordered. After the end of the fiscal year, in *Goodyear Tire and Rubber Co.*, 138 NLRB No. 59, the same rule, beginning the period with the petition filing, was made applicable by a Board majority to all cases, including cases where the election was held by agreement of the parties rather than by direction of the Board.

The Board is charged with the responsibility of balancing with employee freedom of choice the free-speech interests of all: unions, employers, and employees alike. Particular attention was drawn to the problem of whether discussion purporting to be a prediction or estimate of the situation is actually under all the circumstances a substantial threat to visit reprisals if the election goes a certain way. In such cases as *Lake Catherine Footwear*, 133 NLRB 443, the underlying threat was found, that of closing the plant.

Storkline Corporation, 135 NLRB 1146, involved the rule of *R. D. Cole Manufacturing Company*, 133 NLRB 1455, that assertions of slack work as a result of the election may be made under such circumstances as to render impossible the exercise of free choice. On the other hand, as in *Motec Industries*, 136 NLRB 711, the employees may be in position to evaluate the claims of risk of economic loss.

Physical circumstances also affect freedom of choice. Questions of where employer interviewing of employees takes place, whether the union should have access to plant premises for campaigning, and what methods of communication fall below legitimate tactics continued to require resolution.

The Board, by a divided vote, reaffirmed the department store application of the *Bonwit Teller* doctrine in *May Company*, 136 NLRB 797, holding that if the store forbids solicitation in the selling areas it may not use company time and premises for antiunion speeches while denying the union's request for an equal opportunity to address

the employees. Discussion in *Aragon Mills*, 135 NLRB 859, carried on in company offices, was held an interference in accordance with the *General Shoe* doctrine. The Board also set aside elections on the basis of strikers' threats to a fellow employee of knocking him in the head if he voted, in *National Gypsum Company*, 133 NLRB 1492; and anonymous telephone calls to intimidate rival union leaders from vigorous prosecution of their campaign, in *Gabriel Company Automotive Division*, 137 NLRB No. 130.

f. Picketing and Other Pressures

Reconsidering cases relating to the new provisions of the statute covering recognitional and organizational picketing, Board majorities issued important decisions in *C. A. Blinne Construction Company*, 135 NLRB 1153; *Stork Restaurant, Inc.*, 135 NLRB 1173; *Charlton Press, Inc.*, 135 NLRB 1178, and *Crown Cafeteria*, 135 NLRB 1183.

Although finding unfair labor practice violations in the *Blinne* and *Stork* cases, a majority of the Board took the view that under certain conditions picketing for recognition or organization does not violate the Act, by virtue of the informational proviso to the statutory section added in 1959.

The Board majority held that picketing for informational purposes where the picketing does not interfere with deliveries is protected by the proviso although the union does not file a representation petition and one of the objects of the picketing may be organization or recognition.

No violation was found in *Calumet Contractors*, 133 NLRB 512, as a Board majority held that the object of an uncertified union's picketing was to require the employer to conform to wage rates and working conditions prevailing in the area even with another union certified to represent the employer's workers.

A Board majority held that the publicity proviso of the secondary boycott amendment protects union members who distribute leaflets at business places of employers not involved in a labor dispute. In *Lohman Sales Company*, 132 NLRB 901, the Board ruled that the proviso applied even though the primary employer was a distributor of goods rather than a manufacturer of products.

In *Plauche Electric, Inc.*, 135 NLRB 250, a Board majority upheld common situs picketing by a union whose signs clearly evidenced that the picketing was directed only against the employer with whom it had a dispute and occurred only at times when the primary employer's workers were busy at the site. In the decision, the Board discarded

“a rigid rule” that picketing at a multiemployer site was unlawful where the employer has a regular place of business in the locality which can be picketed. The majority noted that existence of such a place of business would not be the controlling factor but would be considered as one circumstance, among others, in determining the object of the picketing, adding: “We shall not automatically find unlawful all picketing at the site where the employees of the primary employer spend practically their entire working day simply because, as in this case, they may report for a few minutes at the beginning and end of each day to the regular place of business of the primary employer.”

In *Tree Fruits Labor Relations Committee, Inc.*, 132 NLRB 1172, the Board found a secondary boycott violation when pickets at grocery stores carried signs calling upon consumers not to purchase apples coming from fruit-packing firms using nonunion employees. The Board held that the picketing coerced the grocery chain to cease doing business with the fruit packers. Near the end of the fiscal year, the U.S. Court of Appeals for the District of Columbia remanded the case to the Board, asserting the statute does not completely ban consumer picketing at the premises of a secondary employer and calling upon the Board to support its decision with a specific showing of coercive effect on the neutral employer. After the close of the fiscal year, the Board filed with the Supreme Court a petition for certiorari, seeking reversal of the court of appeals decision.

g. Superseniority

By unanimous vote, the Board held that an employer violated the Act by awarding an additional seniority credit to replacements for strikers and to strikers who returned to work during a strike, *Erie Resistor Corporation*, 132 NLRB 621.

In a subsequent layoff at the manufacturing plant, strikers who did not return to their jobs until after termination of the strike were laid off as junior employees.

The Board ruled that the employer's superseniority policy was an unlawful, discriminatory means of combating the employees' right to strike. Recognizing established law that an employer may replace economic strikers in order to carry on his business, the Board said, “in our opinion superseniority is a form of discrimination extending far beyond the employer's right of replacement,” adding that it is “in direct conflict with the express provisions of the Act prohibiting discrimination.”

In a case decided soon afterward, *Swan Rubber Company*, 133 NLRB 375, the Board similarly found an unfair labor practice violation in the granting of superseniority to strikers to induce them to abandon the strike and return to work. The extra seniority was offered only to returning strikers in this case, not to new, replacement employees.

The issue was taken to the Supreme Court after the U.S. Court of Appeals for the Third Circuit reversed the Board in the *Erie* case while the Sixth Circuit affirmed the Board's position in the *Swan* case.

h. Problem Areas

As the new fiscal year began, Chairman McCulloch said new aspects of "hard, legal and industrial relations issues" remain for Board consideration. In an address before the Section of Labor Relations Law of the American Bar Association, he listed these problem areas:

1. The determination of whether an individual is an "employee," an "independent contractor," or a "supervisor" in our automated factories and ever-changing distributive and merchandising systems.

2. The scope of "mandatory," as contrasted with "permissive" bargaining, as group interests change with the changing social conditions.

3. The limitations to be put on preelection speech and propaganda; and whether the introduction of new and more sophisticated techniques of communications, or a more sophisticated labor force, require modification of our rules

4. The weight and finality to be given arbitration in light of recent Supreme Court decisions in allied fields.

5. The determination of appropriate units for bargaining as the blue collar worker gives way to the white, and business concerns expand by merger and purchase.

6. Techniques for differentiating between organizational and publicity picketing, as the two become more and more blended.

7. How to distinguish between "secondary" and "primary" strike action as the employers or the unions enmesh their activities.

8. How far can employers utilize lockouts to counterbalance strike threats or action by their labor force.

9. Techniques for resolving, and minimizing, jurisdictional disputes.

10. The creation of remedies that will give more protection to the rights of self-organization, discourage unfair practices by unions and employers, and encourage the practice and procedure of collective bargaining.

11. The encouragement of an atmosphere where voluntary adjustments become commonplace; and "employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other."

4. Fiscal Statement

The obligations and expenditures of the National Labor Relations Board for fiscal year ended June 30, 1962, are as follows:

Personnel compensation-----	¹ \$14,599,652
Personnel benefits-----	1,070,940
Travel and transportation of persons-----	1,146,136
Transportation of things-----	63,224
Communication services-----	543,979
Rents and utility services-----	29,684
Printing and reproduction-----	357,567
Other services-----	676,609
Supplies and materials-----	228,727
Equipment-----	155,941
Insurance claims and indemnities-----	311
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Subtotal, obligations and expenditures-----	18,872,770
Transferred to Operating Expenses, Public Buildings Service (Rent)-----	846,401
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Total Agency-----	19,719,171
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¹ Includes \$1,193 for reimbursable personal service costs.

This item has always been included in the totals for the annual report. As a matter of reconciliation, the budget document presents direct obligations and reimbursable obligations separately.

II

Jurisdiction of the Board

The Board's jurisdiction under the Act, as to both representation proceedings and unfair labor practices, extends to all enterprises whose operations "affect" interstate or foreign commerce.¹ However, Congress and the courts² 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 limitation³ that jurisdiction may not be declined where it would be asserted under the Board's jurisdictional standards prevailing on August 1, 1959.⁴ Accordingly, before the Board takes cognizance of a case, it must first be shown that the Board has legal or statutory jurisdiction, i.e., that the business operations involved "affect" commerce as required by the Act, and it must also appear that the business operations meet the Board's applicable jurisdictional standards.⁵

Upon appropriate petition,⁶ the Board will issue an advisory opinion as to its jurisdiction in certain circumstances. Under its

¹ See secs. 9(c) and 10(a) of the Act. 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 nonprofit hospital, any person subject to the Railway Labor Act, or any labor organization other than when acting as an employer. "Agricultural laborers" and others excluded from the term "employee" as defined by sec. 2(3) of the Act are discussed below under "Representation Cases," pp 71-76

² See Twenty-fifth Annual Report (1960), p. 18.

³ Sec. 14(c)(1) of the Act. See also *Hirsch, et al. v. McCulloch*, 303 F. 2d 208 (C.A.D.C.), discussed below, p. 255, under "Miscellaneous Litigation," where the court held that under sec. 14(c)(1), the Board may decline jurisdiction over a class or category of employers by published rule adopted pursuant to the Administrative Procedure Act, or by "rule of decision" after hearings but not on the basis of an "advisory opinion" without hearing.

⁴ The last general standards established by the Board prior to August 1, 1959, and prevailing on that date, were those announced on October 2, 1958. Press Release (R-576) October 2, 1958; Twenty-third Annual Report (1958), p. 8. See also Press Release (R-586) January 11, 1959, and *Floridan Hotel of Tampa, Inc.*, 124 NLRB 261 (July 30, 1959), for hotel and motel standards.

⁵ While a mere showing that the Board's gross dollar volume standards are met is ordinarily insufficient to establish legal or statutory jurisdiction, no further proof of legal or statutory jurisdiction is necessary where it is shown that its "outflow-inflow" standards are met. Twenty-sixth Annual Report (1961) p. 23; and *Southern Dolomite*, 129 NLRB 1342 (1961). But see *Sioux Valley Empire Electric Assn.*, 122 NLRB 92 (1958), as to the treatment of local public utilities.

⁶ See *H. W. Woody, Jr., et al.*, 125 NLRB 1172 (1959), Twenty-fifth Annual Report (1960), p. 19, as to what constitutes an appropriate petition.

Rules,⁷ where a proceeding is pending before a State or Territorial tribunal, and a party to the proceeding or the tribunal itself is in doubt whether the Board would assert jurisdiction under current jurisdictional standards, the party or tribunal may seek an advisory opinion as to whether the Board would assert or decline jurisdiction in the particular case.⁸ During the past fiscal year, the Board issued nine such opinions.⁹ In one opinion,¹⁰ it noted, "Advisory opinions are rendered only on the jurisdictional issue as presented by the facts submitted. This Board will not presume to render an [advisory] opinion on the merits of a case or whether the subject matter of a dispute is governed by the Act."¹¹

1. Enterprises Subject to Board Jurisdiction

During fiscal 1962, the Board again had occasion to determine the applicability of its legal jurisdiction and jurisdictional standards to various types of enterprises. Among those considered were certain maritime operations, a communications system consisting of a community TV antenna system, and various real estate and homebuilding enterprises.¹²

a. Maritime Operations

The principal cases in the maritime field involved vessels of foreign registry, vessels of U.S. registry employing foreign crews abroad, and a tugboat operation rendering navigational services to the U.S. Navy and oceangoing vessels.

⁷ Secs 102.98-102.104, Rules and Regulations, Series 8, as amended, effective November 13, 1959.

⁸ In this connection, it is pertinent to note that sec. 14(c)(2) of the Act empowers State and Territorial agencies and courts to assert jurisdiction in labor relations matters over which the Board has declined jurisdiction.

⁹ *Gradwohl & Pitcher*, 133 NLRB 1696; *Fred L. Roberts*, 134 NLRB 1005; *Jemcon Broadcasting Co.*, 135 NLRB 362; *Connecticut State Board of Labor Relations (Norwalk Motor Inn, Inc.)*, 136 NLRB 1090, *Connecticut State Board of Labor Relations (Westport New Englander Motor Hotel)*, 136 NLRB 1092; *Oregon Labor-Management Relations Board (Charles Lake Construction Co.)*, 136 NLRB 1207; *Globe Security Systems, Inc.*, 137 NLRB No. 12; *R. I. Incinerator Inc.*, 137 NLRB No. 32; *Terrizzi Beverage Co.*, 137 NLRB No. 59.

¹⁰ *Globe Security Systems, Inc.*, above, where the Board advised that it would assert jurisdiction over an employer which engaged in providing plant protection services for employers located in 28 States, and met the current standard for service enterprises—\$50,000 annual inflow or outflow, direct or indirect, as defined in *Stemons Mailing Service*, 122 NLRB 81 (1958).

¹¹ See Board's Statements of Procedure, Series 8, as amended, sec. 101.40; and *American Linen Supply*, 128 NLRB 639, 641 (1960).

¹² For the Board's assertion of jurisdiction over a local union and a welfare trust fund, in their capacity as employers, see *Chain Service Restaurant, Luncheonette & Soda Fountain Employees, Local 11 (Childs Restaurant)*, 132 NLRB 960, discussed below, p. 39.

(1) Vessels of Foreign Registry

In cases involving foreign-flag vessels, a Board majority¹³ continued to adhere to its *West India* decision,¹⁴ which followed the guidelines enunciated by the Supreme Court in *Lauritzen v. Larson*.¹⁵ It asserted or declined jurisdiction on the basis of whether the commerce involved was “essentially that of this nation and not of a foreign nation”—the test being “whether there exist[ed] substantial contacts between the ‘foreign’ maritime operation and important United States interests.”¹⁶ Thus, jurisdiction was asserted where: (1) a U.S. corporation had full control of a foreign-flag cruise vessel, was its beneficial owner and the employer of the foreign crew, the vessel was primarily provisioned and repaired in the United States, and most of its passengers and cargo was obtained in this country;¹⁷ (2) a vessel’s foreign owner and its U.S. agent constituted a single integrated enterprise which was essentially a domestic operation;¹⁸ (3) several foreign-flag vessels were operated by a U.S. corporation for the transportation of pulpwood for its U.S. business, although one of these vessels never operated in U.S. waters but acted as a link in the through international voyages of the company’s other vessels;¹⁹ and (4) the maritime operations involved were those of a U.S. corporation, although the petitioning union was organized under foreign laws.²⁰

In *United Fruit Company*,²¹ a Board majority asserted jurisdiction over a fleet of Honduran-flag vessels, beneficially owned and controlled by a U.S. corporation—primarily concerned in the production, transportation, and sale of tropical produce—through its wholly owned foreign subsidiaries, and directed an election on the basis that these vessels were “wholly integrated” in the American company’s shipping operations and “encompass[ed], in large part, transporta-

¹³ Chairman McCulloch and Members Leedom, Fanning, and Brown; Member Rodgers dissenting.

¹⁴ *West India Fruit & Steamship Co.*, 130 NLRB 343 (1961), then-Chairman Leedom and Members Jenkins and Fanning for the majority, Members Rodgers and Kimball dissenting. Twenty-sixth Annual Report (1961), pp. 23–26.

¹⁵ 345 U.S. 571 (1953).

¹⁶ *United Fruit Co.*, 134 NLRB 287, Chairman McCulloch and Members Leedom, Fanning, and Brown for the majority, Member Rodgers dissenting.

¹⁷ *Pennsular & Occidental Steamship Co., et al.*, 132 NLRB 10, Members Leedom and Fanning for the majority, Member Rodgers dissenting, Chairman McCulloch and Member Brown not participating. Twenty-sixth Annual Report (1961), p. 25.

¹⁸ *Eastern Shipping Corp., et al.*, 132 NLRB 930, Members Leedom and Fanning for the majority, Member Rodgers dissenting, Chairman McCulloch and Member Brown not participating. Twenty-sixth Annual Report (1961), p. 25.

¹⁹ *Owens-Illinois Glass Co.*, 136 NLRB 389, decided subsequent to the court decisions referred to in footnote 22, below, Chairman McCulloch and Members Leedom and Brown for the majority, Member Rodgers dissenting, Member Fanning not participating; election enjoined in *Owens-Illinois Glass Co. v. McCulloch*, 50 LRRM 2041 (D.C.D.C.).

²⁰ *Hamilton Bros., Inc.*, 133 NLRB 868, Chairman McCulloch and Members Leedom, Fanning, and Brown for the majority, Member Rodgers dissenting.

²¹ 134 NLRB 287, Chairman McCulloch and Members Leedom, Fanning, and Brown for the majority, Member Rodgers dissenting.

tion and trade between foreign countries and States of this Nation.”²² It cautioned, however, as follows:

. . . [N]one of these cases support the proposition . . . that underlying stock or other beneficial ownership and, thus, ultimate control of a foreign corporation and its operations by domestic United States interests necessarily bring the foreign corporation or its operations within the coverage of the Act. We do not read the Act as necessarily following United States investments abroad. It is the commerce of this Nation, not of foreign nations, with which the Act is concerned. . . . Nothing in the Act or relevant cases suggests, however, that all seaborne commerce reaching our ports on regular runs or sporadically is within the Act's coverage irrespective of other aspects of the operation. [Footnote omitted.] . . . Rather the problem is one of evaluating the many aspects of the operation and determining whether or not the shipping involved is essentially that of this Nation and not that of a foreign nation which the exigencies of international trade have brought in contact with the United States. [Footnote omitted.]

On the other hand, in *Dalzell Towing*,²³ the Board found that it was “without jurisdiction to proceed” in the case of a tanker of Panamanian registry which operated under charter arrangements with both domestic and foreign corporations, and spent “only some 26 percent” of a 3-year period in voyages touching U.S. ports. The fact that the vessel was owned and operated by a Panamanian corporation which was a wholly owned subsidiary and instrumentality of an American corporation, and “essentially a U.S. enterprise,” was not considered controlling. The Board observed that while in other cases it has noted the importance of the U.S. nationality of a ship-owning employer and of voyages to and from U.S. ports, the situation here was different in that it was the business operations of the charterers and not that of the owner-operator which determined in what commerce the vessel sailed.²⁴ Under the type of charter operations involved here, the Board found that the U.S. connections of the owner-operator did not in themselves demonstrate sufficiently substantial U.S. contacts to confer jurisdiction. And the physical contacts of the vessel to the United States were not deemed to evince substantial ties to the commerce of this Nation.²⁵

²² The election has been enjoined by the courts. See *Empresa Hondurena de Vapores v McLeod*, 300 F. 2d 222 (C.A. 2), reversing 200 F. Supp. 484 (D.C.N.Y.), certiorari granted 370 U.S. 915; and *Sociedad Nacional de Marineros de Honduras v. McCulloch (United Fruit Co.)*, 201 F. Supp. 82 (D.C.D.C.), certiorari granted 370 U.S. 915.

²³ *Dalzell Towing Co., Inc., et al.*, 137 NLRB No. 48, Chairman McCulloch and Members Leedom, Fanning, and Brown joining in the principal opinion, Member Rodgers concurring only in the result.

²⁴ The situation here was distinguished from that in *United Fruit Co.*, above, and *Peninsular & Occidental*, above, in that the foreign corporations there chartered their vessels only to U.S. corporations to which they were related, for the continuing use of such corporations as an adjunct of their U.S.-located commerce.

²⁵ See also *Reynolds Metal Co., et al.*, 134 NLRB 1187, and *National Bulk Carriers, Inc., et al.*, 134 NLRB 1186, where the Board dismissed petitions for declaratory orders involving foreign-flag vessels, without determining the merits of the jurisdictional issue.

(2) American-Flag Vessels Employing Foreign Crews Abroad

Conversely, in *Grace Line, Inc.*,²⁶ a Board majority asserted jurisdiction over the operations of a fleet of U.S.-flag vessels, sailing between the United States and South American ports, with respect to "coast crews" composed entirely of Panamanian citizens who were never on board when the vessels called at a U.S. port. These "coast crews" were hired and discharged at the Panama Canal Zone and were used principally to prepare the vessels for loading and unloading at the South American ports of call. The majority stated,

The obvious fact that such voyages are trade or transportation between a State and foreign nation cannot be destroyed by ignoring the point of departure or by considering only a segment of the voyage beyond United States territories simply because the petition is restricted to employees who sail only on such segment. [Footnote omitted.] The voyages must be considered in their entirety and, as so viewed, clearly come within the definition of commerce as set forth in Section 2(6) and (7) of the Act.

The fact that the petitioning organization and the requested employees were Panamanian, or that the vessels touched upon the territory of Panama, was held not to render what was essentially U.S. shipping a Panamanian maritime operation subject only to the Panamanian laws.

(3) Tugboat Operations

Under the Board's established standards, it will assert jurisdiction over "all enterprises . . . whose operations exert a substantial impact on national defense."²⁷ It will also assert jurisdiction over "enterprises engaged in the handling and transportation of commodities or passengers in interstate commerce, or which function as essential links in such transportation," which derive at least \$50,000 gross revenues per annum from such operations, or perform services valued at \$50,000 or more per annum for enterprises as to which the Board would assert jurisdiction under any of its standards except "indirect" outflow or "indirect" inflow.²⁸

In *Carteret Towing Company, Inc.*,²⁹ the Board asserted jurisdiction over an employer who operated two tugboats in and around the harbor at Morehead City, North Carolina, on the basis of both these standards.³⁰ It found that by virtue of the services it rendered U.S.

²⁶ 135 NLRB 775, Chairman McCulloch and Members Leedom and Brown for the majority, Member Rodgers concurring only in the result—the majority dismissing the petition because of the inappropriateness of the unit requested—Member Fanning not participating.

²⁷ See *Ready Mixed Concrete & Materials, Inc.*, 122 NLRB 318 (1958).

²⁸ See *HPO Service, Inc.*, 122 NLRB 394 (1958).

²⁹ 135 NLRB 975

³⁰ See also *Hazleton Laboratories, Inc.*, 136 NLRB 1609, where the Board asserted jurisdiction on the basis of its "national defense" standard, as well as its "nonretail" standard adopted in *Siemons Mailing Service*, 122 NLRB 81, 85 (1958).

Navy vessels in entering and leaving the harbor, for which it received \$40,000 during the past 12 months, the employer exerted a substantial impact on national defense. And by virtue of the navigation services its tugs furnished large commercial oceangoing vessels entering and leaving the harbor—vessels engaged in the transportation of passengers and freight to and from U.S. and foreign ports, whose owners annually received in excess of \$100,000 in revenue from its transportation business—for which it received \$150,000 during the same period, the employer also satisfied the Board's "essential link" in interstate and foreign commerce standard.³¹

b. Communications Systems

The Board's standards require \$100,000 of gross annual volume for communications systems.³² During the past year, the Board was again confronted with the question whether a community television antenna system, whereby television signals are transmitted by cable to local subscribers,³³ is a communications system within the meaning of that standard.

In *Perfect T.V., Inc.*,³⁴ the Board held the communications systems standard applicable where a company engaged in maintaining a community television antenna system was administered as "a single integrated operation" with other related enterprises, including a radio station and microwave facilities which picked up television signals of major networks originating outside the State for relay to community antennas. It found that this company and the other enterprises constituted a "single employer" under the Act, that their combined volume of business satisfied the communications systems standard, and that the assertion of jurisdiction over the company was therefore warranted.³⁵

c. Real Estate Operations

In two cases involving real estate operations, the Board was again faced with the problem of asserting jurisdiction over enterprises for

³¹ See also *Greyhound Terminal*, 137 NLRB No. 11, where the Board asserted jurisdiction over an employer engaged in the operation of a bus terminal under a lease agreement and contract with an interstate bus company, as a "link in the transportation of passengers and express in interstate commerce," and on the basis of its gross income for the sale of bus tickets as well as its income from other phases of the operations which were deemed related to and part of the terminal facilities.

³² See *Raritan Valley Broadcasting Co., Inc.*, 122 NLRB 90 (1958).

³³ See *Warren Television Corp.*, 128 NLRB 1 (1960); Twenty-sixth Annual Report (1961), pp. 26-27.

³⁴ 134 NLRB 575.

³⁵ But see *Warren Television Corp.*, above, which did not include a microwave transmission system, where the Board declined to assert jurisdiction under its communications system standard.

which specific standards have not been established.³⁶ One of these, *Carol Management Corporation, et al.*,³⁷ involved a multistate enterprise which primarily owned and managed residential properties, and also owned and operated shopping centers and a nonresidential hotel. The other, an advisory opinion, involved a homebuilding enterprise.³⁸

In *Carol Management*, the Board observed that it presently had no jurisdictional standards covering employers engaged exclusively in the ownership and management of residential properties.³⁹ But, as heretofore in cases involving diversified operations, it considered "the totality of the operations to determine whether, in the circumstances, any portion of the Employer's operations [met] the Board's presently applicable discretionary standards." It then asserted jurisdiction over this employer on the basis of its "shopping center" standard, which it announced for the first time, and also on the basis of its established standard for nonresidential hotels.⁴⁰

While, in *Carol Management*, the Board specifically left open the question whether it should establish a specific standard covering operators of residential properties, "and, if so, what standard should be adopted," it declared that it would apply its office building standard⁴¹ to employers engaged in the operation of shopping centers. It pointed out that the rationale for asserting jurisdiction over office buildings, i.e., disputes involving office building operations that "interfere, or tend to interfere, with the conduct of the interstate commerce activities carried on within the buildings," was "equally applicable" to employers engaged in the operation of shopping centers. Accordingly, the Board noted that it would "assert jurisdiction over employers engaged in the management and operation, whether as owners, lessors; or contract managers, of shopping centers, if their gross annual revenue from such shopping centers amounts to \$100,000, of which \$25,000 is derived from organizations whose operations meet any of the Board's

³⁶ See also *El Paso Country Club, Inc.*, 132 NLRB 942, where, absent specific standards for country clubs, the Board declined to assert jurisdiction over a country club because it did not meet either the Board's retail or nonretail standards, without deciding whether it would assert jurisdiction over country clubs which do meet those standards or whether it would apply those standards in future cases involving similar employers.

³⁷ 133 NLRB 1126.

³⁸ *Oregon Labor-Management Relations Board (Charles Lake Construction Co.)*, 136 NLRB 1207. See also *Harry Tancodi*, 137 NLRB No. 92, which involved a general contractor engaged in constructing and selling residential houses, apartments, and office buildings, discussed below, p. 41.

³⁹ The Board, however, has asserted jurisdiction over an employer's operation of a residential housing project which affected national defense (*Western Area Housing Co.*, 107 NLRB 1263 (1954)); or where the residential operations were an integral part of the employer's commercial operations (*Kennecott Copper Corp.*, 99 NLRB 748, 751 (1952)); or where the residential apartments involved were located in the District of Columbia (*The Westchester Corp.*, 124 NLRB 194 (1959)).

⁴⁰ See *Floridan Hotel of Tampa, Inc.*, 124 NLRB 261 (1959).

⁴¹ See *Mistletoe Operating Co.*, 122 NLRB 1534 (1959).

jurisdictional standards exclusive of the indirect outflow or indirect inflow standards as stated in *Siemons Mailing Company*.⁴²

On the other hand, in *Charles Lake Construction Co.*,⁴³ the Board issued an advisory opinion that it would not assert jurisdiction over an employer engaged in the business of constructing residential houses, because its annual inflow of materials from outside the State, direct or indirect, did not meet the Board's nonretail standard of \$50,000,⁴⁴ and its gross annual sales of homes did not meet the Board's \$500,000 standard of retail enterprises.⁴⁵ It again stated that in the absence of any specific standard for homebuilding operations, the Board would apply the existing jurisdictional standards to such operations.⁴⁶ It also noted that, in multiemployer association cases, only those members who participate in, or are bound by, multiemployer bargaining negotiations are considered single employers for jurisdictional purposes.⁴⁷

2. Application of Jurisdictional Standards

During the past year, a number of cases presented questions as to the manner or method of applying the Board's discretionary standards. These dealt primarily with the application of the Board's current standards to labor organizations, trust funds, hotels, integrated retail-nonretail enterprises, and secondary boycott situations.⁴⁸

a. Labor Organizations and Trust Funds

With respect to labor organizations and trust funds acting in the capacity of employers, the Board continued principally to follow its *Oregon Teamsters* decision,⁴⁹ where it asserted jurisdiction over local unions as "integral parts of a multistate enterprise," and on the basis of the annual "inflow" or "outflow"⁵⁰ of initiation fees and per capita

⁴² *Siemons Mailing Service*, 122 NLRB 81, 85 (1958).

⁴³ *Oregon Labor-Management Relations Board (Charles Lake Construction Co.)*, 136 NLRB 1207.

⁴⁴ See *Siemons Mailing Service*, above.

⁴⁵ See *Carolina Supplies & Cement Co.*, 122 NLRB 88, 89 (1958).

⁴⁶ See *United State, Tile & Composition Roofers, Damp & Waterproof Workers Assn., etc. (Atlas Roofing Co., Inc.)*, 131 NLRB 1267, 1269, footnote 7; Twenty-sixth Annual Report (1961), p. 28, and *Harry Tancredi*, 137 NLRB No. 92, discussed below.

⁴⁷ See *Siemons Mailing Service*, above, 122 NLRB at p. 84.

⁴⁸ See also *Painters Local Union No. 249, etc. (John J. Reich)*, 136 NLRB 176, where the Board adopted a trial examiner's prorating of compensation received by a painting contractor for services performed partly within and partly outside the base period used for determining jurisdiction, in asserting jurisdiction on the basis of the portion of the services performed within the base period.

⁴⁹ *Oregon Teamsters' Security Plan Office, et al.*, 119 NLRB 207 (1957); Twenty-third Annual Report (1958), pp. 10 and 12.

⁵⁰ The Board's current "inflow-outflow" standard for nonretail enterprises was defined in *Siemons Mailing Service*, 122 NLRB 81 (1958). This standard requires \$50,000 annual inflow or outflow, direct or indirect. While direct and indirect outflow may be combined, and direct and indirect inflow may be combined, outflow and inflow may not be combined to meet the \$50,000 requirement.

taxes to their parent international union;⁵¹ and over a trust fund on the basis of its annual remittance of insurance premiums to an out-of-State insurance carrier.

Thus, in accord with *Oregon Teamsters*, the Board asserted jurisdiction over a local union where the local was "an integral part of a multistate labor organization" consisting of its parent international and 500 affiliated locals, and these locals remitted dues and fees outside their respective States to the international's office in excess of \$250,000 a year, including more than \$40,000 from the particular local involved.⁵²

On the other hand, as to a welfare trust fund established by this local and various employers, the Board found the situation not comparable to that in *Oregon Teamsters*, the premiums paid by this fund not having been transmitted directly across State lines to the insurance carrier. Moreover, the payment of these premiums was not deemed *indirect* "inflow" or "outflow" as defined by the Board in the *Siemons* case,⁵³ as the payment for the *purchase* of the policies could not be considered a sale of goods or services within the "indirect outflow" definition; and it did not appear that the purchased policies "originated outside the employer's State," as required by the "indirect inflow" definition. However, the Board asserted jurisdiction over the fund on the basis that it furnished services valued in excess of \$50,000 to employers who met the Board's jurisdictional standards. It viewed the amount contributed to the fund by these employers as "payment for services to be rendered by the fund to such employers, such services consisting in the discharge on behalf of such employers of their contractual obligation to furnish various forms of insurance protection to their employees."

b. Hotels and Motels

The Board limits its assertion of jurisdiction in cases involving hotels and motels to such enterprises which receive at least \$500,000 in gross revenues per annum, other than permanent or residential hotels and motels.⁵⁴ For the purpose of this standard, a permanent or residential hotel or motel is one as to which 75 percent of its guests may

⁵¹ See also *Laundry, Dry Cleaning & Dye House Workers' International Union, Local 26*, 129 NLRB 1446 (1961).

⁵² *Chain Service Restaurant, Luncheonette & Soda Fountain Employees, Local 11 (Childs Restaurant)*, 132 NLRB 960, enforced 302 F. 2d 167 (C.A. 2).

⁵³ *Siemons Mailing Service*, above.

⁵⁴ *Floridan Hotel of Tampa, Inc.*, 124 NLRB 261, 264 (July 30, 1959). As to the necessity of also establishing legal jurisdiction, see *Southwest Hotels, Inc.*, 126 NLRB 1151 (1960); Twenty-fifth Annual Report (1960), pp 19-20.

be regarded as permanent guests, that is, guests who remain for a month or more.⁵⁵

During fiscal 1962, the Board had occasion to clarify this standard in *Continental Hotel*.⁵⁶ It pointed out that, although stated in terms of "guests," the determination as to the residential character of the business is to be made on the basis of an annual computation of either (1) the percentage of rental units occupied by permanent guests who stay more than a month, or (2) the percentage of the gross rental income which was derived from permanent guests. Thus, if in an annual period a hotel or motel rents 75 percent or more of its rental units to guests who remain for a month, or receives 75 percent or more of its rental income from such guests, it is a permanent or residential hotel or motel over which the Board will not assert jurisdiction. Conversely, if on an annual basis an establishment rents more than 25 percent of its rental units to transient guests who remain less than a month, or receives more than 25 percent of its rental income from such guests, it is a transient hotel over which the Board will assert jurisdiction. In the instant case, the Board found that the employer, who had a gross annual income of over \$900,000, and received goods, supplies, and material valued in excess of \$50,000 directly from outside the State, satisfied both the "rental units" and "rental income" criteria as a "transient" hotel, and asserted jurisdiction.

In another case,⁵⁷ the Board asserted jurisdiction over an employer engaged in a hotel business, although its gross volume of business during the previous year had dropped below the \$500,000 requirement to \$493, 276. The Board noted that the employer began the construction of a motel addition the previous year, that it was operating this motel at the time of the hearing, that this addition increased the number of hotel rooms available for rental by more than one-third its previous capacity, and that the newly added rooms were being rented at rates higher than those in the older facility. From these facts, it found it reasonable to assume that the employer's gross volume of business from its present operations would exceed \$500,000 annually, and that its current operations satisfied the Board's standards.⁵⁸

⁵⁵ *Ibid.*

⁵⁶ *Spink Arms Hotel Corp. d/b/a Continental Hotel*, 133 NLRB 1694.

⁵⁷ *Chickasaw Hotel Co., d/b/a Chisca Plaza Motor Hotel*, 132 NLRB 1540.

⁵⁸ To the same effect, see advisory opinion in *Connecticut State Board of Labor Relations (Norwalk Motor Inn, Inc)*, 136 NLRB 1090, where the Board noted "the fact that 90 percent of the guests who stay in the motel are from outside the State and the United States and that national firms utilize the Employer's facilities, is sufficient to support the conclusion that the Employer's business affects commerce and is subject to the Board's jurisdiction" See also *Connecticut State Board of Labor Relations (Westport New Englander Motor Hotel, Inc)*, 136 NLRB 1092, where the Board advised that it would assert jurisdiction on the basis of projecting the employer's 9 months' volume of business, during which period it commenced operating directly a restaurant and bar in connection with its motel, for a full 12-month period.

c. Integrated Retail-Nonretail Enterprises

The Board continued to apply its previously announced policy of asserting jurisdiction over a single integrated enterprise which encompasses both retail and nonretail operations, if the employer's total operations meet either its retail or nonretail standards.⁵⁹ Accordingly, it asserted jurisdiction over a general contractor engaged in constructing residential houses, apartments, and office buildings, and in selling them to users—where the combined sales of such structures exceeded \$500,000 during the past calendar year, and the value of the materials and fixtures originating outside the State, purchased by this contractor or his subcontractors for these buildings, exceeded \$50,000 a year.⁶⁰ The Board found that the employer's operation constituted a single integrated enterprise encompassing both nonretail operations, i.e., the construction and sale of commercial and Government office buildings, and operations "within the characterization of a retail enterprise," i.e., the construction and sale of residential homes to users,⁶¹ and applied its retail standard.⁶²

d. Secondary Boycott Cases

In applying its jurisdictional standards to cases alleging secondary activities violative of section 8(b) (4) of the Act, the Board first looks to the operations of the primary employer to the dispute. If his operations do not meet these standards, "the Board will take into consideration for jurisdictional purposes not only the operations of the primary employer, but also the entire operations of the secondary employers at the locations affected by the alleged conduct involved."⁶³

During fiscal 1962, the Board considered a case where the alleged section 8(b) (4) violations involved four homebuilders as secondary employers, and the Board's jurisdictional standards could be met only on the basis of the combined indirect inflow of all these secondary employers at three locations where the primary employer was then performing lathing work.⁶⁴ The trial examiner recommended dismissal

⁵⁹ See *Man Products, Inc.*, 128 NLRB 546 (1960); Twenty-sixth Annual Report (1961), pp. 30-31.

⁶⁰ *Harry Tancredi*, 137 NLRB No. 92.

⁶¹ See *United Slate, Tile & Composition Roofers, Damp & Waterproof Workers Assn., etc. (Atlas Roofing Co., Inc.)*, 131 NLRB 1267 (1961); Twenty-sixth Annual Report (1961), p. 28; and discussion above, p. 38, with respect to *Oregon Labor-Management Relations Board (Charles Lake Construction Co.)*, 136 NLRB 1207.

⁶² As adopted in *Carolina Supplies & Cement Co.*, 122 NLRB 88 (1958), this standard requires a gross volume of business of at least \$500,000 per annum.

⁶³ *Madison Building & Construction Trades Council, et al. (H & K Lathing Co.)*, 134 NLRB 517, citing *Truck Drivers Local Union No. 649, Teamsters (Jamestown Builders Exchange, Inc.)*, 93 NLRB 386 (1951); and *International Brotherhood of Teamsters etc. Local Nos. 554 and 608 (McAllister Transfer, Inc.)*, 110 NLRB 1769 (1954). See also Twenty-second Annual Report (1957), p. 9; and Twenty-first Annual Report (1956), pp. 12-13.

⁶⁴ *H & K Lathing Co.*, above.

of the complaint on jurisdictional grounds because he found that no violation had occurred affecting the job at one of these locations, and therefore excluded the inflow to this job from consideration. In reversing the trial examiner, the Board stated:

The requirement that secondary employers be affected by the conduct involved does not mean that a violation must first be found. It is sufficient that conduct occurred that involved the secondary employer, which conduct must be considered and ruled upon as alleged violations. Moreover, the conduct involving one secondary employer may not, as an isolated incident, be ruled upon as to whether it constitutes a violation, as the Trial Examiner did, unless jurisdiction is first asserted in the proceeding upon the Board's applicable standards.

Subsequently, in two advisory opinions,⁶⁵ the Board stated that it would assert jurisdiction over a primary employer and secondary employers affected by a union's secondary activities, "whether or not such activities [were] in fact violative of section 8(b) (4)," on the basis that the secondary employers satisfied the Board's jurisdictional standards.⁶⁶

⁶⁵ *Terrizzi Beverage Co.*, 137 NLRB No. 59; *Jemcon Broadcasting Co.*, 135 NLRB 362.

⁶⁶ For further aspects of secondary boycott cases, see discussion below, pp. 165-170

III

Representation Cases

The Act requires that an employer bargain with the representative selected by a majority of his employees in a unit appropriate for collective bargaining.¹ But the Act does not require that the representative be selected 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.² The Board may conduct such an election after a petition has been filed by the employees, or any individual or labor organization acting in their behalf, or by an employer who has been confronted with a claim of representation from an individual or a labor organization.

Once a petition has been properly filed, the Board has the statutory authority to determine the employees' choice of collective-bargaining representative in any business or industry affecting interstate commerce, with the major exceptions of agriculture, railroads, airlines, nonprofit hospitals, and governmental bodies.³ It also has the power to determine the unit of employees appropriate for collective bargaining.⁴

The Board may formally certify a collective-bargaining representative in a representation case only upon the basis of the results of a Board-conducted election. Once certified by the Board, the bargaining agent is the exclusive representative of all employees in the appropriate unit for collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

The Act also empowers the Board to conduct elections to decertify incumbent bargaining agents which have been previously certified, or which are being currently recognized by the employer. Decertification petitions may be filed by employees, or individuals other than

¹ Secs. 8(a)(5) and 9(a).

² Sec. 9(c)(1).

³ The Board does not exercise that power where the enterprises involved have relatively little impact upon interstate commerce. See above, pp. 31-42

⁴ Sec. 9(b).

management representatives, or by labor organizations acting on behalf of employees.

Petitions for elections are filed in the regional office in the area in which the plant or business involved is located. The Board provides standard forms for filing petitions in all types of cases.

This chapter deals with the Board's delegation of decisional authority to regional directors, the general rules which govern the determination of bargaining representatives, and the Board's decisions during the past fiscal year in which those rules were adapted to novel situations or changed upon reexamination.

A. The Board's Delegation of Decisional Authority to Regional Directors

During the previous fiscal year, the Board delegated its decision-making authority in representation cases to the regional directors, effective May 15, 1961, subject to review by the Board on one or more of the following grounds: ⁵

1. A substantial question of law or policy is raised because of (a) the absence of, or (b) a departure from officially reported Board precedent.

2. The regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

3. The conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

4. There are compelling reasons for reconsideration of an important Board rule or policy.⁶

In fiscal 1962, the Board experienced its first full year of operations under this delegation of authority. During the year, regional directors issued approximately 2,000 original or initial decisions. Requests for review were filed with the Board in 400, or 20 percent, of these cases. And of the 400 filed, 370 were ruled upon as of the end of the fiscal year. In 280, or 76 percent, of those ruled upon, review was denied. In 60, or 16 percent, of those ruled upon, review was granted. And in the remaining 30, or 8 percent, of those ruled upon, fringe cate-

⁵ See Twenty-sixth Annual Report (1961), pp. 1-2; Press Release (R-781) of April 28, 1961, and the Board's Rules and Regulations and Statements of Procedure, Series 8, as amended, secs 102.67, 102.69(c), and 101.21(a), (c), and (d). See also *Wallace Shops, Inc*, 133 NLRB 36, where the Board overruled a contention that this delegation was not properly made.

⁶ Challenges or objections in "stipulated" consent-election cases under sec. 102.62(b) of the Rules and Regulations, wherein agreements provide for a determination by the Board, are not decided by the regional director. Rules and Regulations, sec 102.69 (c) and (e).

gories or individual employees, whose eligibility was in issue, were ordered to be voted by challenged ballot—in very few instances were such challenges determinative of the results of the election.

During the fiscal year, the Board issued 40 decisions in cases where review was granted. Twenty of these involved unit issues. The balance involved commerce jurisdiction, contract bar, disclaimer, and miscellaneous issues. The Board reversed regional directors in 21 cases and affirmed them in 19.

Requests for review of decisions on objections to elections or on challenged ballots were filed in 94, or 40 percent, of the cases decided by the regional directors. Of these, 81 have been ruled upon. Review was denied in 65, or 80 percent, of the cases ruled upon, and granted in 16, or 20 percent, of those ruled upon. The principal issues ran the gamut of objections.

B. The Determination of Bargaining Representatives

1. Showing of Employee Interest To Justify Election

The Board requires a petitioner, other than an employer, seeking an election under section 9(c) (1) to show that at least 30 percent of the employees favor an election.⁷ However, petitions filed under the circumstances described in the first proviso to section 8(b) (7) (C) are specifically exempted from this requirement.⁸

The showing of employee interest must relate to the appropriate bargaining unit in which the employees are to be represented.⁹

Where the unit found appropriate by the Board is larger than the proposed unit, or substantially different from the latter, and the petitioner's showing of interest with respect to such unit is either inadequate¹⁰ or not clear,¹¹ the Board will instruct the regional director to conduct an election only in the event that the petitioner establishes a sufficient showing of interest among the employees in the larger or substantially different unit.¹² But where the Board directs an election in a unit larger than that requested by either the petitioner or intervenor, even if a sufficient showing of interest is established, either or both of the unions will be permitted to withdraw from the election upon proper notice to the regional director.¹³

However, a new showing of interest was not required by a Board majority where there was a change in the ownership of an operation

⁷ See NLRB Statements of Procedure, sec 101.18(a).

⁸ See NLRB Statements of Procedure, sec 101.23.

⁹ See Twenty-sixth Annual Report (1961), p 33, and earlier reports.

¹⁰ *Ben Pearson's Inc*, 133 NLRB 636.

¹¹ *Hamilton Bros Inc*, 133 NLRB 868.

¹² See also Twenty-sixth Annual Report (1961), p. 33.

¹³ *Rhode Island, Inc.*, 132 NLRB 1534. See also *Hamilton Bros. Inc*, above.

during the pendency of a representation petition, since the petitioner had originally made an adequate showing in the appropriate unit which remained substantially the same after the change.¹⁴ And no showing of interest was required where a petitioner sought, by motion for clarification, to have certain employees added to an existing certified unit as an accretion.¹⁵

a. Sufficiency of Showing of Interest

The Board has adhered to the rule that the sufficiency of a showing of interest is a matter for administrative determination and may not be litigated at the representation hearing.¹⁶

In one case, which involved the sale of plants to a new employer, the Board held that the early filing of the petition before the employer became the employer of the employees “in a formal sense”—but after the sales agreement had been concluded and the employees notified when they would go on the employer’s payroll—was, under the circumstances, no basis for dismissing the petition, absent proof of prejudice to the employer or intervenor, where the showing of interest was found adequate.¹⁷ The Board noted that at the time of the filing of the petition the employer was committed by the sales agreement to employ all those who had not signified their wish not to be employed, and “their identity therefore was a matter of ready ascertainment for all parties concerned.”¹⁸

In another case, the Board rejected an employer’s contention that a 50-percent showing of interest should be required rather than the usual 30 percent, where the union had previously lost several elections.¹⁹

2. Existence of Question of Representation

Section 9(c)(1) empowers the Board to direct an election and certify the results thereof, provided the record of the hearing before the Board²⁰ shows that a question of representation exists. However, petitions filed under the circumstances described in the first proviso

¹⁴ *New Laxton Coal Co.*, 134 NLRB 927; *J & W Coal Co.*, 136 NLRB 393.

¹⁵ *Kennametal, Inc.*, 132 NLRB 194.

¹⁶ *Rhode Island, Inc.*, 132 NLRB 1534. See also Twenty-sixth Annual Report (1961), p. 34, and earlier reports.

¹⁷ *Consolidated Edison Co. of New York*, 132 NLRB 1518.

¹⁸ See also *Miller & Miller, Inc.*, 132 NLRB 1530, where the Board found that a petition filed prior to the *Deluxe* 60-day insulated period was supported by a sufficient showing of interest submitted prior to that period. For a discussion of the *Deluxe Metal* rule, see below, pp. 57–60.

¹⁹ *The Sheffield Corp.*, 134 NLRB 1101. See also *Barber-Colman Co.*, 130 NLRB 478 (1961).

²⁰ A hearing must be conducted “if [the Board] has reasonable cause to believe that a question of representation exists.”

to section 8(b)(7)(C) are specifically exempted from this requirement.²¹

a. Certification Petitions

Petitions for certification of representatives filed by representatives under section 9(c)(1)(A)(i), or by employers under section 9(c)(1)(B), will be held to raise a question of representation if they are based on the representative's demand for recognition and the employer's denial thereof, whether before or during the hearing.²² The demand for recognition need not be made in any particular form and may consist merely of conduct.²³ Moreover the filing of a petition by a representative is itself considered a demand for recognition.²⁴ Conversely, the Board will not entertain a motion to amend an existing certification, in lieu of a petition, where the motion constitutes an attempt to raise a question concerning representation.²⁵

b. Decertification Petitions

A question of representation may also be raised by the filing of a decertification petition under section 9(c)(1)(A)(ii), by or on behalf of the employees in the unit, challenging the representative status of the currently recognized or previously certified bargaining representative.²⁶ But if the employer unlawfully initiates or sponsors the filing of such a petition, it will be dismissed because, by reason of such conduct, the petition cannot be said to raise a question concerning representation.²⁷

c. Disclaimer of Interest

A petition will be dismissed for lack of a question concerning representation if interest in the employees involved has been effectively disclaimed by the petitioning labor organization itself, by the labor organization named in an employer petition, or by the incumbent representative which is sought to be decertified.²⁸ But a union's dis-

²¹ See NLRB Statements of Procedure, sec. 101.23.

²² See *Rhode Island, Inc.*, 132 NLRB 1534; *Lowell Sun Publishing Co.*, 132 NLRB 1168. See also Twenty-sixth Annual Report (1961), p. 35.

²³ See Twenty-fourth Annual Report (1959), pp. 15-16; Twenty-fifth Annual Report (1960), p. 23.

²⁴ *Rhode Island, Inc.*, above; *Lowell Sun Publishing Co.*, above.

²⁵ *Gulf Oil Corp.*, 135 NLRB 184, where the substitution of a new and different local union as representative of the employees for which a local union was certified would have resulted in a complete loss of identity of the certified local; *Monon Stone Company*, 137 NLRB No. 89, where the unit claimed was substantially different from the originally certified unit. But see *Boston Gas Co.*, 136 NLRB 219, where the Board entertained an employer's motion for clarification as the union's representative status was not questioned.

²⁶ See Twenty-sixth Annual Report (1961), pp. 35-36.

²⁷ *Sperry Gyroscope Co., Div of Sperry Rand Corp.*, 136 NLRB 294.

²⁸ See Twenty-sixth Annual Report (1961), p. 36.

claimer must be clear and unequivocal, and not inconsistent with its other acts or conduct.²⁹ In one case³⁰ during the fiscal year, a Board majority overruled the *Humko* case³¹ and held that the union's conduct in seeking a Board order in an unfair labor practice proceeding which would require the employer to bargain was not necessarily inconsistent with the union's disclaimer of its *present* status as majority representative. The majority noted that a finding of a section 8(a)(5) violation does not require a showing of majority status at the time of the Board order, particularly where the union had represented the majority when it requested recognition.³²

In another case,³³ although the union picketed the employer with signs addressed to the public that the employer had no contract with the union, a Board majority found that the union had effectively disclaimed its interest in representing employees, both prior to the picketing and at the hearing. Here, the union sought to correct the mistaken impression, created by the employer's continued display of certain signs in its stores, that the employer had a union contract, and informed the employer that it was not asking for a contract or claiming to represent the employees. The majority noted that "in any inquiry into the effectiveness of a disclaimer of prior action, it is the Union's contemporaneous and subsequent conduct which ought to receive particular attention, [and that] [i]n this case, the Union once having disclaimed [its interest] in unmistakable terms, engaged in no action inconsistent therewith."³⁴

Similarly, in another case,³⁵ the Board held that a union effectively disclaimed any interest in representing plant production employees, where it repeatedly denied any such claim, and picketed the employer's retail stores, rather than the plant itself, to persuade the consuming public to transfer their business to those employers with whom it had a contract.³⁶

²⁹ *Ibid.*

³⁰ *Franz Food Products of Green Forest, Inc.*, 137 NLRB No. 35.

³¹ *Humko, a Division of National Dairy Products Corp.*, 123 NLRB 310 (1959); Twenty-fourth Annual Report (1959), p. 17.

³² *Franz Food Products of Green Forest, Inc.*, above, Members Fanning and Brown joining in the principal opinion, Chairman McCulloch concurring, Members Rodgers and Leedom dissenting on the ground that the disclaimer was equivocal.

³³ *Miratti's Inc.*, 132 NLRB 699, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting.

³⁴ Cf. *Normandi Bros. Co.*, 131 NLRB 1225 (1961); Twenty-sixth Annual Report (1961), p. 36.

³⁵ *Andes Candies, Inc.*, 133 NLRB 758.

³⁶ See *Chisca Plaza Motor Hotel*, 132 NLRB 1540, where a decertification petition was dismissed and a certification revoked because the Board construed the union's contention that it represented only those individuals who had joined an economic strike to constitute a disclaimer that it represented a majority of the employees in the certified unit.

3. Qualification of Representative

Section 9(c)(1) provides that employees may be represented "by an employee or group of employees or any individual or labor organization."

It is the Board's policy to direct an election and to issue a certification unless the proposed bargaining agent fails to qualify as a bona fide representative of the employees. In this connection, the Board is not concerned with internal union matters which do not affect its capacity to act as a bargaining representative.³⁷ Thus, during this fiscal year, the Board held in *Alto Plastics*³⁸ that it is without authority to withhold its processes from the petitioning union seeking an election, where the petitioner qualified as a labor organization under section 2(5), notwithstanding the contention that the union was an ineffectual representative because it was "corrupt." The Board noted that in the event the petitioner is certified, and it fails to fulfill its statutory obligations to the employees, the Board could entertain a motion to revoke the certificate under its power to police and revoke a certification upon good cause shown.³⁹

a. Statutory Qualifications

The Board's power to certify a labor organization as bargaining representative is limited by section 9(b)(3) which prohibits certification of a union as the representative of a unit of guards if the union "admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."⁴⁰ However, during this fiscal year, a Board majority held that this statutory proscription does not preclude the application of the Board's contract-bar rules to contracts covering such units.⁴¹

As in previous years, compliance with the requirements of the Labor-Management Reporting and Disclosure Act of 1959 was not

³⁷ See Twenty-sixth Annual Report (1961), p. 37.

³⁸ *Alto Plastics Mfg. Corp.*, 136 NLRB 850. See also *Chicago Pottery Co.*, 136 NLRB 1247, where the petitioner was held not disqualified from acting as a representative because its president had been convicted of violating sec. 302(b) of the Labor Management Relations Act of 1947.

³⁹ See *Boston Gas Co.*, 136 NLRB 219, and cases cited therein, as to the Board's power to police certifications.

⁴⁰ See *Carborundum Co.*, 133 NLRB 1129, where the petitioner was held eligible under sec. 9(b)(3) since there was no affirmative evidence to rebut the testimony of its representative that it did not admit to membership anyone other than guards, watchmen, and fire watchmen, and that it was not affiliated with any other labor organization; and *The Centor Co.*, 136 NLRB 1506, where barge landing employees, who performed watchmen duties only incidentally to their primary duties as landing men, were held not guards within the meaning of the Act.

⁴¹ *William J. Burns International Detective Agency, Inc.*, 134 NLRB 451, Chairman McCulloch and Members Rodgers, Fanning, and Brown for the majority, Member Leedom dissenting, reversing *Columbia-Southern Chemical Corp.*, 110 NLRB 1189 (1954), discussed below, p. 56.

deemed a condition precedent to the filing of a representation petition by a labor organization.⁴² In *Alto Plastics*,⁴³ the Board noted that it is "duty bound . . . to exercise only those powers which Congress invested in the Board," and that "Congress gave very explicit expression in the law . . . that the Board should not withhold its procedures or remedies where unions or employers, or their officers or agents, breached the obligations laid down in Titles I through VI of the LMRDA."

b. Other Limitations

In craft and departmental severance situations, the Board refuses to entertain petitions where the petitioner seeks to represent inconsistent units at the same time.⁴⁴ In one case during the year, a Board majority held that this rule did not apply where one of two joint representatives of a maintenance unit filed a petition seeking *sole* certification for the historical maintenance unit, as the petitioner's participation in joint bargaining in the past for such maintenance employees was not inconsistent with its action in seeking to represent only the historical unit.⁴⁵

4. Contract as Bar to Election

The Board has adhered to the policy not to direct an election among employees presently covered by a valid collective-bargaining agreement, executed prior to the filing of the petition,⁴⁶ except under certain circumstances. The question whether a present election is barred by an outstanding contract is determined according to the Board's "contract bar" rules. Generally, these rules require that a contract asserted as a bar be in writing and properly executed and binding on the parties; that the contract have been in effect for no more than a "reasonable" period; and that the contract contain substantive terms and conditions of employment which are consistent with the policies of the Act.⁴⁷ Several major revisions relating to the application of these rules were made during fiscal 1962.⁴⁸ The more important

⁴² See Twenty-sixth Annual Report (1961), pp. 37-38.

⁴³ *Alto Plastics Mfg Corp.*, above.

⁴⁴ See Twenty-sixth Annual Report (1961), p. 39; Twenty-first Annual Report (1956), pp. 56-57.

⁴⁵ *Jefferson Chemical Co.*, 134 NLRB 1552, Chairman McCulloch and Members Leedom, Fanning, and Brown for the majority, Member Rodgers dissenting. *Hollingsworth & Whitney Div. of Scott Paper Co.*, 115 NLRB 15 (1956), and *International Paper Co.*, 115 NLRB 17, distinguished.

⁴⁶ See *Whiting Milk Co.*, 137 NLRB No. 122, where contracts which were not signed prior to the filing of petitions were held no bar, citing *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958).

⁴⁷ See Twenty-fourth Annual Report (1959), pp. 19-35; Twenty-fifth Annual Report (1960), pp. 27-35; Twenty-sixth Annual Report (1961), pp. 39-52.

⁴⁸ These changes involved the effect of union-security clauses, *Paragon Products Corp.*, 134 NLRB 662; hot cargo clauses, *Food Haulers, Inc.*, 136 NLRB 394; and the timeliness of petitions, *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000; *The Absorbent Cotton Co.*, 137 NLRB No. 93; and *Montgomery Ward & Co., Inc.*, 137 NLRB No. 26.

applications of these rules, including the revisions, during the year are discussed below.

a. Coverage of Contract

To bar a petition an asserted contract must clearly cover the employees sought in the petition and embrace an appropriate unit.⁴⁹ A contract covering only a portion of the established appropriate unit does not operate as a bar to an election in such unit.⁵⁰ And a contract for "members only" does not operate as a bar.⁵¹ Thus, a contract containing a recognition clause which was found to be ambiguous as to the intended coverage of the contract was held to operate as a bar because it was not a members-only agreement, where the intent and practice of the parties were shown by extrinsic evidence to include all employees sought in the petition.⁵²

(1) Change of Circumstances During Contract Term

The Board's rules as to the effectiveness of a contract as a bar where changes in the employer's operations and personnel complement have occurred during the contract term were reappraised and restated in the *General Extrusion* case,⁵³ during fiscal 1959.

Applying these rules during the past year, the Board held contracts no bar, where changes occurred in the nature of the employer's operations, between the execution of the contract and the filing of the petition, which involved an indefinite period of closing followed by a resumption of operations at a new location with new employees;⁵⁴ and where new operations were not mere normal accretions to the unit covered by the contract.⁵⁵ On the other hand, a Board majority held that a changeover from a retail store operation to a catalog store operation did not remove a contract as a bar, where the differences between the two types of operations primarily concerned the employer's administration rather than its labor relations.⁵⁶

⁴⁹ See Twenty-fourth Annual Report (1959), p. 21, for discussion of *Appalachian Shale Products Co.*, 121 NLRB 1160.

⁵⁰ *Pure Seal Dairy Co.*, 135 NLRB 76.

⁵¹ *Appalachian Shale Products Co.*, *supra*.

⁵² *Hebron Brick Co.*, 135 NLRB 245, Chairman McCulloch and Members Fanning and Brown for the majority, Member Rodgers dissenting, Member Leedom not participating.

⁵³ *General Extrusion Co., Inc.*, 121 NLRB 1165 (1958). See Twenty-fourth Annual Report (1959), pp. 21-22; Twenty-fifth Annual Report (1960), pp. 28-29; Twenty-sixth Annual Report (1961), pp. 40-43.

⁵⁴ *Slater System Maryland, Inc.*, 134 NLRB 865.

⁵⁵ *Mueller Industries, Inc.*, 132 NLRB 469.

⁵⁶ *Montgomery Ward & Co., Inc.*, 137 NLRB No. 26, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting on other grounds.

(a) Effect of section 8(f)

It is the Board's established rule that a contract executed before any employees were hired is not a bar.⁵⁷ Section 8(f) of the Act provides that it shall not be an unfair labor practice for an employer engaged primarily in the building and construction industry to make a prehire contract under certain circumstances. Noting that section 8(f) itself provides that any such agreement shall not be a bar to a petition filed pursuant to section 9(c), the Board held, during the preceding fiscal year, that such a prehire contract was no bar to a petition.⁵⁸ Conversely, in one case during this past year,⁵⁹ the Board held that contracts entered into between a construction employer and a union on the basis of a showing of authorization cards signed by a majority of the employees⁶⁰ constituted bars despite the final proviso to section 8(f), which provides that a contract will not bar a petition when the majority status of the contracting union has not been established pursuant to section 9. As pointed out by the Board, a union selected either in a Board-conducted election pursuant to section 9(c) or by other voluntary designation pursuant to section 9(a) is entitled to recognition and to negotiate a contract. It saw "no justification to limit Section 8(f) (1) as meaning that the union's representative status may only be acquired by certification, or that recognition accorded under Section 9(a) is not an equally suitable method for determining whether the proviso to Section 8(f) applies."

b. Duration of Contract

Under the Board's continuing practice in fiscal 1962, a valid collective-bargaining agreement is held to bar a determination of representatives "for as much of its term as does not exceed 2 years."⁶¹ A contract with a fixed term of more than 2 years was treated as for a fixed term of 2 years.⁶² But contracts of indefinite duration⁶³ and those terminable at will⁶⁴ are not considered as a bar for any period.

⁵⁷ *General Extrusion Co, Inc*, above.

⁵⁸ *S. S. Burford, Inc.*, 130 NLRB 1641 (1961); Twenty-sixth Annual Report (1961), p. 42.

⁵⁹ *Island Construction Co, Inc.*, 135 NLRB 13.

⁶⁰ Proof of majority status in such manner is recognized as valid under sec. 9(a).

⁶¹ *Pacific Coast Assn. of Pulp & Paper Mfrs.*, 121 NLRB 990 (1958); Twenty-fourth Annual Report (1959), p. 23.

⁶² *Ibid*; *Crane Co, Chattanooga Division*, 132 NLRB 944, where the intervenor's request for modification of the *Pacific Coast* decision, insofar as it holds that contracts for over 2 years are of unreasonable duration, was denied; *Victor Mfg. & Casket Co.*, 133 NLRB 1283.

⁶³ *Dalmo Victor Co*, 132 NLRB 1095.

⁶⁴ *Pacific Motor Trucking Co.*, 132 NLRB 950.

During fiscal 1962, a Board majority announced, in the *Montgomery Ward* case,⁶⁵ that where an incumbent union is the certified bargaining representative, a current contract constitutes a bar to a petition by either of the contracting parties during the entire term of that contract. Thus, absent a conflicting timely claim by a rival union, a petition by either of such parties to a contract is timely only when filed at the proper time with respect to the contract's expiration date. To that extent, the Board's rule that a contract of unreasonable duration does not bar a petition timely filed at or near the end of the first 2 years of its duration⁶⁶ does not apply to the employer and the certified union.⁶⁷ And in the *Absorbent Cotton* case,⁶⁸ a Board majority further held that whether or not the union is certified, an employer's petition is barred by a current contract to which it is a party for the term of the contract.

(1) Amendment of Long-Term Contract

During the past year, the Board restated its rule governing extensions of long-term agreements.⁶⁹ In one case, a supplemental agreement executed after the end of the second year of a long-term contract and before the filing of the petition was held to be no bar, where it was neither a new agreement nor an amendment which expressly reaffirmed the long-term contract and indicated a clear intent of the contracting parties to be bound for a specific period.⁷⁰

c. Terms of Contract

To bar a petition, an asserted contract must contain substantial terms and conditions of employment sufficient to stabilize the bargaining relationship of the parties.⁷¹ In the Board's view, "real stability

⁶⁵ *Montgomery Ward & Co, Inc*, 137 NLRB No 26, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting. The majority held that an employer's 5-year contract with a certified union was a bar to the employer's petition which was filed during the third year of that contract.

⁶⁶ *Pacific Coast Assn of Pulp & Paper Mfrs*, 121 NLRB 990, 992.

⁶⁷ An uncertified union may file a petition during the existence of its contract which would otherwise bar an election where it seeks the benefits of certification, *General Box Co*, 82 NLRB 678 (1949). However, in *Botany Mills, Inc*, 101 NLRB 293 (1952), the Board dismissed a petition filed by a certified union during the existence of its 1-year contract. To the extent the holding of *Botany Mills* might be subject to a different interpretation as to the time at which a petition by a certified union may be filed with respect to its contract, it was modified to accord with *Montgomery Ward & Co, Inc*, above.

⁶⁸ *The Absorbent Cotton Co*, 137 NLRB No. 93, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting. The majority held that an employer's 3-year contract with an uncertified union was a bar to the employer's petition which was filed during the third year of that contract.

⁶⁹ See *Southwestern Portland Cement Co*, 126 NLRB 931 (1960); Twenty-fifth Annual Report (1960), p. 30.

⁷⁰ *Victor Mfg. & Gasket Co.*, 133 NLRB 1283.

⁷¹ See *Appalachian Shale Products Co*, 121 NLRB 1160 (1958); Twenty-fourth Annual Report (1959), p. 24.

in industrial relations can only be achieved where the contract undertakes to chart with adequate precision the course of the bargaining relationship, and the parties can look to the actual terms and conditions of their contract for guidance in their day-to-day problems."⁷²

(1) Union-Security Clauses

In fiscal 1962, the Board reevaluated the principles underlying the *Keystone* rules⁷³ for determining the effect of union-security clauses for contract-bar purposes. In the *Paragon Products* case,⁷⁴ a Board majority revised the rule enunciated in the *Keystone* decision that a contract could not qualify as a bar if its union-security provision did not expressly reflect the limitations placed thereon by the statute. The majority announced the following rules for determining whether a contract containing a union-security provision will operate as a bar:

(a) Only those contracts containing a union-security provision which is clearly unlawful on its face, or which has been found to be unlawful in an unfair labor practice proceeding, may not bar a representation petition. A clearly unlawful union-security provision for this purpose is one which by its express terms clearly and unequivocally goes beyond the limited form of union-security permitted by Section 8(a) (3) of the Act, and is therefore incapable of a lawful interpretation. Such unlawful provisions include—

(1) those which expressly and unambiguously require the employer to give preference to union members in hiring, in laying off, for purpose of seniority;

(2) those which specifically withhold from incumbent [nonunion employees] and/or new employees the statutory 30-day grace period;

(3) those which expressly require as a condition of continued employment the payment of sums of money other than "periodic dues and initiation fees uniformly required."

(b) The mere existence of a clearly unlawful union-security provision in a contract will render it no bar regardless of whether it has ever been or was intended to be enforced by the parties, unless the contract also contains a provision which clearly defers the effectiveness of the unlawful clause or such clause has been eliminated by a properly executed rescission or amendment thereto.

(c) Contracts containing ambiguous though not clearly unlawful union-security provisions will bar representation proceedings in the absence of a determination of illegality as to the particular provision involved by this Board or a Federal court pursuant to an unfair labor practice proceeding. . . . And no evidence will be admissible in a representation proceeding, where the . . . evidence is only relevant to the question of the practice under a contract urged as a bar to the proceeding⁷⁵

⁷² *Ibid.*

⁷³ *Keystone Coat, Apron & Towel Supply Co.*, 121 NLRB 880 See Twenty-fourth Annual Report (1959), pp 24-26

⁷⁴ *Paragon Products Corp.*, 134 NLRB 662, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting

⁷⁵ The majority held in the *Paragon Products* case that the union-security clause did not remove the contract as a bar because the provision was not clearly unlawful on its face and the majority would not indulge in a presumption of illegality See *Artesian Ice & Cold Storage Co.*, 135 NLRB 572.

According to the majority, the objectives in establishing these new rules were to conform with the principles of interpretation enunciated by the Supreme Court,⁷⁶ to retain the simplicity aspired to in the *Keystone* case without its objectionable presumptions of illegality, to avoid prejudging a union-security provision the validity of which may become the subject of a subsequent complaint case, and to be more in accord with the Act's objective of stabilizing labor relations than was the case under *Keystone*.

(a) Deferral clauses

In fiscal 1962, the Board reversed its policy of refusing to give any effect to deferral clauses in contracts which also contained otherwise illegal clauses. On the basis of the Supreme Court's decisions in *News Syndicate* and *Haverhill Gazette*,⁷⁷ the Board held that deferral clauses were effective to postpone the operation of otherwise illegal clauses, and that contracts containing such clauses were valid and constituted a bar.⁷⁸

(2) "Hot Cargo" Clauses

The effect of a "hot cargo" agreement⁷⁹—an agreement whereby the employer agrees to cease or refrain from handling the products of any other employer, or to cease doing business with any other person⁸⁰—upon a contract as a bar to a petition not involving the construction or garment industries⁸¹ was first enunciated in the *Pilgrim Furniture* case.⁸² In that case and in two subsequent cases,⁸³ the hot cargo clause involved was held to remove the contract as a bar. But the contract-bar policy enunciated in the *Pilgrim Furniture* case⁸⁴

⁷⁶ *NLRB v. News Syndicate Co., Inc., et al.*, 365 U.S. 695 (1961); *Local 357, Teamsters v. NLRB (Los Angeles-Seattle Motor Express)*, 365 U.S. 807 (1961).

⁷⁷ *NLRB v. News Syndicate Co.*, 365 U.S. 695; *I.T.U. v. NLRB.*, 365 U.S. 705.

⁷⁸ *American Broadcasting Co.*, 134 NLRB 1458, an unfair labor practice proceeding, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting, and *Columbia Broadcasting System, Inc.*, 134 NLRB 1466, a representation proceeding, Members Rodgers and Leedom not joining in the order. See also *Paragon Products Corp.*, above.

⁷⁹ Sec 8(e) of the Act makes it an unfair labor practice for any union and employer, except in certain aspects of the construction and the apparel and garment industries, to enter into a hot cargo agreement. It also provides that any contract "entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void." See Twenty-sixth Annual Report (1961), p. 47.

⁸⁰ For the unfair labor practice aspect, see below, pp 171-175

⁸¹ Certain aspects of the construction and the apparel and garment industries are exempt, under the provisos to sec 8(e) of the Act, from the general proscription to enter into a hot cargo agreement.

⁸² *Pilgrim Furniture Co., Inc.*, 128 NLRB 910 (1960). See Twenty-sixth Annual Report (1961), pp 47-48

⁸³ *American Feed Co.*, 129 NLRB 321 (1960), *Calorator Mfg. Corp.*, 129 NLRB 704 (1960). See Twenty-sixth Annual Report (1961), pp. 47-48

⁸⁴ *Pilgrim Furniture Co., Inc.*, above.

was overruled during this fiscal year by the *Food Haulers* decision.⁸⁵ Here a Board majority found that a hot cargo provision,⁸⁶ although unlawful under section 8(e) of the Act, does not act as a restraint upon an employee's choice of a bargaining representative. Consequently, such provision now will not defeat a contract's validity as a bar to an election petition. The majority also distinguished a hot cargo provision from an illegal union-security provision which defeats a contract as a bar.⁸⁷ Nor could the majority perceive any reason for applying a remedy under the *Pilgrim Furniture* doctrine,⁸⁸ which is more drastic than is permitted by statute in unfair labor practice proceedings.⁸⁹

d. Qualification of Contracting Union

In fiscal 1962, the Board reversed its policy that a contract for a unit of guards would not at any time during its term operate as a bar if the contracting union admitted to membership, or was affiliated directly or indirectly with a union which admitted to membership, employees other than guards.⁹⁰ A Board majority held in the *Burns International Detective Agency* case⁹¹ that the statutory proscription⁹² against certification of certain guard units does not preclude the application of the Board's contract-bar rules to contracts covering such units. Accordingly, a contract covering a unit of guards only and which was entered into by a union affiliated with a nonguard union was held a bar.⁹³

e. Changes in Identity of Contracting Party—Defunctness

The basic rules as to whether a contract will be denied as a bar because of a schism in the ranks of the contracting union, or because the

⁸⁵ *Food Haulers, Inc.*, 136 NLRB 394, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting.

⁸⁶ The question of whether the clause in *Food Haulers* violated sec. 8(e) of the Act was not decided by the Board.

⁸⁷ *C. Hager & Sons Hinge Mfg. Co.*, 80 NLRB 163 (1948); *Paragon Products Corp.*, 134 NLRB 662. An unlawful union-security clause interferes with one of the objectives sought to be balanced by the bar rules, i.e., a contract containing such clause will not operate as a bar because, as the Board stated in the *Hager Hinge* case, the "existence of such a provision acts as a restraint upon those desiring to refrain from union activities within the meaning of Section 7 of the Act . . ."

⁸⁸ In representation proceedings, the entire contract would in effect have been set aside because of a hot cargo provision.

⁸⁹ In unfair practice proceedings, only the unlawful clause would be set aside. *American Feed Co.*, 134 NLRB 481.

⁹⁰ *Columbia-Southern Chemical Corp.*, 110 NLRB 1189 (1954).

⁹¹ *William J. Burns International Detective Agency, Inc.*, 134 NLRB 451, Chairman McCulloch and Members Rodgers, Fanning, and Brown for the majority, Member Leedom dissenting.

⁹² See sec. 9(b)(3) of the Act; see also above, p. 49.

⁹³ *Columbia-Southern*, above, and other prior cases, were overruled to the extent inconsistent herewith.

union is defunct, were stated in the *Hershey Chocolate* case⁹⁴ during fiscal 1959. Applying these rules during this past year, the Board held that a union was defunct and its contract no bar where the union was "neither willing nor able to represent the employees,"⁹⁵ and an employer's refusal to accept the fact that a local "had ceased to exist" did not breathe life into it.⁹⁶ On the other hand, a Board majority held that a local union was not defunct and its contract was not removed as a bar, where the local and its international were able and willing to function as the representative of the employees.⁹⁷ The majority found that the circumstances surrounding an attempt by certain members of the local union to disaffiliate from its international for the purpose of affiliating with another union did not warrant a finding that the local was unable or unwilling to function as a representative of the employees. Although the local made no attempt to intervene at the hearing, the majority relied on the fact that representatives of the international union purporting to act on the local's behalf had intervened at the hearing.⁹⁸

f. Effect of Rival Claims and Petitions, and Conduct of Parties

Under the Board's rules, as revised in the *Deluxe Metal Furniture* decision⁹⁹ during fiscal 1959, an asserted contract may not bar a present election in certain situations because of a timely rival claim or petition,¹ or the parties' conduct regarding their contract.

(1) Substantial Representation Claims

The Board will deny contract-bar effect to collective-bargaining agreements executed at a time when the employer was confronted with a substantial, as distinguished from an unsupported, representation claim.

Generally, to constitute a substantial claim, a nonincumbent union's claim must be supported by a petition filed at an appropriate time, unless the nonincumbent has refrained from filing a petition in reliance upon the employer's conduct indicating that recognition had

⁹⁴ *Hershey Chocolate Corp.*, 121 NLRB 901 (1958); Twenty-fourth Annual Report (1959), p. 28.

⁹⁵ *Pepsi Cola Bottling Co. of Chattanooga, Inc.*, 132 NLRB 1441.

⁹⁶ *Gulf Oil Corp.*, 137 NLRB No. 62.

⁹⁷ *Hebron Brick Co.*, 135 NLRB 245, Chairman McCulloch and Members Fanning and Brown for the majority, Member Rodgers dissenting, Member Leedom not participating.

⁹⁸ Dissenting Member Rodgers cited the *Hershey Chocolate* case, wherein it was held that the willingness of an international union to assume the functions of a local union is relevant to the question of defunctness of a local union *only* if the international union is a party to the contract, which he stated is not the case here.

⁹⁹ *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958); Twenty-fourth Annual Report (1959), pp. 28-34.

¹ See *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000, for revision of the *Deluxe Metal* rule with respect to timeliness of rival petitions.

been granted or that a contract would be obtained without an election.² Thus, in one case,³ the Board rejected a petitioner's contention that its "substantial claim" for recognition, 1 week prior to the execution of agreements between the employer and incumbent union, was sufficient ground for directing an election⁴ where, in the face of the petitioner's demand for recognition and offer to submit to a Board election, the employer indicated that he would think the matter over and that a further meeting would have to be held. The Board held that these statements fell short of a commitment by the employer that no union would be recognized except pursuant to a Board-directed election.

(2) Timeliness of Rival Petitions

To defeat a contract as a bar, a rival petition must be filed timely in accordance with the Board's rules.⁵ Generally, a petition will be held untimely if (1) filed on the same day a contract is executed; or (2) filed prematurely, *viz*, more than 90 days before the terminal date of an outstanding contract;⁶ or (3) filed during the 60-day "insulated" period immediately preceding that date.

Prior to May 1, 1962, a petition filed more than 150 days before the termination of a subsisting contract was regarded as premature.⁷ However, in the *Leonard Wholesale Meats* case,⁸ the Board announced that petitions filed on or after May 1, 1962, would be considered premature if they are filed more than 90 days before the terminal date of contracts. This reduction of the open period for the filing of petitions during the term of a contract was deemed desirable by the Board, in view of the considerable decrease in the time between the filing of petitions and elections which resulted from the Board's dele-

² *Deluxe Metal Furniture Co.*, above, at 998-999 (1958); Twenty-fourth Annual Report (1959), p. 28.

³ *Island Construction Co., Inc.*, 135 NLRB 13.

⁴ In advancing its contention, the petitioner relied upon *Greenpoint Sleep Products*, 128 NLRB 548, where the Board construed the "substantial claim" rule of *Deluxe Metal* to cover situations where a petitioner was lulled into a false sense of security by an employer who led it to believe that recognition would not be granted or any contract entered into with any union until after a Board election. See Twenty-sixth Annual Report (1961), pp 49-50.

⁵ See Twenty-fourth Annual Report (1959), pp 29-31.

⁶ See *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000, revising the rule established in *Deluxe Metal Furniture Co.*, 121 NLRB 995.

⁷ *Deluxe Metal Furniture Co.*, above. See *The Absorbent Cotton Co.*, 137 NLRB No. 93; *Lundy Manufacturing Corp.*, 136 NLRB 1230; *Anaconda Aluminum Co.*, 133 NLRB 1123, where the Board rejected the contention that an existing contract barred a rival petition inasmuch as the petition was filed more than 60 days but less than 150 days before the expiration date of the existing contract, *Dalmo Victor Co.*, 132 NLRB 1095, where a petition timely filed between 150 and 60 days before the expiration date of contract was held not barred, *S. J. Doroski and/or Luis Perez*, 132 NLRB 746, where a contract was held no bar, notwithstanding the prematurity of the petition, because a hearing was held and the Board's decision would issue after the 90th day preceding the expiration date of the contract; *United Fruit Co.*, 134 NLRB 287.

⁸ *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000 (April 11, 1962).

gation of decisional authority to the regional directors.⁹ The Board pointed out, however, that although the open period for the filing of petitions during the term of an existing contract was being reduced, this change in the *Deluxe* period did not in any way modify the length of the 60-day insulated period.

A contract is no bar when it is signed after the filing of a motion for reconsideration of a Board decision and, therefore, during the existence of a substantial question concerning representation.¹⁰ And in the case of an amended petition, timeliness is controlled by the filing date of the original petition, provided the employees sought in the original petition can be identified with reasonable accuracy.¹¹ Thus, the Board held in one case¹² that a union's amended petition was not barred by a contract, even though the original petition inaccurately named only one of two constituent corporations of the employer, where service of the original petition upon the employer's negotiator before he signed the contract constituted notice to the employer that the petitioner was seeking to represent the employees of both corporations.¹³

(3) Termination of Contract

A contract ceases to be a bar to a rival petition upon its termination. However, termination of a contract during the 60-day insulated period does not render timely a petition filed during the 60-day period.¹⁴

In the case of an automatically renewable contract—as in the case of a fixed-term contract—a petition is untimely if filed during the 60-day insulated period preceding the contract's expiration date.¹⁵

(4) Premature Extension of Contract

The Board adheres to the general rule that a prematurely extended contract will not bar a petition which is timely in relation to the original contract's terminal date. However, in view of the *Deluxe Metal* requirements as revised by *Leonard Wholesale Meats*,¹⁶ a petition to be timely must be filed over 60 days, but not more than 90 days, before

⁹ See above, pp. 44-45.

¹⁰ *New Laston Coal Co*, 134 NLRB 927, Members Leedom, Fanning, and Brown for the majority, Member Rodgers dissenting, Chairman McCulloch not participating. See *Deluxe Metal Furniture Co*, 121 NLRB 995, 1000-1001, footnote 12; Twenty-fourth Annual Report (1959), p. 29, footnote 88.

¹¹ *Deluxe Metal Furniture Co*, above, at 1000-1001, footnote 12; Twenty-fourth Annual Report (1959), p. 29, footnote 88.

¹² *U. S. Mattress Corp., et al.*, 135 NLRB 1150.

¹³ Cf. *The Baldwin Co*, 81 NLRB 927 (1949), where the company which signed the contract had not previously been served with a petition indicating that the petitioner was seeking to represent its employees.

¹⁴ See *Deluxe Metal Furniture Co*, 121 NLRB 995. Twenty-fourth Annual Report (1959), p. 33.

