FORTY-EIGHTH

ANNUAL REPORT

OF THE

NATIONAL LABOR RELATIONS BOARD

FOR THE FISCAL YEAR

ENDED SEPTEMBER 30

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[1] Appointment expired August 27, 1983.
[2] Appointment effective August 19, 1983

LETTER OF TRANSMITTAL

NATIONAL LABOR RELATIONS BOARD,
Washington, D.C., 24 October 1986.

SIR: As provided in section 3(c) of the Labor Management Relations Act, 1947, I submit herewith the Forty-Eighth Annual Report of the National Labor Relations Board for the fiscal year ended September 30, 1983.

Respectfully submitted,

DONALD L. DOTSON, *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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I

Operations In Fiscal Year 1983

A. Summary

The National Labor Relations Board, an independent Federal agency, initiates no cases: it acts only upon those cases brought before it. All proceedings originate from filings by the major segment of the public covered by the National Labor Relations Act—men and women workers, labor unions, and private employers who are engaged in interstate commerce. During fiscal year 1983, 49,436 cases were received by the Board.

The public filed 40,634 charges alleging that business firms or labor organizations, or both, committed unfair labor practices, prohibited by the statute, which adversely affected hundreds of thousands of employees. The NLRB during the year also received 8,319 petitions to conduct secret-ballot elections in which workers in appropriate groups select or reject unions to represent them in collective bargaining with their employers. Also, the public filed 483 amendment to certification and unit clarification cases.

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

At the end of fiscal year 1983, the five-member Board was composed of Chairman Donald L. Dotson and Members Don A. Zimmerman, Robert P. Hunter, and Patricia Diaz Dennis. William A. Lubbers was the General Counsel.

Satistical highlights of NLRB's casehandling activities in fiscal 1983 include:

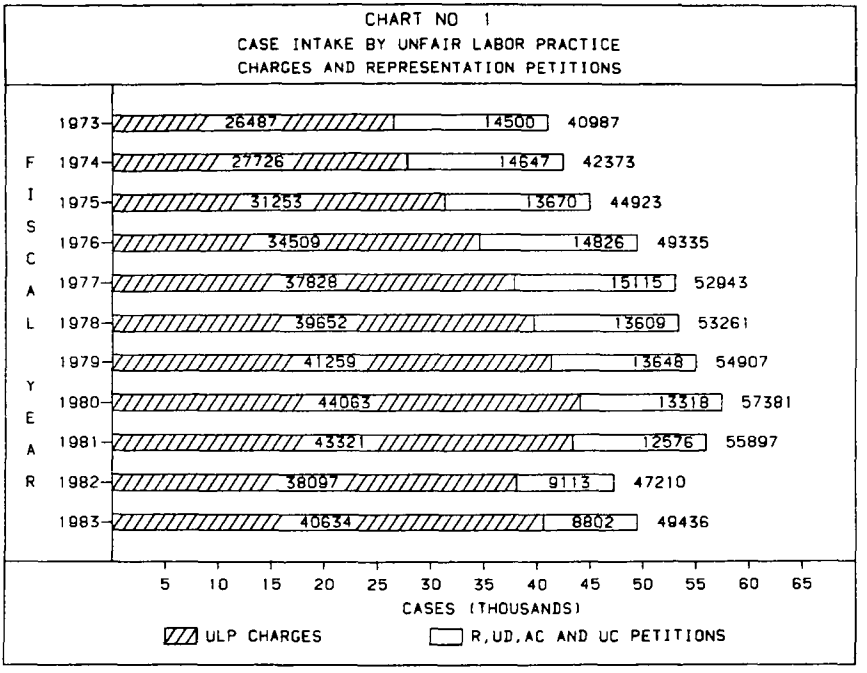
- The NLRB conducted 4,405 conclusive representation elections among some 181,308 employee voters, with workers choosing labor unions as their bargaining agents in 43.0 percent of the elections.
- Although the Agency closed 46,521 cases, 25,915 cases were pending in all stages of processing at the end of the fiscal year. The closings included 38,041 cases involving unfair labor practice charges and 7,808 cases affecting employee representation.

• Settlements, avoiding formal litigation while achieving the goal of equitable remedies in unfair labor practice situations, numbered 10,776. Only on three previous occasions has this total been exceeded.

• The amount of $32,071,532 in reimbursement to employees illegally discharged or otherwise discriminated against in violation of their organizational rights was obtained by the NLRB from employers and unions. This total was for lost earnings, fees, dues, and fines. The NLRB obtained 6,029 offers of job reinstatements, with 5,091 acceptances.

• Acting upon the results of professional staff investigations, which produced a reasonable cause to believe unfair labor practices had been committed, regional offices of the NLRB issued 5,371 complaints, setting the cases for hearing.

• NLRB's corps of administrative law judges, issued 1,102 decisions.



NLRB Administration

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

Declared constitutional by the Supreme Court in 1937, the Act was substantially amended in 1947, 1959, and 1974, each amendment increasing the scope of the NLRB's regulatory powers.

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

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

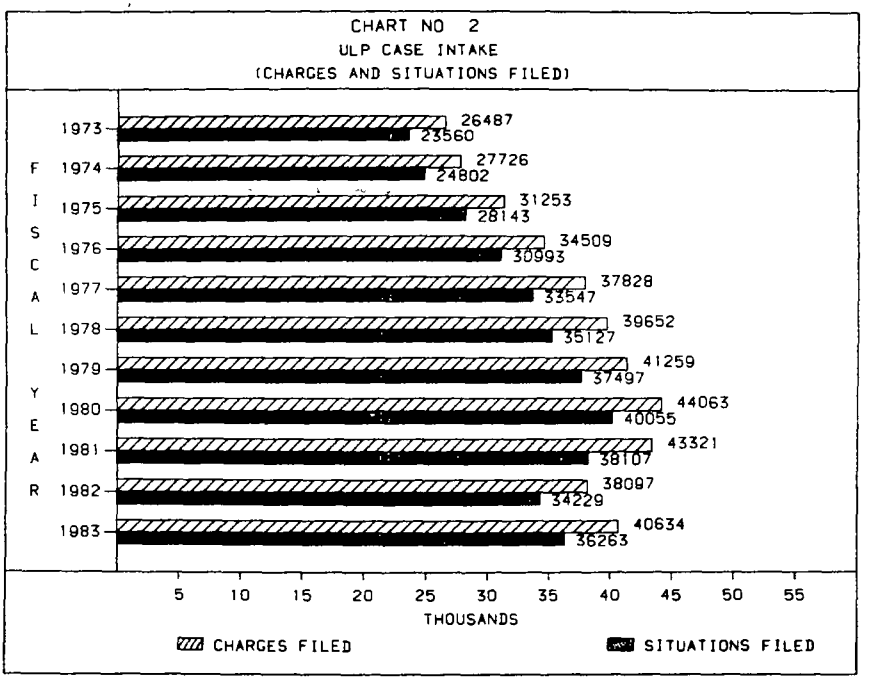
The NLRB does not act on its own motion in either function. It processes only those charges of unfair labor practices and petitions for employee elections which are filed in the NLRB's regional, subregional, and resident offices, which numbered 52 during fiscal year 1983.

The Act's unfair labor practice provisions place certain restrictions on actions of employers and labor organizations in their relations with employees, as well as with each other. Its election provisions provide mechanics for conducting and certifying results of representation elections to determine collective-bargaining wishes of employees, including balloting to determine whether a union shall continue to have the right to make a union-shop contract with an employer.

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

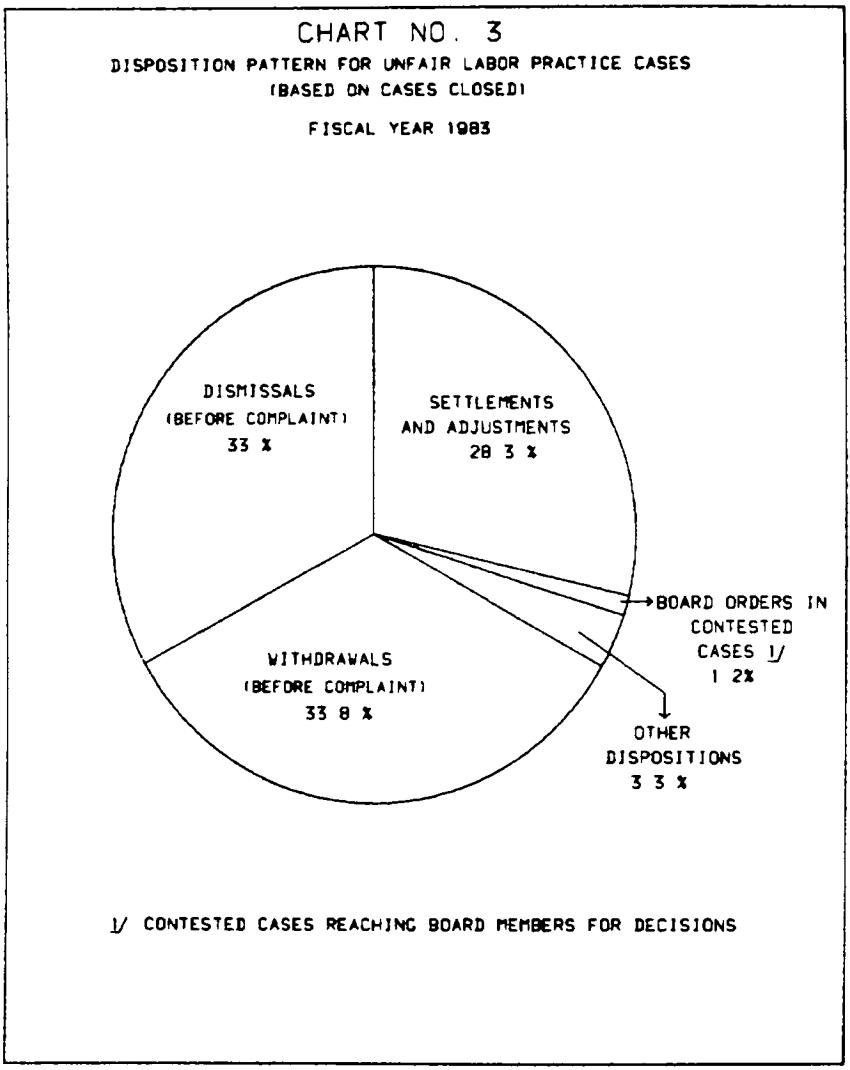
The NLRB has no independent statutory power of enforcement of its decisions and orders. It may, however, seek enforcement in the U.S. courts of appeals, and parties to its cases also may seek judicial review.

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



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

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



B. Operational Highlights

1. Unfair Labor Practices

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

Following their filing, charges are investigated by the regional professional staff to determine whether there is reasonable cause to believe

that the Act has been violated. If such cause is not found, the regional director dismisses the charge or it is withdrawn by the charging party. If the charge has merit, the regional director seeks voluntary settlement or adjustment by the parties to the case to remedy the apparent violation; however, if settlement efforts fail, the case goes to hearing before an NLRB administrative law judge and, lacking settlement at later stages, on to decision by the five-member Board.

Of major importance is that more than 90 percent of the unfair labor practice cases filed with the NLRB in the field offices are disposed of in a median of some 40 days without the necessity of formal litigation before the Board. Only about 2 percent of the cases go through to Board decision.

In fiscal 1983, 40,634 unfair labor practice charges were filed with the NLRB, an increase of 7 percent from the 38,097 filed in fiscal 1982. In situations in which related charges are counted as a single unit, there was a 6-percent increase from the preceding fiscal year. (Chart 2.)

Alleged violations of the Act by employers were filed in 28,995 cases, about 5 percent more than the 27,749 of 1982. Charges against unions increased 13 percent to 11,565 from 10,278 in 1982.

There were 74 charges of violation of section 8(e) of the Act, which bans hot-cargo agreements. (Tables 1A and 2.)

The majority of all charges against employers alleged illegal discharge or other discrimination against employees. There were 14,866 such charges or 51 percent of the total charges that employers committed violations.

Refusal to bargain was the second largest category of allegations against employers, comprising 12,211 charges, or about 42 percent of the total charges. (Table 2.)

Of charges against unions, the majority (8,143) alleged illegal restraint and coercion of employees, about 70 percent, a slight drop from last year. There were 2,090 charges against unions for illegal secondary boycotts and jurisdictional disputes, an increase of 9 percent over the 1,911 of 1982.

There were 1,749 charges (about 15 percent) of illegal union discrimination against employees, virtually the same as in 1982. There were 463 charges that unions picketed illegally for recognition or for organizational purposes, compared with 375 charges in 1982. (Table 2.)

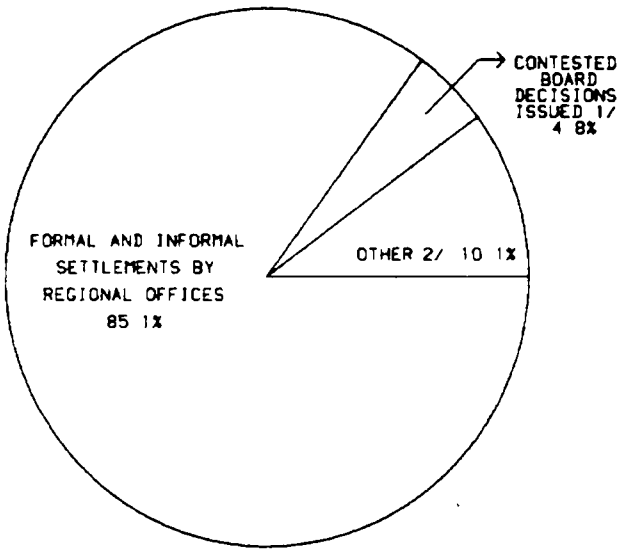
In charges filed against employers, unions led with 63 percent of the total. Unions filed 18,181 charges, individuals filed 10,799, and employers filed 15 charges against other employers.

As to charges against unions, 7,223 were filed by individuals, or 62 percent of the total of 11,565. Employers filed 4,100 and other unions filed the 242 remaining charges.