¹⁵ See *Long-Lewis Hardware Co*, 134 NLRB 1554, where the petition was timely filed prior to the insulated period.

¹⁶ *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000.

the original contract's terminal date. If so filed, the petition is timely in relation to the extended contract.¹⁷

A contract will be considered prematurely extended if during its term the contracting parties execute an amendment thereto or a new contract which contains a later terminal date.¹⁸ But the extension will not be held premature when made (1) during the 60-day insulated period preceding the terminal date of the old contract; (2) after the terminal date of the old contract, if notice by one of the parties forestalled its automatic renewal or it contained no renewal provision; or (3) at a time when the existing contract would not have barred an election because of other contract-bar rules.¹⁹

Consistent with these rules, the Board held in one case that a contract, executed during the term of a prior contract which the petitioning and intervening unions agreed would not be a bar, was not a premature extension and was a bar to any petition untimely filed during its term.²⁰

5. Impact of Prior Determination

To promote the statutory objective of stability in labor relations, representation petitions under section 9 are barred during specific periods following a prior Board determination of representatives. Thus, according to longstanding judicially approved Board practice, the certification of a representative ordinarily will be held binding for at least a year.²¹ In addition, section 9(c) (3) specifically prohibits the Board from holding an election during the 12-month period following a valid election in the same group.

a. One-Year Certification Rule

Under the Board's 1-year rule, a certification is a bar for 1 year to a petition for employees in the certified unit,²² and a petition filed before the end of the certification year will be dismissed,²³ except where the certified incumbent and the employer have executed a new contract which will terminate within the certification year.²⁴ In that

¹⁷ See Twenty-sixth Annual Report (1961), p. 51.

¹⁸ *Deluxe Metal Furniture Co.*, above, at 1001-1002.

¹⁹ *Ibid.*

²⁰ *John Vilicich, et al.*, 133 NLRB 238.

²¹ See *Ray Brooks v. N L R. B.*, 348 U.S. 96 (1954).

²² *Kimberly-Clark Corp.*, 61 NLRB 90 (1945)

²³ *Centr-O-Cast & Engineering Co.*, 100 NLRB 1507 (1952); *Cleveland Pneumatic Tool Co., Div. of Cleveland Pneumatic Industries, Inc.*, 135 NLRB 815.

²⁴ *Ludlow Typograph Co.*, 108 NLRB 1463 (1954); Nineteenth Annual Report (1954), p. 35; Twenty-first Annual Report (1956), p. 49-50. See also *The Great Atlantic & Pacific Tea Co.*, 125 NLRB 252, footnote 5 (1959); Twenty-fifth Annual Report (1960), p. 36.

situation, the certification year is held to merge with the contract, the contract becoming controlling with respect to the timeliness of a rival petition. But a preelection agreement to continue an existing contract in effect after certification does not amount to a negotiation of a post-certification contract.²⁵ Accordingly, the Board held in one case that a contract entered into by the incumbent union and the employer prior to certification did not merge the certification year with the contract,²⁶ and a rival petition filed during the certification year was untimely.

In another case,²⁷ the Board announced that an extension to its 1-year certification rule²⁸ would be applied to cases revealing certain inequities, such as existed in the *Mar-Jac Poultry* case. There, an employer refused to bargain with the certified union during the certification year, but executed a settlement agreement in which it agreed to bargain. The Board granted the union a period of at least 1 year of actual bargaining from the date of the settlement agreement.²⁹ Inasmuch as the employer had already bargained for 6 months with the union, its obligation to bargain continued for at least an additional 6 months from the resumption of negotiations.

b. Twelve-Month Limitation

Section 9(c) (3) prohibits the holding of an election in any bargaining unit or any subdivision in which a valid election was held during the preceding 12-month period.³⁰ The Board gives the same effect to elections conducted by responsible State agencies as to Board-conducted elections, where they are valid under State law and not affected by any irregularities under Board standards.³¹ Consistent with this policy, the Board rejected a union's contention that a consent election conducted by a State labor board barred a Board election for 1 year, where the election was considered invalid.³²

²⁵ *The Great Atlantic and Pacific Tea Co.*, 123 NLRB 1005 (1959).

²⁶ *John Vulcich, et al.*, 133 NLRB 238.

²⁷ *Mar-Jac Poultry Co., Inc.*, 136 NLRB 785.

²⁸ Absent unusual circumstances, an employer is required to honor a certification for a period of 1 year. *Ray Brooks v. N.L.R.B.*, 348 U.S. 96, 101-103 (1954)

²⁹ The Board overruled *Daily Press, Inc.*, 112 NLRB 1434 (1955), and similar cases, to the extent that they are inconsistent herewith.

³⁰ For the Board's policy that petitions filed more than 60 days before the expiration of the statutory 12-month period will be dismissed forthwith, see *Vickers, Inc.*, 124 NLRB 1051, 1052-1053 (1959); Twenty-fifth Annual Report (1960), pp. 36-37; Twenty-sixth Annual Report (1961), p. 53.

³¹ *Olin Mathieson Chemical Corp.*, 115 NLRB 1501 (1956). See Twenty-sixth Annual Report (1961), p. 53.

³² *Modern Litho Plate Corp.*, 134 NLRB 66. The Board found that a final determination by the State board of the validity of the election was deliberately avoided by the union's withdrawal of its petition in the State proceedings.

6. Unit of Employees Appropriate for Bargaining

Section 9(b) requires the Board to decide in each representation case³³ whether, "in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."³⁴

The broad discretion conferred on the Board by section 9(b) in determining bargaining units is, however, limited by the following provisions:

Section 9(b) (1) prohibits the Board from deciding that a unit including both professional and nonprofessional employees is appropriate unless a majority of the professional employees vote for inclusion in such a mixed unit.³⁵

Section 9(b) (2) prohibits the Board from deciding that a proposed craft unit is inappropriate because of the prior establishment by the Board of a broader unit, unless a majority of the employees in the proposed craft unit vote against separate representation.³⁶

Section 9(b) (3) prohibits the Board from establishing units including both plant guards and other employees or from certifying a labor organization as representative of a guard unit, if the labor organization admits to membership, or is affiliated, directly or indirectly, with an organization which admits, nonguard employees.³⁷

During fiscal 1962, the Board made several major revisions of its rules with respect to unit determination and placement.³⁸ The following sections discuss the more important cases decided during the year which deal with factors generally considered in unit determinations, particular types of units, and treatment of particular categories of employees or employee groups.

³³ Unit determinations also have to be made in refusal-to-bargain cases, as no violation of the relevant paragraph of section 8 (a) or (b) can be found unless the bargaining representative involved had a majority status in an appropriate bargaining unit at the time of the alleged refusal to bargain.

³⁴ See *Ballentine Packing Co., Inc.*, 132 NLRB 923.

³⁵ See *Skagg's Pay Less Drug Stores*, 134 NLRB 168; but see *Tele-Dynamics Division, American Bosch Arma Corp.*, 132 NLRB 748, where the Board declined to direct an election to determine whether professional employees desired to become a part of a nonprofessional unit.

³⁶ For the application of rules governing the establishment of craft units, see below, pp. 63-65.

³⁷ See *William J Burns International Detective Agency, Inc.*, 134 NLRB 451. For the application of contract-bar rules, see above, p. 56.

³⁸ These changes involved the severance of functionally distinct groups, *Kalamazoo Paper Box Corp.*, 136 NLRB 134; insurance units, *Quaker City Life Insurance Co.*, 134 NLRB 960; unit placement of technical employees, *The Sheffield Corp.*, 134 NLRB 1101; truckdrivers, *E. H. Koester Bakery Co., Inc.*, 136 NLRB 1006; and driver-salesmen, *Plaza Provision Co. (P.R.)*, 134 NLRB 910; and self-determination elections for unrepresented fringe groups, *D. V. Displays Corp., et al.*, 134 NLRB 568.

a. General Considerations

The appropriateness of a bargaining unit is primarily determined on the basis of the common employment interests of the group involved. In making unit determinations, the Board also has continued to give particular weight to any substantial bargaining history of the group.³⁹

A union is not required to seek representation in the largest possible unit. The crucial question in each case is whether the unit sought is appropriate.⁴⁰

The Board has consistently refused to predicate unit findings upon the scope of a local's territorial jurisdiction.⁴¹

b. Craft and Quasi-Craft Units

The Board has continued to apply the *American Potash* rules⁴² in passing on petitions for the establishment of craft units, or the severance of craft or craftlike groups from existing larger units. Under these rules, (1) a craft unit must be composed of true craft employees having "a kind and degree of skill which is normally acquired only by undergoing a substantial period of apprenticeship or comparable training"; (2) a noncraft group, sought to be severed, must be functionally distinct and must consist of employees who, "though lacking the hallmark of craft skill," are "identified with traditional trades or occupations distinct from that of other employees . . . which have by tradition and practice acquired craft-like characteristics"; and (3) a representative which seeks to sever a craft or quasi-craft group from a broader existing unit must have traditionally devoted itself to serving the special interests of the type of employees involved.

(1) Craft Status

Craft status and the consequent right to separate representation was recognized in one case⁴³ involving cutters and spreaders in the garment industry, who performed the highly skilled function of "preparation of markers" or "marking," because they constituted a

³⁹ See, e.g., *E. H. Koester Bakery Co., Inc.*, 136 NLRB 1006; *Toffeneth Restaurant Co., Inc.*, 133 NLRB 640; *Neo Gravure Printing Co.*, 136 NLRB 1407. But see *Sea-Land Service, Inc.*, 137 NLRB No. 65, Chairman McCulloch and Members Leedom and Fanning for the majority, Members Rodgers and Brown dissenting, where a Board majority disregarded a 3-year contractual multiport bargaining history as being tainted by the employer's unlawful assistance to the union throughout the entire contract period, and held a single-port unit appropriate in the absence of any controlling valid multiport bargaining history and in view of other factors.

⁴⁰ *Ballentine Packing Co., Inc.*, 132 NLRB 923.

⁴¹ *Broomall Construction Co.*, 137 NLRB No. 37.

⁴² *American Potash & Chemical Corp.*, 107 NLRB 1418 (1954), Nineteenth Annual Report (1954), pp. 38-41.

⁴³ *Benjamin & Johns, Inc.*, 133 NLRB 768.

functionally distinct and homogeneous group of highly skilled craft employees with interests separate and apart from those of other production and maintenance employees. Although the petitioner was willing to represent the cutters and spreaders as a craft unit, it preferred to represent all employees in the cutting department. The Board, accordingly, directed an election to include all cutting department employees, including the cutters and spreaders, because, in the garment industry, cutting department employees—who have essentially different skills and separate interests and supervision—have traditionally been organized on a departmental basis, and the Board has in the past recognized their separate interests and found that these interests entitled them to separate representation.⁴⁴

(2) Craft and Departmental Severance

During fiscal 1962, a Board majority, in the *Kalamazoo Paper Box* case,⁴⁵ overruled the approach taken in prior cases to ascertain whether severance from an established unit should be accorded a subgroup of employees, such as truckdrivers,⁴⁶ claiming functional distinction with resulting special interests. The majority held that severance will be warranted only where such employees in reality constitute a functionally distinct group and they, as a group, have overriding separate, special interests. The majority also stated that the Board's determination in such cases must be based upon the factual situation existing in each case, rather than upon title, tradition, or practice.⁴⁷

A Board majority held in one case⁴⁸ that a question of representation⁴⁹ existed where one of two joint representatives of a maintenance unit filed a petition seeking sole certification for the historical maintenance unit, because the petitioner was not petitioning for an inconsistent unit within the meaning of the *Hollingsworth* and *International Paper* cases.⁵⁰ On the other hand, in the same case, a petition

⁴⁴ See, e.g., *Rothschild-Kaufman Co., Inc.*, 98 NLRB 353 (1952); *Sir James, Inc.*, 97 NLRB 1572 (1952). Cf. *Chalet, Inc.*, 107 NLRB 109 (1953).

⁴⁵ *Kalamazoo Paper Box Corp.*, 136 NLRB 134 (March 6, 1962), Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting.

⁴⁶ For unit placement of truckdrivers, see below, pp. 69-70.

⁴⁷ In the *Kalamazoo Paper Box* case, the majority held that neither truckdrivers alone, nor the shipping department including truckdrivers, constituted a functionally distinct group with special interests sufficiently distinguishable from those of the other employees to warrant severance from an overall unit.

⁴⁸ *Jefferson Chemical Co., Inc.*, 134 NLRB 1552, Chairman McCulloch and Members Leedom, Fanning, and Brown for the majority, Member Rodgers dissenting.

⁴⁹ For discussion of question of representation aspect, see above, pp. 46-48.

⁵⁰ *Hollingsworth & Whitney Division of Scott Paper Co.*, 115 NLRB 15 (1956); *International Paper Co.*, 115 NLRB 17 (1956), where the Board held that a union which sought to represent inconsistent units at the same time was acting so inconsistently that its petition for craft or departmental severance must be dismissed. See Twenty-first Annual Report (1956), pp. 56-57.

filed by a participating member of the other joint representative, seeking to sever boilermakers from the existing maintenance unit, was held not to have raised a representation question, because a Board majority failed to find that the unit sought was an appropriate unit.⁵¹

In another case, the Board declined to reconsider its longstanding rules concerning unit determinations in the commercial printing industry, and held that a lithographic unit was appropriate and may be severed from the existing unit.⁵² Rejecting the contention that numerous technological developments have caused a shift in the pattern of the industry and resulted in a blending of printing techniques which have almost eradicated those features of lithography distinguishing it from other types of printing, the Board recognized the present and impending technological changes in the industry but found insufficient progress in the use of new techniques and machinery to warrant present reconsideration of the Board's rules concerning appropriate units in the commercial printing industry.⁵³

c. Multiemployer Units

Questions regarding the appropriateness of multiemployer units were again presented in a number of cases. In determining whether requests for such a unit should be granted, the Board has continued to look to the existence of a controlling bargaining history, and the intent and conduct of the parties.

The Board had occasion during the past year to restate the principle that a single-employer unit is presumptively appropriate unless there is a controlling history of collective bargaining on a multiemployer basis.⁵⁴ And in the *U.S. Pillow* case,⁵⁵ the Board reexamined its "duration of multiemployer bargaining history" test. This test has been used to determine whether a multiemployer bargaining his-

⁵¹ *Jefferson Chemical Co., Inc.*, above, Members Leedom and Fanning would have found that the requested unit was an appropriate craft unit and would, therefore, have directed elections in a voting group of boilermakers and in a voting group of maintenance employees excluding boilermakers. However, since there was no Board majority for an election among the boilermakers, they joined Chairman McCulloch and Member Brown in directing an election in the existing unit of maintenance employees. Member Rodgers would have dismissed both petitions for the reasons stated in *Hollingsworth & Whitney*, above, and *International Paper Co.*, above.

⁵² *Allen, Lane & Scott*, 137 NLRB No. 33

⁵³ However, the Board noted that it would continue to scrutinize very closely the future course of the industry and would reevaluate its unit policies upon a proper showing that technological advancements and the needs of the industry require it.

⁵⁴ *Hot Springs Bathhouse Assn.*, 133 NLRB 1066; *Houston Automobile Dealers Assn.*, 132 NLRB 947, where the Board found a multiemployer unit inappropriate because the employer association was never given authority to bargain in behalf of its members and never entered into a bargaining agreement. See *Hayes Express*, 134 NLRB 408, where the Board found an associationwide unit to be appropriate in view of the long history of bargaining on an associationwide basis; *Dittler Bros., Inc.*, 132 NLRB 444

⁵⁵ *U.S. Pillow Corp.*, 137 NLRB No. 72, Members Fanning and Brown joining in the principal opinion, Member Leedom concurring, Chairman McCulloch and Member Rodgers not participating.

tory would foreclose a petition seeking a unit confined to a single employer whose employees had an antecedent history of bargaining on a separate basis.⁵⁶ On the basis of its analysis, the Board revised the test to be used in cases involving this question, having found that the pattern of such cases may be broadly analogized to the Board's contract-bar rules. Thus, without attempting to restate rules applicable to all possible factual situations, the Board announced that where there has been a prior bargaining history on an individual basis, a rival petition for a single-employer unit will prevail if timely filed before the insulated period of the last individual contract, even if the employer has adopted or joined in a multiemployer contract and whether or not that multiemployer contract would otherwise be a bar to a petition.⁵⁷ In applying this new test, the Board held in *U.S. Pillow* that the union's petition for a single-employer unit, filed 11 months after the employer joined a multiemployer association and adopted the group contract, was timely with respect to the insulated period at the end of the first 2 years of the employer's individual contract.⁵⁸

During the past year, it was again pointed out that an essential element for a multiemployer unit is an unequivocal manifestation by the individual employers of a desire to be bound in future collective bargaining by group rather than individual action.⁵⁹ The fact that a union *voluntarily* bargains with a new employer association with no prior bargaining history and no existing multiemployer unit, without reaching agreement, is insufficient to establish a multiemployer unit binding upon the union.⁶⁰

In fiscal 1962, the Board reconsidered the original holding of the *Holiday Hotel* case⁶¹ that only a multiemployer unit was appropriate and that separate residual units of all unrepresented employees at each of four hotels were inappropriate in view of the fact that they were not

⁵⁶ See, e.g., *Miron Building Products Co., Inc.*, 116 NLRB 1406 (1956), where the Board stated that it "has consistently held that multiemployer bargaining history of [less than 1 year] and not predicated upon a Board certification does not warrant the finding that only a multiemployer unit is appropriate." See also Twenty-second Annual Report (1957), pp. 33-34.

⁵⁷ *I. Muller & Bro., Inc.*, 135 NLRB 924, where the petition seeking a single-employer unit was dismissed solely because it was filed 16 months after the employer joined a multiemployer association, was overruled by *U.S. Pillow Corp.*

⁵⁸ *U.S. Pillow Corp.*, above, Members Fanning and Brown joining in the principal opinion, Member Leedom concurring in the conclusion that group bargaining was not controlling, but reaching such results by applying the "brief duration" test for the multiemployer relationship, Chairman McCulloch and Member Rodgers not participating.

⁵⁹ *Chester County Beer Distributors Assn.*, 133 NLRB 771; *Goldene's, Inc.*, 134 NLRB 770, where an employer was excluded from a requested multiemployer unit because the employer showed an unequivocal intent not to be part of any multiemployer unit.

⁶⁰ *Hoisting & Portable Engineers Local 701, Operating Engineers (Cascade Employers Assn., Inc.)*, 132 NLRB 648.

⁶¹ *Holiday Hotel*, 131 NLRB 106 (April 14, 1961), following *The Los Angeles Statler Hilton Hotel*, 129 NLRB 1349 (1961). Twenty-sixth Annual Report (1961), p. 58.

coextensive with the multiemployer unit. In reversing the prior decision, a panel majority distinguished the *Los Angeles Statler Hilton* case⁶² because, unlike the situation in that case, the employers in the *Holiday Hotel* case were members of an employers council composed of other enterprises as well as hotels, but were not members of a hotel association and had never bargained on a multiemployer basis for employees employed exclusively by hotels.⁶³ The majority concluded that even though the hotels bargained on a multiemployer basis as to other employees, separate residual units of the unrepresented employees were appropriate, since there existed no hotel employers bargaining unit to which such employees were residual.

An employer may withdraw from multiemployer bargaining and thereby reestablish his employees in separate appropriate units. In one case, the Board held that employers effectively withdrew from an employer association where, after terminating their relationship with the association, they did not engage in any multiemployer bargaining but executed separate, individual contracts with the union.⁶⁴ In another case, the Board found that 8 of 10 employers, all of whom comprised a restaurant association, effectively abandoned the multiemployer bargaining unit when they executed an agreement which was the result of individual rather than group bargaining.⁶⁵ In noting that single-employer units were thereby established, the Board deemed immaterial the fact that the agreement consisted of a single document. But the Board held that the remaining two employers continued to constitute an appropriate multiemployer group, because they continued to bargain jointly with the union and neither party indicated that bargaining was on anything but a joint basis.⁶⁶

A panel majority rejected a contention that an employer had withdrawn from an employer association, where the attempted withdrawal was untimely and ineffective because it took place after the filing of the petition.⁶⁷ To recognize such withdrawal attempt would, according to the majority, permit fragmentation of the multiemployer unit which was appropriate at the time the petition was filed.

d. Hotel Units

Office clerical employees are excluded from units of hotel employees if the parties stipulate their exclusion.⁶⁸ In fiscal 1962, a panel ma-

⁶² *Los Angeles Statler Hilton Hotel*, above

⁶³ *Holiday Hotel*, 134 NLRB 113, Chairman McCulloch and Member Fanning for the majority, Member Leedom dissenting

⁶⁴ *Goldeen's, Inc.*, 134 NLRB 770

⁶⁵ *International Restaurant Associates*, 133 NLRB 1088.

⁶⁶ *Ibid.*

⁶⁷ *Dittler Bros., Inc.*, 132 NLRB 444, Members Rodgers and Leedom for the majority, Member Fanning dissenting.

⁶⁸ *Arlington Hotel Co., Inc.*, 126 NLRB 400 (1960), Twenty-fifth Annual Report (1960), p 42

majority announced in the *Holiday Hotel* case⁶⁹ that this rule will similarly be applied to categories of hotel employees other than office clerical where they, like office clericals, have sufficiently different interests from other hotel employees to justify their exclusion.

All operating personnel in hotels are included in hotel units.⁷⁰ Applying this rule, a panel majority held that the sports department employees at a hotel and at its pheasant farm, which was operated by the hotel for its guests' hunting, were part of the hotel's operating personnel and, consequently, were included in the hotel unit.⁷¹

e. Insurance Units

Heretofore, it has been the policy that only a statewide or company-wide unit of insurance employees was appropriate.⁷² But, in fiscal 1962, a Board majority overruled this policy in the *Quaker City Life Insurance* decision.⁷³ In finding a citywide unit of insurance employees appropriate, the majority stated that there is no longer any rational basis for applying different organizational rules to the insurance industry than are applied to other industries, and that normal unit principles will be applied to future cases as they arise.

f. Employer Mergers

Several cases during the fiscal year involved merger situations where complements of employees were transferred to a new owner who already operated an existing enterprise. In one case, where three powerplants were sold and their entire complement of represented employees transferred to a new owner, the Board held that these employees constituted an appropriate residual unit of unrepresented employees of the purchaser, rather than a normal accretion to another union's certified unit at the purchaser's public utility operation.⁷⁴ Although the acquired plants became an integral part of the employer's utility system, they continued as complete and separate operating entities with a readily identifiable group of employees.⁷⁵ On the other

⁶⁹ *Holiday Hotel*, 134 NLRB 113, Chairman McCulloch and Member Fanning for the majority, Member Leedom dissenting on other grounds.

⁷⁰ *Arlington Hotel Co., Inc.*, above.

⁷¹ *Holiday Hotel*, 134 NLRB 113.

⁷² *Metropolitan Life Insurance Co.*, 56 NLRB 1635 (1944).

⁷³ *Quaker City Life Insurance Co.*, 134 NLRB 960, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting

⁷⁴ *Consolidated Edison Co. of New York, Inc.*, 132 NLRB 1518.

⁷⁵ Although the Board favors a systemwide unit as the optimum for public utilities, it has stated that in many situations the application of such policy is tempered by the rights of employees to a self-determination election before being merged in a larger unit, *Brooklyn Union Gas Co.*, 123 NLRB 441, 445. In *Consolidated Edison Co. of New York, Inc.*, above, the sales agreement established certain common interests and employment conditions for these employees not shared by the purchaser's other employees and intended to reserve to them the freedom of choice in selecting their representative, which they previously enjoyed

hand, where a small part of a unit was sold and an insubstantial number of old employees were retained by the new employer, the Board held that these employees constituted an accretion to the unit of the purchaser's employees.⁷⁶

In another case, where the office operations of a trucking firm merged with the purchaser's operations, the Board included the seller's office and clerical employees in the purchaser's certified unit pending final Interstate Commerce Commission approval of the purchase.⁷⁷ However, the Board further held that in the event the Commission should disapprove the purchase, these employees will revert to their former status with their original employer. Otherwise, they will remain in the certified unit.

g. Unit Placement of Various Employee Groups

Some of the cases decided during fiscal 1962 presented issues regarding the unit placement of driver-salesmen, truckdrivers, professional employees, and technical employees.

(1) Driver-Salesmen

The policy with respect to the unit placement of driver-salesmen as enunciated in the *Valley of Virginia* case⁷⁸ was modified by a Board majority in the *Plaza Provision* decision.⁷⁹ The majority stated that where employees are engaged in selling their employer's products, and drive vehicles and make deliveries of such products only as an incident of such sales activity, they are essentially salesmen and have interests more closely allied to salesmen than to truckdrivers, production and maintenance employees, or warehouse employees. The majority, accordingly, found that route and special salesmen who sold and delivered merchandise from their vehicles were truly salesmen rather than deliverymen or truckdrivers, and excluded them from the requested unit of warehousemen and truckdrivers, because their interests were diverse from those of the warehousemen and truckdrivers.⁸⁰

(2) Truckdrivers

Under past Board policy, truckdrivers were included in the production and maintenance unit where there was no agreement to exclude them and no union sought to represent them separately. But in the

⁷⁶ *Granite City Steel Co.*, 137 NLRB No. 24.

⁷⁷ *Gillette Motor Transport, Inc.*, 137 NLRB No. 58.

⁷⁸ *Valley of Virginia Cooperative Milk Producers Assn.*, 127 NLRB 785 (1960), where the Board held that driver-salesmen would be included in production and maintenance units unless the parties agreed to exclude them or some other union sought to represent them separately.

⁷⁹ *Plaza Provision Co. (P R)*, 134 NLRB 910. Chairman McCulloch and Members Leedom, Fanning, and Brown for the majority, Member Rodgers dissenting.

⁸⁰ *Ibid.* See also *E. H. Koester Bakery Co., Inc.*, 136 NLRB 1006, where driver-salesmen were excluded from a production and maintenance unit.

Koester Bakery case,⁸¹ a Board majority abandoned this blanket policy of automatically including truckdrivers in more comprehensive units under such circumstances, and returned to the Board's older approach of predicating their unit placement in each case upon a determination of their community of interest.⁸² The majority stated that in so doing, the Board will continue to accord to the history of bargaining and to the agreement or stipulation of the parties the substantial weight previously given to these factors. Also, the Board will determine whether the truckdrivers may appropriately constitute a separate unit where their representation in a separate unit is requested.⁸³ However, in the absence of such a request, inclusion will no longer be automatically required. The Board will also consider, among other factors, (1) whether the truckdrivers have related or diverse duties, mode of compensation, hours, supervision, and other conditions of employment, and (2) whether they are engaged in the same or related production process or operation, or spend a substantial portion of their time in such production or adjunct activities. If the interests shared with other employees are sufficient to warrant their inclusion, the Board will include the truckdrivers in the more comprehensive unit. If, on the other hand, truckdrivers are shown to have such a diversity of interest from those of other employees as to negate any mutuality of interest between the two groups, the Board will exclude them.⁸⁴

(3) Professional Employees

With respect to professional employees, the Board refused in one case to exclude employees from a professional unit simply because they were not college graduates.⁸⁵ The Act's requirement for professionals to possess "knowledge of an advanced type" need not come through academic training alone. Although the background of the

⁸¹ *E H Koester Bakery Co, Inc*, above, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting. See also *Tops Chemical Co*, 137 NLRB No 94.

⁸² The majority overruled *Thomas Electronics, Inc*, 107 NLRB 614 (1953), and *Valley of Virginia Cooperative Milk Producers Assn*, 127 NLRB 785 (1960), which stated a contrary policy. See also *Intercontinental Engineering-Manufacturing Corp*, 134 NLRB 824, where a Board majority made no final determination with respect to truckdrivers, but permitted them to vote under challenge, since it was reconsidering the problem at that time.

⁸³ See *Ballentine Packing Co, Inc*, 132 NLRB 923, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting. In directing separate elections in a production and maintenance unit and a truckdrivers unit respectively sought by two different unions, a Board majority declined to defer a final unit determination to permit placement of truckdrivers in the production and maintenance unit should they fail to vote for separate representation. *Independent Linen Service Co. of Mississippi*, 122 NLRB 1002 (1959), and *American Linen Supply Co, Inc*, 129 NLRB 993 (1960), were overruled by the majority to the extent they are inconsistent with the *Ballentine* holding.

⁸⁴ For severance of truckdrivers from established units, see *Kalamazoo Paper Box Corp*, 136 NLRB 134, above, p 64.

⁸⁵ *Ryan Aeronautical Co*, 132 NLRB 1160.

individual is relevant, it is not the individual qualifications of each employee but rather the character of the work required of them as a group which is determinative of professional status. If it appears that a group of employees within a classification is predominantly composed of individuals possessing a degree in a field to which the profession is devoted, it may be presumed that the work requires knowledge of an advanced type.⁸⁶

(4) Technical Employees

In the past, the Board has followed the policy of excluding all technical employees from production and maintenance units whenever their unit placement was in issue.⁸⁷ But during this fiscal year, the Board, in the *Sheffield* case,⁸⁸ discarded this automatic placement formula in favor of a policy of making a pragmatic judgment in each case based upon an analysis of its particular factors and circumstances.⁸⁹ The new policy gives effective weight to the consideration of the community of interests of technical employees with the production and maintenance employees. However, the Board stated that, in assessing all the factors, considerable weight will be given to the desires of the parties where they are in agreement as to the unit placement of the technical employees. Applying these factors to the *Sheffield* case where the parties were in disagreement, the Board included certain technical employees in the production and maintenance unit and excluded others, depending on whether their community interests were sufficiently close to or considerably different from those of the production and maintenance employees.⁹⁰

h. Individuals Excluded From Bargaining Unit by the Act

A bargaining unit may include only individuals who are "employees" within the meaning of section 2(3) of the Act. The major categories expressly excluded from the term "employee" are agricultural laborers, independent contractors, and supervisors. In addition, the statutory definition excludes domestic servants, or anyone employed by his parent or spouse, or persons employed by an employer

⁸⁶ *Ibid.*

⁸⁷ *Litton Industries of Maryland, Inc.*, 125 NLRB 722 (1959), Twenty-fifth Annual Report (1960), pp 42-43.

⁸⁸ *The Sheffield Corp.*, 134 NLRB 1101.

⁸⁹ Such factors include, among others, desires of the parties, history of bargaining, similarity of skills and job functions, common supervision, contact and/or interchange with other employees, similarity of working conditions, type of industry, organization of plant, whether the technical employees work in separately situated and separately controlled areas, and whether any union seeks to represent technical employees separately.

⁹⁰ *The Sheffield Corp.*, 134 NLRB 1101. See also *Meramec Mining Co.*, 134 NLRB 1675; *The Budd Co.*, 136 NLRB 1153; *Aeronautical & Instrument Div., Robertshaw-Fulton Controls Co.*, 137 NLRB No. 8; *Westinghouse Electric Corp.*, 137 NLRB No. 30; *Dewey Portland Cement Co.*, 137 NLRB No. 107.

subject to the Railway Labor Act or by any person who is not an employer within the definition of section 2(2).⁹¹

The statutory exclusions have continued to require determinations as to whether the employment functions or relations of particular employees precluded their inclusion in a proposed bargaining unit.

(1) Agricultural Laborers

A continuing rider to the Board's appropriation act requires the Board to determine "agricultural laborer" status so as to conform to the definition of the term "agriculture" in section 3(f) of the Fair Labor Standards Act.

In applying the statutory terms, it is the Board's policy "to follow wherever possible" the interpretation of section 3(f) by the Department of Labor.⁹² Thus, relying on the rulings of the Department of Labor, the Board held that processing and marketing employees at a dairy farm were not "agricultural laborers," because all eggs handled and 90 percent of the milk processed were produced elsewhere, not on the employer's farm.⁹³

Employees engaged in canning operations on a farm, involving the processing, cooking, grading, canning, and labeling of vegetables, were held not agricultural laborers.⁹⁴ The Board noted that the processing of farm products, which requires extensive investment in machinery and involves changing the form of the farm product by cooking and canning, is not incidental to farming but is a separate industrial enterprise which happens to be performed on a farm. And in a similar case, the Board held that employees at a potato packing-shed also were not agricultural laborers within the meaning of section 2(3) of the Act and section 3(f) of the Fair Labor Standards Act, because their work was not performed as an incident to or in conjunction with farming operations.⁹⁵ Here, the employer's packing-shed operations constituted a separate commercial venture which was operated independently from his farming operations.

Truckdrivers and packing carton stitchers employed by a vegetable and fruit grower and shipper were held not agricultural laborers, where they were engaged in shipping lettuce harvested on land owned or leased by other parties who did the farming under various economic arrangements with the employer.⁹⁶ In all its arrangements, the em-

⁹¹ See above, p 31, footnote 1

⁹² *Schoenberg Farms*, 132 NLRB 1331; *G. L. Webster Co., Inc.*, 133 NLRB 440. See also Twenty-sixth Annual Report (1961), p 61

⁹³ *Schoenberg Farms*, above

⁹⁴ *G. L. Webster Co., Inc.*, above

⁹⁵ *H. H. Zimmerli*, 133 NLRB 1217

⁹⁶ *Norton & McElroy Produce, Inc.*, 133 NLRB 104

ployer either invested in a crop cultivated by another or, together with other parties, set up a separate entity which cultivated the crop with its own employees. Consequently, the employer was deemed not to be a "farmer," and the shipping employees not to be employed in the independent farming operation, even though the employer invested in or owned a share in such operation.

(2) Independent Contractors

In determining whether an individual is an independent contractor rather than an employee, and therefore must be excluded from a proposed bargaining unit, the Board has consistently applied the "right-of-control" test.⁹⁷ This test is based on whether the person for whom the individual performs services has retained control not only over the result to be achieved but also over the manner in which the work is to be performed. The resolution of this question depends on the facts of each case, and no one factor is determinative.⁹⁸

In one case the Board held that driver-owners and driver-renters at a taxicab company were employees rather than independent contractors because they did not possess independence of action as to the manner and means of accomplishing their work.⁹⁹ Although the employer did not make social security or income tax deductions, all cabs were operated under the employer's franchise, the drivers paid a fee to the employer for services, and the employer required the drivers to accept job assignments and to purchase gasoline from it, maintained inspectors, sold advertising to be carried on the cabs, prescribed rates to be charged, furnished drivers with operational manuals which prescribed rules to be followed, and disciplined violators of such rules. Similarly, distributors for a carbonated beverage bottling company were found to be employees because the employer retained the right to control the manner and means by which the work of the distributors was to be accomplished, notwithstanding the fact that the distributors purchased their trucks from the employer and paid for all maintenance, and that the employer made no provisions for social security payments, withholding tax deductions, or any hospitalization insurance program.¹

A Board majority held that drivers who had previously been employees of a toy and novelty distributor had not been converted to independent contractors by virtue of their individual franchise con-

⁹⁷ This test applies equally in determining whether the particular individuals may properly be included in a bargaining unit under sec 9 of the Act, and where their employee status for the purposes of the unfair labor practice provisions of sec 8 is in issue

⁹⁸ *Pure Seal Dairy Co.*, 135 NLRB 76 See Twenty-sixth Annual Report (1961), p 61.

⁹⁹ *Mound City Yellow Cab Co*, 132 NLRB 484

¹ *Coca-Cola Bottling Co of New York, Inc*, 133 NLRB 762.

tracts with the employer.² The majority found that the employer reserved to itself the right to control the manner and means by which the drivers performed their work, and left little room for the drivers to make decisions which would govern their profit and loss.³ And a panel majority held that individuals who used their own trucks to deliver concrete from the employer's plant to a construction site, and who were paid haulage rates instead of hourly rates, were employees rather than independent contractors.⁴ The majority based its finding principally on the fact that their work and the manner of its performance did not differ from that of other employee drivers, and that they could not—by the exercise of independent skill or judgment—increase their profit.

A Board majority held that an individual who distributed his employer's dairy products under an oral agreement whereby the employer sold its products to him for resale at the individual's own price, the difference representing his only compensation, was an employee rather than an independent contractor.⁵ This individual distributed the company's products in the same manner as the other drivers, and, except for the right to fix his own price, his right of control over the method of doing business was not substantially greater than that exercised by the regular drivers. On the other hand, in another dairy case, distributors were found not to be employees since, in material respects, they retained sufficient independence of action as to the manner and means of accomplishing their work to constitute independent contractors.⁶

In another case, a freelance performer engaged in making transcriptions to be broadcast over a radio station for an advertiser was held by a Board majority to be an independent contractor⁷ rather than an employee of the producer of such transcriptions. The majority

² *Servette, Inc.*, 133 NLRB 132, Chairman McCulloch and Members Leedom and Fanning for the majority, Member Rodgers dissenting, Member Brown not participating

³ See also *Air Control Products, Inc. of Tampa*, 132 NLRB 114.

⁴ *Construction, Building Material & Miscellaneous Drivers Local 83, Teamsters (Mashall & Haas)*, 133 NLRB 1144, Members Fanning and Brown for the majority, Member Leedom dissenting.

⁵ *Milk Drivers & Dairy Employees Union, Local 546, Teamsters (Minnesota Milk Co.)*, 133 NLRB 1314, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting. In this sec 8(e) case, the majority rejected the trial examiner's reliance on the fact that, although the employer provided the truck and covering insurance and supplied the gas and oil, the parties intended that the individual would eventually procure his own equipment and make his own arrangements for all maintenance and upkeep. The majority pointed out that only their relationship during the period of the oral agreement was relevant.

⁶ *Pure Seal Dairy Co.*, 135 NLRB 76

⁷ *American Federation of Television & Radio Artists (L B Wilson, Inc.)*, 133 NLRB 1736, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom adhering to their original decision, dissenting. In disagreeing with the original decision, 125 NLRB 786, where a Board majority found the freelance performer to be an employee and also found a sec. 8(b)(4)(A) violation, the majority here dismissed the complaint

noted that "the periodic use of and consultation with an independent contractor does not necessarily convert him into an employee," nor "does the fact that all the independent contractors are organized into an exclusive source of supply convert them into employees." The majority found that the amount or degree of control exercised over this performer was not sufficient to deprive him of his status as an independent contractor, particularly in view of the fact that the advertiser contracted with the performer because he was an independent radio personality, and did not make any employee deductions from his talent fees.

(3) Supervisors

The supervisory status of an individual under the Act depends on whether he possesses authority to act in the interest of his employer in the matters and the manner specified in section 2(11), which defines the term "supervisor."⁸ An employee will be found to have supervisory status if he has any of the indicia of authority enumerated in section 2(11).⁹

During fiscal 1962, the Board modified its policy with respect to the unit placement and voting eligibility of individuals in seasonal industries who spend a part of their working year as rank-and-file employees and the remainder as supervisors.¹⁰ In the past, the Board has followed the policy enunciated in the *Whitmoyer* case¹¹ that employees who spend a regular and substantial part of their time performing supervisory duties on a seasonal basis are supervisors and are excluded from a unit of seasonal and year-round employees even as to their nonseasonal, nonsupervisory duties.¹² Upon reconsideration of the original *Great Western Sugar* case,¹³ a Board majority revised the *Whitmoyer* policy to include these seasonal supervisors in the unit, but only with respect to their rank-and-file duties, and to permit them to vote regardless of their employee status at the time of the election.¹⁴ In establishing this new rule, the majority stated that

⁸ Sec 2(11) reads "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment"

⁹ See Twenty-sixth Annual Report (1961), p 63

¹⁰ *Great Western Sugar Co*, 137 NLRB No 73, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting.

¹¹ *Whitmoyer Laboratories, Inc*, 114 NLRB 749 (1955).

¹² See *Great Western Sugar Co*, 132 NLRB 936, where the Board excluded such individuals from the unit, and stated that the fact that these individuals were included in the unit on a consent basis in past bargaining was not binding on the Board.

¹³ The Decision and Direction of Election in 132 NLRB 936 was accordingly amended to conform to the finding and direction in 137 NLRB No. 73.

¹⁴ *Great Western Sugar Co*, 137 NLRB No. 73, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting. The majority pointed out that it would reach a contrary result where individuals spend a part of each working day or week as supervisors (called part-time supervisors).

it is "an adjustment which accommodates the requirements of the statute for separating supervisors from employees, to those protections which the statute holds out to persons who are employees to engage in self-organization and bargaining, and during their status as employees, to be free from unfair labor practices by employers or by unions." In the majority's view, when seasonal supervisors lose their supervisory powers, they should not be deprived of the law's protection for "employees," which they then become. And, the majority rationalized, if these protections were denied them, it would also adversely affect the efforts of the other year-round employees to protect their terms and conditions of employment.

The fact that individuals have been included in a contract unit does not preclude the Board from excluding them as supervisors.¹⁵

Although an individual may not currently have any employees assigned to him, he nevertheless is considered a supervisor, where he is being groomed to exercise supervisory authority because he is expected to have subordinates in the future.¹⁶ The fact that an employee has been recommended for a supervisory position but has not received such promotion is immaterial, where he actually exercises supervisory authority—it is the exercise of supervisory authority and not the title a person holds that is controlling.¹⁷ But where the control a person exercises over another is derived from his experience in the type of work involved rather than from responsible direction, a nonsupervisory status is found.¹⁸

A panel majority held that an employee was not a supervisor where her duties constituted routine office work and she had been continuously classified by the employer as a mere office clerk.¹⁹ Although she occasionally substituted for the supervisor and on one occasion disciplined another employee, the majority reaffirmed the principles that one who substitutes sporadically for a supervisor does not necessarily become a supervisor,²⁰ and that an isolated act of discipline does not make a supervisor out of a rank-and-file employee.²¹

i. Employees Excluded From Unit by Board Policy

It is the Board's policy to exclude from bargaining units employees who act in a confidential capacity to officials who formulate, determine, and effectuate the employer's labor relations policies,²² as well as

¹⁵ *Pacific Motor Trucking Co.*, 132 NLRB 950.

¹⁶ *Yale & Towne Mfg Co.*, 135 NLRB 926.

¹⁷ *Sperry Gyroscope Co., Division of Sperry Rand Corp.*, 136 NLRB 294.

¹⁸ *Bugle Coat, Apron & Linen Service, Inc., et al.*, 132 NLRB 1098

¹⁹ *Webb Fuel Co.*, 135 NLRB 309, Chairman McCulloch and Member Leedom for the majority, Member Rodgers dissenting.

²⁰ See, e.g., *Seattle Automobile Dealers Assn.*, 122 NLRB 1616 (1959).

²¹ See, e.g., *Cincinnati Transit Co.*, 121 NLRB 765 (1958).

²² See Twenty-third Annual Report (1958), pp. 41-42.

managerial employees, i.e., employees in executive positions with authority to formulate and effectuate management policies.²³

Access to confidential file material has been held insufficient, in itself, to confer confidential status.²⁴ Nor does the fact that an employee may spend a fraction of his time in substituting for a secretary to an official engaged in matters relating to the employer's labor relations policies, render him a confidential employee.²⁵ In one case the Board held that an employee, who neither determined, formulated, or effectuated management policy in the field of labor relations, nor assisted anyone who did, was not a confidential employee, even though she handled personnel correspondence to the home office.²⁶

j. Employees' Wishes in Unit Determinations

The wishes of the employees concerned, as ascertained in self-determination elections, are taken into consideration where (1) specifically required by the Act,²⁷ or (2) in the Board's view, representation of an employee group in a separate unit or a larger unit is equally appropriate,²⁸ or (3) the question of a group's inclusion in an existing unit rather than continued nonrepresentation is involved.²⁹

(1) Unrepresented Fringe Groups

In cases where a question of representation existed in the historical unit and the incumbent union sought to include a previously unrepresented fringe group not sought by any other union on a different basis, the *Zia* rule³⁰ provided that such unrepresented fringe groups would not be included in the historical unit without first ascertaining whether they desired to be included. During fiscal 1962, the Board, in the *D.V. Displays* decision,³¹ reexamined the merits of that rule and the predecessor *Waterous* principle³² which found no cogent reason for

²³ See Twenty-third Annual Report (1958), pp. 42-43. See also *Reynolds Electrical & Engineering Co., Inc.*, 133 NLRB 113, where medical department personnel were held not to have managerial functions.

²⁴ *Meramec Mining Co.*, 134 NLRB 1675.

²⁵ *Ibid.*

²⁶ *Quaker City Life Insurance Co.*, 134 NLRB 960, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting on other grounds.

²⁷ See above, p. 62.

²⁸ See, e.g., *Müller & Miller, Inc.*, 132 NLRB 1530; *Weyerhaeuser Co.*, 123 NLRB 1381; *American Freezerships, Inc.*, 135 NLRB 1113. See also Twenty-sixth Annual Report (1961), p. 64.

²⁹ See, e.g., *Meramec Mining Co.*, 134 NLRB 1675; *D.V. Displays Corp.*, 134 NLRB 568.

³⁰ *The Zia Co.*, 108 NLRB 1134 (1954). See Nineteenth Annual Report (1954), pp. 42-43.

³¹ *D.V. Displays Corp., et al.* 134 NLRB 568, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting.

³² *Waterous Co.*, 92 NLRB 76 (1950), which overruled *Petersen & Lytle*, 60 NLRB 1070 (1945), where self-determination was accorded to previously unrepresented fringe groups. See Nineteenth Annual Report (1954), pp. 42-43.

balloting fringe employees separately where the only union seeking to represent them on any basis was at the same time asking for an election in the historical unit in which the fringe group properly belonged. A majority of the Board, thereupon, modified the *Zia* doctrine and reinstated the *Waterous* rule.

The majority held in the *D.V. Displays* case that the Board now will direct only one election which will include all the employees in the unit found to be appropriate. The majority pointed out that "it is more consistent with [the Board's] statutory responsibility for determining the appropriate unit, now that the unit placement of [the fringe group] has been raised as an issue before the Board for the first time, to correct the fringe defect in the historical unit." And, contrary to the *Zia* doctrine, the inclusion of the fringe group, according to the majority, "is the more democratic approach because it gives all employees in the appropriate unit an equal voice in choosing a unit representative."

(2) Pooling of Votes

In the *Felix Half* case,³³ a Board majority provided for the pooling of votes³⁴ where separate elections are directed among voting groups of represented and unrepresented employees³⁵ and overruled the *Waikiki*³⁶ and *Cook Paint*³⁷ cases,³⁸ which required a union to win separate majorities in both units before being entitled to represent the entire group. In the majority's view, this pooling was necessary in order to insure that, in all cases, the will of the majority in appropriate units will be given effect.

k. Units for Decertification Purposes

A decertification election is directed only in the certified or currently recognized bargaining unit.³⁹ The fact that the unit described in a decertification petition may be an appropriate unit is immaterial if the union sought to be decertified is not the certified or currently recognized representative of that unit.⁴⁰

³³ *Felix Half & Brother, Inc.*, 132 NLRB 1523, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting. See also *Battle Creek Gas Co.*, 132 NLRB 1528.

³⁴ For a description of the pooling technique, see *American Potash & Chemical Corp.*, 107 NLRB 1418, 1427 (1954), Nineteenth Annual Report (1954), pp 43-44.

³⁵ *Felix Half & Brother, Inc.*, above, where the intervening union did not seek to add employees to the existing unit but desired to participate in an election in the existing unit.

³⁶ *The Waikiki Baltimore Hotel*, 127 NLRB 82 (1960), Member Fanning dissenting; Twenty-sixth Annual Report (1961), pp 64-65.

³⁷ *Cook Paint & Varnish Co.*, 127 NLRB 1098 (1960), Member Fanning dissenting.

³⁸ See Twenty-sixth Annual Report (1961), p. 65.

³⁹ See, e.g., *Goldeen's, Inc.*, 134 NLRB 770. See also *Calorator Mfg. Corp.*, 129 NLRB 704, footnote 3 (1960), *The Root Dry Goods Co., Inc.*, 126 NLRB 953, 954, footnote 6 (1960); *Oakwood Tool & Engineering Co.*, 122 NLRB 812, 814 (1958).

⁴⁰ *Goldeen's, Inc.*, 134 NLRB 770.

7. Units Appropriate for 8(b)(7)(C) Expedited Elections

In situations involving recognitional or organizational picketing, whenever a section 9(c) petition is timely filed—within a reasonable period of time not to exceed 30 days from the commencement of such picketing—in accordance with the first proviso to section 8(b)(7)(C) and the Board's Rules and Regulations pertaining thereto,⁴¹ the Board must direct an election “forthwith” in such unit as it finds appropriate.

During the past year, the Board had occasion in only one case to pass upon the question concerning the processing of a petition under section 8(b)(7)(C).⁴² In the *Anaconda Aluminum* case,⁴³ the Board found that the employees requested by the petitioner were part of the existing production and maintenance unit rather than a separate unit, and therefore did not constitute an appropriate unit. Thus, as the picketing union could not, under Board policy, be certified because the unit involved was inappropriate, the Board found that no election could be held and that the petition could not serve to block further processing of the 8(b)(7)(C) charge.⁴⁴

8. Conduct of Representation Elections

Section 9(c)(1) provides that if a question of representation exists the Board must resolve it through an election by secret ballot. The election details are left to the Board. Such matters as voting eligibility, timing of elections, and standards of election conduct are subject to rules laid down in the Board's Rules and Regulations and in its decisions.

In fiscal 1962, the Board revised the rule concerning the cutoff date for objections in contested election cases, and revived the equal-time rule for addressing department store employees before an election. The cases involving these matters,⁴⁵ and the more important cases decided during the year which deal with other matters relating to the conduct of representation elections, are discussed in the following sections.

a. Voting Eligibility

An employee's voting eligibility depends generally on his status on the payroll eligibility date and on the date of the election. To be entitled to vote, an employee must have worked in the voting unit

⁴¹ See the Board's Rules and Regulations, Series 8, as amended, secs. 102 75-102 77

⁴² During the preceding fiscal year, the Board had occasion for the first time to pass upon this question in *Woodco Corp.*, 129 NLRB 1188, and *Al & Dick's Steak House, Inc.*, 129 NLRB 1207; Twenty-sixth Annual Report (1961), pp 66-67

⁴³ *Anaconda Aluminum Co.*, 133 NLRB 1123

⁴⁴ See *Al & Dick's Steak House, Inc.*, 129 NLRB 1207, Twenty-sixth Annual Report (1961), pp 66-67 For discussion of 8(b)(7) unfair labor practices, see below, pp 181-196.

⁴⁵ *The Ideal Electric & Manufacturing Co.*, 134 NLRB 1275, *The May Co.*, 136 NLRB 797.

during the eligibility period and on the date of the election. However, as specified in the Board's usual direction of election, this does not apply in the case of employees who are ill or on vacation or temporarily laid off, or employees in the military service who appear in person at the polls. Other exceptions pertain to striker replacements and irregular and intermittent employees discussed below.

Laid-off employees are permitted to vote only if they have a reasonable expectancy of reemployment at the time of the election.⁴⁶

(1) Economic Strikers and Replacements

During fiscal 1962, the Board adhered to the principles enunciated in the *Wilton Wood* case⁴⁷ with respect to the voting eligibility of economic strikers and permanent replacements for such strikers.⁴⁸ Generally, the status of an economic striker for voting purposes is forfeited where the striker obtains permanent employment elsewhere before the election.⁴⁹ But a striker's new employment must be substantially equivalent to the struck job before he can be held to such forfeit.⁵⁰ And even a striker who secures equivalent employment may maintain his status by affirmative acts such as indicating to the new employer that he intends to return to the struck work, or that he is on strike,⁵¹ or that he is continuing to picket,⁵² or other credible testimony of the striker's intention to return.⁵³

(2) Irregular and Intermittent Employees

As heretofore, voting eligibility in industries where employment is intermittent or irregular has been adjusted by the use of formulas designed to enfranchise all employees with a substantial continuing

⁴⁶ See, e.g., *Great Bay Chemical & Plastics, Inc.*, 133 NLRB 770, where employees placed on furlough pending the operation of a new plant were permitted to vote as temporarily laid-off employees because they were simply waiting completion of the new plant and had a reasonable expectancy of employment there. Compare *Booth Broadcasting Co.*, 134 NLRB 817, where the employees were not entitled to vote because they were permanently discharged.

⁴⁷ *W. Wilton Wood, Inc.*, 127 NLRB 1675 (1960).

⁴⁸ See Twenty-fifth Annual Report (1960), pp. 46-47.

⁴⁹ *National Gypsum Co.*, 133 NLRB 1492, citing *W. Wilton Wood, Inc.*, above.

⁵⁰ *National Gypsum Co.*, above, citing *Horton's Laundry, Inc.*, 72 NLRB 1129, 1135-1137 (1947). Substantially lower pay or loss of seniority, or other less favorable conditions of employment are all factors which must be considered in determining equivalence.

⁵¹ *National Gypsum Co.*, above; *Remington Rand, Inc.*, 74 NLRB 447, 451 (1947).

⁵² *National Gypsum Co.*, above; *W. Wilton Wood, Inc.*, above.

⁵³ *National Gypsum Co.*, above. Here, the Board overruled challenges to the ballots of those employees who did not sever their relationships as strikers, and sustained challenges to the ballots of strikers who obtained permanent, substantially equivalent employment elsewhere. The Board also sustained challenges to the ballots of strikers who were given notice by the employer of their replacement for unlawful acts of violence and coercion on the picket line, and sustained the challenge to the ballot of a replacement who had no intention of remaining in permanent employment with the employer but had a reasonable expectation of recall by his former employer.

interest in their employment conditions and to insure a representative vote. To this end, voting eligibility was extended to employees of a construction company who were employed during the payroll period immediately preceding the date of the direction of election, or who were employed for 30 days or more in the year immediately preceding the eligibility date for the election, or who had some employment in that year and also were employed 45 or more days in the 2 years immediately preceding the eligibility date for the election.⁵⁴

Generally, eligibility is determined on the basis of the employer's payroll for the period which immediately precedes the date of the direction of election. Since it is the Board's policy to make the franchise available to the largest possible number of eligible voters, elections in seasonal industries are held during peak seasons. The date of the election is left to the regional director and eligibility is determined on the basis of the payroll immediately preceding the date of his notice of election.⁵⁵

b. Timing of Election

Ordinarily, the Board directs that elections be held within 30 days from the date of the direction of election. But where an immediate election would occur at a time when there is no representative number of employees in the voting unit—because of such circumstances as a seasonal fluctuation in employment or a change in operations—a different date will be selected in order to accommodate voting to the peak or normal work force. In the case of an expanding unit, the election date will be made to coincide with the time when a representative number of the contemplated enlarged work force is employed.⁵⁶ In one case the Board denied an employer's request to postpone an election until after his planned consolidation with another company, where the employees of the other company were treated by the Board as temporarily laid off employees and were permitted to vote with the employer's employees.⁵⁷

c. Standards of Election Conduct

Board elections are conducted in accordance with strict standards designed to assure that the participating employees have an opportunity to register a free and untrammelled choice in selecting a bargaining representative. Any party to an election who believes that

⁵⁴ *Daniel Construction Co., Inc.*, 133 NLRB 264

⁵⁵ See, e.g., *Norton & McElroy Produce, Inc.*, 133 NLRB 104; *Micro Metalizing Co., Inc.*, 134 NLRB 293.

⁵⁶ See *Greene Construction Co. and Tecon Corp.*, 133 NLRB 152, where unit expansion was held not to justify postponement because it was shown that a substantial and representative segment of the employee complement would be employed at the normal election date.

⁵⁷ *Great Bay Chemical & Plastics, Inc.*, 133 NLRB 770.

the standards were not met may, within 5 days, file objections to the election with the regional director under whose supervision it was held. The regional director then may either make a report on the objections, or may issue a decision disposing of the issues raised by the objections which is subject to a limited review by the Board.⁵⁸ In the event the regional director issues a report, any party may file exceptions to this report with the Board. The issues raised by the objections, and exceptions if any, are then finally determined by the Board.⁵⁹

(1) Mechanics of Election

Election details, such as the time, place, and notice of an election, are left largely to the regional director.⁶⁰ The Board does not interfere with the regional director's broad discretion in making arrangements for the conduct of elections except where the discretion has been abused.⁶¹ The test is whether the employees in fact had an adequate opportunity to cast a secret ballot.

In one case, a Board majority rejected a contention that an election should be set aside because certain temporarily laid off employees who may have been eligible to vote were not individually notified of the time, date, and place of the election.⁶² Noting that, under Board procedures, individual notification to employees in layoff status, or to persons who for other reasons may not be working or employed at the time of the election, is discretionary with the Board's regional office and agents, and that it is not the customary practice of Board agents to send such notification, the majority found no abuse of discretion under the circumstances of the case. In the majority's view, to make mandatory individual notification to all conceivably eligible voters would place an almost impossible burden on the Board agent, and to set aside the election would effectively change the Board's discretionary rule to a mandatory one. The majority stated that it was unwilling to abandon the present discretionary rule.

In the same case,⁶³ the majority rejected the contention that the election should be set aside because the names of the laid-off employees were not included on the eligibility list. Noting that all parties

⁵⁸ This procedure applies only to directed elections, not consent or stipulated elections. For the latter procedures, see Board's Rules and Regulations, Series 8, secs 102.62 and 102.69 (c).

⁵⁹ The procedures for filing objections and exceptions and for their disposition are set out in sec. 102.69 of the Board's Rules and Regulations, Series 8, as amended, effective with respect to any petition filed under sec 9 (c) or (e) of the Act on or after May 15, 1961.

⁶⁰ See, e g, *Rohr Aircraft Corp*, 136 NLRB 958.

⁶¹ *Ibid.*

⁶² *Rohr Aircraft Corp*, above, Members Rodgers, Leedom, and Fanning for the majority, Chairman McCulloch dissenting, Member Brown not participating.

⁶³ *Rohr Aircraft Corp*, above.

checked and certified the eligibility list as correct, and that the laid-off employees could not have been prejudiced if they were unaware of the absence of their names from the list, the majority observed that if they were so aware it was incumbent on them to attempt to vote by challenged ballot, or in some other manner protest to the Board agent, prior to the election, the failure to include their names.

(2) Interference With Election

An election will be set aside if it was accompanied by conduct which, in the Board's view, created an atmosphere of confusion or fear of reprisals and thus interfered with the employees' free and untrammelled choice of a representative guaranteed by the Act.⁶⁴ In determining whether specific conduct amounted to such interference, the Board does not attempt to assess its actual effect on the employees but concerns itself with whether it is reasonable to conclude that the conduct tended to prevent a free expression of the employees' choice.

An election will be set aside because of prejudicial conduct whether or not the conduct is attributable to one of the parties. The determinative factor is that conduct has occurred which created a general atmosphere in which a free choice of a bargaining representative was impossible.⁶⁵

(a) Election propaganda

In order to safeguard the right of employees to select or reject collective-bargaining representatives in an atmosphere which is conducive to the free expression of the employees' wishes, the Board will set aside elections which were accompanied by propaganda prejudicial to such expression. The Board adheres to its established policy of not policing or censuring the parties' election propaganda, absent coercion or fraud, unless it appears from all the circumstances that the employees could not properly evaluate the propaganda involved. In applying the evaluation test, the Board considers the total picture, including (1) whether the promulgating party had special knowledge of the facts asserted, thus making it more likely that the employees would rely on them; and (2) whether the challenging party had the opportunity to or did rebut the false assertions.⁶⁶

⁶⁴ In order to prevent confusion and turmoil at the time of the election, the Board has specifically prohibited electioneering speeches on company time during the 24-hour period just before the election (*Peerless Plywood Co.*, 107 NLRB 427 (1953)), as well as electioneering near the polling place during the election (see *Clawssen Baking Co.*, 134 NLRB 111).

⁶⁵ See *Lake Catherine Footwear, Inc.*, 133 NLRB 443, and *Myrna Mills, Inc.*, 133 NLRB 767, where the Board set aside elections because newspaper advertisements and letters to the editor from third parties in the community, together with employer pre-election statements, reasonably conveyed to the employees the threat of plant closure and removal in the event the union won the election.

⁶⁶ See *Motec Industries, Inc.*, 136 NLRB 711, where the Board held that the employees themselves were capable of evaluating the employer's campaign propaganda, noting that the union had sufficient opportunity to, and did, respond to the employer's assertions.

(b) No-solicitation rules—equal time

During the past year, the Board had occasion in *The May Co.* case⁶⁷ to pass upon the question whether a department store unjustifiably intruded upon the free choice of its employees by using company time and property for preelection antiunion speeches, while refusing, under its broad rule forbidding solicitation in the selling areas at any time, the union's request for an equal opportunity to address the same employees. A Board majority found that the employer's conduct interfered with a free election,⁶⁸ basing its finding on the fact that the employer's enforcement of its rule prohibiting union solicitation in the selling areas during both working and nonworking time—a rule permitted only department stores⁶⁹—while at the same time utilizing working time and place for its antiunion campaign, created an imbalance in the opportunities for organization communication. According to the majority, it followed the Board and court holdings in the *Bonwit Teller* case,⁷⁰ and rejected the employer's contention that the *Bonwit Teller* doctrine was overruled by *Livingston Shirt*,⁷¹ as it applied to department stores. It noted that it was not passing upon the effect of *Livingston Shirt* on cases involving non-department-store situations.⁷²

(c) Other campaign tactics

As in the case of prejudicial propaganda, an election will be set aside if the Board finds that campaign tactics resorted to by a party impaired the employees' free choice.

The giving of things of value to individual employees for their own use, or for the use in urging other employees to vote a certain way in the election, in circumstances which reasonably would lead the donees

⁶⁷ *The May Department Stores Co.*, 136 NLRB 797, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting.

⁶⁸ The majority found also that this conduct constituted an unfair labor practice in violation of sec 8(a)(1). For discussion of this aspect of the case, see below, p. 94.

⁶⁹ Department stores have long been exempted from the general ban against "no-solicitation" rules for nonworking time, because the nature of the business is such that solicitation, even on nonworking time, in selling areas would unduly interfere with the retail store operations. See, e.g., *Marshall Field & Co.*, 98 NLRB 88 (1952); *Great Atlantic & Pacific Tea Co.*, 123 NLRB 747 (1959); *Walton Mfg. Co.*, 126 NLRB 697 (1960), enforced 289 F. 2d 177 (C.A. 5); Seventeenth Annual Report (1952), pp. 102-105, and 115-118.

⁷⁰ *Bonwit Teller, Inc.*, 96 NLRB 608 (1951), enforcement denied, 197 F. 2d 640 (C.A. 2), certiorari denied 345 U.S. 905. See Seventeenth Annual Report (1952), pp. 102, 103, and 115.

⁷¹ *Livingston Shirt Corp.*, 107 NLRB 400 (1953), See Nineteenth Annual Report (1954), pp. 65, 74-76.

⁷² The majority was also of the opinion that the Supreme Court's decisions in *N.L.R.B. v United Steelworkers of America (Nutmeg, Inc.)*, 357 U.S. 337, and *N.L.R.B. v Babcock & Wilcox Co.*, 351 U.S. 105, supported, rather than impaired, its position herein.

to believe that it was given to influence their vote, is conduct which interferes with employee free choice.⁷³

In one case, an election was set aside where the employer made available to employees immediately before the election campaign badges bearing the legend "Vote on the right side—Vote No."⁷⁴ The Board observed that because of the employer's control over the tenure and working conditions of the employees, the availability of such campaign insignia placed the employees in the position of declaring themselves as to union preference, just as if they had been interrogated.

(i) Employee interviews

The Board has adhered to the *General Shoe* doctrine⁷⁵ that an election does not reflect a free choice where the employer has endeavored to influence the outcome by the device of encouraging a "no" vote while interviewing a substantial number of his employees individually or in small groups, away from their work stations and at a location the employees regard as a place of managerial authority. The Board found, in one case, that an employer's preelection notification to its employees that copies of "company policy" would be available for discussion at its offices, resulting in individual visitation by a substantial number of employees, was calculated to induce the employees to come to the various offices for the purpose of being individually propagandized.⁷⁶

(ii) Threats

Preelection threats which tend to influence the employees' vote are grounds for setting aside an election. In one case, a panel majority held that the preelection statement by high-ranking supervisors to all employees that "We have been told [by customers] that we would not continue to be the sole source of supply if we become unionized, due to the ever present possibility of a work stoppage due to strikes or walkouts" constituted substantial interference with the election.⁷⁷

⁷³ See *The Coca-Cola Bottling Co. of Memphis*, 132 NLRB 481, where the Board set aside an election because the employer paid a sum of money to an employee while urging him to vote for the employer, and also gave money to other employees with instructions to buy beer for all employees and to urge them to vote against the union.

⁷⁴ *The Chas. V. Weisse Co.*, 133 NLRB 765

⁷⁵ *General Shoe Corp. (Marman Bag Plant)*, 97 NLRB 499 (1951); Seventeenth Annual Report (1952), p. 101

⁷⁶ *Aragon Mills*, 135 NLRB 859.

⁷⁷ *Haynes Stellite Co., Div. of Union Carbide Corp.*, 136 NLRB 95, Members Fanning and Brown for the majority, Member Leedom dissenting. See also *Myrna Mills, Inc.*, 133 NLRB 767, and *Lake Catherine Footwear, Inc.*, 133 NLRB 443, where the Board found that the employer's preelection statements reasonably conveyed to its employees the threat of plant closure and removal in the event the union won the election, and that such statements created an atmosphere of fear of reprisal, *Plaskolite, Inc.*, 134 NLRB 754, where the Board held that the employer's posted notice respecting "physical examinations and other protections of that sort" constituted a clear threat of reprisal against the employees if they voted for the union.

Although couched in the form of a prediction, according to the majority this statement contained a clear threat of loss of employment if the employees selected the union.⁷⁸ And in another case, a Board majority reversed the regional director's finding that an employer's preelection speech was privileged as a mere prediction of the dire consequences which would result from a union's demands and policies.⁷⁹ The majority set aside the election because it viewed the speech as conveying to the employees the threat that the employer would go out of business if it had to deal with the union. Similarly, a Board majority held that an employer's preelection speech to his employees generated fear of economic loss if the union won the election, where the employer made unsupported assertions that a prior business decline was due to a union's organizational efforts and that business and employment conditions would improve if the union lost the election.⁸⁰

An election was set aside where the employer built up a pool of potential replacements before the election and emphasized to its employees the existence of this pool in campaign speeches.⁸¹ The Board found that such conduct could be reasonably interpreted by the employees to mean that bargaining would be futile and that a strike to enforce demands would lead only to their replacement from the pool. Such appeals to the employees' fear of loss of job opportunity, according to the Board, created an atmosphere rendering the exercise of free choice impossible.

But in one case, a panel majority overruled an objection to an election, where an employee remarked that organization could lead to shutdowns which in turn could mean cancellation of big orders that made for steady employment, and the employer avoided affirmance of the employee's remarks by stating the truism that big customers are good for business.⁸² The majority held that the employer was not obligated to disavow the employee's statement.

⁷⁸ *Haynes Stellite Co., Div of Union Carbide Corp.*, above. The majority also found material the employer's misrepresentation of the facts by its statement that "some customers" would seek other sources of supply when, in fact, only one customer had so informed the employer. The employer's failure to name the customers or supply any other information was deemed significant by the majority.

For the unfair labor practice aspect of such statements, see below, p 89

⁷⁹ *Somismo, Inc.*, 133 NLRB 1310, Chairman McCulloch and Members Leedom and Brown for the majority, Member Rodgers dissenting.

⁸⁰ *E. D. Cole Mfg. Co.*, 133 NLRB 1455, Chairman McCulloch and Members Fanning and Brown for the majority, Member Rodgers dissenting, Member Leedom not participating. Here, the majority reversed the regional director's finding that the speech contained permissible campaign propaganda. See also *Storkline Corp.*, 135 NLRB 1146.

⁸¹ *Storkline Corp.*, above

⁸² *American Molded Products Co.*, 134 NLRB 1446, Members Leedom and Fanning for the majority, Member Brown dissenting in this respect.

d. Cutoff Date for Objections

Heretofore, it has been the Board's rule, established in the *Woolworth* case⁸³ during fiscal 1955, not to consider preelection conduct in contested election cases, as distinguished from consent election cases,⁸⁴ that occurred before the Board's direction of election. But, in the *Ideal Electric* case,⁸⁵ the Board overruled the *Woolworth* doctrine and held that the date of filing the petition would now be the cutoff date for objections in contested cases.⁸⁶ The Board's finding was influenced by the marked decrease in the time between the filing of petitions and elections resulting from the Board's delegation of its decisional authority in representation cases to regional directors.⁸⁷

⁸³ *F. W. Woolworth Co.*, 109 NLRB 1446 (1954); Twentieth Annual Report (1955), pp. 65-66; Twenty-first Annual Report (1956), p. 74.

⁸⁴ For uncontested cases, the cutoff date is the execution by the parties of the consent agreement. See *The Great Atlantic & Pacific Tea Co.*, 101 NLRB 1118, 1120 (1962); Eighteenth Annual Report (1953), pp. 26-27; Twentieth Annual Report (1955), pp. 65-66. See also *American Molded Products Co.*, 134 NLRB 1446

⁸⁵ *The Ideal Electric & Mfg Co.*, 134 NLRB 1275.

⁸⁶ A Board majority would only apply this new policy to cases in which the petition is filed "on or after the date of issuance of this decision" (December 14, 1961).

⁸⁷ See above, pp. 44-45.

IV

Unfair Labor Practices

The Board is empowered by the Act "to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce." In general, section 8 prohibits *an employer* or *a union* or their agents from engaging in certain specified types of activity which Congress has designated as unfair labor practices. The Board, however, may not act to prevent or remedy such activities until an unfair labor practice charge has been filed with it. Such charges may be filed by an employer, an employee, a labor organization, or other private party with the regional office of the Board in the area where the unfair practice allegedly was committed.

This chapter deals with decisions issued by the Board during the 1962 fiscal year, emphasis being given to decisions which involve novel questions or set new precedents.

A. Unfair Labor Practices of Employers

1. Interference With Section 7 Rights

Section 8(a) (1) of the Act forbids an employer "to interfere with, restrain, or coerce" employees in the exercise of their rights to engage in, or refrain from, collective bargaining and self-organizational activities as guaranteed by section 7. Violations of this general prohibition may take the form of any of the types of conduct specifically identified in paragraphs (2) through (5) of section 8(a),¹ or any other employer conduct which independently tends to interfere with, restrain, or coerce employees in exercising their statutory rights. This section treats only cases within the latter category, the independent violations of section 8(a) (1).

During the past year, the cases of independent section 8(a) (1) violations continued to present the usual pattern of employer conduct designed to prevent union organization, to discourage union adherence, or to impede other concerted activities protected by section

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

7 of the Act. For the most part they involved such clearly coercive conduct as reprisals, and express or implied² threats of reprisals, for participating in union or other protected concerted activities, and promises or grants of economic advantages to discourage such activities.

Specific reprisals or threats of reprisal found violative of section 8(a)(1) included discriminatory assignment of work,³ withdrawal of Christmas bonus,⁴ discharge of and failure to reinstate strikers,⁵ discharge of employees for presenting wage demands,⁶ threatened loss of employment,⁷ threatened closing of plant⁸ or going out of business,⁹ threatened moving of plant to new location,¹⁰ threatened unfavorable reply concerning credit rating,¹¹ threatened loss or reduction in pay¹² or overtime,¹³ threatened loss of promotion,¹⁴ and threatened violence.¹⁵

Unlawful interference within the meaning of section 8(a)(1) was also found where employers granted beneficial changes in hours, wages, and working conditions,¹⁶ or granted wage increases to a substantial number of female employees in order to combat union activity among male employees.¹⁷ Similarly, interference was found where employers promised to "take care" of employees who voted against the union,¹⁸ to give paid holidays,¹⁹ to assist in securing Air Force approval for additional benefits,²⁰ to grant raises if the pay

² For cases involving implied threats see, e.g., *Goldblatt Bros.*, 135 NLRB 153; *Sachs & Sons*, 135 NLRB 1199; *General Tire & Rubber Co.*, 134 NLRB 1160; *Lapeer Metal Products Co.*, 134 NLRB 1518; *Product Engineering & Mfg. Co.*, 133 NLRB 1375; *Chain Service Restaurant, Luncheonette, etc.*, 132 NLRB 960.

³ *Beiser Aviation Corp.*, 135 NLRB 450

⁴ *Electric Steam Radiator Corp.*, 136 NLRB 923

⁵ *Dobbs Houses*, 135 NLRB 885. Compare with *Bernhard Altmann International Corp.*, 137 NLRB No 28, which involved an isolated threat of discharge

⁶ *Gladiola Biscuit Co.*, 134 NLRB 591. See also *Latex Industries*, 132 NLRB 1

⁷ See, e.g., *Haynes Stellite Co.*, 136 NLRB 95, Members Fanning and Brown for the majority, Member Leedom dissenting; *Quaker Alloy Casting Co.*, 135 NLRB 805; *Guard Services, Inc.*, 134 NLRB 1753; *Frank Sullivan & Co.*, 133 NLRB 726; *Willard's Shop Rate Markets*, 132 NLRB 1146.

⁸ *Murray Ohio Mfg Co.*, 134 NLRB 175; *Ken Lee, Inc.*, 133 NLRB 1598; *Beiser Aviation Corp.*, 135 NLRB 399.

⁹ *T. E. Mercer Trucking Co.*, 134 NLRB 859, Members Fanning and Brown for the majority, Member Leedom dissenting with respect to this violation

¹⁰ *Oswall Products Mfg. Co.*, 135 NLRB 840.

¹¹ *Ken Lee, Inc.*, 133 NLRB 1598.

¹² *Sachs & Sons*, 135 NLRB 1199.

¹³ *Han-Dee Spring & Mfg. Co.*, 132 NLRB 1542.

¹⁴ *Haynes Stellite Co.*, 136 NLRB 95

¹⁵ *Porter County Farm Bureau Co-operative*, 133 NLRB 1019

¹⁶ *Arts & Crafts Distributors, Inc.*, 132 NLRB 166. See also *Standard Rate & Data Service*, 133 NLRB 337.

¹⁷ *Spranger Spring Co.*, 132 NLRB 751.

¹⁸ *Han-Dee Spring & Mfg. Co.*, 132 NLRB 1542.

¹⁹ *Weisman Novelty Co.*, 135 NLRB 173.

²⁰ *Beiser Aviation Corp.*, 135 NLRB 399.

scale rose in the area,²¹ or to "get a raise next week" for the employee who affirmed he was on the employer's side.²²

However, no violation was found where the employer did not clearly threaten reprisals or his prejudicial conduct was neutralized.²³ Thus, no violation was found where an employer stated that he would close the plant and rent it out for storage, but subsequently indicated that he would operate the plant as long as he was physically and financially able to do so.²⁴ A noncoercive prediction was found in a manager's statement that "if word of the union activity were to spread or if the activity itself were to go further," he would "definitely not get those [40 additional] trucks" which, if obtained, would mean more work for the employees.²⁵ And a company president's statement that he could resign was held to carry no threat that the employer would go out of business if he resigned or that working conditions would be worse.²⁶ In one instance,²⁷ an employer's statement to drivers that a rival union would be a logical one for them to join if they accepted a proposed franchise plan was held protected by section 8(c), since it was made in reply to a question by the drivers, rather than in an attempt to switch their allegiance from one union to another, and conformed to the employer's consistent position that he would not have to negotiate with *any* union concerning the drivers who accepted the franchise plan.

But section 8(a)(1) was held violated where employers solicited striking employees to abandon the union,²⁸ promoted repudiation petitions,²⁹ coerced employees to sign applications and dues checkoff cards for an assisted union,³⁰ sponsored a favored union,³¹ suggested the formation of an employee committee and bargained with it,³² solicited employees to form a company union,³³ induced or assisted employees to withdraw from a union,³⁴ initiated and fostered the filing of a decertification petition,³⁵ or refused to recognize an employee

²¹ *Publishers Printing Co.*, 135 NLRB 1278

²² *Lowell Sun Publishing Co.*, 136 NLRB 206.

²³ See, e.g. *Crystal Laundry & Dry Cleaning Co.*, 132 NLRB 222, *Ryder Truck Rental*, 135 NLRB 53, Chairman McCulloch and Members Rodgers, Leedom, and Fanning for the majority, Member Brown dissenting with respect to this charge, *Leggett's Department Store, etc.*, 137 NLRB No. 42.

²⁴ *Crystal Laundry & Dry Cleaning Co.*, above

²⁵ *Ryder Truck Rental*, above

²⁶ *Unanue & Sons, Inc.*, 132 NLRB 572, enforced *sub nom NLRB v Goya Foods, Inc.*, 303 F. 2d 442 (C.A. 2).

²⁷ *Servette, Inc.*, 133 NLRB 132

²⁸ *Cactus Petroleum*, 134 NLRB 1254; *Fitzgerald Mills Corp.*, 133 NLRB 877

²⁹ *Ridge Citrus Concentrate*, 133 NLRB 1178; *Servette, Inc.*, above, *Chan Service Restaurant, Luncheonette, etc., Local 11*, 132 NLRB 960

³⁰ *Lapeer Metal Products Co.*, 134 NLRB 1518.

³¹ *Lincoln Bearing Co.*, 133 NLRB 1069.

³² *Alberto Culver Co.*, 136 NLRB 1432.

³³ *I. Posner, Inc.*, 133 NLRB 1573.

³⁴ *Sperry Gyroscope Co., Div. of Sperry Rand Corp.*, 136 NLRB 294, *Continental Hotel*, 134 NLRB 1060; and *Porter County Farm Bureau Co-operative*, 133 NLRB 1019

³⁵ *Sperry Gyroscope Co., Div. of Sperry Rand Corp.*, above

grievance committee because its members were inclined to favor a certain union.³⁶

And an employer was held to have violated section 8(a)(1), as well as (3), by reorganizing and retraining his printing department employees in such manner as to remove the basis for finding that a unit of lithographic production employees was appropriate, thereby frustrating the desires of his lithographic employees to select a lithographic union as their bargaining representative.³⁷

a. Interrogation and Polling

The Board has continued to adhere to the test enunciated in *Blue Flash Express, Inc.*,³⁸ that the legality of an employer's interrogation of employees as to their union allegiance and activities depends upon "whether under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act."³⁹ If "the surrounding circumstances together with the nature of the interrogation itself" render the interrogation coercive, it need not "be accompanied by other unfair labor practices before it can violate the Act." However, when such interrogation viewed in the context in which it occurred "falls short of interference or coercion [it] is not unlawful."⁴⁰ The same tests apply with respect to the lawfulness of an employer's polling employees as to their union sentiments.⁴¹

Thus, the Board found no violation where an employer interrogated his employees concerning a matter into which the employer had a legitimate cause to inquire.⁴² On the other hand, an employer's interrogation of an employee was held to have violated section 8(a)(1), where the interrogation was neither for a legitimate purpose nor accompanied by assurances against reprisal⁴³—factors which neutralized the coercive effects of interrogation in *Blue Flash*.⁴⁴

³⁶ *Lundy Mfg Corp*, 136 NLRB 1230.

³⁷ *Weyerhaeuser Co*, 134 NLRB 1371

³⁸ 109 NLRB 591, 592-594 (1954).

³⁹ See, e.g., *Frank Sullivan & Co.*, 133 NLRB 726

⁴⁰ See Twentieth Annual Report (1955), pp 67-69; Twenty-third Annual Report (1958), p 57.

⁴¹ See *A. L. Gilbert Co*, 110 NLRB 2067, 2072 (1954), where the Board observed, "Polling of employees is akin to interrogation and the tests for determining the unlawfulness of the latter are equally applicable to the former"

⁴² *Georgia-Pacific Corp*, 132 NLRB 612 (interrogation as to whether a valid no-solicitation rule was being violated).

⁴³ *Super Operating Corp, et al.*, 133 NLRB 240. See also *Orkin Exterminating Co. of South Florida, Inc.*, 136 NLRB 399, *Southern Coach & Body Co., Inc.*, 135 NLRB 1240 (employer's request of an employee was held to be an attempt to place the employee in a position of an informer regarding union activity, rather than being a mere interrogation), *Hilton Credit Corp.*, 137 NLRB No. 5 (employer demands from employees for copy of statements given to Board agent and for substance of testimony expected to be given at unfair practice proceeding—whether or not they constituted interrogation of employees concerning their union activities—interfered with Board processes and employees' exercise of self-organizational rights).

⁴⁴ *Blue Flash Express, Inc.*, 109 NLRB 591 (1954).

In one case, an employer was found to have violated section 8(a)(1) by conducting a series of polls as to his employees' union sentiments, where the polls were conducted without any genuine purpose of ascertaining whether the union represented a majority of the employees, but rather were conducted with an attempt to coerce the employees in the exercise of their right to join a union.⁴⁵ In so finding, the Board observed that it has held that—

an employer may lawfully poll his employees concerning their desires as to representation, provided that the evidence clearly establishes that the purpose of the poll is to ascertain whether a union demanding recognition actually represents a majority of employees so as to permit the employer to recognize the union. In addition, the poll must be conducted against a background free of hostility toward unions. Such freedom from hostility is not restricted to the absence of employer unfair labor practices.⁴⁶

In another case, a poll of employees' union sentiments, taken upon the suggestion of the employer, was held violative of section 8(a)(1), notwithstanding the fact that the poll was secret and tallied by the employees themselves after management representatives had withdrawn, where the poll occurred in a context of an unlawful wage increase granted by the employer, and tended to undermine the union.⁴⁷ And a panel majority held in another case that an employer violated section 8(a)(1) by conducting a poll of his employees' union sentiments in the context of other coercive conduct, and in view of the timing of such poll, after he had agreed to the holding of a Board-conducted election, and his raising of new issues and solutions.⁴⁸

Other interrogations found coercive, in a context of hostility⁴⁹ or other unfair labor practices, included questioning a job applicant concerning his attitude toward unions, and whether the plant in which his father worked had a union; ⁵⁰ interrogation of employees regarding

⁴⁵ *Crystal Laundry & Dry Cleaning Co.*, 132 NLRB 222. See also *Frank Sullivan & Co.*, 133 NLRB 726 (employer indicated an antipathy towards the union by stating at a meeting of all employees that he had "evicted" a union representative from the plant, and no assurance was given to the employees that they would not be subject to reprisals for engaging in union activities); *Han-Dee Spring & Mfg. Co., Inc.*, 132 NLRB 1542.

⁴⁶ See *Blue Flash Express, Inc.*, above; *Burke Golf Equipment Corp.*, 127 NLRB 241, 245 (1960); *Murray Envelope Corp. of Mississippi*, 130 NLRB 1574 (1961); *Spink Arms Hotel Corp., d/b/a Continental Hotel*, 134 NLRB 1060 (employer's contention that polling his employees fell within the *Blue Flash* principle was rejected). An employer's contention that his interrogation fell within the *Blue Flash* doctrine was rejected in each of the following cases: *Lincoln Bearing Co.*, 133 NLRB 1069; *Bon-R Reproductions, Inc.*, 134 NLRB 429; *Southern Coach & Body Co., Inc.*, 135 NLRB 1240; *Orkin Exterminating Co. of South Florida, Inc.*, 136 NLRB 399; *J. Weingarten, Inc.*, 137 NLRB No. 81.

⁴⁷ *Standard Rate & Data Service, Inc.*, 133 NLRB 337, Members Leedom and Brown for the majority, Member Rodgers dissenting with respect to this violation.

⁴⁸ *Offner Electronics, Inc.*, 134 NLRB 1064, Chairman McCulloch and Member Leedom for the majority, Member Rodgers dissenting. Member Leedom found the poll unlawful in the context of the employer's other coercive conduct (promise of benefits), but Chairman McCulloch found the poll to be coercive under the circumstances in which it took place, without regard to the existence of the other violation.

⁴⁹ See *Murray Ohio Mfg. Co.*, 134 NLRB 175.

⁵⁰ *Murray Ohio Mfg. Co.*, above, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting.

their union membership, activities, and desires and those of fellow employees;⁵¹ and interrogation of employees as to whether they had gone to see the Board agent investigating unfair labor practice charges.⁵²

In *Thompson Ramo Wooldridge, Inc.*,⁵³ the Board stated that regardless of an employer's motive, "interrogation is generally deemed unlawful unless it is isolated." Thus, the Board found interrogation unlawful, and not isolated, where it was addressed to seven employees, elicited not only the union sentiments of these employees but also that of their fellow workers, and occurred in the context of other conduct found to be unlawful.⁵⁴ The Board rejected the contention of another employer that interrogation must occur in a context of other unlawful conduct to constitute a violation of the Act.⁵⁵ And in another case, the Board, in finding a section 8(a) (1) violation based on systematic interrogation, noted that the fact that the interrogation did not contain threats of reprisal or promises of benefit did not detract from its otherwise unlawful character.⁵⁶

b. Prohibitions Against Union Activities

Company rules and prohibitions against such union activities as union solicitation and discussion, the distribution of union cards, and the wearing of union insignia were again considered by the Board in several cases.

Generally, a prohibition against union solicitation on *company or working time* is presumptively valid, and will not be held unlawful, absent a showing that it had a "discriminatory purpose" or was "unfairly applied."⁵⁷ Thus, an employer's enforcement of a rule prohibiting employees from engaging in union solicitation during working time was held unlawful where the employer discriminated in its enforcement in favor of one of two rival unions.⁵⁸ And an announced intention to enforce a rule prohibiting union activity on

⁵¹ *Pennsular & Occidental Steamship Co.*, 132 NLRB 10, Members Leedom and Fanning for the majority, Member Rodgers dissenting on jurisdictional grounds; *Twin Table & Furniture Co., Inc.*, 133 NLRB 1113, Members Fanning and Brown for the majority, Member Rodgers dissenting with respect to this violation; *International Trailer Co., Inc., et al.*, 133 NLRB 1527; *Skyline Homes, Inc.*, 134 NLRB 155; *Lapeer Metal Products Co.*, 134 NLRB 1518; *Al Tatti, Inc.*, 136 NLRB 167; *Hatch Chevrolet*, 136 NLRB 284.

⁵² *Corpus Christi Grain Exchange, Inc.*, 132 NLRB 145

⁵³ 132 NLRB 993, enforced with modification of scope of order, 305 F. 2d 807 (C.A. 7).

⁵⁴ *Thompson Ramo Wooldridge, Inc.*, above.

⁵⁵ *Super Operating Corp., et al.*, 133 NLRB 240; *J. Wengarten, Inc.*, 137 NLRB No. 81

⁵⁶ *Charlotte Union Bus Station, Inc.*, 135 NLRB 228. See also *Beiser Aviation Corp.*, 135 NLRB 399.

⁵⁷ *Walton Mfg. Co.*, 126 NLRB 697 (1960), enforced 289 F. 2d 177 (C.A. 5, 1961); *Star-Brite Industries, Inc.*, 127 NLRB 1008; Twenty-fifth Annual Report (1960), pp. 57-59.

⁵⁸ *Beiser Aviation Corp.*, above. See also *W. T. Grant Co.*, 136 NLRB 152, which involved an 8(a) (3) violation, Members Fanning and Brown for the majority, Member Rodgers dissenting. Compare with *Stuart F. Cooper Co.*, 136 NLRB 142, where no violation was found.

company time was held violative of section 8(a)(1), since it was made in retaliation for the union's filing of an unfair practice charge, and not to prevent interference with production.⁵⁹

Conversely, an employer's rule which forbids union solicitation by employees on company property during *nonworking* time is "presumptively an unreasonable impediment to self-organization" and therefore unlawful, absent evidence that special circumstances make the rule necessary to maintain production or discipline.⁶⁰ Department stores, however, have long been exempted from this restriction because the nature of the business is such that solicitation even on nonworking time in selling areas would unduly interfere with the retail store operations.⁶¹ But in the *May Company* case,⁶² a Board majority held that a department store violated section 8(a)(1) when it used company time and property to make preelection, noncoercive, antiunion speeches to its employees, and then under its broad rule forbidding solicitation during both working and nonworking time, refused the union's request for an opportunity to reply on equal terms. The majority, relying on the *Bonwit Teller* case,⁶³ based its holding on the fact that the employer's enforcement of its broad rule prohibiting union solicitation on the selling floors of the store during both the working and nonworking time of the employees, while at the same time utilizing the working time and place for its antiunion campaign, created a glaring "imbalance in opportunities for organizational communication." Although it rejected the contention that the *Livingston Shirt* case⁶⁴ overruled the *Bonwit Teller* doctrine insofar as is applied to department stores, it noted that it was not passing upon the effect of *Livingston Shirt* on cases involving non-department-store situations.⁶⁵

⁵⁹ *Memphis Publishing Co.*, 133 NLRB 1435

⁶⁰ See *Texas Aluminum Co.*, 131 NLRB 443 (1961), enforced 300 F.2d 315 (C.A. 5); *Walton Mfg. Co.*, above; *Star-Brite Industries, Inc.*, above

⁶¹ See, e.g., *Marshall Field & Co.*, 98 NLRB 88 (1952); *Great Atlantic & Pacific Tea Co.*, 123 NLRB 747 (1959); *Walton Mfg. Co.*, above.

⁶² *The May Department Stores Co., d/b/a The May Co.*, 136 NLRB 797, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting.

⁶³ *Bonwit Teller, Inc.*, 96 NLRB 608 (1951), enforcement denied 197 F.2d 640 (C.A. 2 1952), certiorari denied 345 U.S. 905.

⁶⁴ *Livingston Shirt Corp.*, 107 NLRB 400 (1953), where the Board ruled that "in the absence of either an unlawful broad no-solicitation rule (prohibiting union access to company premises on other than working time) or a privileged no-solicitation rule (broad, but not unlawful because of the character of the business), [citing *Marshall Field & Co.*, 98 NLRB 88], an employer does not commit an unfair labor practice if he makes a preelection speech on company time and premises to his employees and denies the union's request for an opportunity to reply."

⁶⁵ The majority was also of the opinion that the Supreme Court's decision in *N.L.R.B. v. United Steelworkers of America (Nutmeg, Inc.)*, 357 U.S. 357 (1959), and *N.L.R.B. v. The Babcock & Wilcox Co.*, 351 U.S. 105 (1956), supported, rather than detracted from, its position herein.

On the other hand, no-solicitation or no-distribution rules which prohibit union solicitation or distribution of union literature by *nonemployee* union organizers at *any* time on the employer's property are presumptively valid, absent a showing that the union cannot reasonably reach the employees with its message in any other way, or that the employer discriminates against the union by allowing other solicitation or distribution.⁶⁶ Thus, in one case, a panel majority agreed with a trial examiner that an employer could lawfully prohibit the distribution of union cards on the company's parking lot by a non-employee union organizer, and that in forcibly ejecting a union representative it was merely enforcing its valid rule rather than interfering with section 7 rights.⁶⁷

While the right of employees to wear union insignia at work has been recognized as a legitimate form of union activity, the Board found in one case⁶⁸ that unusual circumstances justified an employer's rule prohibiting employees from wearing them. There, the employer was held not to have violated section 8(a)(1) by prohibiting employees from wearing pins at work symbolizing their union loyalty during a preceding strike. The Board found that poststrike instances of bitterness and discord fully justified the employer's apprehension that the pins would promote disorder in the plant as a result of friction between strikers and nonstrikers, and that the prohibition against the pins was a reasonable precautionary measure under the circumstances. The Board noted, moreover, that the employer had explained to each employee wearing a pin that its removal would preserve harmony among the employees. However, an employer's order that employees remove bowling shirts which displayed union insignia, or be discharged, was held unlawful since, even assuming the existence of special circumstances warranting the order, it was incumbent upon the employer to advise the employees why it was ordering them to give up a protected right.⁶⁹

c. Surveillance

During fiscal 1962, the Board again held that an employer independently interferes with employees' rights under section 7, in violation of section 8(a)(1), by creating an impression of surveillance,⁷⁰ as well as by actual acts of surveillance,⁷¹ over employees' union activities.⁷²

⁶⁶ *Walton Mfg. Co.*, above, at p 698.

⁶⁷ *Salzer Stay Ready Filter Corp.*, 136 NLRB 1210, Members Rodgers and Fanning for the majority, Chairman McCulloch dissenting

⁶⁸ *United Aircraft Corp., Pratt & Whitney Aircraft Div.*, 134 NLRB 1632

⁶⁹ *Power Equipment Co.*, 135 NLRB 945

⁷⁰ See, e.g., *Sachs & Sons and Helen Sachs, Inc.*, 135 NLRB 1199, footnote 1; *Colvert Dairy Products Co.*, 136 NLRB 1508

⁷¹ See, e.g., *Dal-Tex Optical Co., Inc.*, 137 NLRB No. 27; *Beiser Aviation Corp.*, 135 NLRB 399; *Ken Lee, Inc.*, 133 NLRB 1598.

⁷² See also Twenty-sixth Annual Report (1961), pp 83-84

Thus, violations were found where: (1) supervisors drove slowly past a union hall several times while meetings were in progress, and on one occasion stopped several minutes immediately across the street;⁷³ (2) the principal owner of the company gave \$10 to an employee to attend a union banquet and report the names of the employees who attended, which she did;⁷⁴ (3) a supervisor stated to an employee that he had driven around the employee's home looking for the employee's car, knowing full well that a union meeting was being conducted at the same time at another employee's house;⁷⁵ (4) the employer used electronic listening devices installed in the plant to overhear employee conversations concerning union activities;⁷⁶ and (5) the employer's vice president photographed, or pretended to photograph, union representatives with a motion picture camera, as they distributed union handbills and talked to employees in the vicinity of the plant.⁷⁷

In one case, *Threads, Incorporated*,⁷⁸ an employer was held to have violated section 8(a) (1) by subjecting reinstated employees, who had previously been discharged because of their union activities, to an extraordinary amount of watching by supervisors during working hours, in order to discover some pretext for again discharging them. The Board observed, "While such watching did not constitute surveillance in the normal sense, as it did not involve scrutiny of employees' union or concerted activities, we find, because of the inhibiting effect upon employees who knew they were being watched and why, that the Respondent interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a) (1), by such conduct."

d. Discharges for Concerted Activities

The discharge of employees for engaging in concerted activities protected by the Act, not sponsored by a *union* or reflecting activity for or on behalf of a *union*, is violative of section 8(a) (1).⁷⁹ In one case during the fiscal year, the Board found such a violation where the employees' activity consisted of a concerted walkout to protest unsatisfactory working conditions, the direct cause, or "last straw" in the accumulation of grievances, being the employer's termination of a

⁷³ *Dal-Tex Optical Co., Inc.*, above. See also *Beiser Aviation Corp.*, above, which involved similar conduct.

⁷⁴ *Ken Lee, Inc.*, above. See also *Southern Coach & Body Co., Inc.*, 135 NLRB 1240, where the employer attempted to persuade an employee to attend a union meeting and report the union's action on a strike vote.

⁷⁵ *Sachs & Sons, et al.*, above, footnote 1.

⁷⁶ *International Trailer Co., Inc., et al.*, 133 NLRB 1527.

⁷⁷ *Colvert Davy Products Co.*, 136 NLRB 1508.

⁷⁸ 132 NLRB 451.

⁷⁹ Discharges which encourage or discourage union membership are specifically prohibited by sec 8(a) (3), and are discussed below, pp 107-126.

supervisor.⁸⁰ The Board noted that “concerted action by employees to protest an employer’s selection or termination of a supervisory employee is not automatically removed from the protection of the Act. Each case must turn on its facts.” Since the identity and capability of the supervisor in this case had a direct impact on employees’ own job interests and on performance of the work, the employees were deemed legitimately concerned with his identity, and their walkout found to be a protected economic strike. Neither the fact that the employer was justified in terminating the supervisor, nor the employer’s belief that it was therefore justified in discharging the employees protesting the supervisor’s termination, was considered a defense for the discharge of the economic strikers.

Violations of section 8(a) (1) were also found where an employer discharged five out of six employees who spoke up at a meeting between the employer and an *ad hoc* gathering of employees formed to present wage and other demands involving working conditions;⁸¹ and where an employer discharged two employees who were most active in presenting grievances and discussing various shortcomings in their relations with management, their working conditions, and terms of employment, in order to discourage such activities.⁸² However, an employer was held not to have violated section 8(a) (1) by discharging an employee because he had appealed to higher management, “over the head” of a terminal manager, concerning an alleged shortage in pay, the employee’s claim being purely personal and not “concerted” activity protected by the Act.⁸³

e. Supervisory Instructions and Discharges

Supervisors are not “employees” within the protection of the Act.⁸⁴ However, the discharge of a supervisor for refusing to engage in unfair labor practices to thwart employees’ union activities has long been held violative of section 8(a) (1), as its net effect is to cause employees to fear that the employer would take similar action against them if they continued to support the union.⁸⁵

During fiscal 1962, the Board found such a violation where an employer discharged a supervisor because she failed to comply with its express instructions to report on employees’ union activities, to assist in the employer’s antiunion campaign involving conduct violative of the Act—information which her husband, a nonsupervisory employee,

⁸⁰ *Dobbs Houses, Inc.*, 135 NLRB 885

⁸¹ *Latex Industries, Inc.*, 132 NLRB 1.

⁸² *Ryder Tank Lines, Inc.*, 135 NLRB 936. See also *Fant Mulling Co., d/b/a Gladiola Biscuit Co.*, 134 NLRB 591.

⁸³ *Ryder Tank Lines*, above.

⁸⁴ Sec 2(3) of the Act.

⁸⁵ *Talladega Cotton Factory, Inc.*, 106 NLRB 295 (1953), enforced 213 F 2d 208 (C A 5, 1954). See also Twenty-sixth Annual Report (1961), pp 85–86.

had volunteered to her in their home.⁸⁶ The Board rejected, as a mere pretext, the employer's contention that it discharged this supervisor because her knowledge of union activities acquired from her husband might be imputed to the employer, and render it liable in future unfair labor practice litigation. Under the circumstances, it found it unnecessary to decide whether the employer would nevertheless have violated section 8(a)(1) had it discharged the supervisor in good faith to protect itself from future litigation.

On the other hand, in another case, the Board found that an employer did not violate section 8(a)(1) by discharging a supervisor, even assuming that she was discharged for failing to follow instructions to "talk people out of voting for the Union."⁸⁷ It held that these instructions were not unlawful, since an employer, "through its supervisors, was privileged to try to dissuade employees from supporting the Union, so long as threats of reprisals or promises of benefits were not employed."⁸⁸

f. Interference With Board Proceedings

During fiscal 1962, the Board continued to hold that an employer's intimidating or coercive conduct to dissuade employees from participating in a Board proceeding constitutes unlawful interference with employees' rights under the Act.⁸⁹ Thus, violations of section 8(a)(1) were found where an employer solicited an employee to withdraw unfair labor practice charges and to persuade other employees to do the same, with the assurance that if he did so "everything will be all right,"⁹⁰ and where an employer demoted an employee in reprisal for his testimony as a witness for the Board's General Counsel in an unfair labor practice proceeding.⁹¹

In one case,⁹² the Board held that an employer violated section 8(a)(1) by requiring employees, who gave written statements to Board agents investigating an unfair labor practice charge against the employer, to furnish a copy of such statement to the employer, and by demanding that an employee reveal the substance of the testimony she expected to give in the case. The Board stated as follows:

⁸⁶ *Brookside Industries, Inc.*, 135 NLRB 16

⁸⁷ *Southwest Shoe Exchange Co.*, 136 NLRB 247

⁸⁸ In any event, the Board found that the supervisor was discharged in this case for failure to obey instructions and warnings about permitting employees to leave before quitting time, not for discriminatory reasons.

⁸⁹ See Twenty-sixth Annual Report (1961), p. 86

⁹⁰ *Shipwrecking, Inc.*, 136 NLRB 1518, footnote 1. The respondent union's participation in the actual process of requesting the withdrawal of these charges was also held violative of sec. 8(b)(1)(A) of the Act

⁹¹ *Beiser Aviation Corp.*, 135 NLRB 399, a sec. 8(a)(4) violation was also found. See discussion below, p. 126

⁹² *Hilton Credit Corp.*, 137 NLRB No. 5, footnote 1.

. . . "Clearly inherent in employees' statutory rights is the right to seek their vindication in Board proceedings." *Better Monkey Grip Company*, 115 NLRB 1170. It is quite obvious that the Board's ability to secure such vindication depends in large measure upon the ability of its agents to conduct effective investigations of matters alleged to be unfair labor practices, and to obtain relevant information and supporting statements from employees. Such statements are, and must be, treated as confidential matters until, and unless, the employees involved testify in subsequent proceedings, at which time, and upon proper demand, the pretrial statements of *witnesses* become available to respondent. Employer demands of employees that their statements be disclosed to it before trial, and without the safeguards afforded by trial procedure, necessarily exerts an inhibitory effect on employees' willingness to make such statements and to otherwise cooperate with Board agents. Such demands therefore interfere with the Board's efforts to secure vindication of employees' statutory rights and thus interfere with the enjoyment of such rights in violation of Section 8(a) (1).

And in another case,⁹³ an employer was held to have violated section 8(a) (1) by attempts to bypass the Board's processes. Here, the employer conducted ceremonies at the reinstatement of employees previously unlawfully discharged so as to deprive their reinstatement, which had been ordered by the Board, of its dissipatory or corrective effect, and attempted, with the use of threats, to induce employees previously unlawfully discharged to waive their rights to reinstatement under the Board's order.

2. Employer Domination or Support of Employee 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." The section provides, however, that an employer may permit employees to confer with him during working hours without loss of pay.⁹⁴

a. Domination of Labor Organization

A labor organization⁹⁵ is considered dominated within the meaning of section 8(a) (2)⁹⁶ if the employer has interfered with its formation or has assisted or supported its administration to such an extent that the organization must be regarded as the employer's creation rather than the true bargaining representative of the employees.⁹⁷

⁹³ *Threads, Inc.*, 132 NLRB 451

⁹⁴ Reimbursement of employees for time spent on union business, or in conference with management "after regular working hours," is unlawful assistance. See Twenty-sixth Annual Report (1961), p. 86, footnote 78. Cf. *Signal Oil & Gas Co.*, 131 NLRB 1427.

⁹⁵ "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." See 2(5) of the Act. See also *Hazelton Laboratories, Inc.*, 136 NLRB 1609, footnote 2.

⁹⁶ The distinction between domination and lesser forms of employer interference with labor organizations is of importance for remedial purposes. See below, pp 104-106

⁹⁷ See Twenty-sixth Annual Report (1961), pp. 86-87

This, according to the Board, was the case where an employer, just prior to the time of a scheduled Board election, organized and determined the nature, structure, and function of an employee grievance committee which never developed formal procedures, bylaws, or a constitution.⁹⁸ Here, the employer's supervisors conducted the committee's meetings, which were held in the employer's office, and the committee members were paid for the time spent on committee business.⁹⁹

In another case,¹ the Board sustained the trial examiner's finding that an employer violated section 8(a)(2) and (1) by dominating as well as assisting and interfering with the administration of an employees' association, where the employer subsidized the association and was the donor of its treasury, controlled its organic charter and internal composition, imposed automatic membership on all employees, and subjected minutes of meetings to management approval, and its supervisors attended and participated in association meetings.²

b. Assistance and Support

Section 8(a)(2) violations short of domination involved in fiscal 1962 such conduct as employer assistance to unions by soliciting employees to join or sign checkoff cards for a favored union;³ or by other action favoring one union over another;⁴ or by employer support of unions by exclusive recognition of a union when it did not

⁹⁸ *Han-Dee Spring & Mfg Co., Inc.*, 132 NLRB 1542.

⁹⁹ See also *Wahlgren Magnetics, Div of Marshall Industries*, 132 NLRB 1613, *Supermarket Housewares, Inc.*, 133 NLRB 1273; *Betsler Aviation Corp.*, 135 NLRB 399, where the Board held that an employer not only assisted and supported an employees' committee and its successor, but also dominated and interfered with their formation and administration

¹ *Thompson Ramo Wooldridge, Inc.*, 132 NLRB 993.

² The Board rejected the employer's contention that, since the association merely "expressed views and conveyed information" to management, the association was not "dealing" with management, and consequently was not a labor organization, within the meaning of sec. 2(5), as construed by the Supreme Court in *N.L.R.B. v Cabot Carbon Co.*, 360 U.S. 203.

³ *Bear Creek Construction Co.*, 135 NLRB 1285; *Fiore Brothers Oil Co., Inc.*, 137 NLRB No. 19; *Guard Services, Inc.*, 134 NLRB 1753.

⁴ *Consolidated Edison Co. of New York, Inc.*, 132 NLRB 1502 (permitting agents of favored union to solicit members on company time, while refusing agents of rival union similar privilege); *Guard Services, Inc.*, above (suggesting formation of an independent union and then supplying employee who favored such organization with a list of interested employees, and directing him to an attorney to set up the union); *A. O. Smuth Corp., Granite City Plant*, 132 NLRB 339 (providing employee address slips to a union at company expense to be used by the union to combat the activities of employees opposing it, permitting union agents to combat dissidents' activities during working time while forbidding similar activities by others, and permitting the favored union to post notices on the company's bulletin board and to distribute literature to employees on company premises while forbidding dissidents to engage in such conduct); *Reliance Steel Products Co.*, 135 NLRB 730 (authorizing the agent of a favored union to notify employees, who were discriminatorily discharged and laid off because of their activities in behalf of a rival union, of their recall, conditioned upon their pledging adherence to the favored union).

represent a majority of the employees in the appropriate unit;⁵ or by financial assistance;⁶ or by permitting supervisors to hold responsible office in a union.⁷

On the other hand, the Board dismissed that portion of a complaint which alleged that an employer violated section 8(a) (2) by promoting and interfering with the administration of a "grievance committee," where the employer met with a group of striking employees, discussed their grievances and the possible formation of a "grievance committee" but made no concessions, promises, or threats, and did not recognize or bargain with this group as the representative of its employees.⁸

In one case, a Board majority held that employers violated section 8(a) (2) by acquiescing in a union's practice of exacting a service fee from nonunion applicants as a condition of employment, and then treating them as second-rate citizens for referral purposes by placing them at the bottom of the referral list because they lacked union membership.⁹ And in another case, an employer was held to have violated section 8(a) (2) by discharging employees at the behest of a favored "inside" union.¹⁰

The Board and the courts have uniformly held that management officials and supervisory employees who are members of a local union but are excluded from an applicable bargaining unit may not participate in the administration of the local by voting in elections to select officials who are to participate in the negotiation and adminis-

⁵ *Lapeer Metal Products Co.*, 134 NLRB 1518. See also *Harbor Carriers of the Port of New York*, 136 NLRB 815 (recognizing a favored union as the holder of contracts when the employers were obligated to recognize another union which was constituted as the result of the employees' disaffiliation action)

⁶ *The Post Publishing Co.*, 136 NLRB 272; *Reliance Steel Products Co.*, 135 NLRB 730 (urging employees to attend a meeting of a favored union, held during working hours, without loss of pay).

⁷ *Houston Maritime Association, Inc., et al.*, 136 NLRB 1222.

⁸ *Burrell Metal Products Corp.*, 134 NLRB 921. Compare *Greystone Kmtwear Corp.*, 136 NLRB 573, where a panel majority consisting of Chairman McCulloch and Member Leedom, Member Rodgers dissenting, held that an employer furnished illegal assistance and support to an employees' committee in violation of sec. 8(a) (2) and (1), by suggesting, initiating, and assisting the formation of the committee in order to frustrate a union's organizational drive

⁹ *Houston Maritime Association, Inc., et al.*, above, Members Rodgers, Leedom, Fanning, and Brown for the majority, Chairman McCulloch dissenting on this point. The majority also found sec 8(a) (3) and (1) violations on the basis of this conduct.

¹⁰ *Fender Electric Instrument Co., Inc.*, 133 NLRB 676; *Harbor Carriers of the Port of New York*, 136 NLRB 815; *A. O. Smith Corp., Granite City Plant*, 132 NLRB 339, where the discharge of an employee because of his unwillingness to subordinate himself to union leadership, and the demotion of an employee from his foreman's position because of union pressure, were held violative of sec 8(a) (1), (2), and (3); *Houston Maritime Association, Inc., et al.*, above, where the Board held that employers violated sec. 8(a) (1), (2), and (3) by denying employment to a nonunion applicant and suspending four nonunion employees because they engaged in rival union activity.

tration of the local's contracts.¹¹ During the past fiscal year, the Board again held that an employer interfered with the internal affairs of a union in violation of section 8(a)(2) by permitting its supervisor of 4 years, who was excluded from the bargaining unit and was directly responsible to the company's president, to vote in the union's elections.¹² And in another case,¹³ a Board majority held that an employer association interfered with the administration of a local union by the conduct of its executive secretary, who was also a member of the local, in voting at an election for delegates to the international's biennial convention. Although the majority observed that, here, the connection between the officials being voted for and the bargaining process at the local union level was indirect, and that any effect which the executive secretary's vote might have had on the formulation of the international's policies was slight, it held that his voting was an illegal intrusion into the local's administrative affairs because of his status in the employer association and such voting represented the judgment of a person with dual loyalties.

(1) Assistance Through Contract

The Board has adhered to the rule, first enunciated in *Midwest Piping*¹⁴ and reaffirmed in *Shea Chemical*,¹⁵ that an employer renders unlawful assistance within the meaning of section 8(a)(2) by recognizing and entering into a contract with a union while the majority claim of another union raises a real question of representation.

Thus, in one case,¹⁶ during fiscal 1962, the Board held that an employer violated section 8(a)(2) by recognizing a rival union at a time when a real question concerning representation existed, where the incumbent union asserted its representative status in reliance upon its contract with the employer simultaneously with a timely filed petition by the rival union.¹⁷ But, in another case,¹⁸ the Board

¹¹ See *Nassau & Suffolk Contractors Assn., Inc.*, 118 NLRB 174 (1957), *N.L.R.B. v. Anchorage Businessmen's Assn.*, 289 F. 2d 619 (C.A. 9), enforcing *Anchorage Businessmen's Assn.*, 124 NLRB 662 (1959); *Local No. 636 Plumbers v N.L.R.B.*; 287 F. 2d 354 (C.A.D.C.), enforcing in part and remanding in part *Detroit Assn. of Plumbing Contractors, et al.*, 126 NLRB 1381 (1960); *N.L.R.B. v. Employing Bricklayers' Assn.*, 292 F. 2d 627 (C.A. 3), enforcing *Employing Bricklayers' Assn. of Delaware Valley, et al.*, 127 NLRB 188 (1960). See also Twenty-second Annual Report (1957), pp. 67-68, Twenty-fifth Annual Report (1960), pp. 62-63.

¹² *Detroit Assn. of Plumbing Contractors*, 132 NLRB 658, upon remand in *Local 636 Plumbers v N.L.R.B. (Detroit Assn. of Plumbing Contractors, et al.)*, 287 F. 2d 354 (C.A.D.C.).

¹³ *Employing Bricklayers' Assn. of Delaware Valley etc.*, 134 NLRB 1535, Members Rodgers, Leedom, Fanning, and Brown for the majority, Chairman McCulloch dissenting.

¹⁴ *Midwest Piping & Supply Co.*, 63 NLRB 1060 (1945).

¹⁵ *Shea Chemical Corp.*, 121 NLRB 1027 (1958). See Twenty-fourth Annual Report (1959), p. 60.

¹⁶ *Duralite Co., Inc.*, 132 NLRB 425.

¹⁷ The Board noted that, since a real question concerning representation existed, the fact that the rival union may have shown its numerical majority status was irrelevant. See *Swift & Co.*, 128 NLRB 732 (1960); Twenty-sixth Annual Report (1961), p. 89.

¹⁸ *Coronet Mfg. Co.*, 133 NLRB 641.

found that no real question of representation existed, and held that an employer did not violate section 8(a)(2) by entering into a bargaining agreement with a rival union 2 hours after receipt of the charging union's telegraphic demand for recognition, where the charging union's petition was supported by less than 30 percent of the employees in the unit.

In another case,¹⁹ the Board found the *Midwest Piping* doctrine²⁰ inapplicable where the representation claim of one union was made 16 months prior to the time the employer entered into a contract with another union, and was not renewed thereafter. When there are rival unions and no representation petition is on file, the Board has recognized the necessity of an "active and continuing claim" as a basis for holding that a real question of representation exists.²¹ Here, the Board found that the rival union's "stale" claim was not an active and continuing one at the time of the execution of the contract, and held that the employer did not unlawfully assist the contracting union.²² However, an employer was held to have violated section 8(a)(2) by entering into a contract that assigned to the contracting union work performed by employees in a unit claimed by a rival union.²³ It was noted that a question of union jurisdiction over the type of work performed is not a question concerning representation.²⁴

Contract provisions giving a union the right to reject any person as a permanent employee and to discharge probationary employees were held violative of section 8(a)(2), as well as section 8(a)(1) and (3), and 8(b)(1)(A) and (2).²⁵ An employer was also held to have violated section 8(a)(2) by entering into a prehire contract with a union to cover work at a new plant at a time when the plant had not commenced production and had no employees.²⁶ And a construction company and a union were held to have violated section 8(a)(1), (2), and (3), and 8(b)(1)(A) and (2), respectively, by entering into and maintaining a prehire agreement, notwithstanding the construction industry exemption of section 8(f), where the employer had unlaw-

¹⁹ *Gaylord Printing Co., Inc.*, 135 NLRB 510.

²⁰ *Midwest Piping & Supply Co.*, above

²¹ See *Novak Logging Co.*, 119 NLRB 1573, 1574 (1958)

²² *Gaylord Printing Co., Inc.*, above. The Board further found that the employer did not unlawfully assist the contracting union, even though that union did not represent an actual majority in the appropriate unit when the contract was signed, as the result of an unfair practice strike. According to the Board, the union was entitled to claim a constructive majority on the contracting date because it had an actual majority on the date the strike was called.

²³ *Neo Gravure Printing Co.*, 136 NLRB 1407

²⁴ Here, the Board reaffirmed the principle that "it is the underlying factual situation which controls the question of whether recognition of a union by an employer in the circumstances of any given case violates the duty of neutrality." *Burke Oldsmobile, Inc.*, 128 NLRB 79, 86 (1960), enforced in part in 288 F. 2d 14 (C.A. 2), 1961

²⁵ *Filtron Co., Inc.*, 134 NLRB 1691 -

²⁶ *W L Rives Co.*, 136 NLRB 1050.

fully assisted the union in obtaining membership applications and checkoff authorization cards.²⁷

c. Remedies in Section 8(a)(2) Cases

In remedying section 8(a)(2) violations, the Board has continued to differentiate between domination and lesser forms of interference with labor organizations. Where the labor organization is found to be employer dominated, that is, inherently incapable of ever fairly representing employees, the Board has directed that the dominated organization be completely disestablished.²⁸ On the other hand, the normal remedy in assistance and support cases is to require the employer to cease recognizing or dealing with the assisted union, or giving effect to any contract with it, unless and until it is certified by the Board.²⁹

In one case, however, an employer was not required to withdraw and withhold recognition from an unlawfully supported and assisted union, or to cease giving effect to a contract with it, where the execution and maintenance of the contract were not under attack, and the contract was neither a consequence of unfair labor practices nor did it thwart any policy of the Act.³⁰ And a Board majority found in another case³¹ that it would not effectuate the policies of the Act to direct an employer—which unlawfully interfered with the adminis-

²⁷ *Bear Creek Construction Co.*, 135 NLRB 1285. The Board noted that sec. 8(f), by its express terms, does not validate prehire agreements where the union has been "established, maintained, or assisted by any action defined in section 8(a) . . . as an unfair labor practice"

²⁸ See, e.g., *Thompson Ramo Wooldridge, Inc.*, 132 NLRB 993, *Han-Dee Spring & Mfg Co., Inc.*, 132 NLRB 1542, *Wahlgren Magnetics, Div. of Marshall Industries*, 132 NLRB 1613; *Supermarket Housewares, Inc.*, 133 NLRB 1273; *Beiser Aviation Corp.*, 135 NLRB 399

²⁹ See, e.g., *Palette Sample Card Co., Inc.*, 134 NLRB 70; *Filtron Co., Inc.*, 134 NLRB 1691, Members Fanning and Brown for panel majority, Member Rodgers dissenting in part on this point would not require a withdrawal of recognition but would order the parties to cease maintaining and giving effect to an unlawful contractual provision; *The Post Publishing Co.*, 136 NLRB 272, Members Fanning and Brown for panel majority, Member Rodgers dissenting in part would not issue a cease-recognition order; *Lundy Mfg. Corp.*, 136 NLRB 1230, where background evidence—prior to 10(b) period—that an employer coerced his employees into designating a union as their representative was used to determine the remedy herein to expunge effects of unfair labor practices which occurred within the statutory limitation period; *Fiore Brothers Oil Co., Inc.*, 137 NLRB No. 19.

³⁰ *M. Eskin & Son*, 135 NLRB 666, Chairman McCulloch and Members Rodgers and Leedom for the majority, Member Fanning dissenting on this point would order the employer to cease recognizing the union pending its certification by the Board, Member Brown not participating. The Board also found merit in the employer's exceptions to the provision of the trial examiner's recommended order that the employer cease and desist from supporting and assisting "any other labor organization," and accordingly limited the applicability of that provision to the respondent union which received the employer's support and assistance.

³¹ *Employing Bricklayers' Assn. of Delaware Valley*, 134 NLRB 1535, Members Rodgers, Leedom, Fanning, and Brown for the majority, Chairman McCulloch dissenting. The majority did order the employer to cease and desist from participating through its officials in local union elections of delegates to the international union's convention or by participating otherwise in the internal administration of the local union

tration of a local union by the voting of its executive secretary at the local's election for delegates to the international convention—either to cease and desist from recognizing the union or to withdraw or withhold recognition therefrom.

In a third case,³² the Board deleted the provisions of its original order³³ which required an employer to withdraw and withhold recognition from an illegally assisted union and to cease giving effect to any contract with the union, because those provisions were obstacles to the holding of immediate elections which were petitioned for by three other unions, and the Board was advised by the regional director that free elections could currently be held.

(1) Reimbursement

In remedying section 8(a)(2) violations involving employer-dominated unions, the Board requires that employees who are compelled to pay dues, fees, assessments, or other exactions, under an illegal union-security or hiring arrangement or other contractual arrangements to which their employer is a party, be appropriately reimbursed³⁴ by the employer.³⁵ In this situation, the "return of dues is one of the means for disestablishing the union."³⁶ On the other hand, when employer support, assistance, and interference do not reach the point of domination, the Board requires reimbursement by the employer only in the event the employees were coerced into joining, remaining members, or paying dues or other exactions to the assisted union.³⁷

³² *A. O. Smith Corp., Granite City Plant*, 137 NLRB No. 39.

³³ 132 NLRB 339.

³⁴ In view of the provision of sec. 10(b) of the Act that a complaint may not be based on any unfair labor practice occurring more than 6 months before charges were filed and served, reimbursement is limited to the period beginning 6 months before the filing and service of the charge. See, e.g., *Double A Products Co.*, 134 NLRB 222; *Houston Maritime Assn., Inc., et al.*, 136 NLRB 1222.

³⁵ In cases where the assisted union is a party to the proceeding and is found to have violated sec. 8(b)(2), the employer and the union are directed to effect reimbursement jointly and severally. See, e.g., *Bear Creek Construction Co.*, 135 NLRB 1285, *Houston Maritime Assn., Inc., et al.*, above; *Fiore Brothers Oil Co., Inc.*, 137 NLRB No. 19. However, in the case of a dominated union, since it is in effect merely a creature of the employer, it cannot be held independently responsible or liable, and the employer must bear the sole responsibility for remedying unfair labor practices. *Supermarket Housewares, Inc.*, 133 NLRB 1273.

³⁶ *Local 60, Carpenters v. N.L.R.B. (Mechanical Handling Systems)*, 365 U.S. 651, affirming the principle enunciated in *Virginia Electric & Power Co. v. N.L.R.B.*, 319 U.S. 533.

³⁷ *Local 60, Carpenters v. N.L.R.B.*, above, where the Supreme Court rejected the *Brown-Olds* principle and refused to affirm a reimbursement order on the ground that the record failed to indicate that the employees involved were in fact coerced into joining the union or into paying membership dues. See Twenty-sixth Annual Report (1961), pp. 105, 156-157. See also *Duralite Co., Inc.*, 132 NLRB 425, where Chairman McCulloch and Member Fanning comprising the majority refused to issue a reimbursement order because the employees involved were not coerced into joining the union or paying membership dues, Member Leedom dissenting on this point, Members Rodgers and Brown not participating.

Thus, an employer who was found to have unlawfully contracted with an assisted minority union, and to have unlawfully coerced his employees into joining the union and authorizing dues checkoffs as a condition to obtain and retain employment, was required to reimburse all present and former employees hired after the execution of the contract for all dues and initiation fees paid pursuant to the unlawful agreement.³⁸ According to the Board, the Supreme Court decision in *Local 60, Carpenters v. N.L.R.B.*³⁹ “preserved the Board’s authority to order such a remedy to remove the consequences of violations on record evidence that employees were illegally coerced into joining or remaining members or joining the union ‘with the view of obtaining work’ as well as in cases where the union was unlawfully created.”

In one case,⁴⁰ the Board limited reimbursement to those employees who were in fact subject to specific coercion and discrimination in the payment of various union initiation fees and dues, refusing to accept the trial examiner’s recommendation that all present and former employees be reimbursed for moneys unlawfully deducted from their wages as a result of the “closed shop” practices in effect at the employer’s operations. In another case,⁴¹ employers were directed by a Board majority to reimburse⁴² all nonunion employees for all moneys illegally exacted from their wages as a condition of employment beginning 6 months prior to the filing of the charge.⁴³ And, in a third case,⁴⁴ where an employer unlawfully assisted a union by maintaining an illegal union-security contract affording the employees less than 30 days in which to join the union and pay dues, the Board ordered the employer to reimburse the first month’s dues to all employees hired during the 6-month period prior to the filing of the charges, and to reimburse employees who worked less than 30 days during the applicable period for initiation fees.⁴⁵

³⁸ *Lapeer Metal Products Co.*, 134 NLRB 1518. Member Leedom in accord with his position in *Duralite Co., Inc.*, above, would order reimbursement of dues and fees exacted during the applicable 10(b) period from employees hired before as well as after execution of the unlawful contract.

³⁹ 365 U.S. 651.

⁴⁰ *Shipwrecking, Inc.*, 136 NLRB 1518.

⁴¹ *Houston Maritime Assn., Inc., et al.*, 136 NLRB 1222, Members Rodgers, Leedom, Fanning, and Brown for the majority, Chairman McCulloch dissenting on this point.

⁴² The union and employers involved were ordered to effect this reimbursement jointly and severally.

⁴³ Members Rodgers and Leedom would also reimburse union employees for moneys exacted to the extent that they had not already been reimbursed by rebates. Chairman McCulloch would not direct reimbursement to either members or nonmembers.

⁴⁴ *Double A Products Co.*, 134 NLRB 222.

⁴⁵ The Board did not order the employer to reimburse employees for any initiation fees paid during their first month of employment, as all employees would have had to pay such initiation fees pursuant to a lawful union-security clause.

3. Discrimination Against Employees

Section 8(a) (3) prohibits an employer from discriminating against employees "in regard to hire or tenure of employment or any term or condition of employment" for the purpose of encouraging or discouraging membership in any labor organization. However, the union-security provisions of section 8(a) (3) and 8(f) permit an employer to make an agreement with a labor organization requiring union membership as a condition of employment subject to certain limitations.⁴⁶

a. Encouragement or Discouragement of Union Membership

To violate section 8(a) (3), discrimination in employment must have been intended to encourage or discourage membership in a labor organization. Such an intention will be presumed where the discrimination inherently has that effect, as where it is based on union membership or lack thereof.⁴⁷ Conversely, where discrimination does not inherently encourage or discourage union membership, the employer's unlawful motivation must be shown by independent evidence.⁴⁸

In *Erie Resistor*,⁴⁹ the Board held that an employer inherently discouraged legitimate union activity, in violation of section 8(a) (1), (3), and (5), by according superseniority to striker replacements and returning strikers. Relying on *Radio Officers*,⁵⁰ the Board stated:

In view of the immediate consequences to employees' tenure which follow from a grant of superseniority, we do not believe that specific evidence of Respondent's discriminatory motivation is required to establish the alleged violations of the Act. . . . The right to strike is a privilege guaranteed to employees by statute, and Respondent's superseniority policy—on its face discriminatory against those who continued to strike—clearly discouraged strike activities and union membership of employees. Such was the inevitable result of a preference granted for all time to those who did not join the Union's strike activities. Where discrimination is so patent, and its consequences so inescapable and demonstrable, we do not think the General Counsel need prove that Respondent subjectively "intended" such a result.

⁴⁶ See discussion of union-security agreements, pp 115-119, below.

⁴⁷ See, e.g., *Southern Stevedoring & Contracting Co.*, 135 NLRB 544; Twenty-sixth Annual Report (1961), p. 91 Cf. *International Marine Terminals, Inc.*, 137 NLRB No. 70

⁴⁸ *Ibid.*

⁴⁹ *Erie Resistor Corp.*, 132 NLRB 621, enforcement denied, *sub nom International Union of Electrical, Radio & Machine Workers, Local 613, AFL-CIO v N.L.R.B.*, 303 F. 2d 359 (C.A. 3, 1962). See also *Swan Rubber Co.*, 133 NLRB 375, where superseniority was offered only to strikers and not to striker replacements; *Marydale Products Co, Inc.*, 133 NLRB 1223, where formula for hiring employees had the effect of excluding employees on strike during the prior season with another company.

⁵⁰ *Radio Officers' Union of the Commercial Telegraphers Union, AFL v N.L.R.B.*, 347 U.S. 17 (1954)

Discrimination to discourage union activity was also found where an employer discontinued a Christmas bonus given every year for at least 10 years because the employees had selected the union as their representative.⁵¹ And in another case,⁵² a Board majority found that an employer violated section 8(a)(3) by failing to recall seasonal employees pursuant to an employee evaluation program which had been adopted as a device to eliminate union adherents and by applying this program in a discriminatory manner. Among the factors relied upon by the majority were: the employer's union animus, the timing of the formulation of the employee evaluation program a month after representation proceedings demonstrated that employees were almost equally divided in their sympathies for the union, the employer's knowledge of union adherents' activities, and the employer's disparate rating of known union and nonunion employees pursuant to the evaluation program.

But in *Continental Can*,⁵³ a panel majority found no violation of section 8(a)(1) and (3) on the part of an employer who discharged employees for fighting during a union meeting on company premises, where there was no independent evidence that any of the parties was motivated by a desire to get rid of the employees for union reasons.

b. Discrimination for Protected Activities

Discrimination against employees in their employment because of activities protected by section 7 of the Act⁵⁴ is violative of section 8(a)(3) where it tends to encourage or discourage membership in

⁵¹ *Electric Steam Radiator Corp.*, 136 NLRB 923, Chairman McCulloch and Member Leedom for panel majority, Member Rodgers dissenting. The majority further found that the employer intended to use the bonus as an economic weapon in future bargaining with the union, and also as a means of coercing the union to withdraw its unfair labor practice charges. See also *American Lubricants Co.*, 136 NLRB 946, where a panel majority comprised of Members Rodgers and Leedom, Chairman McCulloch dissenting in part, held that an employer violated sec 8(a)(5) by unilaterally discontinuing the payment of Christmas bonuses to employees in a bargaining unit with 5 years of service, while continuing bonus payments to unrepresented nonunit employees in accord with its past schedules. Here, the majority, Chairman McCulloch dissenting, found it unnecessary to decide whether such action also violated sec. 8(a)(3), because the remedy would be the same.

⁵² *Murray Ohio Mfg. Co.*, 134 NLRB 175, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting.

⁵³ *Continental Can Co., Inc.*, 136 NLRB 1135, Members Rodgers and Leedom for panel majority, Chairman McCulloch dissenting.

⁵⁴ Sec. 7 provides that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

a labor organization.⁵⁵ Accordingly, the question is frequently presented whether the employees' activities involved are within the statutory protection.⁵⁶

During the past year, the Board considered the issue of protected activities and found violations of section 8(a)(3) where employees were discriminated against because of such conduct as arranging for a meeting of employees favoring a union;⁵⁷ leading a walkout of employees to protest working conditions;⁵⁸ soliciting fellow employees to counter an antiunion petition circulated in the store, where a no-solicitation rule was unfairly and discriminatorily applied in a manner constituting an unreasonable impediment to the union's organizational efforts;⁵⁹ and striking to protest the employer's imposition of a no-smoking rule.⁶⁰

In other cases, the Board found that employee conduct generally deemed protected as "concerted activity" was circumscribed by special circumstances. Thus, in one case,⁶¹ the Board held that an employer did not violate section 8(a)(3) by suspending an employee for refusing to remove a pin at work symbolizing his union loyalty during a preceding strike. Finding that the poststrike instances of bitterness and discord fully justified the employer's apprehension that the pins would promote disorder in the plant as a result of friction between strikers and nonstrikers, the Board held that the employer's rule prohibiting the wearing of the pins after settlement of the strike was a reasonable precautionary measure under the circumstances. In another case,⁶² an employer's disciplinary layoff for a 4½-day period of leaders of a prounion group was found not unlawful, where the disciplined employees were the aggressors in creating an atmosphere of bickering and dissension which interfered with

⁵⁵ Discrimination in employment for such activities which does not tend to encourage or discourage union membership is nevertheless violative of the prohibition of sec. 8(a)(1) against employer interference with employees' sec. 7 rights. The remedy for both types of discrimination in employment is the same. See *Latea Industries, Inc.*, 132 NLRB 1, where the discharge of employees who engaged in protected concerted activities was held violative of sec. 8(a)(1), and reinstatement and backpay were ordered. A panel majority comprised of Members Rodgers and Leedom deemed it unnecessary to consider a sec. 8(a)(3) violation, Chairman McCulloch would have found a sec. 8(a)(3) violation.

⁵⁶ See Twenty-sixth Annual Report (1961), p. 92.

⁵⁷ *Willard's Shop Rite Markets, Inc.*, 132 NLRB 1146

⁵⁸ *Ablon Poultry & Egg Co.*, 134 NLRB 827

⁵⁹ *W T. Grant Co.*, 136 NLRB 152, Members Fanning and Brown for the majority, Member Rodgers dissenting, Chairman McCulloch and Member Leedom not participating. See also *Offner Electronics, Inc.*, 134 NLRB 1064, where a panel majority comprised of Chairman McCulloch and Member Leedom, Member Rodgers dissenting, found the discharge of an employee for circulating among other employees an anonymous note containing criticism of the employer's pay practices, and casting aspersions upon a new employee and a supervisor, under the circumstances to be violative of sec. 8(a)(3). For discussion of no-solicitation rules, see above pp 93-95.

⁶⁰ *Delsea Iron Works, Inc.*, 136 NLRB 453.

⁶¹ *United Aircraft Corp., Pratt & Whitney Aircraft Div.*, 134 NLRB 1632

⁶² *Stuart F Cooper Co.*, 136 NLRB 142.

production, the employer's effort to deal with the situation in an even-handed manner met with no success, and five employees threatened to quit.

No violations were found where employees were refused reinstatement because they engaged in production slowdowns to force an employer to accept the union's contract terms;⁶³ and where employees were discharged for fighting during a union meeting on company premises.⁶⁴ Similarly, the discharge of a union's chief steward for acquiescing in and ratifying the action of an assistant steward, who left his work station without permission in order to obtain an immediate resolution of a grievance and thereby caused an unauthorized work stoppage in violation of a no-strike clause, was found not violative of the section.⁶⁵ A Board majority stated that, although the presentation of a grievance is normally a protected activity,⁶⁶ an employer may, in the absence of any specific contractual agreement as to when grievances are to be handled, impose reasonable rules relating to such activities on working time.

But in *Sunbeam Lighting*,⁶⁷ a Board majority, distinguishing the case from the *Draper* line of cases,⁶⁸ rejected an employer's contention that a walkout during bargaining negotiations was an unprotected "wildcat" strike undermining the status of the employees' bargaining representative. Finding that the strike was not to undermine the bargaining representative, but rather to strengthen the status of the union's bargaining committee by impressing upon the employer the employees' support of the committee's bargaining position, the majority found that the employer's discharge of these strikers violated section 8(a) (1) and (3) of the Act. Similarly, a Board majority found that the refusal to rehire unreplaced strikers, who engaged in a strike to obtain a consent-election agreement, violated section 8(a) (3), even if such strike had not been authorized by the union.⁶⁹

⁶³ *Raleigh Water Heater Mfg. Co., Inc.*, 136 NLRB 76

⁶⁴ *Continental Can Co., Inc.*, 136 NLRB 1135, Members Rodgers and Leedom for panel majority, Chairman McCulloch dissenting.

⁶⁵ *Russell Packing Co. & Peerless Packing Co.*, 133 NLRB 194, Chairman McCulloch and Members Rodgers and Leedom for the majority, Member Brown dissenting, Member Fanning not participating.

⁶⁶ See *Bowman Transportation, Inc.*, 134 NLRB 1419.

⁶⁷ *Sunbeam Lighting Co., Inc.*, 136 NLRB 1248, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting.

⁶⁸ *N.L.R.B. v. Draper Corp.*, 145 F. 2d 199, 204 (C.A. 4, 1944), and other cases cited in footnote 12 of the *Sunbeam* case

⁶⁹ *Philanz Oldsmobile, Inc.*, 137 NLRB No 103, Chairman McCulloch and Members Fanning and Brown, for the majority, relied in part on *New Orleans Roosevelt Corp.*, 132 NLRB 248; Members Rodgers and Leedom, dissenting, would find a strike to force a consent election to be at variance with the consent-election procedure

(1) Effect of No-Strike Clauses

Generally, in accord with the Supreme Court's opinion in *Mastro Plastics*,⁷⁰ unfair labor practice strikers are entitled to the statutory protection, although the bargaining agreement to which they are subject contains a no-strike clause, absent an explicit waiver of the employees' right to strike against unfair labor practices. But the Board has held that *Mastro Plastics* is inapplicable when a union agrees by way of limitation on its right to strike that it would not strike over grievances, including discharges, until after it has exhausted the grievance procedure provided in the contract.⁷¹

During this fiscal year, in *Arlan's Department Store*,⁷² a majority of a three-member Board held that only strikes in protest against "serious" unfair labor practices are immune from general no-strike clauses under *Mastro Plastics*, where the no-strike clause does not explicitly forbid strikes in protest of unfair labor practices. Here, according to the majority, the unfair labor practice—the discharge of a union steward resulting from her conduct as a steward—was not so serious as to excuse compliance with the contract's grievance procedure as a means for the settlement of the dispute, "i.e., it was not in the words of the Supreme Court 'destructive of the foundation on which collective bargaining must rest.'" ⁷³ The majority concluded that the case fell more nearly within the facts of *Mid-West Metallic*,⁷⁴ than of *Mastro Plastics*, and that the employees did not engage in protected concerted activities by striking in violation of the no-strike clause and grievance and arbitration procedure. Thus, this allegation of the complaint was dismissed.

However, in *Biazevich*,⁷⁵ the employers' unfair labor practices were found sufficiently "serious" to excuse the employees' violation of a no-strike clause. There, the employers discriminatorily discharged the employees in order to avoid dealing with the incumbent union.

c. Forms of Discrimination

Section 8(a)(3), except for its union-security proviso, forbids an employer to encourage or discourage union membership by any dis-

⁷⁰ *Mastro Plastics Corp. and French-American Reeds Mfg Co, Inc. v. NLRB.*, 350 U.S. 270 (1956); Twenty-first Annual Report (1956), pp 121-122

⁷¹ *Mid-West Metallic Products, Inc.*, 121 NLRB 1317 (1959)

⁷² *Arlan's Department Store of Michigan, Inc.*, 133 NLRB 802, Chairman McCulloch and Member Leedom for the majority, Member Fanning dissenting on this issue, Members Rodgers and Brown not participating. See Twenty-sixth Annual Report (1961), p. 93

⁷³ *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 281 (1956).

⁷⁴ *Mid-West Metallic Products, Inc.*, above.

⁷⁵ *Paul Biazevich, et al.*, 136 NLRB 13, Members Leedom and Brown comprising the majority of a three-member Board, Member Fanning dissenting in this respect, Chairman McCulloch and Member Rodgers not participating. See also *A. O. Smith Corp., Granite City Plant*, 132 NLRB 339

crimination in employment.⁷⁶ As heretofore, cases under section 8(a)(3) involved, for the most part, such forms of discrimination as unlawful discharges,⁷⁷ layoffs,⁷⁸ transfers,⁷⁹ or refusals to hire,⁸⁰ and presented questions as to the sufficiency of credible evidence to support the allegations of discrimination contained in the complaint.⁸¹

In one case,⁸² a violation of section 8(a)(3) was found where the employer reorganized and retrained its printing department's lithographic employees at the close of representation hearings so as to remove the basis for finding a unit of lithographic employees appropriate, and thereby sought to frustrate the desires of the lithographers to organize and select a lithographers' union as their representative. In another case,⁸³ an employer was held to have constructively discharged employees in violation of section 8(a)(3) by "placing" them in the position of either crossing a picket line at the premises of other respondent employers, or being placed in a "quit" status. Other cases involving particular forms of discrimination are discussed below.

(1) Discontinuance of Operations

An employer who causes his employees to be discharged or laid off by closing the plant, or discontinuing the operation in which the employees are engaged, violates section 8(a)(3) if the action is not taken solely for economic reasons,⁸⁴ but because of the employees' organizational activities.⁸⁵

Thus, in *Town & Country*,⁸⁶ A Board majority found that a manufacturer of mobile home trailers violated section 8(a)(3) by terminating and subcontracting its hauling operations, and consequently discharging its drivers, because they joined and selected the union as their representative.⁸⁷ But, in *Renton News Record*,⁸⁸ the Board found that two newspapers did not violate section 8(a)(3) when they subcontracted their composing work to companies utilizing improved

⁷⁶ See Twenty-sixth Annual Report (1961), p. 96, footnote 35.

⁷⁷ See *Jimmie Green Chevrolet*, 133 NLRB 44, *J. Posner, Inc., etc.*, 133 NLRB 1573

⁷⁸ See *Willard's Shop Rite Markets, Inc.*, 132 NLRB 1146; *A. O. Smith Corp., Granite City Plant*, above

⁷⁹ See *Anderson-Rooney Operating Co. et al.*, 134 NLRB 1480; *Goldblatt Bros., Inc.*, 135 NLRB 153

⁸⁰ See *John McAuliffe Ford, Inc.*, 134 NLRB 340, *New England Tank Industries, Inc.*, 133 NLRB 175.

⁸¹ See *Diamond National Corp.*, 133 NLRB 268, *Lo-K Foods, Inc.*, 134 NLRB 956.

⁸² *Weyerhaeuser Co.*, 134 NLRB 1371.

⁸³ *Cone Brothers Contracting Co.*, 135 NLRB 108

⁸⁴ See *Precrete, Inc.*, 132 NLRB 986, where an employer was found not to have violated sec. 8(a)(3) by shutting down its plant solely for economic reasons, and by failing to reinstate discharges after temporarily reopening the plant.

⁸⁵ See *Fine's Nearby Egg Corp.*, 132 NLRB 1585, *Weyerhaeuser Co.*, above

⁸⁶ *Town & Country Mfg. Co., Inc., etc.*, 136 NLRB 1022, Chairman McCulloch and Members Leedom, Fanning, and Brown for the majority, Member Rodgers dissenting.

⁸⁷ For discussion of the sec. 8(a)(5) aspects of this case, see pp. 134-135, below

⁸⁸ *Renton News Record, et al.*, 136 NLRB 1294

methods and equipment, and terminated employees engaged in such work. Here, the Board found that the employers subcontracted the work because of compelling economic necessity, and the record was devoid of evidence of discriminatory motive.⁸⁹

In one case,⁹⁰ the Board found that an employer violated section 8(a)(3) by the lockout and discharge of its employees as the result of a shutdown and announced liquidation of its operations immediately following the union's victory in a State Board election. In another case,⁹¹ although the Board found that an employer's original decision to set up a new operation out of the State to manufacture a new line was dictated by legitimate economic considerations, rather than a desire to avoid collective bargaining, it nevertheless held that the employer violated section 8(a)(3) by the ultimate shutdown of its plant and removal of the remainder of its operations to its new location, with the resulting discharge of employees. It reasoned that since the employer offered to reopen the local plant if granted certain concessions, the employer's true purpose in moving the entire plant was to use the move as a device for attempting to wrest bargaining concessions from the union.

In still another case,⁹² a panel majority found that an employer violated section 8(a)(3) by discriminatorily accelerating the transfer of its shipping employees, because of its employees' union activities and its manifest union animus, although the employer initially planned such move at a later date for economic considerations.⁹³

(2) Lockouts

The Supreme Court held in *Buffalo Linen*⁹⁴ that nonstruck employer-members of a multiemployer unit may temporarily lock out employees as a defensive measure in a "whipsaw" situation, to protect the solidarity of the multiemployer unit, when one of its members is struck. During the past year, however, in *Brown Food Store*,⁹⁵ a Board majority held that such nonstruck employers could not lawfully lock out employees and still operate with temporary replace-

⁸⁹ For discussion of sec 8(a)(5) aspects of this case, see p. 135 below

⁹⁰ *New England Web, Inc., et al.*, 135 NLRB 1019.

⁹¹ *Siddele Fashions, Inc., et al.*, 133 NLRB 547

⁹² *Ox-Wall Products Mfg. Co., Inc., et al.*, 135 NLRB 840, Members Fanning and Brown for panel majority, Member Leedom dissenting

⁹³ The majority noted its disagreement with two circuit court decisions, *NLRB v. Rapid Bindery, Inc.*, 293 F. 2d 170 (C.A. 2), and *NLRB v. Lassing et al. d/b/a Consumers Gasoline Stations*, 284 F. 2d 781 (C.A. 6), certiorari denied 366 U.S. 909, which it deemed inapposite and distinguishable from the instant case, and relied on its decision in *Brown-Dunkin Co., Inc.*, 125 NLRB 1379 (1959), enforced 287 F. 2d 17 (C.A. 10).

⁹⁴ *NLRB v. Truck Drivers Local 449, IBT (Buffalo Linen Supply Co.)*, 353 US 87 (1957), affirming 109 NLRB 447 (1954).

⁹⁵ *Brown Food Store*, 137 NLRB No. 6, Chairman McCulloch and Members Leedom and Brown for the majority, Members Rodgers and Fanning dissenting.

ments. In this case, the union struck one employer of a five-member association during the course of bargaining negotiations. The four other employers immediately locked out all of their employees, telling them that they would be returned to work at the conclusion of the strike, but continued to operate. The struck employer obtained striker replacements, and the other four functioned with the assistance of supervisory personnel, relatives of management and new employees hired on a temporary basis. In the majority's view, the *Buffalo Linen* "whipsaw" situation is an exception to the rule against lockouts for union activity—to prevent unfair advantage being taken of the members of an employer unit. "Locking out employees in order to replace them with other workers," the majority stated, "may hardly be viewed as equivalent to the defensive action of a shutdown to preserve the solidarity of the Association unit." It noted further as follows:

If the union could successfully strike one at a time, the other members of the employer unit would in ordinary circumstances continue operating to the severe economic damage of the struck member, and each in turn could be driven to the wall in the "whipsaw." For this reason, if one member is shut down by a strike, the others may also shut down, but they are not *required* to do so. If the struck member operates through replacements, no economic necessity exists for the other members shutting down. If in those circumstances they resort to a lockout and hire replacements, it may be reasonably inferred that they do so not to protect the integrity of the employer unit, but for the purpose of inhibiting a lawful strike. In short, the lockout in these circumstances ceases to be "defensive" and becomes "retaliatory."

It accordingly held that by replacing employees who were willing to work and were not on strike, the four nonstruck employers violated section 8(a) (1) and (3) of the Act.⁹⁶

(3) Superseniority to Striker Replacements

The legality of an employer's granting superseniority to striker replacements and returning strikers was presented to the Board in two cases during the past fiscal year. Relying on the *Radio Officers'* case,⁹⁷ the Board held, in *Erie Resistor*,⁹⁸ that an employer's policy of granting 20 years' superseniority to striker replacements and returning strikers, during an economic strike, violated section 8(a) (1) and (3), regardless of the employer's nondiscriminatory motive. Noting its disagreement with the Ninth Circuit's decision in *Potlatch Forests*,⁹⁹ which held that superseniority was a legitimate corollary

⁹⁶ See *Seaboard Diecasting Corp.*, 137 NLRB No. 60, where an employer was found to have violated sec. 8(a) (3) by locking out its employees until the union agreed not to press for reinstatement of an objectionable union steward. See also *Texas Gas Corp.*, 136 NLRB 355.

⁹⁷ *Radio Officers' Union v. N L.R.B.*, 347 U.S. 17.

⁹⁸ *Erie Resistor Corp.*, 132 NLRB 621.

⁹⁹ *N.L.R.B. v. Potlatch Forests, Inc.*, 189 F. 2d 82, setting aside 87 NLRB 1193 (1949).

of the employer's right under *Mackay Radio*¹ to secure permanent replacements, the Board held that "superseniority is a form of discrimination extending far beyond the employer's right of replacement . . . , and is, moreover, in direct conflict with the express provisions of the Act prohibiting discrimination." Among other things, the Board pointed out, permanent replacement affects only those replaced, while superseniority affects the tenure of all employees, whether or not replaced; an award of superseniority to striker replacements renders one important requirement of *Mackay* an impossibility—the nondiscriminatory and complete reinstatement of unreplaced strikers; and superseniority renders future bargaining difficult, if not impossible, for the authorized bargaining representative.

For the reasons expressed in *Erie Resistor*, the Board found, in *Swan Rubber*,² that an employer also violated section 8(a)(1) and (3) by offering and granting superseniority only to returning strikers, notwithstanding the fact that superseniority was not offered to striker replacements.

(4) Union-Security Agreements

The Act permits an employer to enter into an agreement with a labor organization requiring membership therein as a condition of employment, subject to certain limitations set out in the union-security proviso to section 8(a)(3) and section 8(f). The Board has consistently held that a union-security agreement to be valid must set forth terms which conform to these statutory requirements.³

Under the section 8(a)(3) proviso, a union-security agreement is valid (1) if made with the majority representative of the employees in an appropriate unit, whose authority to make such agreement has not been revoked in an election pursuant to section 9(e); and (2) if the agreement affords the employees 30 days' grace within which to acquire union membership "following the beginning of [their] employment, or the effective date of [the] agreement, whichever is later."

Section 8(f) makes specific provision for contracts in the construction industry, permitting, *inter alia*, contracts with unions whose majority status has not been established and union-security clauses requiring membership "after the seventh day following [rather than on or after the thirtieth day following] the beginning of such employment or the effective date of the agreement, whichever is later."

(a) Union's status

During the past year, violations of section 8(a)(3) were found in a number of cases where the employer executed, maintained, or enforced

¹ *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U S 333.

² *Swan Rubber Co.*, 133 NLRB 375.

³ See Twenty-sixth Annual Report (1961), p 99.

a union-security agreement with a union which was unlawfully recognized by an employer. In *Duralite*,⁴ an employer and a newly recognized union, who entered into a collective-bargaining agreement during the unexpired term of an incumbent union's contract, were held to have violated section 8(a)(3) and 8(b)(2), respectively, by making and enforcing a union-security arrangement requiring membership in the newly recognized union as a condition of employment. Violations were also found in other cases on the basis of union-security agreements entered into with illegally assisted unions.⁵

(b) Terms of agreement

The proviso to section 8(a)(3) sanctions only agreements which provide for union security within the prescribed limits. Employees may not be compelled to acquire union membership until after 30 days "following the beginning of [their] employment, or the effective date of [the] agreement, whichever is later." Thus, violations of section 8(a)(3) were found where the employer entered into or gave effect to union-security provisions which established closed-shop or preferential hiring conditions,⁶ permitted the union to reject any new probationary employee as a permanent employee and linked any wage increase promised new employees to the deduction of union dues,⁷ failed to grant old nonunion employees⁸ or new employees⁹ the statutory 30-day grace period,¹⁰ or required the deduction of dues from nonmembers' wages prior to the expiration of the 30-day grace period.¹¹

In *New York State Electric & Gas*,¹² a Board majority, overruling the *Chun King* decision¹³ and reaffirming the *Al Massera* decision,¹⁴ held that a clause requiring employees to apply for union membership "within 30 days after date of their employment" is equivalent to the statutory language "on or after the thirtieth day" and is, therefore, lawful.¹⁵

⁴ *Duralite Co., Inc.*, 132 NLRB 425.

⁵ See, e.g., *Lapeer Metal Products Co.*, 134 NLRB 1518, *Fiore Brothers Oil Co., Inc.*, 137 NLRB 191.

⁶ See, e.g., *Pan Atlantic Steamship Company*, 132 NLRB 868

⁷ *Filtron Co., Inc.*, 134 NLRB 1691.

⁸ See, e.g., *Guard Services, Inc.*, 134 NLRB 1753.

⁹ See, e.g., *Double A Products Co.*, 134 NLRB 222

¹⁰ See also *Gladys A. Juett, Administratrix of the Estate of C. D. Juett, Deceased*, 137 NLRB No. 47, a case in the construction industry, where the Board found the execution of a retroactive union-security agreement violative of sec. 8(a)(3).

¹¹ See, e.g., *Lapeer Metal Products Co.*, 134 NLRB 1518.

¹² *New York State Electric & Gas Corp.*, 135 NLRB 357, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting.

¹³ *Chun King Sales, Inc.*, 126 NLRB 851 (1960).

¹⁴ *Al Massera, Inc.*, 101 NLRB 837 (1952).

¹⁵ See also *Television & Radio Broadcasting Studio Employees, Local 804 (Radio & Television Div. of Triangle Publications, Inc.)*, 135 NLRB 632.

Other types of union-security agreements considered by the Board during the past year are discussed below.

(i) "Agency shop"

On reconsideration of its original decision in *General Motors*,¹⁶ a Board majority¹⁷ vacated the prior decision and held that an agency-shop proposal—whereby employees would be required to pay to the union, their collective-bargaining representative, the equivalent of initiation fees and monthly dues regularly required of union members, as a condition of employment after 30 days following the date of the agreement or initial employment, whichever was later—was lawful under the proviso to section 8(a) (3), absent any "suggestion" that union membership was not available to any nonmember employee who wished to join, and in view of the fact that the State courts had held that the provision in question was not unlawful under the Indiana right-to-work law. The majority, referring to several court and Board decisions, including *Union Starch*,¹⁸ stated:

The *Union Starch* construction of Section 8(a) (3) has been an accepted and settled rule in a great many Board and court cases. In those cases, even where "membership" is specifically required in a valid union-security contract, the union in particular situations cannot enforce the actual membership requirement but can obtain at most the periodic dues and initiation fees. Thus, a contract, such as the agency shop, which requires only that which the union under the Act can realistically and effectively enforce as to all employees in this case must in all reason and equity be held lawful.

(ii) Agreements in construction industry

As noted above, with respect to the construction industry, section 8(f) permits contracts with unions whose majority status has not been established,¹⁹ and union-security agreements which require union membership "after the seventh day following [rather than on or after the thirtieth day following] the beginning of such employment or the effective date of such agreement, whichever is later."

In *Bateson*,²⁰ however, the execution and maintenance of an agreement by an employer and a union in the construction industry, which required union membership "no later than" the seventh day following the beginning of employment as a condition of employment, was held

¹⁶ *General Motors Corp.*, 130 NLRB 481 (1961), then Chairman Leedom and Members Jenkins and Kimball separately concurring, Members Rodgers and Fanning dissenting.

¹⁷ *General Motors Corp.*, 133 NLRB 451, Chairman McCulloch and Members Rodgers, Fanning, and Brown for the majority, Member Leedom dissenting. See also *Twenty-sixth Annual Report* (1961), p. 102

¹⁸ *Union Starch & Refining Co.*, 87 NLRB 779 (1949), enforced 186 F. 2d 1008, 1011-1012 (C.A. 7), certiorari denied 342 U.S. 815

¹⁹ But sec 8(f), by its express terms, does not validate prehire agreements where the union has been "established, maintained, or assisted" by any action defined in sec. 8(a) as an unfair labor practice. See *Bear Creek Construction Co.*, 135 NLRB 1285.

²⁰ *J. W. Bateson Co., Inc.*, 134 NLRB 1654.

violative of section 8(a)(3) and (1), as well as section 8(b)(2) and (1)(A), as it failed to provide a full 7-day grace period required by section 8(f)(2). And in another case,²¹ the Board found that an agreement between a building contractor and a union, which required union membership “on”—instead of “after”—the seventh day of employment as a condition of employment, was not sanctioned by section 8(f). The execution and maintenance of this agreement was accordingly held violative of section 8(a)(3).²²

(c) *Illegal enforcement of union-security agreement*

Under the proviso to section 8(a)(3), no employee may be discharged for nonmembership in a labor organization, under the terms of a union-security agreement, if the employer “has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.” Moreover, “the only obligation an employee has under the compulsion of the proviso to section 8(a)(3) [to pay dues], is to pay dues for the period of employment with the employer who is a party to the contract and during the term of the contract.”²³

In *General Motors Corp., Packard Electric Division*,²⁴ the Board overruled the *Aluminum Workers* decision²⁵ insofar as the latter held that a full and unqualified tender of delinquent dues at any time prior to actual discharge, regardless of whether the request for discharge was made before or after such tender, was a proper tender, and that a subsequent discharge based upon the request was unlawful. Reasoning that the application of the *Aluminum Workers* rule was at odds with the congressional purpose of allowing parties to collective-bargaining agreements to enter into and enforce union-security agreements, the Board noted:

. . . [T]here can be little if any union security if dissident members can frustrate the orderly administration of lawful collective-bargaining agreements by delaying payment of dues and fees they are lawfully obligated to pay until the last minute before their actual discharge. We shall therefore no longer apply the *Aluminum Workers* rule when the tender occurs after a lawful request, but shall in all such cases look to the record to determine the real reason for the parties' subsequent conduct.

Finding the employee in the instant case delinquent in his dues at the time the union requested his discharge, the Board held that his

²¹ *Glady's A. Juett, Administratrix of the Estate of C. D. Juett, Deceased*, 137 NLRB No 47.

²² The Board also held the agreement invalid because the union-security clause was retroactive.

²³ See Twenty-sixth Annual Report (1961), p. 103

²⁴ *General Motors Corp., Packard Electric Div.*, 134 NLRB 1107.

²⁵ *Aluminum Workers International Union, Local No. 135 (Metal Ware Corp.)*, 112 NLRB 619 (1955).

discharge did not violate section 8(a)(3), despite the employee's offer of payment prior to actual discharge, absent evidence of an unlawful purpose by the union.²⁶

Several other cases presented issues as to whether a union requested the discharge of employees for reasons other than dues delinquency and whether the employer had "reasonable grounds" for believing that union membership was denied such employees for a reason other than their failure to tender dues. Thus, in *Pacific Plywood Company*,²⁷ the Board held that an employer and a union violated section 8(a)(3) and 8(b)(2), respectively, where the employer discharged an employee at the union's request because of her ouster from union membership for criticizing the union and speaking favorably on behalf of a rival union. In another case,²⁸ the Board held that an employer violated section 8(a)(3) by acceding to a union's unlawful request to discharge an employee for dues delinquency, without any attempt to investigate the matter, despite the employee's claim that she had orally resigned from the union prior to the execution of a contract requiring union members to maintain membership. The Board held that the employer improperly presumed from the union's letter requesting her discharge that withdrawal from the union could only be effected by a registered letter, and, in the face of the divergent positions and information in its possession, was under an obligation to seek further verification of validity of the union's demand.

On the other hand, in another case,²⁹ a Board majority found that an employer did not violate section 8(a)(3) by discharging an employee at a union's request, although the union was found to have violated section 8(b)(2) in causing the discharge, where the employer had "no reasonable grounds" for believing that union membership was denied the employee for a reason other than his failure to tender dues. In the majority's opinion, the employer here did all that "it should be reasonably required to do" when it advised the union of the employee's claim of having tendered his dues and relied on the union's assurance that the employee had not done so, "a matter *solely* within the Union's knowledge."

(5) Discriminatory Hiring Practices

Violations under section 8(a)(3) were again found in situations where individual employees were denied employment because they were unacceptable to the union,³⁰ or where employers were parties to

²⁶ See also *Acme Fast Freight, Inc.*, 134 NLRB 1131

²⁷ *Pacific Plywood Co.*, 134 NLRB 736

²⁸ *May Department Stores, Inc.*, 133 NLRB 1096.

²⁹ *Philadelphia Sheraton Corp.*, 136 NLRB 888, Chairman McCulloch and Members Leedom and Brown for the majority, Members Rodgers and Fanning dissenting.

³⁰ See, e.g., *Local 592, United Brotherhood of Carpenters & Joiners (Brunswick Corp.)*, 135 NLRB 999.

discriminatory hiring arrangements.³¹ However, because of the Supreme Court's decision in *Local 357, Teamsters*,³² the Board abandoned its *Mountain Pacific* rule,³³ which required specific safeguards as a condition for establishing the validity of exclusive hiring hall arrangements, and reconsidered a number of cases originally decided under that rule.³⁴ Thus, employers and unions were held not to have violated the Act by maintaining and enforcing the hiring hall and referral provisions of their contracts absent specific discriminatory provisions or evidence that nondiscriminatory provisions were enforced in a discriminatory manner against employees, job applicants, or discharged employees.³⁵

Upon reconsideration of its original decision in *Houston Maritime Association*,³⁶ the Board dismissed an allegation that the employers and union violated the Act by entering into and maintaining a contract which delegated to the union unilateral control over the selection of gang foremen who were granted effective authority by the contract to hire employees.³⁷ It affirmed its previous finding, however, that the employers violated section 8(a) (3) by engaging in unlawful discriminatory practices with respect to referral and employment of employees, in that the gang foremen picked union members first for jobs and gave them the better ones, and by denying employment and suspending employees at the union's request because of their rival union activity. A majority also found that the employers further violated section 8(a) (3) by requiring nonunion applicants to pay a percentage of their wages to the union as a condition of employment, and treating such applicants as "second-rate citizens" for referral purposes.³⁸

In *Porter-DeWitt Construction*,³⁹ an employer was found to have violated section 8(a) (3) by maintaining and enforcing an unlawful hiring arrangement whereby nonmembers of a union were required to

³¹ See, e.g., *Porter-DeWitt Construction Co., Inc.*, 134 NLRB 963; *Central Rigging & Contracting Corp.*, 136 NLRB 913.

³² *Local 357, Teamsters v. N.L.R.B. (Los Angeles-Seattle Motor Express Lines)*, 365 U.S. 667; Twenty-sixth Annual Report (1961), pp. 153-155.

³³ *Mountain Pacific Chapter of the Associated General Contractors, Inc.*, 119 NLRB 883 (1957); Twenty-third Annual Report (1958), pp. 85-86.

³⁴ See, e.g., *Petersen Construction Corp., et al.*, 134 NLRB 1768; *Houston Maritime Assn., Inc., et al.*, 136 NLRB 1222. See also *United States Lines Co.*, 133 NLRB 27; and *Southern Stevedoring & Contracting Co.*, 135 NLRB 544, which did not involve reconsideration.

³⁵ *Ibid.*

³⁶ *Houston Maritime Assn., Inc., et al.*, 121 NLRB 389 (1958).

³⁷ *Houston Maritime Assn., Inc., et al.*, 136 NLRB 1222.

³⁸ Members Rodgers and Leedom found the requirement that all employees pay a percentage of their wages as a condition of employment constituted a discriminatory exaction; Members Fanning and Brown found the exaction of a service fee from nonunion applicants as a condition of employment, while placing them on the bottom of the referral list, to be discriminatory; Chairman McCulloch, dissenting, found discrimination not to have been established as to the service fees.

³⁹ *Porter-DeWitt Construction Co., Inc.*, 134 NLRB 963.

pay a weekly permit fee of \$2.50 for employment clearance, which was at least \$5 more per month than union members were required to pay as dues. Termination of nonmember employees who did not receive union clearance because of failure to pay the discriminatory permit fee was also found violative of the section.⁴⁰

(6) Other Forms of Discrimination

Violations of section 8(a) (3) were also found in other situations. In *Pontiac Motors*,⁴¹ a majority of a three-member Board held that an employer violated section 8(a) (3) by initially discharging and then disciplining a union committeeman, pursuant to a grievance settlement, as a consequence of his union stewardship—his failure to dissuade employees from refusing to work in violation of the union's contractual no-strike pledge. According to the majority, the dispute was not "solely one of contract interpretation" since the committeeman neither caused nor took part in the work stoppage, and the contract did not provide a lawful basis for disciplining him.⁴² Disagreeing with the trial examiner, it also held that the *Spielberg* decision,⁴³ with respect to arbitration awards, was not applicable here for the following reasons:

The Board has been charged by Congress with the initial responsibility of determining whether or not an alleged violation of Section 8(a) (3) has occurred. In the exercise of this responsibility the Board cannot leave [the committeeman] where it finds him. The issue involves not only the right of [the committeeman] but of all other employees similarly situated to be free from employer discipline for their union activity. This is not a minor factual question which, as in the *Spielberg* case, had been resolved by an arbitrator. No impartial arbitrator has ruled in this case. A grievance, carried through step 2 of a grievance procedure, is hardly a substitute for an arbitration proceeding. The Board may not abdicate its exclusive jurisdiction over unfair labor practices merely because an unlawfully discharged employee has attempted to get his job back by dealing directly with the offending employer.

In *Rives*,⁴⁴ the Board found that an employer violated section 8(a) (3), as well as section 8(a) (5), by unilaterally transferring certain work from employees represented by a certified union at one plant to employees at a newly established plant who were members of another union, in order that the employer might take advantage of the second union's label, without which the work involved would be un-

⁴⁰ Cf. *Local 825, Operating Engineers (H. John Homan Co.)*, 137 NLRB No. 118.