CHART NO. 3A

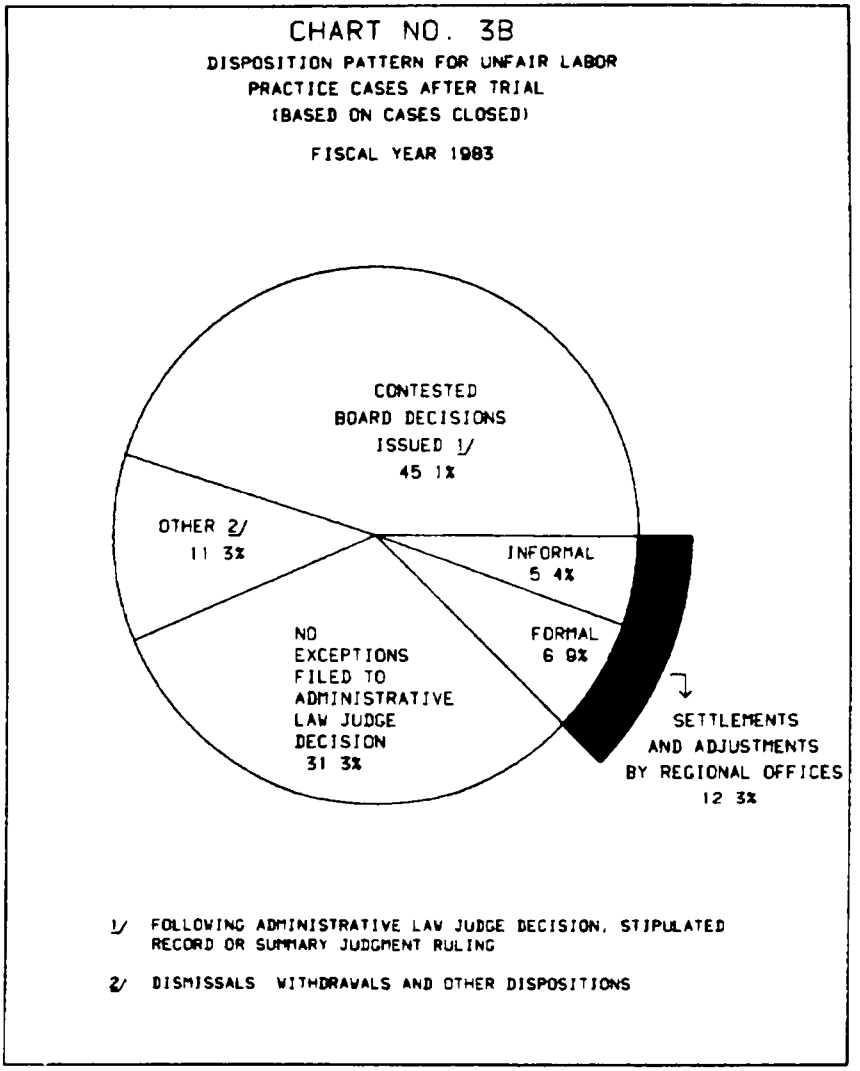
DISPOSITION PATTERN FOR MERITORIOUS
UNFAIR LABOR PRACTICE CASES
(BASED ON CASES CLOSED)

FISCAL YEAR 1983



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

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



In fiscal 1983, 38,041 unfair labor practice charges were closed. Some 95 percent were closed by NLRB regional offices, as compared to 94 percent in 1982. During the fiscal year, 28.3 percent of the cases were settled or adjusted before issuance of administrative law judges' decisions, 33.8 percent by withdrawal before complaint, and 33.0 percent by administrative dismissal.

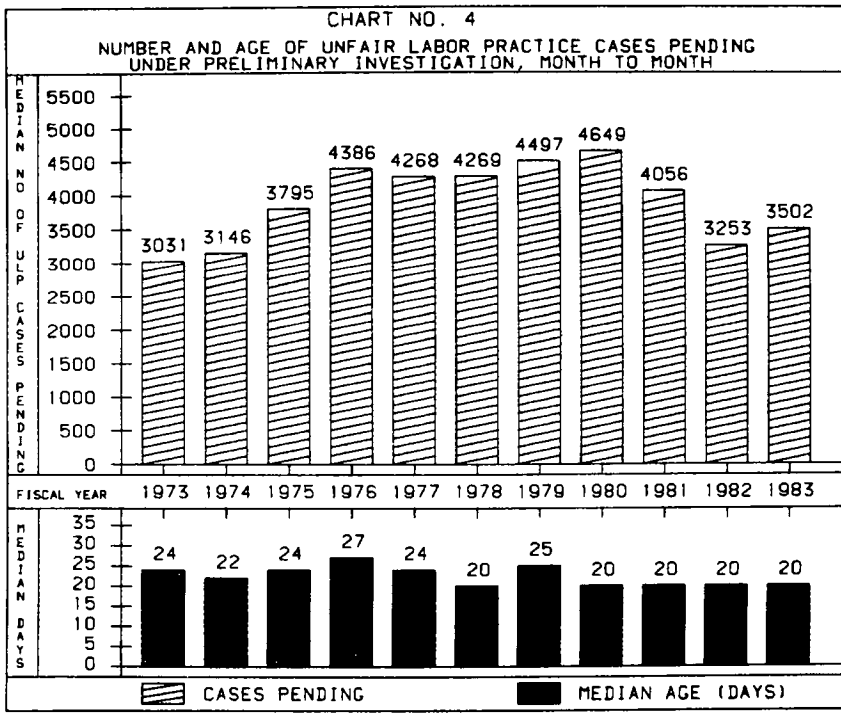
In evaluation of the regional workload, the number of unfair labor practice charges found to have merit is important—the higher the merit factor the more litigation required. Some 34 percent of the unfair labor practice cases were found to have merit.

When the regional offices determine that charges alleging unfair labor practices have merit, attempts at voluntary resolution are stressed—to improve labor-management relations and to reduce NLRB litigation and related casehandling. Settlement efforts have been successful to a substantial degree. In fiscal 1983, precomplaint settlements and adjustments were achieved in 6,677 cases, or 17.3 percent of the charges. In 1982 the percentage was 16.6.

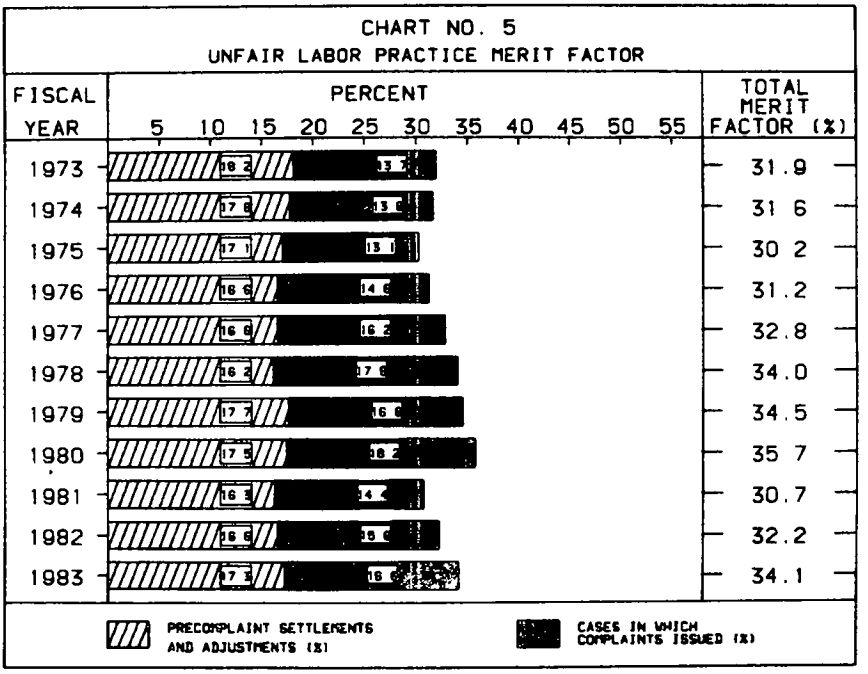
Cases of merit not settled by the regional offices produce formal complaints, issued on behalf of the General Counsel. This action schedules hearings before administrative law judges. During 1983, 5,371 complaints were issued, compared with 4,126 in the preceding fiscal year. (Chart 6.)

Of complaints issued, 82.8 percent were against employers, 17.0 percent against unions, and 0.2 percent against both employers and unions.

NLRB regional offices processed cases from filing of charges to issuance of complaints in a median of 45 days, compared with 48 days in 1982. The 45 days included 15 days in which parties had the opportunity to adjust charges and remedy violations without resort to formal NLRB processes. (Chart 6.)



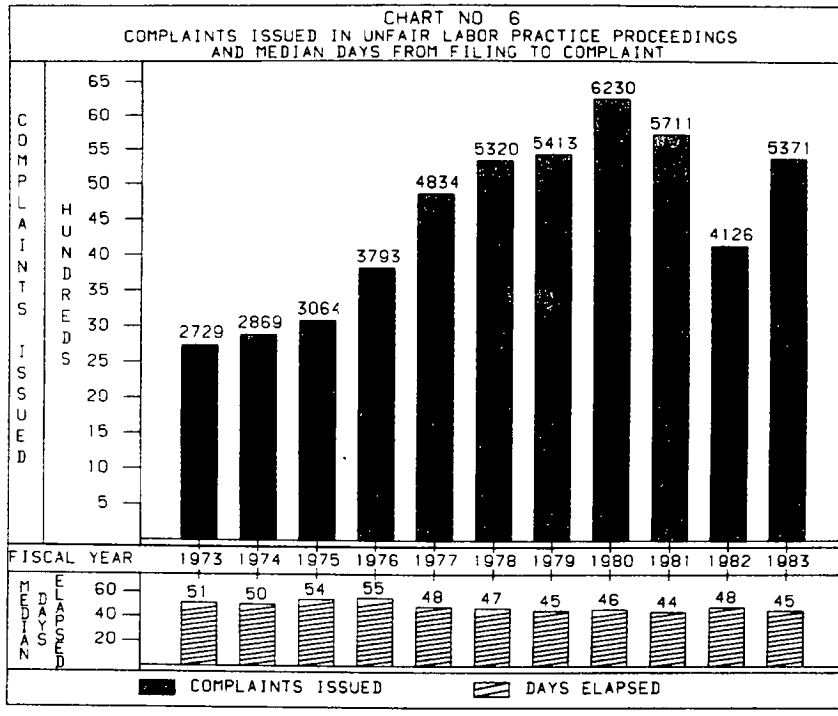
Additional settlements occur before, during, and after hearings before administrative law judges. Even so, their hearing and decisional workload is heavy. The judges issued 1,102 decisions in 1,415 cases during 1983. They conducted 1,013 initial hearings, and 83 additional hearings in supplemental matters. (Chart 8 and Table 3A.)



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

In fiscal 1983, the Board issued 671 decisions in unfair labor practice cases contested as to the law or the facts—599 initial decisions, 20 backpay decisions, 41 determinations in jurisdictional work dispute cases, and 11 decisions on supplemental matters. Of the 599 initial decision cases 514 involved charges filed against employers, 81 had union respondents, and 4 contained charges against both employers and unions. For the year, the NLRB awarded backpay of $31.3 million. (Chart 9.) Reimbursement for unlawfully exacted fees, dues, and fines added another $0.8 million. Backpay is lost wages caused by unlawful discharge and other discriminatory action detrimental to employees, offset by earnings elsewhere after the discrimination. Some 6,029 employees were offered reinstatement, and 84 percent accepted.

At the end of fiscal 1983, there were 25,915 unfair labor practice cases being processed at all stages by the NLRB, compared with 23,000 cases pending at the beginning of the year.

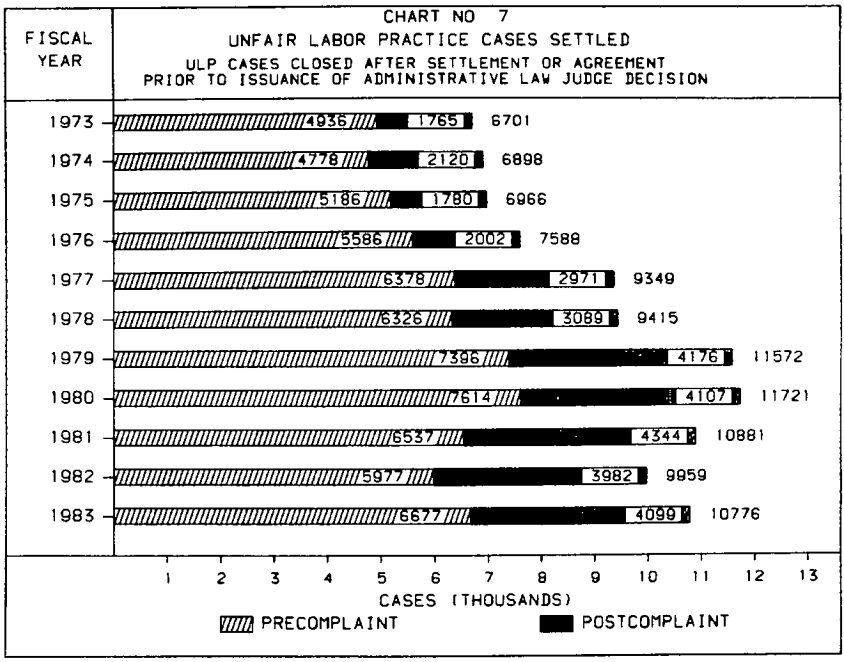


2. Representation Cases

The NLRB received 8,802 representation and related case petitions in fiscal 1983. This compared with 9,113 such petitions a year earlier.

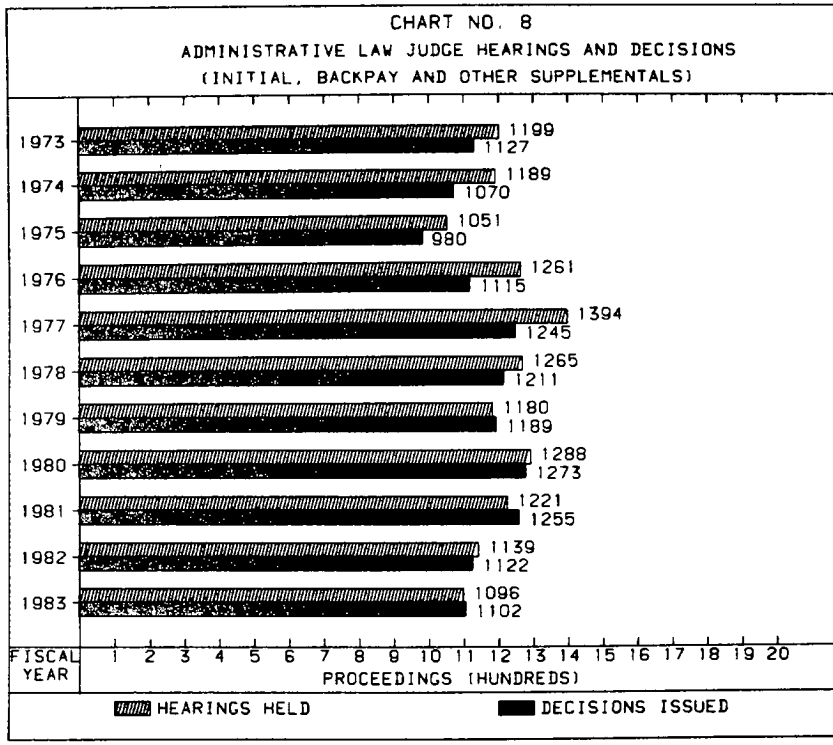
The 1983 total consisted of 6,174 petitions that the NLRB conduct secret-ballot elections where workers select or reject unions to represent them in collective bargaining; 1,904 petitions to decertify existing bargaining agents; 241 deauthorization petitions for referendums on rescinding a union's authority to enter into union-shop contracts; and 445 petitions for unit clarification to determine whether certain classifications of employees should be included in or excluded from existing bargaining units.

Additionally, 38 amendment of certification petitions were filed.



During the year, 8,480 representation and related cases were closed, compared with 8,679 in fiscal 1982. Cases closed included 5,927 collective-bargaining election petitions; 1,881 decertification election petitions; 231 requests for deauthorization polls; and 441 petitions for unit clarification and amendment of certification. (Chart 14 and Tables 1 and 1B.)

The overwhelming majority of elections conducted by the NLRB resulted from some form of agreement by the parties on when, where, and among whom the voting should occur. Such agreements are encouraged by the Agency. In 14.9 percent of representation cases closed by elections, balloting was ordered by NLRB regional directors following hearings on points in issue. In 40 cases, elections were directed by the Board after appeals or transfers of cases from regional offices. (Table 10.) There were 6 cases which resulted in expedited elections pursuant to the Act's 8(b)(7)(C) provisions pertaining to picketing.

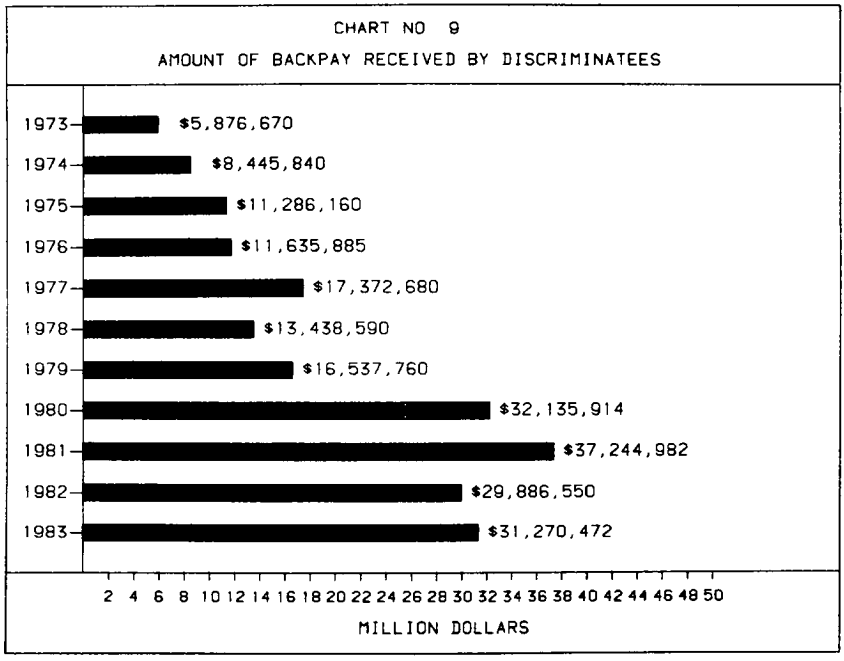


3. Elections

The NLRB conducted 4,405 conclusive representation elections in cases closed in fiscal 1983, compared with the 5,116 such elections a year earlier. Of 209,918 employees eligible to vote, 181,308 cast ballots, virtually 9 of every 10 eligible.

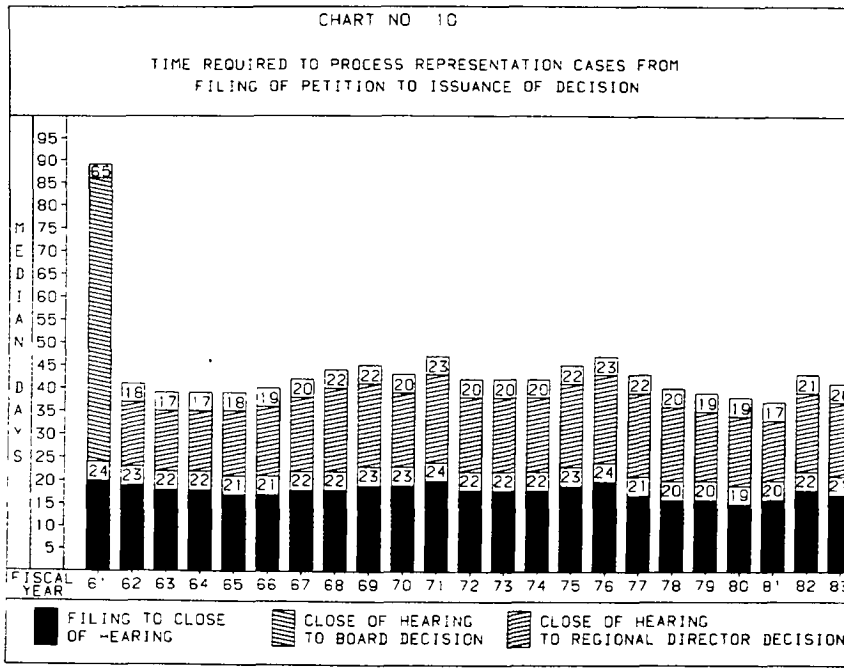
Unions won 1,895 representation elections, or 43.0 percent. In winning majority designation, labor organizations earned bargaining rights or continued as employee representatives for 91,311 workers. The employee vote over the course of the year was 90,370 for union representation and 90,938 against.

The representation elections were in two categories—the 3,483 collective-bargaining elections in which workers chose or voted down labor organizations as their bargaining agents, plus the 922 decertification elections determining whether incumbent unions would continue to represent employees.



There were 4,195 select-or-reject-bargaining-rights (one union on ballot) elections, of which unions won 1,725, or 41.1 percent. In these elections, 74,333 workers voted to have unions as their agents, while 87,967 employees voted for no representation. In appropriate bargaining units of employees, the election results provided union agents for 71,899 workers. In NLRB elections, the majority decides the representational status for the entire unit.

There were 210 multiunion elections, in which two or more labor organizations were on the ballot, as well as a choice for no representation. Employees voted to continue or to commence representation by one of the unions in 170 elections, or 81.0 percent.

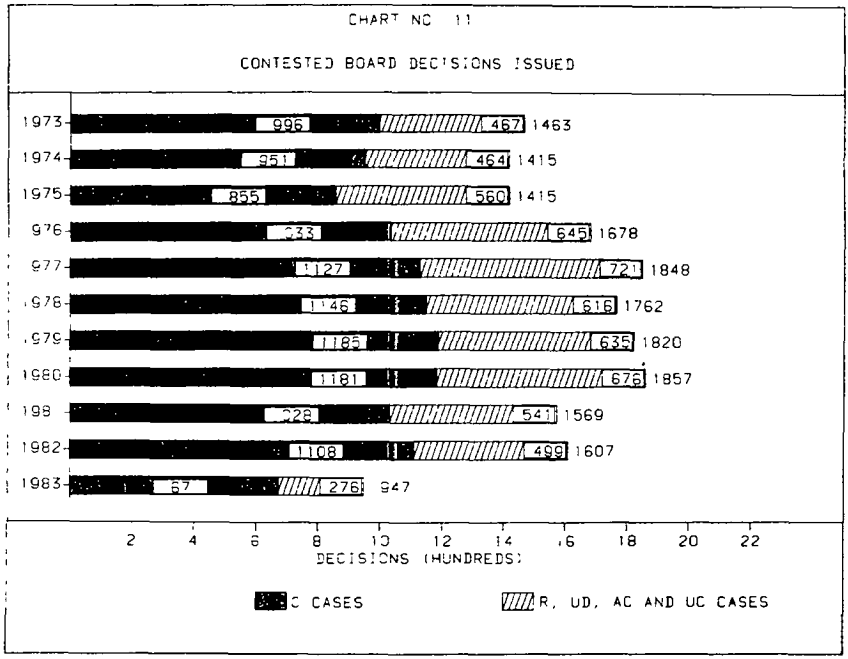


As in previous years, labor organizations lost decertification elections by a substantial percentage. The decertification results brought continued representation by unions in 232 elections, or 25 percent, covering 14,652 employees. Unions lost representation rights for 23,718 employees in 690 elections, or 75 percent. Unions won in bargaining units averaging 63 employees, and lost in units averaging 34 employees. (Table 13.)

Besides the conclusive elections, there were 128 inconclusive representation elections during fiscal 1983 which resulted in withdrawal or dismissal of petitions before certification, or required a rerun or runoff election.

In deauthorization polls, labor organizations lost the right to make union-shop agreements in 51 referendums, or 67 percent, while they maintained the right in the other 25 polls which covered 1,677 employees. (Table 12.)

For all types of elections in 1983, the average number of employees voting, per establishment, was 41 compared with 50 in 1982. About three-quarters of the collective-bargaining and decertification elections involved 59 or fewer employees. (Tables 11 and 17.)



4. Decisions Issued

a. Five-Member Board

Dealing effectively with the remaining cases reaching it from nationwide filings after dismissals, settlements, and adjustments in earlier processing stages, the Board handed down 1,963 decisions concerning allegations of unfair labor practices and questions relating to employee representation. This total compared with the 2,394 decisions rendered during fiscal 1982. A breakdown of Board decisions follows:

Total Board decisions		**1,963**
Contested decisions		**947**
Unfair labor practice decisions	671	
Initial (includes those based on stipulated record)	599	
Supplemental	11	
Backpay	20	
Determinations in jurisdictional disputes	41	
Representation decisions	274	
After transfer by regional directors for initial decision	16	

After review of regional director decisions	50		
On objections and/or challenges	208		
Other decisions		2	
Clarification of bargaining unit	0		
Amendment to certification	0		
Union-deauthorization	2		
Noncontested decisions			1,016
Unfair labor practice	451		
Representation	561		
Other	4		

Thus, it is apparent that almost half (48 percent) of Board decisions resulted from cases contested by the parties as to the facts and/or application of the law. (Tables 3A, 3B, and 3C.)

Emphasizing the steadily mounting unfair labor practice caseload facing the Board was the fact that in fiscal 1983 more than 4 percent of all meritorious charges and 45 percent of all cases in which a hearing was conducted reached the five-member Board for decision. (Charts 3A and 3B.) These high proportions are even more significant considering that unfair labor practice cases in general require about 2½ times more processing effort than do representation cases.

b. Regional Directors

Meeting the challenge of a heavy workload, the NLRB regional directors issued 1,662 decisions in fiscal 1983, compared with 1,607 in 1982. (Chart 13 and Tables 3B and 3C.)

c. Administrative Law Judges

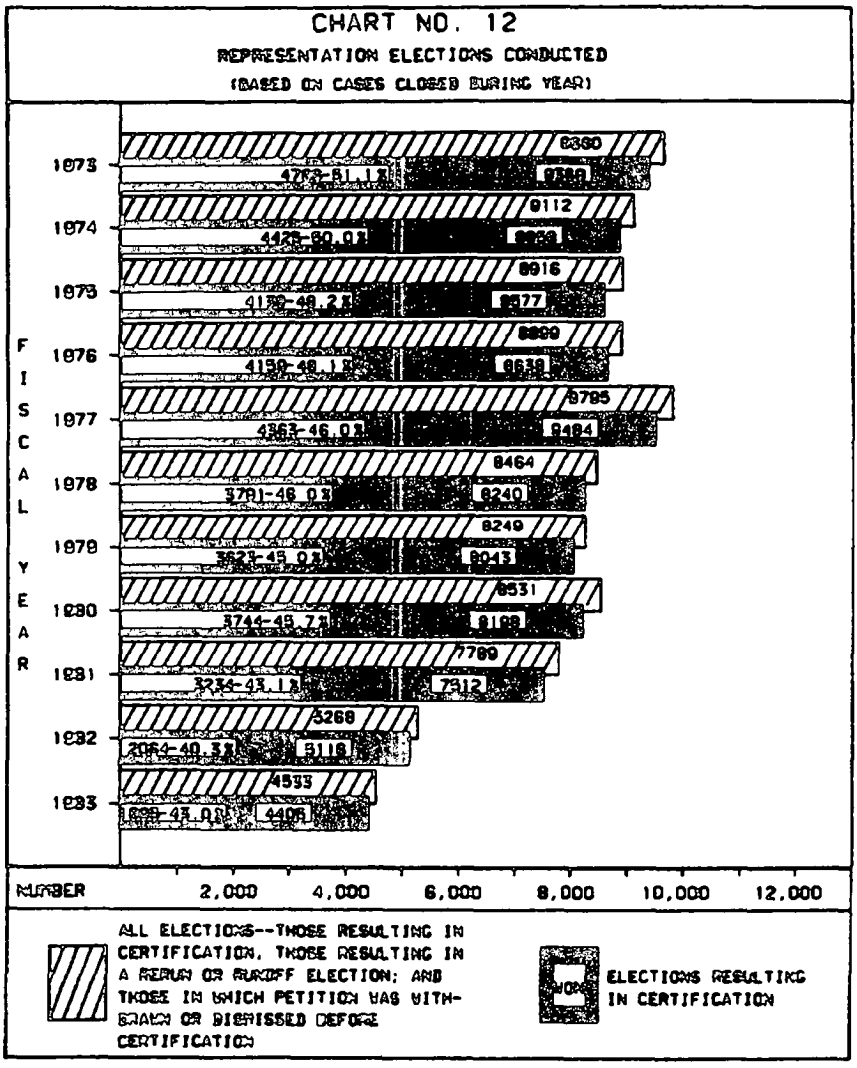
Despite the decrease in case filings alleging commission of unfair labor practices, the administrative law judges issued 1,102 decisions and conducted 1,096 hearings. (Chart 8 and Table 3A.)