⁴¹ *Pontiac Motors Div., General Motors Corp.*, 132 NLRB 413, Members Rodgers and Fanning for the majority, Member Leedom dissenting, Chairman McCulloch and Member Brown not participating.

⁴² Member Leedom dissenting in this respect only.

⁴³ *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), where the Board dismissed a complaint charging that the employer had unlawfully refused to reinstate certain employees, where an arbitration award, in which all the parties had participated, had held the employer not obligated to reinstate the employees.

⁴⁴ *W. L. Rives Co.*, 136 NLRB 1050.

acceptable to the employer's customers. And in *Biazevich*⁴⁵ a majority of a three-member Board rejected the contention that boatowners discharged their crew members solely because of economic considerations, i.e., their inability to meet the wage demands of the local to which the crew members belonged. Finding a section 8(a)(3) violation, the majority held that even if there was convincing evidence of economic hardship, the boatowners would not be free to discharge their employees to avoid dealing with their bargaining representative.

In *White Sulphur Springs*,⁴⁶ the Board found that an employer violated section 8(a)(3) by discharging employees and subsequently failing to allow them a reasonable time to consider its offer of reinstatement. Here, the employees were discharged for failing to accept individually the employer's new contract offer during the term of an existing collective-bargaining agreement, and, according to the Board, the employees were justified in delaying their return to work until they were satisfied that their bargaining representative had no objections.

Then, in *Brunswick Corp.*,⁴⁷ the Board found that an employer violated section 8(a)(3) by discharging an employee from a job as a result of union pressure because of the employee's failure to perform obligations imposed by the respondent union on its members and work permit holders. The pressure was brought here by the union steward because the employee, a "work permit holder," took exception to the steward's remarks during a lecture to the employees on quitting and starting times, which lecture was delivered by the steward at the direction of the union's business agent.

d. Special Remedial Problems

(1) Dues Reimbursement

Since the Supreme Court's decision in *Local 60, Carpenters*,⁴⁸ that an order requiring the refund of dues and fees was beyond the Board's remedial authority "where no membership in the union was shown to be influenced or compelled by reason of any unfair labor practice," the Board has directed reimbursement of dues and fees only in those cases where coercion was actually shown or other special circumstances warranted it.

Thus, in *Duralite*,⁴⁹ a majority of a three-member Board refused to direct reimbursement of moneys required to be paid a union under

⁴⁵ *Paul Biazevich, et al.*, 136 NLRB 13, Members Leedom and Brown for the majority, Member Fanning dissenting, Chairman McCulloch and Member Rodgers not participating.

⁴⁶ *White Sulphur Springs Co.*, 136 NLRB 375.

⁴⁷ *Brunswick Corp.*, 135 NLRB 574.

⁴⁸ *Local 60, United Brotherhood of Carpenters v. NLRB. (Mechanical Handling Systems)*, 365 U.S. 651 (April 17, 1961). See Twenty-sixth Annual Report (1961), p. 156.

⁴⁹ *Duralite Co., Inc.*, 132 NLRB 425, Chairman McCulloch and Member Fanning for the majority, Member Leedom dissenting, Members Rodgers and Brown not participating.

an illegal union-security arrangement, where there was no evidence that the employees were coerced into joining or paying dues to the union which was unlawfully recognized by the employer. The majority found that reimbursement was not justified here under the theory of the *Virginia Electric & Power Co.* case⁵⁰ since the union was not found company dominated and disestablishment was not ordered. On the other hand, in *Lapeer*,⁵¹ a general reimbursement order against an employer was deemed appropriate under the *Virginia Electric* case, where an employer unlawfully coerced job applicants into executing union membership applications and checkoff authorizations as a condition for reporting to work after execution of an unlawful union-security agreement. And in *Fiore Brothers*,⁵² the Board directed an employer and a union to reimburse the employer's present and former employees for initiation fees, dues, and other moneys which they were required to pay the union since the date of their collective-bargaining agreement, where the agreement was executed with an assisted union and the employees were coerced into making payments to it.

Similarly, in *Porter-DeWitte*,⁵³ where a union maintained and enforced unlawful hiring practices whereby nonmembers were required to pay a discriminatory weekly permit fee as the price of clearance for employment, the Board ordered the union to reimburse the permit fees paid by the nonmembers. It also ordered one of the employers who violated the Act by maintaining and enforcing the unlawful hiring arrangement with the union to reimburse the nonmember employees of such employer jointly and severally with the union.

(2) Backpay Awards

Although reinstatement and backpay for discriminatees are the customary remedies for discharges violative of section 8(a)(3),⁵⁴ heretofore, whenever the Board found such violations contrary to the trial examiner, it excluded from the backpay computation the period from the date of issuance of the trial examiner's intermediate report

⁵⁰ *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533 (1943).

⁵¹ *Lapeer Metal Products Co.*, 134 NLRB 1518.

⁵² *Fiore Brothers Oil Co., Inc.*, 137 NLRB No. 19.

⁵³ *Porter-DeWitte Construction Co., Inc.*, 134 NLRB 963.

⁵⁴ For problems involved in the computation of backpay, see *San Juan Mercantile Corp.*, 135 NLRB 698, where a panel majority comprised of Chairman McCulloch and Member Fanning, Member Rodgers dissenting, held that the computation of backpay in accordance with the sporadic employment rule of *Local 419, Brotherhood of Painters, etc. (Spoon Tile Co.)*, 117 NLRB 1596 (1957)—i.e., during a period when no gross pay is attributable to a discriminatee, no deductions are made either from interim earnings or willful loss during that period—was not a substantial variance from a settlement stipulation which provided that backpay be "computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289."

to the date of the Board's order.⁵⁵ During the past fiscal year, upon examination of the adequacy of the Board's remedial orders, a majority held in *A. P. W. Products Co.*,⁵⁶ that it would discontinue, absent unusual circumstances, the practice of "tolling" monetary awards from the date of an intermediate report recommending dismissal of 8(a) (3) allegations to the date of a Board order finding such violation. According to the majority, the purpose of remedial orders is to effectuate the policies of the Act by redressing as completely as possible statutory wrongs which have been committed. It viewed the practice of tolling awards to be inimical to that purpose, as "the particular respondent, who is responsible for the wrong committed, is, to the extent of the tolling, relieved of its obligation to restore the discriminatees to the *status quo ante* and thus is permitted to profit by its violations of the Act—the respondent's benefit being both in the monetary sense and in the advantage it may enjoy by reason of the delay in returning unwanted employees to the plant." Accordingly, the majority held that where backpay or other reimbursement is warranted, such an award will be made for the full period from the date of the discrimination to the date of an offer of reinstatement, placing on a preferential list, or other cutoff date found in the particular case, regardless of the nature of the trial examiner's recommendations.⁵⁷

(3) Remedies for Unlawful Discontinuance of Operations

In remedying discrimination resulting from the discontinuance of business operations for purposes prohibited by section 8(a) (3), it is the Board's policy to assess the rights of the affected employees in the light of the particular situation,⁵⁸ and to restore, insofar as is possible, the status quo existing prior to the the commission of the unfair labor practices.

In some situations, the Board has required the employer to resume the discontinued operation, and reinstate the employees with full backpay.⁵⁹ Thus, in the *Town & Country* case,⁶⁰ a Board majority ordered an employer to reestablish its hauling operations and reinstate its drivers with full backpay, where the employer discriminatorily discontinued its hauling operations, discharged its drivers, and uni-

⁵⁵ See, e.g., *E. R. Haffelstinger Co., Inc.*, 1 NLRB 760 (1936); *Time-O-Matic, Inc.*, 121 NLRB 179 (1958); *Southern Dolomite*, 131 NLRB 513 (1961).

⁵⁶ *A. P. W. Products Co., Inc.*, 137 NLRB No. 7, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting.

⁵⁷ The majority overruled the *Haffelstinger* case, above, and all similar cases to the extent they are inconsistent with the instant holding, and further stated that the new practice will be equally applied to sec. 8(a) (3) and sec. 8(b) (2) proceedings.

⁵⁸ See Twenty-sixth Annual Report (1961), pp. 98-99.

⁵⁹ See, e.g., *Fine's Nearby Egg Corp.*, 132 NLRB 1585

⁶⁰ *Town & Country Mfg. Co., Inc., etc.*, 136 NLRB 1022, Chairman McCulloch and Members Fanning and Brown for the majority, Member Leedom dissenting in part, Member Rodgers dissenting.

laterally subcontracted out the hauling operations. The majority stated that even if it had found that the employer terminated its operations for nondiscriminatory reasons, it would order the employer to abrogate its subcontract and bargain with the union over any future decision to subcontract those operations, as well as to reinstate its drivers with appropriate backpay remedy.⁶¹

In some cases, the Board has refused to direct the resumption of operations, but has ordered the employer to establish a preferential hiring list to become effective in the event he resumed his former operations, as well as directed backpay until such time as the employees obtained other substantially equivalent employment.⁶² Thus, in the *Sidelo Fashions* case,⁶³ where an employer's original decision to set up a new operation outside the State to produce part of its line was "dictated by legitimate, economic consideration" but its subsequent shutdown of the old plant and removal of the balance of its operations outside the State was discriminatorily motivated, the employer was ordered to offer the discharges reinstatement at the old plant should operations be resumed there or elsewhere in that geographical area, or at the new plant with payment of traveling and moving expenses. The employer was further ordered to place nonreinstated employees on a preferential hiring list, and to make the discharges whole for any loss of pay by paying them normal wages from the time of their discharge either until the employer reopened a plant in the former geographical area or until the discharges secured substantially equivalent employment with some other employer. Similarly, in *New England Web*,⁶⁴ where one of five companies, found to be a single employer, discriminatorily locked out its employees and liquidated its plant operations, a Board majority ordered the employers to reinstate the employees as a group, either at the liquidated plant should the employers resume operations there or at one of the other enterprises of the employer.

In one case,⁶⁵ however, where an employer discriminatorily accelerated the transfer of its shipping operations to another city, which would otherwise have been made for economic reasons a month later, and no evidence indicated that the discharged employees would have been reassigned instead of terminated, the remedial order was limited

⁶¹ Compare with *Renton News Record, et al.*, 136 NLRB 1294, which involved only an 8(a)(5) finding, where resumption of a discontinued department was not directed because of economic and other factors. For discussion of sec. 8(a)(5) aspects, see pp. 135-136, below.

⁶² See, e.g., *Superior Maintenance Co.*, 133 NLRB 746.

⁶³ *Sidelo Fashions, Inc., et al.*, 133 NLRB 547.

⁶⁴ *New England Web, Inc., et al.*, 135 NLRB 1019, Chairman McCulloch and Members Fanning and Brown for the majority; Member Leedom dissenting on the ground that the order to reinstate locked-out employees as a group would, in effect, require the respondent to reopen its closed plant; Member Rodgers not participating.

⁶⁵ *Or-Wall Products Mfg. Co., Inc., et al.*, 135 NLRB 840, Members Fanning and Brown for panel majority, Member Leedom dissenting

to backpay for the period from the date of discharge to the date the transfer of operations would normally have occurred. And, in another case,⁶⁶ the Board made no provision for the restoration of the *status quo ante*, or reinstatement, or backpay, where the employer violated the section by reorganizing his printing department in such a manner as to eliminate the appropriateness of a unit of lithographic employees previously petitioned for by a lithographic union in a representation case. The Board found it unnecessary to order reinstatement or backpay, or to require the employer to restore the physical organization of the printing department to the *status quo ante* at the time of the representation proceedings, as no employee had been deprived of a job or suffered any economic loss, and an election had been directed in the representation proceeding to permit the employees to determine whether they desired to be represented by the lithographic union.

4. Discrimination for Filing Charges or Testifying

Section 8(a) (4) makes it an unfair labor practice for an employer to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under the Act.

During the past fiscal year, violations of section 8(a) (4) were found in situations where employees were discharged,⁶⁷ refused reemployment,⁶⁸ or otherwise discriminated against⁶⁹ for filing charges under the Act,⁷⁰ for refusing to withdraw charges against a union,⁷¹ for testimony before the Board in a representation or unfair labor practice proceeding,⁷² or for merely appearing at a representation proceeding for the purpose of giving testimony as a union witness, without actually testifying.⁷³

In one case, an employer was held to have violated section 8(a) (4), as well as section 8(a) (1), (2), and (3), by its joint action with a union of imposing unlawful conditions upon the reinstatement of a group of economic strikers. Here, upon the strikers' application for

⁶⁶ *Weyerhaeuser Co.*, 134 NLRB 1371.

⁶⁷ *Esgro, Inc.*, 135 NLRB 285; *Beiser Aviation Corp.*, 135 NLRB 433

⁶⁸ *Southern Electronics Co.*, 134 NLRB 80; *Bilton Insulation, Inc.*, 133 NLRB 665; *Brunswick Corp.*, 135 NLRB 574; *M Eskin & Son*, 135 NLRB 666; *Pratt & Whitney Aircraft Div. of United Aircraft*, 133 NLRB 158; *Peninsular & Occidental Steamship Co.*, 132 NLRB 10.

⁶⁹ See e.g., *Beiser Aviation Corp.*, 135 NLRB 399, where the employer violated the section by relieving an employee of his normal work by seating him in the center of its engineering room, demoting him to the job of ordinary mechanic, and requiring him to prepare a report on all instances where fellow employees were responsible for faulty engine assembly; and *Vita Foods*, 135 NLRB 1357, where the employer transferred an employee to a less desirable position

⁷⁰ *Esgro, Inc.*, above

⁷¹ *Peninsular & Occidental Steamship Co.*, above; *Brunswick Corp.*, above.

⁷² *Beiser Aviation Corp.*, above; *Southern Electronics Co.*, above; *Pratt & Whitney Aircraft Div. of United Aircraft*, above; *Bilton Insulation*, above.

⁷³ *Vita Foods*, above.

reinstatement, the employer conditioned their return to work on their obtaining union clearance, and the union, in turn, conditioned their reinstatement on the execution of documents providing for affirmation of the union as bargaining agent, reauthorization of checkoff, and the withdrawal of a petition and charges filed by another union on the strikers' behalf.^{74a}

5. Refusal To Bargain in Good Faith

Section 8(a) (5) makes it an unfair labor practice for an employer to refuse to bargain in good faith about wages, hours, and other conditions of employment with the representative⁷⁴ selected by a majority of the employees in an appropriate unit.⁷⁵

The employer's duty to bargain arises when the employees' majority representative requests the employer to recognize it and negotiate about matters which are subject to bargaining under the Act. As defined by section 8(d), the statutory duty to bargain includes the duty of the respective parties⁷⁶ "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party." However, "such obligation does not compel either party to agree to a proposal or require the making of a concession."

a. Duty To Recognize Majority Representative

(1) Certified Representative

When a Union's majority status is established by a Board certification, the Board, with Supreme Court approval,⁷⁷ requires the employer to bargain with that union for a reasonable period, ordinarily a year absent unusual circumstances.

During the past year, the Board ruled that the presumption of the certified union's continuing majority status during the normal 1-year period had not been rebutted by proof of such events as the valid discharge of a substantial number of the known union adherents in the

^{74a} *M. Eskin & Son*, above.

⁷⁴ "The term 'representatives' includes any individual or labor organization." Sec. 2(4) of the Act. The term "labor organization," as defined in sec 2(5), includes any organization in which employees participate and which exists, at least, in part, for the purpose of bargaining collectively with employers on behalf of employees.

⁷⁵ Sec. 9(a) makes the majority representatives the "exclusive representatives of all the employees" in the appropriate unit "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."

⁷⁶ The union's duty to bargain is discussed below, pp. 154-157.

⁷⁷ *Ray Brooks v. NLRB*, 348 U.S. 96 (1954). See Twentieth Annual Report (1955), pp. 121-122

unit;⁷⁸ the filing of decertification petitions signed by a substantial number of employees comprising the unit;⁷⁹ or the drastic reduction, for business reasons, of operations and personnel in the unit, from 130 employees to 23.⁸⁰ Following established practice, the Board also ruled that where an employer transferred the legal ownership of a business to a new employer during the certification year, and the character of the operations and of the unit remained substantially the same, the successor employer was bound by the certificate for its normal operative period, and therefore violated section 8(a)(5) by refusing to recognize and bargain with the union certified under his predecessor.⁸¹

The Board's policy of not reconsidering, in a refusal-to-bargain proceeding, matters which have been disposed of in a prior representation proceeding, was extended to include cases in which the Board denied a request for review of a regional director's unit determination.⁸² However, in *American Broadcasting Co.*,⁸³ a Board majority held that "where the disputed matter involves a legal, as distinguished from a mere policy, issue," the Board would reexamine, in the complaint proceeding, the underlying legal premise resolved in the representation proceeding, if it believes the earlier resolution to be incorrect, "particularly in view of supervening Supreme Court holdings."

In a number of cases, the Board was called upon to decide whether, and to what extent, an employer's breach of his duty to bargain during the certification year affected the employer's normal right to question the majority status of the certified union after the certification year. In *John S. Swift Co.*,⁸⁴ the employer had previously committed a section 8(a)(5)⁸⁵ violation during the fourth month of the certification year, and sought to challenge the Board's unfair labor practice findings in court litigation on the ground that the Board had erred in finding that the certified union was in fact the majority representative. After the court's enforcement of the Board's order, the employer refused anew to honor the union's bargaining requests on grounds of

⁷⁸ *John S. Swift Co., Inc.*, 133 NLRB 185.

⁷⁹ *Ridge Citrus Concentrate, Inc., et al.*, 133 NLRB 1178. In this case, while the Board adopted the trial examiner's findings that "a bargaining agent, freely elected by a majority of the employees as the union was here, cannot be unseated for a reasonable period thereafter [usually a year], notwithstanding a genuine change of heart by the employees," it was also in agreement with the trial examiner that the respondents prepared and caused to be circulated among the employees the petitions designed to oust the union, and that it therefore appeared that the employees' change of heart was not genuine and voluntary.

⁸⁰ *The Electric Furnace Co., et al.*, 137 NLRB No. 120.

⁸¹ *Howard Johnson's Inc.*, 135 NLRB 1260.

⁸² *The Mountain States Telephone & Telegraph Co.*, 136 NLRB 1612, enforced 51 LRRM 2666 (C.A. 10).

⁸³ *American Broadcasting Co.*, 134 NLRB 1458, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting.

⁸⁴ *John S. Swift Co., Inc.*, 133 NLRB 185.

⁸⁵ 124 NLRB 394 (1959), enforced in relevant part, 277 F. 2d 641 (C.A. 7), May 2, 1960.

genuine doubt of majority status, in view of the lapse of some 4 years since the union's demonstration of its majority in the Board election. Finding this refusal to be violative of section 8(a)(5), the Board reasoned that the employer's earlier unfair labor practices during the certification year had prevented the union from enjoying the full period of 1 year to establish bargaining relations, and that the union was therefore now entitled to enjoy a free opportunity to bargain.

In *Electric Furnace Co.*,⁸⁶ the employer refused to furnish, until immediately before the expiration of the certification year, pension information requested by the union some months before. After the end of the certification year, the employer challenged the union's majority status and conditioned further bargaining on the conduct of a new election. In asserting doubt of the union's majority, the employer relied upon the economic changes made during the certification year, which had resulted in a reduction in the size of the unit. The Board held that the employer's refusal to meet with the union after expiration of the certification year was in violation of section 8(a)(5). In its opinion, although the refusal to furnish pension information may not have been a factor in the possible loss of the union's majority, the employer's 5-month refusal to supply the needed data effectively prevented the union from bargaining for a contract during the certification year, when the majority status could not have been rebutted.

But, in *Midwestern Instruments*, the Board sustained the trial examiner's finding that, although the employer had breached his duty to bargain during the certification year by refusing to bargain on merit increases, such breach did not preclude the employer from lawfully questioning the union's majority status after the certification year had expired.⁸⁷ Here, the Board noted that there had been long and protracted negotiations which had otherwise been conducted in good faith, that the employer's refusal to bargain on the subject of merit increases had not created a bargaining impasse and had not otherwise prejudiced the union's conduct of bargaining, that toward the end of the certification year the employees had filed a decertification petition, and that the employer's conduct had not contributed to any defection in the unit.

And in another case,⁸⁸ where a substantial number of employees had sought to unseat a certified representative and, late in the certification year, had sent a petition to the employer so indicating, the Board held that the employer had not engaged in conduct violative of section 8(a)(5) by demanding, toward the end of the certification year, that

⁸⁶ *The Electric Furnace Co., et al.*, 137 NLRB No. 120.

⁸⁷ *Midwestern Instruments, Inc.*, 133 NLRB 1132. In view of its conclusions the Board held that it would not issue the usual order requiring the employer to bargain with the union upon request, but would remedy the breach of the employer's obligation to bargain on merit increases by directing it to so bargain when requested by a majority representative.

⁸⁸ *McCulloch Corp.*, 132 NLRB 201.

any contract resulting from the negotiations then being conducted be confined to the certification year, and by refusing, immediately after the end of the certification year, to meet and negotiate with the union unless it demonstrated its majority status anew.

During fiscal 1962, the Board followed its established policy of holding that even after the end of the certification year a presumption of a union's majority status continues.⁸⁹ In one case,⁹⁰ it noted that at the termination of the certification year this presumption becomes rebuttable, and the employer can, without violating the Act, refuse to bargain with the union on the ground that it doubts the union's majority, provided that the doubt is in good faith. Finding a complete absence of "a reasonable ground" for doubting the union's majority status, in this case the employers' refusal to bargain after the certification year was held violative of section 8(a) (5).

(2) Designated Representative

The Act does not require that a bargaining representative prove its majority status in a Board election as a condition precedent to bargaining.⁹¹ Thus, an employer may not condition the performance of his obligation to bargain with a majority-designated union on the conduct of a Board election, unless it entertains a good-faith doubt of the union's majority in the appropriate unit.⁹² During the past year, the Board continued to view the question of the employer's good faith as one to be resolved in each individual case on the basis of the particular facts.⁹³ And it continued to hold that an employer violates section 8(a) (5) when he insists on Board certification of a majority-designated union in order to gain time in which to undermine the union's status or to preempt his employees' enjoyment of their bargaining rights.

In *Snow & Sons*,⁹⁴ a Board majority found that an employer did not entertain any genuine doubt of the union's majority status, and accordingly violated section 8(a) (5) by conditioning recognition upon Board certification, although there was no independent evidence of employer hostility to organizational activities, where, pursuant to the employer's request, the union had previously demonstrated its ma-

⁸⁹ See *Carter Machine & Tool Co.*, 133 NLRB 247.

⁹⁰ *Ibid.*

⁹¹ See sec 9(a).

⁹² See, e.g., *Snow & Sons*, 134 NLRB 709 enforced 51 LRRM 2199 (C.A. 9); *Hamilton Plastic Molding Co.*, 135 NLRB 371; *Mitchell Concrete Products Co., Inc.*, 137 NLRB No 57.

⁹³ *Ibid.*

⁹⁴ *Snow & Sons*, above, Chairman McCulloch and Members Leedom, Fanning, and Brown for the majority, Member Rodgers dissenting on grounds that there was no proof that the employer was motivated by bad faith in requesting a Board-conducted election before granting the union recognition. See also *Mitchell Concrete Products Co., Inc.*, above.

⁹⁵ *Orkin Exterminating Co.*, 136 NLRB 630, Members Rodgers and Fanning for panel majority, Chairman McCulloch dissenting.

jority status by a card check. But, in another case,⁹⁵ a panel majority dismissed 8(a) (5) allegations charging the employer with bad-faith insistence on a Board election, as a condition of recognizing a majority-designated union in one of its several plants, where the union's bargaining request was so worded as to leave actual doubt as to whether the unit it sought was multi-plant or single-plant.⁹⁶ The majority reached this result, although the employer had demonstrated hostility to its employees' organizational activities by discriminatory discharges prior to the bargaining request, where the employer had voluntarily and promptly rescinded these discharges when "it became apparent that the men were in the Union and were being backed by that organization."

In still another case,⁹⁷ the Board held that an employer-purchaser of an established business did not violate section 8(a) (5) by refusing to bargain with the representative established under its predecessor, unless it obtained Board certification, because it had a good-faith doubt of the representatives' majority status. The Board noted that there had been a complete change in ownership, a substantial change in management, a modification in operations, a marked reduction in the number of employees, and an even more marked reduction in the number of employees formerly employed by the predecessor; the last election had been held approximately 18 years previously, the employer's willingness to agree to a consent election indicated that it "was not insisting upon an election for purposes of delay"; and it had not committed any unfair labor practices either before or after its insistence upon an election.

(3) Effect of Rival Claims

During fiscal 1962, the Board had occasion to define the employer's duty to bargain in the face of rival claims in a number of cases.

In one case, *Duralite Co., Inc.*,⁹⁸ the Board held that at a time when an incumbent union's contract is still in effect, an employer may not withdraw recognition from the incumbent, or refuse to permit the incumbent to continue to administer the contract or process grievances

⁹⁵ Normally an employer is not required to bargain where the union fails to make clear for what unit it is requesting bargaining, or where the unit, while clearly specified, is not an appropriate unit. However, a minor insubstantial variance between a requested unit and the unit found appropriate does not excuse an employer's refusal to bargain with the union. *Ash Market & Gasoline*, 130 NLRB 641 (1961). See also *Hamilton Plastic Molding Co.*, 135 NLRB 371, where the Board held that the union's failure to exclude specifically supervisors and clerical employees from its request for recognition did not justify the employer's refusal to bargain, even if the union intended to seek representation for supervisors and clerical employees, since the variance from what would otherwise have been an appropriate production and maintenance unit was minor and subject to modification, and the employer's refusal to meet and discuss the union's request for recognition foreclosed any clarification as to the scope of the requested unit.

⁹⁶ *Diamond National Corp.*, 133 NLRB 268

⁹⁸ 132 NLRB 425.

through its stewards, although its status is challenged by a rival.⁹⁹ Finding that the employer thereby violated section 8(a)(5), notwithstanding an unlawful welfare fund clause in the incumbent's contract, which removed the contract as a bar to the rival union's filing of a representation petition,¹ the Board noted that the presence of the unlawful clause did not justify the employer's resort to self-help. It cautioned, however, that it was not holding that the employer was under an obligation to bargain with the contracting union as to any future contracts, in view of the rival claim and petition which raised a real question concerning representation.²

In *Neo Gravure Printing Co.*,³ the employer refused to accord full recognition to a representative designated by the majority of the employees in a then unrepresented unit because of a jurisdictional claim from a union, representing another unit, which asserted that its contract with the employer covered the work performed by the unrepresented employees. The Board held that this employer violated section 8(a)(5) by unlawfully conditioning recognition of the majority-designated union upon written assurance that recognition would not result in a jurisdictional dispute—such assurance to consist of a signed renunciation of any jurisdictional claim by the other union. The Board rejected the contention that, under the *Midwest Piping* doctrine,⁴ the employer's duty of neutrality required that it not recognize the majority representative. According to the Board, this employer was not faced with conflicting claims for representation in the unit involved, as "a question of union jurisdiction over the type of work performed is not a question concerning representation of employees engaged in such work."

In *Radio Corporation of America*,⁵ an employer refused to negotiate with a local union, which was recently certified to represent a craft unit of maintenance electricians as to matters covered by a national agreement previously entered into between the employer and the local's international. In accord with the parties' past bargaining practices, the national agreement established certain conditions for all employees in the employer's various plants represented by the international or its locals in separate bargaining units, but left open for negotiation be-

⁹⁹ Compare *Harbor Carriers of the Port of New York, et al.*, 136 NLRB 815, where the Board found that an employer violated sec 8(a)(1), (2), and (5) by recognizing another union during the term of an effective contract with the incumbent on alleged grounds that the employees had disaffiliated from it and joined the other union.

¹ For contract bar, see discussion above, pp 53-56.

² See discussion above, p 102, as to Board's *Midwest Piping* doctrine, *Midwest Piping & Supply Co., Inc.*, 63 NLRB 1060 (1945).

³ 136 NLRB 1407.

⁴ See footnote 2, above.

⁵ 135 NLRB 980, Chairman McCulloch and Members Rodgers and Leedom for the majority, Members Fanning and Brown dissenting.

tween the locals and the employer supplementary agreements covering local issues. A Board majority held that the employer had not refused to bargain in good faith by insisting that the local was bound by the international agreement—which specified that any of its locals “hereafter” recognized would be covered by its terms—and by refusing to negotiate except as to matters which were local in nature.⁶

b. Subjects for Bargaining

The statutory duty to bargain extends to all matters pertaining to “rates of pay, hours of employment, or other conditions of employment.”⁷ Regarding such matters, the employer, as well as the employees’ representative, must bargain in good faith, although the statute does not require “either party to agree to a proposal or require the making of a concession.”⁸ But, in *McGregor & Werner, Inc.*,⁹ the Board did not interpret this to mean that a party is free to insist that an agreement be reached on one disputed matter falling within the mandatory area of bargaining before negotiating on any other subject.¹⁰

On the other hand, in nonmandatory matters, i.e., lawful matters unrelated to “wages, hours, and other conditions of employment,” the parties are free to bargain or not to bargain, and to agree or not to agree.¹¹ However, insistence by one party that the other accept a proposal involving a nonmandatory subject as a condition of bargaining on mandatory subjects violates the statutory bargaining obligation.¹²

In *Arlington Asphalt Co.*,¹³ the Board held that the employer’s proposal for an indemnification provision in a contract, in order to protect itself against monetary losses which might be caused by rival unions’ retaliatory measures, such as secondary boycotts, was not a mandatory subject for bargaining. It accordingly found that the employer’s insistence upon the inclusion of such a proposal as a condition for en-

⁶ *American Seating Co.*, 106 NLRB 250 (1953), was distinguished on the ground that the contract, in that case, which the Board held not binding on the newly certified bargaining representative, had been negotiated by an unsuccessful rival union representing the unit from which the new unit was severed. Here, the national contract was one negotiated by the union with which the new local was expressly affiliated

⁷ Secs 8(d) and 9 of the Act.

⁸ Sec. 8(d).

⁹ 136 NLRB 1306.

¹⁰ In this case, the Board held that the employer’s refusal to bargain on any of the union’s proposals until agreement was reached on the language of an employer-proposed antidiscrimination clause was in violation of sec. 8(a)(5).

¹¹ See *N.L.R.B. v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958); Twenty-fourth Annual Report (1959), pp. 78–79. See also Twenty-fifth Annual Report (1960), pp. 96–101.

¹² *Ibid.*

¹³ *Arlington Asphalt Co.*, 136 NLRB 742.

tering into any agreement with the certified union constituted a refusal to bargain in violation of section 8(a) (5).¹⁴

Similarly, in *Bethlehem Steel*,¹⁵ a Board majority held that an employer violated 8(a) (5) by insisting upon a bargaining proposal which would require an employee's signature to any grievance processed on his behalf by the union. But the majority also ruled that such matters as preferential seniority rights of union representatives, union security, and checkoff, as well as grievance procedures, were mandatory subjects of collective bargaining within the meaning of the Act, although the employer's unilateral action with respect to some of these matters was not, in the context presented, violative of section 8(a) (5).¹⁶

In *Erie Resistor Corp.*,¹⁷ the Board found that the granting of superseniority to striker replacements and to strikers returning before the termination of the strike inherently interfered with the employee exercise of the right to strike, and discriminated against employees validly exercising such a right, in violation of section 8(a) (1) and (3).¹⁸ It accordingly held that the employer violated section 8(a) (5) by insisting upon a contractual proposal for such superseniority as a condition of negotiating an agreement.¹⁹

(1) Decision To Subcontract Work

In the *Town & Country* case,²⁰ a Board majority specifically overruled the earlier Board holding in *Fibreboard*²¹ that an employer may unilaterally decide to subcontract a portion of its operations for economic reasons, without notifying and negotiating with the employees' representative with respect to such decision. Finding that the *Fibreboard* rule "unduly extends the area within which an employer may curtail or eliminate entirely job opportunities for its employees without notice to them or negotiation with their bargaining representative," the majority concluded that "the elimination of unit jobs, albeit for economic reasons, is a matter within the statutory

¹⁴ *Borg-Warner*, above, was cited to the effect that a mandatory bargaining subject is one which "is concerned with the relationship between the employer and its employees" Here, the indemnity proposal dealt with the employer's relations with other employers and unions *Bausch & Lomb Optical Co.*, 108 NLRB 1555 (1954), was distinguished

¹⁵ *Bethlehem Steel Co. (Shipbuilding Div.)*, 136 NLRB 1500, reconsidering and clarifying 133 NLRB 1347, Chairman McCulloch and Members Leedom, Fanning, and Brown for the majority, Member Rodgers dissenting in part.

¹⁶ See discussion below, p 142

¹⁷ 132 NLRB 621, enforcement denied 303 F. 2d 359 (C A. 3), May 15, 1962, certiorari granted 371 US 810, October 8, 1962. See also discussion below, p 209.

¹⁸ See discussion under sec 8(a) (3), pp. 107, 114-115, above.

¹⁹ See also *Griffin Pipe Div of Griffin Wheel Co.*, 136 NLRB 1667

²⁰ *Town & Country Mfg. Co., Inc., et al*, 136 NLRB 1022, Chairman McCulloch and Members Fanning and Brown for the majority, Member Rodgers dissenting, Member Leedom dissenting in part.

²¹ *Fibreboard Paper Products Corp.*, 130 NLRB 1558 (1961) ; Twenty-sixth Annual Report (1961), p. 111.

phrase 'other terms and conditions of employment' and is a mandatory subject" for bargaining. In this case, the majority held that the employer's action in terminating its trailer hauling department, discharging its drivers, and subcontracting its hauling work, because its drivers joined and selected the union as their representative, violated section 8(a)(5), as well as (3), since it "sought to disparage and undermine the Union as majority bargaining agent."²² It also held that "even if Respondent's subcontract was impelled by economic or I.C.C. considerations, we would nevertheless find that Respondent violated Section 8(a)(5) by failing to fulfill its mandatory obligation to consult with the Union regarding its decision to subcontract."²³

In another case, *Renton News*,²⁴ the Board found that newspaper publishers violated section 8(a)(5) and (1) by refusing to bargain about their intended discontinuance of, and contracting to another company, their composition work. While recognizing that the change in operations was necessitated by technological improvements, the Board pointed out that the effect of automation upon employment imposes a joint bargaining responsibility upon employers and employee representatives to explore the means for dissipating, at least in part, the adverse effect of changes in operations. It noted that this cannot be accomplished where, as here, no advance notice is given to the union.²⁵

However, in *Montgomery Ward*,²⁶ the Board held that an employer, who notified the union well in advance of its contemplated action to establish new terminals and to redomicile some of the existing unit employees, did not violate section 8(a)(5) by actually establishing the new terminals and transferring some unit drivers to them. Here, the union voiced no objection to the establishment of the terminals but indicated to the employer that its sole concern was whether the transferred drivers would remain in the local union and be subject to seniority and other provisions of the contract. According to the Board, dismissal of the complaint was justified because the union never requested the employer to bargain concerning the establishment of the terminals, and the parties' collective-bargaining agreement provided for a specific grievance procedure for settling such dispute.²⁷

²² For the 8(a)(3) violation, see above, p 112

²³ To the same effect see the decision in *Marathon-Clark Cooperative Dairy Assn*, 137 NLRB No. 91.

²⁴ *Renton News Record, et al*, 136 NLRB 1294, Members Fanning and Brown for panel majority, Member Leedom dissenting in part

²⁵ See also discussion of shutdown, transfer, and liquidation of operations below, pp 140-141.

²⁶ *Montgomery Ward & Co, Inc.*, 137 NLRB 418.

²⁷ Member Fanning relied solely on the fact that the union never requested the employer to bargain concerning the establishment of the terminals as grounds for dismissal, Member Brown relied solely on the fact that the union failed to follow established grievance procedure with which it could have resolved the particular dispute, Chairman McCulloch and Member Rodgers relied on both factors, Member Leedom not participating Cf *Hercules Motor Corp*, 136 NLRB 1648, discussed below, p 139

With respect to remedy, in *Town & Country*,²⁸ a Board majority framed its order with a view toward restoring the *status quo ante*. It directed the employer to resume its trucking operations, reinstate its discharged drivers with backpay, bargain with the union, and embody any understanding reached in a signed agreement. It also directed the employer to cease and desist from making any future unilateral changes in terms and conditions of employment without first consulting with the employees' designated bargaining representative. The majority concluded that "even were we to find that Respondent terminated its trucking operations for nondiscriminatory reasons, we would, in the circumstances of this case, order Respondent to abrogate its subcontract and bargain with the union over any future decision to subcontract those operations," and to reinstate its drivers with the appropriate backpay.²⁹ In *Renton News*,³⁰ however, the Board did not frame a remedial order restoring the *status quo ante*. Instead, it required the employers to bargain with the union only about the effects of the termination of operations upon the employees. There, the Board took into consideration the fact that economic necessity forced the respondents to change their method of operations to a totally different process requiring the participation of other newspapers and an individual, none of whom were parties to the proceeding. In view of these factors, it held that the issuance of the usual order would have a detrimental impact on those not parties to the proceeding, and would be punitive rather than remedial with respect to the respondents.³¹

(2) "Agency Shop"

Upon reconsideration, a Board majority vacated the prior decision³² in *General Motors Corp.*,³³ and found that an "agency shop" provision

²⁸ *Town & Country Mfg. Co., Inc., et al.*, above, Chairman McCulloch and Members Fanning and Brown for the majority, Member Rodgers dissenting, Member Leedom dissenting in part.

²⁹ See *Savoy Laundry, Inc.*, 137 NLRB No. 21. For previous cases with respect to resumption of terminated operations, see *The R. G. Mahon Co.*, 118 NLRB 1537 (1957), enforcement denied, 269 F. 2d 44 (C.A. 6, 1959); *Bonnie Lass Knitting Mills*, 128 NLRB 1396 (1960). See also Twenty-sixth Annual Report (1961), p. 98, footnote 45.

³⁰ *Renton News Record, et al.*, above.

³¹ See *Adams Dairy, Inc.*, 137 NLRB No. 87, Members Fanning and Brown for panel majority, Member Leedom dissenting in part, where the employer was held to have violated sec. 8(a)(5) by engaging independent distributors to take over the routes of its driver-salesmen without prior notice to, or consultation or bargaining with, the union. Inasmuch as the remedy for the sec. 8(a)(5) violation contained provisions for reinstatement and backpay (the customary remedies for an 8(a)(3) violation), the Board found it unnecessary to pass upon the trial examiner's conclusion that the termination of the employment of the driver-salesmen was violative of sec. 8(a)(3). See also *Greystone Knitwear Corp.*, 136 NLRB 573, where the Board noted that a sec. 8(a)(1) violation may, under certain circumstances, justify an order to bargain.

³² *General Motors Corp.*, 130 NLRB 481 (1961). See Twenty-sixth Annual Report (1961), p. 112.

³³ 133 NLRB 451, Chairman McCulloch and Members Rodgers, Fanning, and Brown for the majority, Member Leedom dissenting, enforcement denied, 303 F. 2d 428 (C.A. 6), June 8, 1962. See discussion below, p. 213-214.

in an existing national agreement, covering employees in a right-to-work State which permits such a provision, was a permissible form of union security under the Act, where the final decision as to membership or nonmembership in the union was left to each individual employee, *at his option*, but employment was conditioned upon the payment of a sum constituting each employee's share of financial support to his bargaining representative. Finding that such proposal was a mandatory subject for bargaining, the majority held that the employer's refusal to bargain concerning this proposal was violative of section 8(a)(5). In so holding, the majority noted that there was "no suggestion" here that membership in the union was not available to any nonmember employee who wished to join, and that the issues, as framed by the parties, did not require the Board to reach section 14(b) and the State's right-to-work law in deciding the case.

c. Violation of Bargaining Duty

An employer violates section 8(a)(5) not only by an outright refusal to bargain or meet with the majority representative of his employees,³⁴ but also by other conduct, in the course of negotiations or in the context of established contractual relations, which disregards his bargaining duty. During fiscal 1962, a number of cases turned on such questions as whether an employer was engaged only in "surface bargaining," thus violating his duty to explore in good faith a mutually satisfactory basis for agreement; whether he unlawfully restricted the right of the union to meet with him at reasonable times through its chosen negotiators; whether he unlawfully impeded the operation of the bargaining process by such conduct as refusing to furnish information requested by the union; and whether he undermined or disregarded the representation status of the union by unilaterally changing conditions of employment. Illustrative cases in these areas are discussed below.

(1) "Surface Bargaining"

In one case,³⁵ the Board held that an employer had not fulfilled his duty to bargain in good faith where, during negotiations with a union, the employer merely rejected the union's proposals, proffered its own, and made no effort to reconcile its differences with the union. And in another case,³⁶ a Board majority found a section 8(a)(5) violation where, during a contract term, the employer offered to increase commission rates for debit agents in the bargaining unit—as it was doing

³⁴ See, e.g., *Snow & Sons*, 134 NLRB 709; *Robert P. Scott, Inc.*, 134 NLRB 1120; *Cactus Petroleum, Inc.*, 134 NLRB 1254; *Oates Bros., Inc.*, 135 NLRB 1295.

³⁵ *Fitzgerald Mills Corp.*, 133 NLRB 877.

³⁶ *Equitable Life Insurance Co.*, 133 NLRB 1675, Chairman McCulloch and Members Leedom and Brown for the majority, Members Rodgers and Fanning dissenting in part.

for debit agents outside the unit—provided the union would approve, but then adopted a take-it-or-leave-it attitude when the union sought to bargain with respect to the employer's proposal.

On the other hand, in *Raleigh Water Heater*,³⁷ the Board reversed the trial examiner's finding that an employer's conduct during negotiations reflected on the employer's good faith and proved in its totality that the employer was engaged in "surface bargaining." Dismissing the section 8(a)(5) allegations, the Board found: (1) The employer's statement to the effect that there was no binding contract until agreement was reached on all its terms represented the adoption of a legal position, rather than a repudiation of prior commitments; (2) the employer's refusal to accede to the union's demands for the reinstatement of lawfully discharged employees, and its statement that it would not agree to a contract proposal requiring their reinstatement because of the pendency of charges before the Board with respect thereto, was neither a refusal to sign any contract nor an attempt to condition the signing of a contract on withdrawal of charges; (3) the employer's unilateral grant of wage increases to certain employees, in amounts previously offered the union during negotiations, did not prejudice the negotiations; and (4) the employer had engaged in no independent violations of 8(a)(1), and there was no evidence of the "type of tactics or attitude" upon which the Board normally relies in finding that a respondent had no real intention of reaching agreement.³⁸

(2) Imposing Restrictions on Employee Representative

In *Westinghouse Electric*,³⁹ the Board found that an employer violated section 8(a)(5) by imposing restrictions on meeting with the chairman of the union's negotiating committee who was not a member of the bargaining unit. Finding that the restrictions effectively deprived the union of the committee chairman's service, the Board held that while "an employer may consider its own convenience in setting limitations on bargaining meetings . . . it may not disregard the right of the bargaining representative to meet and negotiate with it at reasonable times, through its chosen negotiators."⁴⁰

(3) Refusal To Furnish Information

The statutory duty of an employer to bargain in good faith includes the duty to supply information which is "relevant and necessary to the

³⁷ *Raleigh Water Heater Mfg. Co., Inc.*, 136 NLRB 76

³⁸ The Board cited *Fitzgerald Mills Corp.*, above; *Herman Sausage Co., Inc.*, 122 NLRB 168 (1958), enforced 275 F.2d 229 (C.A. 5).

³⁹ *Westinghouse Electric Corp.*, 132 NLRB 406

⁴⁰ See also *Standard Oil Co.*, 137 NLRB No. 68, where, in finding a sec 8(a)(5) violation, the Board relied upon the employer's objection to meet with the bargaining agents of the union on grounds that "temporary International representatives" were present; *Oates Bros., Inc.*, 135 NLRB 1295, where the 8(a)(5) violation was based, in part, upon the employer's insistence that appointment of a union shop steward be subject to its approval.

union in order that it might carry on intelligent bargaining.”⁴¹ If the information sought directly relates to setting up wage rates, the union is not obliged to show specific need for such data, nor can any inference of harassment be drawn from the failure to show such need.⁴² Moreover, the possible incompleteness of the information sought does not make it irrelevant or unnecessary.⁴³

In one case,⁴⁴ the employer was held to have violated section 8(a)(5) by refusing to furnish, until immediately before the expiration of the certification year, information as to employees' pension benefits which was requested by the union 5 months previously. Although the pension fund covered all employees, both within and outside the unit represented by the union, and was financed solely by the employer,⁴⁵ the Board found that the employer's refusal to release the required data sooner “effectively prevented the union from any opportunity to negotiate a contract during the certification year.”⁴⁶

In *Hercules Motor Corp.*,⁴⁷ however, a Board majority held that an employer did not violate section 8(a)(5) and (1) by refusing to furnish the contracting union with certain time-study and job-evaluation data, regarding operations which were the subject of a grievance over the “equity” of rates established by the employer, and by refusing to permit the union's industrial engineer to enter the plant for the purpose of conducting independent time studies of the operations in question. The majority reasoned that this was not a case in which the union was denied information relating to contractual negotiations, the policing or administration of a contract, or the adjustment of a grievance, but a dispute over the interpretation of the contract—i.e., whether the matter was grievable—within the purview of specific contract provisions for resolution by the grievance procedure. According to the majority, the employer was justified in insisting upon the use of the grievance procedure rather than in having the matter submitted to the Board for resolution. It noted that to have the Board resolve the dispute under such circumstances would frustrate the Act's policy of promoting industrial stability through collective-bargaining agreements.⁴⁸

⁴¹ *John S Swift Co, Inc*, 133 NLRB 185.

⁴² *International Powder Metallurgy Co, Inc*, 134 NLRB 1605

⁴³ *Sinclair Refining Co*, 132 NLRB 1660, enforcement denied 306 F. 2d 569 (C.A. 5)

⁴⁴ *The Electric Furnace Co*, 137 NLRB No. 120.

⁴⁵ The Board distinguished *The Sylvania Electric Products, Inc. v NLRB*, 291 F 2d 128 (C.A. 1, 1961), reversing 127 NLRB 924 (1960), on the ground that, in the instant case, the union was not seeking an increase or adjustment of the employer's contribution to the pension plan, but was attempting to learn what pension rights would become available to certain laid-off employees

⁴⁶ For discussion of duty to bargain after certification year, see pp 127-130, above

⁴⁷ 136 NLRB 1648, Chairman McCulloch and Members Rodgers, Leedom, and Brown for the majority, Member Fanning dissenting. Cf *Sinclair Refining Co*, 132 NLRB 1660

⁴⁸ Compare *Montgomery Ward & Co., Inc*, 137 NLRB No. 41, discussed above at p 135 and footnote 27.

(4) Unilateral and Other Derogatory Action

The duty of an employer to bargain with the statutory representative of his employees includes the duty to refrain from taking unilateral action with respect to matters as to which he is required to bargain, and from making changes in terms and conditions of employment, without first giving the statutory representative an opportunity to negotiate concerning the contemplated action or change.⁴⁹

(a) Shutdown, transfer, and liquidation of operations

During the past year, a number of cases involved the effect of employer action in shutting down, transferring, and liquidating operations on the bargaining rights of the employees' representative.⁵⁰ In one case,⁵¹ an employer was found to have refused to bargain in good faith by shutting down its plant without consulting with the union, although the employer may have had economic justification for setting up a new out-of-State operation where labor costs were lower. While the employer offered to reopen the old plant, it conditioned such offer upon the union's acceptance of the employer's bargaining proposals. The Board reviewed such offer to be a device for wresting concessions from the union rather than a good-faith attempt to fulfill the duty to bargain.

In another case,⁵² an employer was held to have violated section 8(a) (5) by locking out and discharging its employees, and liquidating one of its operations, where such action was taken to avoid dealing with the union. To remedy the unlawful conduct and restore the status quo, a Board majority ordered reinstatement of the employees as a group and bargaining with the union, either at the closed plant, if the employer resumed its operation, or in other enterprises of the employer.⁵³ And in *W. L. Rives Co.*,⁵⁴ an employer was held to have violated section 8(a) (5) and (3) by unilaterally transferring certain work from employees represented by a certified union at one plant to employees at a newly established plant who were members of another union, notwithstanding the fact that the transfer was accomplished so that the employer might benefit from the use of the second union's label, without which the work in question was unacceptable to the employer's customers. Although it realized the em-

⁴⁹ See, e.g., *Servette, Inc.*, 133 NLRB 132. See also *N L.R.B. v. Benne Katz, etc., d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736, discussed below, pp. 199-200.

⁵⁰ For cases involving subcontracting of work, see above, pp. 134-136.

⁵¹ *Sidèle Fashions, Inc., et al.*, 133 NLRB 547, enforced 305 F. 2d 825 (C.A. 3).

⁵² *New England Web, Inc., et al.*, 135 NLRB 1019, enforcement denied 309 F. 2d 696, Chairman McCulloch and Members Fanning and Brown for the majority, Member Leedom dissenting in part with respect to the remedy, Member Rodgers not participating.

⁵³ For remedial aspects of shutdown, transfer, and liquidation of operations, see discussion under sec. 8(a) (3), above, pp. 124-126.

⁵⁴ 136 NLRB 1050.

ployer's predicament, the Board found no legal justification for the employer's failure to afford the first union an opportunity to bargain on the matter.

On the other hand, the Board dismissed a section 8(a) (5) and (3) complaint based, in part, upon the failure of an employer, who had shut down his operation after a good-faith impasse in bargaining over wages, to notify the union and inform it of employment opportunities when it reopened the plant for the purpose of completing unfinished contracts.⁵⁵ The Board reasoned that this reopening did not create employment opportunities for the discharged employees with respect to which the union should have been informed, and, in view of the impasse which had been reached in the negotiations prior to the shutdown, notification to the union would have constituted "a completely futile act."

(b) Terminating employee benefits

An employer's unilateral actions in terminating its share of an employees' group insurance program and withholding holiday pay during contract negotiations, without advance notice to or consultation with the union, were held violative of section 8(a) (5) in the *Crestline* case.⁵⁶ Here, the employer contended that it sought to impose economic pressure on the union to obtain a contract and that, under the Supreme Court's *Prudential Insurance* decision,⁵⁷ no violation of 8(a) (5) had occurred. Rejecting this defense, the Board noted that *Prudential* did not sanction the commission of unfair labor practices by either employer or union as a means of extracting contract concessions during bargaining negotiations.

In another case,⁵⁸ a panel majority found that an employer violated section 8(a) (5) and (1) by unilaterally discontinuing the payment of Christmas bonuses to bargaining unit employees with 5 years of service, while continuing bonus payments to unrepresented nonunit employees in accord with its past schedules.⁵⁹ Finding without merit the employer's contention that the payment of such bonuses was a

⁵⁵ *Precrete, Inc.*, 132 NLRB 986.

⁵⁶ *The Crestline Co.*, 133 NLRB 256.

⁵⁷ *N.L.R.B. v. Insurance Agents' International Union (Prudential Insurance Co.)*, 361 U.S. 477 (1960). It was noted in the *Crestline* case, above, that the *Prudential* case did not affect the Supreme Court's decision in *N.L.R.B. v. Crompton Highland Mills*, 337 U.S. 217 (1949), which upheld the Board's reasonable inference that a unilateral change in wages during negotiations was a rejection of the employer's obligation to bargain concerning such matters without derogating from the union's right to be consulted. See also *N.L.R.B. v. Benne Katz, etc., d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736, discussed below, pp. 199-200.

⁵⁸ *The American Lubricants Co.*, 136 NLRB 946, Members Rodgers and Leedom for panel majority, Chairman McCulloch dissenting in part.

⁵⁹ The majority found it unnecessary to decide whether, as alleged in the complaint, the discontinuance also violated sec. 8(a) (3), as such determination would not alter the scope of the remedial order. Chairman McCulloch dissented from the majority's failure to find the 8(a) (3) violation, but concurred on the 8(a) (5) findings.

management prerogative not mentioned in the negotiations which resulted in the existing contract, the Board ordered the employer to make whole those employees who had 5 years' service as of the date the bonuses were discontinued.⁶⁰

In the *Bethlehem Steel* case,⁶¹ a Board majority held that the employer violated section 8(a)(5) by unilaterally terminating the preferential seniority rights of union representatives and by altering the established grievance procedure, even after the expiration of the collective-bargaining contract, since both of these matters related to "wages, hours, and other terms and conditions of employment" and, consequently, were compulsory bargaining subjects.⁶² The majority, however, found no violation in the employer's unilateral refusal to adhere to the union-security and checkoff provisions of the expired contract. It held that since the acquisition and maintenance of union membership, and the checkoff provisions implementing the union security, cannot be made a condition of employment except under a contract which conforms to the proviso to section 8(a)(3), the union's rights thereto continued to exist only as long as the contracts remained in force.

B. Union Unfair Labor Practices

The several subsections of section 8(b) of the Act specifically proscribe as unfair labor practices seven separate types of conduct by labor organizations or their agents. In addition, section 8(e), added by the 1959 amendments, prohibits employers and labor organizations alike from entering into "hot cargo" type contracts.

Cases decided by the Board during fiscal 1962 under subsections (1), (2), (3), (4), (5), and (7) of section 8(b) as well as under section 8(e) are discussed below. No cases came to the Board for decision involving subsection (6) of section 8(b) which forbids so-called featherbedding practices.

1. Restraint and Coercion of Employees

Section 8(b)(1)(A) makes it an unfair labor practice for a labor organization or its agents "to restrain or coerce" employees in the

⁶⁰ See also *Toffenetti Restaurant Co., Inc.*, 136 NLRB 1156, where the Board found violations of the Act predicated on the employer's unilateral changes in its profit-sharing plan and in its anniversary or Christmas bonus payments.

⁶¹ *Bethlehem Steel Co. (Shipbuilding Div.)*, 136 NLRB 1500, modifying on reconsideration 133 NLRB 1347, Chairman McCulloch and Members Leedom, Fanning, and Brown for the majority, Member Rodgers dissenting in part.

⁶² The Board also affirmed the trial examiner's finding that the employer violated sec. 8(a)(5) by insisting to impasse in bargaining negotiations with the union upon its proposed contract clause requiring the signature of individual employees on grievances. See *N.L.R.B. v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).

exercise of their right to engage in or refrain from concerted activities directed toward self-organization and collective bargaining.

While section 8(b)(1)(A) also provides that it “shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein,” the Board has consistently held that this proviso does not permit a labor organization to enforce its internal rules so as to affect the hire or tenure of employees, and thereby to coerce them in the exercise of their statutory rights.⁶³

a. Forms of Restraint and Coercion

Section 8(b)(1)(A) is violated by conduct which independently restrains or coerces employees in their statutory rights without regard to whether the conduct also violates other subsections of 8(b). While employer violations of subsections (2) to (5) of section 8(a) have been held to constitute derivative violations of subsection (1)—which prohibits interference with, restraint, and coercion of employees in their section 7 rights—the Board has adhered to the view that there is no like relation between subsection (1) and other subsections of 8(b).⁶⁴

(1) Threats and Violence; Other Coercive Conduct

As heretofore, some of the cases under section 8(b)(1)(A) involved conduct by striking employees intended to compel other employees to participate in the strike or to observe picket lines. The Board has adhered to the view that such conduct coerced the strikers in whose presence the conduct took place, as well as the nonstrikers, and that the union was liable for coercive conduct by strikers committed in the presence of its representative and not repudiated by him.⁶⁵ The Board reiterated that a threat need not be effectuated to constitute a violation of the Act.⁶⁶

Strike activities found violative of section 8(b)(1)(A) included threatened physical violence of employees;⁶⁷ recordation by pickets of license numbers of automobiles of nonstriking employees accompanied by threats that the pickets would “get” the drivers;⁶⁸ exhortation of a union representative to the pickets not to let nonstrikers through the

⁶³ See Twenty-fourth Annual Report (1959), p 85

⁶⁴ *Ibid.*

⁶⁵ *Bonnaz Embroideries, etc., Local 66, Garment Workers (V. & D Machine Embroidery)*, 134 NLRB 879, Members Leedom and Fanning for panel majority, Member Brown dissenting. See also *United Steelworkers (Vulcan-Cincinnati, Inc.)*, 137 NLRB No 9, Chairman McCulloch and Member Brown for panel majority, Member Leedom concurring in part and dissenting on other issues.

⁶⁶ *Bonnaz Embroideries, etc., Local 66, Garment Workers (V. & D Machine Embroidery)*, above.

⁶⁷ *United Steelworkers (Vulcan-Cincinnati, Inc.)*, above.

⁶⁸ *Ibid.*

picket line;⁶⁹ and blocking ingress or egress at a struck plant.⁷⁰ Where, however, the alleged mass picketing did not block ingress or egress, the mere presence of a number of pickets at the plant gate did not itself violate the Act.⁷¹

Threats and violence directed against persons other than employees, such as the employer,⁷² peace officers,⁷³ and employees of neutral employers,⁷⁴ were found violative of section 8(b)(1)(A) when non-strikers or strikers witnessed or were likely to know of them.

In nonstrike situations, the Board continued to hold violative of section 8(b)(1)(A) express or implied threats by union representatives that antiunion activity would result in loss of employment.⁷⁵ The Board found tantamount to a threat of loss of employment opportunity, and therefore violative of section 8(b)(1)(A), a union contract provision which denied the use of the union's hiring halls for a period of 1 year to any previously registered employee who worked under nonunion conditions outside the area covered by the contract, even though the provision was never enforced against an employee.⁷⁶ Another union was found to have violated section 8(b)(1)(A) by conditioning the prosecution of grievances filed by employees who had attempted to disavow the union upon the employees' compliance with the discriminatory union demands.⁷⁷

(2) Illegal Union-Security and Employment Practices

The Board has consistently held that the execution, maintenance, or enforcement of illegal union-security and employment agreements, which condition employment on union membership, is not only violative of section 8(b)(2),⁷⁸ but is also violative of section 8(b)(1)(A)

⁶⁹ *Ibid.*

⁷⁰ *Bonnaz Embroideries, etc., Local 66, Garment Workers (V. & D. Machine Embroidery)*, above; *Local 5895, Steelworkers (Carrier Corp.)*, 132 NLRB 127, Chairman McCulloch and Members Leedom, Fanning, and Brown for the majority, Member Rodgers dissenting on another issue.

⁷¹ *United Steelworkers (Vulcan-Cincinnati, Inc.)*, above, Member Leedom would have found mass picketing.

⁷² *District 65, Retail, Wholesale & Department Store Union (I. Posner, Inc.)*, 133 NLRB 1555.

⁷³ *Local 5895, Steelworkers (Carrier Corp.)*, above.

⁷⁴ *United Steelworkers (Vulcan-Cincinnati, Inc.)*, above; *Local 5895, Steelworkers (Carrier Corp.)*, above.

⁷⁵ See, e.g., *Arlan's Department Store of Michigan*, 133 NLRB 802 (threat by union agent that those employees responsible for bringing in rival union authorization cards, and those signing them, would lose jobs unless they repudiated rival union). See also *A. O. Smith Corp., Granite City Plant*, 132 NLRB 339, 342 (threat of loss of employment if employees refused to revoke authorizations to petition the Board for an election to rescind authority of the union to make an agreement requiring membership in that union as a condition of employment).

⁷⁶ *District Council No. 19 and Local 334, Brotherhood of Painters, etc (Wilham B. G. Pitman Co.)*, 137 NLRB No. 69.

⁷⁷ *M. Eskin & Son*, 135 NLRB 666

⁷⁸ See below, pp. 148-154.

in that such action inevitably restrains and coerces employees in their section 7 right to acquire and maintain, or refrain from acquiring or maintaining, union membership.

The interrelated 8(b)(1)(A)–8(b)(2) cases decided during fiscal 1962 again involved unlawful hiring arrangements⁷⁹ and agreements giving preference to union members in terms of employment.⁸⁰

(3) Minority Union Activity

In June 1961 the Supreme Court, in *Bernhard-Altman*,⁸¹ held that it was a violation of section 8(b)(1)(A), as well as of section 8(a)(1) and (2), for an employer and a union to enter into an agreement in which the employer recognized the union as the exclusive bargaining representative of his employees when only a minority of those employees had authorized the union to represent them. On the basis of that decision the Board in a subsequent case found violative of section 8(b)(1)(A) the activities of a minority union which included negotiating amendments with a single employer to their existing contract, and presenting grievances on behalf of its employees although the employees were appropriately included in a multi-employer unit for which a rival union had been certified.⁸²

The Board continued to hold that a union violates section 8(b)(1)(A) by executing, maintaining, and enforcing a contract at a time when its majority status is tainted by illegal employer support.⁸³

2. Restraint and Coercion of Employers

Section 8(b)(1)(B) prohibits labor organizations from restraining or coercing employers in the selection of their bargaining representatives.

In one of the two cases where unions were charged with having violated section 8(b)(1)(B) during the past year,⁸⁴ the union demanded single-employer bargaining with certain employer-members of a "successor" employer association. In reversing the trial examiner, the Board held that the union was not bound to bargain with

⁷⁹ *Shipwrecking, Inc.*, 136 NLRB 1518 (noncontractual hiring practice requiring all employees to be union members); *Porter-DeWitte Construction Co., Inc.*, 134 NLRB 963 (practice of requiring nonmembers of the union to pay for employment clearance a weekly permit fee amounting to twice the amount paid by union members as dues).

⁸⁰ *Teamsters, etc., Hawaii Local 996, et al. (Twentieth Century-Fox Film Corporation)*, 134 NLRB 1556 (closed-shop contract).

⁸¹ *International Ladies' Garment Workers' Union (Bernhard-Altman Texas Corp.) v. N.L.R.B.*, 366 U.S. 731.

⁸² *Michigan Advertising Distributing Co.*, 134 NLRB 1289, Chairman McCulloch and Members Rodgers, Leedom, and Brown for the majority, Member Fanning dissenting on ground that the employer had withdrawn from the multiemployer unit.

⁸³ *Shipwrecking, Inc.*, above.

⁸⁴ *Hoisting & Portable Engineers, Local Union No. 701, etc. (Cascade Employers Assn., Inc.)*, 132 NLRB 648.

the association as a multiemployer representative within the meaning of section 8(b)(3), since the new, enlarged association did not succeed to the predecessor's bargaining history, and the union's *voluntary* bargaining with the new association was insufficient to establish a multiemployer bargaining unit. In the same respect, the union was held not bound to accept the new association as a multiemployer bargaining representative under section 8(b)(1)(B), and since the association did not represent the employers involved on a single-employer basis, the union's demands for single-employer bargaining were held lawful.

Section 8(b)(1)(B) illegality in the other case⁸⁵ turned on whether the union's statements that it would not meet with the employer's representative while the employer's court and Board litigation were outstanding constituted an unlawful attempt to dictate the employer's choice of bargaining representatives as well as a refusal to bargain under section 8(b)(3). Although the Board found, contrary to the trial examiner, that the union's conduct constituted an unlawful refusal to bargain, it adopted the trial examiner's view that the same conduct did not violate section 8(b)(1)(B), since the record failed to establish that the employer informed the union that the attorney who represented it in the injunction suit was also its representative in collective bargaining, and the statement, in context, indicated only that the union would not meet with the attorney to settle the injunction dispute before the date set for trial.

3. Causing or Attempting To Cause Discrimination

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

The cases arising under section 8(b)(2) during fiscal 1962 were concerned, for the most part, with illegal union-security requirements, and unlawful hiring arrangements and practices, which resulted in closed-shop conditions, or otherwise conditioned employment opportunities on union membership or other union requirements.⁸⁶

⁸⁵ *International Assn. of Bridge, Structural & Ornamental Ironworkers, Local 600 (Bay City Erection Co.)*, 134 NLRB 301.

⁸⁶ For illegal employer participation in such practices, see chapter on sec. 8(a)(3) violations, pp. 115-121, above.

a. Forms of Violations

The cases under section 8(b) (2) have continued to present both individual instances of unlawful union conduct directed against employees because of their lack of union membership⁸⁷ or their failure to observe union rules,⁸⁸ as well as instances of union agreements or arrangements with employers unlawfully conditioning employment on union membership⁸⁹ or performance of union obligations.⁹⁰

To establish a violation under the first part of section 8(b) (2), the respondent union must be shown to have caused, or attempted to cause, an employer to discriminate against employees in violation of section 8(a) (3). Thus, a number of cases decided during the year turned on issues as to (1) what constitutes "cause" or "attempt to cause," and (2) whether the employer's action sought by the union would, if granted, have violated section 8(a) (3).

The Board has consistently held that to find that a union caused prohibited employer discrimination, it is not necessary that an express demand for discrimination be made. Thus, in *St. Joe Paper Co.*,⁹¹ the Board held that a union violated section 8(b) (2) by causing two different employers to discharge an employee because he was not a member in good standing in the union, having been previously expelled, although no direct request for discharge was made. In finding that the union had "caused" one of the discharges, the Board relied upon the union president's statements to the employer's general manager that the discriminatee was "a troublemaker," "a bad actor," "a problem," one who "had to be watched," and that "he was always running to the Labor Board."

Where the union's request that an employee be given preference over another by the employer did not result in discrimination contrary to section 8(a) (3), the Board found no violation by the union. Thus, a Board majority reversed a trial examiner's conclusion in one case⁹² that it was unlawful *per se* for the union to request that the employer

⁸⁷ See, e.g., *Local 592, United Brotherhood of Carpenters & Joiners (Brunswick Corp.)*, 135 NLRB 999, *St. Joe Paper Co.*, 135 NLRB 1340; *IBEW, Local 861 (Ace Electric Co.)*, 135 NLRB 498; *Sightseeing Guides, etc., Local 20076 (ABT Sightseeing Tours)*, 133 NLRB 985

⁸⁸ See, e.g., *ILA, Local 1408 (Caldwell Shipping Co.)*, 134 NLRB 1669 (union rule required members to have their membership cards with them at all times and employee did not have his card in his possession); *Brunswick Corp.*, 135 NLRB 574 (employee disregarded union rule regarding quitting time)

⁸⁹ *Duralite Co., Inc.*, 132 NLRB 425 (enforcement of arrangement making membership in unlawfully recognized union a condition of employment).

⁹⁰ *Paul Brazevich d/b/a M. V. Liberator*, 136 NLRB 13 (contract required (1) payment of dues or support money to the union without allowing the statutory 30-day grace period, (2) payment of unspecified nonperiodic assessments, (3) execution of involuntary checkoff authorizations, and (4) forfeiture of earnings by all employees who failed to pay such amounts).

⁹¹ *St. Joe Paper Co.*, above.

⁹² *International Hod Carriers, Local 7 (Yonkers Contracting Co., Inc.)*, 135 NLRB 865, Chairman McCulloch and Members Fanning and Brown for the majority, Member Rodgers dissenting, Member Leedom not participating.

prefer an employee in the unit it represented for a job vacancy, rather than hire an outside applicant who was also a union member. The majority pointed out that it is a union's function to attempt to obtain benefits for the employees it represents and that the union was performing that function by inducing the employer to fill desirable new jobs from within the working force rather than hiring from outside. Although such action might encourage union membership, the majority held that it is a type of encouragement permitted by the Act. Similarly, where an employer laid off an out-of-town employee as the result of the union's request that out-of-town employees be laid off first, the Board refused to infer that the layoff was caused by the fact that the employee was not a member of the union.⁹³ A contrary decision was reached, however, and violations found by a Board majority in *Animated Displays Company* where the respondent district council, which represented both carpenters and decorators in its contract with the employer, caused the discharge of an employee who had been hired as a decorator but was working as a carpenter, in conformance with an understanding between two of the council's locals that decorators would not be employed at carpentry work if carpenters were on layoff.⁹⁴

(1) Illegal Employment Agreements and Practices

The Board has consistently held that a union violates section 8(b)(2) by entering into or maintaining an agreement or practice which requires in effect that preference in hiring be given to the contracting union's members, or otherwise establishes hiring practices that result in closed-shop conditions.⁹⁵ However, where an exclusive hiring or referral agreement or arrangement is nondiscriminatory on its face, discrimination must be proved. Thus, in one case, a Board majority dismissed a complaint in the absence of clear evidence of discrimination, stating that "the point that the hiring arrangement conceivably could have been utilized in a discriminatory manner does not in any way establish that the hiring arrangement in fact was so utilized by Respondents and this employer."⁹⁶

⁹³ *Bricklayers, etc., Local 2 (Wilputte Coke Oven Div., Allied Chemical Corp.)*, 135 NLRB 323.

⁹⁴ *Animated Displays Co.*, 137 NLRB No. 99, Members Rodgers, Leedom, and Brown for the majority, Chairman McCulloch and Member Fanning concurring in part and dissenting in part, would have found no violation in the council's action, as such action was taken by the council in its role as bargaining representative for all the employees in seeking to accommodate their varying interests.

⁹⁵ See, e.g., *Sightseeing Guides, etc., Local 20076 (ABT Sightseeing Tours)*, above, *Teamsters, etc., Hawaii Local 996 (Twentieth Century-Fox Film Corp.)*, 134 NLRB 1556; *Yuba Consolidated Industries*, 136 NLRB 683.

⁹⁶ *Local 694, United Brotherhood of Carpenters & Joiners of America (Jervis B. Webb Co.)*, 133 NLRB 52, Members Fanning and Brown for panel majority, Member Rodgers dissenting, would have found that secs. 8(b)(2) and 8(b)(1)(A) had been violated. See also *Bricklayers, etc., Union No. 28 (Plaza Builders, Inc.)*, 134 NLRB 751. In *Local 592, United Brotherhood of Carpenters & Joiners (Brunswick Corp.)*, above, the Board held that a single instance of discharge was not sufficient to establish the existence of an illegal hiring practice.

Prior to the decision of the Supreme Court in *Local 357, Teamsters*⁹⁷ on April 17, 1961, the Board had found violations of section 8(b) (2) in situations where exclusive hiring hall arrangements were operated without the safeguards specified in the Board's *Mountain Pacific* rule.⁹⁸ Thus, violations were found in *Petersen Construction Corp.*,⁹⁹ where individuals were discharged or denied referrals or clearance pursuant to, and in implementation of, an exclusive hiring contract, and in *Local 450, Operating Engineers (Procon)*,¹ where the respondents had entered into and maintained a rotation arrangement obligating the employer to hire new crews for new construction work, using the union hiring hall as the exclusive source of such employees.

After the Supreme Court's decision in *Local 357*, wherein, *inter alia*, the Court held that exclusive hiring hall contracts are not illegal *per se*, and that the Board is without jurisdiction to prescribe criteria for the maintenance of such contracts but is limited to the elimination of discrimination, the Board reconsidered its decision in *Petersen Construction Corp.*, and held that the respondents had not violated the Act by maintaining and enforcing their contract with exclusive hiring and referral clauses which did not contain the *Mountain Pacific* safeguards. Since the contract was lawful, the discharges thereunder were likewise lawful.² The Board also reconsidered its decision in *Local Union No. 450, Operating Engineers* on remand from the court of appeals, and dismissed in its entirety the complaint alleging unlawful hiring arrangements, since an understanding merely providing for a system of rotating jobs among "people . . . loafing in the hall" was insufficient to establish that an agreement was entered into which obligated the employer to hire only union members, absent a showing that the hall was not equally available to nonmembers. In the absence of an unlawful arrangement, the union's demands that the employer follow the job rotation system, and the consequent layoffs, were not violative of the Act. In addition, no violation of the Act could be predicated upon failure of the arrangement or understanding to comply with *Mountain Pacific*.³

In a number of other cases, the Board held that where hiring hall and referral provisions are found lawful under the decision in *Local 357*, no violation can be found in the absence of specific evidence that the hiring hall and referral provisions were enforced in a discrimina-

⁹⁷ *Local 357, Teamsters v. N.L.R.B. (Los Angeles-Seattle Motor Express)*, 365 U.S. 667

⁹⁸ See *Mountain Pacific Chapter of the Associated General Contractors, Inc.*, 119 NLRB 883 (1957).

⁹⁹ 128 NLRB 969 (1960).

¹ 129 NLRB 937 (1960).

² *Petersen Construction Corp.*, 134 NLRB 1768.

³ *Local 450, Operating Engineers (Procon)*, 133 NLRB 1312.

tory manner.⁴ In one case, a business agent's refusal to clear union members for employment, thereby causing their dismissal from a construction job, was held not violative of section 8(b)(2) where he did so not for discriminatory reasons but because he had selected men for the job from those registered on the union's work list, a right which had lawfully accrued to the union pursuant to the agreement with the employer. Although the agreement was oral and did not, as in *Local 357*, specifically provide against discrimination because of "presence or absence of union membership," those factors were considered not controlling.⁵

In *Southern Stevedoring & Contracting Co.*,⁶ however, the Board, although finding that the respondents had not violated the Act through entering into and maintaining a contract providing for an exclusive hiring hall, since the language thereof expressly provided that hiring shall be on a nondiscriminatory basis,⁷ found the parties had violated section 8(a)(3) and (1) and 8(b)(1)(A) and (2). In that case the employer had acquiesced in the unions' demand that all stevedores hired for ship-unloading jobs be members of the respondent unions, resulting in a discriminatory shapeup from which, of more than 200 men hired on 3 vessels, only 2 or 3 were nonmembers of the respondent unions. The unions' demand was tantamount to a demand for a closed shop, which is not permitted under the Act. Another union was held to have violated section 8(b)(1)(A) and (2) where, although its referral contract provided for registration and referral in four categories according to experience and length of residence in the local geographical area, in actual practice the union maintained only two lists: union membership in good standing was the subjective qualification for placement on the priority referral list, and all others were placed

⁴ See, e.g., *Pipe Fitters Local Union No. 392, etc. (Alco Products, Inc.)*, 136 NLRB 492, *United States Lines Co.*, 133 NLRB 27; *Mason Contractors Exchange of So. Calif., Inc.*, 132 NLRB 839; *Hod Carriers, etc., Local 324 (Roy Price, Inc.)*, 134 NLRB 661.

⁵ *Local Union No. 106, United Brotherhood of Carpenters & Joiners of America (Otis Elevator Co.)*, 132 NLRB 1444. See also *Laborers & Hod Carriers etc. Local 652 (Hood-River-Neill)*, 135 NLRB 43; and *Millwrights & Machinery Erectors Local 2471 (Otis Elevator Co.)*, 135 NLRB 79, wherein the Board held that employment of the alleged discriminatees, nonmembers of the local union, would have been violative of the lawful hiring hall agreement, and the local union had no obligation to represent them. In *American Flint Glass Workers' Union, etc. (Glass Container Mfrs Institute)*, 133 NLRB 296, Chairman McCulloch and Members Leedom, Fanning, and Brown for the majority, Member Rodgers dissenting, the majority refused to interpret a contractual requirement that employees be "journeymen mould makers" to mean members of the union.

⁶ *Southern Stevedoring & Contracting Co.*, 135 NLRB 544, Chairman McCulloch and Members Rodgers and Leedom for the majority, Member Fanning concurring in part and dissenting in part, Member Brown not participating.

⁷ The union's use of cards which authorized payment of a percentage of employees' wages to the locals and designated the locals as collective-bargaining representatives of the employees was also held lawful, in the absence of evidence that employees were required to sign the cards as a condition of employment.

on a second priority referral list, thus conditioning job referral priority on membership in good standing.⁸

The Board also reconsidered its prior decision in the *Houston Maritime Association* case,⁹ in the light of *Local 357, Teamsters*,¹⁰ and, contrary to its previous decision, dismissed the allegation that the employers and union violated the Act by entering into and maintaining a contract which delegated to the union unilateral control over selection of gang foremen who are granted effective authority by the contract to hire employees, because the contract was not invalid on any basis apart from the absence of *Mountain Pacific* safeguards. Further, in view of the decision of the Supreme Court in the *News Syndicate* case¹¹ the Board also dismissed the allegation that the employers violated section 8(a) (2) by acquiescing in the unilateral selection by the union of gang foremen who are supervisors.¹²

(2) Illegal Union-Security Agreements and Practices

The Act's limitations on the right of labor organizations and employers to make and enforce agreements conditioning employment on union membership are—as stated earlier in this report¹³—contained in the so-called union-security proviso to section 8(a) (3), as supplemented by section 8(f) relating to the building and construction industry.

Union-security agreements which fail to conform to any one of the statutory requirements have been held to subject the affected employees to unlawful discrimination. A union which seeks to compel an employer to enter into such an agreement, or executes or maintains such an agreement, thereby violates section 8(b) (2) which prohibits unions from attempting to cause, as well as causing, unlawful discrimination. Violations of this type were found during fiscal 1962 in the maintenance of union-security agreements which were unlawful in that they provided for closed-shop conditions and committed the

⁸ *Intl. Assn. of Bridge, Structural & Ornamental Ironworkers, Local 600 (Bay City Erection Co.)*, 134 NLRB 301.

⁹ 121 NLRB 389 (1958).

¹⁰ See p 149 and footnote 97, above.

¹¹ *N L R B. v. News Syndicate*, 365 U S. 695

¹² *Houston Maritime Assn. Inc. & Master Stevedore Assn of Texas*, 136 NLRB 1222. See also *New York Mailers' Union, Local 6, ITU (New York Times Co)*, 133 NLRB 1052, wherein the Board held, on the basis of the Supreme Court decision in the *News Syndicate* case, that the contract did not create closed-shop and preferential employment conditions or delegate to the union control over employment seniority and priority for mailroom employees and therefore was not violative of section 8(b) (2) and (1)(A). The Board restated the Court's further findings that (1) the contract giving foremen hiring authority was not unlawful on its face even though foremen were union members because (a) the contract did not require employees to be union members, (b) the contract made foremen solely the employer's agent, and (c) there is no assumption that employers and unions will violate Federal law; and (2) a provision in the contract, which incorporated only general laws of the union "not in conflict with this contract or with federal or state law" was not *per se* unlawful, since it excluded any discriminatory rule or regulation of the union from incorporation.

¹³ See p. 115, above.

employer to utilize the union as the exclusive source of its drivers and special equipment operators,¹⁴ or required payment of dues or support money to the union without allowing the statutory 30-day grace period, payment of unspecified nonperiodic assessments, execution of involuntary checkoff authorizations, and forfeiture of earnings by all employees who failed to pay such amounts.¹⁵

In the *New York State Electric & Gas Corporation* case,¹⁶ the Board had occasion to rule on whether a union-security clause requiring new employees to apply for membership "within 30 days after date of their employment" was a lawful union-security requirement. A majority of the Board, following the *Al Massera* case,¹⁷ held the provision lawful since the phrase "within 30 days," in ordinary understanding, is equivalent to the statutory "on or after the thirtieth day" provided in section 8(a) (3), and accords new employees the full statutory 30-day grace period.¹⁸

Section 8(b) (2) and 8(b) (1) (A) violations were also found where the respondent union enforced valid union-security clauses in a manner not permitted by the Act. Thus, in one case the Board held that a union violated the Act by demanding the discharge of an employee under a valid union-security contract for failure to pay dues, where the employee had, in fact, effectively withdrawn from the union prior to the execution of the current contract and therefore was under no obligation to maintain membership in the union or pay dues.¹⁹ A similar decision was reached in another case where 10 employees had resigned from the union before the employer and the union executed their new contract. The Board rejected the union's contentions that since the employees had not resigned in accordance with the procedure established by its constitution and bylaws, their resignations were ineffective, and that the action taken by the union in requesting their discharge and filing a grievance upon the employer's refusal to discharge them was privileged under the proviso to section 8(b) (1) (A),

¹⁴ *Teamsters, etc., Hawaii Local 996 (Twentieth Century-Fox Film Corp)*, 134 NLRB 1556

¹⁵ *Paul Biasevich d/b/a M. V. Liberator*, 136 NLRB 13.

¹⁶ 135 NLRB 357, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting.

¹⁷ 101 NLRB 837 (1952).

¹⁸ The Board overruled *Chun King Sales*, 126 NLRB 851 (1960) (Member Fanning dissenting), to the extent the holding therein is inconsistent with the instant case.

¹⁹ *May Department Stores, Inc., etc.*, 133 NLRB 1096. The employer was held to have violated sec 8(a) (3) and (1) of the Act by discharging the employee without investigating her claim that she had withdrawn from the union, the Board finding that under the circumstances the employer was under an obligation to seek verification of the validity of the union's demand and was not justified in accepting the union's statement as to dues obligation without further investigation.

which confers on unions the right to “prescribe . . . rules with respect to the . . . retention of membership.”²⁰

(a) Tender of dues

The Act permits the discharge of employees for failure to make a proper tender of the dues and initiation fees required by a valid union-security contract, if that is the real reason for the discharge and not merely a pretext for denying or terminating membership for some other reason.