5. Court Litigation

a. Appellate Court Activity

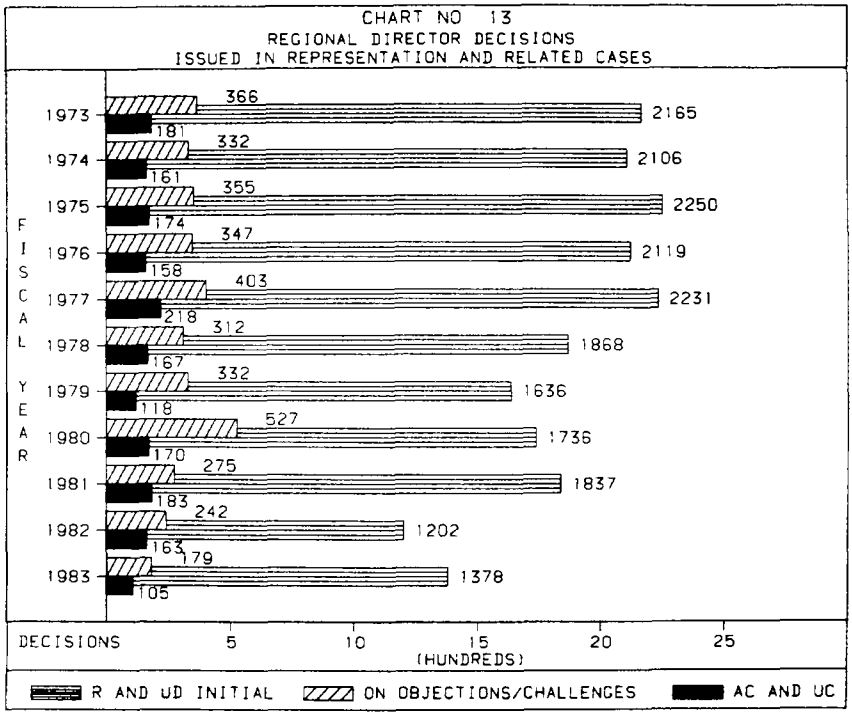
The National Labor Relations Board is involved in more litigation in the United States courts of appeals than any other Federal administrative agency. In fiscal 1983, the Appellate Court Branch was responsible for handling 217 cases referred by the Regions for court enforcement and 149 cases wherein petitions for review were filed by other parties

for a total intake of 366 cases. By filing briefs in 331 cases and securing compliance in another 133 cases for a total of 464, dispositions exceeded the intake. Oral arguments were presented in 302 cases compared with 331 in fiscal 1982. The median time for filing applications for enforcement was 72 days, compared to 44 days last year. The median time for both enforcement and review from the receipt of cases to the filing of briefs was 160 days, up from 145 days in fiscal 1982.



In fiscal 1983, 338 cases involving NLRB were decided by the United States courts of appeals compared with 424 in fiscal 1982. Of these, 81.7 percent were won by NLRB in whole or in part compared to 79.7 per-

cent in fiscal 1982; 5.9 percent were remanded entirely compared with 7.8 percent in fiscal 1982; and 12.4 percent were entire losses compared to 12.5 percent in fiscal 1982.

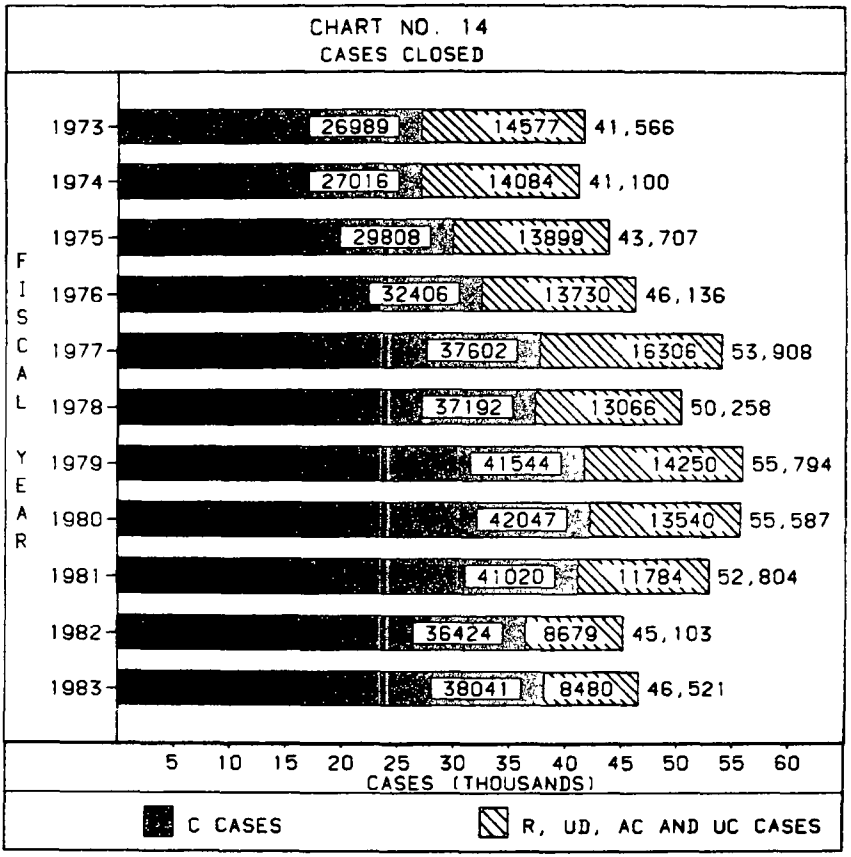


b. Supreme Court Activity

In fiscal 1983, the Supreme Court decided five Board cases; the Board won three in full, one in part, and lost one. In addition, in fiscal 1983, the Board participated as amicus in two cases. In fiscal 1983, the court denied 39 private party petitions for certiorari compared to 52 private party petitions denied in fiscal 1982. Finally, in fiscal 1983, the Court granted five Board petitions for certiorari and seven private party petitions.

c. Contempt Activity

In fiscal 1983, 115 cases were referred to the contempt section for consideration of contempt action. During fiscal 1983, 23 contempt proceedings were instituted. There were 20 contempt adjudications awarded in favor of the Board; 7 cases were discontinued upon compliance after petitions were filed before court orders; 3 cases where compliance was directed without contempt adjudications; and in 1 case the Board's petition was denied on the merits.



d. Miscellaneous Litigation Activity

There were 51 additional cases involving miscellaneous litigation decided by appellate and district courts. The NLRB's position was upheld in 46 cases. (Table 21.)

e. Injunction Activity

The NLRB sought injunctions pursuant to section 10(j) and 10(l) in 110 petitions filed with the U.S. district courts, compared with 143 in fiscal 1982. (Table 20.) Injunctions were granted in 40, or 71 percent, of the 56 cases litigated to final order.

NLRB injunction activity in district courts in 1983:

Granted	40
Denied	16
Withdrawn	2
Dismissed	4

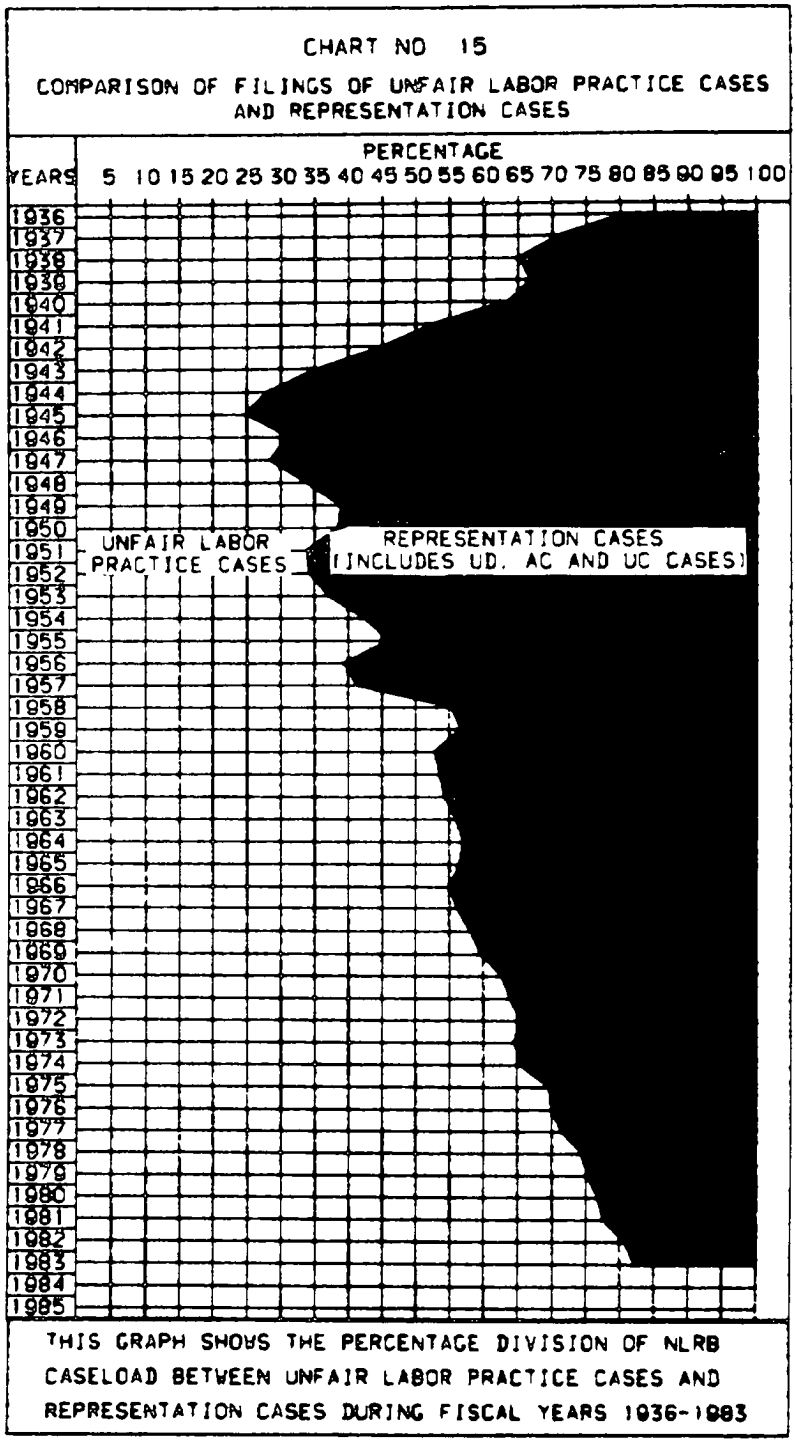


CHART NO 15
COMPARISON OF FILINGS OF UNFAIR LABOR PRACTICE CASES AND REPRESENTATION CASES
YEARS
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UNFAIR LABOR PRACTICE CASES
REPRESENTATION CASES (INCLUDES UD, AC AND UC CASES)
THIS GRAPH SHOWS THE PERCENTAGE DIVISION OF NLRB CASELOAD BETWEEN UNFAIR LABOR PRACTICE CASES AND REPRESENTATION CASES DURING FISCAL YEARS 1936-1983

Settled or placed on courts' inactive lists 46
Awaiting action at end of fiscal year 2

C. Decisional Highlights

In the course of the Board's administration of the Act during the report period, it was required to consider and resolve complex problems arising from the great variety of factual patterns in the many cases reaching it. In some cases, new developments in industrial relations, as presented by the factual situation, required the Board's accommodation of established principles to those developments. Chapter II on "Jurisdiction of the Board," Chapter III on "Board Procedure," Chapter IV on "Representation Proceedings," and Chapter V on "Unfair Labor Practices" discuss some of the more significant decisions of the Board during the report period. The following summarizes briefly four of the decisions establishing or reexamining basic principles in significant areas.

1. Restriction on Union Member's Right to Resign

In two cases,[1] the Board was asked to consider whether a union could lawfully impose restrictions on the right of a member to resign during an actual strike or lockout or within a reasonable time preceding its commencement. In balancing two competing interests—the statutory right of a member to resign union membership against the legitimate interest of the union, and the majority of its membership which supports the strike, in maintaining its effectiveness—the Board found that neither of these interests is absolute, and reasonable restriction on the right to resign can be enforced. However, a union rule that limits the right of a member to resign only to nonstrike periods constitutes an unreasonable restriction on a member's section 7 right to resign.

2. Units at Health Care Institutions

In a case involving a petition for a unit of maintenance employees at a hospital,[2] the Board established guidelines that it would use in determining whether a petitioned-for unit in the health care industry was appropriate. The Board, noting Congress' admonition against proliferation of employee units in this industry, adopted a two-tiered approach that it

[1] *Machinists Local 1327 (Dalmo Victor)*, 263 NLRB 984, and *Pattern Makers (Rockford-Beloit)*, 265 NLRB 1332
[2] *St Francis Hospital*, 265 NLRB 1025

would follow except when presented with extraordinary and compelling circumstances. First, it enumerated seven categories of employees that *may* constitute appropriate units for bargaining. Second, only after finding that a petitioned-for unit fit into one of those seven categories would the Board then apply its traditional unit principles to determine whether the specific employees do, in fact, display the requisite community of interest to warrant separate representation.

3. Superseniority

In *Gulton*,[3] the Board reconsidered its policy of extending contractual superseniority clauses for purposes of layoff and recall to all officers of a union.[4] It returned to the standard announced in *Dairylea*[5] of restricting such coverage only to those individuals who perform steward functions or other on-the-job contract administration. The Board noted that the grant of superseniority unjustifiably discriminates against employees for union-related reasons, but also recognized that steward superseniority serves a legitimate statutory purpose of benefit to all unit members by fostering the effective administration of bargaining agreements on the plant level by encouraging the continued presence of the steward on the job.

D. Financial Statement

The obligations and expenditures of the National Labor Relations Board for the fiscal year ended September 30, 1983, are as follows:

Personnel compensation	$88,192,576
Personnel benefits	10,048,184
Travel and transportation of persons	3,944,243
Transportation of things	140,977
Rent, communications, and utilities	16,018,365
Printing and reproduction	581,195
Other services	3,808,658
Supplies and materials	1,318,347
Equipment	879,528
Insurance claims and indemnities	42,413
Total obligations and expenditures[6]	$124,974,486

[3] *Gulton Electro-Voice*, 266 NLRB 406

[4] *Electrical Workers UE Local 623 (Limpco Mfg)*, 230 NLRB 406 (1977), enfd sub nom *D'Amico v NLRB*, 582 F 2d 820 (3d Cir 1978)

[5] *Dairylea Cooperative*, 219 NLRB 656 (1975)

[6] Includes $2,103

II

Jurisdiction of the Board

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

A. Job Corps Center Contractors

Two cases were decided during the report year in which the Board asserted jurisdiction over two corporations operating Job Corps centers under contract with the United States Department of Labor (DOL).

In *Management & Training Corp.*,[6] a Board majority consisting of Members Fanning, Jenkins, and Zimmerman asserted jurisdiction over

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

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

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

[4] These self-imposed standards are primarily expressed in terms of the gross dollar volume of business in question 23 NLRB Ann Rep 18 (1958) See also *Floridan Hotel of Tampa*, 124 NLRB 261 (1959), for hotel and motel standards

[5] While a mere showing that the Board's gross dollar volume standards are met is ordinarily insufficient to establish legal or statutory jurisdiction, no further proof of legal or statutory jurisdiction is necessary where it is shown that the Board's "outflow-inflow" standards are met 25 NLRB Ann Rep 19–20 (1960) But see *Sioux Valley Empire Electric Assn* , 122 NLRB 92 (1958), as to the treatment of local public utilities

[6] 265 NLRB 1152

the employer which operated a Job Corps center providing, under its contract with the DOL, vocational academic training for underemployed men and women between the ages of 16 and 21. In asserting jurisdiction, the Board majority decided to continue to adhere to the principles set forth in *Singer Co.*[7]

In *Singer* the Board articulated the standard applicable to determine whether to assert jurisdiction over a government contractor. The test is whether the employer has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative.

The majority in *Management & Training Corp.*, above, 265 NLRB at 1153, found that, although the employer must obtain DOL approval before hiring any employee with an annual salary of $15,000 or more, it "is free to promote, demote and transfer employees" as long as it operates under broad outlines of its contract with the DOL. The majority in addition pointed out that "Nowhere in *Singer* or in any of its progeny does the Board adopt the position that lack of hiring authority would be determinative of whether or not an Employer was vested with sufficient authority over the employment conditions of its employees to enable it to bargain with a labor organization as their representative." The majority then concluded that the employer retained sufficient control over labor relations to allow bargaining in good faith with the petitioning union should it be certified as collective-bargaining agent.

Dissenting, Chairman Van de Water and Member Hunter found that the DOL controls and limits the labor relations policies and practices of Management and Training Corporation to such an extent that the employer is precluded from meaningful bargaining and shares the exemption of the DOL from Board jurisdiction. They noted that certain bargaining unit employees are subject to prehire approval by the DOL, and that the record showed that DOL representatives are in frequent contact with the center " 'talking about nuts and bolts' and how to operate the center."

In the second decision[8] the same Board majority consisting of Members Fanning, Jenkins, and Zimmerman asserted jurisdiction over another employer that operates a Job Corps center, in Tucson, under contract with the DOL, since they found the case indistinguishable from *Singer*, supra. The *Singer* decision overruled *Teledyne Economic Development Co.*,[9] wherein the Board had previously declined to assert jurisdiction over this same employer's Job Corps centers, but at another location, Pittsburgh.

Again dissenting, Chairman Van de Water and Member Hunter would decline to assert jurisdiction on the ground that in their view the Teledyne

[7] 240 NLRB 965 (1979)

[8] *Teledyne Economic Development Co* , 265 NLRB 1216

[9] 223 NLRB 1040 (1976) (Chairman Murphy and Member Penello, Member Fanning dissenting)

Job Corps center shares the DOL's exemption from jurisdiction of the Act. They agreed with Teledyne's contention that "it is but a surrogate for the DOL acting at its behest and in conformity with all its numerous rules and regulations."

B. Navy Contractor at Diego Garcia

In *Offshore Express, Inc.*,[10] a Board panel declined on discretionary grounds to assert jurisdiction over an employer that provides crew boat service and operates two tugboats for the United States Navy at the lagoon at Diego Garcia, an atoll in the British Indian Ocean territory. The panel observed that, since 1966, the governments of the United States and the United Kingdom have agreed to the establishment of a limited United States naval communications facility at Diego Garcia, to be developed into a support facility of the United States Navy. Access to Diego Garcia is extremely restricted; military transportation provides the only regular means of transportation; and only specific parties agreed to by the two governments are permitted to enter. According to the panel, Diego Garcia is "a distant and remote island territory under foreign sovereign jurisdiction, which the United States and the United Kingdom by express written agreement have dedicated to the defense purposes of both nations," and the employer's vessels do not engage in international trade or visit foreign ports, but operate exclusively in Diego Garcia's territorial waters. The Board assumed, arguendo, that it had statutory jurisdiction but concluded, based on the facts stated above, that it would not effectuate the policies of the Act to assert jurisdiction over the employer. In reaching this conclusion, the Board cited *Facilities Management Corp.*,[11] a case involving an employer that furnished maintenance, repair, and support services for the United States Air Force at Wake Island.

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[10] 267 NLRB 378 (Chairman Dotson and Members Jenkins and Hunter)
[11] 202 NLRB 1144 (1973) (Members Jenkins, Kennedy, and Penello)

III

Board Procedure

A. Lawyer Disqualification

In *Hillview Convalescent Center*,[1] the Board panel considered whether an entire law firm should be disqualified as a result of the violation of section 102.120 of the Board's Rules and Regulations by one of its attorneys who "concededly became involved in this case after joining the law firm and remained involved" until being advised by the regional office of the apparent violation of the rule.

Section 102.120 prohibits any person who has been an employee of the Board in Washington from engaging in practice before the Board "in any respect or in any capacity with any case or proceeding pending before the Board or *any Regional Offices* during the time of his employment with the Board [emphasis supplied]."

In this case, the charging party's counsel had been employed as an attorney in the Board's Division of Enforcement Litigation in Washington, prior to joining the law firm and becoming involved in the case. The attorney withdrew his notice of appearance after having been advised by the NLRB regional office of the apparent violation of Board rules. An employer motion to disqualify the entire law firm was granted by an administrative law judge. The Board however granted a request for special permission to appeal the judge's order disqualifying the entire firm and, on appeal, decided to reverse the judge's ruling. In denying the motion to disqualify the entire law firm, the panel majority noted that "if there was evidence that some material advantage had accrued to the party represented by an attorney in violation of rule 102.120, we would disqualify the law firm involved to assure that no prejudice inured to the other party or parties." However, in the absence of such a showing, Members Zimmerman and Hunter concluded that disqualification of the entire law firm was inappropriate. Member Jenkins, dissenting, held that the Board's rule "is designed to avoid, not only actual impropriety, but the appearance of impropriety."

In another ruling during the report year dealing with lawyer disqualification for practice before the Board, a Board panel denied an application and motion for Burton R. Horowitz for reinstatement to practice

[1] 266 NLRB 758 (Members Zimmerman and Hunter, Member Jenkins dissenting)

before the Board.[2] The Board in *Kings Harbor Health Care*[3] had disbarred Horowitz from appearing and practicing before the Board, after having taken note of certain criminal proceedings to which Horowitz had pleaded guilty. As a result of the criminal proceedings, Horowitz had been disbarred from the practice of law in the State of New York. Although Horowitz had successfully completed his probationary period when he filed his application and motion for reinstatement before the Board, Horowitz was at that time still disbarred from the practice of law in the State of New York.

Member Zimmerman, concurring, agreed that the Board should continue to prohibit Horowitz from practicing and appearing before the Board. However, Member Zimmerman believes that state law in this area should be accorded great weight, so he would continue to prohibit Horowitz from appearing or practicing before the Board "at least until such time as he is eligible to seek readmission to the New York Bar under the laws of that State."

B. Subpoena to News Editor

In *Valley Camp Coal Co.*,[4] a Board panel denied a request for special permission to appeal the administrative law judge's order denying a motion to revoke a subpoena *ad testificandum* directing Johanna Maurice, business editor of The Charleston Daily Mail, to appear and testify at an unfair labor practice hearing in connection with an article she had written which appeared in the Daily Mail on August 12, 1980. The judge denied Maurice's motion to revoke on grounds that a district court complaint she had filed did not excuse her failure to file a petition to revoke within 5 days of service as required by section 102.31(b) of the Board's Rules and Regulations. In appealing the judge's ruling, Maurice contended that the 5-day statute of limitations had been tolled when the district court issued a temporary restraining order enjoining the Board from enforcing a subpoena. Maurice further contended that the subpoena was invalid because it was served on Maurice by mail, and not in person, and that the attempt to compel Maurice to testify "substantially impinged Maurice's right to freedom of the press guaranteed by the First Amendment." In regard to the latter, Maurice, relying on Justice Powell's concurrence in *Branzburg v. Hayes*, 408 U.S. 665, 710 (1972), argued that the "asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony." Maurice urged the Board to strike the balance in her favor because the General Counsel

[2] 266 NLRB 755 (Members Jenkins and Hunter, Member Zimmerman concurring)
[3] 239 NLRB 679 (1978)
[4] 265 NLRB 1683 (Members Jenkins, Zimmerman, and Hunter)

failed to make any efforts to obtain the information sought "from a non-media source." Maurice further contended that the information sought was peripheral to the heart of the Board's claim and that Maurice was "unquestionably not competent to provide direct testimony as to [Respondent's] reasons for shutting down Mine 15(A)."

In addition to sustaining the judge's disposition of Maurice's motion to revoke on procedural grounds, i.e., that it was not filed within 5 days of service as provided for under section 102.31(b) of the Rules and Regulations, the Board panel denied Maurice's appeal on the merits. The Board panel rejected Maurice's contention that the balancing approach set forth in Justice Powell's concurrence in *Branzburg v Hayes*, supra, requires the Board to grant her petition to revoke. In so concluding, the panel noted that "the Supreme Court expressly declined to create another testimonial privilege similar to the fifth amendment's self-incrimination privilege." In short, the Board observed, "members of the news gathering media have no absolute privilege not to appear and testify in a judicial proceeding." The panel noted that the situation here "does not involve a confidential source of information which a reporter is trying to protect." The panel rejected Maurice's contention that the information sought could be obtained from a nonmedia source and since respondent "denied certain statements attributed to him by [Maurice], the General Counsel could not, for impeachment purposes, rely on [Maurice's] article itself."

C. Limitation of Section 10(b)

Section 10(b) of the Act precludes the issuance of a complaint based on conduct occurring more than 6 months prior to the filing of the charge with the Board and the service of a copy thereof on the person against whom the charge is made.

In *Winer Motors*,[5] the Board considered whether unfair labor practice charges which have been withdrawn by the charging party may be reinstated by the General Counsel beyond the normal 6-month period prescribed in section 10(b). The Board majority overruled an earlier decision in *Silver Bakery, Inc. of Newton*,[6] and held that such charges may not be reinstated. In reaching this result, the majority stated that it was guided by the Board's recognition that the 6-month limitations period in section 10(b) was a statute of limitations created by Congress, and that the Board exceeds its authority to allow the General Counsel to ignore such a limitations period on equitable grounds. The Board majority agreed with the First Circuit's statement in its denial of enforcement

[5] 265 NLRB 1457 (Chairman Van de Water and Member Hunter, Member Zimmerman concurring, Members Fanning and Jenkins dissenting)

[6] 150 NLRB 421 (1964), enf denied 351 F 2d 37 (1st Cir 1965)

of the Board order in *Silver Bakery* that disregarding section 10(b) on the basis of equitable considerations was created out of whole cloth. The majority further commented that the denial of alleged misconduct by a respondent, as had occurred in the instant case, was dissimilar from instances where a respondent fraudulently conceals from a charging party the operative facts underlying a violation of the Act.

With respect to such instances of fraudulent concealment, the majority agreed with the principle that the 6-month limitations period does not begin to run until the charging party knows or should have known of such operative facts.

In concurring with the majority's result, Member Zimmerman distinguished between the reinstatement of withdrawn, as opposed to dismissed, charges. In Member Zimmerman's view, a withdrawn charge ceases to exist, whereas a dismissed charge continues to exist and the statutory prerequisite for a complaint remains. Accordingly, he disagreed with Chairman Van de Water's and Member Hunter's position that *California Pacific Signs*,[7] allowing the reinstatement of dismissed charges after the normal running of the 6-month limitations period, should also be overruled.

Members Fanning and Jenkins in dissent disagreed that section 10(b) precludes the reinstatement of timely filed charges which have been withdrawn. Citing with approval the Board's decision in *Silver Bakery*, they noted that the express language of section 10(b) relates only to the actual filing of charges, and that Congress conferred on the General Counsel the authority to reinstate withdrawn charges under section 3(d), which provides that the General Counsel "shall have the final authority, on behalf of the Board, in respect to the investigation of charges and the issuance of complaints before the Board." They further stated that Board precedent which remains undisturbed by the majority decision, tolling the limitations period in cases of fraudulent concealment and where the party affected by the alleged misconduct does not acquire actual or constructive notice of its occurrence, is based on equitable considerations. In claiming that the equities in the present case warrant the reinstatement of the withdrawn charge, the dissent relied on the administrative law judge's finding that the employer's proffered economic defense, which initially had been accepted and which apparently was the basis for the withdrawal of the charge, was "a pure sham and a pretext to cover up its true motive."