In the *Aluminum Workers* case,²¹ the Board previously enunciated the rule that where an employee is in default of his union dues lawfully required under a valid union-security agreement, it is violative of section 8(a) (3) and (1) and 8(b) (1) (A) and (2) to discharge the employee on the basis of a prior timely request therefor if, at any time before the discharge is actually effected, the employee makes full and unqualified tender of such dues to the union. The *General Motors* case²² afforded the Board an opportunity to reexamine the *Aluminum Workers* rule, which rule the Board held—

is at odds with the congressional purpose of allowing parties to collective-bargaining relationships to enter into and effectively enforce union-shop agreements requiring membership in the union as a condition of employment. For, as illustrated by the circumstances of this case, there can be little if any union security if dissident members can frustrate the orderly administration of lawful collective-bargaining agreements by delaying payment of dues and fees they are lawfully obligated to pay until the last minute before their actual discharge. We shall therefore no longer apply the *Aluminum Workers* rule when the tender occurs after a lawful request, but shall in all such cases look to the record to determine the real reason for the parties' subsequent conduct.

As the record in *General Motors* established that the union requested the employee's discharge not for any unlawful purpose but solely because he was delinquent in his dues, and that the employer discharged him for such delinquency as it was required to do by the valid union-security agreement in effect between them, the Board found no violations even though the employee offered to pay the union his delinquency prior to his discharge.²³

When a union requires a new employee to perfect membership under a lawful security agreement, it has a duty to notify the employee, at

²⁰ *International Union, United Automobile, Aircraft, & Agricultural Implement Workers, etc. (John I. Paulding, Inc.)*, 137 NLRB No. 104. The Board further held that, except as permitted by the sec. 8(a) (3) proviso, the union's right to prescribe rules does not extend to interference with the relationship between employee and employer.

²¹ *Aluminum Workers Intl. Union, Local 135 (Metal Ware Corp.)*, 112 NLRB 619 (1955).

²² *General Motors Corp., Packard Electric Div.*, 134 NLRB 1107.

²³ In joining the majority opinion, Member Brown did not view the decision as determining whether the validity of the discharge action is contingent upon a specific request for discharge before a belated tender is made.

some point, as to what his membership obligations are. Thus, in *Philadelphia-Sheraton Corporation*,²⁴ the Board held that the union violated section 8(b) (1) (A) and (2) by causing the employer to discharge two employees, pursuant to a lawful union-security agreement, for alleged dues delinquency, where both employees had paid their initiation fees but at no time was either told the amount of his regular dues or when such payments were to be made. Having failed in its duty to apprise the employees of their dues-paying obligations, the union could not justifiably demand their discharge for failure to perform such undisclosed obligations.

(b) Construction industry

Although section 8(f) permits an employer and a union to enter into prehire agreements in the construction industry without requiring a labor organization to first establish majority status in the bargaining unit prior to the entering of such an agreement, a union was held to have violated section 8(b) (1) (A) and (2) by entering into such an agreement covering employees engaged in building and construction, where the employer had assisted the union in obtaining membership applications and checkoff authorization cards, since section 8(f), by its express terms, does not validate prehire agreements where the union had been "established, maintained, or assisted by any action defined in section 8(a) . . . as an unfair labor practice." In short, the Board stated, "the validity which section 8(f) gives to prehire agreements is removed where it is shown that the union has been illegally 'established, maintained or assisted' by the employer."²⁵

Section 8(f) (2) permits union-security agreements in the building and construction industry requiring as a condition of employment membership in a union "after the seventh day" following the beginning of employment. In *J. W. Bateson Co., Inc.*,²⁶ the Board held that an employer and a union violated section 8(a) (3) and (1), and 8(b) (2) and (1) (A), respectively, by executing and maintaining a union-security contract which required union membership of construction employees "no later than" the seventh day, since the contract did not provide a full 7-day grace period as required by section 8(f) (2) before employees were required to join the union.

4. Refusal To Bargain in Good Faith

Section 8(b) (3) prohibits a labor organization from refusing "to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a)."

²⁴ 136 NLRB 888.

²⁵ *Bear Creek Construction Co.*, 135 NLRB 1285.

²⁶ 134 NLRB 1654.

Under section 8(d), the performance of the statutory duty to bargain includes the duty of the respective parties, unions and employers²⁷ alike, to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party.” However, “such obligation does not compel either party to agree to a proposal or require the making of a concession.”

As in the case of employers, the union’s duty to bargain extends only to an appropriate bargaining unit. Thus, in *Cascade Employers Assn.*,²⁸ the Board dismissed a section 8(b)(3) complaint which alleged that the union unlawfully refused to bargain with a “successor” employer association. The Board held that the new, enlarged association did not succeed to its predecessor’s bargaining history. And the fact that the union voluntarily bargained with the new association during a period of some months was held to have been insufficient to establish the association as a multiemployer bargaining unit binding upon the union.

a. Bargaining Demands

The statutory representative of an appropriate employee unit—as in the case of the employer²⁹—must bargain as to all matters pertaining to “wages, hours, and other terms and conditions of employment.” In other matters which are lawful, bargaining is permissible though not mandatory. But insistence on inclusion in a contract of clauses dealing with matters outside the category of bargaining subjects specified in the Act, as a condition of bargaining on mandatory matters, constitutes an unlawful refusal to bargain.³⁰

In the *Mill Floor Covering* case,³¹ the question of participation in an industry promotion fund was held to be a permissive, rather than a mandatory, subject of bargaining, because it concerned neither wages, hours, nor a term or condition of employment. The Board, therefore, held that a union’s insistence on bargaining with respect to the employer’s participation in such a fund was violative of section 8(b)(3). The Board held that an industry promotion fund is outside the employment relationship, since it concerns itself with the relationship of employers to one another or, like advertising, with the relation-

²⁷ The employer’s duty to bargain is discussed above, pp. 127–142

²⁸ *Hoisting & Portable Engineers Local 701, Operating Engineers (Cascade Employers Assn., Inc.)*, 132 NLRB 648.

²⁹ See above, pp. 133–137.

³⁰ *N.L.R.B. v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958); Twenty-third Annual Report (1958), pp. 104–106.

³¹ *Detroit Resilient Floor Decorators, Local 2265, Carpenters (Mill Floor Covering, Inc.)*, 136 NLRB 769

ship of an employer to the consuming public. The Board pointed out that while it intends to keep pace with changing conditions "to insure that bargaining for new forms of 'wages' or for hitherto undeveloped terms or conditions of employment is not restricted," it is not empowered "to lend its sanctions of enforcement either to encourage or to discourage experimentation, through the bargaining process, in areas which are outside the employment relationship altogether, or which, at best, touch it only peripherally." It also emphasized that its finding here does not imply that parties are not free to include provisions of this type in collective-bargaining agreements—only that there is no obligation that either party bargain thereon.

In one case,³² a union was held to have violated section 8(b) (3) by insisting as a condition precedent to entering into negotiations with the employer that the employer withdraw its unfair labor practice charges filed against the union. In another case,³³ a Board majority based its finding of an 8(b) (3) violation solely upon the unions' violation of section 8(b) (1) (B)—coercing the employers in the choice of a bargaining representative. And in a third case,³⁴ the Board found that a union violated section 8(b) (3) by insisting, as a condition of agreement, that an employer association accept contract provisions whereby association members would not be represented in grievance adjustment procedures by designees of their own choosing, but by designees chosen by another association.

On the other hand, a Board majority dismissed a complaint which alleged that a union violated section 8(b) (3) and (2) by insisting upon, striking for, and executing, a contract clause that required the employer, in the event it was unable to secure "competent Journeymen Mould Makers," to request the union to supply them and, if not furnished within 30 days, then to obtain labor from any source.³⁵ The majority held that the clause did not provide for a closed shop or grant the union a 30-day exclusive referral period. Moreover, even assuming that exclusive referral rights were granted for 30 days, the majority noted that the contract would not thereby have become unlawful, and there was no showing that it had been discriminatorily enforced.³⁶

³² *International Assn. of Bridge, Structural & Ornamental Ironworkers, Local 600 (Bay City Erection Co.)*, 134 NLRB 301.

³³ *Portland Stereotypers' and Electrotypers' Union No. 48 et al. (Journal Publishing Co.)*, 137 NLRB No. 97, Chairman McCulloch and Members Fanning and Brown for the majority, Member Rodgers dissenting in part, Member Leedom not participating.

³⁴ *United Assn. of Journeymen, etc., Plumbers, Local 525 (Federated Employers of Nevada, Inc.)*, 135 NLRB 462.

³⁵ *American Flint Glass Workers' Union (Glass Container Manufacturers Institute)*, 133 NLRB 296, Chairman McCulloch and Members Leedom, Fanning, and Brown for the majority, Member Rodgers dissenting.

³⁶ Citing *Local 357, Teamsters (Los Angeles-Seattle Motor Express) v. N.L.R.B.*, 365 U.S. 667 (1961).

b. Refusal To Sign Agreement

In one case,³⁷ a local union and its international were held to have violated section 8(b) (3) by refusing and failing to execute a contract agreed upon by the employer and a unit bargaining committee found to be the unions' agent. Here, the bargaining committee proceeded to negotiate and settle on final terms, obtained membership ratification, and executed the resulting document, with apparent authority to do so and in the manner of previous negotiations. A letter from the international union to the unit bargaining committee as to provisions the international desired in the contract was held to constitute an affirmation, rather than a limitation, of the negotiating committee's authority, despite the international's insistence that the provisions suggested had to be included.

In another case,³⁸ a Board majority held that an international union and one of its locals violated section 8(b) (3) by unilaterally refusing to sign, upon reaching agreement, contracts covering their respective units at several of the employer's refineries, where the delay in signing was unrelated to any dissatisfaction with the contract terms but was merely a device to increase the bargaining power of a sister local at another of the employer's refineries. While a local union may properly delay signing a contract until approved by superior union bodies pursuant to the provisions of its constitution and bylaws, the majority found that the refusal to sign in this case was unlawful because it constituted an improper precondition to the execution of agreements already reached.³⁹

5. Prohibited Strikes and Boycotts

The Act's prohibitions against certain types of strikes and boycotts are contained in section 8(b) (4). Clause (i) of this 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 an industry affecting commerce, while clause (ii) makes it unlawful for a union to threaten, coerce, or restrain any such person, in either case for any of the objects proscribed in subparagraphs (A), (B), (C), or (D).

During the past fiscal year, the Board had occasion to further construe the statutory term "person engaged in commerce or in an industry

³⁷ *International Union, UAW, and Local No. 453 (Maremont Automotive Products, Inc.)*, 134 NLRB 1337.

³⁸ *The Standard Oil Co.*, 137 NLRB No. 68, Members Leedom, Fanning, and Brown for the majority, Chairman McCulloch concurring in part and dissenting in part, Member Rodgers not participating.

³⁹ *U.S. Pipe & Foundry Co. v. N.L.R.B.*, 298 F 2d 873 (CA 5, 1962), distinguished by the majority.

affecting commerce.” In *Bergen Drug Co., Inc.*⁴⁰ the Board pointed out that the fact that a secondary employer is not itself “engaged in commerce” is immaterial if it is in fact engaged “in an industry affecting commerce.” In that case, the secondary employers were engaged in the building and construction industry, which industry the Board had previously determined to be an “industry affecting commerce” within the meaning of the statute.⁴¹ In the same case, the Board took “judicial notice” that a telephone company is also engaged in an “industry affecting commerce.” Similarly, in *Layne-Western Co.*,⁴² the Board, relying on *S. M. Kisner & Sons*,⁴³ held that where the primary employer was admittedly engaged in commerce within the meaning of the Act, proof of commerce facts with respect to secondary persons involved was not required since the latter were engaged in construction, “an industry affecting commerce.”

a. Inducement and Encouragement of Work Stoppage

(1) Individual Employed by Any Person

The Act prohibits inducement or encouragement of strike action by “any individual employed by any person.” The Board in interpreting this language has held that it refers to individuals who, although supervisors, are more nearly related to “rank-and-file employees” than to “management,” as the term is generally understood.⁴⁴ In *Carolina Lumber*,⁴⁵ the Board enunciated a formula for determining who is “an individual employed by any person.” The Board stated that “no single factor will be determinative” and the question would be decided on the facts in each case aided by criteria set out in its decision.

In the case of *Minneapolis House Furnishing*,⁴⁶ the Board held that a store manager, a sales manager, and other unnamed supervisors were not “individuals employed by any person” because they had authority, actual or apparent, either to determine store purchasing or selling policies or “effectively to influence the formulation of such policies.” In *Servette*,⁴⁷ the Board also held that store man-

⁴⁰ *Local 20, Sheet Metal Workers (Bergen Drug Co., Inc)*, 132 NLRB 73.

⁴¹ *Sheet Metal Workers, Local 299 (S. M. Kisner & Sons)*, 131 NLRB 1196 (1961). Twenty-sixth Annual Report (1961), p 130.

⁴² *International Union of Operating Engineers, Local 571 (Layne-Western Co.)*, 133 NLRB 208. See also *United Assn of Journeymen etc, Local 575 (Boulder Master Plumbers Assn.)*, 132 NLRB 1355

⁴³ *Sheet Metal Workers, Local 299 (S. M. Kisner & Sons)*, above

⁴⁴ *Local 505, Teamsters (Carolina Lumber Co)*, 130 NLRB 1438 (1961) Twenty-sixth Annual Report (1961), pp. 131-132. Accord: *N.L.R.B. v. Local 294, Teamsters (Van Transport Lines, Inc.)*, 131 NLRB 242, enforced 298 F. 2d 105 (C A 2)

⁴⁵ *Local 505, Teamsters (Carolina Lumber Co)* above.

⁴⁶ *Upholsterers Frame & Bedding, etc, Local No. 61, et al. (Minneapolis House Furnishing Co)*, 132 NLRB 40.

⁴⁷ *Wholesale Delivery Drivers & Salesmen's Union, Local No 848 (Servette Inc)*, 133 NLRB 1501.

agers were not "individuals" as that term is used in section 8(b) (4) (i).

On reconsideration of *L. B. Wilson Inc., Radio Station WCKY*,⁴⁸ remanded by the Sixth Circuit for further proceedings on another point, the Board concluded that the members of the union who allegedly had been induced to cease work constituted a "pool" of artists who were independent contractors, and dismissed the original 8(b) (4) (A) complaint issued prior to the 1959 amendments to the Act.

(2) Inducement and Encouragement To Strike

Under the present Act, and also before the 1959 amendments, the terms "induce or encourage," found in section 8(b) (4) (i), have been construed as "broad enough to include in them every form of influence and persuasion."⁴⁹ Whether a union's conduct constitutes unlawful inducement or encouragement depends on the factual situation in each case.⁵⁰ The Board has reiterated that inducement or encouragement need not be successful to violate the Act.⁵¹

In *Ets-Hokin & Galvin, Inc.*,⁵² where an oral request by a union representative that an employer not assign work involving installation of communication cable for missile sites at Forbes Air Force Base to the charging party resulted in mass work stoppages, the Board found a violation of section 8(b) (4) (i) (B). And in *Southern Construction Corporation*⁵³ the Board found that a union's secondary picketing, together with its business agent's threats to an employee in the presence of other employees in connection with said picketing, induced or encouraged employees of Southern to engage in a strike or refusal to perform their work with an object of forcing Southern to cease doing business with the primary employer in violation of section 8(b) (4) (i) (B). However, in *Tampa Sand and Material Co.*,⁵⁴ statements made by two union business agents at a union meeting that members had a right, as individuals, not to handle a struck employer's products, absent any threat of discipline or reprisal for handling the products or assurance of protection if they

⁴⁸ 133 NLRB 1736; original decision reported at 125 NLRB 786 (1959)

⁴⁹ *International Brotherhood of Electrical Workers, Local 501, v. NLRB (Langer)*, 341 U S 694, 701-702 (1951).

⁵⁰ *Local 505, Teamsters (Carolina Lumber Co)*, 130 NLRB 1438 (1961).

⁵¹ *Ibid.*

⁵² *Local 101, Intl. Union of Operating Engineers (Ets-Hokin & Galvan, Inc.)*, 133 NLRB 1728.

⁵³ *Lafayette Bldg & Construction Trades Council, etc., Local 762 (Southern Construction Corp.)*, 132 NLRB 673.

⁵⁴ *Building & Construction Trades Council, etc. (Tampa Sand & Material Co)*, 132 NLRB 1564.

refused to handle the products, were held insufficient to establish inducement or encouragement.⁵⁵

(a) Consumer picketing

The legality of so-called consumer picketing under clause (i) of section 8(b)(4), which proscribes inducement or encouragement of employees to engage in a strike or refusal to perform services, was further considered by the Board during the fiscal year.

In *Minneapolis House Furnishing*,⁵⁶ a union picketed at customer entrances of retail stores to protest the stores' purchasing certain products of out-of-town manufacturers. A Board majority found that the union's object in picketing was to bring to the attention of the consumer public its dispute with the employers. The picket signs made no mention of strikes or lockouts, no union members employed at the stores were asked to quit work, and there was no picketing at truck entrances or those used exclusively by employees. The picketing here was found not to be *per se* "inducement or encouragement" of store employees or neutral employees to make "common cause" with the union, since the union's appeal was directed to the consumer public only.⁵⁷ This consumer picketing was held not violative of clause (i) of section 8(b)(4),⁵⁸ and the *Perfection Mattress* doctrine⁵⁹ was overruled to the extent it was inconsistent with the instant decision.

b. Threats, Coercion, and Restraint

Section 8(b)(4)(ii) makes it unlawful for a union to "threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce" for proscribed objectives. The legislative history of the 1959 amendments clearly indicates, as the Board has stated,⁶⁰

⁵⁵ Compare *Truck Drivers & Helpers, Local 728 (Genuine Parts Co)*, 119 NLRB 399 (1957); and *General Drivers, Salesmen & Warehousemen's Local 984, et al. (The Humko Co., Inc.)*, 121 NLRB 1414 (1958), where statements made at union meetings were held to constitute inducement on the ground that in *Genuine Parts* and *Humko*, unlike *Tampa*, the union offered protection to those members who engaged in secondary boycotts.

⁵⁶ *Upholsterers Frame & Bedding Workers Town City Local 61 (Minneapolis House Furnishing Co.)*, 132 NLRB 40, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting on this point. See also *Fruit & Vegetable Packers & Warehousemen, Local 760, etc. (Tree Fruits Labor Relations Committee, Inc.)*, 132 NLRB 1172, enforcement denied 308 F. 2d 311 (C.A.D.C.).

⁵⁷ See *Local 459, IUE (Friden, Inc.)*, 134 NLRB 598.

⁵⁸ The Board unanimously adhered to the interpretation that such picketing does violate clause (ii) of this section. See below, p. 162.

⁵⁹ *United Wholesale & Warehouse Employees, Local 261 (Perfection Mattress & Spring Co.)*, 129 NLRB 1014 (1960), Member Fanning dissenting on this point. Upon reconsideration of this case on remand from the Fifth Circuit, the Board, in 134 NLRB 931, deleted from its original order those remedial provisions applicable to the initial finding of clause (i) violations. See *Fruit & Vegetable Packers & Warehousemen, Local 760, etc. (Tree Fruits Labor-Relations Committee, Inc.)*, above, where District of Columbia Circuit Court of Appeals reversed Board's ruling that consumer picketing was *per se* violative of clause (ii).

⁶⁰ Twenty-sixth Annual Report (1961), p. 136, footnote 67

that the purpose of section 8(b) (4) (ii) (B) was to eliminate the loophole in the existing law whereby unions could coerce secondary *employers* (as distinguished from employees) directly by threats to strike, picketing, and other forms of pressure and retaliation.

During the fiscal year, the Board found such types of union pressure violative of clause (ii) as the following: Telling a secondary employer that he could expect trouble because he had awarded a sub-contract to a nonunion contractor;⁶¹ consumer picketing of a retail outlet to compel secondary employer to cease handling products of a primary employer;⁶² threat by union agent during walkout that future walkouts could be avoided by doing business with people other than struck employer and that "we can't put up with this very much longer";⁶³ threats of physical violence if neutral employer continued to do business with primary employer;⁶⁴ paying men to smash windows of business concerns which continued to advertise in a struck newspaper after union had asked the concerns not to do business with the newspaper;⁶⁵ refusing to refer applicants for employment in order to force subcontractors to cease doing business with contractor;⁶⁶ picketing of a homebuilding project on Sunday when only salesmen and prospective buyers were present;⁶⁷ and circulating a letter addressed to a secondary employer containing an unqualified threat to picket all of its business premises if it handled goods of a struck primary employer.⁶⁸

⁶¹ *Lafayette Building & Construction Trades Council, et al. (Southern Construction Corp)*, 132 NLRB 673. But see *Construction, Building Material etc., Drivers Local 83 (Marshall & Haas)*, 133 NLRB 1144, Members Fanning and Brown for panel majority, Member Leedom dissenting, where the majority dismissed a complaint holding similar conduct to be notice of prospective strike action against another employer with whom union had a dispute, and therefore not a violation of clause (ii).

⁶² *Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits Labor Relations Committee)*, above

⁶³ *Building & Construction Trades Council of Tampa, Local 397 (Tampa Sand & Material Co.)*, 132 NLRB 1564.

⁶⁴ *Plumbers & Pipefitters, Local 142 (Piggly Wiggly)*, 133 NLRB 307. See also *Local 282, Teamsters (Twin County Transit Mx)*, 137 NLRB No. 105, where union threatened neutral employer with violence and actually inflicted physical violence on him, threatened to press charges against neutral's employees if they continued to work for him, threatened to picket neutral's customers, sought to prevent deliveries to neutral's main suppliers, picketed and blocked entrances to premises and his suppliers.

⁶⁵ *Teamsters, Local 901 (Editorial "El Imparcial")*, 134 NLRB 895. See also *Local 154, ITU (Ypsilanti Press, Inc.)*, 135 NLRB 991, where union picketed advertisers of newspaper with object of forcing or requiring newspaper to recognize union.

⁶⁶ *Local 825, Operating Engineers (R. G. Maupai Co.)*, 135 NLRB 578. See also *Local 5, Plumbers (Arthur Venneri Co.)*, 137 NLRB No. 100.

⁶⁷ *Plumbers Local Union No. 519, United Association of Journeymen etc. (Babcock Co.)*, 137 NLRB No. 46.

⁶⁸ *General Drivers, etc., Local 886 (The Stephens Co.)*, 133 NLRB 1393. See also *Local 459, IBEW (Friden, Inc.)*, 134 NLRB 598, where, in addition to sending a letter threatening customers of primary employer, which was found violative of clause (ii), the union by means of telephone calls threatened to picket Friden customers if they continued to do business with Friden.

In *Minneapolis House Furnishing Co.*,⁶⁹ the Board found that by picketing customer entrances of retail stores with signs appealing to consumers when patronizing the stores to buy locally and union-made upholstered furniture and mattresses, with an object of forcing or requiring the stores to cease or curtail business with the nonarea manufacturers of these products, respondent union "coerced and restrained" the store owners in violation of section 8(b)(4)(ii)(B). And in *Arthur Venneri Co.*,⁷⁰ a Board majority held that a union's refusal to refer plumbers to a secondary employer as it was required to do by contract constituted coercion and restraint of such secondary employer in violation of clause (ii).

However, a panel majority held in the *Stephens* case⁷¹ that a letter stating that if any picketing of Stephens took place in the vicinity of the secondary employer's place of business "it will be conducted in strict conformity with the standards for primary ambulatory picketing as enunciated by the Board in a series of cases beginning with *Moore Dry Dock Co.*"⁷² was not unlawful, since it did no more than state the union would exercise its lawful rights.

c. Publicity Proviso

The second proviso to section 8(b)(4) exempts from the section's proscriptions truthful publicity, other than picketing, concerning a product produced by an employer with whom a labor organization has a primary dispute, under certain specified conditions.⁷³ In *Lohman Sales*,⁷⁴ a Board majority held that handbilling at retail stores was not picketing but was "publicity, other than picketing"

⁶⁹ *Upholsterers Frame & Bedding Workers, Local 61 (Minneapolis House Furnishing Co.)*, 132 NLRB 40. See also *International Hod Carriers, etc., Local 1140 (Gilmore Construction Co.)*, 127 NLRB 541 (1960); *United Wholesale & Warehouse Employees, Local 261 (Perfection Mattress & Spring Co.)*, 129 NLRB 1014 (1960).

⁷⁰ *Local 5, Plumbers (Arthur Venneri Co.)*, 137 NLRB No. 100, Chairman McCulloch and Members Rodgers and Leedom for the majority, Members Fanning and Brown dissenting.

⁷¹ *General Drivers etc., Local 886 (The Stephens Co.)*, above, Members Fanning and Brown for panel majority, Member Leedom dissenting on this point.

⁷² *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547 (1950).

⁷³ The second proviso reads, "That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution."

⁷⁴ *International Brotherhood of Teamsters, etc., Local 537 (Lohman Sales Co.)*, 132 NLRB 901, Chairman McCulloch and Members Leedom, Fanning, and Brown for the majority, Member Rodgers dissenting in part. See also *Radio-TV Service Technicians Local 202, IBEW (Packard Bell Electronics Corp.)*, 132 NLRB 1049; *Plumbers & Pipefitters, Local 142 (Piggly Wiggly)*, 133 NLRB 307; *IBEW Local 712 (Industrial Electric Service and Gallo Refrigeration Co.)*, 134 NLRB 812; *Plumbers Local 519, United Association, etc. (Babcock Co.)*, 137 NLRB No. 46; where, in each case, handbilling was held to be "publicity, other than picketing."

protected by this proviso, and that the "truthfulness" required by the proviso was met if there was no intent to deceive and no substantial departure from fact. Moreover, the majority rejected the view that the proviso did not apply because the primary employer wholesaler did not "produce" the products involved within the meaning of the proviso.

In *Middle South Broadcasting Co.*,⁷⁵ a Board majority held that the "publicity proviso" to section 8(b) (4) was intended to permit a consumer boycott of a secondary employer's entire service-type business, and not merely a "product boycott" of the product involved in the primary dispute. The majority stated:

As found in [*Lohman Sales*], labor is the prime requisite of one who "produces," and therefore an employer who applies his labor to a product, whether of an abstract or physical nature, or in the initial or intermediate stages of the marketing of the product, is one of the "producers" of the product. Accordingly, the Board held in that case that a primary employer wholesaler, by adding his labor in the form of capital, enterprise, and service to a product manufactured by someone else, became one of the producers of that product. Similarly here, the primary employer radio station, by adding its labor in the form of capital, enterprise, and service to the automobiles which it advertises for the secondary employer retail distributor of the automobiles, becomes one of the producers of the automobiles. Indeed, by adding such labor in the form of advertising in order to make the automobile salable, the radio station becomes a very important producer in the intermediate stage leading toward the ultimate sale or consumption of the product. And of course the secondary employer retail distributor of the automobiles clearly "distributes" such product within the meaning of the proviso. For the foregoing reasons, and the additional reasons fully explicated in *Lohman Sales* for not drawing any arbitrary distinction between different kinds of "producers of products," we find that the publicity proviso is applicable to the service-type situation present here. [Footnote omitted.]

In one case,⁷⁶ a Board majority held that a union's threat to hand-bill was protected by the publicity proviso. And in another case,⁷⁷ a Board majority held that a union's threat to a neutral employer to place his name on an unfair list was also protected. Similarly, in *Editorial "El Imparcial,"*⁷⁸ a Board majority held that a union did not violate section 8(b) (4) (ii) (B) by threatening advertising agen-

⁷⁵ *Local 662, Radio & Television Engineers (Middle South Broadcasting)*, 133 NLRB 1698, Chairman McCulloch and Members Fanning and Brown for the majority, Member Rodgers dissenting, Member Leedom dissenting in part and concurring in part

⁷⁶ *International Brotherhood of Teamsters, etc., Local 537 (Lohman Sales Co.)*, above

⁷⁷ *Electrical Workers Union, Local 73, et al (Northwestern Construction of Washington, Inc.)*, 134 NLRB 498, Chairman McCulloch and Members Leedom, Fanning, and Brown for the majority, Member Rodgers dissenting.

⁷⁸ *Teamsters, Chauffeurs, Warehousemen & Helpers, Local 901, etc. (Editorial "El Imparcial", Inc.)*, 134 NLRB 895, Chairman McCulloch and Members Leedom, Fanning, and Brown for the majority, Member Rodgers dissenting in part. However, where a union picketed advertisers of a newspaper with the object of obtaining recognition, the Board found a violation of sec. 8(b) (4) (ii) (B), *Local 154, I T U., etc (Ypsilanti Press, Inc.)*, 135 NLRB 991.

cies and certain of their clients that unless they ceased advertising in the struck newspaper, the union would distribute leaflets urging the public not to patronize such clients or buy their products or services, since such leaflets would be protected by the proviso. And in *Great Western Broadcasting Corp.*,⁷⁹ a panel majority held that threats to handbill all advertisers so they would discontinue their patronage of the radio station were similarly protected.

d. Proscribed Objectives

The objectives which a union cannot lawfully seek to achieve by the inducement or encouragement defined by clause (i), or by the threats, coercion, or restraint defined by clause (ii), are enumerated in subparagraphs (A), (B), (C), and (D) of section 8(b)(4).

(1) Compelling Membership in Labor or Employer Organization

Section 8(b)(4)(A) prohibits a union from compelling an employer or self-employed person to join any labor or employer organization. This prohibition was found to have been violated in one case during the fiscal year. In *John J. Reich*,⁸⁰ a painting contractor, in business with his son, entered into a collective-bargaining contract with a union, which provided, in part, that where there was more than one person in a contracting business "only one person shall be allowed to work with the tools of the trade. If more than one person works with the tools of the trade they shall be members of the union." Neither father nor son agreed to become a member of the union, or to cease working with the tools of the trade, when requested to do so by the union. Thereupon, the union induced the Reich employees to quit work. The Board held that the contract did not excuse conduct which had for an object forcing or requiring an employer or self-employed person to join the union.

(2) Compelling Agreement Prohibited by Section 8(e)

Under subparagraph (A), unions are also prohibited from resorting to section 8(b)(4)(i) and (ii) conduct in order to force an employer to "enter into any agreement which is prohibited by section 8(e)." On six occasions during the past fiscal year⁸¹ the Board had to deter-

⁷⁹ *American Federation of Television & Radio Artists, et al. (Great Western Broadcasting Corp., d/b/a KXTV)*, 134 NLRB 1617, Chairman McCulloch and Member Fanning for panel majority, Member Rodgers dissenting.

⁸⁰ *Painters Local 249, Brotherhood of Painters, et al. (John J. Reich)*, 136 NLRB 176.

⁸¹ *District 15, United Mine Workers of America (Edna Coal Co)*, 132 NLRB 685; *Upholsterers Frame & Bedding Workers, Twin City Local No 61, et al. (Minneapolis House Furnishing Co.)*, 132 NLRB 40; *American Federation of Television & Radio Artists, AFL-CIO (L. B. Wilson, Inc)*, 133 NLRB 1736; *Los Angeles Mailers Union No. 9, I.T.U. (Hullbro Newspaper Printing Co.)*, 135 NLRB 1132; *Excavating & Building Material Chauffeurs et al., Local 379, IBT, et al. (Consalvo Trucking, Inc.)*, 132 NLRB 827; *Bakery Wagon Drivers & Salesmen, Local 484 (Sunrise Transportation)*, 137 NLRB No. 98.

mine whether or not a union's strike or other conduct had as an object the compelling of an employer to enter into a proscribed type of agreement. In two of these cases⁸² the Board found that certain contract clauses or conduct were unlawful under section 8(e)⁸³ and, therefore, the union's conduct was forbidden by section 8(b)(4)(i) and (ii)(A).

(3) Secondary Strikes and Boycotts

The secondary boycott provisions of the Act, contained in section 8(b)(4)(B), prohibit pressure on "any person" to cease doing business with "any other person." The Board has held that this section does not require evidence that a union's conduct complained of was aimed at a particular person.⁸⁴

Some of the cases during the fiscal year required a determination as to the identity of the employer with whom the union had its primary dispute. And some required a determination as to whether employers complaining of secondary action were in fact neutrals, or had so allied themselves with the primary employer with whom the union had a dispute as to be outside the statutory protection. Other cases turned on the question whether pressure against the primary employer at a "common situs" shared with neutral employers was carried out in a manner which justified the conclusion that inducement of work stoppages by employees of neutral employers was intended.

(a) Identity of primary employer

The prohibition against secondary boycotts is intended to protect neutral employers from being drawn into a dispute between a union and another employer. Thus, a union's conduct found to be "secondary," in that it is directed against a "neutral" or "wholly disinterested" employer to a dispute with another employer, is violative of section 8(b)(4)(B). Conversely, if the conduct is "primary," in that it is directed against the employer with whom the union has its primary dispute, it is protected activity not proscribed by section 8(b)(4)(B).⁸⁵ Thus, the identity of the employer with whom the union has its primary dispute may, at times, become the crucial issue. In a number of cases during the past fiscal year, the Board had occasion to determine this issue.

⁸² *Los Angeles Mailers Union No. 9, I.T.U. (Hillbro Newspaper Printing Co)*, above; *Bakery Wagon Drivers & Salesmen, Local 484 (Sunrise Transportation)*, above.

⁸³ This phase of the cases is discussed below, pp. 172-174.

⁸⁴ *Amalgamated Lithographers, etc. & Local 17 (The Employing Lithographers)*, 130 NLRB 985 (1961), then Chairman Leedom and Members Rodgers, Jenkins, and Kimball for the majority, Member Fanning dissenting on this point

⁸⁵ Under a proviso to sec. 8(b)(4)(B) of the Act as amended in 1959, and as construed prior to such amendment, "nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing"

In one case,⁸⁶ employees of a stevedoring company, who were represented by the respondent union, engaged in a slowdown because a foreign-car distributor, who used the services of the stevedoring company, changed its method of handling the cars after they were unloaded from vessels. This resulted in less work for the stevedoring company's employees. A Board majority noted that the union's demands were directed at the car distributor rather than at the stevedoring company, and thus held that the union's real dispute was with the car distributor which was the primary employer and that the stevedoring company was a secondary employer. Consequently, the inducement of the stevedoring company's employees to engage in the slowdown for an objective proscribed by section 8(b)(4)(B) was found to be unlawful.⁸⁷

In another case,⁸⁸ a contract between the respondent union and a plumbing subcontractor required the subcontractor to obtain from a general contractor at a construction project all of the project's plumbing work. When the subcontractor obtained only the inside plumbing work from the general contractor, who awarded the outside plumbing work to another firm whose employees were represented by a rival union, the respondent induced employees of the subcontractor for the inside plumbing work to refuse to handle the general contractor's materials and refused to refer plumbers to that subcontractor. According to a Board majority, the control and allocation of plumbing assignments lay here not with the inside plumbing subcontractor but with the general contractor who was in no way bound by or required to give effect to the respondent's contract. As the inside plumbing subcontractor was powerless to effect the result which the respondent sought—to force the general contractor to sever relations with the firm who was awarded the outside plumbing work, and to reassign such work to the inside plumbing subcontractor—the majority found that the general contractor, rather than the subcontractor, was the primary target of the respondent's conduct. The majority consequently con-

⁸⁶ *Local 1066, ILA, et al. (Wiggin Terminals, Inc.)*, 137 NLRB No. 3, Chairman McCulloch and Members Rodgers and Leedom for the majority, Members Fanning and Brown dissenting

⁸⁷ See also *Bakery Salesmen's Local 227, Teamsters (Associated Grocers, Inc.)*, 137 NLRB No. 102, where a Board majority consisting of Chairman McCulloch and Members Rodgers, Leedom, and Fanning, Member Brown dissenting, found a violation of sec. 8(b)(4)(B), where the union picketed a baking company when it changed its methods of distribution to a grocery cooperative association, thereby reducing the number of jobs available to its members, since the "heart" of the dispute was the fact that the association's drivers were not members of the union.

⁸⁸ *Local 5 Plumbers (Arthur Vennert Co.)*, 137 NLRB No. 100, Chairman McCulloch and Members Rodgers and Leedom for the majority, Member Fanning dissenting on other grounds, Member Brown dissenting would find the subcontractor of the inside plumbing work as the primary employer.

cluded that the union's action against the subcontractor constituted "secondary" action violative of section 8(b) (4) (i) and (ii) (B).

(b) The "ally" doctrine

When a union extends its primary action to an employer who is an "ally" of the primary employer, rather than a neutral, no violation of section 8(b) (4) (B) will be found. Thus, in *Chas. S. Wood & Co.*,⁸⁹ where an alleged neutral employer was retained to do "struck work," the neutral took on the status of an ally to the struck employer and was held equally vulnerable with the struck employer to primary picketing. But in *Friden*,⁹⁰ where a union picketed customers of a primary employer with whom it had a dispute because they used nonunion workers to service the primary employer's business machines during a strike, the Board held that the customers were neutrals entitled to the protection of the section. Here, the customers merely continued their previous business relationship with the struck employer without any change during the strike.

In *Priest Logging, Inc.*,⁹¹ the Board held that a picketed company which temporarily stored logs for a struck primary employer was not an ally of the primary employer. It reasoned that the secondary employer's services to the primary employer during the strike were not "struck work" services, since the secondary employer's acceptance of the logs neither aided the primary employer's business activity nor deprived the striking employees of any work opportunities.

(c) Ambulatory and common situs picketing

In situations involving picketing at locations where business is carried on by both the primary employer—the employer with whom the union has a dispute—and neutral employers, the Board continued to determine whether the picketing was primary and protected, or secondary and therefore prohibited, on the basis of the evidentiary tests established in the *Moore Dry Dock* case.⁹² As heretofore, these situations chiefly involved picketing of common construction sites or ambulatory trucking sites.

⁸⁹ *Teamsters Local 408, International Brotherhood of Teamsters, etc (Chas. S Wood & Co.)*, 132 NLRB 117

⁹⁰ *Local 459, IUE (Friden, Inc)*, 134 NLRB 598

⁹¹ *Western States Regional Council No. 3, etc (Priest Logging, Inc.)*, 137 NLRB No. 31.

⁹² *Sailors' Union of the Pacific, AFL (Moore Dry Dock Co.)*, 92 NLRB 547 (1950), in which the Board, in order to accommodate lawful primary picketing while shielding secondary employers and their employees from pressure in controversies not their own, laid down certain tests to establish common situs picketing as primary: (1) the picketing must be strictly limited to times when the situs of the dispute is located on the secondary employer's premises; (2) at the time of the picketing the primary employer must be engaged in its normal business at the situs; (3) the picketing must be limited to places reasonably close to the location of the situs; and (4) the picketing must clearly disclose that the dispute is with the primary employer.

The Board, in four cases during the past fiscal year, found violations in common situs picketing where the *Moore Dry Dock* standard requiring the presence of the primary employer's employees at the picketing situs was not met.⁹³ And in *Piggly Wiggly*,⁹⁴ where a union attempted to force a secondary employer to cease doing business with the only firm involved in the union's primary dispute at a common situs project, the Board found a violation where the union picketed the driveway entrances to a shopping center which induced and encouraged a work stoppage by neutral employees.

In the area of common situs picketing, the most important development occurred in the *Plauche Electric* case.⁹⁵ There, a Board majority overruled the so-called *Washington Coca Cola* doctrine⁹⁶ which imposed a rule that picketing at a common situs is unlawful when the primary employer has a regular place of business in the locality which can be picketed.⁹⁷ It decided that it would not find unlawful picketing at the premises of the secondary employer where the primary employer's employees spent practically their entire working day simply because they also reported for a few minutes at the beginning and end of each day to the regular place of business of the primary employer. The majority found that it could not be said that the union could adequately air its dispute by picketing the primary employer's office premises, and that the picketing of the premises where the primary employees performed their work was not unlawful so long as the union observed the *Moore Dry Dock* standards. In overruling the *Washington Coca Cola* doctrine, the majority stated that it was not holding that the existence of a separate primary place of picketing was irrelevant, but that it would consider such a place of picketing as one of the circumstances, among others, in determining an object of picketing elsewhere.

Following its interpretation of the *Washington Coca Cola* doctrine as set out in *Plauche*, a panel majority found no violation in *Wyckoff Plumbing*,⁹⁸ where a union picketed a construction site only 2 miles

⁹³ *Sheet Metal Workers etc., Local 8 (Stiebler Heating & Air Conditioning, Inc.)*, 133 NLRB 650; *IBEW, Local 861 (Cleveland Construction Corp.)*, 134 NLRB 586; *Local Union 469, Plumbers (Hansberger Refrigeration & Electric Co.)*, 135 NLRB 492; and *Hotel, Motel & Club Employees' Union, Local 568 (Leonard Shaffer Co., Inc., et al.)*, 135 NLRB 567.

⁹⁴ *Plumbers & Pipefitters, Local 142 (Piggly Wiggly)*, 133 NLRB 307.

⁹⁵ *IBEW, Local 861 et al. (Plauche Electric, Inc.)*, 135 NLRB 250; Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting.

⁹⁶ *Brewery & Beverage Drivers & Workers, Local 67 (Washington Coca Cola Bottling Works, Inc.)*, 107 NLRB 299 (1953), enforced 220 F. 2d 380 (C.A.D.C.).

⁹⁷ Member Fanning indicated that he did not subscribe to the *Washington Coca Cola per se* doctrine and dissented from its application in several cases.

⁹⁸ *Plumbers & Pipefitters Local 471 (Wyckoff Plumbing)*, 135 NLRB 329, Chairman McCulloch and Member Fanning for panel majority, Member Leedom dissenting.

from the primary employer's establishment since the picketing met *Moore Dry Dock* standards and there was no other evidence which demonstrated that the picketing had an unlawful purpose.⁹⁹ Similarly, in *Houston Armored Car Co.*,¹ where a union picketed trucks of a primary employer during visits to customers, a panel majority found no violation since the picketing conformed to *Moore Dry Dock* standards,² notwithstanding the fact that the primary employer maintained a permanent place of business where its drivers returned six times daily and which also was effectively picketed.

(i) Separate gate picketing

During the past fiscal year, the Board had occasion to consider a case where a union extended its primary picketing to a gate on a railroad's right-of-way, adjacent to the premises of the struck primary employer, which the railroad used to furnish boxcar services to the primary employer.³ Here, a Board majority found that the union's picketing and blocking of train passage through the railroad gate with an object of forcing the railroad to cease doing business with the primary employer was primary picketing, since the railroad services rendered to the primary employer were in connection with the primary employer's *normal* operations. The Board followed the Supreme Court's limitation placed on the Board's so-called "contractor's gates" policy in the *General Electric* case.⁴ There the Supreme Court limited application of the policy to gates established for the use of outside contractors whose employees do jobs "unrelated to the normal operations of the [struck] employer" and are "of a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations." In the instant case, the determinative factor was that the railroad services performed for the primary employer were "related" to the primary employer's normal operations, as contrasted to being "unrelated."

⁹⁹ See also *IBEW, Local 59 (Andersen Co. Electrical Service)*, 135 NLRB 504, Chairman McCulloch and Members Fanning and Brown for the majority, Member Rodgers dissenting, Member Leedom not participating.

¹ *United Plant Guard Workers of America (Houston Armored Car Co.)*, 136 NLRB 110, Members Fanning and Brown for panel majority, Member Rodgers dissenting.

² See *Local 662, Radio & Television Engineers, IBEW (Middle South Broadcasting Co.)*, 133 NLRB 1698, Chairman McCulloch and Members Fanning and Brown for the majority, Member Rodgers dissenting, Member Leedom dissenting in part and concurring in part, where the majority dismissed sec. 8(b)(4)(i) and (ii)(B) charges against a union for picketing the studio of a broadcasting station and picketing an automobile, from which remote broadcasts were being made, at the sites of sponsors of such remote broadcasts. Such picketing was found to meet *Moore Dry Dock* standards.

³ *Local 5895, United Steelworkers of America, et al. (Carrier Corp.)*, 132 NLRB 127, modified in this respect 311 F. 2d 135 (C.A. 2), October 18, 1962.

⁴ *Local 761, International Union of Electrical, Radio & Machine Workers v. N.L.R.B. (General Electric)*, 366 U.S. 667. Original Board decision reported at 123 NLRB 1547 (1959).

(d) Certified union exemption

Section 8(b)(4)(B) also proscribes secondary pressure for "an object" of "forcing or requiring any other employer to recognize or bargain with a labor organization" as his employees' representative "unless such labor organization has been certified as the representative of such employees under the provisions of section 9." In *Overnite Transportation Co.*,⁵ the Board held that a bargaining order remedying a section 8(a)(5) violation was not a certification within the meaning of section 8(b)(4)(B), notwithstanding the fact that in some cases the Board has indicated that a bargaining order may be tantamount in certain respects to a certification.

(4) Strikes for Recognition Against Certification

Under subparagraph (C) of section 8(b)(4), a labor organization is forbidden to exert the proscribed types of pressure for an object of forcing any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees.

During the past fiscal year, on reconsideration of a prior decision⁶ upon remand from the Court of Appeals for the First Circuit,⁷ the Board accepted the court's conclusion that an employee committee declared its independence of the certified union and demanded recognition as the bargaining representative in violation of section 8(b)(4)(C).⁸ And in another case⁹ the Board adopted a trial examiner's finding that by picketing and threatening an employer to force it to recognize and bargain with the respondent union, when another union had been certified as the bargaining representative, the respondent union violated section 8(b)(4)(i) and (ii)(C), although the respondent union had filed a representation petition within 30 days after the commencement of the picketing. The Board agreed with the trial examiner's finding that there was no merit to the respondent's defense, which equated section 8(b)(4)(C) with section 8(b)(7)(C),¹⁰ as the two sections establish separate and different unfair labor practices.

⁵ *International Brotherhood of Teamsters, etc., Local 728 (Overnite Transportation Co.)*, 133 NLRB 62. Member Brown under the circumstances in this case would have equated the sec. 8(a)(5) bargaining order with a Board certification under sec. 9.

⁶ *Comité de Empleados de Simmons, Inc., et al. (Simmons, Inc.)*, 127 NLRB 1179 (1960), where the Board found that an employee committee claiming recognition was but "an internal and integral functioning part" of an established labor organization rather than a separate labor organization, and that it therefore did not violate sec. 8(b)(4)(C).

⁷ *Simmons, Inc. v. N.L.R.B.*, 287 F. 2d 628.

⁸ *Comité de Empleados de Simmons, Inc., et al. (Simmons, Inc.)*, 132 NLRB 242.

⁹ *Teamsters, Local 901 (Valencia Bant Express, Inc.)*, 137 NLRB No. 95.

¹⁰ See discussion of this section below, pp 190-196.

On reconsideration of its prior decision in *Calumet Contractors Assn.*,¹¹ which found so-called "area standard" picketing violative of section 8(b) (4) (C), a Board majority held that such picketing was lawful under the particular circumstances involved.¹² In the later decision, a union's admitted objective to require the employer and his employer association to conform to standards of employment prevailing in the area was held not to be tantamount to, nor having the objective of, recognition or bargaining.¹³

6. "Hot Cargo" Agreements

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

In *American Feed Company*,¹⁴ the Board held that the absence of a request or attempt by the union to enforce a hot cargo provision was no defense and that the act of entering into, signing, executing, or making a contract, either express or implied, was sufficient to establish a violation of that section.¹⁵ And in each of the two *Greater St. Louis*

¹¹ *International Hod Carriers, etc, Local 41 (Calumet Contractors Assn)*, 130 NLRB 78 (1961).

¹² 133 NLRB 512, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting. See rationale in discussion of this case reported in Twenty-sixth Annual Report (1961), p 141.

¹³ Compare *Local 130, Brotherhood of Painters, etc (Jomer, Inc)*, 135 NLRB 876. See also *Houston Building & Construction Trades Council (Claude Everett Construction Co.)*, 136 NLRB 321.

¹⁴ 133 NLRB 214. See also *Dan McKimney Co*, 137 NLRB No. 74; *General Teamsters, etc, Local 890 (San Joaquin Valley Shippers, et al)*, 137 NLRB No. 75.

¹⁵ In the *Sand Door* case (*Local 1976, Carpenters v. NLRB*, 357 US 93 (1958)), the Supreme Court held that while a hot cargo agreement was not a defense to a refusal to handle goods with an object proscribed by sec 8(b) (4), it was not unlawful for an employer merely to make such agreement with a union. It is clear from the subsequent legislative history, however, that Congress intended to close this loophole by banning all such agreements under sec. 8(e). II Legis. Hist 1007.

Automotive Trimmers and Upholsterers Assn. cases,¹⁶ a Board majority held that the unions involved had violated the Act by reaffirming and continuing to give effect to a hot cargo clause entered into prior to enactment of section 8(e). In one of these cases,¹⁷ the union informed several employer members of an association that they were violating a hot cargo clause in an existing agreement between the union and the association, and the employers replied that they would comply with the prohibitions of the clause. The majority concluded that, by acknowledging and reaffirming the "current effectiveness and application" of the clause, the parties "entered into" a hot cargo agreement in violation of section 8(e). Similarly, in *Hillbro Newspaper*,¹⁸ a Board majority held that the reaffirmation of an existing hot cargo arrangement was included within the meaning of the statutory phrase "to enter into" and is unlawful under section 8(e), and a union's attempt by coercive means to obtain such reaffirmation from an employer is violative of section 8(b) (4) (ii) (A).

a. Contracts Prohibiting Subcontracting

In *Minnesota Milk*,¹⁹ the Board expanded its interpretation of the hot cargo ban as expressed during the preceding fiscal year in the *Amalgamated Lithographers* cases.²⁰ Rejecting the trial examiner's broad conclusion that section 8(e) bars all agreements prohibiting the subcontracting of work, the Board saw no justification for so sweeping a generalization. A majority observed that it would examine each contract or agreement on a case-by-case basis to determine from the language used, the scope of restrictions, and the intent of the parties whether the questioned clauses violated the Act. It then found that the language contained in the questioned clause—concerning sales promotions and solicitations of customers, and setting forth the conditions under which the employer may establish independent distributor-

¹⁶ *District No. 9, IAM (Greater St. Louis Automotive Trimmers & Upholsterers Assn, Inc.)*, 134 NLRB 1354; *Automotive, Petroleum, etc, Union Local 618 (Greater St. Louis Automotive Trimmers & Upholsterers Assn., Inc.)*, 134 NLRB 1363; in each case, Chairman McCulloch and Members Rodgers and Leedom for the majority, Members Fanning and Brown concurring and dissenting. See also *Los Angeles Mailers Union No. 9, I.T.U. (Hillbro Newspaper Printing Co.)*, 135 NLRB 1132, Chairman McCulloch and Members Rodgers and Leedom for the majority, Members Fanning and Brown dissenting in part. ¹⁷ 134 NLRB 1363

¹⁸ *Los Angeles Mailers Union No. 9, I.T.U. (Hillbro Newspaper Printing Co.)*, above.

¹⁹ *Milk Drivers & Dairy Employees Union, Local 546, Teamsters (Minnesota Milk Co.)*, 133 NLRB 1314, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting.

²⁰ See *Amalgamated Lithographers & Local 17 (The Employing Lithographers)*, 130 NLRB 985 (1961), where struck-work, chain-shop, termination, trade-shop, and refusal-to-handle clauses were all held to be illegal; *Amalgamated Lithographers & Local 78 (Miami Post Co.)*, 130 NLRB 968 (enforced in part 301 F. 2d 20) then-Chairman Leedom and Members Fanning and Kimball for the majority, Members Rodgers and Jenkins dissenting in part, where the majority held struck-work, chain-shop, and right-to-terminate clauses that were worded differently not to be violative of the section.

ships—too vague to permit a finding that it illegally precluded the employer from subcontracting or dealing with independent contractors.²¹

In two companion cases,²² a Board majority held that an employer and a union may not enter into an agreement whereby the employer agrees that in subcontracting work out preference must be given to a shop or subcontractor approved or having contracts with such union. The purpose of such a clause, it was held, was to preserve jobs for union members, rather than for the employees of the employer. The majority saw “no meaningful distinction between a contract which prohibits an employer from handling products produced by a nonunion firm and a contract which causes an employer to cease subcontracting work to a nonunion firm.”

Then, in *Sunrise Transportation*,²³ a violation was found on the basis of an oral guarantee between a union and a baking company, under which the company was permitted to use Sunrise’s delivery services so long as it guaranteed the performance of Sunrise’s contract with the union. Upon withdrawal of this guarantee by the baking company, the union induced the bakery employees not to handle products to be delivered by Sunrise, the object of such conduct being either to reinstate the oral guarantee or to require performance by the bakery under its contract with the union which barred such subcontracting. The Board concluded that the guarantee violated section 8(e) for, although it has been held that section 8(e) does not prohibit all agreements which limit an employer’s right to subcontract work, agreements which limit the right to subcontract only to employers who have agreements with the contracting union violate its terms.

b. Other Contractual Provisions

During the past fiscal year, in the *Dan McKinney* case,²⁴ the Board considered a contractual provision which contained the following terms:

. . . It shall not be cause for discharge and no employee shall be discriminated against . . . for refusing to load or unload trucks where drivers are not working under a collective bargaining agreement negotiated by a legitimate labor organization. Provided, however, that where a Brewery Establishment is con-

²¹ Members Rodgers and Leedom would have found the clause in question clearly violative of sec. 8(e).

²² *Greater St. Louis Automotive Trimmers*, above. See also *Ohio Valley Carpenters Dist Council (Cardinal Industries)*, 136 NLRB 977, where the Board held that a clause which provided that materials prefabricated by employees of another employer could be used or handled on jobsites only if such materials were produced within Council’s jurisdictional area by outside employees who were members of or represented by the Council and employed under Council’s contract conditions, was a hot cargo clause.

²³ *Bakery Wagon Drivers & Salesmen, Local 484, (Sunrise Transportation)*, 137 NLRB No. 98, citing *Greater St. Louis Automotive Trimmers & Upholsterers Assn., Inc.*, 134 NLRB 1354 and 1363. See also *General Teamsters’, etc., Local 890 (San Joaquin Valley Shippers’ Labor Committee, et al.)*, 137 NLRB No. 75.

²⁴ *Dan McKinney*, 137 NLRB No. 74.

cerned, in the absence of a labor controversy with a distributor, emergency deliveries may be made to such distributor's vehicle, at the Individual Employer's dock and where a Distributor's Establishment is concerned, in the absence of a labor controversy with a retailer, emergency deliveries may be made to such Retailer's vehicle, at the Individual Employer's dock. The existence of an emergency shall be mutually agreed upon by the Local Union and Individual Employer involved. . . .

The Board construed these terms as an agreement that the respondent wholesale distributor would cease doing business with retailers whose employees were not covered by a union contract, except in certain emergencies. It held that the disputed clause fell squarely within the prohibition of section 8(e), and the fact that it was worded in terms of protection of employees rather than a direct prohibition against the respondent's doing business with other persons was deemed immaterial. According to the Board, by specifying in the provision the conditions under which deliveries could be made to nonunion employers (emergency deliveries), the parties agreed, at least by implication, that deliveries could be made to such employers in no other circumstances. In the same case, the Board held that a "savings clause," stating that the respondent would not cease doing business with any other person and that the respondent would continue doing business by use of other personnel or methods, was so impractical and burdensome as to be meaningless, and constituted an attempted subterfuge to avoid the application of section 8(e).

In accord with the *Dan McKinney* case, the Board held in *San Joaquin Valley Shippers' Labor Committee*²⁵ that an agreement to do business only with those who meet either union membership or contract coverage requirements was an agreement, at least by implication, not to do business with those who do not so qualify, and was therefore prohibited by section 8(e). And in *Hillbro Newspaper Printing Co.*,²⁶ where a contract contained a "struck shops" clause providing that the employer will not require employees to process material received from, or destined for, shops in which an authorized strike was in progress, the Board held the clause unlawful on the ground that there was no distinction between an employer agreeing that he will not do business with another employer and agreeing that he will not require his employees to handle outside merchandise from another employer.

c. Section 8(e) Exemptions

In the only case involving either of the industry exemptions in

²⁵ *General Teamsters' etc., Local 890 (San Joaquin Valley Shippers' Labor Committee, et al.)*, 137 NLRB No 75

²⁶ *Los Angeles Mailers Union No. 9, I.T.U. (Hillbro Newspaper Printing Co.)*, 135 NLRB 1132, Chairman McCulloch and Members Rodgers and Leedom for the majority, Members Fanning and Brown dissenting in part

section 8(e) decided during fiscal 1962,²⁷ the Board held that a Carpenters district council violated section 8(e) by entering into a contract which provided that only prefabricated materials produced within the council's jurisdictional area by outside employees represented by the council, and employed under the council's contract conditions, could be used on the jobsite. The Board adopted the trial examiner's interpretation that the 8(e) construction industry proviso relating to the contracting or subcontracting of work to be done at the site of construction does not extend to work done away from the actual site of construction, even though such work might be viewed as part of the construction process and is of a kind that may feasibly be done at the construction site. Accordingly, the Board adopted the trial examiner's finding that the prefabricating clause violated section 8(e).

7. Jurisdictional Disputes

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

An unfair labor practice charge under this section, however, must be handled differently from a charge alleging any other type of unfair labor practice. Section 10(k) requires that parties to a jurisdictional dispute be given 10 days, after notice of the filing of the charges with the Board, to adjust their dispute. If at the end of that time they are unable to "submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute," the Board is empowered to hear the dispute and make an affirmative assignment of the disputed work.²⁸

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

²⁷ *Ohio Valley Carpenters District Council, et al (Cardinal Industries, Inc)*, 136 NLRB 977.

²⁸ *N.L.R.B. v Radio & Television Broadcast Engineers Union Local 1212, IBEW (Columbia Broadcasting System)*, 364 U.S. 573 (1961); Twenty-sixth Annual Report (1961), p. 152

During the past fiscal year, the Board determined a number of work assignment disputes in section 10(k) proceedings, but had no occasion to consider compliance with such a determination in a section 8(b) (4) (D) complaint proceeding.²⁹

a. Proceedings Under Section 10(k)

In order for the Board to proceed with a determination under section 10(k), the record made at the hearing must show that a work assignment dispute within the meaning of sections 8(b) (4) (D) and 10(k) exists; that there is reasonable cause to believe that the respondent union has resorted to conduct which is prohibited by section 8(b) (4) in furtherance of its dispute; and that the parties have not adjusted their dispute or agreed upon methods for its voluntary adjustment.

(1) Disputes Subject to Determination

A dispute to be subject to determination under section 10(k) must concern the assignment of particular work to one group of employees rather than to members of another group. The Board has held that such disputes are not limited to situations where two groups of employees are concurrently working for the same employer.³⁰

During the previous fiscal year, the Board in *Safeway Stores*³¹ rejected the picketing union's contention that it struck and picketed merely to protest the employer's termination of its bargaining relationship with the union and its refusal to sign a new agreement, and held that the picketing was a jurisdictional dispute within the meaning of sections 8(b) (4) (D) and 10(k). Upon reconsideration, in the light of the Supreme Court's decision in *Columbia Broadcasting System*, a Board majority held that the dispute, which was wholly between the picketing union and the employer for the retrieval of jobs, did not constitute a "jurisdictional dispute" within the meaning of the Act, and that to constitute such dispute there must be involved "real competition between unions or groups of employees for the work."³²

²⁹ But see *Local 101, Operating Engineers (Ets-Hokin & Galvan, Inc)*, 133 NLRB 172S, where the Board found conduct violative of sec. 8(b) (4) (i) and (ii) (B) might also have been violative of 8(b) (4) (D) but did not pass on the issue for lack of contention therein.

³⁰ *International Alliance of Theatrical Stage Employees, etc., Local 862 (Allied Maintenance Co. of Pennsylvania, Inc.)*, 137 NLRB No. 79; *International Union of Operating Engineers, Local 66 (Frank P. Badolato & Son)*, 135 NLRB 1392. See also *International Longshoremen's & Warehousemen's Union (Juneau Spruce Corp.)*, 82 NLRB 650, 653 (1949); *International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp.*, 342 U.S. 237, 244-245 (1952); *United Mine Workers of America (Turman Construction Co.)*, 136 NLRB 1068.

³¹ *Highway Truck Drivers & Helpers, Local 107 (Safeway Stores)*, 129 NLRB 1.

³² 134 NLRB 1320, Chairman McCulloch and Member Brown joining in the principal opinion, Member Fanning concurring, Members Rodgers and Leedom dissenting. See *Penello v. Local 59, Sheet Metal Workers*, 195 F. Supp. 458 (D.C. Del.); *International Brotherhood of Electrical Workers, Local 292 (Franklin Broadcasting Co.)*, 126 NLRB 1212 (1960).

Similarly, in *Valley Sheet Metal*,³³ no jurisdictional dispute was found where members of two sister locals were in agreement on the question of limiting the number of out-of-county journeymen who may properly work in their respective geographical jurisdictions. And in *Carleton Bros. Co.*,³⁴ the Board quashed a notice of hearing, where a construction contractor charged that the respondent union struck with the object of forcing him to change the assignment of the disputed work—involving extension of gas piping from gas mains to meters at a construction site—from a public utility to a plumbing subcontractor. According to the Board, the only dispute shown by the record was between the union and the plumbing subcontractor, whose employees the union represented, concerning an alleged breach of their agreement which required the subcontractor to accept only job contracts which covered all the plumbing work, a matter outside the scope of the proceeding. In the Board's opinion, the only jurisdictional dispute suggested by the record was one relating to the assignment of the work in question to the utility's employees, represented by another union, rather than to the plumbing subcontractor's employees represented by the respondent, a matter not framed by the charge nor litigated at the hearing.³⁵

On two occasions, the Board refused to dismiss section 10(k) proceedings based on the contention that the disputing parties had made contractual provisions to settle work assignment disputes voluntarily. In *Frank P. Badolato & Son*,³⁶ where the claiming union contended that Badolato was bound by agreement to submit the dispute to the National Joint Board for Settlement of Jurisdictional Disputes in the Building and Construction Industry, the Board found no merit to this contention since there was no assertion that Badolato had "stipulated" to Joint Board procedures, which was a condition precedent to being bound by the Joint Board's decision. And in the *New York Times Co.* case,³⁷ where two disputing unions both contended that the arbitration provisions of their respective contracts provided a method for voluntary adjustment of their individual dispute, the Board found no merit to such contention, holding that in neither instance was the second union, party only to its own contract, bound thereby.

³³ *Sheet Metal Workers, Local 272 (Valley Sheet Metal Co.)*, 136 NLRB 1402, Chairman McCulloch and Member Fanning for the majority, Member Leedom dissenting, Members Rodgers and Brown not participating.

³⁴ *Local 373, Plumbers (Carleton Brothers Co.)*, 137 NLRB No. 80

³⁵ Cf. *Local 5, Plumbers (Arthur Vennert Co.)*, 137 NLRB No. 100, which involved sec. 8(b)(4) (i) and (ii) (B) allegations.

³⁶ *International Union of Operating Engineers, Local 66 (Frank P. Badolato & Son)*, 135 NLRB 1392.

³⁷ *New York Mailers' Union No. 6 et al. (The New York Times Co.)*, 137 NLRB No. 78.

In *Ray Fabricating*,³⁸ the Board quashed a notice of a section 10(k) proceeding, in view of the fact that almost 2 years had passed since the events involved in the dispute, the disputed work had long been completed, the absence from the State of the charging employer itself, and the serious impact a determination of the dispute would have upon employer-employee relations in the construction industry generally. The Board concluded that the objectives of the Act would not be furthered by attempting to determine the dispute at such late date. And in *Carling Brewing Co.*,³⁹ a Board majority found that a statement by a union that it would take whatever "action it deemed necessary" to retain contract assigned work did not constitute an illegal threat, and quashed a section 10(k) hearing.

(2) Determination of Disputes

During the fiscal year, the Board issued three "affirmative" work assignment determinations⁴⁰ in accordance with the *Columbia Broadcasting System* decision. In the lead case, *Jones Construction Co.*, the Board stated:

At this beginning stage in making jurisdictional awards as required by the Court, the Board cannot and will not formulate general rules for making them. Each case will have to be decided on its own facts. The Board will consider all relevant factors in determining who is entitled to the work in dispute, e.g., the skills and work involved, certifications by the Board, company and industry practice, agreements between unions and between employers and unions, awards of arbitrators, joint boards and the AFL-CIO in the same or related cases, the assignment made by the employer, and the efficient operation of the employer's business. This list of factors is not meant to be exclusive, but is by way of illustration. The Board cannot at this time establish the weight to be given the various factors. Every decision will have to be an act of judgment based on common sense and experience rather than on precedent. It may be that later, with more experience in concrete cases, a measure of weight can be accorded the earlier decisions.

It then assigned the job of operating electric overhead cranes in a machine shop to electricians, rather than to machinists, giving substantial weight to the longstanding rulings by the parent federation of both disputing unions, particularly since the employer made its work assignment on the basis of the same rulings.

In the *Badolato* case, which stemmed from technological changes in the plastering industry, the Board assigned the work of operating

³⁸ *Panama City Building & Construction Trades Council (Ray Fabricating & Mfg. Co.)*, 136 NLRB 1002. See also *Brotherhood of Teamsters & Auto Truck Drivers, Local 70 (Hulls Transportation Co.)*, 136 NLRB 1086

³⁹ *International Association of Machinists (Carling Brewing Co.)*, 136 NLRB 1216, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting on the ground that strike action was threatened

⁴⁰ *International Association of Machinists, Lodge No. 1743 (J. A. Jones Construction Co.)*, 135 NLRB 1402; *International Union of Operating Engineers, Local 66 (Frank P. Badolato & Son)*, 135 NLRB 1392; *International Association of Machinists, Lodge No 681, District 27 (P. Lorillard Co., Inc.)*, 135 NLRB 1382

plaster mixers and applicators to hod carriers, rather than to operating engineers. In so doing the Board relied on the fact that the work could be performed as an incident to the work traditionally performed by the hod carriers, the employer and other employers in the industry traditionally assigned such work to hod carriers, and there was no contract, Board certification, or relevant jurisdictional awards compelling the assignment to the operating engineers. And in the *Lorillard* case, the Board's assignment of "fixing" work on new cigarette boxing machines to "fixers" in the production unit, rather than to machinists, was based upon past practices in the plant, practices in the industry, the fact that the fixers were capable of performing such work and that their work was more closely related to the production process, and "fixing" work underutilized the skills of the machinists.

In each of these cases, the Board emphasized that it awarded the work assignment to a *group of employees* performing a particular type of work rather than to *members of a particular union* which represented them. And in the *Lorillard* case, the machinist union was excluded from representing the fixers by virtue of its Board certification which had excluded fixers from its bargaining unit.

In subsequent determinations, the Board utilized additional criteria. In *Precrete*,⁴¹ it considered the element of cost to the employer as part of a total evaluation of the facts and relied on a settlement reached by the parties and reduced to writing. In *All-Boro*,⁴² it considered the relative skill of competing employees to perform the work involved and the fact that the current assignment was supported by a contract in effect for several years. And in *Matera*,⁴³ it assigned highly skilled carpenters to perform the specialized carpentry work involved.

In *Turman Construction Co.*,⁴⁴ the Board awarded the work in dispute to employees represented by various unions under a conventional collective-bargaining agreement with their employers, on a record which was not only barren of evidence supporting the claimant union but established the complete and conventional regularity of the existing work assignments. And in the *New York Times Co.* case,⁴⁵ which involved a dispute between two unions as to which employees should tie certain advertising material into bundles, it divided the work between the two groups on the basis of the ultimate destination of the bundles, in accordance with the company's past practice. It found

⁴¹ *Local 46, Wood, Wire & Metal Lathers International Union (Precrete, Inc.)*, 136 NLRB 1072.

⁴² *Enterprise Association of Steam, Hot Water, etc., Local 638, Plumbers & Pipefitters (All-Boro Air Conditioning Corp)*, 136 NLRB 1641. See also *Local 853, International Union of Operating Engineers (Schlavone & Sons, Inc.)*, 136 NLRB 993.

⁴³ *Local 1266, United Brotherhood of Carpenters & Joiners of America (William Matera, Inc.)*, 137 NLRB No. 4.

⁴⁴ *United Mine Workers of America, District 50 (Turman Construction Co.)*, 136 NLRB 1068

⁴⁵ *New York Mailers' Union No. 6, et al. (The New York Times Co.)*, 137 NLRB No. 78.

this to be a practical solution that had operated satisfactorily in the past and had given relative stability to the company's operations.

In *Union Carbide Chemical Co.*,⁴⁶ the International Longshoremen's Association, whose members had never worked directly for the company, claimed that its members were entitled to load ships at the company's new docks built to handle a newly packaged product never handled by the longshoremen. A Board majority awarded the disputed work to the company's employees who were represented by the Texas City Metal Council since their job classifications were substantially identical to those included in the production and maintenance unit represented by the Council under a Board certification and a collective-bargaining agreement. And in *Allied Maintenance Co. of Pennsylvania, Inc.*,⁴⁷ the Board awarded ticket-selling work to company employees hired for such purpose, on the basis that the custom and practice in the area showed no traditional assignment limited to either union, and the evidence did not support claimant union's assertion that ticket-selling work required skills possessed to a sufficient degree only by their members.

In *Binswanger Glass Co.*,⁴⁸ the dispute arose between "outside" and "inside" glaziers, both groups being members of the same local. On the basis of past practice and the parties' existing contract, the Board assigned the disputed work to Binswanger's "inside" or warehousemen group of employees, "whether called inside glaziers, drivers, helpers, or glass handlers." In *Pittsburgh Plate Glass Co.*,⁴⁹ the dispute was essentially the same as that in the companion *Binswanger* case but, in addition to the "inside" and "outside" glaziers, involved laborers on the same project. For the same reasons as in *Binswanger*, a Board majority assigned the disputed work to both the laborers and the "inside" glaziers without making any distinction between the assignments.

8. Excessive or Discriminatory Membership Fees

Section 8(b) (5) makes it an unfair labor practice for a labor organization to charge employees subject to a valid union-security agreement a membership fee "in an amount which the Board finds excessive or discriminatory under all the circumstances." The section

⁴⁶ *Local 991, ILA, etc. (Union Carbide Chemical Co.)*, 137 NLRB No. 85, Members Leedom and Fanning joining in the principal opinion, Member Rodgers concurring, Member Brown dissenting, Chairman McCulloch not participating.

⁴⁷ *International Alliance of Theatrical Stage Employees, etc., Local 862, et al. (Allied Maintenance Co. of Pennsylvania, Inc.)*, 137 NLRB No. 79.

⁴⁸ *Glaziers Local No. 1778, etc. (Binswanger Glass Co., Inc.)*, 137 NLRB No. 101.

⁴⁹ *Glaziers Glass Workers & Glass Warehouse Workers, Local 1778, Painters, et al. (Pittsburgh Plate Glass Co.)*, 137 NLRB No. 115, Members Rodgers, Leedom, and Fanning for the majority, Chairman McCulloch and Member Brown dissenting.

further provides, "In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected."

In *Triangle Publications*,⁵⁰ a union was held to have violated section 8(b) (5) by increasing the initiation fee for an employer's new employees, under a valid union-security clause,⁵¹ from \$50 to \$500, while requiring new members of newly organized employers to pay an initiation fee of only \$25. The increased fee was deemed discriminatory since it was designed to restrain the employer from hiring part-time and temporary employees who were not union members, and they, in turn, would be discouraged from accepting such employment by the size of the fee. Further, it was deemed excessive since the starting salary of new employees ranged between \$90 to \$95 per week; part-time employees had no guarantee of such earnings; temporary employees had no guarantee of continued employment; no other union in the area, representing the same classification of employees, charged comparable fees; and the increase in fees for employees of this employer was tenfold.

On the other hand, in *Twentieth Century-Fox*,⁵² a Board panel found that the union and the employer were parties to an agreement which unlawfully imposed union membership as a condition of employment, and therefore held that the union, and its agents, did not violate section 8(b) (5) by imposing and collecting allegedly excessive initiation fees pursuant to the unlawful agreement. The Board stated, "Section 8(b) (5) was intended to cover situations where employees, otherwise *lawfully* compelled to join a labor organization as a condition of employment, were required to pay excessive or discriminatory fees for such membership."

9. Recognitional and Organizational Picketing by Noncertified Union

Section 8(b) (7) of the Act makes it an unfair labor practice for a labor organization, in specified situations, to picket or threaten to

⁵⁰ *Television & Radio Broadcasting Studio Employees, Local 804 (Radio & Television Division of Triangle Publications, Inc., et al.)*, 135 NLRB 632. Chairman McCulloch and Members Fanning and Brown for the majority, Member Rodgers dissenting in part, Member Leedom not participating.

⁵¹ In this case, the Board majority found a union-security clause, which required all present employees to become members of the union and all future employees to become members within 30 days after employment, to be valid.

⁵² *Teamsters & Allied Workers, Hawaii Local 996, et al. (Twentieth Century-Fox Film Corp.)*, 134 NLRB 1556, Chairman McCulloch and Members Leedom and Fanning participating.

picket for "an object" of "forcing or requiring"⁵³ an employer to recognize or bargain with it, or employees to accept it, as the bargaining representative, unless the labor organization is "currently certified" as the employees' representative.⁵⁴ But even a union which has not been certified is barred from such picketing only in the "three general areas" delineated in subparagraphs (A); (B), and (C) of section 8(b) (7).⁵⁵

Recognitional or organizational picketing is prohibited under the three subparagraphs of section 8(b) (7) as follows: (A) where another union is lawfully recognized by the employer and a question concerning representation may not be appropriately raised under section 9(c);⁵⁶ (B) where a valid election has been held within the preceding 12 months; or (C) where no petition for a Board election has been filed "within a reasonable period of time not to exceed 30 days from the commencement of such picketing."

Subparagraph (C) provides further that if a timely petition is filed, the representation proceeding shall be conducted on an expedited basis.⁵⁷ However, picketing for informational purposes stated in the second proviso to subparagraph (C) is exempted from the prohibition of subparagraph (C), unless it has the effect of inducing work stoppages by employees of persons doing business with the picketed employer.

During the past fiscal year, the Board decided 29 cases under section 8(b) (7). Five of these cases, *Macatee*, *Blinne*, *Stork*, *Charlton*, and *Crown*,⁵⁸ were upon reconsideration of decisions issued prior to the fiscal year.

a. Scope of Section 8(b)(7)

The proscriptions of section 8(b) (7) apply only to picketing, or the causing or threat thereof,⁵⁹ for an object of recognition, bargaining,

⁵³ See *Automotive, Petroleum & Allied Industries Employees Union, Local 618, Teamsters (Charlie's Car Wash and Service)*, 136 NLRB 934, footnote 8. The words "forcing or requiring" refer to the intended effect of the picketing, not the manner in which the picketing is carried on, to the 'object', not the method" *N.L.R.B. v. Local 239, Teamsters (Stan-Jay)*, 289 F. 2d 41, 44 (C.A. 2, 1961), enforcing 127 NLRB 958 (1960).

⁵⁴ A "currently certified" union "may picket for recognition or organization of employees for whom it is certified." *International Hod Carriers, etc., Local 840 (Blinne)*, 135 NLRB 1153. See also *Retail Store Employees' Union Local 692, etc. (Irving, Inc.)*, 134 NLRB 686, footnote 9.

⁵⁵ *Ibid.*

⁵⁶ For the Board's contract bar rules see discussion above, pp. 57-59.

⁵⁷ Issues affecting such representation proceedings are discussed above, pp. 45, 46, 79.

⁵⁸ *Dallas General Drivers, etc. (Macatee, Inc.)*, 135 NLRB 62, modifying the order in 127 NLRB 683 (1960); *International Hod Carriers, Local 840 (Blinne Construction Co.)*, 135 NLRB 1153, reaffirming 130 NLRB 587 (1961); *Chefs, Cooks, etc., Hotel & Restaurant Employees Union, Locals 89 and 1 (Stork Restaurant, Inc.)*, 135 NLRB 1173, reaffirming 130 NLRB 543 (1961); *International Typographical Union & Local 285 (Charlton Press, Inc.)*, 135 NLRB 1178, reversing 130 NLRB 727 (1961); *Local Joint Executive Board of Hotel & Restaurant Employees Union, Local 681 (Crown Cafeteria)*, 135 NLRB 1183, reversing 130 NLRB 570 (1961).

⁵⁹ For threats to picket, see *Local 1199, Drug & Hospital Employees Union, etc. (Janel Sales Corp)*, 136 NLRB 1564.

or organization, by a labor organization which has not been certified.⁶⁰

In the *Woodward Motors* case,⁶¹ the Board held that the placing of two picket signs in a snowbank abutting an employer's entrance, as union agents watched from a car parked on an adjacent highway, constituted picketing within the meaning of the section.⁶² It has also been repeatedly held that the fact that picketing is peaceful is no defense.⁶³

And upon reconsideration of its original decisions in the *Blinne*, *Stork*, and *Charlton* cases,⁶⁴ the Board again held that (1) picketing for purposes prohibited by section 8(b) (7) is unlawful whether conducted by a minority or a majority union which is not "currently certified"; and (2) an employer's unfair labor practice is not ordinarily a defense to a section 8(b) (7) charge based on picketing for a proscribed object.⁶⁵ However, in the second *Blinne* and *Charlton* decisions, a Board majority⁶⁶ noted that the filing of a "meritorious" 8(a) (5) charge—and *only* a "meritorious" 8(a) (5) charge—would be a defense to an 8(b) (7) (C) charge, absent the filing of a timely representation petition.⁶⁷

b. Legality of Objective

Only picketing for "an object"⁶⁸ of recognition,⁶⁹ bargaining,⁷⁰ or organization⁷¹ is limited by section 8(b) (7). In determining whether

⁶⁰ See *International Hod Carriers, Local 840 (Blinne)*, 135 NLRB 1153

⁶¹ *Local 182, Teamsters (Woodward Motors, Inc)*, 135 NLRB 851.

⁶² See also *Service & Maintenance Employees Union, Local 399 (The William J. Burns International Detective Agency, Inc.)*, 136 NLRB 431, which involved the publicity proviso of sec. 8(b) (4), where Members Rodgers and Leedom deemed the marching of 20 to 70 individuals in an elliptical path in front of a sports arena without placards or armbands, while handbills were distributed, to be picketing

⁶³ *Automotive, Petroleum & Allied Industries Employees Union, Local 618, Teamsters (Charlie's Car Wash & Service)*, 136 NLRB 934, footnote 8 See also *Local 239, Teamsters (Stan-Jay Auto Parts)*, 127 NLRB 958 (1960), and footnote 53, p. 182, above.

⁶⁴ See footnote 58, p. 182, above.

⁶⁵ See Twenty-sixth Annual Report (1961), pp 148-149. See also discussion below, p 187, as to proscribed objectives, and p 191, as to sec 8(b) (7) (C).

⁶⁶ Chairman McCulloch and Members Fanning and Brown agreed in this respect. However, Member Fanning, unlike the Chairman and the other Members, would have dismissed the complaint in the *Blinne* case because of the *Aiello* doctrine, 110 NLRB 1365 (1954), which he would modify.

⁶⁷ Members Rodgers and Leedom did not agree with this, but concurred in the finding of a violation in the *Blinne* case, and dissented in the dismissal of the complaint in the *Charlton* case.

⁶⁸ See *Culinary Workers & Bartenders Union Local 535, etc. (Educational Supply Service of California)*, 134 NLRB 1505, footnote 1, *Local 346, International Leather Goods Union, etc. (Baronet of Puerto Rico, Inc)*, 133 NLRB 1617.

⁶⁹ For cases involving a recognition object, see *Hod Carriers, Local 840 (Blinne)*, 135 NLRB 1153; *Chefs, Cooks, etc., Hotel & Restaurant Employees Union, Locals 1 and 89 (Stork Restaurant, Inc)*, 135 NLRB 1173; *ITU and Ansonia, Local 285 (Charlton Press, Inc.)*, 135 NLRB 1178; *Local 1199, Drug & Hospital Employees Union, RWDSU (Janet Sales Corp)*, 136 NLRB 1564.

⁷⁰ For cases involving a bargaining object, see *Educational Supply Service of California*, above; *Local 182, Teamsters (Woodward Motors, Inc)*, 135 NLRB 851.

⁷¹ For cases involving an organization object, see *Retail Clerks, Local 219 (National Food Stores, Inc.)*, 134 NLRB 1680, *Retail Store Employees' Union, Local 692 (Irvins, Inc.)*, 134 NLRB 686, footnote 2.

particular picketing was for any of these proscribed objects, the Board considered such factors as (1) the nature of the union's prepicketing conduct,⁷² particularly whether it demanded recognition or a contract⁷³ or solicited employees to join the union;⁷⁴ (2) the language on the picket signs;⁷⁵ and (3) the union's conduct and statements during picketing,⁷⁶ including the place and manner of picketing.⁷⁷ A Board majority noted, however, "The question of objectives in every case is one of fact and not of assumptions or presumptions."⁷⁸ In each case, the Board considered all the circumstances involved, and did not rely on any single factor.⁷⁹

During fiscal 1962, the Board also had occasion to decide whether various picketing purposes, i.e., picketing for area or union standards, picketing to protest an employer's unfair labor practices, picketing for informational purposes, and picketing to obtain the reinstatement of discharged employees, were in a category proscribed by section 8(b) (7).