[7] 233 NLRB 450 (1977)

IV

Representation Proceedings

The Act requires that an employer bargain with the representative designated by a majority of its employees in a unit appropriate for collective bargaining. But it does not require that the representative be designated by any particular procedure as long as the representative is clearly the choice of a majority of the employees. As one method for employees to select a majority representative, the Act authorizes the Board to conduct representation elections. The Board may conduct such an election after a petition has been filed by or on behalf of a group of employees or by an employer confronted with a claim for recognition from an individual or a labor organization. Incident to its authority to conduct elections, the Board has the power to determine the unit of employees appropriate for collective bargaining and formally certify a collective-bargaining representative on the basis of the results of the election. Once certified by the Board, the bargaining agent is the exclusive representative of all employees in the appropriate unit for collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment. The Act also empowers the Board to conduct elections to decertify incumbent bargaining agents who have been previously certified, or who are being currently recognized by the employer. Decertification petitions may be filed by employees, by individuals other than management representatives, or by labor organizations acting on behalf of employees.

This chapter concerns some of the Board's decisions during the past fiscal year in which the general rules governing the determination of bargaining representatives were adapted to novel situations or reexamined in the light of changed circumstances.

A. Bars to Conduct of Elections

In certain circumstances the Board, in the interest of promoting the stability of labor relations, will find that circumstances appropriately precluded the raising of a question concerning representation.

One such circumstance occurs under the Board's contract-bar rules. Under these rules, a present election among employees currently covered by a valid collective-bargaining agreement may, with certain

exceptions, be barred by an outstanding contract. Generally, these rules require that, to operate as a bar, the contract must be in writing, properly executed, and binding on the parties; it must be of definite duration and in effect for no more than 3 years; and it must also contain substantive terms and conditions of employment which in turn must be consistent with the policies of the Act.

During the report year a panel of the Board had occasion to hold that an election petition filed during the 90-to-60 day "open" period prior to the expiration of an agreement, which extended an original 3-year contract between the employer and the union, was not barred by a new contract which had been negotiated during the extension period.

In *Hertz Corp.*,[1] the employer and the union executed a contract modification in 1978 extending the expiration date of the parties' then existing 3-year contract from February 1, 1981, to November 13, 1981. On February 9, 1981, with a little more than 9 months remaining in the term of the extension agreement, the employer and the union executed a new contract effective February 1, 1981, through November 13, 1984.

A Board panel ruled that the new contract did not bar a decertification petition filed on September 9, 1981, within 90 to 60 days of the stated expiration date of the modified contract. It rejected an argument that the February 1, 1981 contract was a new agreement which wholly superseded the extension agreement and rendered its expiration date meaningless for contract-bar purposes.

Relying on the premature extension doctrine set forth in *Deluxe Metal Furniture Co.*,[2] the panel found that the February 1, 1981 contract had prematurely extended the extension agreement. Thus, the panel concluded that this contract could not have barred the petition, since the petition was filed during the 90-to-60-day open period prior to November 13, 1981, the date on which the extension agreement would have expired, but for the execution of the February 1, 1981 contract.

The union did not dispute that the extension agreement constituted a premature extension of the original, 3-year contract. Its position was that the February 1, 1981 contract was a new agreement, which completely superseded, rather than prematurely extended, the extension agreement. The union maintained that the new agreement rendered the extension agreement's November 13, 1981 expiration date meaningless for contract-bar purposes. Therefore, according to the union, the only 90-60-day open period for filing petitions was the period prior to February 1, 1981, the expiration date set forth in the original contract. The panel disagreed, finding in these circumstances "a second open period not only appropriate, but necessary." The panel reasoned that the employer and the union, by executing the extension agreement, "effec-

[1] 265 NLRB 1127 (Chairman Van de Water and Members Jenkins and Hunter)
[2] 121 NLRB 995, 1001 (1958)

tively gave notice" that petitions could be filed during the 90-to-60-day open period preceding the November 13, 1981 expiration date. "To foreclose such an open period," the panel explained, "would result in the parties to the new contract capitalizing on a contract that was prematurely extended and on which parties such as the Petitioner here relied in considering when to file a timely petition."

In another case centering on contract-bar issues,[3] a Board panel found an intervening union's collective-bargaining agreement with the employer, a debtor-in-possession under Chapter XI of the U.S. Bankruptcy Code, was an effective bar to a rival representation petition and dismissed the petition.

During the period of time covered by the previous contract the employer became a debtor-in-possession and the contract, which had already been in effect for some time, was approved by the Bankruptcy Court. Shortly after the expiration of the contract the employer and the union entered into a new 3-year contract which modified the earlier contract and which was not submitted to the bankruptcy judge for approval or rejection.

The panel found the contract to be an effective bar to a rival petition even though it had not been affirmatively approved by the bankruptcy judge, citing "11 U.S.C. Section 1108, which states that, unless the court orders otherwise, the trustee may operate the debtor's business, and 11 U.S.C. Section 1107 (a), which states that the debtor-in-possession has the powers of the trustee unless limited by the court." The panel reasoned that "by virtue of these two sections the Employer had the right and the duty to continue operation of the company without seeking the court's approval of each business decision. The collective-bargaining contract, which was a slightly modified version of a contract already sanctioned by the court, was entered into in the ordinary course of business under 11 U.S.C. Section 1108."

While the earlier contract had required court approval, this contract was entered into after the employer became a debtor-in-possession, empowered with the right to continue his business activities without submitting each decision for court approval. Thus the panel concluded that absent affirmative repudiation by the Bankruptcy Court the contract was a bar to the petition.

B. Qualification as Labor Organization

The Board will refuse to direct an election where the proposed bargaining agent fails to qualify as a bona fide representative of the employees. In *Harrah's Marina Hotel & Casino*,[4] the Board affirmed

[3] *Sealift Maritime, Inc* , 265 NLRB 1219 (Chairman Van de Water and Members Jenkins and Hunter)

[4] 267 NLRB 1007 (Members Jenkins, Zimmerman, Hunter, Dennis, Chairman Dotson did not participate)

the regional director's dismissal of the petition for an election on the grounds that the petitioner, Casino Police and Security Officers, Local 2, and its parent organization, the Federation of Special Police and Law Enforcement Officers, were not organizations dedicated to the interests of employees as bona fide collective-bargaining representatives; that they were not organizations in which employees participate to any significant extent in the governance and administration thereof; and that they were not labor organizations within the meaning of section 2(5) of the Act. In so doing, the Board found it was not necessary to rely on the regional director's ancillary finding that "[t]he record is practically devoid of evidence that the Federation observes any of the most fundamental practices of democratic governance," as whether a union need be democratic to constitute a labor organization is a proposition the panel noted it need not address. Moreover, having found that the petitioner and the Federation had failed to establish that they exist, either in whole or in part, for the purposes set forth in the statute,[5] the Board concluded that it was not necessary to adopt the regional director's rationale that the officers of these organizations do not function with the single-minded purpose of protecting and advancing the interests of employees who have selected [it] as their bargaining agent, the standard enunciated in *Bausch & Lomb Optical Co.*,[6] which serves as a test in competitive conflict of interest cases. Accordingly, the Board concluded these organizations were not labor organizations within the meaning of section 2(5) of the Act.

C. Unit Issues

1. Status as "Employee"

A bargaining unit may include only individuals who are "employees" within the meaning of section 2(3) of the Act. The major categories expressly excluded from the term "employee" are agricultural laborers, independent contractors, and supervisors. In addition, the statutory definition excludes domestic servants, or any one employed by his parent or spouse, or persons employed by a person who is not an employer within the definition of section 2(2). These statutory exclusions have continued to require the Board to determine whether the employment functions or relations of particular employees preclude their inclusion in a proposed bargaining unit.

[5] Sec 2(5) provides

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

[6] 108 NLRB 1555, 1559 (1954)

a. Utility System Supervisors

In *Big Rivers Electric Corp.*,[7] a Board panel, in reversing the regional director's dismissal of the petition, clarified an existing systemwide operation and maintenance unit to exclude the system supervisor position, finding that the employer's system supervisors (formerly called dispatchers) were statutory supervisors. In so doing, the Board overruled, to the extent inconsistent, several prior Board decisions which had held that similar employees were not supervisors; and in which enforcement had been denied by the various circuit courts.[8]

The system supervisor position had been created in 1981 when the employer reorganized its energy control department and installed a new computer system to be manned by the system supervisors who were responsible for determining the most economical operation and service continuity for the employer's entire system of generation and transmission of electrical power. Although these system supervisors did not hire, transfer, suspend, lay off, recall, promote, discharge, or discipline employees, the panel found that they responsibly directed field employees in the execution of complex switching orders, both in routine maintenance operations and in emergency situations which required the exercise of independent judgment.

Moreover, the panel found that they were on duty 24 hours a day, 7 days a week, and often had the sole and complete responsibility for ensuring safe and continuous service to the employer's customers, since there were no other supervisory personnel on duty in the power control center on weekends or after regular working hours. The panel also noted that the employer treated the position as supervisory, scheduled management meetings to include them, paid them on a salaried basis, and accorded them certain fringe benefits which its other supervisors received but which other bargaining unit employees did not. Accordingly, the panel concluded that the system supervisors were statutory supervisors within the meaning of section 2(11) of the Act.

b. Firefighters

In *Florence Volunteer Fire Department*,[9] a Board panel dismissed a union's petition for a unit of 14 paid firefighters because they are managerial employees not properly included in a bargaining unit. The panel noted that the employer's remaining employee complement, or membership, consisted of 45 to 50 volunteers, and that the paid members com-

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[7] 266 NLRB 380 (Chairman Miller and Members Zimmerman and Hunter)

[8] See, e g , *Arizona Public Service Co* , 182 NLRB 505 (1970), enf denied 453 F 2d 228 (9th Cir 1971), *Detroit Edison Co* , 216 NLRB 1022 (1975), enf denied 537 F 2d 239 (6th Cir 1976), *Maine Yankee Atomic Power Co* , 239 NLRB 1216 (1979), enf denied 624 F 2d 347 (1st Cir 1980), *Southern Indiana Gas & Electric Co* , 249 NLRB 252 (1980), enf denied 657 F 2d 878 (7th Cir 1981), *Monogahela Power Co* , 252 NLRB 715 (1980), enf denied 657 F 2d 608 (4th Cir 1981)

[9] 265 NLRB 955 (Members Fanning, Jenkins, and Zimmerman)

prised only one-third of the executive committee and one-fourth of the total membership. However, the panel pointed out that whether or not paid members on the executive committee participate in matters involving their own wages and benefits, the fact is "that each and every paid and unpaid member shares an equal voice in management decisions and no policy is set or implemented by the Employer without the ratification vote of the membership at large." The panel accordingly concluded that the paid members constitute a large homogenous group clearly having the potential for influencing management policy by their participation in the ratification procedure and are therefore excluded as managerial employees.

c. Courier Guards

In *Purolator Courier Corp.*,[10] the petitioning union sought to represent a unit of courier-guards at the employer's Memphis, Tennessee terminal office, one of several terminal facilities located in the employer's south-central region. A panel of four Board Members unanimously agreed, however, that the work of the courier-guards in this region was no different from that of courier-guards employed by the employer in its Texas-Oklahoma region who, in a previous case,[11] were found to be guards within the meaning of section 9(b)(3) of the Act. The panel found the courier-guards in the petitioned-for unit, like their counterparts in the Texas-Oklahoma region, to be responsible for protecting the valuable property of the employer's customers, noting, inter alia, that the courier-guards have extensive security training, regularly open customers' security vaults, and use keys to enter customers' premises during nonbusiness hours. Accordingly, the panel dismissed the petition on the ground that the union, which admits non-guard employees to membership, could not be certified to represent the employer's statutory guards.

In addition, the panel unanimously agreed, citing *American Courier Corp.*,[12] that a bargaining unit limited to a single terminal within one of the employer's administrative regions is inappropriate, and dismissed the petition on this ground as well. On the basis of such factors as the highly integrated nature of the employer's operations, necessitated by customers' demands for time sensitive and secure delivery, overlapping supervision, frequent contact among courier-guards stationed in different parts of the south-central region, uniformity of working conditions and duties throughout the region, and significant centralized control over daily operations and labor relations, the panel concluded that only a unit coextensive with the employer's south-central region would be appropriate.

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[10] 265 NLRB 659 (Chairman Van de Water and Members Fanning, Zimmerman, and Hunter)

[11] *Purolator Courier Corp*, 254 NLRB 599 (1981)

[12] 184 NLRB 602 (1970) Prior to 1973, Purolator Courier was called American Courier

d. Religious Order Member

In *Mercy Hospital of Buffalo*,[13] a Board panel, on remand from the United States Court of Appeals for the Second Circuit,[14] affirmed an administrative law judge's supplemental decision that a religious order controls a hospital and that a sister of the order working in the hospital's business office does not share a sufficient community of interest with the employees in the bargaining unit so as to warrant her inclusion in the unit.

In the original underlying representation proceeding,[15] a regional director recommended that the challenge to the sister's ballot be sustained and, consequently, that the union be certified because the sister is a member of the order which owns and administers the hospital. In adopting the regional director's recommendation, a Board panel found that the order administers the hospital because it not only has majority control of the board of trustees, but further controls the day-to-day operation of the hospital. The Board also found that the sister is, in a sense, part of her employer and that her relationship with the hospital is fundamentally different from that of the employees in the bargaining unit. Following the union's request, the hospital refused to bargain in order to seek further review before the Board of the validity of the union's certification. The Board, by granting the General Counsel's motion for summary judgment and denying the hospital's motion for reconsideration,[16] refused to reconsider the decision reached in the representation proceeding.

The court remanded the case to the Board for more extensive factfinding on whether the "Order controls the hospital" and whether the sister's terms and conditions of employment differ significantly from those of the other employees in the unit.[17] The court noted that, even if the Board concludes that the order exercises significant financial control over the hospital, it does not necessarily follow that the sister must be excluded from the unit.

On remand, a Board panel affirmed an administrative law judge's conclusion that the order controls the hospital. The judge noted, among other things, that the constitution and bylaws of the corporation ensure that the control is and will be by the order; that although the lay people on the board of directors are not required to be Catholics and two are

[13] 266 NLRB 944 (Members Jenkins, Zimmerman, and Hunter) Member Hunter, who was not a Member of the Board when the earlier decision issued, indicated that the Second Circuit remanded the case to the Board solely to decide whether "the Order controls the Hospital" and whether Sister Mary Blanche's terms and conditions of employment differ significantly from those of the other employees in the unit He therefore found it unnecessary to pass on any other issues contained in the original Board decision

[14] 668 F 2d 661 (2d Cir 1982)

[15] 250 NLRB 949 (1980) (Members Jenkins, Penello, and Truesdale)

[16] 255 NLRB 72 (1981) Member Zimmerman, who did not participate in the underlying representation proceeding, concurred in the result

[17] 668 F 2d at 664, 666

not, in fact, Catholics, they are required to adhere to the philosophy of the order which is the philosophy of the hospital corporation; that the membership of the hospital corporation consists exclusively of members of the order; and that important matters must be approved by the membership of the hospital corporation which includes no lay persons.

As for the sister whose ballot was challenged, the judge noted that the Board has held that sisters who belong to an order that operates an institution should be excluded from the bargaining unit because they do not share the same benefits and terms and conditions of employment as the lay employees. Here, the judge found, the wages, benefits, and terms and conditions of employment for the sisters employed by the hospital, including the sister at issue, are quite different from those provided lay employees. She has enjoyed certain privileges not afforded other lay employees of the business office of the hospital and, therefore, she does not share a sufficient community of interest with the employees in the bargaining unit.

2. Health Care Industry

In *St. Francis Hospital*,[18] the Board granted review of a regional director's decision and direction of election and concluded that a separate unit comprised solely of maintenance employees is appropriate for bargaining in the health care field. Referring specifically to the congressional admonition against "undue proliferation" of health care bargaining units, and acknowledging the criticism from the circuit courts on this issue, the Board stated that it would not apply only its traditional community-of-interest test to unit questions in the health care industry, but rather would engage in a two-tiered analysis of all health care unit cases.

The Board majority outlined its analysis as follows: First, the petition will be examined to determine whether the requested unit falls within one of seven broadly defined health care employee classifications: physicians, registered nurses, other professional employees, technical employees, business office clerical employees, service and maintenance employees, and skilled maintenance employees. If the requested unit coincides with one of these "potentially" appropriate units, then a community-of-interest test will be applied to determine whether the circumstances of the particular employees encompassed by the petition warrant a separate unit. Only when both of these criteria have been satisfied will the unit be granted. If, however, the petition seeks a smaller unit, not among those identified as potentially appropriate, the petition will be dismissed unless extraordinary circumstances are shown to exist. In this manner, the majority explained, the rights of employees

[18] 265 NLRB 1025 (Members Fanning, Jenkins, and Zimmerman, Chairman Van de Water and Member Hunter dissenting separately)

to effective representation within a bargaining unit reflective of their own interests will be balanced against the dangers of disruptions in services which might be caused by unit fragmentation.

The majority also pointed out that the community-of-interest test is not merely an evaluation of job characteristics shared by employees within a requested unit, but that it also necessarily includes an assessment of those characteristics which differentiate the employees in the requested unit from other employees of the employer—that is, a disparity of interests analysis is an inherent component of the overall community-of-interest test.

In his dissent Chairman Van de Water asserted that the majority has ignored congressional intent as well as a consistent line of judicial interpretation in applying its traditional unit standards to the health care industry. In his view, "in a health care institution, separate units composed of all professional employees and all nonprofessional employees are appropriate for purposes of collective bargaining." He added that "a more limited unit of either professional or nonprofessional employees may be appropriate, but only where it is clearly established that the employees in the proposed unit have a notable disparity of interests from employees in the larger unit which would prohibit or inhibit fair representation for them if they were denied separate representation."

Member Hunter echoed the Chairman's position that using a community-of-interest analysis is contrary to Congress' directive regarding unit proliferation and that a stricter, disparity of interest standard is necessary in this industry. He also criticized the majority's finding of certain "presumptively appropriate" units, stating that while the majority may identify them as only "potentially appropriate," they are at least akin to presumptions. Member Hunter expressed reluctance to apply any "presumptions" in determining appropriate units in health care settings and, in this regard, could not join the Chairman's finding that only two units are presumptively appropriate.

3. College Faculty

In *University of San Francisco*,[19] the Board was called upon for the first time to decide whether a unit of part-time faculty was appropriate. In 1971 the Board had held in *University of New Haven*,[20] that a unit of full- and part-time faculty was appropriate. That holding was subsequently overruled, however, in *New York University*[21] where the Board held that such a combined unit was inappropriate because part-time faculty did not share a sufficient community of interest with full-time faculty. This conclusion was based on the differing functions, compen-

[19] 265 NLRB 1221 (Members Fanning, Jenkins, Zimmerman, and Hunter)

[20] 190 NLRB 478 (Members Fanning, Brown, and Kennedy)

[21] 205 NLRB 4 (1973) (Members Jenkins, Kennedy, and Penello, Chairman Miller dissenting, Member Fanning dissenting in part)

sation, participation in university governance, eligibility for tenure, and working conditions of the two groups. The Board there expressly reserved decision as to whether the part-time faculty could separately form an appropriate unit. The issue was also left unresolved by the Board's *Goddard College* decision,[22] where a unit of full-time faculty was found appropriate. Because the part-time Goddard employees did not share a community of interest, the Board did not reach the issue of whether a part-time unit could be appropriate.

In *University of San Francisco*, the Board found that the part-time employees did exhibit a substantial community of interests, and, contrary to the employer, were not merely temporary employees but had a reasonable expectation of being rehired. Thus, the Board noted that "[b]eing hired on the basis of special expertise may be *consistent* with temporary status, but clearly does not establish it." Further, the part-time employees' lack of tenure was held not to establish that they were temporary employees:

> [T]here is no evidence that they are told, when hired, that the position which each is filling is a temporary one which will not exist in subsequent semesters. Instead, their contracts merely make clear that the appointment to a teaching position in one year does not establish a *right* to reappointment in successive years. Such a disclaimer of "tenure" does not, without more, demonstrate temporary status. The key question which remains unanswered is whether, apart from the fact that the Employer is not obligated to reappoint such employees, it, in fact, does so. The Employer made no effort to prove that part-time lecturers are not, in fact, offered reappointment. On this record, therefore, there is no showing that the part-time faculty are temporary employees. [265 NLRB at 1223.]

Finding that two distinct groups of part-time faculty shared a community of interests among themselves based on commonalities in their hiring, compensation, functions, locations, hours, and contacts with one another, the Board found appropriate a unit of part-time lecturers at the university's main campus, and another unit of part-time faculty who worked at various sites throughout the state in the employer's College of Professional Studies.

In *Lewis University*,[23] the Board majority found that the faculty members of the College of Arts and Sciences were not managerial employees and therefore a unit comprised of these individuals was appropriate for the purposes of collective bargaining within the meaning of section 9(b). The majority noted that faculty members "did exercise independent

[22] 216 NLRB 457 (1975) (Members Jenkins, Kennedy, and Penello)

[23] 265 NLRB 1239 (Members Fanning, Jenkins, and Zimmerman, Chairman Van de Water and Member Hunter dissenting separately)

judgment in the routine discharge of their professional duties" but did not "effectively formulate and effectuate the policies of the employer." In so doing, the majority relied on the fact that the employer's established policies provide little discretion to faculty members in performing their jobs. The faculty members, therefore, routinely discharge their duties relying on professional expertise. Additionally, the majority relied on the employer's decisive authority to formulate and effectuate management policy as evidenced by the governing collective-bargaining agreement and the testimony of the university's president.

In dissenting, Chairman Van de Water concluded that the faculty members were managerial employees because they possessed substantial authority beyond strictly academic spheres in areas such as the hiring of new faculty and the promotion and tenure of existing faculty. Member Hunter, in a separate dissent, agreed with Chairman Van de Water's position that the faculty members were managerial employees.

4. Multi-Craft Unit

In *Atlanta Div. of S. J. Groves & Sons Co.*,[24] a Board panel concluded that a construction industry unit of employees which included four craft groups—carpenters, concrete finishers, laborers, and power equipment operators—but excluded other craft groups was not appropriate for collective-bargaining purposes. The employer was engaged in highway construction projects and employed various craft employees. There were three stages to these projects. Evidence indicated that all classifications of employees worked together on integrated crews during these stages. All employees were paid on an hourly basis; received the same benefits; and shared other common terms and conditions of employment.

The regional director concluded that, because the four groups of employees sought to be represented by the joint petitioner were in distinct craft groups and possessed common interests distinguishable from those of other employees, they constituted an appropriate unit. The Board panel reversed the regional director. In the construction industry, the Board has found a separate unit of craft employees to be appropriate, and it has also found appropriate a unit that constitutes a clearly identifiable and functionally distinct group of employees. The panel concluded that the petitioned-for unit did not meet these standards. The panel noted that excluded craft groups of employees such as bricklayers and ironworkers worked alongside employees in the four craft groups sought by the joint petitioner. The panel stated that this four-craft group was neither a traditional craft unit, a departmental unit, nor a functional unit. The panel concluded that, since other craft or functional groups were being excluded from the unit, the arbitrary grouping

[24] 267 NLRB 175 (Chairman Dotson and Members Zimmerman and Hunter)

of the petitioned-for craft employees did not constitute an appropriate unit.

D. Conduct of Election

Section 9(c)(1) of the Act provides that, where a question concerning representation is found to exist pursuant to the filing of a petition, the Board shall resolve it through a secret-ballot election. The election details are left to the Board. Such matters as voting eligibility, timing of elections, and standards of election conduct are subject to rules laid down by the Board in its Rules and Regulations and in its decisions. Elections are conducted in accordance with strict standards designed to ensure that the participating employees have an opportunity to register a free and untrammeled choice in the selection of a bargaining representative. Any party to an election who believes that the standards have not been met may file timely objections to the election with the regional director under whose supervision it was held. The regional director may either make an administrative investigation of the objections or hold a formal hearing to develop a record as the basis for a decision, as the situation warrants. If the election was held pursuant to a consent election agreement authorizing a determination by the regional director, he will then issue a final decision.[25] If the election was held pursuant to a consent agreement authorizing a determination by the Board, the regional director will issue a report on objections which is subject to exceptions by the parties and to decision by the Board.[26] However, if the election was originally directed by the Board,[27] the regional director may either (1) make a report on the objections, subject to exceptions, with the decision to be made by the Board, or (2) issue a decision, which is then subject to limited review by the Board.[28]

1. Norris-Thermador Eligibility List

The eligibility of an employee to vote in a representation election may be challenged by the union, the employer, or the supervising Board agent. If the ballots cast by challenged voters would affect the result of the election, the Board will review the eligibility of these voters and, as appropriate, either count or reject their votes. If the parties adopt a *Norris-Thermador* eligibility list, however, the Board under most circumstances will not review the eligibility of those voters whose names appear on the list.

[25] Rules and Regulations, sec 102 62(a)
[26] Rules and Regulations, sec 102 62 (b) and (c)
[27] Rules and Regulations, secs 102 62 and 102 67
[28] Rules and Regulations, sec 102 69 (c) and (a)

In *Norris-Thermador Corp.*,[29] the Board stated that when "the parties enter into a *written and signed* agreement which *expressly* provides that issues of eligibility resolved therein shall be final and binding upon the parties, the Board will consider such an agreement, and only such an agreement, a final determination of the eligibility issues treated therein unless it is, in part or in whole, contrary to the Act or established Board policy." In other words, a preelection stipulation as to voter eligibility is binding on the parties unless the agreement incorporating the stipulation contravenes the Act or Board policy. In *Clear Lam Packaging, Inc.*,[30] decided during the report year, a panel majority identified such a nonbinding agreement.

In *Clear Lam*, the employer and the union agreed to conduct a consent election and, in furtherance thereof, adopted a *Norris-Thermador* list of eligible voters. Following the election, the union challenged the ballots of five voters on the ground that the voters were statutory supervisors and therefore ineligible. The Board panel addressed the issue whether the union was bound by its preelection stipulation as to voter eligibility.

Chairman Van de Water and Member Jenkins reasoned that the case fell within the specific exception to the *Norris-Thermador* rule in that "it would contravene the Act and established Board policy to accord finality to the parties' stipulation because the challenged voters' ballots were challenged on the ground of their statutory supervisory status." (Id. at 701 fn. 1.) Therefore, the panel majority concluded, the *Norris-Thermador* list was not dispositive as to eligibility issues. Reviewing the eligibility of the challenged voters, the panel majority found that four of the five voters were in fact statutory supervisors whose ballots should not be opened and counted.

Adhering to his previously drawn distinction,[31] Member Jenkins predicated his willingness to review the eligibility of the challenged voters on the fact that the *Norris-Thermador* list appeared to incorporate a stipulation going to the ultimate legal question of "eligibility to vote" rather than a "factual stipulation" as to the employees' duties and authorities.

Member Hunter, dissenting, would have accorded binding legal effect to the *Norris-Thermador* list. He maintained that "[a] stipulation is a stipulation; the parties knowingly entered into this agreement of their own accord and should be given credit for having determined whether the voters fell within the statutory supervisory standard when they determined which employees were eligible to vote." To permit the union to disregard its stipulation, he argued, "strikes at the very heart of the consent election system and seems to sanction the parties' ability to manipulate the system to fit their particular needs." Furthermore, he

[29] 119 NLRB 1301, 1302 (1958)

[30] 265 NLRB 701 (Chairman Van de Water and Member Jenkins, Member Hunter dissenting in relevant part)

[31] See *Judd Valve Co* , 248 NLRB 112 (1980) (Member Jenkins concurring)

rejected the distinction drawn by Member Jenkins between agreements incorporating factual stipulations and agreements addressing the ultimate legal question of eligibility to vote. Member Hunter maintained that "both forms of agreement concern the same ultimate fact—the lack of supervisory indicia" and therefore should not be construed as differing in intent or effect.