⁷² See *Automotive, Petroleum & Allied Industries Employees Union, Local 618, Teamsters (Charlie's Car Wash & Service)*, 136 NLRB 934, where a proscribed object was found although the union's last request for recognition occurred about a year before picketing commenced. Compare with *Local 344, Retail Clerks (Alton Myers Bros., Inc.)*, 136 NLRB 1270, where no proscribed object was found.

⁷³ See, e.g., *Educational Supply Service of California*, above; *Local 130, Painters (Joiner, Inc.)*, 135 NLRB 876. *Janel Sales Corp.*, above; *Local Union 154, ITU (Ypsilanti Press, Inc.)*, 137 NLRB No. 123. Compare with *Teamsters "General" Local 200 (Bachman)*, 134 NLRB 670, where no violation was found, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting. See also *Miratti's, Inc.*, 132 NLRB 699, a representation case.

⁷⁴ See, e.g., *Baronet of Puerto Rico, Inc.*, above; *National Food Stores, Inc.*, above. *Department & Specialty Store Employees' Union, Local 1265 (Oakland G. R. Kinney Co., Inc.)*, 136 NLRB 335. But see *Local 741, Plumbers (Keith Riggs Plumbing & Heating Contractor)*, 137 NLRB No. 121, where a majority consisting of Chairman McCulloch and Members Fanning and Brown held that a union representative's visits to one employee several weeks before picketing commenced, during which visits the advantages of joining the union were mentioned, were insufficient to negative the union's repeated statements that the picketing was to protect wage and other standards; Members Rodgers and Leedom dissenting in part.

⁷⁵ See, e.g., *Baronet of Puerto Rico, Inc.*, above; *Joiner, Inc.*, above; *Philadelphia Window Cleaners etc., Local 125 (Atlantic Maintenance Co.)*, 136 NLRB 1104. But see *Woodward Motors, Inc.*, above, *Charlie's Car Wash & Service*, above; and *Janel Sales Corp.*, above, where proscribed objects were found despite the language on some of the picket signs used. See also *Ypsilanti Press, Inc.*, above.

⁷⁶ See, e.g., *Educational Supply Service of California*, above; *Joiner, Inc.*, above; *National Food Stores, Inc.*, above; *Hotel, Motel & Club Employees' Union Local 568 (Marriott Motor Hotels, Inc.)*, 136 NLRB 759; *Charlie's Car Wash & Service*, above.

⁷⁷ See, e.g., *Ypsilanti Press, Inc.*, above; *Atlantic Maintenance Co.*, above. See also *Miratti's, Inc.*, above, and *Andes Candies, Inc.*, 133 NLRB 758, representation proceedings.

⁷⁸ *Keith Riggs Plumbing & Heating Contractors*, above, Members Rodgers and Leedom dissenting in part. See also *Local 344, Retail Clerks (Alton Myers Bros., Inc.)*, 136 NLRB 1270, where a Board majority, consisting of Chairman McCulloch and Members Fanning and Brown, Members Rodgers and Leedom dissenting, rejected "the application of a presumption of the continuity of a state of affairs in construing the legality of picketing where there is no substantial independent evidence to support such a presumption" and found no proscribed object.

⁷⁹ See, e.g., *Local Joint Executive Board of San Diego, etc. (The Evans Hotels Operating the Bahia Motor Hotel)*, 132 NLRB 737; *Retail Store Employees' Union, Local 692 (Irvins, Inc.)*, 134 NLRB 686, footnote 2; *Department & Specialty Store Employees' Union, Local 1265 (Oakland G. R. Kinney Co., Inc.)*, 136 NLRB 335. Compare with *Teamsters "General" Local 200 (Bachman)*, 134 NLRB 670.

(1) "Area Standards" Picketing

Recognizing that its rationale in the *Calumet Contractors* case⁸⁰—which arose under the section 8(b)(4)(C) prohibition against recognitional picketing⁸¹—was equally applicable to 8(b)(7) situations, a Board majority found picketing for so-called "area standards" not for a proscribed object under section 8(b)(7) in two cases, *Claude Everett Construction Company* and *Keith Riggs Plumbing*.⁸² In two other cases, *Joiner* and *Janel Sales*,⁸³ the Board found proscribed objects notwithstanding the claim of "standards" picketing.

In the *Claude Everett Construction* case,⁸⁴ the majority held that a council of local unions did not picket for a proscribed object when it picketed to induce an employer to raise its wage rates to those negotiated in the area by its member locals. The majority observed that neither in its communications to the employer, nor on its picket signs, did the council claim to represent the employees, request recognition, or solicit employees to become members of any of its locals. And the council had on numerous occasions in the past made similar protests against "substandard" wages paid by other employers without ever requesting recognition as the bargaining representative.

Similarly, in the *Keith Riggs* case,⁸⁵ the majority found no proscribed object on the ground that the union's demand that the employer meet "prevailing standards" did not in itself support an inference that the union sought to bargain with the company. It noted that the union did not have to negotiate its objective—establishment of standard wage and working conditions—as these had already been set in contracts with unionized employers, and the union had furnished this information to the employer. And it rejected the assertion of the dissenting members that picketing to compel a change in wages and working conditions "necessarily" is for the purpose of recognition and bargaining.

On the other hand, in the *Joiner* case,⁸⁶ the Board found picketing for "an object" of recognition or bargaining proscribed by section

⁸⁰ *International Hod Carriers, etc., Local 41 (Calumet Contractors Assn.)*, 133 NLRB 512, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting.

⁸¹ See discussion above, pp. 170–171. See also Twenty-sixth Annual Report (1961), pp. 141–142.

⁸² *Houston Building & Construction Trades Council (Claude Everett Construction Co.)*, 136 NLRB 321, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting; *Local 741, Plumbers (Keith Riggs Plumbing & Heating Contractor)*, 137 NLRB No. 121, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting in part.

⁸³ *Local 130, Painters (Joiner, Inc.)*, 135 NLRB 876; *Local 1199, Drug & Hospital Employees Union, RWDSU (Janel Sales Corp.)*, 136 NLRB 1564.

⁸⁴ *Houston Building & Construction Trades Council (Claude Everett Construction Co.)*, above.

⁸⁵ *Local 741, Plumbers (Keith Riggs Plumbing & Heating Contractor)*, above.

⁸⁶ *Local 130, Painters (Joiner, Inc.)*, above.

8(b) (7), although the union's business agent claimed that it was solely "to bring [the employer] up" to the prevailing wage scale and fringe benefits of other employers with whom the union had bargaining agreements, not to obtain an agreement. In finding a proscribed object here, the Board relied on the following factors: (1) For several years the union requested the employer to recognize it, and 60 days prior to the picketing requested a contract; (2) the union has a long-established practice of picketing employers whose wages and working conditions fall below union standards until they execute its standard collective-bargaining agreement, irrespective of its representative status; (3) the language on its picket sign advised that the employer did not employ its members nor have a contract with it; and (4) the statements of the picket to the employer's president and salesman indicated that the union wanted a contract.

In like manner, a proscribed object was found in *Janel Sales Corp.*,⁸⁷ notwithstanding the union's claim that it was merely protesting the employer's failure to meet prevailing rates of pay and working conditions. In this case, although two picket signs referred in part to "standards," one sign—which read, "This is not a Local 1199 drug store. Please do not patronize this store. Local 1199"—was deemed to evidence a recognition object when considered in conjunction with the union's pre-picketing conduct.⁸⁸

(2) "Informational" Picketing

Upon reconsideration of the original decisions in the *Crown* and *Stork* cases,⁸⁹ a Board majority⁹⁰ was of the opinion that "informational picketing, divorced from any object of recognition, bargaining, or organization falls outside the literal scope of Section 8(b) (7) altogether."⁹¹ It noted in *Crown*, however, that picketing to advise the public in conformity with the language contained in the second proviso to section 8(b) (7) (C)—that "an employer does not employ members of, or have a contract with, a labor organization"—clearly "imports a present object of organization" or "implies a recognitional

⁸⁷ *Local 1199, Drug & Hospital Employees Union, RWDSU (Janel Sales Corp.)*, above.

⁸⁸ The Board found it unnecessary to pass upon the trial examiner's conclusion that "standards" picketing is barred by sec. 8(b) (7) (A) where an employer has "lawfully recognized" another union as the bargaining representative for its employees.

⁸⁹ *Local Joint Executive Board of Hotel & Restaurant Employees Union, Local 681 (Crown Cafeteria)*, 135 NLRB 1183, reversing 130 NLRB 570 (1961), Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting; *Chefs, Cooks, etc., Hotel & Restaurant Employees Union, Locals 89 and 1 (Stork Restaurant, Inc)*, 135 NLRB 1173, reaffirming 130 NLRB 543 (1951), principal opinion by Chairman McCulloch and Members Fanning and Brown, separate opinion by Members Rodgers and Leedom. See Twenty-sixth Annual Report (1961), pp. 149-150, for discussion of original decisions in these cases.

⁹⁰ Chairman McCulloch and Members Fanning and Brown, Members Rodgers and Leedom dissenting.

⁹¹ *Crown Cafeteria*, above, 135 NLRB 1183, at footnote 5.

and bargaining object," depending upon which language of the proviso is used.

(3) Picketing for Reinstatement of Employees

Picketing solely in protest against an employee's discharge and to secure his reinstatement was held by a Board majority not for a proscribed object in the *Fanelli Ford* case.⁹² While recognizing that picketing for an employee's reinstatement may in some circumstances be used as a pretext for attaining recognition as the collective-bargaining representative of all the employees in a unit, the majority was unwilling to infer such broader objective in this case absent some more affirmative showing of such an object. Accordingly, it overruled the *Lewis Food* case⁹³—which held that a strike or picketing by a union to obtain reinstatement of a discharged employee was "necessarily" to compel recognition or bargaining on such matter, in violation of section 8(b)(4)(C)—to the extent it was inconsistent with this decision.

(4) Protests Against Employer's Unfair Labor Practices

Upon reconsideration of the *Blinne* decision,⁹⁴ it was noted that "Congress did not consider picketing against unfair labor practices as such to be also for proscribed objects" under section 8(b)(7). However, a violation was found in this case as the union's objectives for picketing included recognition. And although the Board majority dismissed the complaint in the second *Charlton Press* decision⁹⁵ because of various circumstances and equitable considerations,⁹⁶ the union's picketing in protest of the employer's refusal to bargain in an appropriate unit was not deemed beyond the scope of section 8(b)(7).⁹⁷

c. Picketing When Another Union Is Contractual Representative

Subparagraph (A) of section 8(b)(7) prohibits recognitional or organizational picketing by a noncertified union when another union, which has been lawfully recognized, has a contract with the employer

⁹² *Local 259, UAW (Fanelli Ford Sales, Inc.)*, 133 NLRB 1468, Chairman McCulloch and Members Fanning and Brown for the majority, Member Rodgers dissenting, Member Leedom not participating.

⁹³ *Lewis Food Co.*, 115 NLRB 890 (1956).

⁹⁴ *International Hod Carriers, Local 840 (Blinne)*, 135 NLRB 1153, reaffirming 130 NLRB 587 (1961), principal opinion by Chairman McCulloch and Member Brown, Member Fanning concurring and dissenting in part, separate opinion by Members Rodgers and Leedom.

⁹⁵ *ITU, Local 285 (Charlton Press, Inc.)*, 135 NLRB 1178, reversing 130 NLRB 727 (1961), Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting.

⁹⁶ See discussion below, p. 191.

⁹⁷ See also *Stork Restaurant, Inc.*, above; *Local 182, Teamsters (Woodward Motors, Inc.)*, 135 NLRB 851; *ITU, etc. (Greenfield Printing & Publishing Co.)*, 137 NLRB No. 49; *Local 154, ITU (Ypsilanti Press, Inc.)*, 137 NLRB No. 123.

that would bar an election under section 9(c).⁹⁸ During fiscal 1962, the Board decided only one case, *Janel Sales*,⁹⁹ involving this subparagraph.

In *Janel Sales*, the Board found that a union violated section 8(b)(7)(A) by threatening to picket and picketing for recognition, where the employer had an existing contract with another union covering the employees sought by the respondent union. In so finding, it rejected the union's contention that its picketing was protected by the so-called informational or publicity proviso of section 8(b)(7)(C),¹ and that the contracting union was not "lawfully recognized" by the employer as required by section 8(b)(7)(A).² The Board noted that the informational or second proviso of section 8(b)(7)(C) was not available as a defense to an alleged violation of section 8(b)(7)(A), as it "appertains only to situations defined in the principal clause of Section 8(b)(C)," and that the respondent union introduced no substantial evidence in support of its contention that the employer did not "lawfully" recognize the incumbent union.³

d. Picketing Within 12 Months of Valid Election

Section 8(b)(7)(B) prohibits recognition or organizational picketing by a noncertified union where a valid election has been conducted under section 9(c) within the preceding 12 months. During fiscal 1962, the Board decided 10 cases under this section.⁴ One of these cases, *Macatee*,⁵ involved the reconsideration and modification of an order issued prior to the fiscal year. In all, violations were found in seven cases,⁶ and three cases were dismissed for lack of merit.⁷

⁹⁸ For the Board's contract bar rule, see discussion above, pp 57-59.

⁹⁹ *Local 1199, Drug & Hospital Employees Union, etc. (Janel Sales Corp.)*, 136 NLRB 1564. For the only previous case involving sec. 8(b)(7)(A), see *Local 182, Teamsters (Sitruie, Inc.)*, 129 NLRB 1459 (1961).

¹ See discussion below, p. 193.

² The Board also rejected the union's contention that its picketing was merely to protest the employer's failure to meet prevailing rates of pay and working conditions, discussed above, p. 186.

³ While not agreeing with all the views of the trial examiner concerning the nonlitigability of the lawfulness of an incumbent union's recognition in an 8(b)(7)(A) proceeding, the Board found it unnecessary to decide in this case the scope or conditions under which the question may be litigated in such proceeding.

⁴ For the only other cases previously decided on the merit under this section, see *District 76, RWDSU (Morgan Shoe Co.)*, 129 NLRB 1339 (1961), where the complaint was dismissed because of insufficient commerce, and *Dallas General Drivers, etc., Local 745 (Macatee, Inc.)*, 127 NLRB 683 (1960), which was reconsidered this year.

⁵ *Dallas General Drivers, etc., Local 745 (Macatee, Inc.)*, 135 NLRB 62, modifying order in 127 NLRB 683 (1960).

⁶ *Macatee, Inc.*, above; *Local Joint Executive Board of San Diego, etc. (Evans Hotels)*, 132 NLRB 737; *Retail Store Employees' Union Local 692 (Irvins, Inc.)*, 134 NLRB 686; *Retail Clerks Local 219 (National Food Stores, Inc.)*, 134 NLRB 1680; *Local 182, Teamsters (Woodward Motors, Inc.)*, 135 NLRB 851; *Local 130, Painters (Joiner, Inc.)*, 135 NLRB 876; *Retail Clerks, Local 1439 (Ames IGA Foodliner)*, 136 NLRB 778.

⁷ *Teamsters "General" Local 200, etc. (Bachman)*, 134 NLRB 670; *Department & Speciality Store Employees' Union, Local 1265 (Oakland G. R. Kinney Co., Inc.)*, 136 NLRB 335; *Local 344, Retail Clerks (Alton Myers Bros., Inc.)*, 136 NLRB 1270. In *Bachman* and *Alton Myers*, no proscribed object was found. In *Kinney*, no valid election was found.

Other than the existence of a proscribed object, the principal issues in these cases were: the validity of the election; the determinative dates for finding a violation and an appropriate remedy; and the applicability of the second proviso of section 8(b)(7)(C) to 8(b)(7)(B).

(1) Validity of Election

A violation of section 8(b)(7)(B) is dependent upon the validity of an election. In the *Kinney* case,⁸ a panel majority⁹ held that the union did not violate section 8(b)(7)(B) by picketing after an "expedited" election had been conducted pursuant to section 8(b)(7)(C),¹⁰ because the "expedited" election had been improperly directed. The majority found that since the union's picketing, before and after the filing of the representation petition, conformed to the requirements of the publicity proviso to section 8(b)(7)(C), no "expedited" election was warranted.¹¹ It accordingly dismissed the section 8(b)(7)(B) complaint and set aside the election.

(2) Determinative Dates

To constitute a violation of section 8(b)(7)(B), the picketing must occur within 12 months following a valid election. In the *Irvins* case,¹² the Board was faced with two distinct problems: the determinative date for finding a *violation*; and the determinative date for an appropriate *remedy*.

As for the finding of a violation, the Board held that the decisive date is the date on which a certification of bargaining representative or a certification of results is issued in an election conducted under section 9(c), rather than the date of the balloting.¹³ This, the Board noted, is supported by the legislative history, and the belief that the "certification of results" date will more realistically conform with the concept of when a "valid election" has been conducted, since "an election, under the Board's rules, is not a conclusive and final determination until the time for filing challenges and objections has expired, or until it has been determined that a runoff election is not required."

As for the remedy in section 8(b)(7)(B) cases, the Board was of the opinion that it would best effectuate the policies of the Act if the

⁸ *Department & Specialty Store Employees Union, Local 1265 (Oakland G. R. Kinney Co., Inc.)*, above.

⁹ Chairman McCulloch and Member Fanning for the panel majority, Member Leedom dissenting.

¹⁰ See discussion below, p. 192.

¹¹ See discussion below, pp. 195-196.

¹² *Retail Store Employees Union Local 692 (Irvins, Inc.)*, above.

¹³ Compare with the Board's long-established interpretation of sec. 9(c)(3) that the "twelve-month" limitation contained therein runs from the date of the balloting and not from the date of the certification of results where no union is selected. See e.g., *Mallinckrodt Chemical Works*, 84 NLRB 291, 292 (1949); *Kolcast Industries, Inc.*, 117 NLRB 418, 419 (1957).

remedy preserved to employers and employees "a 12-month period free from picketing, while at the same time ensuring that the prohibition on the union's picketing activity [would] not, due to circumstances beyond *its* control, be unreasonably extended beyond the same period of time." Accordingly, the Board decided that, absent unusual circumstances warranting different treatment, it would require a cessation of all recognitional and organizational postelection picketing for a period of 12 months "computed from the date the labor organization terminates its picketing activities," either voluntarily or involuntarily.¹⁴

Subsequently, in its supplemental decision in the *Macatee* case,¹⁵ the Board only ordered the union "to cease and desist from picketing for [a recognition] object for a year following the conduct of any future valid election in which the Union is unsuccessful," as more than a year had already elapsed since the issuance of a Federal district court injunction.

(3) Second Proviso to Section 8(b)(7)(C) Inapplicable

The Board has repeatedly rejected the contention that the publicity proviso to section 8(b)(7)(C)¹⁶ applies to picketing alleged to be violative of section 8(b)(7)(B).¹⁷ It has noted that this proviso's application is specifically limited to subparagraph (C) of section 8(b)(7).¹⁸

e. Picketing for an Unreasonable Period of Time

Section 8(b)(7)(C) limits recognitional or organizational picketing by a noncertified union, not barred by section 8(b)(7)(A) or (B), to a reasonable period not to exceed 30 days, unless a representation petition is filed prior to the expiration of that period. Absent the filing of a timely petition, continuation of the picketing beyond the reasonable period or 30 days violates the section.¹⁹

However, the second proviso to the section provides that picketing "for the purpose of" advising the public that the employer "does not

¹⁴ The Board also required the union "thereafter, to refrain from engaging in recognitional and/or organizational picketing" of the employer "where within the preceding 12 months a valid election shall have been conducted."

¹⁵ *Dallas General Drivers, etc., Local 745 (Macatee, Inc.)*, 135 NLRB 62.

¹⁶ See discussion below, p. 193.

¹⁷ See *Retail Clerks, Local 1439 (Ames IGA Foodliner)*, 136 NLRB 778, footnote 8; *Local 182, Teamsters (Woodward Motors, Inc.)*, 135 NLRB 851; *Retail Store Employees Union Local 692 (Irvins, Inc.)*, 134 NLRB 686.

¹⁸ See *Ames IGA Foodliner*, above; *International Hod Carriers, Local 840 (Blinne)*, 135 NLRB 1153; *Local 1199, Drug & Hospital Employees Union, etc. (Janel Sales Corp.)*, 136 NLRB 1564.

¹⁹ *International Hod Carriers, Local 840 (Blinne)*, 135 NLRB 1153, principal opinion by Chairman McCulloch and Member Brown, Member Fanning concurring in part and dissenting in part, separate opinion by Members Rodgers and Leedom. See also *Chicago Printing Pressmen's Union No. 3, et al. (Moore Laminating, Inc., et al.)*, 137 NLRB No. 88.

employ members of, or have a contract with," the union is not prohibited by section 8(b)(7)(C) "unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services."

During fiscal 1962, the Board decided 18 cases under this subparagraph of 8(b)(7). Four of these cases, *Blinne*, *Stork*, *Charlton*, and *Crown*, were upon reconsideration of decisions issued the previous fiscal year.²⁰ All told, the Board found violations in 11 cases and dismissed the complainants because of lack of merit in 7 cases.

(1) Effect of Employer's Unfair Labor Practices

An employer's unfair labor practice is ordinarily no defense to a section 8(b)(7) allegation based on picketing for a proscribed object.²¹ But in the second *Blinne* and *Charlton* decisions,²² a Board majority²³ observed that the filing of a "meritorious" 8(a)(5) charge against an employer—and *only* a "meritorious" 8(a)(5) charge—would be a defense to an 8(b)(7)(C) charge, where picketing has been conducted without the timely filing of a representation petition.²⁴ In the *Charlton* case, however, the majority dismissed the complaint, notwithstanding the failure to file a meritorious 8(a)(5) charge or a timely representation petition, because of the fortuitous combination of restrictions imposed upon the union's filing of such a charge by section 9(f), (g), and (h), which has been repealed, and by the 6-months limitation of section 10(b).²⁵

(2) Timely Operative Petitions

The filing of a timely representation petition, i.e., within a reasonable period not to exceed 30 days from the commencement of the picketing, "stays the limitation [of section 8(b)(7)(C)] and picketing may continue pending the processing of the petition."²⁶ Under

²⁰ See Twenty-sixth Annual Report (1961), p. 148.

²¹ See discussion above, pp. 183, 187. See also p. 192, footnote 27 as to the effect of outstanding 8(a) charges in deferring "expedited" elections under the first proviso to sec 8(b)(7)(C).

²² *International Hod Carriers, Local 840 (Blinne)*, 135 NLRB 1153; *ITU and Local 285 (Charlton Press, Inc)*, 135 NLRB 1178.

²³ Chairman McCulloch and Members Fanning and Brown agreed in this respect. However, Member Fanning, disagreeing with the Chairman and the other Members, would have dismissed the complaint in the *Blinne* case because of the *Aiello* doctrine, 110 NLRB 1365 (1954), which he would modify.

²⁴ Members Rodgers and Leedom did not agree with this, but concurred in the finding of a violation in the *Blinne* case and dissented in the dismissal of the complaint in the *Charlton* case.

²⁵ Compare with *ITU, etc. (Greenfield Printing & Publishing Co.)*, 137 NLRB No. 49, where the union's failure to file an 8(a)(5) charge was not excused and an 8(b)(7)(C) violation was found.

²⁶ *International Hod Carriers, Local 840 (Blinne)*, 135 NLRB 1153, principal opinion by Chairman McCulloch and Member Brown, Member Fanning concurring in this respect but dissenting in other respects; separate opinion by Members Rodgers and Leedom.

the first proviso to section 8(b) (7) (C), such a petition may be filed without "a showing of substantial interest on the part of the labor organization" and an election will be directed "forthwith, without regard to the provisions of section 9(c) (1)" in such unit as the Board finds appropriate.²⁷ However, this procedure is available only where a section 8(b) (7) (C) charge has been filed.²⁸ And picketing which meets the requirements of the second proviso to section 8(b) (7) (C)²⁹ renders it inapplicable.³⁰

In *Moore Laminating, Inc.*,³¹ representation petitions filed at the commencement of picketing, but withdrawn within 9 days, were held not to afford the first proviso's protection to picketing because the unions' withdrawal of the petitions "created a situation in which the Board could not direct an election 'forthwith' as contemplated by the proviso." The Board observed that by the provisions of section 8(b) (7) (C),

. . . Congress sought to settle, wherever possible, by means of expedited elections, problems resulting from recognition and organizational picketing . . . [W]here a petition has been filed within "a reasonable period," Congress has imposed upon the Board the requirement that it direct an election "forthwith" in such unit as the Board finds to be appropriate. Obviously, the Board can neither find the appropriate unit nor direct an election unless there is a petition *pending* as to which these procedures relate; and a petition which has been withdrawn is not such a pending petition.³²

It accordingly found that the union's picketing beyond 30 days, for an admittedly proscribed object, violated section 8(b) (7) (C) of the Act.³³

²⁷ For the representation proceeding aspects, see above, pp. 45, 46, 79. See also *Blunne*, above, where a Board majority, consisting of Chairman McCulloch and Members Fanning and Brown, agreed that the filing of a petition in an 8(b) (7) (C) situation would not result in an immediate election under the first proviso where there are outstanding 8(a) charges against the employer, but that the election would be held in abeyance pending resolution of such charges, consistent with the Board's regular practice of staying representation proceedings in such circumstances.

²⁸ See principal opinion in *Blunne*, above. See also the Board's Rules and Regulations, Series 8, as amended, sec. 102.76; and its Statements of Procedure, Series 8, as amended, sec. 101.23.

²⁹ The second proviso is discussed below, pp. 193-196.

³⁰ *Department & Specialty Store Employees' Union, Local 1265 (Oakland G. R. Kinney Co., Inc.)*, 136 NLRB 335, Chairman McCulloch and Member Fanning for a panel majority, Member Leedom dissenting on the basis of the majority's interpretation of the second proviso. See also principal opinion in *Blunne*, above.

³¹ *Chicago Printing Pressmen's Union No. 3, et al (Moore Laminating, Inc., et al.)*, 137 NLRB No. 88.

³² It was also noted that this conclusion is reflected in the Board's Rules and Regulations, Series 8, as amended, secs 102.73 through 102.82; and Statements of Procedure, Series 8, as amended, secs 101.22 through 101.25.

³³ In this case, the Board found it unnecessary "to pass on the effect if any to be given to a timely petition which is subsequently dismissed by the Regional Director."

(3) "Informational Picketing" Proviso

The second proviso to section 8(b)(7)(C) "removes the time limitation imposed upon, and preserves the legality of, recognition or organization picketing falling within the ambit of subparagraph (C), where that picketing merely [truthfully] advises the public that an employer does not employ members of, or have a contract with, a union unless an effect of such picketing is to halt pickups or deliveries, or the performance of services"³⁴ by any individual employed by any other person.

This proviso pertains only to the situation defined in section 8(b)(7)(C).³⁵ Where a union's picketing satisfies the proviso's requirements, it may picket under section 8(b)(7)(C), regardless of whether it is a majority or minority union,³⁶ and the expedited election procedure of the first proviso to section 8(b)(7)(C) is inapplicable.³⁷

However, to obtain the proviso's protection the picketing must be directed at the "public."³⁸ Thus, in *Atlantic Maintenance Co.*,³⁹ the Board held that picketing was not protected by the proviso where "the evidence taken in its total context" disclosed that the picketing "was not for the informational purpose authorized by the second proviso but, rather, was focused upon the [company's] employees *qua* employees."⁴⁰ In this case, the picket signs were specifically addressed to the company's employees, as well as the consuming public, and requested them to take circulars being distributed by persons on or near the picket line. These circulars not only asked the public to appeal to the employer and to a defense agency for whom it performed janitorial services, to establish union wages guaranteed by a union contract, but also requested the company's employees to "join our union." And the picket line itself was stationed at the main entrance of the building where the services were performed only as long as that entrance was used by the company's employees, and moved to another entrance when the employees' en-

³⁴ Principal opinion in *Blinne*, above.

³⁵ *Ibid.* See also *Local Joint Executive Board of San Diego, et al. (The Evans Hotels)*, 132 NLRB 737, footnote 12; *Retail Clerks Local 1439, et al. (Ames IGA Foodliner)*, 136 NLRB 778, footnote 8; *Local 1199, Drug & Hospital Employees Union, RWDSU (Janel Sales Corp.)*, 136 NLRB 1564.

³⁶ See *Chefs, Cooks, et al., Hotel & Restaurant Employees Union, Locals 89 and 1 (Stork Restaurant)*, 135 NLRB 1173; *Local Joint Executive Board of Hotel & Restaurant Employees Union, Local 681 (Crown Cafeteria)*, 135 NLRB 1183; *Retail Store Employees Union, Local 400, et al. (Jumbo Food Stores, Inc.)*, 136 NLRB 414.

³⁷ *Department & Specialty Store Employees' Union, Local 1265 (Oakland G. R. Kinney Co., Inc.)*, 136 NLRB 335, Chairman McCulloch and Member Fanning for panel majority, Member Leedom dissenting.

³⁸ See *Philadelphia Window Cleaners & Maintenance Workers' Union, Local 125 (Atlantic Maintenance Co.)*, 136 NLRB 1104, principal opinion by Chairman McCulloch and Members Fanning and Brown, Members Rodgers and Leedom concurring.

³⁹ *Ibid.*

⁴⁰ See also *Local Union 154, ITU (Ypsilanti Press, Inc.)*, 137 NLRB No. 123, footnote 1.

trance was moved. The Board noted that "where picketing, though ostensibly directed at the public, is transparently not for that purpose, circumvention of the statutory prohibition of Section 8(b) (7) (C) will not be tolerated."⁴¹

(a) Existence of proscribed object

Upon reconsideration of the *Crown* case,⁴² a Board majority held that picketing which truthfully advises the public that the employer does not employ members of, or have a contract with, a union is protected by the proviso, absent any stoppage of goods or services, even though the picketing is for an object of recognition or organization.⁴³ The majority rejected the alternative contentions that the second proviso immunized picketing only (1) where the sole object was the dissemination of information "divorced" from a present object of organization, recognition, or bargaining, or (2) where the picketing did not coincide with any other union activity for organization, recognition, or bargaining.⁴⁴ It observed that "the express words of the proviso make it clear that the proviso applies where organization, recognition, or bargaining is an object" and that "informational picketing, divorced from any object of recognition, bargaining, or organization, falls outside the literal scope of Section 8(b) (7) altogether." It also noted that to interpret the proviso as only protecting picketing "divorced" from a present object of organization, recognition, or bargaining would be holding, in effect, that picketing without such an object would be proscribed by section 8(b) (7) (C) if attended by a disruption of deliveries and services. According to the majority, this would be construing the proviso as

⁴¹ However, Chairman McCulloch and Members Fanning and Brown did not agree with "the implication" of the concurring opinion by Members Rodgers and Leedom that surrounding circumstances might render unlawful picketing which in other respects conformed to the language and intent of the proviso. Compare with *Local Joint Executive Board of Hotel & Restaurant Employees Union Local 681 (Crown Cafeteria)*, 135 NLRB 1183, discussed below.

⁴² *Local Joint Executive Board of Hotel & Restaurant Employees Union, Local 681 (Crown Cafeteria)*, above, overruling majority opinion in 130 NLRB 570 (1961), Chairman McCulloch and Members Fanning and Brown for the new majority, Members Rodgers and Leedom dissenting.

⁴³ To the same effect, see also *Retail Store Employees Union, Local 400 (Jumbo Food Stores, Inc.)*, 136 NLRB 414; *Department & Specialty Store Employees' Union, Local 1265 (Oakland G. R. Kinney Co., Inc.)*, 136 NLRB 335; *International Ladies' Garment Workers' Union (Saturn & Sedran, Inc.)*, 136 NLRB 524; *Carpenters District Council of St. Louis (Vestaglas, Inc.)*, 136 NLRB 855.

⁴⁴ See *Hotel, Motel & Club Employees' Union Local 568 (Marriott Motor Hotels, Inc.)*, 136 NLRB 759, where a panel majority consisting of Members Fanning and Brown found a violation of sec. 8(b) (7) (C) because the picketing induced stoppages of deliveries and services, whereas Member Rodgers, concurring in the result, found a violation on the ground that "independent evidence," i.e., evidence apart from the language on the picket signs, of a proscribed object removed the proviso's protection, irrespective of the stoppages

creating a wholly new unfair labor practice outside the contemplation of Congress.⁴⁵

Thus, in *Claude Everett Construction Co.*,⁴⁶ the same Board majority held the fact that picketing interfered with deliveries and services did not constitute a violation of section 8(b) (7) (C) where it did not have a recognition or organization objective.

(b) Proviso picket signs

Picket signs found to conform to the proviso's requirement included: "Notice to Members of Organized Labor and their friends—This Establishment is Non-Union—Please Do Not Patronize";⁴⁷ "Notice to Public. [Employer] Does not employ members of ILGWU and is unfair to organized labor";⁴⁸ "Notice To The Public—[Employer's] Employees Do Not Belong To the A.F.L.-C.I.O. And Have Substandard Wages and Working Conditions."⁴⁹

In the *Kinney* case,⁵⁰ the picket signs read, "This store does not operate Under AFL-CIO Union Conditions. Please Do Not Patronize." And the pickets distributed leaflets which advertised that the employer did not have a contract with, or employ members of, a labor organization, and appealed to the public not to patronize the employer. A panel majority found that these picket signs, when considered together with the leaflets distributed by the pickets, were "substantially" for the "purpose of truthfully advising the public (including consumers)" that the company did not "employ members of, or have a contract with," the union, in conformity with the require-

⁴⁵ See dissenting opinion of Members Jenkins and Fanning in 130 NLRB 570, 571-577. which the majority adopted upon reconsideration; and principal opinion of Chairman McCulloch and Members Fanning and Brown in *Chefs, Cooks etc, Hotel & Restaurant Employees Union, Locals 89 and 1 (Stork Restaurant, Inc.)*, 135 NLRB 1173, Members Rodgers and Leedom filing a separate opinion.

⁴⁶ *Houston Building & Construction Trades Council (Claude Everett Construction Co)*, 136 NLRB 321, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting.

⁴⁷ *Local Joint Executive Board of Hotel & Restaurant Employees Union, Local 681 (Crown Cafeteria)*, 135 NLRB 1183, overruling on reconsideration the majority opinion in 130 NLRB 570 (1961), Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting. For other cases where picket signs urging the withdrawal of patronage were found protected, see *Department & Specialty Store Employees' Union, Local 1265 (Oakland G R Kinney Co, Inc)*, 136 NLRB 335, Chairman McCulloch and Member Fanning for panel majority, Member Leedom dissenting; and *Retail Store Employees Union, Local 400 (Jumbo Food Stores, Inc)*, 136 NLRB 414, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting.

⁴⁸ *International Ladies' Garment Workers' Union (Saturn & Sedran, Inc.)*, 136 NLRB 524, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting.

⁴⁹ *Carpenters District Council of St. Louis (Vestglas, Inc.)*, 136 NLRB 855, Chairman McCulloch and Member Fanning for panel majority, Member Rodgers dissenting.

⁵⁰ *Department & Specialty Store Employees' Union, Local 1265 (Oakland G. R. Kinney Co., Inc.)*, above.

ments of the proviso.⁵¹ Such picketing, it held, was protected by the second proviso and, therefore, not subject to the expedited election procedure of the first proviso to section 8(b) (7) (C).⁵²

(c) "Effect of" inducing stoppages

The publicity proviso does not protect picketing by an uncertified union "an effect" of which is "to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services." Thus, in *Marriott Motor Hotels*,⁵³ an uncertified union's picketing with proviso signs was held violative of section 8(b) (7) (C) where it was conducted for more than 30 days without the filing of a petition, and had the effect of inducing employees of construction and other contractors not to perform services or make deliveries at the employer's premises.⁵⁴

However, in *Claude Everett Construction Co.*,⁵⁵ a Board majority held that the mere fact that picketing by an uncertified union interferes with deliveries or services does not itself constitute a violation of section 8(b) (7) (C) unless the picketing has a recognition or organization objective.

⁵¹ For other cases involving the distribution of leaflets during picketing, where the picketing was found protected, see *Retail Store Employees Union, Local 400 (Jumbo Food Stores, Inc.)*, above; and *Carpenters District Council of St. Louis (Vestaglas, Inc.)*, above. Compare with *Philadelphia Window Cleaners & Maintenance Workers' Union, Local 125 (Atlantic Maintenance Co.)*, 136 NLRB 1104, where the picketing was held not protected by the proviso.

⁵² See discussion above, pp. 191-192.

⁵³ *Hotel, Motel & Club Employees' Union Local 568 (Marriott Motor Hotels, Inc.)*, 136 NLRB 759, Members Fanning and Brown for a panel majority, Member Rodgers concurring in the result.

⁵⁴ See also *Automotive, Petroleum & Allied Industries Employees Union, Local 618, Teamsters (Charlie's Car Wash & Service)*, 136 NLRB 934.

⁵⁵ *Houston Building & Construction Trades Council (Claude Everett Construction Co.)*, 136 NLRB 321, Chairman McCulloch and Members Fanning and Brown for the majority, Members Rodgers and Leedom dissenting.

V

Supreme Court Rulings

During the fiscal year 1962, the Supreme Court decided five cases¹ involving questions concerning the administration of the National Labor Relations Act. One case (and its companion cases) related to the power of the courts of appeals to modify Board orders where the respondents had either consented to the provisions of the order, or had failed to except thereto, before the Board. Two cases involved the scope of the reviewing power of the courts of appeals with respect to Board findings of fact in unfair labor practice cases. Another case involved the legality under section 8(a)(5) of unilateral action by an employer during bargaining negotiations. The last case concerned the right of employees to walk out in protest over objectionable working conditions, without first affording the employer a fresh opportunity to correct those conditions. The Board's position was sustained in all of these cases.

1. Modification of the Scope of Board Orders

In the *Ochoa* case,² the Supreme Court held that the court of appeals erred in modifying a Board order where the respondents, in a settlement agreement executed prior to hearing, had consented to the order and to its enforcement by the court. In settlement of a complaint alleging violations of section 8(a)(1), (2), and (3) and section 8(b)(1)(A) and (2) of the Act, the parties stipulated to the entry of a Board order and a court decree which covered the respondent unions "or any other labor organization" and the respondent company "or any other employer over which the Board will assert jurisdiction." Despite the fact that the scope of the order was contested neither before the Board nor the court, the First Circuit, *sua sponte*, modified the Board's order and notice by striking the quoted phrases.³ Relying upon section

¹ The Court decided three other cases, but they were based on its decision in *N.L.R.B. v. Ochoa Fertilizer Corp.*, 368 U.S. 318.

² *N.L.R.B. v. Ochoa Fertilizer Corp.*, above.

³ 283 F. 2d 26.

10(e) which provides that no objection not raised before the Board shall be considered by the courts of appeals, unless the failure was due to extraordinary circumstances, the Supreme Court ruled that "The limitation of § 10(e) applies *a fortiori* to the consideration of an objection to enforcement made by a respondent who has consented to the terms of the order." That the record contained no findings or facts supporting a broad order was irrelevant, the Court added, for "consent makes a significant difference; it relieves the Board of the very necessity of making a supporting record." The decision in *Ochoa* was followed by per curiam reversals in the companion *Brandman Iron, Las Vegas*, and *Local 476* cases.⁴

2. Review of Board Findings

In the *Walton* and *Florida Citrus* cases,⁵ the Supreme Court reversed the judgments of the Fifth Circuit denying enforcement of the Board's orders⁶ and remanded the cases to that court for reconsideration. In *Walton* the Fifth Circuit had overturned the Board's findings that certain employees were discharged and laid off because of union activity, and in *Florida Citrus* it had set aside findings that the employer refused to bargain in good faith, that this resulted in an unfair labor practice strike, and that the strikers were thus entitled to be reinstated with backpay despite intervening replacement. The Board contended, and the Supreme Court agreed, that the Fifth Circuit had applied an erroneous standard of review in setting aside the Board's findings in these cases.

The Supreme Court noted that the Fifth Circuit, in the early *Tex-O-Kan* case,⁷ had declared that a higher standard of proof was required in discriminatory discharge cases, which entail a backpay remedy, than in cases involving employer interference with union activity, where the only remedy authorized by the Act is a cease-and-desist order. Thus, for reinstatement cases, *Tex-O-Kan* enunciated the principle "that the employer's statement under oath" as to the reason for a discharge or layoff must be believed unless there is "impeachment of him, or substantial contradiction, or if circumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point."⁸ The Supreme Court found that the

⁴ *N.L.R.B. v. Brandman Iron Co.*, 368 U.S. 399; *N.L.R.B. v. Las Vegas Sand & Gravel Corp.*, 368 U.S. 400; *N.L.R.B. v. Local 476, Plumbing & Pipefitting, AFL-CIO (E. Turgeon Construction Co.)*, 368 U.S. 401. *Brandman* and *Las Vegas* involved consent orders, like *Ochoa* itself. In *Local 476*, the Board had adopted the trial examiner's recommended order, no exceptions having been filed thereto.

⁵ *N.L.R.B. v. Walton Manufacturing Co. & Loganville Pants Co.* and *N.L.R.B. v. Florida Citrus Cannery Cooperative*, 369 U.S. 404. Justice Frankfurter, joined by Justice Harlan, dissented.

⁶ 286 F. 2d 16 and 288 F. 2d 630.

⁷ *N.L.R.B. v. Tex-O-Kan Flour Mills Co.*, 122 F. 2d 433 (C.A. 5).

⁸ 369 U.S. 404, 406, quoting from *Tex-O-Kan*.

Tex-O-Kan test was applied in *Walton*, and also appeared to have been in *Florida Citrus*. In the Court's view, the *Tex-O-Kan* test was contrary to the substantial evidence standard of review enunciated in *Universal Camera*.⁹ First, under that standard, "there is no place in the statutory scheme for one test of the substantiality of evidence in reinstatement cases and another test in other cases." Second, *Universal Camera* recognizes that, while the "reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view," it may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*."¹⁰ The *Tex-O-Kan* test unduly restricts the Board's power to draw inferences from all the circumstances, and overlooks the fact that a witness' demeanor, which the trial examiner is in the best position to evaluate, may itself be a sufficient reason for discrediting his testimony.

The Supreme Court remanded the cases to the Fifth Circuit for reconsideration absent the erroneous *Tex-O-Kan* yardstick.

3. Unilateral Employer Action During Negotiations

In the *Katz* case,¹¹ the Supreme Court held that an employer violated the duty to bargain collectively imposed by section 8(a)(5) of the Act by unilaterally changing conditions of employment which were the subject of current negotiations with the union. The employer, without notifying or consulting the union, placed into effect new wage rates substantially in excess of any previously offered the union, changed its sick-leave policy, and granted merit increases so numerous as to amount to a general wage increase, at a time when the union was seeking to negotiate upon those subjects and prior to the existence of any impasse. The Board found a refusal to bargain based solely upon the above unilateral acts, but specifically disclaimed any finding that the totality of the employer's conduct manifested bad faith in the pending negotiations.¹² The Second Circuit, being of the view that, absent a finding that the employer had bargained in bad faith, unilateral changes, even occurring during negotiations, could not constitute a refusal to bargain, remanded the case to the Board to make such findings on the employer's good faith as might

⁹ *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474.

¹⁰ 340 U.S. at 488.

¹¹ *N.L.R.B. v. Benne Katz, d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736.

¹² 126 NLRB 288.

be warranted by the record.¹³ The Supreme Court, sustaining the Board's position, reversed.

The Supreme Court concluded that the duty to bargain collectively, as imposed by section 8(a) (5) and defined by section 8(d), "may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate *in fact*—"to meet . . . and confer"—about any of the mandatory subjects." Thus, the Court noted that "A refusal to negotiate *in fact* as to any subject which is within § 8(d), and about which the union seeks to negotiate, violates § 8(a) (5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end." In the Court's view, "an employer's unilateral change in conditions of employment under negotiation is similarly a violation of § 8(a) (5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a) (5) much as does a flat refusal." Distinguishing *Insurance Agents*,¹⁴ on which the Second Circuit had relied, the Supreme Court pointed out that: "The union in that case had not in any way whatever foreclosed discussion of any issue, by unilateral actions or otherwise. The conduct complained of consisted of partial-strike tactics designed to put pressure on the employer to come to terms with the union negotiators."¹⁵

4. Walkout To Protest Unfavorable Working Conditions

In *Washington Aluminum*,¹⁶ the Supreme Court upheld the Board's finding that an employer violated section 8(a) (1) by discharging employees who walked out in concert in protest over cold working conditions.¹⁷ The Fourth Circuit had set aside the Board's order, on the ground that the walkout was not a protected concerted activity because the employees had not, immediately prior to the walkout, requested the employer to rectify the objectionable conditions in the plant.¹⁸ The Supreme Court reversed, holding that employees do not lose their

¹³ 289 F. 2d 700. Twenty-sixth Annual Report, p. 170. Chief Judge Lumbard dissented on the ground that "certain unilateral acts during the course of collective bargaining violate § 8(a) (5) apart from any finding with respect to good faith."

¹⁴ *N.L.R.B. v. Insurance Agents' International Union (Prudential Insurance Co.)*, 361 U.S. 477.

¹⁵ The Court also rejected the employer's contention that, because of the time lapse between the unfair labor practices and the Board's final decision, and because the employees had repudiated the union after the unlawful events, enforcement of the Board's order should be denied or conditioned upon the holding of a new election. The Court said, "Inordinate delay in any case is regrettable, but Congress has introduced no time limitation into the Act except that in § 10 (b)," citing *Franks Brothers Co. v. N.L.R.B.*, 321 U.S. 702; *N.L.R.B. v. P. Lorillard Co.*, 314 U.S. 512, *N.L.R.B. v. Mesia Textile Mills*, 339 U.S. 563, 568.

¹⁶ *N.L.R.B. v. Washington Aluminum Co.*, 370 U.S. 9.

¹⁷ 126 NLRB 1410; 128 NLRB 643.

¹⁸ 291 F. 2d 869. Twenty-sixth Annual Report, p. 162. Chief Judge Sobeloff dissented.

section 7 rights to engage in concerted activities “merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable.”

The Court pointed out that “The language of § 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made.” To interpret section 7 in the “niggardly fashion” suggested by the employer would “tend to frustrate the policy of the Act to protect the right of workers to act together to better their working conditions,” and such an interpretation “might place burdens upon employees so great that it would effectively nullify the right to engage in concerted activities.” Thus, the Court emphasized that the employees here were wholly unorganized and they had no bargaining representative to present grievances to the employer, and they had complained about the cold, to no avail, in the past. In these circumstances, “They were not required to make any more specific demand than they did to be entitled to the protection of § 7.”

The Court added that the walkout here was not within the normal categories of unprotected concerted activities such as those that are unlawful,¹⁹ violent,²⁰ or in breach of contract.²¹ Nor was the activity conduct which must be considered “indefensible” by all recognized standards of conduct.²² Rather, “concerted activities by employees for the purpose of trying to protect themselves from working conditions as uncomfortable as the testimony and Board findings showed them to be in this case are unquestionably activities to correct conditions which modern labor-management legislation treats as too bad to have to be tolerated in a humane and civilized society like ours.”²³

¹⁹ *Southern Steamship Co v N.L.R.B.*, 316 U.S. 31.

²⁰ *N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240.

²¹ *N.L.R.B. v. Sands Mfg. Co.*, 306 U.S. 332.

²² *N.L.R.B. v. Local Union No. 1229, International Brotherhood of Electrical Workers (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464.

²³ The Court also rejected the employer's contention that the employees were discharged for justifiable cause because a plant rule forbade them to leave work without obtaining permission of the foreman. The Court held that neither a plant rule, nor the discharge for “cause” provision of sec 10(c), permits an employer “to punish a man by discharging him for engaging in concerted activities which § 7 of the Act protects.”

VI

Enforcement Litigation

Board orders in unfair labor practice proceedings were reviewed by the courts of appeals in 148 enforcement cases during fiscal 1962.¹ Some of the more important issues decided by the respective courts are discussed in this chapter.

1. Employers Covered by the Act

The Supreme Court has made it clear that the Board's jurisdiction is coextensive with the broad scope of the commerce clause of the Constitution, subject only to the rule of *de minimis*.² However, a number of cases involving varying commerce facts occasioned judicial rulings concerning the Board's jurisdiction.³

The Board's petition for enforcement of an order to remedy discriminatory discharges committed by an employer was considered by the Ninth Circuit in a case⁴ in which the Board had asserted jurisdiction under its new jurisdictional standards,⁵ after it had twice declined to take jurisdiction at the employer's request under the old standards. The employer opposed the Board's assertion of jurisdiction in the

¹ Results of enforcement litigation are summarized in table 19 of appendix A.

² *Guss v. Utah Labor Relations Board*, 353 U.S. 1, 3 (1957); *Polish National Alliance v. N.L.R.B.*, 322 U.S. 643, 647 (1944); *N.L.R.B. v. Fainblatt*, 306 U.S. 601, 606-607 (1939). For cases wherein the *de minimis* issue was raised, see *Gray, et al. v. N.L.R.B.*, 295 F. 2d 38 (C.A. 9), where the court held that the Board had no jurisdiction over "a very small operation" engaged in the business of architecture, engineering, and land surveying in Alaska, and performing services valued over \$79,000 a year for the U.S. Corps of Engineers, the Air Force, an Alaska commercial airport, and the Alaska Department of Aviation; and *N.L.R.B. v. Aurora City Lines, Inc.*, 299 F. 2d 229 (C.A. 7), where the Board's assertion of jurisdiction over a city transit system which exceeded the Board's jurisdictional standard of \$250,000 gross volume of business for transit systems was sustained, although it only bought \$2,000 worth of materials outside the State.

³ See, e.g., *N.L.R.B. v. Cham Service Restaurant, Luncheonette & Soda Fountain Employees, Local 11*, 302 F. 2d 167 (C.A. 2), where the court upheld the Board's assertion of jurisdiction over a local labor union, and its welfare fund, as employers of office personnel; and *N.L.R.B. v. Miscellaneous Drivers & Helpers, Local 610 (Funeral Directors of Greater St. Louis)*, 293 F. 2d 437 (C.A. 8), where the court sustained the Board's exercise of jurisdiction over a multiemployer association of funeral directors.

⁴ *N.L.R.B. v. Mike Trama*, 293 F. 2d 28, enforcing with modification 125 NLRB 151 (1959).

⁵ See Twenty-third Annual Report (1958), pp. 8-9.

present case on the ground that the alleged unlawful conduct had occurred at a time when the employer's operations did not satisfy the old standards which were then in effect. The Board pointed out, however, that in adopting the new standards it had stated that such standards would be applied to all future and pending cases, and, at the time this policy was announced, the present case was pending on appeal to the General Counsel from the regional director's refusal to issue a complaint on jurisdictional grounds. Without questioning the Board's action in asserting jurisdiction pursuant to its changed jurisdictional standards, the Ninth Circuit, in a *per curiam* opinion, enforced the Board's order except as to backpay which, under the circumstances here, the court considered unwarranted.

Two cases in which local operations met the Board's jurisdictional standards for "indirect inflow or outflow" were remanded to the Board by the courts of appeals for additional findings concerning the manner in which their operations affected interstate commerce. In *Reliance Fuel Oil*,⁶ the Board had asserted jurisdiction over a local distributor of fuel oil for heating purposes, who locally purchased over \$600,000 worth of fuel oil a year from a national company which received the oil through interstate channels and stored it within the State. All of the distributor's customers were homeowners located within the State. The Second Circuit remanded the case to the Board for further evidence and findings as to "the manner in which a work stoppage [at the local distributor's operations] would affect commerce." In subsequently rejecting the Board's petition for rehearing, the court conceded that "the constitutionality of regulating the defendant's labor dispute is clear," but held that "Congress intended the courts to examine whether or not a labor dispute involving only employers not engaged in interstate commerce did or did not directly or indirectly burden or obstruct interstate commerce," and that findings to that effect were essential to the Board's jurisdiction.⁷ The *Reliance* decision was followed by the First Circuit in remanding the *Benevento* case,⁸ where the Board had predicated its jurisdiction upon the fact that the employer supplied over \$50,000 worth of sand and gravel to a ready-mix concrete company which was directly engaged in interstate commerce.⁹

⁶ *N.L.R.B. v Reliance Fuel Oil Corp*, 297 F. 2d 94 (C A 2).

⁷ The Supreme Court granted the Board's petition for certiorari in this case, 369 U S 883.

⁸ *N L R.B. v. Michael Benevento*, 297 F. 2d 873.

⁹ For the Board's decision on remand, issued after the close of the fiscal year, see 138 NLRB No. 9.

2. Employees Protected by the Act

Two cases decided during the year involved the issue whether certain employees were excluded from the protection of the Act—in one case, because they were claimed to be “agricultural laborers”; and in the other, because they were claimed to be “supervisors.”¹⁰

In the *Tepper* case,¹¹ the Tenth Circuit held that farm employees who processed for market milk and eggs, most of which were not produced on that farm, were protected by the Act. In reliance on a Supreme Court decision under the Fair Labor Standards Act,¹² the court held that the processing done by the employees was not agriculture since it was not incident to “such” farming.

In the *Gulf Bottlers* case,¹³ the employees in question were soft-drink route drivers who were permitted to hire casual helpers most of whose pay was withheld from the driver’s earnings. Under the Act’s definition, a supervisor is “any individual having authority in the interest of the employer, to hire, . . . discharge, . . . or discipline other employees, or responsibly to direct them. . . .”¹⁴ Agreeing with the Board that the drivers were employees and not supervisors, the District of Columbia Circuit pointed out that the drivers’ exercise of authority with respect to the helpers was in no meaningful sense “in the interest of the employer.” Rather, they “were acting in their own interest” since their responsibilities to the company “were in nowise diminished” when they engaged helpers.

3. Employer Unfair Labor Practices

a. Responsibility for Remedying Unfair Labor Practices

The Board’s action in assessing responsibility for remedying unfair labor practices upon interlocking and successor corporations was considered in several court decisions.

In *Aluminum Tubular*,¹⁵ the Second Circuit held, contrary to the Board, that an established corporation with a longstanding union contract, whose owners had participated in the formation of a new corporation, was not obliged to bargain with another union representing the employees of the new corporation when the latter went out of business, although the established corporation absorbed some of the defunct

¹⁰ See sec. 2(3) of the Act.

¹¹ *N.L.R.B. v. Tepper d/b/a Shoenberg Farms*, 297 F. 2d 280.

¹² *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755. A longstanding rider to the Board’s Annual Appropriation Act requires the Board, in effect, to define “agricultural laborers” in accordance with sec. 3(f) of the Fair Labor Standards Act.

¹³ *International Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers of America v. N.L.R.B. (Gulf Bottlers)*, 298 F. 2d 297, certiorari denied, 369 U.S. 843.

¹⁴ Sec. 2(11) of the Act.

¹⁵ *N.L.R.B. v. Aluminum Tubular Corp.*, 299 F. 2d 595.

corporation's employees in order to complete the latter's contracts. However, in the *McFarland* case,¹⁶ the Tenth Circuit agreed with the Board that an employer which bought a trucking company's physical properties, took assignment of its hauling contract, acquired its State trucking permits, and hired some of its drivers, succeeded to the trucking company's business, and was under a duty to recognize a union which had been certified as its drivers' bargaining representative before the purchase. The court approved the Board's finding that the hauling operation did not become so integrated with the purchaser's already existing business as to render the drivers' certified unit inappropriate.

One case decided by the First Circuit¹⁷ involved a corporation which, during the term of a collective-bargaining agreement, ceased production and laid off all employees. A month later, production was resumed by a new corporation formed by the original corporation's former sales manager under contract terms which kept the effective control and financing of the operation in the hands of the original corporation's owner. The court approved the Board's reinstatement and backpay order against both corporations on the ground that the new corporation, which refused to recognize the union which had represented the original corporation's employees, was merely "a disguised continuance of the old employer"¹⁸ and was an "artifice . . . to evade and avoid contractual and statutory bargaining rights."

b. Employee Conduct Protected by the Act

The First Circuit considered a case which involved the propriety of the Board's finding that a strike to compel reinstatement of both rank-and-file employees and supervisors, all of whom had been discharged to discourage a union campaign among rank-and-file employees, was protected concerted activity.¹⁹ The court held that a strike seeking to compel reinstatement of supervisors who represented the employer in collective bargaining or grievance processing is not protected activity, because section 8(b) (1) (B) makes it an unfair labor practice for a union to coerce an employer in his selection of representatives for those purposes. The court remanded the case for the Board to determine whether these supervisors had such responsibilities.

c. Interference, Restraint, and Coercion—Section 8(a)(1)

Two cases during the year presented issues of employer interference with employees' protected activities, in violation of section 8

¹⁶ *N.L.R.B. v. McFarland*, 306 F. 2d 219, 50 LRRM 2707.

¹⁷ *N.L.R.B. v. U.S. Air Conditioning Corp.*, 302 F. 2d 280.

¹⁸ Quoting *Southport Petroleum Co. v. N.L.R.B.*, 315 U.S. 100.

¹⁹ *N.L.R.B. v. Puerto Rico Rayon Mills, Inc.*, 293 F. 2d 941.

(a) (1) of the Act, by efforts to influence election results and employee discharges.²⁰

In the *Exchange Parts* case,²¹ the Fifth Circuit set aside the Board's finding and held that an employer did not violate the Act by announcing a permanent improvement in employee benefits, in order to induce employees to vote against union representation in a forthcoming election, where such improvement was not conditioned upon the outcome of the election. The court stated that freedom to increase employee benefits in an effort to make a union seem unnecessary is "scarcely any more coercive" than the right to argue against the union, and that the statute outlaws the use of force and pressure, not persuasive action such as was used here.²²

In the *Walls* case,²³ the District of Columbia Circuit set aside the Board's finding that an employer did not violate section 8(a) (1)²⁴ of the Act by discharging an employee for sending a written complaint to the State health department about working conditions when the employer did not know, until advised by the employee immediately after her discharge, that the complaint was made on behalf of other employees as well and was, therefore, concerted activity. The court assumed, without deciding, that "as a general rule the employer must have prior knowledge of the concerted nature of the activity in order to violate section 8(a) (1)." However, the court said, this rule "should not be applied in full strictness and severity to a case like the present, in which the employee's claim of having acted in concert with others is made known to the employer contemporaneously with the discharge, and where the reasonableness and probable soundness of the claim is supported by the background and surrounding circumstances." Having found that the circumstances raised "vital issues" with regard to the employer's "good faith, and the fairness and reasonableness of its conduct," the court remanded the case to the Board for further consideration, including consideration of the contention that the letter was not protected activity since it contained falsehoods.²⁵

²⁰ For cases involving unlawful interrogation, see *N.L.R.B. v. Flemingsburg Mfg. Co.*, 300 F. 2d 182 (C.A. 6); and *N.L.R.B. v. Harbison-Fischer Mfg Co.*, 304 F. 2d 738 (C.A. 5), where the courts approved the Board's consideration of background, surrounding circumstances, and the "totality" of the employers' conduct in finding violations. For cases involving employer rules restricting union activities, see *N.L.R.B. v. Floridan Hotel of Tampa, Inc.*, 300 F. 2d 204 (C.A. 5); *N L R B. v. Texas Aluminum Co, Inc.*, 300 F. 2d 315 (C.A. 5); and *Revere Camera Co. v. N L R B.*, 304 F. 2d 162 (C.A. 7).

²¹ *N.L.R.B. v. Exchange Parts Co.*, 304 F. 2d 368.

²² A petition for certiorari is contemplated.

²³ *International Ladies' Garment Workers' Union v. N L R B.*, 299 F. 2d 114.

²⁴ The charging union did not challenge the Board's adoption of the trial examiner's finding that a sec 8(a) (3) allegation was not supported by the evidence.

²⁵ For the Board's decision on remand, issued after the close of the fiscal year, see 137 NLRB No. 134.

d. Assistance and Support—Section 8(a)(2)**(1) Improper Recognition of a Labor Organization**

In the *Appleton Electric* case,²⁶ the Seventh Circuit denied enforcement of a Board order based on its finding that an employer had illegally supported an incumbent union by recognizing it as the representative of employees hired for a newly acquired plant, under a contractual provision which made subsequently acquired plants part of the existing unit. The court found that the new operation was “under centralized control” of “only one employer” and had been “integrated” with existing operations which utilized “virtually the entire production.” Moreover, the court said, to prohibit the inclusion of a nonconsenting minority in an appropriate larger unit before a rival union has raised a question of representation with respect to that minority is “to refashion the statutory scheme.” It observed further that the Board’s “attempt to make illegal the inclusion of prospective employees of after-acquired plants and divisions would seem to be contrary to a basic policy of the Act, to wit: to achieve stability of labor relations.”

(2) Recognition of One of Two Competing Labor Organizations

The courts had occasion to consider a number of cases involving application of the Board’s *Midwest Piping*²⁷ doctrine, which imposes a duty of neutrality upon an employer faced with competing union claims which raise a real question concerning representation.

The Third Circuit, in the *Swift* case,²⁸ rejected the Board’s position that an employer had breached this duty by executing a new contract with an incumbent union after a Board hearing on a rival union’s petition had been held, but before the petition was disposed of or an election directed. The court, defining a real question of representation on the basis of whether “the employer had a reasonable basis for believing that the union no longer represented a majority,” held that there was an insufficient basis for finding that such a question existed here. According to the court, the filing of the rival petition, an administrative determination to hold a hearing on the petition, and the holding of such hearing without any election being ordered or held, established at most the existence of a naked claim on the part of the rival union.²⁹

²⁶ *N.L.R.B. v. Appleton Electric Co. et al.*, 296 F. 2d 202.

²⁷ See *Midwest Piping & Supply Co., Inc.*, 63 NLRB 1060 (1945), and *William Penn Broadcasting Co.*, 93 NLRB 1104 (1951); Twenty-third Annual Report (1958), p. 60, and Twenty-sixth Annual Report (1961), pp. 89–90, 163.

²⁸ *N.L.R.B. v. Swift & Co.*, 294 F. 2d 285.

²⁹ See also *N.L.R.B. v. North Electric Co.*, 296 F. 2d 137 (C.A. 6), citing the *Swift* case, above.

However, in the *Signal Oil* case,³⁰ the Fifth Circuit agreed with the Board that an employer unlawfully assisted an incumbent union by executing a contract with it shortly after a rival union had filed a representation petition, at a time when nobody really knew whether the incumbent union represented a majority of the employees. The court held that the evidence supported the Board's finding that a serious question as to representation existed and the employer had a duty to postpone bargaining until it could be determined by the Board which of the two unions was the actual representative of the employees.

**e. Discrimination To Encourage or Discourage Union Membership—
Section 8(a)(3)**

(1) Discrimination Generally

Several cases involved the scope of section 8(a)(3) which makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage" union membership.

In *Community Shops*,³¹ the Seventh Circuit set aside the Board's finding that a seasonal employer violated the Act by selecting seasonally laid-off employees for rehire in the order of their length of "actual working experience" during the previous season, without crediting some of these employees for time spent on strike. The court found that the employer had adopted the formula for legitimate business reasons, and rejected the argument that the employer's conduct by its very nature contained the implications of the required intent to discourage union membership, or that the natural foreseeable consequence of this action warranted the inference that this intent existed.

However, in another case,³² the Ninth Circuit agreed with the Board that a newspaper publisher engaged in unlawful discrimination to discourage union membership when it offered to promote a union adherent from flyboy to district manager—in the mistaken belief that the promotion would deprive him of union representation—and discharged him when he refused to accept the promotion for reasons unrelated to the union. While the publisher may have had no policy against union membership by district managers, or against promoting qualified flyboys to district managers notwithstanding union membership, the court stated that discouragement of union membership among flyboys who are not qualified for promotion would "certainly seem to be the result" of the act of discrimination here involved.

³⁰ *N.L.R.B. v. Signal Oil & Gas Co.*, 303 F. 2d 785.

³¹ *N.L.R.B. v. Community Shops, Inc.*, 301 F. 2d 263.

³² *N.L.R.B. v. Southern California Associated Newspapers, d/b/a South Bay Daily Breeze*, 299 F. 2d 677

(2) Superseniority to Nonstrikers

During the year, the courts also decided two cases involving an employer's right to accord "super-seniority" to employees who work during an economic strike.

In one of these cases, *Swarco*,³³ the Sixth Circuit approved the Board's finding that an employer violated section 8(a)(1) and (3) of the Act by offering strikers who returned to work during the strike superseniority over the employees who remained on strike. The court observed that this offer "constituted an inducement to give up the strike and a threat of reprisal to those who continued on strike." Although the employer had a right to keep his plant in operation during the strike, the court said, "an honest motive alone for that purpose is not enough," in cases where a natural consequence of the employer's action is encouragement or discouragement of union membership.³⁴

However, in *Erie Resistor*,³⁵ the Third Circuit rejected the Board's finding that an employer violated section 8(a)(3) and (1) by formulating, in the course of the strike, a preferential seniority plan under which 20 years were added to the seniority of all employees—both returning strikers and strike replacements—who worked during the strike. The court rejected the Board's contention that a preferential seniority plan is illegal however motivated. It stated that "inherent in the right of an employer to replace strikers during a strike is the concomitant right to adopt a preferential seniority policy which will assure the replacements some form of tenure, provided the policy is adopted *solely* to protect and continue the business of the employer."³⁶

(3) Reinstatement of Strikers

In *New England Tank*,³⁷ the First Circuit agreed with the Board that an employer, which had taken over operation of a pipeline, was obligated to offer reinstatement, on application, to three men who had accepted the employer's offer of the same jobs which they had performed for the previous pipeline contractor, but had refused to report for work because of the employer's unlawful refusal to hire a number of others who had formerly worked for the old employer. The court observed that if these three employees had reported for work, for however brief a period, they would clearly be unfair labor

³³ *Swarco, Inc (Swan Rubber Co. Division of Amerace Corp) v. N.L.R.B.*, 303 F. 2d 668

³⁴ The company has filed a petition for a writ of certiorari which the Board does not oppose. See footnote 36, below

³⁵ *International Union of Electrical, Radio & Machine Workers, Local 613, AFL-CIO v. N.L.R.B.*, 303 F. 2d 359.

³⁶ The Board has asked the Supreme Court to review this holding.

³⁷ *N.L.R.B. v. New England Tank Industries, Inc.*, 302 F. 2d 273.

practice strikers, and that there was "no significant reason why a different result should obtain here."³⁸

The right of unfair labor practice strikers to reinstatement notwithstanding the commission of unprotected acts of strike misconduct was considered by the District of Columbia Circuit in the *Kohler* case.³⁹ In reliance upon the First Circuit's opinion in the *Thayer* case,⁴⁰ the court held that in such situations the Board must consider both the seriousness of the employer's unlawful acts and the seriousness of the employees' misconduct in determining whether reinstatement would effectuate the policies of the Act. It accordingly remanded the case to the Board for further proceedings.

f. Termination or Change of Operations—Section 8(a)(3) and 8(a)(5)

During the fiscal year, the courts decided a number of cases which involved the effect of the Act upon an employer's right, for union or other reasons, to discontinue temporarily or permanently all or part of his business, or to transfer it elsewhere.

(1) Lockouts

Two of these cases put at issue the employer's right temporarily to lock out his employees in order to better his bargaining position. In one of these cases,⁴¹ the Tenth Circuit agreed with the Board that a multiemployer association violated section 8(a)(1) and (3) of the Act by threatening to lock out the members' employees, and causing them to be locked out, in order to exert economic pressure on the employees and their bargaining representatives to accept the association's last contract offer. The court concluded that the association's threat at the bargaining table to resort to a lockout unless the union representatives would give assurance of their endeavor to bring about acceptance of the association's last offer, and the prompt effectuation of the lockout, "constituted wrongful interference with the right of collective bargaining under section 7 of the Act and therefore an unfair labor practice under section 8."⁴²

³⁸ See also *N.L.R.B. v. American Aggregate Co.*, 305 F. 2d 559, where, notwithstanding sec. 10(b), the Fifth Circuit substantially sustained a complaint based on a refusal to afford strikers the reinstatement rights of unfair labor practice strikers within 6 months of the filing of the charges, even though the unfair labor practices which initially caused the strike occurred more than 6 months before the filing of the charges in the instant case, it having been held in a prior complaint proceeding that the employer had committed these unfair labor practices.

³⁹ *Local 833, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, UAW-AFL-CIO v. N.L.R.B.*, 300 F. 2d 699, certiorari denied 370 U.S. 911.

⁴⁰ *N.L.R.B. v. Thayer Co.*, 213 F. 2d 748 (1954), certiorari denied 348 U.S. 883.

⁴¹ *Utah Plumbing & Heating Contractors Association v. N.L.R.B.*, 294 F. 2d 165.

⁴² The court relied on *Quaker State Oil Refining Corp. v. N.L.R.B.*, 270 F. 2d 40 (C.A. 3, 1959), certiorari denied 361 U.S. 917. See Twenty-fourth Annual Report (1959), pp. 122-123.

However, in the other case,⁴³ the Fifth Circuit set aside the Board's finding that the employer violated section 8(a) (1), (3), and (5) of the Act by locking out its employees in order to enhance its bargaining position and the ultimate acceptance of its terms by the union. Citing the *Insurance Agents* case,⁴⁴ the court said that since there was no evidence that the employer was making "a mere formal pretense of bargaining," the Board was not entitled to find that the statutory obligation to bargain had not been fulfilled merely because one of the parties had resorted "to forces of a kind the Board thinks undesirable." *Insurance Agents* makes it clear, the court said, that "when the Board undertakes to balance the relative power of the competing forces its authority must be found in the statute," and that nothing in the statute gave it such authority with respect to a bargaining lockout.

(2) Shutdown or Transfer of Operations

Several cases involved the employer's shutdown or transfer of operations for union or other reasons. In one of these cases,⁴⁵ the First Circuit agreed with the Board that three corporations, which were found to constitute a single employer or joint enterprise, violated section 8(a) (1) and (3)⁴⁶ by shutting down the plant operated by one of the corporations, discharging union adherents, and thereafter reopening it under the management of another of the corporations—in order to avoid dealing with the union which had represented the former employees at that plant and to evade the contract benefits which the union had obtained for them.⁴⁷ In like manner,⁴⁸ the Seventh Circuit agreed with the Board that an employer who had operated his trucking service partly by leasing tractors with drivers from independent operators, and partly by having his own employees drive his own tractors, violated section 8(a) (3) and (1) of the Act by discontinuing operations involving his own tractors, and discharging all of his drivers, because of his hostility toward dealing with the union they had chosen. And the Second Circuit reached a similar con-

⁴³ *N.L.R.B. v. Dalton Brick & Tile Corp.*, 301 F. 2d 886

⁴⁴ *N.L.R.B. v. Insurance Agents' International Union (Prudential Insurance Co.)*, 361 U.S. 477 (1960).

⁴⁵ *N.L.R.B. v. U.S. Air Conditioning Corp.*, 302 F. 2d 280.

⁴⁶ The court found it unnecessary to pass on the Board's finding that the corporations violated sec. 8(a) (1) and (5) by failing to bargain with the union concerning the shutdown and reopening of the plant and by unilaterally and directly dealing with the employees concerning their recall and terms and conditions of employment in the new plant. The Board's order, 133 NLRB 1012, which the court enforced, required the corporations to bargain with the union.

⁴⁷ See also *N.L.R.B. v. Winchester Electronics, Inc.*, 295 F. 2d 288 (C.A. 2), where the court approved the Board's finding that two corporations, which were stipulated to be a single employer, violated sec. 8(a) (3) and (1) by laying off employees at two plants and opening a third plant to perform the work, primarily because of opposition to the union which represented the employees at the plants where the layoffs occurred.

⁴⁸ *N.L.R.B. v. Major*, 296 F. 2d 466.

clusion in *Goya Foods*,⁴⁹ where the employer discharged his salesmen and offered some of them employment as "independent brokers" to prevent them from organizing.

However, in the *Rapid Bindery* case,⁵⁰ the Second Circuit rejected the Board's finding that the employer violated section 8(a) (3) and (1) by transferring first some, and then all, of the work previously performed at the employer's plant to another plant operated by the employer's *alter ego* with a different employee complement, in order to discourage membership in the union selected by the employees at the old plant. The court found that the initial move, although it may have been "accelerated or reinforced" by the employer's differences with the union, did not violate section 8(a) (3), because the "preponderant motive" therefor was "business necessity."⁵¹ Nor did the final move and complete shutdown violate section 8(a) (3), the court held, because that action was motivated by the demand of the employer's sole customer at that plant that the work in question be performed by members of another union pursuant to the customer's contract with the latter union. As to the Board's finding that the employer violated section 8(a) (5), the court concluded that the decision to move was not a required subject of collective bargaining, but agreed with the Board that the employer violated its statutory bargaining obligation by failing to notify the union in advance of the moves and give it an opportunity to bargain concerning the consequences of the moves to the employees.⁵²

(3) Subcontracting or "Farming Out" Work

In *Jays Foods*,⁵³ the Seventh Circuit rejected the Board's finding that the employer violated section 8(a) (1), (3), and (5) of the Act by discontinuing a department of its business because the employees in that department had chosen union representation, and by "farming out" the work to independent contractors. The court found that

⁴⁹ *N.L.R.B. v. Goya Foods, Inc.*, 303 F. 2d 442.

⁵⁰ *N.L.R.B. v. Rapid Bindery, Inc.*, 293 F. 2d 170.

⁵¹ Cf. *N.L.R.B. v. New England Tank Industries, Inc.*, 302 F. 2d 273, in which the First Circuit approved the Board's finding of unlawful discrimination where, "if not the only reason, the substantial or motivating reason" therefor was the employees' union membership.

⁵² See also *District 65, Retail, Wholesale & Department Store Union, AFL-CIO v. N.L.R.B. (Joseph Bag)*, 294 F. 2d 364, where the Third Circuit refused to pass on the Board's conclusion that an employer violated sec. 8(a) (1), (3), and (5) by going out of business because of union animus. Instead, the court remanded the case to the Board to make findings as to the date on which the decision to go out of business was made, if ever. The court stated that if such a decision was made after the plant shutdown and refusal to bargain, this latter conduct would have constituted an unfair labor practice even if the employer was no longer in business. A finding to that effect, the court said, would make it unnecessary to decide "the novel and serious questions" presented by the contention that the shutdown and refusal to bargain were unlawful regardless of when the employer decided to go out of business.

⁵³ *Jays Foods, Inc. v. N.L.R.B.*, 292 F. 2d 317.

the employer had previously considered doing so in order to reduce its costs, and that its "sole reason" for abolishing the operation in question was "simply the exercise of a right of management to avert a threatened economic loss and operate its business according to established principles."

An employer's statutory duty to bargain with respect to the subcontracting of work was also considered by the Sixth Circuit in the *Fetzer* case.⁵⁴ That court approved the Board's finding that the employer failed to bargain in good faith in that, *inter alia*, it failed to confer with the union before "farming out" to independent contractors some of the work previously performed by employees in the bargaining unit, and assigned some of the work to employees outside the plant. The Board had held that the employer was obligated to bargain about these changes regardless of its justification for making them.

4. Union-Security Agreements and Practices— Section 8(a)(3) and 8(b)(2)

a. Scope of the Union-Security Proviso

During the year, the courts decided a number of cases having at issue the type of agreement or conduct authorized by the union-security proviso of section 8(a)(3). The principal cases in this area involved the validity of an "agency shop" agreement and the application of the Board's "schism doctrine"⁵⁵ to the enforcement of a maintenance-of-membership agreement.⁵⁶

In the *General Motors* case,⁵⁷ the Sixth Circuit rejected the Board's finding that the proviso to section 8(a)(3) permits an "agency shop" agreement, i.e., an agreement which leaves union membership optional with the employee but requires him to pay to the union, as a condition of continued employment, a sum equal to the initiation fee and periodic dues paid by union members.⁵⁸ The court observed that the

⁵⁴ *Fetzer Television, Inc. v. N.L.R.B.*, 299 F. 2d 845, enforcing per curiam 131 NLRB 821 (1961).

⁵⁵ See discussion above, pp 56-57.

⁵⁶ For another type of case in this area, see *N.L.R.B. v. Miscellaneous Drivers & Helpers, Local 610, IBT (Funeral Directors of Greater St. Louis)*, 293 F. 2d 437 (C.A. 8), where the court agreed with the Board that an employer association and a union violated sec. 8(a)(1) and (3), and 8(b)(2)(A) and (1)(A), respectively, by maintaining and enforcing an agreement which compelled association members to give preference in hiring to union members, to employees on a hiring list prepared by the union, and to employees referred by the union; and required nonunion employees to become and remain members after 2 weeks of work and to pay union fines and assessments, as a condition of continued employment.

⁵⁷ *General Motors Corp. v. N.L.R.B.*, 303 F. 2d 428; petition for certiorari filed Sept. 4, 1962.

⁵⁸ The court consequently set aside the Board's finding that the employer violated sec. 8(a)(5) by refusing to bargain concerning such an agreement.

language in section 7 of the Act which gives employees the right to refrain from union activities excepts "from the operation of the law only agreements requiring membership in a labor organization" as provided in section 8(a) (3). In its opinion, an employee "subjected to the 'agency shop arrangement' as a condition of employment, is not a Union member or the equivalent of it." Contrary of the Board's position, the court regarded the agency shop arrangement not "something lesser" than a union shop, but something "entirely different."

The *Hershey* case⁵⁹ involved a collective-bargaining contract which required members of the contracting local to maintain their membership therein as a condition of continued employment. After the contracting local's international was expelled from its parent federation, most of the members of the contracting local voted to affiliate with another international, and the newly affiliated local won a Board-directed election⁶⁰ and assumed the contract. The Third Circuit rejected the Board's finding that because the "old" contracting local and the "new" contracting local were two different entities, the employer and the "new" local violated the Act by requiring members of the "old" local to maintain membership in the "new" local. The court stated that according to the Board's own standards for determining whether there is a "schism" in the contracting union which warrants an election during a contract term⁶¹ there was no schism here, because the local's action occurred as "a united movement by the members to hold fast to their own local and merely change its international connection." It noted further that in this case it was always the local which controlled and motivated all its actions, including all of its bargaining and representation; and after the change of affiliation, its officers, bargaining relationship, constitution, and bylaws remained the same. According to the court, the "same local merely changed its international hat."

b. Discrimination Caused by Unions

A number of cases presented issues as to the legality of union motivation in effecting an employee's discharge or failure to obtain employment, an employer's liability in yielding to union demands, and the operation of the 6-month limitation period of section 10(b) in connection with discrimination caused by unions.

In the *Spiegelberg* case,⁶² the Tenth Circuit approved the Board's finding that a union violated section 8(b) (2) and (1) (A) by causing the discharge of an employee because he accepted wages and other em-

⁵⁹ *N L R. B. v. Hershey Chocolate Corp.*, 297 F. 2d 286.

⁶⁰ See *Hershey Chocolate Corp.*, 121 NLRB 901 (1958); Twenty-fourth Annual Report (1959), pp. 26-27.

⁶¹ *Id.* at 906-909.

⁶² *N. L. R. B. v. International Association of Bridge, Structural & Ornamental Iron Workers Local No. 494, AFL-CIO*, 295 F. 2d 808.

ployment benefits better than those contained in the union's contract with the employer, which the employer had offered him as an inducement to keep him in its employ. Similarly, in another case,⁶³ the Eighth Circuit affirmed the Board's finding that a union which was a party to a lawful exclusive hiring arrangement violated section 8(b) (2) and (1)(A) by denying referral to one of its members, because he had worked for an "unfair" employer contrary to union rules. The employer's consequent failure to hire him deprived the employee, the court noted, of his statutory right under section 7 "to join in or abstain from union activities without thereby affecting his job."⁶⁴

In a case decided by the Second Circuit,⁶⁵ the Board had found that the respondent union violated section 8(b) (2) and (1)(A) by instigating employee work stoppages to secure the discharge or transfer of union reformers, and that several respondent employers violated section 8(a) (1) and (3) by effecting the discrimination thus sought. The court stated that an employer who discriminates against an employee—because that employee had been expelled from a union for causes other than failure to tender dues and initiation fees, or is otherwise in disfavor with the union because of activities protected by section 7—violates section 8(a) (1) and (3), even though he acts under the economic duress of a threatened work stoppage and the employee suffers no monetary loss. The court added, however, that in order to hold the employer liable "there must at least be proof that he knew he was acting for an impermissible cause." It thus approved the Board's unfair labor practice findings only as to those employers who "yield[ed] knowingly to union pressure to discharge or transfer employees illegally."⁶⁶

And in the *Bradley* case,⁶⁷ the Seventh Circuit approved the Board's finding that a union violated section 8(b) (2) and (1)(A) by causing an employer to discharge an employee for nonmembership in the union, within the 6-month limitation period provided by section 10(b) of the Act,⁶⁸ even though the union's demand for his

⁶³ *N.L.R.B. v. Local 490, International Hod Carriers etc. (Dickmann-Pickens-Bond Construction Co.)*, 300 F. 2d 328.

⁶⁴ See also *N.L.R.B. v. IBEW, Local Union 340, etc (Walsh Construction Co)*, 301 F. 2d 824 (C.A. 9), where the court approved the Board's finding that a so-called "wireman's" local union, party to a lawful exclusive hiring agreement, violated sec. 8(b) (2) by refusing to refer a member of a sister "railroad" local "in a manner transparently indicating a purpose" to prefer its own members or members of other "wireman's" locals.

⁶⁵ *N.L.R.B. v. Local 188, International Union of Operating Engineers, AFL-CIO (Nassau & Suffolk)*, 293 F. 2d 187.

⁶⁶ However, the court modified the Board's backpay order so as to make the union, "which was plainly the prime wrongdoer," primarily liable, and the employers, "who were rather its victims," only secondarily liable.

⁶⁷ *N.L.R.B. v. Plumbers & Pipe Fitters Local Union 214*, 298 F. 2d 427.

⁶⁸ That section provides, in relevant part:

" . . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made"

discharge was made outside the 6-month period. According to the court, the limitation period began when the union committed the unfair labor practice, i.e., when it "caused" the employer to discriminate against the employee by discharging him. Hence, the date of the discharge and not the date of the union's demand therefor was held controlling.

5. The Collective-Bargaining Obligations of Employers and Labor Organizations—Section 8(a)(5) and 8(b)(3)

The parallel provisions of section 8(a)(5) and 8(b)(3) of the Act require good-faith bargaining between an employer and a union⁶⁹ which is the statutory representative of his employees.⁷⁰ Several cases decided during the year raised issues pertaining to the duration of the duty to bargain, the scope of a multiemployer association's duty to bargain, and whether a particular subject was bargainable.

a. Duration of Duty To Bargain

Two cases involved the question of how long the duty to bargain continues. In one of these,⁷¹ the District of Columbia Circuit, relying on the *Poole Foundry* case,⁷² agreed with the Board that an employer which entered into a settlement agreement requiring it to bargain in good faith with a union was under a statutory obligation to honor that agreement for a reasonable length of time following its execution.⁷³

In the other case,⁷⁴ the employer had previously been found to have violated the bargaining requirements of the statute by refusing to turn over certain wage and related information to a certified union. In those proceedings, the court issued a decree which did not expressly require the employer to bargain with the union, but required it to furnish the union with the requested information.⁷⁵ The employer

⁶⁹ See *N.L.R.B. v. Chain Service Restaurant, Luncheonette & Soda Fountain Employees, Local 11*, 302 F. 2d 167 (C.A. 2), where the court affirmed the Board's finding that a local union and union welfare trust fund, acting as employers, violated sec. 8(a)(5) of the Act.

⁷⁰ See *Northern Virginia Steel Corp. v. N.L.R.B.*, 300 F. 2d 168 (C.A. 4), where the court, relying on *International Ladies' Garment Workers' Union v. N.L.R.B. (Bernhard-Altman)*, 366 U.S. 731 (1961), rejected the employer's contention that its refusal to bargain did not violate sec. 8(a)(5) because it was predicated on a good-faith, although mistaken, doubt as to the union's majority status.

⁷¹ *N.L.R.B. v. Stant Lithograph, Inc.*, 297 F. 2d 782, enforcing *per curiam* 131 NLRB 7 (1961).

⁷² *Poole Foundry & Machine Co. v. N.L.R.B.*, 192 F. 2d 740 (C.A. 4, 1951), certiorari denied 342 U.S. 954. See Seventeenth Annual Report (1952), p. 238.

⁷³ Cf. *N.L.R.B. v. H. E. Fletcher Co.*, 298 F. 2d 594, where the First Circuit found it unnecessary to decide how long an employer must bargain after entering into such an agreement, in view of the court's rejection of the Board's finding that the employer had bargained in bad faith during the period in question.

⁷⁴ *N.L.R.B. v. John S. Swift Co.*, 302 F. 2d 342.

⁷⁵ See *N.L.R.B. v. John S. Swift Co.*, 277 F. 2d 641 (1960).

provided the union with this information as of the time the unlawful refusal had occurred, 3 years earlier. However, the employer refused to furnish current data to the union or to engage in further negotiations, on the ground that the union did not represent a majority of the employees in the unit.

The Seventh Circuit agreed with the Board that the employer's refusal to furnish current wage data and to meet with the union violated section 8(a)(5) of the Act. The court rejected the employer's contention that the union had lost its majority status within the certification year and before the employer had initially refused to give the wage data to the union. Noting that the record showed a turnover of employees in the unit, the court observed that "of itself" this was no evidence of a loss of majority during the certification year, or of probative value to justify "fair doubts" of the union's continuing majority after the certification year. Moreover, said the court, the lapse of the certification year "is of no consequence so far as the Company's obligation to bargain with the Union is concerned" in view of the fact that the certification year was interrupted by litigation of unfair labor practice charges. The court pointed out that the employer was obligated to bargain with the union for a reasonable period of time exclusive of the period during which the bargaining relationship was suspended by litigation of the employer's unfair labor practices.⁷⁶

b. Employer Association's Duty To Bargain

In one case,⁷⁷ the Ninth Circuit agreed with the Board that an employer association which bargained with respect to most issues on a multiemployer basis with the unions involved could not lawfully insist on a continuation of the practice of bargaining on a single-employer basis with respect to pensions and retirement plans. Finding no oral contract requiring the parties to bargain about pensions at the single-employer level rather than at the association level, the court also found no "insuperable obstacles" to association bargaining because each employer had a different pension or retirement plan while some employers had no such plans; some employees at employer locations for which the association did not bargain were included in pension plans; in many cases employees were not represented by the unions; and in some cases, several other unions were involved. The court pointed out that the unions did not demand their own plans;

⁷⁶ See also, *N.L.R.B. v. Holly-General Co.*, 305 F. 2d 670, where the Ninth Circuit agreed with the Board that an employer remained under a duty to bargain 2 weeks prior to the end of the certification year, even though a majority of the employees in the unit opposed the union.

⁷⁷ *Pacific Coast Association of Pulp & Paper Manufacturers v. N.L.R.B.*, 304 F. 2d 760.

instead, they asked that all employers have pension and retirement plans and that such plans have certain features. As stated by the court, "Bargaining does not require agreement; it does require consideration of proposals."⁷⁸

c. Bargainable Subject—Contract's Expiration Date

In the *United States Pipe and Foundry* case,⁷⁹ the Fifth Circuit held that three unions, each certified as the representative of the same employer's employees in three separate single-plant bargaining units, did not violate section 8(b)(3) by insisting to impose on bargaining agreements containing a common expiration date. The court noted that absent such a common expiration date, any union striking for a new contract on a different date might have to "bail with a sieve" while the employer shifted its operations to the other plant or plants. With the same expiration date at all plants, each union might be able to negotiate a more advantageous new contract. Consequently, according to the court, a common expiration date had a vitally important connection with "wages, hours and other terms and conditions of employment" which are mandatory subjects of bargaining. Under the circumstances, the court concluded that "the importance of collective bargaining on questions affecting 'wages, hours and other terms and conditions of employment' overrides the *apparent* expansion of the scope of the bargaining unit," which under different circumstances has often been considered not to be a mandatory bargaining subject. The court added that just as the employer could adamantly insist that the contracts of the three unions expire on different dates, so could the unions insist that all three contracts expire on the same common date.⁸⁰

6. Union Unfair Labor Practices

a. Prohibited Strikes, Boycotts, and Hot Cargo Agreements— Section 8(b)(4) and 8(e)

(1) Scope of Section 8(b)(4)(i) and (ii)

Section 8(b)(4)(i) of the Act forbids unions "to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce" to engage in, a work stoppage for certain specified objects. Section 8(b)(4)(ii) forbids unions "to threaten, coerce or restrain any person engaged in

⁷⁸ Citing *N.L.R.B. v. American National Insurance Co.*, 343 U.S. 395 (1952).

⁷⁹ *United States Pipe & Foundry Co. v. N.L.R.B.*, 298 F. 2d 873, certiorari denied 370 U.S. 919.

⁸⁰ See also *General Motors Corp. v. N.L.R.B.*, 303 F. 2d 428 (C.A. 6), discussed above, p. 213, where the court held that an employer was not obligated to bargain with respect to an "agency shop" proposal.

commerce or in an industry affecting commerce” to attain these objects. Several cases decided during the year dealt with the interpretation of these provisions.

(a) Person engaged in commerce

The Second Circuit had occasion to construe the statutory language “any person engaged in commerce or in an industry affecting commerce” in a case⁸¹ involving a tennis club which arranged and acted as a general contractor for the construction of tennis and swimming facilities for its members. Although neither the club nor the subcontractors whose employees walked off the job were shown to be in commerce, or in an industry affecting commerce, the primary employer, a nonunion subcontractor whose presence on the job caused the work stoppages, was engaged in commerce. Since a work stoppage of all building crafts on the job would substantially affect the flow of materials into the State, such a dispute was held by the court to “affect commerce” within the meaning of the section. The court further ruled that threats to stop the job, and to pull the other crafts off the job unless the nonunion subcontractor capitulated, were threats to “any person” to force cessation of business with the nonunion subcontractor and violated section 8(b)(4)(ii)(B).

(b) Individual employed—section 8(b)(4)(i)

In *Van Transport*,⁸² the Second Circuit, approving the Board’s interpretation of section 8(b)(4)(i) and (ii), held that the term any “individual employed by” in section 8(b)(4)(i) does not include corporate officers, high-ranking supervisors, and others “high up the management ladder,” but does apply to rank-and-file workers and minor supervisors who “although they are management’s representatives at a low level, are through their work, association, and interests still closely aligned with those whom they direct and oversee.” The court stated that inducements and encouragements addressed to true management representatives, such as corporate officers, will not suffice to establish an unfair labor practice in the area of secondary boycotts and that only threats, coercion, or restraints directed at such representatives constitute the means proscribed by section (8)(b)(4)(ii).⁸³

(c) Threats, coercion, and restraint—section 8(b)(4)(ii)

The Third Circuit held in *Riss*⁸⁴ that while mere inducement of true management representatives to engage in a secondary boycott does not

⁸¹ *N.L.R.B. v. Plumbers Union of Nassau County, Local 457 (Bomat)*, 299 F. 2d 497.

⁸² *N.L.R.B. v. Local 294, Teamsters*, 298 F. 2d 105.

⁸³ Accord: *Alpert v. Excavating & Bldg. Material Chauffeurs & Helpers Local 379 (Consalvo Trucking)*, 184 F. Supp 558 (D.C. Mass.).

⁸⁴ *N.L.R.B. v. Highway Truck Drivers & Helpers, Local 107*, 300 F. 2d 317

constitute a violation of section 8(b) (4) (ii) (B), the subsection is not restricted to the use of force and violence as means of bringing pressure against secondary employers. Relying mainly on the legislative history of the 1959 amendments to the Act, the court held that economic sanctions were among the means proscribed by clause (ii). Accordingly, the union's refusal to clear the handling of shipments of the primary employer's goods, following which union members employed by the secondary employer refused to handle the shipment, was held to violate clause (ii).

However, in *Tree Fruits*,⁸⁵ the District of Columbia Circuit set aside the Board's finding that the unions violated section 8(b) (4) (ii) (B) by patrolling in front of customers' entrances to retail stores with picket signs urging customers not to buy the products packed by another employer with which the unions had a primary dispute. The Board, in reliance on the legislative history concerning the second proviso to section 8(b) (4) which exempts "publicity other than picketing" from that section's prohibition, had taken the position that all secondary consumer picketing was banned. The court, however, disagreed with the Board on the ground that a more plausible reading of the Act is that section 8(b) (4) (ii) "outlaws only such conduct (including picketing) as in fact threatens, coerces or restrains secondary employers, and that the proviso is intended to exempt from regulation 'publicity other than picketing' even though it threatens, coerces or restrains an employer." In view of the union's successful efforts to prevent its picketing from having the customary "signal" effect on employees—the employees continued to work and pickups and deliveries were not affected—and in the absence of evidence showing any injury to the retail stores as secondary employers, the court believed that the Board's interpretation of the Act raised serious constitutional difficulties relating to "free speech." It therefore remanded the case to the Board, to receive evidence as to whether the retail stores were in fact threatened, coerced, or restrained.⁸⁶

(2) Secondary Boycotts

Several cases decided during the year involved the scope of section 8(b) (4) (A) and (B) of the 1947 Act, which was generally incorporated in section 8(b) (4) (i) and (ii) (B) of the present statute and interpreted as forbidding only secondary, not primary, pressure.⁸⁷

⁸⁵ *Fruit & Vegetable Packers & Warehousemen, Local 760 v. N.L.R.B.*, 308 F. 2d 311

⁸⁶ The court noted that the record did not show whether the picketing "caused or was likely to cause substantial economic injury" to the retail stores, whether pickets "confronted" consumers, or whether consumers felt "coerced" by their presence.

⁸⁷ See, e.g., Twenty-sixth Annual Report (1961), pp 157-158. See also the proviso to sec. 8(b) (4) (i) and (ii) (B) of the Act as amended in 1959, which provides that "nothing contained in this clause (B) shall be construed to make unlawful . . . any primary strike or primary picketing."

(a) Primary conduct unaffected

In the *McJunkin* case,⁸⁸ the District of Columbia Circuit agreed with the Board that the union's inducement of secondary employees not to unload the primary employer's truck at a location away from the primary employer's place of business constituted a violation of section 8(b) (4) (A) of the 1947 Act. However, the court regarded the union's telephonic appeals to the employees of neutral employers to respect the picket line at the plant as but normal incidents of peaceful primary picketing, without "any illegal purpose or effect." It concluded that such picketing and request could not be forbidden, even though the union had acted illegally elsewhere.

(b) Proscribed object,

In *Wesco Merchandise Co.*,⁸⁹ the District of Columbia Circuit agreed with the Board that work stoppages called by a union which represented clerks at a number of retail stores violated section 8(b) (4) (B) of the 1947 Act to the extent that they sought to require bargaining by certain wholesalers which distributed food products to the stores, but instructed the Board to reexamine its finding that these stoppages also violated section 8(b) (4) (A) of the 1947 Act.

The court questioned the Board's finding that the union sought to require the retail markets to "cease doing business with" the distributors, since the union would have been satisfied if the wholesale distributors had left the goods at the store's delivery decks, to be arranged on the shelves by the clerks, or if the distributors had recognized and bargained with the union. It requested the Board to re-evaluate its finding as to the object of the work stoppages in the light of a clause in the union's contract which required the retail stores to assign certain work to clerks in the bargaining unit or to employees of an employer under contract with the union.

In another case,⁹⁰ where the Board had found inducement of a work stoppage unlawful under section 8(b) (4) (A) and (B) of the 1947 Act, the Ninth Circuit rejected the union's defense that the Board's holding could not stand because the strike merely sought to compel the contractor to comply with the subcontracting clause of its labor agreement which the contractor had breached by having the work performed by a nonunion subcontractor at wage rates below those contained in the union agreement. The court agreed with the Board that the inducement of the work stoppage had the unlawful object of attempting to force the contractor to sever business relations with

⁸⁸ *Chauffeurs, Teamsters & Helpers Local 175 v. N.L.R.B.*, 294 F. 2d 261. For a discussion of the Board decision see Twenty-sixth Annual Report (1961), p. 134.

⁸⁹ *Retail Clerks Union Local 770 v. N.L.R.B.*, 296 F. 2d 368.

⁹⁰ *N.L.R.B. v. International Union of Operating Engineers, Local 12 (Tri County Assn.)*, 293 F. 2d 319.

the subcontractor, and to force the subcontractor to recognize or bargain with the union. Such conduct, the court stated, could not be justified by the claim that the contractor had breached its agreement with the union. Nor could the union properly raise the defense that its conduct was "primary" rather than "secondary," since, if one alternative purpose of a strike is unlawful, then such purpose is an "object" within the meaning of the section.

(c) Common situs and "ally" picketing

In several cases which arose under section 8(b)(4)(i) and (ii)(B) of the Act as amended in 1959, the courts rejected the defenses that the union's activities constituted common situs picketing protected under the *Moore Dry Dock* doctrine,⁹¹ or that the alleged secondary and primary employers had an "ally" relationship which justified inducement of the secondary employees.

In *Riss*,⁹² the Third Circuit found that *Moore Dry Dock* did not avail the union because its picketing activities made it perfectly clear that picketing was not limited to the primary employer at a common place of business, and that the union "deliberately enmesh[e] secondary employers and employees" in its dispute with the primary employer. Similarly, the Second Circuit rejected the *Moore Dry Dock* defense in the *Bomat* case⁹³ on the ground that the picket signs at the common construction site failed to identify the primary employer—a nonunion subcontractor—as the target of the dispute. This court further held that the mere fact that the primary employer held a membership card in the tennis club which undertook the general construction work did not make the tennis club his "ally."

Then, in *Fein Can*,⁹⁴ the Second Circuit found that there was no overlapping of management and no domination and control which would justify a refusal to recognize the separate status of each employer. It held further that the secondary employer's leasing of cars and drivers for the purpose of carrying nonstriking employees to the plant of the primary employer did not amount to the performance of "struck work" by the secondary employer or make it an "ally."

(3) "Hot Cargo" Agreements

Under the amended clause (A) of section 8(b)(4), unions are prohibited from resorting to 8(b)(4)(i) and (ii) conduct in order to force an employer to include in a collective bargaining agreement "hot cargo" provisions of a type forbidden by section 8(e). Two

⁹¹ *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547, 549 (1950); see Sixteenth Annual Report (1951), pp. 226-227.

⁹² *N.L.R.B. v. Highway Truck Drivers & Helpers, Local 107*, 300 F. 2d 317.

⁹³ *N.L.R.B. v. Plumbers Union of Nassau County, Local 457*, 299 F. 2d 497.

⁹⁴ *N.L.R.B. v. Local 810, Steel, Metals, Alloys, etc.*, 299 F. 2d 636.

cases decided during the year involved the interpretation of section 8(e) and its relation to section 8(b) (4) (A) under the amended Act.⁹⁵ A third case involved the effect of the construction industry proviso to section 8(e).

(a) Validity of argeement under section 8(e)

In *Employing Lithographers of Greater Miami*,⁹⁶ the Fifth Circuit, in finding a section 8(b) (4) (i) and (ii) (A) violation,⁹⁷ passed on the validity of various clauses which the union, by inducing a refusal to work overtime and a strike, sought to have included in the bargaining agreement.

The court agreed with the Board that a "trade shop" clause, which would permit the union to reopen and terminate the agreement if the employer requested his employees to handle nonunion goods, would constitute an implied "hot cargo" agreement prohibited by section 8(e), even though such requests might create serious economic problems affecting the employees covered by the agreement. The court further agreed with the Board that under the "refusal to handle" clause the employer would bargain away his right to discharge an employee for refusing to handle production work made in a shop not under contract with the union, and that this would again amount to an unlawful implied "hot cargo" agreement. The court also held that the union's proposed "separability" clause, which would defer making the two other proposed clauses effective until declared valid by the Board or courts, did not legalize the union's strike to force the employer to accept the invalid clauses. According to the court, the deferment clause would at least impair the effectiveness of section 8(e) which covers conditioned as well as absolute "hot cargo" clauses.

In this case, the court further held, contrary to the Board, that the "struck work," "right to terminate," and "chain shop" clauses in the union's proposals also violated section 8(e). The Board had found that the "struck work" clause containing a general provision requiring the employer not to render assistance to any employer struck by the union, and an implementation provision stating that employees shall not be required to handle any work "farmed out" by the struck employer unless it was customarily performed for such employer, was not unlawful because it amounted to nothing more than the "allied employer" exception to the secondary boycott prohibitions of the Act. However, the court held that, notwithstanding the imple-

⁹⁵ For a detailed analysis of the Board decisions in these cases, see Twenty-sixth Annual Report (1961), pp. 140, 142-145.

⁹⁶ *Employing Lithographers of Greater Miami, Florida v. N.L.R.B.*, 301 F. 2d 20.

⁹⁷ The court also sustained the Board's finding of a sec. 8(b) (3) refusal-to-bargain violation based on the union's conduct herein.

mentation provision, the general provision exceeded the "ally" exception and was violative of the Act. The "right to terminate" clause, allowing the union to terminate the contract if the employer did not comply with the "struck work" clause, was held to depend on the validity of the latter clause and to fall with it. The court also found that the "chain shop" clause, which permitted the employees to strike at plants "wholly owned and controlled" or "commonly owned and controlled" by the employer, was invalid because the second-quoted phrase went beyond the "single-employer exception" to the secondary boycott prohibitions.⁹⁸

In the *Gallagher* case,⁹⁹ a driver's local union called a strike to compel an employer in the hauling business to enter into an agreement which would prohibit the employer's lease or hire of outside equipment or drivers, unless all of its usable equipment and drivers were working and preference was given to employers having a contract with the local or a sister local. The District of Columbia Circuit held, in agreement with the Board, that because this proposal was proscribed by section 8(e)—since it would curtail the employer's use of independent owner-operators—the strike violated section 8(b)(4)(i) and (ii)(A) of the Act.¹

(b) Construction industry proviso to section 8(e)

The construction industry proviso to section 8(e)² was urged in one case³ as a defense to a union's violation of section 8(b)(4)(A) and (B) of the 1947 Act resulting from the union's attempts to force an employer to comply with a subcontracting clause which the employer had breached by subcontracting work to a nonunion employer. The Ninth Circuit held that while this proviso validated this kind of subcontracting provision in the construction industry, it did not legalize strikes or other coercive action to enforce such clauses.

⁹⁸ The court also rejected the union's argument that sec 8(e) is unconstitutional under the due process clause of the fifth amendment because the lithographic industry involved in this case has integrated production processes like those in the garment industry, which has been exempted from the application of the section. It agreed, in substance, with the opinion of the court in *Brown v. Local 17, Amalgamated Lithographers*, 180 F. Supp 294 (1960), discussed in the Twenty-fifth Annual Report (1960), pp. 157-158.

⁹⁹ *Highway Truck Drivers & Helpers, Local 107 v. N.L.R.B.*, 300 F. 2d 317.

¹ The union was also held to have violated sec. 8(b)(4)(i) and (ii)(B) since an additional object of the strike was to force the employer to cease doing business with other persons.

² This proviso states, ". . . nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work"

³ *N.L.R.B. v. International Union of Operating Engineers, Local 12 (Tri County Assn.)*, 293 F. 2d 319.

b. Remedial Orders—Section 8(b)(4) and 8(e) Conduct

In several secondary boycott cases, courts of appeals affirmed Board orders which proscribed unlawful union pressure not only against the primary and secondary employers involved in the case but also against other persons. Thus, in *Republic Wire*,⁴ the Third Circuit held that a Board order proscribing unlawful pressure against any secondary employer in connection with a dispute with any primary employer was not too broad, where the union's undenied unfair labor practices supported the conclusion that its activities disclosed a pattern of conduct contemptuous of the Act. And in *Riss*,⁵ the same court approved a Board order requiring a union to refrain from exerting unlawful pressure on any secondary employer in connection with a dispute with the primary employer involved in the instant case, where the union had interfered with the activities of several secondary employers and had shown an "obvious proclivity to engage in unlawful secondary activity" when and where such conduct suited its purpose, as evidenced by other recent cases before the Board.⁶

On the other hand, in the secondary boycott situation involved in *W. D. Don Thomas Construction*,⁷ the Ninth Circuit found that the Board could only ban inducement of the employees of the particular secondary employer against whom illegal pressure had been exerted, since no showing was made that the union was likely to implicate other secondary employers. The court pointed out that the primary employer had handled numerous other jobs without interference by the union and it was not shown that the union had a fixed determination to put the primary employer out of business because he was nonunion.

The scope and wording of an order remedying a violation of section 8(e) were considered by the Second Circuit in *Van Transport*,⁸ where the Board directed the union to cease and desist from entering into any contract with the named employer or any other employer in violation of section 8(e). The court held that the order was not too broad since the contract in question was executed not only by the named employer but by other members of the employer's bargaining association, and the union's conduct in the past indicated that the commission of similar unlawful acts might fairly be anticipated.

⁴ *N.L.R.B. v. Local Union 522, Lumber Drivers*, 294 F. 2d 811. See Board's decision in 129 NLRB 376 (1960).

⁵ *N.L.R.B. v. Highway Truck Drivers & Helpers, Local 107*, 300 F. 2d 317.

⁶ Similarly, the Second Circuit in *N.L.R.B. v. Local 810, Steel, Metals, Alloys, etc. (Fein Can Corp)*, 299 F. 2d 636, upheld an order requiring the union to stop its unlawful conduct not only against the named secondary employer but against any other secondary employer doing business with the primary employer.

⁷ *N.L.R.B. v. United Association of Journeymen, etc., Local 469*, 300 F. 2d 649.

⁸ *N.L.R.B. v. Local 294, International Brotherhood of Teamsters, etc.*, 298 F. 2d 105.

7. Representation Matters

Bargaining orders issued by the Board in various cases arising under section 8(a) (5) were contested on the ground that the Board had misapplied the law or exceeded its statutory discretion, either in ruling on issues raised in connection with an election conducted in a prior representation case or in holding that the unit of employees represented by the charging union was appropriate.

a. Elections

During the year, the Fifth Circuit decided two cases in which employers challenged the fairness of Board elections on the basis of preelection statements by the union regarding the wages and working conditions at other plants under contract with the union. In one of these cases,⁹ the court held that the employer had discharged its burden of proving a "*prima facie* case of unfairness in the conduct of the election" by showing that the union's messages, concerning conditions at a plant owned by another employer under contract with the union, contained speculative and exaggerated statements, half-truths, and misrepresentations. The court observed that the union had superior knowledge of these matters "sufficient to inspire reliance in the employees." However, in the other case,¹⁰ the same circuit held that the employer had failed to discharge its burden of proof because it offered no evidence to support its allegations that the union's preelection statements, which involved another plant of the same employer, were false. Moreover, the court found the statements substantially correct, and, even if they were taken to be false, the employees had no reason to believe that the union had "special knowledge" of the facts asserted, and the employer had opportunity to, and did, rebut the union's assertions.

In another case,¹¹ the First Circuit upheld an employer's challenge to the validity of a representation election based on preelection misstatements by the union which, the court found, were "major" and "highly misleading." Rejecting the contention that the employer "effectively" denied some of these assertions in a leaflet distributed 15 minutes before the election, the court stated that the employer did not have the burden of showing that "the employees were necessarily misled," but "only that it is sufficiently likely that it cannot be told whether they were or not."

⁹ *N.L.R.B. v. Houston Chronicle Publishing Co.*, 300 F. 2d 273.

¹⁰ *Anchor Mfg. Co. v. N.L.R.B.*, 300 F. 2d 301.

¹¹ *N.L.R.B. v. Trancoa Chemical Corp.*, 303 F. 2d 456. See also *N.L.R.B. v. Gorbea, Perez & Morrell, S. en C.*, 300 F. 2d 886 (C.A. 1), enforcing in part and remanding in part 133 NLRB 362, as to union's possible improper offer of inducement to employees to join union.

In a case decided by the Fourth Circuit,¹² the employer had filed election objections alleging that immediately prior to the election a departmental foreman, without the employer's knowledge, had engaged in organizational activities on behalf of the union and had "induced, coerced and caused" employees to favor the union and vote for it. The Board had certified the union without conducting a hearing on the objections, on the ground that the employer's allegations, if true, indicated that the foreman's activities were not coercive and that his alleged prounion activities were inconsistent with the employer's antiunion views, which were known to the employees. The court remanded the case to the Board to permit the employer to present its evidence in support of its objections on the ground that the allegations therein, if true, afforded a sufficient basis for believing that the employees' free choice was affected.

b. Unit Determinations

In *Texas Pipeline*,¹³ the Fifth Circuit affirmed the finding that a bargaining unit consisting of three adjacent and functionally integrated geographic divisions of a farflung pipeline operation was appropriate for collective-bargaining purposes. The employees in these divisions, the operations of which were substantially identical, had been represented for some time in separate units and had similar working conditions, job classifications, and employee benefits. The court held that the Board's exclusion of four other divisions was not arbitrary and unreasonable as contended by the employer.¹⁴ Two of these four divisions were geographically remote. As to the remaining two divisions, the court rejected the employer's contention that the Board's exclusion violated section 9(c)(5) of the Act because it gave controlling weight to the extent of union organization. According to the court, although extent of organization may not be "controlling," it is not to be ruled out as a factor to be given weight, and in a close case, such as this, it may be determinative.

In *Royal McBee*,¹⁵ the employer contended that a certified craft unit was inappropriate because its typewriter factory was fully integrated and the setting up of a separate bargaining group for a few craftsmen upon whom the operation of the whole plant depended

¹² *N.L.R.B. v. The Lord Baltimore Press, Inc.*, 300 F. 2d 671.

¹³ *Texas Pipeline Co. v. N.L.R.B.*, 296 F. 2d 208.

¹⁴ *Cf. N.L.R.B. v. Appleton Electric Co.*, 296 F. 2d 202 (C.A. 7), discussed above, p. 207, in which a newly acquired plant, subject to a "future plants" clause in the parties' contract, was held improperly excluded from the existing unit.

¹⁵ *Royal McBee Corp. v. N.L.R.B.*, 302 F. 2d 330.

might harm the entire operation of its business. The Fourth Circuit held that the certification was invalid under its prior decision in *Pittsburgh Plate Glass*,¹⁶ in which it found that in excepting certain integrated industries from the *American Potash* rule¹⁷ and subjecting other such industries to the rule the Board exceeded its power under the statute.

¹⁶ *N.L.R.B. v. Pittsburgh Plate Glass Co.*, 270 F. 2d 167 (1959), certiorari denied 361 U.S. 943; discussed in the Twenty-fifth Annual Report (1960), pp. 143-144.

¹⁷ *American Potash & Chemical Corp.*, 107 NLRB 1418 (1954). See Nineteenth Annual Report (1954), pp. 39-41, 43-44, and Twenty-fifth Annual Report (1960), pp. 39-40, 143-144.

VII

Injunction Litigation

Section 10 (j) and (l) authorize application to the U.S. District Courts, by petition on behalf of the Board, for injunctive relief pending hearing and adjudication of unfair labor practice charges by the Board.¹

Section 10(j) empowers the Board, in its discretion, to petition a district court, after issuance of an unfair labor practice complaint against an employer or labor organization, "for appropriate temporary relief or restraining order" in aid of the unfair labor practice proceeding pending before the Board. In fiscal 1962, the Board filed 11 petitions for temporary relief under the discretionary provisions of section 10(j)—8 against employers, 2 against unions, and 1 against both a union and an employer.²

Section 10(l) imposes a mandatory duty on the Board to petition for "appropriate injunctive relief" against a labor organization or its agent charged with a violation of section 8(b)(4) (A), (B), (C),³ or section 8(b)(7),⁴ and against an employer or union charged with a violation of section 8(e),⁵ whenever the General Counsel's investigation reveals "reasonable cause to believe that such charge is true and a complaint should issue." In section 8(b)(7) cases, however, a district court injunction may not be sought if a charge under sec-

¹ Table 20 in appendix A lists injunctions litigated during fiscal 1962; table 18 contains a statistical summary of results

² In fiscal 1961, one petition was filed under the provisions of sec. 10(j).

³ 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 to 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).

⁴ Sec. 8(b)(7), incorporated in the Act by the 1959 amendments, makes organizational or recognitional picketing under certain circumstances an unfair labor practice.

⁵ Sec. 8(e), also incorporated in the Act by the 1959 amendments, makes hot cargo agreements unlawful, with certain exceptions for the construction and garment industries.

tion 8(a)(2) of the Act has been filed alleging that the employer has 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(1) also provides that its provision shall be applicable, "where such relief is appropriate," to violations of section 8(b)(4)(D) of the Act, which prohibits strikes and other coercive conduct in support of jurisdictional disputes. In addition, under section 10(1) a temporary restraining order pending the hearing on the petition for an injunction may be obtained, without notice to the respondent, upon a showing that "substantial and irreparable injury to the charging party will be unavoidable" unless immediate injunctive relief is granted. Such *ex parte* relief, however, may not extend beyond 5 days.

In fiscal 1962, the Board filed 282 petitions for injunctions under section 10(1).⁶ This was an increase of 27 over the petitions filed in fiscal 1961, or an increase of more than 10 percent. As in past years, most of the petitions, 145 in number, were based on charges alleging violations of the secondary-boycott and sympathy-strike provisions now contained in section 8(b)(4)(i) and (ii)(B) of the Act.⁷ Forty-five petitions involved strikes or other proscribed conduct in furtherance of jurisdictional disputes in violation of section 8(b)(4)(D); 3 petitions were based on charges alleging prohibited conduct to compel an employer or self-employed person to join a labor organization in violation of section 8(b)(4)(A); and 7 petitions were based on charges of strikes against Board certifications of representatives in violation of section 8(b)(4)(C). Eleven cases were predicated on charges alleging unlawful hot cargo agreements under section 8(e) of the Act, which prohibits agreements between employers and labor organizations whereby the employer agrees not to do business with another employer; and 20 cases involved charges alleging strikes or other coercion to obtain such hot cargo agreements, which conduct is proscribed by section 8(b)(4)(A) of the Act. Fifty-eight petitions were predicated on charges alleging violations of the recognitional and organizational picketing prohibitions of section 8(b)(7). Of these 58, 3 cases involved alleged violations of subparagraph (A) by recognitional picketing when the employer was lawfully recognizing another union with which he had a contract that barred an election; 10 were based on charges alleging violations of subparagraph (B) by recognitional or organizational picketing within 12 months after a valid election among the employees; and

⁶ Forty-seven of the petitions filed alleged violations of more than one section of the Act.

⁷ Of these 145 petitions, 46 alleged violations of other sections of the Act as well.

39 alleged violations of subparagraph (C) by recognitional or organizational picketing for more than a reasonable period without a petition for an election having been filed.⁸

A. Procedural Issues

A number of decisions in fiscal 1962 dealt with procedural issues arising in injunction proceedings under section 10(j) or 10(l).

In the *Winwake* case,⁹ the court of appeals held that in a proceeding for an injunction under section 10(l) it is not necessary to allege or prove that an investigation of the charges was made by the regional director. The court held that the provisions of section 10(l) that a "preliminary investigation . . . shall be made" and "if, after such investigation . . . [there is] . . . reasonable cause to believe such charge is true . . . a complaint should issue," do not establish a "jurisdictional prerequisite," but rather "establish mandates for the Board—the noncompliance with which will undoubtedly spawn probative infirmities fatal to the relief it seeks." In this same case, the court also ruled that proceedings under section 10(l) were exempted by Congress from the reach of the anti-injunction provisions of the Norris-La Guardia Act.¹⁰

In *Ryan Homes*¹¹ the court held that only the Board may petition for an adjudication of civil contempt because of any alleged failure by a respondent to comply with the provisions of an injunction granted under section 10(l). It ruled that since only the Board is authorized to petition for injunctive relief under section 10(l), the party filing the unfair labor practice charge on which the petition is based may not move for an order adjudging respondent in civil contempt for alleged noncompliance.

B. Injunction Litigation Under Section 10(j)

In fiscal 1962, eight petitions under section 10(j) went to final order, the courts granting injunctions in six cases and denying injunctions in two cases.¹² Injunctions were granted against employers in four cases, two involving alleged violations of section 8(a) (1), (3), and (5), one involving section 8(a) (1) and (3), and one involving section 8(a) (5). Injunctions were also granted against an employer and a union in a case involving alleged violations of section 8(a) (1), (2),

⁸ All of these cases and the action therein are reflected in table 20, appendix A.

⁹ *Building & Construction Trades Council v. Alpert (Winwake)*, 302 F. 2d 594 (C.A. 1) affirming No. 61-650-S (D. Mass. September 7, 1961).

¹⁰ The same conclusion was reached in *Compton v. Local 901, Teamsters, Chauffeurs, etc. (La Concha Hotel)*, 49 LRRM 2835 (D. P.R.); and in *Fusco v. Kaase Baking Co.*, 205 F. Supp. 465 (D.C.N. Ohio), the court held that "the Norris-La Guardia Act does not limit the instituting of injunction proceedings under section 10(j)."

¹¹ *Shore v. Building & Construction Trades Council*, 50 LRRM 2139 (D.C.W. Pa.).

¹² See tables 18 and 20 in appendix A.

(3), and (5), and 8(b)(1)(A) and (3); and against a union in a case involving section 8(b)(1)(A). Injunctions were denied in two cases involving alleged violations of section 8(a)(1), (3), and (5). And in three cases—involving violations of section 8(a)(1), (3), and (5), section 8(a)(5), and section 8(b)(3), respectively—the commencement of proceeding under section 10(j) resulted in agreements by respondents to comply with the Act, making it unnecessary to secure an injunction.

1. Employer's Discrimination or Refusal To Bargain

Two cases brought under section 10(j) in fiscal 1962 sought injunctions requiring employers to reinstate employees allegedly discharged in violation of section 8(a)(3). In one, *DuBois Chemicals*,¹³ the union requested recognition after a substantial majority of the plant's employees had signed union cards and had reported to work wearing union buttons. A few hours after this demand, the employer discharged seven men in the middle of a shift and the balance of the employees went out on strike in protest. The next workday, the employer discharged all the strikers, thereby terminating practically the entire complement of employees. A petition for an injunction was filed alleging a violation of section 8(a)(1), (3), and (5). The court found sufficient evidence to show reasonable cause to believe that the discharges were not for economic reasons, as claimed by the employer, but to discourage membership in a labor organization in violation of section 8(a)(1) and (3). And the application for an injunction was granted to the extent the court considered necessary to preserve the status quo. The employer was ordered to offer all the discharges reinstatement, and was enjoined from discriminating against employees to discourage membership in a union and from interfering with the employees' right to organize. However, the employer was not ordered to bargain with the union pending Board disposition of the case.

In the second case, *Wellington Manufacturing*,¹⁴ the petition for injunctive relief alleged that following a union's request for recognition, the company, in violation of section 8(a)(1) and (3), discharged three employees who were active in the union; interrogated employees concerning union activities; engaged in surveillance of and threats to prounion employees; and organized an antiunion club among its employees. As a result of the company's antiunion campaign, the organizing activities of the employees were effectively halted. The court enjoined the company from discharging employees for union activity

¹³ *Elliott v. DuBois Chemicals, Inc*, 201 F. Supp. 1 (D.C.N. Tex.).

¹⁴ *Johnston v. Wellington Mfg. Div.*, 49 LRRM 2536 (D.C.S.C.).

and otherwise unlawfully intimidating them to discourage union membership. However, the court, while noting that mandatory reinstatement of discharged employees might be warranted in appropriate situations, did not order reinstatement of the three dischargees because it was not "clear" that the three employees were entitled to restoration or that sufficient urgency existed to require their reinstatement in the injunction proceedings.

In another case under section 10(j), *Burlington Industries*,¹⁵ after the employees' selection of the union in a Board election, the employer, without prior bargaining with the union on this subject, began to close down the plant permanently. The court was asked to order the company to bargain with the newly certified union with respect to its determination to close the plant and to halt its liquidation of the plant after it had engaged in such bargaining in good faith. Although recognizing that the company had objected to the union and that its decision to close the plant may have been influenced to some extent by the advent of the union, the court refused to require the company to continue operations and denied the injunction. The court noted that this plant had for some time been suffering very substantial losses and that the plant was already well on the way to complete liquidation, all but 600 out of approximately 1,700 employees having already been discharged and most of the orders in the plant having been completed.

Three cases involved employer refusals to bargain with a certified union. In *Alberto-Culver*¹⁶ the employer, prior to a Board election, had engaged in a campaign to defeat a union's organizing campaign. After the union won the election and was certified, the employer refused to meet with it at reasonable times. When the employer did meet with the union, it continued to question the union's majority status and refused to consider a union-security proposal; refused to discuss work rules, insisting that this was solely a matter of management prerogative; and, while still discussing wages with the union, unilaterally granted the employees a wage increase without notifying the union. Because the investigation of the charge revealed such persistent, flagrant disregard of the employees' rights under the Act, a 10(j) injunction was sought to prevent continued violations pending the Board's final determination of the charges. The district court found that there was reasonable cause to believe the employer had violated section 8(a)(1) and (5), and enjoined the employer from refusing to bargain in good faith with the union.¹⁷

¹⁵ *Phillips v. Burlington Industries, Inc.*, 49 LRRM 2144 (D.C.N. Ga.).

¹⁶ *Madden v. Alberto-Culver Co.*, 49 LRRM 2516 (D C N. Ill.).

¹⁷ The Board subsequently issued its decision finding a refusal to bargain. *Alberto-Culver Co.*, 136 NLRB 1432.

The second case¹⁸ arose out of an employer's refusal to continue to honor Board certifications as the representative of employees at two of the company's plants. The union had been certified for a separate unit at each plant and had a separate collective-bargaining agreement with the company for each plant. While the contracts were in effect, the employer consolidated the two plants, transferring the employees from one plant to the other. However, the character and identity of the two separate bargaining units were not substantially affected. Nonetheless, the company took the position that as a result of the consolidation the separate units had been destroyed and a new bargaining unit had been created. It refused to be bound by the existing certifications and collective-bargaining agreements, withdrew recognition of the union, and unilaterally changed terms and conditions of employment. The court found reasonable cause to believe this conduct violative of section 8(a) (1) and (5). It held that although the consolidation of the two operations might have been a matter of economy and the Board might consider whether a new unit had been created, the employer could not disregard the certifications and unilaterally determine the appropriate unit. The court required the company to continue dealings with the unions as the representative of the employees, directing that it continue to honor the separate-unit contracts or, in the alternative, to apply the contract originally executed for the existing plant so as to include the employees transferred to the plant.

In the third case, *Elmwood Ford Motors, Inc.*,¹⁹ an injunction was sought against an automobile dealer who allegedly had violated section 8(a) (1) and (3) by coercing and discriminating against his employees prior to a Board-conducted election, and section 8(a) (5) by refusing to bargain with the union after it had been certified as representing a unit of salesmen. In defense of the refusal to bargain charged, the employer argued that the bargaining unit was not appropriate because the salesmen were supervisors or independent contractors. The court refused to issue a bargaining order, holding that an order requiring the employer to bargain would be tantamount to a final determination of an issue which should properly be resolved in an unfair labor practice proceeding by the Board subject to review by a court of appeals. The court continued the case as to the alleged violations of section 8(a) (1) and (3) upon respondent's stipulation on the record not to engage in such conduct.

¹⁸ *Kennedy v. Telecomputing Corp.*, 49 LRRM 2188 (D.C.S. Calif.).

¹⁹ *Madden v. Elmwood Ford Motors, Inc.*, June 26, 1962, No. 62 C 1180 (N.D. Ill.).

2. Employer's Unlawful Assistance

In another case, *Kaase Baking Co.*,²⁰ an injunction was sought against both an employer and a union. It was alleged that the employer, while one union was the certified bargaining agent of the employees, unlawfully assisted another union; that the employer and the assisted union had coerced employees, interfering with their free choice of a representative; and that the employer had then unlawfully recognized the assisted union, withdrawing recognition from the incumbent union. The court found that the employer had illegally assisted the new union, in violation of section 8(a) (1) and (2), and that the new union violated section 8(b) (1) (A). To preserve the status quo, the court ordered the employer and the second union to abandon the new contracts, finding it "was a result of the unfair labor practice," and enjoined the employer from continuing to recognize the second union as the exclusive bargaining representative of the employees. The court did not order the employer to bargain with the incumbent union, finding that on the evidence in the case a question existed as to the incumbent union's continued majority status.

3. Union's Coercive Strike Conduct

In another case under section 10(j), the Board sought interim relief from a district court to prevent a union from continuing to violate sections of the Act other than those which make it mandatory for the Board to seek an injunction under section 10(1) of the Act. In that case, the court enjoined a striking union from restraining or coercing nonstriking employees in violation of section 8(b) (1) (A) of the Act.²¹ It found that strikers had blocked the road to the plant used by nonstriking employees, threatened employees, forced automobiles of nonstrikers off the road, and beaten a nonstriker.

C. Injunction Litigation Under Section 10(1)

In fiscal 1962, 94 petitions under section 10(1) went to final order, the courts granting injunctions in 81 cases and denying injunctions in 13 cases.²² Injunctions were issued in 46 cases involving alleged secondary boycott action proscribed by section 8(b) (4) (B). In three other cases, injunctions were issued enjoining violations of section 8(b) (4) (B) and also 8(b) (4) (A), which proscribes certain conduct to obtain hot cargo agreements barred by section 8(e). Three injunc-

²⁰ *Fusco v. Kaase Baking Co.*, 205 F. Supp. 465 (D.C.N. Ohio).

²¹ *Potter v. United Cement Workers (Texas Portland Cement)*, 48 LRRM 2965 (D.C.E. Tex.).

²² See tables 18 and 20 in appendix A.

tions were issued enjoining the continued effectuation of such hot cargo agreements. Two of these also enjoined violations of section 8(b) (4) (A) and (B), and the third enjoined violations of section 8(b) (4) (A), (B), and (D), as well as 8(e). Injunctions were granted in 13 cases involving jurisdictional disputes in violation of section 8(b) (4) (D). Five of these cases also involved proscribed activities under section 8(b) (4) (B). Injunctions were issued in 14 cases involving recognitional or organizational picketing in violation of section 8(b) (7). Of these, five involved picketing where a valid election had been conducted within the preceding 12 months, in violation of subparagraph (B); and nine involved picketing conducted beyond a reasonable period of time without a petition for an election having been filed, as required by subparagraph (C).

Of the 13 injunctions denied under section 10(e), 5 involved alleged secondary boycott situations under section 8(b) (4) (B), 1 of these also involving an alleged jurisdictional dispute under section 8(b) (4) (D); and 8 involved alleged recognitional or organizational picketing in violation of section 8(b) (7)—1 under subparagraph (A), 1 under subparagraph (B), and 6 under subparagraph (C).

1. Secondary Boycott Situations

a. Consumer Boycotts

Clause (ii) of section 8(b) (4) (B) makes it unlawful for a union "to threaten, coerce or restrain any person engaged in commerce or in an industry affecting commerce" for any of the proscribed objects set forth in the section. During fiscal 1962, the district courts construed this section as prohibiting picketing of customers of a person with whom the union has a dispute in order to persuade the public not to patronize the customers.²³

In *Waterbury Mattress*²⁴ the union told a number of retail stores selling products of a manufacturer with whom it had a dispute that unless they stopped selling these products the stores would be picketed. The stores which thereupon ceased selling these products were not picketed. Others, which continued to sell the products, were picketed by union members with signs designating the manufacturer as "unfair." The district court rejected the union's argument that its picketing was not within the ban against threats, restraint, or coercion because its "sole object was to persuade the public not to purchase a non-union product and that it did not attempt to force the retailers

²³ But see *Fruit & Vegetable Packers & Warehousemen, Local 760 v. N.L.R.B. (Tree Fruits Labor Relations Committee, Inc.)*, 308 F. 2d 311 (C.A. D.C.), discussed above, p. 220, where the court of appeals set aside the Board's findings of a section 8(b) (4) (ii) (B) violation.

²⁴ *Kaynard v. Local 140, Bedding, Curtain & Drapery Workers Union, United Furniture Workers of America (The Waterbury Mattress Co)*, 50 LRRM 2164 (D.C.S. N.Y.).

to do anything.” The court found on these facts that the union’s object was to force the retailers to stop selling the particular product and held that its conduct “comes squarely within” the proscription of section 8(b) (4) (ii) (B) against threats, restraint, and coercion.

In another case, *Remington Rand*,²⁵ firms whose office machines were serviced by employees of Remington Rand, with whom the union had its dispute, were picketed with placards labeling these firms as “unfair.” None of Remington Rand’s servicemen were on the customers’ premises when the picketing occurred. The court concluded that the picketing unlawfully coerced and restrained the customers of Remington Rand.

b. Inducement of Employees

Clause (i) of section 8(b) (4) (B) prohibits, among other things, inducement of employees to engage in strikes or work stoppages in order to compel neutral employers to cease handling the products of or to cease doing business with other persons.

In *Bendix*,²⁶ because of a dispute over the assignment of work in connection with installation of certain electrical equipment at a missile tracking station, the union picketed at the jobsite and distributed a letter to, among others, individuals employed by neutral employers, which the court found was “the equivalent of saying that any union member who worked alongside the employees of [the company] was not a fit and proper member.” The court concluded that this was unlawful inducement of secondary employees and issued an injunction which, among other things, prohibited the union from inducing employees of neutral employers by means of handbills to engage in work stoppages.

c. Common Situs

In *Intertype*,²⁷ the court found reasonable cause to believe that a union engaged in proscribed secondary conduct when it picketed at a public warehouse in which the struck primary employer stored some of its products. Although the union’s picket signs named the primary employer as required by *Moore Dry Dock*,²⁸ the district court held that the warehouse was not a common situs within the purview of the *Moore Dry Dock* case, and enjoined the picketing.²⁹

The union in *Robin Hood*³⁰ picketed a construction site where

²⁵ *Greene v. Local 275, International Union of Electrical, Radio & Machine Workers of America (Remington Rand Univac Division, Sperry Rand)*, 200 F. Supp. 596 (D.C. Mass.).

²⁶ *Kennedy v. International Brotherhood of Electrical Workers (Bendix Corp.)*, 49 LRRM 2761 (D.C.S. Calif.).

²⁷ *McLeod v. United Auto Workers of America, Local 365 (Intertype Co.)*, 200 F. Supp. 778 (D.C.E. N.Y.).

²⁸ See *Sailors’ Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547 (1950).

²⁹ For other aspects of this case, see discussion below, p. 240.

³⁰ *Cuneo v. Carpenters’ Local No. 15 (Robin Hood Estates, Inc.)*, 194 F. Supp. 662 (D.C. N.J.).

a nonunion subcontractor was engaged. Observing that the *Moore Dry Dock* tests relating to common situs picketing are applied only in the absence of "more direct evidence of intent and purposes of the labor organization," the court attached "credence to the insistence by the respondent that at the time it established the picket line . . . it was no longer desirous of obtaining a representation agreement with" the primary employer, and concluded on all the evidence, including threats to neutrals to picket any job on which the primary employer worked, that an object of the picketing was to bring pressure upon the secondary employers to force them to cease doing business with the primary employer.

d. Reserved Gate

In *Mack Trucks*,³¹ the union struck the primary employer's plant at a time it was relocating various plant facilities among several buildings located on a large unfenced tract, and had engaged various contractors to perform this work at two separate locations. At one location, the premises were enclosed by a fence. The other location, about a half mile away, was unfenced. After the union began picketing, the employer set aside one gate at the enclosed premises for the exclusive use of the contractors and their employees. At the unfenced location, it designated a separate entrance for the exclusive use of the contractors and their employees by placing wooden posts with appropriate signs on a dirt road leading across a field to one of the buildings. No fence separated this entrance from the remainder of the site, and no guard was regularly on duty to exclude unauthorized persons. In the court's view, whether such an entrance constituted a "reserved gate" within the meaning of the Supreme Court's decision in the *General Electric* case³² was a novel question of law upon which "the statutory scheme does not contemplate a definitive decision by the District Court . . . [but] only whether the Board's position is reasonable and not frivolous." The court noted that "the Board's legal position may be uncertain when tested by appropriate legal standards" but it was not "unreasonable or frivolous, since the inference to be drawn from the decided cases do not completely exclude the possibility that the Board's position is correct." Similarly, the court rejected the union's contention that it was entitled to picket the "reserved gate" because the contractors' work was in the nature of maintenance work normally performed by employees of the primary employer, holding that

³¹ *Schauffler v. Local No. 677, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America (Mack Trucks, Inc.)*, 201 F. Supp. 637 (D.C.E. Pa.).

³² *Local 761, International Union of Electrical, Radio & Machine Workers v. N L.R.B.* 366 U.S. 667.

whether it was conventional maintenance work rather than work in the nature of a capital improvement was an issue of fact with respect to which there were "reasonable grounds" to support the Board's petition.

e. Ambulatory Picketing

In *Dorsey Owings*³³ pickets followed the primary employer's trucks from the primary premises to the premises of secondary persons where the trucks were to make deliveries or pickups, and picketed at the secondary premises while the trucks were there. In some instances, the picketing at the neutrals' premises was several hundred feet from the trucks and not within view of the primary employer's truckdriver. At one place, the union verbally threatened to picket the neutral's platform if the primary employer's trucks were allowed to unload, and employees of that company engaged in a work stoppage. The court, considering "the totality of the conduct in order to determine the object of the picketing," concluded that the union did not conduct its picketing "so as to minimize the impact thereof on the secondary employer, but that it deliberately enmeshed the secondary employers and their employees in the dispute."

In another case, *J. J. White Ready Mix*,³⁴ the district court also concluded that a union's picketing at or in the vicinity of the premises of secondary employers, while the primary employer's trucks were present, was violative of section 8(b) (4) (i) and (ii) (B), on evidence that the pickets attempted to induce employees of the secondaries to refuse to handle or transport the primary's goods and engaged in conduct "having the effect, if not intent, of coercion" of neutrals.

f. "Ally" or "Struck Work" Defense

In several cases, unions contended that a secondary employer was an ally of the primary employer and, hence, conduct directed against the secondary was lawful primary activity.

In *Knight Newspapers*³⁵ the union, in support of its dispute with a newspaper at Miami, Florida, picketed a newspaper in Detroit, Michigan. The union argued that the Detroit company was not a neutral within the meaning of section 8(b) (4) (B) because the Miami newspaper was a wholly owned subsidiary of the company which published the Detroit paper and both were commonly controlled. Although the court found that the newspapers were commonly owned,

³³ *Penello v. Freight Drivers & Helpers Local 557 (Dorsey Owings, Inc.)*, 50 LRRM 2303 (D.C. Md.).

³⁴ *McLeod v. Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (J. J. White Ready Mix Corp.)*, 49 LRRM 2148 (D.C.E.N.Y.)

³⁵ *Roumell v. Miami Newspaper Printing Pressmen Local No. 46 (Knight Newspapers, Inc.)*, 198 F. Supp. 851 (D.C.E. Mich.).

it nevertheless found reasonable cause to believe that they were not commonly controlled since an official at each newspaper had "complete and final control over purchasing and labor relations for that newspaper." In this connection, the court observed that although the vice president of the parent company at times participated in labor negotiations for both newspapers as an observer and technical advisor, and at times was delegated authority over broader questions of contract negotiations by the business manager of the respective newspapers, "the locus of final authority at each newspaper firmly establishes the lack of common control of labor policies." It accordingly enjoined the picketing of the Detroit newspaper.

In *Intertype*,³⁶ the union struck an employer, a manufacturer of typesetting machinery, with whom it had a primary dispute. A few days before the strike, but not in anticipation of the strike, this employer had stored nine finished typesetting machines in a public warehouse prior to shipment abroad pending final financial arrangements with purchasers of the machines. In the past, machines were sometimes similarly stored in a public warehouse prior to shipment, and then shipped out by the warehouse employees, and on other occasions were stored in the primary employer's plant and shipped out by its own employees. The union picketed the warehouse as well as the primary employer's plant and successfully induced the warehouse employees not to handle the machines. The district court rejected the union's contentions that the warehouse was an ally of the primary employer because the machines could have been stored at the primary situs and shipped by primary employees, and that the warehouse was performing struck work, and enjoined the picketing of the warehouse. In so doing, the court relied upon the evidence that the primary employer had stored machines at the warehouse in the past, that the instant storage had not been in anticipation of the strike, and that when the machines were moved from the primary employer's plant to the warehouse the primary employees performed all the loading and incidental work normally performed by them when machines were shipped out of the plant, so that the warehouse employees, in transshipping the machines, would not be doing work performed by primary employees before the strike. On appeal, the Second Circuit affirmed the district court.³⁷

In *Colgate-Palmolive*,³⁸ the court reached a similar result and granted an injunction. In that case, Colgate had for years contracted

³⁶ *McLeod v. United Auto Workers of America, Local 365 (Intertype Co.)*, 200 F. Supp. 778 (D.C.E.N.Y.). For another aspect of this case, see discussion above, p. 237.

³⁷ *McLeod v. United Auto Workers of America, Local 365 (Intertype Co.)*, 299 F. 2d 654 (C.A. 2).

³⁸ *Hoffman v. Warehouse Union Local 6, International Longshoremen's & Warehousemen's Union (Colgate-Palmolive Co.)*, Civil No. 40,333 (N.D. Calif. April 4, 1962), affirmed 302 F. 2d 352 (C.A. 9).

with various trucking concerns, including Asaro, to pick up merchandise at Colgate's Berkeley warehouse, sort the merchandise according to customer's orders, and deliver it to Colgate's customers. This work constituted all of Asaro's business. The work of Colgate's warehouse employees was completed when they placed the merchandise on the loading dock from which it was to be loaded onto the trucks by the truckers' employees. After the union struck Colgate's Berkeley warehouse, Colgate continued to serve its customers by having products delivered by rail from one of its out-of-State plants to a public railroad siding. Colgate's out-of-State plants prepared the customers' orders as the Berkeley plant employees had done before the strike. The orders were designated for delivery to specific customers and then shipped to a railroad siding consigned to Asaro who received the merchandise at the siding, sorted it, and delivered it to Colgate's customers as before the strike. Rejecting the union's contention that Asaro was an ally of Colgate, the court found that Asaro was not performing "struck work" since he was doing the "same type of work" as before the strike, and held, therefore, that the union's picketing of Asaro's terminals and trucks violated section 8(b)(4)(B). The court also held that although Asaro did no work for anyone other than Colgate, Asaro and Colgate were "not engaged in an integrated operation nor did they constitute a single enterprise or a single employer" since Colgate had no financial interest in Asaro, owned none of its corporate stock nor its trucks, did not employ or control its truckdrivers, exercised no control over its labor policies, and did not direct Asaro as to the manner it made deliveries.

In *Rapid Electrottype*,³⁹ the primary employer, who had used a certain type of printing plate manufactured in its own plant, abandoned the use of this type of plate and changed to another type of printing plate produced by Rapid Electrottype under a new process. As a result, the primary employer laid off a number of employees. Sister locals of the union represented the employees of both the primary employer and Rapid Electrottype. When the union struck the primary employer, members of the sister local at Rapid Electrottype refused to work on the new type of plates ordered by the primary employer, claiming it was "struck work" and that the two employers were "allies." In issuing an injunction, the district court rejected the ally defense, noting that the primary employer's "business determinations" to adopt a new type of plate which it had never used before did not make the secondary employer producing such plates an "allied"

³⁹ *McLeod v New York Electrottypers' Union No 100 (Rapid Electrottype Co.)*, 49 LRRM 2945 (S D N.Y.)

employer working on "struck work." The court distinguished the *Ebasco*⁴⁰ and *Royal Typewriter*⁴¹ decisions from the instant case in that in *Ebasco* the secondary employer "as a result of the strike . . . took on the work of the primary employer at the latter's behest," and in the *Royal Typewriter* case the primary employer, whose employees had served its customers prior to striking, "maintained this service during the strike by referring its customers to independent servicing concerns and paying the charge therefor." In the *Rapid Electrototype* case, however, "the change in procedure . . . is what caused the strike" of the primary employees. "To hold otherwise," the court stated, "would mean that anyone who devises a 'better mouse trap' runs the risk of a strike by his employees as he gains greater acceptance and increased sales for his process," a "limitation on progress" not intended by Congress.

In another case, *Acme Concrete*,⁴² one employer, Twin County, sold and transported concrete, much of which it purchased from Acme Concrete. The two firms were located on premises owned by Acme, parked their trucks on a common lot on the premises, and had offices in the same building on the premises. Twin County paid no rent to Acme, which was owned and controlled by members of a family living on the premises, and one member of that family was employed by Twin County. The court found that although the facts did not establish "common ownership or control" of the two companies, the evidence showed "such identity and community of interests as would negative the claim that Acme is a neutral employer." The petition for injunction was, therefore, denied.⁴³

g. "Hot Cargo" Clause Situations and Strikes To Obtain "Hot Cargo" Clauses

Section 8(e) of the Act makes it an unfair labor practice for a labor organization and an employer to enter into a contract or agreement, either express or implied, whereby the employer ceases or refrains, or agrees to cease or refrain, from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person. However, in two separate provisos to section 8(e), certain such agreements are permitted in the construction and clothing industries. Section 8(b)(4)(A) of the Act, as amended in 1959, makes

⁴⁰ *Douds v. Metropolitan Federation of Architects (Project Engineering Co.)*, 75 F. Supp. 672 (D.C.N.Y.).

⁴¹ *N L R. B. v. Business Machine & Office Appliance Mechanics Conference Board Local 459 (Royal Typewriter Co.)*, 228 F. 2d 553 (C.A. 2).

⁴² *Kaynard v. Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Acme Concrete & Supply Corp.)*, 200 F. Supp. 505 (D.C.E.N.Y.).

⁴³ Subsequent to the fiscal year, the Board reached a similar result and dismissed the complaint. *Acme Concrete & Supply Corp.*, 137 NLRB No. 137.

it an unfair labor practice for a union to strike or exert other coercive pressure on an employer to compel him to enter into an agreement prohibited by section 8(e). In fiscal 1962, the district courts were called upon to construe these provisions in four cases.

In one case, *Weiss Builders, Inc.*,⁴⁴ the court considered the impact of the construction industry proviso⁴⁵ to section 8(e) upon section 8(b)(4)(A). There, two unions, during negotiations with an association of general contractors, picketed to obtain a contract provision prohibiting the subcontracting of work to be done on the jobsite to any person who would not agree to comply with the provisions of the contract between the unions and the association. The court enjoined respondents from picketing, holding that although a voluntary agreement for such a clause might not be illegal because of the construction industry proviso to section 8(e), strike pressure to obtain such an agreement was violative of section 8(b)(4)(i) and (ii)(A). In another case, *Connecticut Sand & Stone Corporation*,⁴⁶ which did not involve construction under the proviso, threats to picket or to "pull all the men off the job" in an attempt to enforce a similar clause in an executed contract were also found violative of section 8(b)(4)(ii)(A).

In *Precon Trucking*,⁴⁷ a union struck to obtain contract provisions which would have required all deliveries of the employer's product to be made by the employer's own drivers on a strict seniority basis. Acceptance by the employer would have brought about a cessation of a long-established practice whereby certain customers of the employer picked up their own purchases at the employer's premises. The union contended, however, that the clause merely was intended to preserve the jobs of the employees. The court, recognizing that the clause might be construed as a job preservation clause, held in substance that it could also be construed as requiring the company to cease doing business with the customers who in the past had made their own pickups. Accordingly, noting that the merits of the case were a matter for the Board, the court concluded that the regional director had reasonable cause to believe that the strike was violative of section 8(b)(4)(i) and (ii)(A), and granted an injunction. In a fourth case, *Wanzer Milk Co.*,⁴⁸ the union maintained that a clause in its collective-

⁴⁴ *Knapp v. Rochester Building & Construction Trades Council, AFL-CIO, et al. (Weiss Builders, Inc)*, 48 LRRM 2788 (D C Minn).

⁴⁵ This proviso declares, in substance, "That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction"

⁴⁶ *Alpert v. Local 559, Teamsters (Connecticut Sand & Stone Corp)*, 49 LRRM 2802 (D C Conn). Subsequent to the fiscal year, the Board held to like effect. *Connecticut Sand & Stone Corp*, 138 NLRB No. 68.

⁴⁷ *McLeod v. Local 282, Teamsters (Precon Trucking)*, 49 LRRM 2027 (D C N Y.)

⁴⁸ *Madden v. Milk Drivers' Union. Local 753, IBT (Wanzer Milk Co.)*, 50 LRRM 2563 (D C N Ill)

bargaining contract forbade the employer from contracting for the delivery of milk to its plant with any other employer whose drivers were not members of this union. The union struck the employer to enforce this provision when milk was delivered to the plant by drivers who were not members of this union. Finding that the agreement violated section 8(e), the court held that the strike to enforce its provisions was a violation of section 8(b)(4) (i) and (ii)(A), and issued an injunction.⁴⁹

2. Picketing After Certification of Another Union

Section 8(b)(4)(C) makes it an unfair labor practice to induce the employees of any person engaged in commerce to engage in a strike or work stoppage, or to threaten or coerce any person engaged in commerce, where an object is to force any employer to recognize or bargain with a labor organization if another labor organization has been certified by the Board as the employees' representative.

One of the cases brought in the district courts under this section during fiscal 1962 presented an unusual situation. In *LaConcha Hotel*,⁵⁰ one union had been certified by the Board in 1959 as the employees' bargaining representative. Thereafter, while that certification was still outstanding, another union petitioned the Board for certification as the bargaining representative. In the election that followed, the second union polled a majority of the ballots, but objections to the conduct of the election were filed. While the objections were pending, the petitioning union struck and picketed the employer to force him to recognize it. The prior certification was considered to be still in effect, in view of the outstanding objections to the more recent election, and a 10(1) injunction was sought under section 8(b)(4)(C). Observing that this not only appeared to be a violation of section 8(b)(4)(i) and (ii)(C), but also an attempt to put pressure upon the Board and to force the employer to violate section 8(a)(1) and (5), the court granted a temporary restraining order enjoining the picketing pending a full hearing on the 10(1) petition. After issuance of the restraining order, the union continued to picket but changed its signs, asserting that it was now only seeking recognition as the bargaining representative of three classifications of employees not included in the certified unit. The court found that the continued picketing was violative of the restraining order and in contempt of court, inasmuch as one object of the picketing continued to be that of forcing the employer to bargain with

⁴⁹ The court also found reasonable cause to believe that the union violated sec. 8(b)(4) (i) and (ii)(D). See below, p. 245.

⁵⁰ *Compton v. Teamsters, Chauffeurs, Warehousemen, Local 901 (LaConcha Hotel)*, 49 LRRM 2835 (D.C.P.R.).

it for employees in the certified unit.⁵¹ The court noted that respondent had "entangled the legal picketing with the illegal picketing," and ordered all picketing halted until further order. The next day, the union sought modification of the contempt order to permit picketing which it contended was legal, but the court declined to make such modification on the ground that a sufficient interval had not elapsed since the illegal picketing ceased.⁵² In the subsequent injunction hearing, the court rejected the union's contention that the incumbent union was no longer certified within the meaning of section 8(b)(4)(C) merely because the Board had found that a question concerning representation could be raised as to that unit.⁵³

3. Jurisdictional Dispute Situations

Injunctions were granted in 14 cases involving jurisdictional disputes—7 relating to conflicting claims to the assignment of work in the building and construction industry;⁵⁴ 1 relating to a work dispute in the maritime industry;⁵⁵ 4 relating to conflicting work claims in the newspaper publishing or printing industry;⁵⁶ and 1 each relating to disputed work in the dairy⁵⁷ and trucking⁵⁸ industries.

⁵¹ *Compton v. Teamsters, etc. Local 901 (LaConcha Hotel)*, 49 LRRM 2837 (D.C.P.R.)

⁵² *Compton v. Teamsters, etc. Local 901 (LaConcha Hotel)*, 49 LRRM 2839 (D.C.P.R.)

⁵³ *Compton v. Teamsters, etc. Local 901 (LaConcha Hotel)*, 49 LRRM 2843 (D.C.P.R.)

⁵⁴ *Cosentino v. Local 553, United Association of Journeymen, etc. (Southern Illinois Builders Assn.)*, 49 LRRM 2272 (D.C.S. Ill.); *Potter v. Local 1266, United Brotherhood of Carpenters, etc. (William Matera, Inc.)*, 48 LRRM 2926 (D.C.W. Tex.); *Reynolds v. Sheet Metal Workers International Assn., AFL-CIO, Local Union No. 249 (Paul Hardeman, et al.)*, 49 LRRM 3030 (D.C.E. Ark.); *Cuneo v. Local Union No. 825, International Union of Operating Engineers*, affirmed 300 F. 2d 832 (C.A. 3); *Kennedy v. International Brotherhood of Electrical Workers & its Local 639, etc. (Bendix Corp.)*, 49 LRRM 2761 (D.C.S. Calif.); *Alpert v. Building & Construction Trades Council of Metropolitan District; International Hod Carriers, Building & Common Laborers Union, etc., Local Union No. 22; and United Assn. of Journeymen, etc., Local Union No. 12 (Boston Gas Co.)*, Nov. 22, 1961 (No. 61-888 W.D. Mass.); *McLeod v. Enterprise Assn. of Steam, Hot Water, Hydraulic, etc., Local Union 638A of the United Assn. of Journeymen, etc. (All Boro Air Conditioning Co.)*, Aug. 2, 1961 (No. 61-Civ.-2499, S.D.N.Y.).

⁵⁵ *Boire v. National Marine Engineers Beneficial Assn. and its Agent, T. G. Cullen, and International Organization of Masters, Mates & Pilots (Pan American World Airways, Inc.)*, Aug. 4, 1961 (No. 1146-ORL-Civ., S.D. Fla.).

⁵⁶ *McLeod v. New York Mailers Union No. 6, ITU, and Newspaper & Mail Deliverers Union of New York City & Vicinity (New York Times Co.)*, Dec. 4, 1961 (61 Civil No. 3810, S.D.N.Y.); *McLeod v. New York Mailers Union No. 6, ITU, and Newspaper & Mail Deliverers Union of New York City & Vicinity (News Syndicate Co., Inc.)*, 49 LRRM 2762 (S.D.N.Y.); *McLeod v. New York Mailers' Union No. 6, ITU (News Syndicate, Inc.)*, 205 F. Supp. 479 (D.C.S.N.Y.); *International Printing Pressmen & Assistants' Union, and Stamford Printing Pressmen & Assistants' Union Local 317 (The O'Brien Suburban Press, Inc.)*, Oct. 31, 1961 (Civil No. 9021, D. Conn.).

⁵⁷ *Penello v. Milk Drivers & Dairy Employees Local Union No. 246, IBT, and Sales Drivers Local Union No. 33, IBT (Thompson's Dairy, Inc., et al.)*, Sept. 14, 1961 (No. 2741-61, D.C.).

⁵⁸ *Madden v. Milk Drivers Union, Local 753, IBT, and Peter Smith, its Agent (Sidney Wanzer & Sons, Inc.)*, 50 LRRM 2563 (D.C.N. Ill.).

In one case, the *News Syndicate Company*,⁵⁹ the court found reasonable cause to believe that respondent Mailers Union representing the mailroom employees of a large metropolitan newspaper had induced its members to engage in a refusal to handle the papers of the employer in violation of section 8(b)(4)(D). The dispute arose when the employer installed automatic equipment for the purpose of stacking and wire-tying bundles of papers and the respondents, the Mailers Union and the Deliverers Union, each demanded the work of operating certain controls. An injunction was issued against the Mailers when it struck to enforce its demand.

In *Bendix Corporation*,⁶⁰ a company engaged in work on a satellite communications system at an army base had assigned certain work to its own engineers and technicians whom it had brought from other locations. These engineers and technicians were not represented by any union. In rejecting the union's contention that they were only protesting low wages paid by the company, the court relied in part upon evidence that the union had conditioned cessation of the work stoppage upon agreement by the employer to subcontract out this work; in the event of such subcontracting the work would be performed by local electricians and members of the union.

4. Recognitional and Organizational Picketing

Section 8(b)(7) declares that in certain circumstances picketing by a union which is not currently certified as the representative of the employees involved to force an employer to recognize or bargain with it, or to organize the employees, is an unfair labor practice. Subparagraph (A) of the section prohibits such picketing when another union has been lawfully recognized by the employer as the representative of the employees and a question of representation cannot currently be raised. Subparagraph (B) provides that such picketing is unlawful during the 12 months following a valid Board-conducted election. Subparagraph (C), which would apply in those situations where an election may be conducted, provides that after a reasonable period of picketing not to exceed 30 days, further picketing is prohibited unless a representation petition has been filed with the Board before the expiration of the reasonable period. A proviso, however, exempts from the proscription of this subparagraph picketing "for the purpose of truthfully advising the public" that the employer does not employ members of or have a contract with the union, unless an effect of such picketing is to cause employees of other employers

⁵⁹ *McLeod v. New York Mailers Union No. 6, ITU, AFL-CIO (News Syndicate Co)*, 205 F Supp 479 (D C S N Y)

⁶⁰ *Kennedy v International Brotherhood of Electrical Workers, AFL-CIO, and Local No. 639, etc (Bendix Corp)*, 49 LRRM 2761 (D C S. Calif.).

to refuse to make pickups or deliveries or perform other services. Additionally, pursuant to a proviso to section 10(1), the Board may not apply for a 10(1) injunction in a section 8(b)(7) case if a meritorious charge has been filed alleging that the employer has dominated or interfered with a labor organization in violation of section 8(a)(2) of the Act.

a. Picketing Where Another Union Is the Contractual Representative

In fiscal 1962, only one case involving an alleged violation of section 8(b)(7)(A) was decided by a district court. In that case, *Spartan of Highway 50, Inc.*,⁶¹ the employer had previously recognized and executed a collective-bargaining agreement with another union. The district court concluded on the evidence before it that the incumbent union had not been lawfully recognized and, accordingly, denied the application for an injunction.

b. Picketing Within 12 Months of Election

Subparagraph (B) of section 8(b)(7) bans recognitional or organizational picketing within the 12 months following a validly conducted Board election. In *Ames IGA Foodliner, Inc.*,⁶² when the employer rejected the union's demand for recognition, the union placed him on a "We Do Not Patronize" list because of his refusal to grant recognition, and began picketing with signs which read "IGA is on We Do Not Patronize List. Retail Clerks Union Local No. 1439." A Board election was conducted, which the union lost. The picketing then ceased. However, on July 1, 1961, within 12 months of the certification of the results of the election, the union commenced picketing again with substantially the same sign. Several days later, the union wrote the employer that it was not picketing for recognitional or organizational purposes, but merely for purposes of inducing a consumer boycott and to advertise that the employer was on the "We Do Not Patronize" list. At the hearing in the district court, the union admitted that the employer was still on the "We Do Not Patronize" list for the reason he had initially been placed on the list, i.e., his failure to grant recognition. Nonetheless, the union contended that its picketing was for consumer boycott purposes and not to secure recognition. Refusing "to accept at face value the self serving statements made by either side," and noting that the previous picketing admittedly had been for recognition, the court concluded "from those prior objectives and from the totality of the Union's conduct" that the

⁶¹ *Sperry v. Retail Clerks International Assn Local Union No. 782, AFL-CIO (Spartan of Highway 50, Inc)*, 202 F Supp 708 (D C.W. Mo.).

⁶² *Graham v. Spokane Labor Council and Retail Clerks International Union, Local No. 1439 (Ames IGA Foodliner, Inc)*, 48 LRRM 2924 (D C E. Wash.).

union still was picketing for recognition. The court, therefore, issued an injunction.⁶³

In another case, *Buy Low Supermarkets, Inc.*,⁶⁴ the union picketed within 12 months of a valid Board election with signs reading "Grocery Employees of this Store are not Union members and do not deserve the patronage of Organized Labor. Please patronize Union Stores . . ." The union contended that the purpose of the picketing for informational. Holding that the union had a recognitional or organizational objective in view of the language of the picket sign, the court granted petitioner's motion for judgment on the pleadings, and issued an injunction.

c. Other Organizational and Recognitional Picketing

Subparagraph (C) of section 8(b)(7) prohibits recognitional or organizational picketing for more than a reasonable period of time, not to exceed 30 days, without the filing of a petition for a Board election before the expiration of the reasonable period. This subparagraph covers situations where neither section 8(b)(7)(A) nor 8(b)(7)(B) applies, i.e., where there is no lawfully recognized union holding a contract which would bar an election, or where there has been no election within the preceding 12 months; in either of these two situations such picketing is not permitted for any period. Where a timely petition is filed, subparagraph (C) provides for an expedited election. A proviso specifies, however, that under subparagraph (C) picketing "for the purpose" of advising the public that the employer "does not employ members of, or have a contract with," the union is not prohibited unless it stops deliveries or causes a secondary work stoppage.⁶⁵

(1) The Object of the Picketing

Under subparagraph (C), as under the other subparagraphs of section 8(b)(7), picketing is unlawful only if an object thereof is to organize the employees or to force an employer to recognize or bargain with the union. In the *Noonan*⁶⁶ case, the union picketed a contractor in the building and construction industry for more than

⁶³ The Board subsequently also held that the renewed picketing was for a recognition objective. *Ames IGA Foodliner*, 136 NLRB 778.

⁶⁴ *Madden v. Retail Clerks International Assn. Local 1460, AFL-CIO (Buy Low Supermarkets, Inc.)*, Aug. 4, 1961 (No. 3140, N.D. Ind.).

⁶⁵ The proviso in full states:

"Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services."

⁶⁶ *Schauffler v. Local 542, International Union of Operating Engineers (R S Noonan, Inc.)*, 50 LRRM 2691 (D. C. Pa.).

30 days to obtain a prehire agreement. The contractor had filed an election petition with the Board but the petition was dismissed because at the time the petition was filed the contractor had no employees in the classification of employees normally represented by the union. The court concluded, nonetheless, that the union's picketing was to force the employer to recognize or bargain with it, an object proscribed by section 8(b)(7)(C), and enjoined the picketing.

Generally, the issue of objective is essentially an issue of fact. In *Sealy Greater New York, Inc.*,⁶⁷ Sealy, Inc., granted licenses for the manufacture and sale of Sealy products to various corporations, among them Sealy Brooklyn. Sealy, Inc., withdrew the license of Sealy Brooklyn and gave it to another company, Sealy New York. As a result, Sealy Brooklyn discharged its employees. Whereupon the union, which had had a collective-bargaining agreement with Sealy Brooklyn, picketed Sealy New York with signs reading "Help us get our jobs back! Don't buy Sealy products!" The union contended that Sealy New York was the successor in interest to Sealy Brooklyn and was obligated to submit the dispute to arbitration pursuant to the terms of the union's agreement with Sealy Brooklyn. The court found on these facts that the object of the picketing was not to secure recognition but to bring economic pressure on the Sealy organization to rehire the discharged employees and, accordingly, denied the petition for an injunction.

In another case, *Computer Systems*,⁶⁸ the union contended that although its picketing had initially been for recognition, after a certain date its object had changed and it was only protesting alleged unfair labor practices and seeking to compel the employer to rehire four employees who had been discharged. The evidence showed, however, that the union had demanded recognition after the alleged change in object. The court found reasonable cause to believe that an object of the picketing continued to be recognition or organization, and enjoined the picketing.

(2) Reasonable Period of Time

Under section 8(b)(7)(C), picketing is unlawful only if it continues without a petition having been filed within a reasonable period of time, not to exceed 30 days from the commencement of such picketing. What is a reasonable period depends on the particular facts of the case. Thirty days is the statutory maximum.

⁶⁷ *McLeod v. Local 140, Bedding, Curtain & Drapery Workers Union, United Furniture Workers of America, AFL-CIO (Sealy Greater New York, Inc.)*, 50 LRRM 2333 (D.C.S. N.Y.).

⁶⁸ *Cuneo v. International Union of Electrical, Radio & Machine Workers (Computer Systems, Inc.)*, Aug. 23, 1961 (No. 599-61, D.N.J.).

In *Eastern Camera & Photo Corp.*,⁶⁹ the union had been engaged in recognitional or organizational picketing for a period of 26 days before a representation petition was filed. However, the picketing had been accompanied by threats, acts of violence, and other coercive conduct against employees and customers. The Board contended that in such circumstances 26 days of picketing was picketing for more than a reasonable period and, hence, the petition had not been timely filed. The court agreed and issued an injunction.

(3) Publicity Proviso

During fiscal 1962, the district courts had occasion to consider the effect of the second proviso to section 8(b)(7)(C),⁷⁰ which permits picketing for the purpose of advising the public that the employer does not employ members of or have a contract with the union, as long as the picketing does not cause a work stoppage by an employee of any other person.

In one case,⁷¹ a union picketed with a sign stating: "This Building is Being Erected by Non-Union Labor." The respondents, one of whom was a Building and Construction Trades Council and the other a constituent union of the Council, contended that the picketing was purely informational and not for recognition or organization, and hence protected by the proviso to section 8(b)(7)(C). The court, however, took into consideration the fact that an earlier demand for recognition had "never been withdrawn," the fact that other unions affiliated with the Council had in the past picketed the same employer for recognition or organization, and the testimony of a business agent to the effect that the employer would have to sign contracts with all the affiliates of the Council, and concluded that the picketing was not protected by the proviso.⁷²

In *Vestaglas*,⁷³ however, the court concluded that on all the evidence before it the union was picketing solely to advise the public of alleged substandard wages and conditions. The picket signs stated

⁶⁹ *McLeod v. District 65, Retail, Wholesale & Department Store Union, AFL-CIO (Eastern Camera & Photo Corp.)*, 50 LRRM 2489 (D C E N Y).

⁷⁰ In *Sperry v. Retail Clerks, Local No. 782 (Spartan of Highway 50, Inc.)*, 202 F Supp. 708 (D.C.W. Mo.), the court points out that this proviso is only applicable in a case involving 8(b)(7)(C) where no union has been recognized and would not apply in a case where the charge alleges a violation of 8(b)(7)(A).

⁷¹ *Alpert v. Local 271, International Hod Carriers' Building & Common Laborers Union of America and Rhode Island Allied Building Trades Council (Reglar, Inc.)*, 48 LRRM 3043 (D C R I).

⁷² The court granted an injunction against one respondent, the constituent union of the Council, but dismissed the petition against the Council itself because, in the opinion of the court, the evidence did not establish that the Council was a labor organization within the meaning of the Act.

⁷³ *Cosentino v. Carpenters District Council of St. Louis, AFL-CIO (Vestaglas, Inc.)*, 200 F Supp 112 (D C E. Mo.)

that the employees of the picketed employer "do not belong to AFL-CIO and have substandard wages and working conditions." In denying the injunction, the court relied on evidence that the union had not made any attempt to organize the employees nor to secure recognition from the employer, but, on the other hand, by letter to the employer and leaflets distributed to the public had expressly disclaimed any organizational or recognitional objective. Inasmuch as there were no work stoppages resulting from the picketing, the court denied the injunction.⁷⁴

In several cases, the courts considered the effect upon informational picketing of resulting work stoppages. In one case, *Houston Contracting Co.*,⁷⁵ the court, noting that the union took "pains not to encourage refusals to cross the picket line," and that deliveries were being made to the jobsite "without interference or interruption of any kind," concluded that a comparatively few "isolated" instances of refusals to make deliveries across the picket line, which, however, were ultimately made, were not sufficient to remove the protection of the proviso from informational picketing.

In two other cases, *Jack Picoult*⁷⁶ and *Marriott Motor Hotels*,⁷⁷ the district courts found that the second proviso to section 8(b)(7)-(C) permitting informational picketing was not applicable since the picketing had had the effect of inducing employees of other persons to engage in refusals to make deliveries or perform other work, and enjoined the picketing.

⁷⁴ Subsequently, a panel majority of the Board also found no violation. *Vestaglas, Inc.*, 136 NLRB 855, Chairman McCulloch and Member Fanning for the majority, Member Rodgers dissenting.

⁷⁵ *LeBus v. Building & Construction Trades Council of New Orleans & Vicinity, AFL-CIO, and Local 60, United Assn of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry of the United States & Canada, AFL-CIO (Houston Contracting Co.)*, 199 F Supp. 628 (D C E Ia).

⁷⁶ *McLeod v. Local No. 3, International Brotherhood of Electrical Workers, AFL-CIO (Jack Picoult)*, 49 LRRM 2695 (D.C.E.N.Y.). Subsequent to the fiscal year, the Board found a violation on the ground that the picketing did not have "an informational purpose but, rather, was focused on the employees of secondary employers" *Jack Picoult*, 137 NLRB No 138

⁷⁷ *Samoff v. Hotel, Motel & Club Employees, Local 568 (Marriott Motor Hotels)*, 199 F Supp 265 (D C E. Pa.). Subsequently, the Board also found a violation. *Marriott Motor Hotels*, 136 NLRB 759.

VIII

Contempt Litigation

During fiscal 1962, petitions for adjudication in contempt for non-compliance with decrees enforcing Board orders were filed in three cases, two for civil contempt¹ and the the third for both civil and criminal contempt.² In one of these,³ the petition was withdrawn following compliance by respondents during the course of the proceedings; the other two remained open. In another case, the Sixth Circuit granted the Board permission to take depositions and inspect the company's books and records to test the company's claim of financial inability to comply with the court's decree, notwithstanding the fact that the Board had not filed an actual petition for adjudication in contempt.⁴

Two cases carried over from fiscal 1961 were completed, one by adjudication⁵ and the other by settlement.⁶ And decisions of some interest were issued in two pending cases, *Olson Rug Co.*,⁷ and *Vapor Blast Independent Shop Workers Association*.⁸

In *Olson Rug Co.*, the U.S. Court of Appeals for the Seventh Circuit granted the Board's petition and adjudged the company in civil contempt for disobeying its bargaining decree. In affirming the Special Master's report, the court noted that immediately after the company broke off bargaining, it granted benefits to the employees which had been requested by, but had been refused, the union; and that the company had disobeyed the decree by engaging undercover

¹ *N.L.R.B. v. Accurate Forming Corp., et al* (C.A. 3, No. 13405); *N.L.R.B. v. Pease Oil Co.* (C.A. 2).

² *N.L.R.B. v. Diamond Manufacturing Co., Inc.* (C.A. 5, No. 19224)

³ *N.L.R.B. v. Accurate Forming Corp., et al*, above

⁴ *N.L.R.B. v. Jerry J. Buckley* (C.A. 6, No. 14703). Compare *N.L.R.B. v. Deena Artware, Inc.*, 251 F. 2d 183 (C.A. 6), reported in Twenty-third Annual Report (1958), p. 140. See also *N.L.R.B. v. Ozanne, Inc.*, 307 F. 2d 81 (C.A. 1), discussed below, p. 258, as to enjoining State garnishment proceedings against employer's backpay payments.

⁵ *N.L.R.B. v. Editorial "El Imparcial" Inc.*, (C.A. 1, No. 5568) Adjudged October 3, 1961.

⁶ *N.L.R.B. v. Local 901, I L A. (Huron Stevedoring Co)* (C.A. 2)

⁷ *Olson Rug Co. v. N L R B*, 304 F. 2d 710 (C.A. 7).

⁸ *Vapor Blast Independent Shop Workers' Association, et al. v. Stmon, et al*, 305 F. 2d 717 (C.A. 7).

operatives to report on union activities and the union's bargaining strategy. The court directed the employer to notify the union of its readiness to resume, and upon request to resume, bargaining negotiations; to cease and desist from its antiunion espionage; and to pay half of the Master's fees and all of the remaining costs.

In *Vapor Blast Independent Shop Workers' Association*, the Seventh Circuit dismissed a petition for a writ of mandamus insofar as it sought to have the court direct the Board's General Counsel, a regional director, and a compliance officer to institute contempt proceedings against a company for failing, allegedly, to comply with a Board order previously enforced by the court.⁹ Noting that it had no jurisdiction to enforce a Board order at the suit of any private person, the court held that it was without power to entertain a petition for contempt action "save as the Board presents it."¹⁰

⁹ For another aspect of this case involving a postdecree settlement, see discussion below, p. 258

¹⁰ Citing *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 270 (1940); *Stewart Die Casting Corp. v. N.L.R.B.*, 132 F.2d 801, 803 (C.A. 7, 1942).

IX

Miscellaneous Litigation

Litigation for the purpose of aiding or protecting the Board's processes during fiscal 1962 was principally concerned with the defense of suits by parties seeking to compel the Board to assert or refrain from asserting jurisdiction over particular categories of employers, to review and set aside orders in representation proceedings, to limit a remand hearing in an unfair labor practice case, to review the refusal of the Board's General Counsel to issue an unfair labor practice complaint, and to order the General Counsel, a regional director, and a compliance officer to repudiate a postdecree settlement. Other litigation was concerned with the Board seeking enforcement of subpoenas *duces tecum* and an injunction to restrain a State court garnishment proceeding affecting an employer's payment of backpay ordered by the Board.

1. The Board's Jurisdiction

a. Foreign-Flag Ships

In *Empresa Hondurena de Vapores v. McLeod (United Fruit Company)*,¹ the employer, a Honduran corporation, sought to enjoin the Board from conducting representation elections among seamen on ships owned by this corporation, a wholly owned subsidiary of a New Jersey corporation. The ships in question were all registered under the laws of Honduras and flew the Honduran flag. The Board had directed an election to be held among the seamen to determine whether they wished to be represented for collective-bargaining purposes by the National Maritime Union, AFL-CIO, by Sindicato Maritimo Nacional de Honduras, or by neither.²

¹ 300 F. 2d 222 (C A. 2), certiorari granted 370 U.S. 915.

² *United Fruit Company*, 134 NLRB 287. Other court cases involving the foreign-flag ship problem include *Owens-Illinois Glass Co. v. McCulloch*, 50 LRRM 2041 (D.C.D.C.), *Sociedad Nacional de Marineros de Honduras v. McCulloch*, 201 F. Supp. 82 (D.C.D.C.), certiorari granted 370 U.S. 915; *Inces Steamship Co. v. International Maritime Workers Union*, 10 N.Y. 2d 218, 219 N.Y.S. 2d 21, certiorari granted 368 U.S. 924; *Navios Corp v National Maritime Union*, 402 Pa. 325, 166 A. 2d 625, certiorari denied 368 U.S. 905.

The Court of Appeals for the Second Circuit, in reversing the district court's order denying an injunction, concluded that a Federal District Court had jurisdiction to grant such relief "where there is a substantial claim that the Board is exceeding its jurisdiction in the field of foreign relations and thereby offending a friendly foreign government."³ In reaching this conclusion, the court, however, continued to adhere to its position that in the "typical domestic representation dispute," district courts in general do not have jurisdiction to review Board representation determinations.⁴

b. Horse Owners and Trainers

The Board's declination of jurisdiction over horse owners and trainers as a class pursuant to section 14(c)(1)⁵ was the subject of a suit to compel the Board's assertion of jurisdiction over this class of employers in the *Hirsch* and *Kelley* cases.⁶ The Board had dismissed representation petitions filed by plaintiff horse owners and trainers on the ground that it had in earlier advisory opinions⁷ declined jurisdiction over this category of employers pursuant to the authority afforded by section 14(c)(1). Plaintiffs contended that Board's declination of jurisdiction violated section 14(c)(1) and further that the Board in its refusal to assert jurisdiction had failed to provide plaintiffs with a proper hearing.

The Court of Appeals for the District of Columbia Circuit, in reversing the order of the district court dismissing the complaint,⁸ concluded that section 14(c)(1) permits the Board "to decline jurisdiction over the class or category after rule-making pursuant to the Administrative Procedure Act . . . or to act by 'rule of decision.'"⁹ It determined, however, that "Congress intended that jurisdiction . . . might be declined as a result of hearings (which might culminate in a rule of decision . . .)" but that an advisory opinion did not constitute such a "rule of decision" within the meaning of section 14(c)(1).¹⁰ Accordingly, the court remanded the case to the Board to afford the parties a hearing on the petitions which they filed pursuant to section 9(c).

³ 300 F. 2d 222, at p. 229.

⁴ *Local 1545, United Brotherhood of Carpenters v. Vincent (Pilgrim Furniture)*, 286 F. 2d 127 (C.A. 2).

⁵ Sec. 14(c)(1). "The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959"

⁶ *Hirsch et al. v. McCulloch, Kelley v. McCulloch*, 303 F. 2d 208 (C.A.D.C.).

⁷ *Meadow Stud*, 130 NLRB 1202 (1961); *William H. Dixon*, 130 NLRB 1204 (1961)

⁸ 48 LRRM 2665 (D.C.D.C.)

⁹ 303 F. 2d 208, at p. 212.

¹⁰ *Id.*, at pp. 213-214.

2. The Board's Contract-Bar Rules

In *Milk and Ice Cream Drivers and Dairy Employees Union, Local 98 v. McCulloch*,¹¹ an incumbent union attempted to enjoin the Board from holding a representation election among the employees of the dairy industry in the greater Cincinnati area. The union contended that the Board's adherence to its 2-year contract-bar¹² policy in ordering the election, and its refusal to receive evidence as to the prevailing practice of having 3-year collective-bargaining agreements in the dairy industry, was in excess of the Board's authority and violative of due process. The union further alleged that rulings excluding certain evidence at the hearing were also improper.

The Court of Appeals for the District of Columbia Circuit, in affirming the district court's dismissal of the complaint for lack of jurisdiction, held that the Board's action violated no express provision of the Act and that the Board's application of its 2-year contract-bar policy did not raise a substantial constitutional question. The court indicated that acceptance of plaintiff's contention would amount to saying that "notwithstanding the validity of the two year contract-bar rule in general . . . whenever in the face of an outstanding contract the Board acts within the terms of the rule a substantial constitutional question is raised."¹³ The court similarly concluded that the exclusionary rulings, precluding the introduction of certain evidence as to the inclusion of clerical employees in the bargaining unit and the exclusion of supervisory employees, presented no violation of any statutory or constitutional provision necessary to support district court jurisdiction.¹⁴

3. Unfair Labor Practice Hearings

In *Deering Milliken, Inc. v. Johnston*,¹⁵ plaintiff corporation sought to restrain the Board from remanding an unfair labor practice case to the trial examiner for a second time, for the taking of additional evidence on the corporate responsibility of plaintiff for remedying unfair labor practices allegedly committed by Darlington Manufacturing Company. The Court of Appeals for the Fourth Circuit held that the district court had jurisdiction to restrain unnecessarily repetitive administrative proceedings which unreasonably delay final agency disposition of a case in situations where the Act does not

¹¹ 306 F. 2d 763 (C.A.D.C.), 50 LRRM 2322.

¹² For a discussion of Board's contract-bar rules see above pp. 50-60

¹³ 50 LRRM 2322, at p. 2324.

¹⁴ See also *Consolidated Edison Company of New York, Inc. v. McLeod*, 302 F. 2d 354 (C.A. 2), affirming 202 F. Supp. 351 (D.C.S.N.Y.), denying an injunction against holding a Board election for lack of jurisdiction.

¹⁵ 295 F. 2d 856 (C.A. 4).

afford plaintiff adequate relief. The court held, however, that the district court had improperly enjoined the holding of the second remand hearing in its entirety.¹⁶ In remanding the case to the lower court, the court of appeals directed that prohibition be limited to preventing the litigation of matters previously covered in the first remand hearing, but that the Board be allowed to take evidence respecting certain events occurring after the first remand hearing.

4. Issuance of Complaints

In *Retail Store Employees Union, Local 954 v. Rothman*,¹⁷ the plaintiff sought a mandatory injunction to compel the General Counsel to issue a complaint charging that action of an employer in denying certain union members the right to wear union buttons or pins in excess of a certain size while working, was in violation of section 8(a)(1) of the Act. The General Counsel had concluded that there was insufficient evidence to support a violation of the Act and dismissed the charge. The Court of Appeals for the District of Columbia Circuit, in accord with its earlier decisions,¹⁸ affirmed the district court's dismissal of the complaint.¹⁹ In rejecting plaintiff's contention that the General Counsel had acted arbitrarily and capriciously, the court concluded that the refusal of the General Counsel to issue a complaint was well within the discretion conferred upon him by the statute, and therefore not subject to judicial review.

5. Enforcement of Subpenas *Duces Tecum*

In *N.L.R.B. v. United Aircraft Corp.*,²⁰ the Board sought an order requiring an employer to comply with certain subpoenas *duces tecum*. In investigating charges that the employer had violated section 8(a)(3) with respect to more than 700 employees, the Board sought information from the employer's records, *inter alia*, as to new employees hired, overtime worked, occupational classifications, and various lists relating to the company's employees. The district court, contrary to defendant's contentions, found that the Board's request for information was not unrelated to the matter under inquiry, unlimited in scope, nor unreasonably burdensome and accordingly granted the Board's request for enforcement of the subpoenas.²¹ In a *per curiam* decision, the Court of Appeals for the Second Circuit affirmed the district court's order.

¹⁶ 193 F. Supp. 741

¹⁷ 298 F. 2d 330 (112 App. D.C. 2).

¹⁸ *Houlihan v. N.L.R.B.*, 201 F. 2d 187 (C.A.D.C.), *Bandlow v. Rothman*, 278 F. 2d 866 (C.A.D.C.).

¹⁹ Civil Action No. 3644-60 (D.C.D.C.), unreported

²⁰ 300 F. 2d 442 (C.A. 2)

²¹ 200 F. Supp. 48 (D.C. Conn.)

6. Settlement of Unfair Labor Practices

In *Vapor Blast Independent Shop Worker's Assn., et al. v. Simon, et al.*,²² the Court of Appeals for the Seventh Circuit denied a petition filed by charging parties for a writ of mandamus to order the Board's General Counsel, a regional director, and a compliance officer to repudiate a postdecree settlement,²³ and held that it was within their discretion to settle for less than what the order enforced by the court required. The court found, moreover, that the Board's General Counsel and agents had acted reasonably in adjusting backpay liability and, as part of the settlement, in excusing the employer from offering reinstatement to a discriminatee because of changed circumstances. It accordingly deemed it unnecessary to determine whether it could grant relief had an abuse of discretion been shown.²⁴

7. Enjoining Garnishment of Backpay

In *N.L.R.B. v. Ozanne, Inc.*,²⁵ the Court of Appeals for the First Circuit adopted the principle urged by the Board that State court garnishment proceedings should be restrained where creditors of employees awarded backpay, under a Board order enforced by the court, seek to subject employer's payments to State court process. In so doing, the court expressly overruled its earlier holding in *N.L.R.B. v. Underwood Machinery Co.*,²⁶ and, agreeing with Judge Magruder's dissent in that case, stated "that it is more important that the Board's regular procedure be not interfered with than that some individual creditor be deprived of one of his possible remedies."

²² 305 F. 2d 717.

²³ For another aspect of the case involving contempt, see discussion above, p 253

²⁴ But see *Textile Workers Union of America v N L R B (Roselle Shoe Corp)*, 294 F 2d 738, where the U.S Court of Appeals for the District of Columbia Circuit set aside a Board order based on a settlement agreement executed by the employers and the Board's General Counsel, to which the charging union objected, and remanded the case to the Board For the Board's decision upon remand, see *Roselle Shoe Corp*, 135 NLRB 492, reaffirming original decision and order

²⁵ 307 F. 2d 81

²⁶ 198 F 2d 93 (1952).

APPENDIX A

Statistical Tables for Fiscal Year 1962

Table 1.—Total Cases Received, Closed, and Pending (Complainant or Petitioner Identified), Fiscal Year 1962

	Number of cases				
	Total	Identification of complainant or petitioner			
		AFL-CIO affiliates	Unaffiliated unions	Individuals	Employers
All cases ¹					
Pending July 1, 1961.....	26,883	2,664	1,341	2,003	875
Received fiscal 1962.....	24,848	10,325	5,267	6,206	3,050
On docket fiscal 1962.....	31,731	12,989	6,608	8,209	3,925
Closed fiscal 1962.....	25,027	10,020	5,435	6,573	2,999
Pending June 30, 1962.....	6,704	2,969	1,173	1,636	926
Unfair labor practice cases					
Pending July 1, 1961.....	4,464	1,358	571	1,856	679
Received fiscal 1962.....	13,479	4,289	1,608	5,416	2,166
On docket fiscal 1962.....	17,943	5,647	2,179	7,272	2,845
Closed fiscal 1962.....	13,319	3,915	1,589	5,737	2,078
Pending June 30, 1962.....	4,624	1,732	590	1,535	767
Representation cases					
Pending July 1, 1961.....	2,408	1,306	770	136	196
Received fiscal 1962.....	11,286	6,036	3,659	707	884
On docket fiscal 1962.....	13,694	7,342	4,429	843	1,080
Closed fiscal 1962.....	11,634	6,105	3,846	762	921
Pending June 30, 1962.....	2,060	1,237	583	81	159
Union-shop deauthorization cases					
Pending July 1, 1961.....	11			11	
Received fiscal 1962.....	83			83	
On docket fiscal 1962.....	94			94	
Closed fiscal 1962.....	74			74	
Pending June 30, 1962.....	20			20	

¹ **Definitions of types of cases used in tables.**—The following designations used by the Board in numbering cases are used in the tables in this appendix to designate the various types of cases

- CA A charge of unfair labor practices against an employer under sec. 8(a)
- CB. A charge of unfair practices against a labor organization under sec. 8(b)(1), (2), (3), (5), (6).
- CC. A charge of unfair labor practices against a labor organization under sec. 8(b)(4)(i) (A), (B), (C).
- CD A charge of unfair labor practices against a labor organization under sec. 8(b)(4)(i)(D)
- CE A charge of unfair labor practices against a labor organization and employer under sec. 8(e).
- CP: A charge of unfair labor practices against a labor organization under sec. 8(b)(7)(A), (B), (C).
- RC A petition by a labor organization or employees for certification of a representative for purposes of collective bargaining under sec. 9(c)(1)(A)(i).

RM A petition by employer for certification of a representative for purposes of collective bargaining under sec. 9(c)(1)(B).

RD A petition by employees under sec. 9(c)(1)(A)(n) asserting that the union previously certified or currently recognized by their employer as the bargaining representative, no longer represents a majority of the employees in the appropriate unit.

UD A petition by employees under sec. 9(e)(1) asking for a referendum to rescind a bargaining agents authority to make a union-shop contract under sec. 8(a)(3).

² Revised as of Sept. 30, 1961.

Table 1A.—Unfair Labor Practice and Representation Cases Received, Closed, and Pending (Complainant or Petitioner Identified), Fiscal Year 1962

	Number of unfair labor practice cases					Number of representation cases				
	Total	Identification of complainant				Total	Identification of petitioner			
		AFL-CIO affiliates	Unaffiliated unions	Individuals	Employers		AFL-CIO affiliates	Unaffiliated unions	Individuals	Employers
	CA cases ¹					RC cases ¹				
Pending July 1, 1961.....	2,955	1,310	545	1,098	2	2,076	1,306	769	1	-----
Received fiscal 1962.....	9,231	4,172	1,516	3,530	13	9,704	6,034	3,656	14	-----
On docket fiscal 1962.....	12,186	5,482	2,061	4,628	15	11,780	7,340	4,425	15	-----
Closed fiscal 1962.....	8,910	3,794	1,495	3,610	11	9,958	6,103	3,842	13	-----
Pending June 30, 1962.....	3,276	1,688	566	1,018	4	1,822	1,237	583	2	-----
	CB cases ¹					RM cases ¹				
Pending July 1, 1961.....	970	33	22	747	168	196	-----	-----	-----	196
Received fiscal 1962.....	2,399	83	64	1,798	454	884	-----	-----	-----	884
On docket fiscal 1962.....	3,369	116	86	2,545	622	1,080	-----	-----	-----	1,080
Closed fiscal 1962.....	2,631	81	66	2,054	430	921	-----	-----	-----	921
Pending June 30, 1962.....	738	35	20	491	192	159	-----	-----	-----	159
	CC cases ¹					RD cases ¹				
Pending July 1, 1961.....	298	9	2	5	282	136	-----	1	-----	135
Received fiscal 1962.....	1,076	11	11	57	997	698	-----	3	-----	693
On docket fiscal 1962.....	1,374	20	13	62	1,279	834	2	4	-----	828
Closed fiscal 1962.....	1,027	18	10	43	956	755	2	4	-----	749
Pending June 30, 1962.....	347	2	3	19	323	79	0	0	-----	79

CD cases ¹										
Pending July 1, 1961.....	² 103	2	1	2	98					
Received fiscal 1962.....	319	18	16	19	266					
On docket fiscal 1962.....	422	20	17	21	364					
Closed fiscal 1962.....	308	17	16	20	255					
Pending June 30, 1962.....	114	3	1	1	109					
CE cases ¹										
Pending July 1, 1961.....	² 30	3	0	2	25					
Received fiscal 1962.....	50	2	0	5	43					
On docket fiscal 1962.....	80	5	0	7	68					
Closed fiscal 1962.....	45	1	0	6	38					
Pending June 30, 1962.....	35	4	0	1	30					
CP cases ¹										
Pending July 1, 1961.....	² 108	1	1	2	104					
Received fiscal 1962.....	404	3	1	7	393					
On docket fiscal 1962.....	512	4	2	9	497					
Closed fiscal 1962.....	398	4	2	4	388					
Pending June 30, 1962.....	114	0	0	5	109					

¹ See table 1, footnote 1, for definitions of types of cases.

² Revised as of Sept 30, 1961.

**Table 2.—Types of Unfair Labor Practices Alleged,
Fiscal Year 1962**

A. CHARGES FILED AGAINST EMPLOYERS UNDER SEC. 8(a)

	Number of cases showing specific allegations	Percent of total cases		Number of cases showing specific allegations	Percent of total cases
Total cases.....	1 9,231	1 100 0	8(a)(3).....	6,953	75 3
8(a)(1).....	2 9,231	2 100 0	8(a)(4).....	240	2 6
8(a)(2).....	691	7 5	8(a)(5).....	2,294	24 9

B. CHARGES FILED AGAINST UNIONS UNDER SEC. 8(b)

	Number of cases showing specific allegations	Percent of total cases		Number of cases showing specific allegations	Percent of total cases
Total cases.....	1 4,198	1 100 0	8(b)(3).....	290	6 9
8(b)(1).....	2,012	47 9	8(b)(4).....	1,395	33 2
8(b)(2).....	1,673	39 9	8(b)(5).....	14	. 3
			8(b)(6).....	21	. 5
			8(b)(7).....	404	9 6

C. ANALYSIS OF 8(b)(4) AND 8(b)(7)

Total cases 8(b)(4)...	1 1,395	1 100 0	Total cases 8(b)(7)...	1 404	1 100 0
8(b)(4)(A).....	131	9 4	8(b)(7)(A).....	58	14 4
8(b)(4)(B).....	996	71 4	8(b)(7)(B).....	118	29 2
8(b)(4)(C).....	54	3 9	8(b)(7)(C).....	250	61 9
8(b)(4)(D).....	326	23 4			

D. CHARGES FILED AGAINST UNIONS AND EMPLOYERS UNDER SEC. 8(c)

Total cases 8(c).....	50	100 0			
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¹ A single case may include allegations of violations of more than one section of the Act. Therefore, the total of the various allegations is more than the figures for total cases.

² An 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 3.—Formal Action Taken, by Number of Cases, Fiscal Year 1962

Formal action taken	All cases	Unfair labor practice cases			Representation cases
		All C cases ¹	CA cases ¹	Other C cases ¹	
Complaints issued.....	2,030	2,030	1,558	472	
Notices of hearing issued.....	5,809	55		55	5,754
Cases heard.....	3,773	1,305	982	323	2,468
Intermediate reports issued.....	989	989	742	247	
Decisions issued, total.....	4,391	1,425	967	458	2,966
Decisions and orders.....	1,230	1,230	2 856	2 374	
Decisions and consent orders.....	195	195	111	84	
Elections directed by regional director.....	1,836				1,836
Elections directed by Board.....	577				577
Rulings on objections and/or challenges in stipulated election cases.....	210				210
Dismissals on record by regional director.....	202				202
Dismissals on record by Board.....	141				141

¹ See table 1, footnote 1, for definitions of types of cases.

² Includes 73 cases decided by adoption of intermediate report in absence of exceptions.

³ Includes 18 cases decided by adoption of intermediate report in absence of exceptions.

Table 4.—Remedial Action Taken in Unfair Labor Practice Cases Closed, Fiscal Year 1962

A. BY EMPLOYERS¹

	Total	By agreement of all parties	By Board or court order
Cases			
Notice posted.....	1,766	1,267	499
Recognition or other assistance withheld from employer-assisted union.....	150	106	44
Employer-dominated union disestablished.....	29	23	6
Workers placed on preferential hiring list.....	72	52	20
Collective bargaining begun.....	432	345	87
Workers			
Workers offered reinstatement to job.....	2,465	1,773	692
Workers receiving backpay.....	3,223	2,175 ²	1,469 ³
Backpay awards.....	\$1,642,030	\$535,360	\$1,106,670

B BY UNIONS⁴

	Cases		
Notice posted.....	788	542	246
Union to cease requiring employer to give it assistance.....	89	59	30
Notice of no objection to reinstatement of discharged employees.....	73	52	21
Collective bargaining begun.....	94	85	9
Workers			
Workers receiving backpay.....	232	212 ²	108 ³
Backpay awards.....	\$109,880	\$33,830	\$76,050

¹ In addition to the remedial action shown, other forms of remedy were taken in 253 cases

² Includes 64 workers who received backpay from both employer and union

³ Includes 33 workers who received backpay from both employer and union.

⁴ In addition to the remedial action shown, other forms of remedy were taken in 320 cases

Table 5.—Industrial Distribution of Unfair Labor Practice and Representation Cases Received, Fiscal Year 1962

Industrial group ¹	Unfair labor practice cases							Representation cases				
	All cases	All C cases	CA ²	CB ²	CC ²	CD ²	CE ²	CP ²	All R cases	RC ²	RM ²	RD ²
Total.....	24,765	13,479	9,231	2,399	1,076	319	50	404	11,286	9,704	884	698
Manufacturing.....	12,484	6,129	4,806	855	245	98	29	96	6,355	5,570	396	389
Ordnance and accessories.....	19	7	6	1	0	0	0	0	12	12	0	0
Food and kindred products.....	1,942	930	673	149	65	23	10	10	1,012	881	67	64
Tobacco manufacturers.....	10	7	4	1	0	2	0	0	3	3	0	0
Textile mill products.....	286	169	143	19	3	0	0	4	117	103	10	4
Apparel and other finished products made from fabric and similar materials.....	497	337	241	61	15	1	2	17	160	133	21	6
Lumber and wood products (except furniture).....	446	177	153	13	7	3	0	1	269	226	23	20
Furniture and fixtures.....	552	303	253	35	9	1	0	5	249	208	28	13
Paper and allied products.....	462	206	163	28	7	2	1	5	256	215	22	19
Printing, publishing, and allied industries.....	802	371	253	50	28	21	12	7	431	396	22	13
Chemicals and allied products.....	666	254	209	32	7	3	1	2	412	379	11	22
Products of petroleum and coal.....	192	92	70	15	4	0	1	2	100	81	10	9
Rubber products.....	419	184	160	16	5	1	0	2	235	214	11	10
Leather and leather products.....	210	104	86	14	2	0	0	2	106	94	5	7
Stone, clay, and glass products.....	668	357	259	45	31	9	1	12	311	271	28	12
Primary metal industries.....	725	349	278	49	10	4	0	8	376	332	21	23
Fabricated metal products (except machinery and transportation equipment).....	1,385	657	536	91	13	8	1	8	728	632	46	50
Machinery (except electrical).....	1,015	435	359	57	10	4	0	5	580	509	28	43
Electrical machinery, equipment, and supplies.....	929	495	400	81	7	6	0	1	434	395	15	24
Aircraft and parts.....	193	120	101	18	0	1	0	0	73	69	1	3
Ship and boat building and repairing.....	106	62	50	7	4	1	0	0	44	34	3	7
Automotive and other transportation equipment.....	504	298	226	57	8	6	0	1	206	175	13	18
Professional, scientific, and controlling instruments.....	150	74	67	3	2	0	0	2	76	60	6	10
Miscellaneous manufacturing.....	306	141	116	13	8	2	0	2	165	148	5	12
Agriculture, forestry, and fisheries.....	26	10	10	0	0	0	0	0	16	12	4	0
Mining.....	375	252	181	47	15	2	2	5	123	110	8	5

Metal mining.....	55	28	22	5	0	1	0	0	27	24	0	3
Coal mining.....	172	130	96	24	7	0	2	1	42	36	6	0
Crude petroleum and natural gas production.....	18	10	5	3	1	0	0	1	8	8	0	0
Nonmetallic mining and quarrying.....	130	84	58	15	7	1	0	3	46	42	2	2
Construction.....	2,476	2,164	788	629	476	164	3	104	312	264	47	1
Wholesale trade.....	1,901	791	549	161	42	2	2	35	1,110	893	126	91
Retail trade.....	3,156	1,529	1,175	156	75	15	1	107	1,627	1,344	188	95
Finance, insurance, and real estate.....	130	55	44	4	7	0	0	0	75	65	2	8
Transportation, communication, and other public utilities.....	2,909	1,860	1,155	441	190	26	12	36	1,049	904	68	77
Local passenger transportation.....	199	106	76	20	6	0	2	2	93	80	4	9
Motor freight, warehousing, and transportation services.....	1,738	1,137	717	236	143	9	8	24	601	511	49	41
Water transportation.....	415	336	146	152	23	9	0	6	79	71	4	4
Other transportation.....	46	23	16	2	3	1	0	1	23	22	1	0
Communications.....	296	168	132	22	11	0	0	3	128	108	6	14
Heat, light, power, water, and sanitary services.....	215	90	68	9	4	7	2	0	125	112	4	9
Services.....	1,308	689	523	106	26	12	1	21	619	542	45	32

¹ Source: Standard Industrial Classification, Division of Statistical Standards, U.S. Bureau of the Budget, Washington, 1957.

² See table 1, footnote 1, for definitions of types of cases.

Table 6.—Geographic Distribution of Unfair Labor Practice and Representation Cases Received, Fiscal Year 1962

Division and State ¹	All cases	Unfair labor practice cases							Representation cases			
		All C cases	CA ²	CB ²	CC ²	CD ²	CE ²	CP ²	All R cases	RC ²	RM ²	RD ²
Total.....	24,765	13,479	9,231	2,399	1,076	319	50	404	11,286	9,704	884	698
New England.....	1,101	519	399	60	42	12	1	5	582	520	29	33
Maine.....	72	32	29	2	1	0	0	0	40	40	0	0
New Hampshire.....	51	23	20	3	0	0	0	0	28	23	1	4
Vermont.....	33	16	13	0	3	0	0	0	17	14	3	0
Massachusetts.....	613	270	194	37	27	9	0	3	343	301	23	19
Rhode Island.....	81	42	33	5	2	1	0	1	39	39	0	0
Connecticut.....	251	136	110	13	9	2	1	1	115	103	2	10
Middle Atlantic.....	5,533	3,310	1,989	796	271	106	12	136	2,223	1,919	186	118
New York.....	2,898	1,815	1,068	448	137	56	7	99	1,083	898	117	68
New Jersey.....	1,113	589	385	116	54	18	2	14	524	472	27	25
Pennsylvania.....	1,522	906	536	232	80	32	3	23	616	549	42	25
East North Central.....	5,937	3,146	2,320	522	163	59	14	68	2,791	2,411	180	200
Ohio.....	1,651	767	567	138	34	7	1	20	884	781	47	56
Indiana.....	866	503	403	71	17	6	0	6	363	314	24	25
Illinois.....	1,567	867	598	163	53	20	5	28	700	626	41	33
Michigan.....	1,401	820	592	130	51	26	8	13	581	461	51	69
Wisconsin.....	452	189	160	20	8	0	0	1	263	229	17	17
West North Central.....	1,679	722	535	88	49	13	3	34	957	834	62	61
Iowa.....	218	62	45	3	7	2	0	5	157	141	8	7
Minnesota.....	314	118	77	10	18	0	1	12	196	173	16	17
Missouri.....	761	394	291	61	19	10	2	11	367	322	19	26
North Dakota.....	36	13	12	1	0	0	0	0	23	18	3	2
South Dakota.....	29	6	6	0	0	0	0	0	23	18	0	5
Nebraska.....	146	62	50	6	4	1	0	1	84	69	9	6
Kansas.....	175	67	54	7	1	0	0	5	108	93	7	8

South Atlantic.....	2,610	1,554	1,163	202	143	22	5	19	1,056	954	60	42
Delaware.....	67	39	24	5	9	0	0	1	28	25	1	2
Maryland.....	396	212	144	39	17	5	1	6	184	171	6	7
District of Columbia.....	93	59	24	19	10	6	0	0	34	30	2	2
Virginia.....	235	108	96	4	8	0	0	0	127	115	10	2
West Virginia.....	184	95	66	19	6	1	2	1	89	76	5	8
North Carolina.....	305	171	146	16	8	0	1	0	134	130	3	1
South Carolina.....	120	76	74	2	0	0	0	0	44	38	4	2
Georgia.....	302	174	135	22	12	2	1	2	128	113	7	8
Florida.....	908	620	454	76	73	8	0	9	288	256	22	10
East South Central.....	1,231	741	527	133	50	18	1	12	490	446	25	19
Kentucky.....	349	183	117	42	14	8	1	1	166	152	5	9
Tennessee.....	411	265	192	42	18	6	0	7	146	128	9	9
Alabama.....	367	229	163	42	17	4	0	3	138	128	10	0
Mississippi.....	104	64	55	7	1	0	0	1	40	38	1	1
West South Central.....	1,578	874	631	135	71	18	0	19	704	612	40	52
Arkansas.....	203	119	90	16	9	2	0	2	84	73	6	5
Louisiana.....	313	192	116	41	22	5	0	8	121	109	7	5
Oklahoma.....	182	71	63	5	1	1	0	1	111	91	5	15
Texas.....	880	492	362	73	39	10	0	8	388	339	22	27
Mountain.....	1,120	610	447	66	54	22	1	20	510	428	40	42
Montana.....	101	51	34	4	5	5	0	3	50	41	6	3
Idaho.....	112	43	39	4	0	0	0	0	69	52	10	7
Wyoming.....	53	21	18	2	1	0	0	0	32	28	2	2
Colorado.....	241	196	149	14	15	10	0	8	145	120	10	15
New Mexico.....	190	130	94	20	10	4	0	2	60	50	4	6
Arizona.....	155	84	59	12	9	1	1	7	71	61	4	5
Utah.....	81	38	24	1	12	1	0	0	43	42	0	1
Nevada.....	87	47	30	9	2	1	0	5	40	34	3	3
Pacific.....	3,272	1,715	1,005	346	222	49	13	80	1,557	1,188	247	122
Washington.....	418	226	137	55	19	1	2	12	192	130	39	23
Oregon.....	261	126	89	21	9	4	0	3	135	85	36	14
California.....	2,593	1,363	779	270	194	44	11	65	1,230	973	172	85
Outlying areas.....	704	288	215	51	11	0	0	11	416	392	15	9
Alaska.....	78	43	23	11	2	0	0	7	35	31	4	0
Hawai.....	112	30	25	0	3	0	0	2	82	78	3	1
Puerto Rico.....	508	215	167	40	6	0	0	2	293	277	8	8
Virgin Islands.....	6	0	0	0	0	0	0	6	6	6	0	0

1 The States are grouped according to the method used by the Bureau of the Census, U. S. Department of Commerce.

2 See table 1, footnote 1, for definitions of types of cases.

After intermediate report, before issuance of Board decision.....	113	8	81	.9	16	6	11	1 1	1	3	0	0	4	1 0
Adjusted.....	4	(⁹)	0	.0	0	.0	4	4	0	.0	0	0	0	.0
Compliance.....	192	8	77	.9	14	.5	7	.7	0	.0	0	0	4	1 0
Withdrawn.....	2	(⁹)	1	(⁹)	0	0	0	.0	1	3	0	0	0	.0
Dismissed.....	1	(⁹)	1	(⁹)	0	0	0	.0	0	.0	0	0	0	.0
Otherwise.....	4	(⁹)	2	(⁹)	2	1	0	0	0	0	0	.0	0	.0
After Board order adopting intermediate report in absence of exceptions.....	68	5	51	6	12	5	4	.4	0	0	0	0	1	.3
Compliance.....	21	2	16	.2	4	2	0	.0	0	0	0	.0	1	3
Dismissed.....	46	3	34	.4	8	3	4	.4	0	.0	0	0	0	.0
Otherwise.....	1	(⁹)	1	(⁹)	0	0	0	0	0	0	0	0	0	.0
After Board decision, before court decree.....	679	5 1	410	4 6	185	7 0	58	5 6	2	.6	3	6 7	21	5 3
Compliance.....	417	3 1	282	3 2	86	3 3	35	3 4	0	.0	3	6 7	11	2 8
Withdrawn.....	4	(⁹)	3	(⁹)	0	0	0	0	1	.3	0	0	0	.0
Dismissed.....	237	1 8	121	1 4	84	3 2	22	2 1	0	.0	0	.0	10	2 5
Otherwise.....	21	2	4	(⁹)	15	5	1	1	1	3	0	0	0	.0
After circuit court decree, before Supreme Court action.....	348	2 6	271	3 0	43	1 6	27	2 6	3	1 0	1	2 2	3	8
Compliance.....	180	1 4	122	1 4	37	1 4	22	2 1	2	7	1	2 2	2	.5
Dismissed.....	159	1 2	147	1 6	6	2	5	5	0	0	0	0	1	.3
Otherwise.....	3	(⁹)	2	(⁹)	0	.0	0	0	1	.3	9	.0	0	.0
After Supreme Court action.....	54	4	22	3	27	1 0	5	5	0	0	0	0	0	.0
Compliance.....	37	3	15	2	18	.7	4	4	0	0	0	0	0	.0
Withdrawn.....	3	(⁹)	1	(⁹)	2	.1	0	0	0	0	0	0	0	.0
Dismissed.....	13	1	6	1	7	2	0	.0	0	0	0	.0	0	.0
Otherwise.....	1	(⁹)	0	0	0	0	1	.1	0	.0	0	0	0	.0

¹ See table 1, footnote 1, for definitions of types of cases

² Includes 60 cases adjusted before 10(k) notice, 1 case adjusted after 10(k) notice, and 1 case adjusted after 10(k) Board decision.

³ Includes 142 cases withdrawn before 10(k) notice; 17 cases withdrawn after 10(k) notice, 3 cases withdrawn after 10(k) hearing; and 9 cases withdrawn after 10(k) Board decision

⁴ Includes 56 cases dismissed before 10(k) notice, 3 cases dismissed after 10(k) notice; 4 cases dismissed after 10(k) hearing; and 3 cases dismissed by 10(k) Board decision.

⁵ Less than one-tenth of 1 percent.

Table 8.—Disposition of Unfair Labor Practice Cases Closed, Fiscal Year 1962

Stage of disposition	All C cases		CA cases ¹		CB cases ¹		CC cases ¹		CD cases ¹		CE cases ¹		CP cases ¹	
	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed
Total number of cases closed.....	13,319	100 0	8,910	100 0	2,631	100 0	1,027	100 0	308	100 0	45	100 0	398	100 0
Before issuance of complaint.....	11,141	83 7	7,424	83 3	2,211	84 0	813	79 2	³ 299	97 1	40	88 9	354	88 9
After issuance of complaint, before opening of hearing ²	653	4 9	481	5 4	74	2 9	91	7 9	3	1 0	1	2 2	13	3 1
After hearing opened, before issuance of intermediate report ²	2 ³	2 0	170	1 9	63	2 4	28	2 7	0	0 0	0	0 0	2	. 6
After intermediate report, before issuance of Board decision.....	113	8	81	9	16	6	11	1 1	1	3 0	0	. 0	4	1 0
After Board order adopting intermediate report in absence of exceptions.....	68	5	51	6	12	5	4	4	0	0 0	0	0 0	1	3
After Board decision, before court decree.....	679	5 1	410	4 6	135	7 0	58	5 6	2	6 6	3	6 7	21	5 3
After circuit court decree, before Supreme Court action.....	348	2 6	271	3 0	43	1 6	27	2 6	3	1 0	1	2 2	3	8
After Supreme Court action ⁴	54	4	22	3	27	1 0	5	5	0	0 0	0	. 0	0	0

¹ See table 1, footnote 1, for definitions of types of cases
² Includes cases in which the parties entered into a stipulation providing for Board order and consent decree in the event court
³ Includes 41 cases in which a notice of hearing issued pursuant to sec 10(k) of the Act. Of these 41 cases, 21 were closed after notice, 7 were closed after hearing, and 13 were closed after Board decision
⁴ Includes either denial of writ of certiorari or granting of writ and issuance of opinion

Table 9.—Disposition of Representation Cases Closed, Fiscal Year 1962

Stage of disposition	All R cases		RC cases ¹		RM cases ¹		RD cases ¹	
	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.....	11,634	100 0	9,958	100 0	921	100 0	755	100 0
Before issuance of notice of hearing.....	5,430	46 7	4,477	45 0	531	57 7	422	55 9
After issuance of notice of hearing, before close of hearing.....	3,325	28 6	2,990	30 0	184	20 0	151	20 0
After hearing closed, before issuance of decision.....	109	9	90	9	11	1 2	8	1 1
After issuance of regional director decision.....	1,749	15 0	1,509	15 1	128	13 9	112	14 8
After issuance of Board decision.....	1 021	8 8	892	9 0	67	7 2	62	8 2

¹ See table 1, footnote 1, for definitions of types of cases

Table 10.—Analysis of Methods of Disposition of Representation Cases Closed, Fiscal Year 1962

Method and stage of disposition	All R cases		RC cases ¹		RM cases ¹		RD cases ¹	
	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.....	11,634	100 0	9,958	100 0	921	100 0	755	100 0
Consent elections.....	3,538	30 4	3,192	32 0	220	23 9	126	16 7
Before notice of hearing.....	2,184	18 8	1,954	19 6	165	17 9	65	8 6
After notice of hearing, before hearing closed.....	1,339	11 5	1,227	12 3	53	5 8	59	7 8
After hearing closed, before decision.....	15	1	11	1	2	2	2	.3
Stipulated elections.....	1,944	16 7	1,800	18 1	102	11 1	42	5 6
Before notice of hearing.....	854	7 3	781	7 9	40	5 3	24	3 2
After notice of hearing, before hearing closed.....	885	7 6	836	8 4	38	4 2	11	1 5
After hearing closed, before decision.....	13	1	10	1	2	2	1	1
After postelection decision.....	192	1 7	173	1 7	13	1 4	6	8
Expedited elections (S(b)(7)(C)).....	33	3	9	1	24	2 6	0	0
Before notice of hearing.....	28	3	6	1	22	2 4	0	0
After notice of hearing, before hearing closed.....	4	(⁴)	3	(⁴)	1	1	0	0
After hearing closed, before decision.....	1	(⁴)	0	(⁴)	1	1	0	0
Withdrawn.....	2,791	24 0	2,269	22 8	247	26 8	275	36 4
Before notice of hearing.....	1,651	14 2	1,277	12 8	174	18 9	200	26 5
After notice of hearing, before hearing closed.....	878	7 5	753	7 6	61	6 6	64	8 5
After hearing closed, before decision.....	67	6	59	6	4	.4	4	.5
After regional director decision and direction of election.....	104	9	97	1 0	1	.1	6	.8
After Board decision and direction of election.....	91	8	83	8	7	8	1	1
Dismissed.....	1,125	9 7	733	7 4	201	21 8	191	25 3
Before notice of hearing.....	636	5 5	391	4 0	114	12 4	131	17 4
After notice of hearing, before hearing closed.....	110	9	72	7	25	2 7	13	1 7
After hearing closed, before decision.....	7	1	4	(⁴)	2	2	1	1
By regional director decision.....	² 211	1 8	160	1 6	32	3 5	19	2 5
By Board decision.....	³ 161	1 4	106	1 1	28	3 0	27	3 6
Regional director-ordered elections.....	1,434	12 3	1,252	12 6	95	10 3	87	11 5
Board-ordered elections.....	769	6 6	703	7 0	32	3 5	34	4 5

¹ See table 1, footnote 1, for definitions of types of cases

² Includes 15 RC, 9 RM, and 3 RD cases dismissed by regional director order after a direction of election issued but before an election was held

³ Includes 12 RC, 5 RM, and 5 RD cases dismissed by Board order after a direction of election issued but before an election was held

⁴ Less than one-tenth of 1 percent

Table 11.—Types of Elections Conducted, Fiscal Year 1962

Type of case ¹	Total elections	Type of election				
		Consent ²	Stipulated ³	Board ordered ⁴	Regional director directed ⁵	Expedited elections under 8(b)(7)(C) ⁶
All elections, total.....	7,668	3,513	1,919	744	1,450	42
Eligible voters, total.....	557,707	166,912	180,214	83,983	125,299	1,299
Valid votes, total.....	501,250	150,384	165,222	73,074	111,468	1,102
RC cases, total.....	6,916	3,181	1,783	686	1,253	13
Eligible voters.....	514,394	152,498	165,779	82,076	113,306	735
Valid votes.....	463,259	137,588	151,875	71,419	101,706	671
RM cases, total.....	439	200	91	26	93	29
Eligible voters.....	21,653	6,499	10,620	459	3,511	564
Valid votes.....	19,299	5,747	9,879	376	2,866	431
R/D cases, total.....	285	125	44	32	84	0
Eligible voters.....	19,253	7,147	3,797	1,448	6,861	0
Valid votes.....	16,781	6,371	3,450	1,279	5,681	0
UD cases, total.....	28	7	1	0	20	-----
Eligible voters.....	2,407	768	18	0	1,621	-----
Valid votes.....	1,911	678	18	0	1,215	-----

¹ See table 1, footnote 1, for definitions of types of cases² Consent elections are held by an agreement of all parties concerned. Postelection ruling and certification are made by the regional director.³ Stipulated elections are held by an agreement of all parties concerned, but the agreement provides for the Board to determine any objections and/or challenges.⁴ Board-ordered elections are held pursuant to a decision and direction of election by the Board. Postelection rulings on objections and/or challenges are made by the Board.⁵ Regional director-directed elections are held pursuant to a decision and direction of election by the regional director.⁶ Expedited elections under sec. 8(b)(7)(C) are held pursuant to direction by the regional director. Postelection rulings on objections and/or challenges are final and binding by the regional director, unless the Board grants an appeal on application by one of the parties.

Table 12.—Results of Union-Shop Deauthorization Polls, Fiscal Year 1962

Affiliation of union holding union-shop contract	Number of polls					Employees involved (number eligible to vote)					Valid votes cast			
	Total	Resulting in deauthorization		Resulting in continued authorization		Total eligible	Resulting in deauthorization		Resulting in continued authorization		Total	Percent of total eligible	Cast for deauthorization	
		Number	Percent of total	Number	Percent of total		Number	Percent of total	Number	Percent of total			Number	Percent of total eligible ¹
Total.....	28	19	67.9	9	32.1	2,407	1,256	52.2	1,151	47.8	1,911	79.4	1,293	53.7
AFL-CIO.....	14	9	64.3	5	35.7	1,256	664	52.9	592	47.1	1,061	84.5	679	54.1
Unaffiliated.....	14	10	71.4	4	28.6	1,151	592	51.4	559	48.6	850	73.8	614	53.3

¹ Sec. 8(a)(3) of the Act requires that, to revoke a union-shop provision, a majority of the employees eligible to vote must vote in favor of deauthorization.

Table 13.—Collective-Bargaining Elections¹ by Affiliation of Participating Unions, Fiscal Year 1962

Union affiliation	Elections participated in			Employees involved (number eligible to vote)			Valid votes cast			
	Total	Won	Percent won	Total eligible	Employees in units selecting bargaining agent		Total	Percent of total eligible	Cast for the union	
					Number	Percent of total eligible			Number	Percent of total cast
Total.....	2,735	4,305	58.5	2,536,047	305,976	57.1	2,482,558	90.0	299,547	62.1
AFL-CIO.....	5,049	2,708	53.6	453,277	190,858	42.1	408,421	90.1	197,038	48.2
Unaffiliated.....	3,014	1,597	53.0	221,125	115,118	52.1	196,535	88.9	102,509	52.2

¹ The term "collective-bargaining election" is used to cover representation elections requested by a union or other candidate for employee representation or by the employer. This term is used to distinguish this type of election from a decertification election, which is one requested by employees seeking to revoke the representation rights of a union which is already certified or which is recognized by the employer without a Board certification.

² Elections involving 2 unions of different affiliations are counted under each affiliation, but only once in the total. Therefore, the total is less than the sum of the figures of the 2 groupings by affiliation.

Table 13A.—Outcome of Collective-Bargaining Elections¹ by Affiliation of Participating Unions, and Number of Employees in Units, Fiscal Year 1962

Affiliation of participating union	Number of elections				Number of employees involved (number eligible to vote)				Total valid votes cast
	Total	In which representation rights were won by—		In which no representative was chosen	Total	In units in which representation rights were won by—		In units where no representative was chosen	
		AFL-CIO affiliates	Unaffiliated unions			AFL-CIO affiliates	Unaffiliated unions		
Total.....	7,355	2,708	1,597	3,050	536,047	190,858	115,118	230,071	482,558
1-union elections:									
AFL-CIO.....	4,092	2,187		1,905	274,124	110,615		163,509	250,781
Unaffiliated.....	2,171		1,173	998	62,549		27,277	35,272	56,429
2-union elections:									
AFL-CIO v. AFL-CIO.....	249	188		61	40,798	22,415		18,383	35,242
AFL-CIO v. Unaffiliated.....	645	298	280	67	113,406	52,457	51,249	9,700	100,930
Unaffiliated v. Unaffiliated.....	135		126	9	20,221		19,576	645	17,708
3 (or more)-union elections.....	63	35	18	10	24,949	5,371	17,016	2,562	21,468

¹ For definition of this term, see table 13, footnote 1.

Table 14.—Decertification Elections by Affiliation of Participating Unions, Fiscal Year 1962

Union affiliation	Elections participated in					Employees involved in elections (number eligible to vote)					Valid votes cast			
	Total	Resulting in certification		Resulting in decertification		Total eligible	Resulting in certification		Resulting in decertification		Total	Percent of total eligible	Cast for the union	
		Number	Percent of total	Number	Percent of total		Number	Percent of total eligible	Number	Percent of total eligible			Number	Percent of total cast
Total.....	285	99	34.7	186	65.3	19,253	12,323	64.0	6,930	36.0	16,781	87.2	9,416	56.1
AFL-CIO.....	192	72	37.5	120	62.5	14,094	9,850	69.9	4,244	30.1	12,365	87.7	7,129	57.7
Unaffiliated.....	93	27	29.0	66	71.0	5,159	2,473	47.9	2,686	52.1	4,416	85.6	2,287	51.8

Table 14A.—Voting in Decertification Elections, Fiscal Year 1962

Union affiliation	Elections in which a representative was redesignated					Elections resulting in decertification				
	Employees eligible to vote	Total valid votes cast	Percent casting valid votes	Votes cast for winning union	Votes cast for no union	Employees eligible to vote	Total valid votes cast	Percent casting valid votes	Votes cast for losing union	Votes cast for no union
Total.....	12,323	10,698	86.8	7,546	3,152	6,930	6,083	87.8	1,870	4,213
AFL-CIO.....	9,850	8,596	87.3	6,030	2,566	4,244	3,769	88.8	1,099	2,670
Unaffiliated.....	2,473	2,102	85.0	1,516	586	2,686	2,314	86.2	771	1,543

Table 15.—Geographic Distribution of Collective-Bargaining Elections, Fiscal Year 1962

Division and State ¹	Total	Number of elections in which representation rights were won by—		Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for—			Employees in units choosing representation
		AFL-CIO affiliates	Unaffiliated unions				AFL-CIO affiliates	Unaffiliated unions	No union	
Total.....	7,355	2,708	1,597	3,050	536,047	482,558	197,038	102,509	183,011	305,976
New England.....	400	125	102	173	54,751	48,614	15,678	15,846	17,090	30,977
Maine.....	33	11	7	15	4,374	4,091	1,738	279	2,074	1,469
New Hampshire.....	17	4	2	11	1,740	1,558	706	155	697	898
Vermont.....	13	5	1	7	458	388	168	15	205	259
Massachusetts.....	242	76	63	103	33,087	28,658	9,428	9,286	9,944	18,752
Rhode Island.....	27	10	4	13	2,908	2,593	1,215	211	1,167	1,430
Connecticut.....	68	19	25	24	12,204	11,326	2,423	5,900	3,003	8,169
Middle Atlantic.....	1,361	472	358	531	96,738	87,575	38,831	19,708	29,036	60,823
New York.....	591	214	159	218	39,956	35,423	16,231	8,328	10,864	25,041
New Jersey.....	321	112	100	109	22,392	20,165	8,811	5,814	5,540	15,877
Pennsylvania.....	449	146	99	204	34,390	31,987	13,789	5,566	12,632	19,905
East North Central.....	1,796	701	399	696	126,927	115,104	44,272	31,174	39,658	79,643
Ohio.....	562	238	120	204	42,904	39,365	14,314	12,695	12,356	27,264
Indiana.....	240	75	65	100	16,682	15,289	5,694	3,426	6,169	9,678
Illinois.....	456	167	105	184	34,222	30,646	11,195	8,671	10,780	22,485
Michigan.....	376	166	72	138	22,527	20,375	9,243	3,640	7,492	13,342
Wisconsin.....	162	55	37	70	10,502	9,429	3,826	2,742	2,861	6,874
West North Central.....	627	238	138	251	31,969	29,010	13,384	5,770	9,856	19,886
Iowa.....	106	32	23	51	3,450	3,170	1,411	215	1,544	1,527
Minnesota.....	141	57	39	45	7,431	6,734	3,095	1,731	1,908	5,201
Missouri.....	236	107	40	89	15,435	13,973	7,143	2,304	4,626	9,775
North Dakota.....	18	4	9	5	303	272	88	108	76	243
South Dakota.....	11	4	3	4	298	287	119	18	150	53
Nebraska.....	44	12	9	23	1,355	1,244	475	255	514	750
Kansas.....	71	22	15	34	3,697	3,330	1,053	1,139	1,138	2,337

South Atlantic.....	827	279	155	393	70,491	64,445	24,896	7,716	31,833	31,161
Delaware.....	21	5	6	10	994	908	322	205	381	701
Maryland.....	139	32	39	68	8,858	8,193	2,424	1,792	3,977	4,292
District of Columbia.....	34	11	5	18	1,019	936	265	147	524	483
Virginia.....	101	37	20	44	12,248	11,123	4,654	1,356	5,113	6,839
West Virginia.....	65	20	17	28	6,282	5,898	2,653	1,190	2,055	3,183
North Carolina.....	116	50	8	58	12,194	11,393	4,227	464	6,702	4,226
South Carolina.....	39	16	4	19	9,246	8,564	3,257	449	4,858	1,164
Georgia.....	100	31	21	48	7,813	6,937	2,895	725	3,317	4,012
Florida.....	212	77	35	100	11,837	10,493	4,199	1,388	4,906	6,261
East South Central.....	347	101	78	168	28,342	26,097	9,424	4,144	12,529	12,336
Kentucky.....	103	29	25	49	7,341	6,790	2,642	975	3,173	3,109
Tennessee.....	115	31	32	52	9,295	8,607	2,714	1,671	4,222	3,930
Alabama.....	101	37	17	47	8,423	7,685	3,103	1,121	3,461	4,371
Mississippi.....	28	4	4	20	3,283	3,015	965	377	1,673	926
West South Central.....	506	160	81	265	43,135	39,635	16,890	5,859	16,886	21,656
Arkansas.....	63	25	6	32	8,836	8,180	3,899	157	4,124	4,265
Louisiana.....	91	23	26	42	5,864	5,025	1,769	1,043	2,213	2,324
Oklahoma.....	76	21	11	44	4,322	3,995	1,644	492	1,859	2,002
Texas.....	276	91	38	147	24,113	22,435	9,578	4,167	8,690	13,065
Mountain.....	324	123	72	129	22,286	19,510	9,639	3,594	6,277	13,771
Montana.....	27	14	5	8	3,508	3,084	1,817	1,051	216	3,231
Idaho.....	39	15	5	19	2,943	2,642	1,171	218	1,253	1,233
Wyoming.....	18	4	6	8	381	360	149	108	103	262
Colorado.....	96	29	30	37	6,167	5,429	2,485	935	2,009	3,272
New Mexico.....	34	17	3	14	2,403	2,150	1,444	115	591	2,059
Arizona.....	50	14	14	22	3,535	3,070	1,322	935	813	2,419
Utah.....	42	16	7	19	2,636	2,282	888	200	1,194	680
Nevada.....	18	14	2	2	713	493	363	32	98	615
Pacific.....	932	389	162	381	48,881	42,548	18,938	6,602	17,008	26,506
Washington.....	107	52	19	36	4,466	3,825	1,940	462	1,423	2,527
Oregon.....	80	38	7	35	4,276	3,878	1,667	351	1,860	1,602
California.....	745	299	136	310	40,139	34,845	15,331	5,789	13,725	22,377
Outlying areas.....	235	120	52	63	12,527	10,020	5,086	2,096	2,838	9,217
Alaska.....	17	7	5	5	185	161	71	46	44	129
Hawaii.....	59	19	22	18	2,130	1,983	535	740	708	1,275
Puerto Rico.....	155	90	25	40	9,650	7,588	4,224	1,310	2,054	7,251
Virgin Islands.....	4	4	0	0	562	288	256	0	32	562

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 Collective-Bargaining Elections, Fiscal Year 1962

Industrial group ¹	Number of elections				Eligible voters	Valid votes cast
	Total	In which representation rights were won by—		In which no representative was chosen		
		AFL-CIO affiliates	Unaffiliated unions			
Total.....	7,355	2,708	1,597	3,050	536,047	482,558
Manufacturing.....	4,391	1,754	806	1,831	409,810	373,016
Ordnance and accessories.....	10	5	2	3	934	879
Food and kindred products.....	745	226	208	311	50,099	44,077
Tobacco manufacturers.....	1	1	0	0	50	49
Textile mill products.....	60	26	11	23	9,546	8,227
Apparel and other finished products made from fabrics and similar materials.....	88	33	6	49	7,880	7,172
Lumber and wood products (except furniture).....	194	92	21	81	16,802	15,147
Furniture and fixtures.....	158	57	26	75	13,916	12,751
Paper and allied products.....	202	95	27	80	23,283	21,024
Printing, publishing, and allied industries.....	293	120	78	95	7,233	6,645
Chemicals and allied products.....	295	108	69	118	27,915	25,885
Products of petroleum and coal.....	68	16	24	28	6,578	5,377
Rubber products.....	160	60	28	72	14,441	13,190
Leather and leather products.....	70	27	3	40	16,124	14,690
Stone, clay, and glass products.....	212	87	48	77	15,687	14,259
Primary metal industries.....	283	135	38	110	36,788	33,672
Fabricated metal products (except machinery and transportation equipment).....	481	220	66	195	37,474	34,298
Machinery (except electrical).....	402	173	48	181	36,796	34,700
Electrical machinery, equipment and supplies.....	293	121	46	126	44,455	41,026
Aircraft and parts.....	49	15	8	26	13,992	12,990
Ship and boat building and repairing.....	24	10	2	12	2,438	2,159
Automotive and other transportation equipment.....	145	59	31	55	11,457	10,657
Professional, scientific, and controlling instruments.....	43	19	1	23	6,273	5,855
Miscellaneous manufacturing.....	115	49	15	51	9,669	8,287
Agriculture, forestry, and fisheries.....	9	4	1	4	211	184
Mining.....	85	18	34	33	2,904	2,647
Metal mining.....	21	4	5	12	1,053	971
Coal mining.....	31	0	22	9	975	893
Crude petroleum and natural gas production.....	3	1	1	1	80	75
Nonmetallic mining and quarrying.....	30	13	6	11	796	708
Construction.....	136	79	16	41	5,329	4,017
Wholesale trade.....	711	132	276	303	16,645	14,967
Retail trade.....	1,043	392	184	467	31,858	28,145
Finance, insurance, and real estate.....	40	18	5	17	3,344	3,172
Transportation, communication, and other public utilities.....	620	179	211	230	47,262	40,610
Local passenger transportation.....	55	14	20	21	11,476	9,258
Motor freight, warehousing, and transportation services.....	358	56	164	138	9,622	8,693
Water transportation.....	40	24	7	9	2,927	2,316
Other transportation.....	19	11	2	6	750	686
Communication.....	75	44	6	25	18,881	16,291
Heat, light, power, water, and sanitary services.....	73	30	12	31	3,606	3,366
Services.....	320	132	64	124	18,694	15,800

¹ Source: Standard Industrial Classification, Division of Statistical Standards, U.S. Bureau of the Budget, Washington, 1957.

Table 17.—Size of Units in Collective-Bargaining and Decertification Elections, Fiscal Year 1962

A. COLLECTIVE-BARGAINING ELECTIONS

Size of unit (number of employees)	Number eligible to vote	Number of elections	Percent of total	Elections in which representation rights were won by—		Elections in which no representative was chosen	
				Number	Percent	Number	Percent
Total.....	536,047	7,355	100.0	2,708	1,697	3,050	100.0
1-9.....	9,929	1,737	23.6	595	22.0	540	33.8
10-19.....	22,111	1,600	21.8	649	20.3	400	25.0
20-29.....	21,713	1,900	12.2	360	13.3	181	11.3
30-39.....	20,507	600	8.2	233	8.6	113	7.1
40-49.....	18,401	416	6.7	154	5.7	73	4.6
50-59.....	15,926	293	4.0	121	4.5	46	2.9
60-69.....	13,931	218	3.0	90	3.3	29	1.8
70-79.....	13,926	188	2.6	75	2.8	23	1.4
80-89.....	12,719	151	2.0	68	2.5	14	0.9
90-99.....	9,727	103	1.4	43	1.5	13	0.8
100-149.....	53,412	436	5.9	165	6.1	53	3.3
150-199.....	35,642	208	2.8	77	2.8	26	1.6
200-299.....	35,004	210	2.8	74	2.7	29	1.8
300-399.....	22,080	101	1.4	39	1.4	18	1.1
400-499.....	22,080	50	0.7	11	0.4	5	0.3
500-599.....	15,801	29	0.4	9	0.3	3	0.2
600-699.....	24,991	37	0.5	13	0.5	6	0.4
700-799.....	18,957	21	0.3	7	0.3	8	0.5
800-899.....	50,353	35	0.5	13	0.5	8	0.5
1,000-1,999.....	43,944	18	0.2	7	0.3	4	0.3
2,000-2,999.....	0	0	0.0	0	0.0	0	0.0
3,000-3,999.....	0	0	0.0	0	0.0	0	0.0
4,000-4,999.....	5,665	2	0.0	0	0.0	2	0.1
5,000-9,999.....	9,176	1	0.0	0	0.0	1	0.0
10,000 and over.....	11,923	1	0.0	0	0.0	1	0.0

B. DECERTIFICATION ELECTIONS

Size of unit (number of employees)	Number eligible to vote	Number of elections	Percent of total	Elections in which representation rights were won by—		Elections in which no representative was chosen	
				Number	Percent	Number	Percent
Total.....	19,253	285	100.0	73	100.0	27	100.0
1-9.....	329	55	19.3	3	4.1	2	7.5
10-19.....	931	66	23.2	9	12.3	5	18.5
20-29.....	922	39	13.7	9	12.3	3	11.1
30-39.....	888	26	9.1	6	8.2	5	18.5
40-49.....	716	16	6.6	6	8.2	3	11.1
50-59.....	496	9	3.1	2	2.7	2	7.4
60-69.....	393	7	2.1	2	4.1	0	0.0
70-79.....	529	6	2.5	3	2.7	1	3.7
80-89.....	245	3	1.0	2	0	0	0.0
90-99.....	562	6	2.1	3	4.1	0	0.0
100-149.....	2,479	21	7.4	14	19.2	1	3.7
150-199.....	1,179	13	4.6	4	5.5	3	11.1
200-299.....	1,646	7	2.5	4	8.2	0	0.0
300-399.....	949	3	1.0	6	1.4	0	0.0
400 and over.....	5,959	8	2.8	1	7.0	2	7.4

1 Less than one-tenth of 1 percent.

**Table 18.—Injunction Litigation Under Sec. 10(j) and (l),
Fiscal Year 1962**

Proceedings	Number of cases instituted	Number of applications granted	Number of applications denied	Cases settled, withdrawn, dismissed, inactive, pending, etc.
Under sec. 10(j):				
(a) Against unions.....	2	1		1 dismissed
(b) Against employers.....	8	4	2	2 settled
(c) Against union and employer.....	1	1		
Under sec. 10(l).....	282	81	13	70 settled 8 withdrawn 8 dismissed 108 alleged illegal activity suspended 8 pending
Total.....	293	87	15	205

Table 19.—Litigation for Enforcement or Review of Board Orders, July 1, 1961–June 30, 1962; and July 5, 1935–June 30, 1962

	July 1, 1961– June 30, 1962		July 5, 1935– June 30, 1962	
	Number	Percent	Number	Percent
Cases decided by U.S. courts of appeals.....	148	100.0	2,277	100.0
Board orders enforced in full.....	84	56.8	1,312	57.6
Board orders enforced with modification.....	23	15.5	459	20.2
Remanded to Board.....	14	9.5	87	3.8
Board orders partially enforced and partially remanded.....	4	2.7	23	1.0
Board orders set aside.....	23	15.5	396	17.4
Cases decided by U.S. Supreme Court.....	8	100.0	142	100.0
Board orders enforced in full.....	6	75.0	88	61.9
Board orders enforced with modification.....	0	.0	13	9.2
Board orders set aside.....	0	.0	24	16.9
Remanded to Board.....	0	.0	3	2.1
Remanded to court of appeals.....	*2	25.0	11	7.7
Board's request for remand or modification of enforcement order denied.....	0	.0	1	.8
Contempt case remanded to court of appeals.....	0	.0	1	.7
Contempt cases enforced.....	0	.0	1	.7

*Cases remanded for further proceedings in accordance with the Board's position as to the scope of review of courts of appeals.

Table 20.—Record of 10(i) and 10(j) Injunctions Litigated During Fiscal Year 1962

Case No.	Name of complainant	Name of union	Disposition of injunctions		
			Granted	Denied	Pending
	<i>8(b) (4) (B)</i>				
2-CC-653	Acme Concrete & Supply Corp	Teamsters, Local 282		x	
2-CC-686	Amalgamated Union Local No. 5 Metal, Iron & Misc. Workers.	Sheet Metal Workers, Local 28	x		
1-CC-294	Apartment Building Realty Trust.	Bldg. & Constr. Trades Council.	x		
2-CC-676	Associated Lerner Shops of America, Inc. & Remington Rand Univac Div., Sperry Rand Corp.	Electrical Workers, Local 459 (IUE).	x		
10-CC-488	Bowman Transportation, Inc.	Teamsters, Local 612*	x		
10-CC-484	Bowman Transportation, Inc.	Teamsters, Local 612 et al.*	x		
26-CC-58	Bowman Transportation, Inc.	Teamsters, Local 667*	x		
1-CC-305	C & R Beef Co., Inc. & Sioux City Dressed Beef Co.	Packinghouse Workers, Local 575.	x		
20-CC-270	Colgate-Palmolive Co.	Longshoremen, Local 6*	x		
9-CC-299	The Dayton Electrotype Co.	Stereotypers, Local 114.	x		
18-CC-119	Dodge Lumber Company Inc.	Construction Trades Council.	x		
22-CC-131	East Photo Lab, Inc.	Photo Empls., Local 249*	x		
2-CC-729	Excellent Ice Cream Co.	Teamsters, Local 757*			x
22-CC-168	Fibrous Glass Products, Inc.	Asbestos Workers, Local 89	x		
2-CC-726	Fotochrome, Inc.	Jewelry Workers, Local 249			x
23-CC-101	W. T. Gunn	Asbestos Workers, Local 22	x		
21-CC-423	Walter Holm & Company	Teamsters, Local 630*	x		
22-CC-134	Robin Hood Estates, Inc.	Carpenters, Local 15	x		
25-CC-91	Indianapolis Electric Co., Inc.	Electrical Workers, Local 481 (IBEW).		x	
10-CC-486	Insul-Coustic Corporation	Asbestos Workers, Local 125	x		
2-CC-674	Intertype Co., a Div. of Harris Intertype.	Auto Wkrs., Local 365	x		
7-CC-173	Knight Newspapers, Inc.	Printing Pressmen, Local 46	x		
13-CC-273	Elizabeth Love	Teamsters, Local 279*	x		
4-CC-199	Mack Truck, Inc.	Auto Workers, Local 677	x		
23-CC-91	E. Frank Muzny	Painters, Local 1778	x		
2-CC-703	New Power Wire & Electric Corp. & P & L Services, Inc.	Electrical Workers, Local 3 (IBEW).		x	
4-CC-216	Tim O'Connell & Sons.	Sheet Metal Workers, Local 59 et al.			x
5-CC-199	Dorsey Owings, Inc.	Teamsters, Local 557*	x		
19-CC-168	Priest Logging, Inc.	Woodworkers, Local 3-101		x	
2-CC-687	Rapid Electrotype Company.	Stereotypers, Local 100	x		
9-CC-298	Rapid Electrotype Co.	Stereotypers, Local 31	x		
4-CC-205	Joseph W. Remedio, Inc.	Bldg. & Constr. Trades Council.	x		
1-CC-299	Remington Rand Univac Div., Sperry Rand Corp.	Electrical Workers, Local 275 (IUE).	x		
2-CC-659	Remington Rand Univac Div., Sperry Rand Corp.	Electrical Workers, Local 459 (IUE).	x		
2-CC-695	Renken Cream Corporation	Teamsters, Local 757*	x		
5-CC-168	C. R. Sheaffer & Sons	Teamsters, Local 730*	x		
7-CC-156	J. R. Snyder Inc. & Detroit Masons Contractors, Inc.	Bricklayers, Local 14	x		
5-CC-186	Speed-Line Mfg. Co.	Asbestos Workers, Local 24	x		
6-CC-261	Speed-Line Mfg. Co.	Asbestos Workers, Local 2	x		
12-CC-177	Touby Painting Corp.	Painters, Local 365	x		
2-CC-649	Twin County Transit Mix	Teamsters, Local 282*	x		
22-CC-139	United Engineers and Constructors, Inc.	Engineers, Operating, Local 825.	x		
2-CC-718	United Parcel Service Inc.	Teamsters, Local 804, Machinists, Local 447*	x		
18-CC-108	Upper Lakes Shipping Ltd	Seafarer's	x		
13-CC-267	Warren H Tetzlaff	Electrical Wkrs., Local 159 (IBEW).	x		
4-CC-215	George Washington Motor Lodge	Hotel Motel & Club Empls., Local 568	x		
2-CC-678	The Waterbury Mattress Co.	Furniture Wkrs , Local 140	x		
2-CC-652	J. J. White Ready Mix Concrete Corp.	Teamsters, Local 282*	x		
22-CC-163	The White Company	Pipefitters, Local 274	x		
1-CC-290	Wiggin Terminals Inc.	Longshoremen, Local 1066*	x		

See footnote at end of table.

Table 20.—Record of 10(l) and 10(j) Injunctions Litigated During Fiscal Year 1962—Continued

Case No.	Name of complainant	Name of union	Disposition of injunctions		
			Granted	Denied	Pending
2-CC-693	Wilson-Jacobi Inc.	Teamsters, Local 802*	x		
1-CC-293	Winwake, Inc.	Teamsters, Local 42* et al.	x		
7-CC-159	Ypsilanti Press	Ann Arbor Typographical, Local 154.	x		
	8(b)(4)(C)				
28-CC-89	Industrial Council, Inc.	Teamsters, Local 83*	x		
24-CC-77	La Concha Hotel Corp.	Teamsters, Local 901*	x		
20-CC-251	Peter Paul, Inc.	Bakery, Local 242.	x		
	8(b)(4)(D)				
1-CD-73	Charlesbanks Apartments, Inc.	Bricklayers, Local 3 & 9.			x
7-CD-76	Bernard Card & Sons, Inc.	Carpenters, Local 334.			x
26-CD-7	Paul Hardeman, Inc., Fishbach & Moore, Inc. & Morrison Knudsen.	Sheet Metal Workers, Local 249.	x		x
23-CD-47	William Maters, Inc.	Carpenters, Local 1266.	x		
2-CD-233	News Syndicate Company, Inc.	Mail Deliverers Union*	x		
2-CD-235	News Syndicate Company, Inc.	Mailers' 6.	x		
2-CD-221	New York Times Company.	Mailers Union Local 6.	x		
2-CD-222	The O'Brien Suburban Press, Inc.	Printing Pressmen, Local 317.	x		
22-CD-54	Schwerman Co. of Pa., Inc.	Engineers Operating, Local 825.	x		
14-CD-122	Southern Illinois Builders Association.	Pipefitters, Local 553.	x		
7-CD-78	Spence Brothers Construction.	Bricklayers, Masons, Plasterers, Local 14.			x
	8(e)				
20-CE-10	California Association of Employers	Teamsters, Local 38* et al.			x
	8(b)(7)(A)				
17-CP-12	Spartan of Highway 50, Inc.	Retail Clerks, Local 782.		x	
	8(b)(7)(B)				
19-CP-30	Ames IGA Foodliner, Inc.	Retail Clerks, Local 1439.	x		
13-CP-44	Aetna Plywood & Veneer Co.	Teamsters, Local 743*		x	
7-CP-13	Banks & Fritz, Inc.	Plant Guards, Local 114.	x		
13-CP-30	Buy Low Supermarket, Inc.	Retail Clerks, Local 1460.	x		
20-CP-67	The Frestone Tire and Rubber Company.	Machinists, Lodge 1492.	x		
14-CP-29	I.G.A. Foodliner	Retail Clerks, Local 81.	x		
	8(b)(7)(C)				
20-CP-57	California Association of Employers.	Retail Store Employees, Local 428.		x	
22-CP-29	Computer Systems, Inc.	IUE, District 4.	x		
2-CP-142	Eastern Camera & Photo Corp.	Retail, Wholesale, District 65.	x		
16-CP-11	Joe Hodges Transportation.	Teamsters, Local 886*	x		
15-CP-9	Houston Contracting Company.	Plumbing & Pipefitting, Local 60.		x	
19-CP-35	Jay Jacobs.	Retail Clerks, Local 1404.	x		
4-CP-34	Marnott Motor Hotels.	Hotel Employees, Local 568.	x		
4-CP-39	R. S. Noonan, Inc.	Engineers Operating, Local 454.	x		
2-CP-122	Jack Picoult.	Electrical Workers, Local 3 (I.B.E.W.).	x		
1-CP-29	Reglar, Inc.	Hod Carriers, Local 271.	x		
6-CP-10	Ryan Homes, Inc.	Carpenters, et al.	x		
2-CP-127	Sealy Greater New York, Inc.	Furniture Workers, Local 140.		x	
26-CP-3	Texarkana Construction Co.	Hod Carriers, Local 107.		x	
14-CP-19	Vestagias, Inc.	Carpenters, District Council.		x	
7-CP-16	Ypsilanti Daily Press.	Typographical Union, Local 154.		x	

See footnote at end of table.

Table 20.—Record of 10(1) and 10(j) Injunctions Litigated During Fiscal Year 1962—Continued

Case No	Name of complainant	Name of union	Disposition of injunctions		
			Granted	Denied	Pending
	<i>8(b)(4) (A) & (B)</i>				
1-CC-308....	Connecticut Sand and Stone Corporation.	Teamsters, Local 559*.....	x	-----	
2-CC-650....	Preon Trucking Corp. et al.	Teamsters, Local 282*.....	x	-----	
18-CC-93....	Weiss Builders Inc.	Carpenters, Local 1382* et al.	x	-----	
	<i>8(b)(4) (B) & (D)</i>				
2-CC-639, 2-CD-217.	All-Boro Air Conditioning Co.	Plumbers, Local 638A.....	x	-----	
21-CC-467, 21-CD-106	Bendix Corp.....	Electrical Wkrs., Local 639 (IBEW).	x	-----	
1-CC-304, 1-CD-67.	Boston Gas Co.....	Buildings & Constructions Trade Council Local 12, et al	x	-----	
3-CC-165, 3-CD-70.	Northeastern Line Constructors.	Operating Engineers, Local 106	-----	x	
12-CC-170, 12-CD-32	Pan American World Airways, Inc	Marine Engineers*.....	x	-----	
5-CC-169, 5-CD-68.	Thompson's Dairy, Inc., Sealtest Foods, Eastern Division, et al.	Teamsters, Local 246 & 33*.....	x	-----	
	<i>8(b)(4) (A), (B) & 8(e)</i>				
2-CC-627, 2-CE-8.	Herbert Burman, Inc.....	Electrical Wkrs, Local 3 (IBEW) et al.	x	-----	
	<i>8(b)(4) (A), (B), (D) & 8(e)</i>				
13-CC-297, 13-CE-9.	Sidney Wanzer & Sons, Inc....	Teamsters, Local 753*.....	x	-----	
	<i>8(b)(4)(C) & 8(b)(7) (A) & (B)</i>				
7-CC-200, 7-CP-25.	Bernard Card & Sons, Inc....	Hod Carriers, Local 1098.....	-----	-----	x
	<i>10(j)</i> <i>8(a) (1), (3), (5)</i>				
10-CA-4819...	Allied Industrial Wkrs. of America.	Peerless Woolen Mills, Division of Burlington Industries.	-----	x	
21-CA-4410...	Auto Wkrs., Local 509.....	Telecomputing Corp, et al....	x	-----	
16-CA-1550...	Packhouse Wkrs, Food & Allied, Loc 398.	Du Bois Chemicals, Inc.....	x	-----	
13-CA-4627...	Vehicle Salesmen's Union (Ind)*.	Elmwood Ford Motors, Inc & Turner, Hunt & Wooley.	-----	x	
	<i>8(a) (1), (3), (5) & 8(b)(1)(A), (5)</i>				
8-CA-2597....	Bakery Wkrs, Local 219.....	Richard W. Kaase Baking Co., Bakery Wkrs., Local 19*.	x	-----	
	<i>8(a)(5)</i>				
13-CA-4357...	Furniture & Woodworkers, Local 1608	Alberto Culver Co.....	x	-----	
	<i>8(b)(1)(A)</i>				
23-CB-394....	Texas Portland Cement Co....	Gypsum Wkrs., Local 379.....	x	-----	
	<i>8(a) (1), (3)</i>				
11-CA-1821...	Textile Wkrs.....	Wellington Division, West Point Mfg. Co.	x	-----	

*All unions are affiliated with AFL-CIO except those indicated by an asterisk.