2. Mismarked Ballot

Section 9(c)(1) of the Act prescribes that Board elections shall be conducted by secret ballot. Because employees vote secretly, the Board cannot identify particular voters for the purpose of determining the intended meaning of marks made on their ballots. Consequently, problems arise in tallying the results of a representation election when employees mismark their ballots or mark their ballots ambiguously.

The Board in *Columbus Nursing Home*[32] established a policy of invalidating ballots marked only on the back. The Board reasoned that "any conclusion drawn about the voter's intent . . . must be almost entirely speculative." The Board abandoned this rule in *Hydro Conduit Corp.*,[33] reasoning that it was inconsistent to consider an irregular expression of voter intent appearing on the front of a ballot while invalidating an expression of voter intent clearly manifested on the back. Therefore, the Board majority stated, "we will hereafter count any unambiguous expression of voter intent as expressed on the ballot." The Board applied this policy in *Celotex Corp.*,[34] decided during the report year.

In voiding a ballot with no markings on its face but with the word "no" written on its back, the hearing officer, in accordance with *Columbus Nursing Home*, reasoned that any conclusion as to the voter's intent would be speculative. Reversing the hearing officer's decision, Members Zimmerman and Hunter found that the voter clearly expressed his intent by writing "no" on the back of the ballot. Pursuant to the policy announced in *Hydro Conduit Corp.*, the panel majority directed that the ballot be counted as a vote against the union.

Adhering to his dissenting opinion in *Hydro Conduit*, Member Jenkins would adopt the hearing officer's recommendation to sustain the objection to the ballot.

3. Site of Election

The Board has the authority to designate the site of a representation election under the broad remedial powers contained in section 10(c) of the Act and the Board's administrative powers to conduct elections under section 9(c)(1)(A) of the Act. The Board's longstanding practice

[32] 188 NLRB 825 (1971)
[33] 260 NLRB 1352 (1982)
[34] 266 NLRB 802 (Members Zimmerman and Hunter, Member Jenkins dissenting)

has been that, as a general rule, the selection of the time and place of elections is better left to the discretion of the regional director.

In *Halliburton Services*,[35] a Board panel rejected the union's contention that the employer's premises were not a suitable place for conducting a second election in view of various unfair labor practices and objectionable conduct earlier engaged in by the employer. The panel reemphasized the administrative necessity of leaving the selection of the time and place of elections to the discretion of the regional director. Quoting from *Manchester Knitted Fashions*,[36] the panel observed that: "Those factors which determine where an election may best be held are peculiarly within the Regional Director's knowledge. His close view of the election scene, including the many imponderables which are seldom reflected in a record, is essential to a fair determination of this issue."

The panel found it "unnecessary and unwise" to deviate from its current standards or practices and to direct that a second election be held off company premises.

E. Objections to Conduct Affecting the Election

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

1. Objections Based Upon Hearsay

In *Holladay Corp.*,[37] a Board panel ruled that a regional director may not dismiss election objections solely because they rest on hearsay evidence.

In an affidavit supporting the employer's objections, the Holladay Corporation's vice president stated that two named employees told him that the union's business agent, during a preelection meeting, promised to waive initiation fees for those employees who supported the organization campaign and also promised that he would promote the union's supporters to higher paying jobs in the event that the union failed to

[35] 265 NLRB 1154 (Members Fanning, Jenkins, and Zimmerman)
[36] 108 NLRB 1366 (1954)
[37] 266 NLRB 621 (Members Jenkins, Zimmerman, and Hunter)

sign a contract with the employer. The regional director concluded that this evidence constituted hearsay which, standing alone, could not be relied upon to sustain the employer's objections.

Contrary to the regional director, the panel found that the employer presented sufficient information to warrant a full investigation. The panel pointed out that the employer alleged with specificity the substance of the objectionable statements and the date on which the union representative allegedly made such statements. More critically, in the panel's view, the employer also identified the two individuals who allegedly received improper inducements to support the union. Under these circumstances, the panel concluded, the regional director should have made an effort to interview these individuals in order to ascertain the merits of the employer's objections.

Noting that a party does not possess any subpoena power during the investigatory stage of a representation proceeding, the panel stated that the employer could have substantiated its vice president's allegations only with the voluntary cooperation of the two employees who heard the objectionable statements. Citing *Eds-Idab, Inc. v. NLRB*,[38] the panel observed that such voluntary cooperation often will be difficult or impossible to obtain because employees may be fearful of alienating their union. Accordingly, the panel excused the employer's failure to fully substantiate its election objections.

"[W]hen an objecting party has specifically identified witnesses to corroborate hearsay evidence that supports its objections," the panel concluded, "such objections may not be overruled by the Regional Director solely on the basis that the objecting party failed to produce such witnesses or their affidavits." The panel remanded the objections for a full investigation or hearing as the regional director might find necessary.

In contrast, a Board panel in *National Duct Corp.*[39] found that allegations based on unsubstantiated hearsay did not warrant an evidentiary hearing. There, the employer claimed that George Quist, co-chairman of an employee organizing committee, threatened to break the hands of Fred Perkins unless that individual voted in favor of the union. To support its allegation, the employer presented Perkins' affidavit, wherein Perkins stated that "other employees" informed him of the threat. The panel noted that Perkins did not hear Quist's alleged remarks; Perkins did not specify the individuals who allegedly heard the alleged remarks; and the employer made no attempt to ascertain the identity of these individuals in order to obtain affidavits from them.

2. Preelection Conduct: Threats, Promises, and Misrepresentations

Electioneering is permissible under the National Labor Relations Act.

[38] 666 F 2d 971, 975 (5th Cir 1982)

[39] 265 NLRB 413 (Members Fanning, Jenkins, and Zimmerman)

However, the Board may invalidate the result of a representation election if the campaign tactics adopted by a party tend to exert a coercive impact. In other words, the employer or the union may attempt to influence the votes of the employees; they may not, however, attempt to coerce the voters so as to deprive them of freedom of choice.

During an election campaign, the employer or the union might employ many forms of conduct in an attempt to influence the votes of the employees. In some election campaigns, the parties threaten the employees with reprisals; cajole them with the promise of benefits; or solicit their support through misrepresentations of law or fact. In several significant cases decided during the report year, the Board considered allegations involving each of these types of preelection conduct.

The Board evaluates the permissibility of electioneering tactics, including threats, in terms of whether the conduct tended to prevent free employee expression. In *Hickory Springs Co.*,[40] a Board majority stated that general threats of violence, directed toward contingent, future events rather than toward the result of the election, would be unlikely to exert an immediate coercive impact. Therefore, the majority concluded, such threats do not constitute grounds for setting the election aside.

The Board overruled *Hickory Springs* during the report year. In *Home & Industrial Disposal Service*,[41] a Board majority stated that it would be "unrealistic to conclude that a union agent's threats of bodily harm, damage to personal property, or the like, cannot, as a matter of law, impact on an election merely because the threat in question is couched in terms of possible future conduct." In the majority's view, "[a] campaign environment in which a union threatens that violent repercussions will ensue, should employees choose to oppose it in the future, is one in which there is substantial likelihood that employees will be inhibited from expressing their actual views, and is surely one which jeopardizes the integrity of the election process." Returning to the approach espoused in *Provincial House, Inc.*,[42] the Board ordered that a hearing be conducted to determine whether the union, during the election campaign, threatened employees with violent repercussions should they ever refuse to cooperate with the union during a strike.

Dissenting, Member Jenkins stated that he could not "equate rhetoric directed toward a union's ability to prevent strike-breaking, in the event of an election victory and a subsequent strike, with threats aimed at securing an election victory in the first place." He maintained that the former constitutes "blustering campaign talk" that employees readily may distinguish from present threats to personal safety. Moreover, he observed, employees who genuinely feel threatened by "a union's claim

[40] 239 NLRB 641 (1978), affd 247 NLRB 1208 (1980), enf denied 645 F 2d 506 (5th Cir 1981)
[41] 266 NLRB 100 (Chairman Miller and Members Zimmerman and Hunter, Member Jenkins dissenting)
[42] 209 NLRB 215 (1974)

to violent propensities during strikes would avoid the risk by voting against the union in the anonymity of the Board's secret-ballot election." Member Jenkins concluded that the coercive impact of the union's statements was "tenuous" and "conjectural" and he would not set aside the election on such a basis.

In *National Duct Corp.*,[43] a Board panel held that the employer failed to meet its burden of presenting a prima facie case of objectionable election interference. The panel found that, accepting as true the facts most favorable to the employer, the employer's affidavits in support of its objections contained no direct evidence that the union threatened employees with bodily harm or made objectionable promises to employees. Specifically, the panel found nothing objectionable in the union representative's statement to an employee that if he did not "play the game" the representative's way, he would not "play at all" followed by a statement that the employee should go ahead and vote "no" because his vote was not needed. Further, it found that an employee's statement in his affidavit that he had found out that one of the co-chairmen of the employee organizing committee had threatened to break both [his] hands, but would "spare [him] if [he] voted yes" was insufficient to establish a prima facie case of objectionable conduct since the employee involved did not hear the remark nor identify the individual who related the alleged threat to him. Nor did the employer attempt to ascertain the identity of any individual who heard the threat or present any justification to the acting regional director or the Board of why such evidence could not be reasonably obtained by it. Further, the panel found the union representative's statements relating to employees obtaining "A cards" if they supported the union were not objectionable.

In *Town & Country Cadillac, Inc.*,[44] a Board panel considered the employer's objection that the union had interfered with the election by an improper offer to reduce initiation fees in violation of the principles established in *NLRB v. Savair Mfg. Co.*[45] Contrary to the regional director's recommendation that the objection be overruled, the panel found that material and substantial issues had been raised concerning the contents of the initiation fee offer and directed a hearing. According to the union's representative, the offer was for a reduced initiation fee remaining open to all employees in the bargaining unit until a collective-bargaining agreement was reached with the employer. In its exceptions, the employer attached an employee affidavit where the employee states that at a union meeting a representative of the union told the employees "if our shop were already a union shop, it would cost one hundred and some dollars to join, but since it's not yet, the initiation fee would be $25.00." The panel found these affidavits inconsistent on the material

[43] 265 NLRB 413 (Members Fanning, Jenkins, and Zimmerman)
[44] 267 NLRB 172 (Chairman Dotson and Members Jenkins and Hunter)
[45] 414 U S 270 (1973)

point of whether the union representative clarified that the offer to reduce initiation fees was not linked with a showing of preelection support and, on that basis, directed a hearing.

Doral Building Services[46] also involved an allegation that a union agent delivered an impermissible promise. The employer produced evidence that Guillermo Gonzalez, an election observer, offered to pay $20 to whomever voted for the union. On this basis, the employer refused to bargain with the union despite its victory in the representation election. The union charged that the employer thereby violated section 8(a)(1) and (5) of the Act.

The administrative law judge found that Gonzalez did not act as a union agent. Although he supported the union and served as an observer, the judge noted, Gonzalez had no particular prominence in the union's campaign. Furthermore, the union's vice president testified that he did not authorize Gonzalez to make an offer of money; the union did not supply Gonzalez with money; and Gonzalez held no permanent position with the union. Accordingly, the judge held that Gonzalez' conduct was not attributable to the union.

Relying on testimony that Gonzalez acted in a joking manner, the judge also found that his conduct did not create a general atmosphere of coercion.

Finally, the judge considered the *Milchem* rule[47] prohibiting electioneering at or near the polling place. For guidance in applying the rule, the judge referred to *Boston Insulated Wire Co.*,[48] wherein the Board acknowledged that "it is unrealistic to expect parties or employees to refrain totally from any and all types of electioneering in the vicinity of the polls." The Board in *Boston Insulated Wire* listed factors by which to determine whether electioneering in a particular case interfered with the free choice of the voters. Applying these factors to the case at hand, the judge found that the promise made by Gonzalez did not violate the *Milchem* rule because: "(1) the offer made by Gonzalez to the employees was made in a joking manner; (2) there was no prolonged conversation, but instead a brief statement; (3) Gonzalez was not an agent of the Union, and thus this was not a statement made by a party to the election; and (4) the statement was made 5 to 10 minutes prior to the start of the election and in a room which was not the polling area."

Affirming the judge's decision, the Board ruled that the employer unlawfully refused to bargain with the union.

Threats and promises are blunt, obvious weapons of persuasion. More subtle forms of influence also exist. For example, an employer or a union might attempt to sway the votes of the employees through decep-

[46] 266 NLRB 1215 (Chairman Dotson and Members Jenkins and Zimmerman)
[47] See *Milchem, Inc*, 170 NLRB 362 (1968)
[48] 259 NLRB 1118 (1982)

tive campaign propaganda. In recent years, the Board has developed distinct rules applicable to such indirect forms of election interference.

In *Shopping Kart Food Market*,[49] the Board stated that it will not probe into the truth or falsity of the parties' campaign statements. The Board recently returned to this rule in *Midland Life Insurance Co.*[50] and *Riveredge Hospital*.[51] In those cases, the Board distinguished between the substance of campaign statements and the manner of presentation adopted by the parties. The Board announced, in essence, that it will not set aside an election in the face of campaign misrepresentations unless a party uses forged documents or another deceptive manner of presentation which renders the employees unable to evaluate the propaganda for what it is.

Shopping Kart and *Midland Life* involved misrepresentations of fact. In *Metropolitan Life Insurance Co.*,[52] decided during the report year, a Board panel majority found that the policy considerations and rationale underlying the *Shopping Kart* rule applied with equal force to cases involving misrepresentations of law.

In *Metropolitan Life*, a representative of the employer announced that the union, if successful in its bid to represent the employees, could fine uncooperative employees during a strike, even if they were not union members. The panel majority acknowledged that the statement was a misrepresentation of law. As the presentation of the statement, however, did not involve forged documents or any other manner of deception, the majority concluded "that the employees readily could evaluate [the employer's] statements for what they were—propaganda." Accordingly, the majority overruled the union's election objection.

Member Jenkins, in accordance with his dissent in *Midland Life*, disagreed with the majority's decision to resurrect the *Shopping Kart* rule. Moreover, even if he were to accept that rule, he would not make the "quantum leap" of applying the rule to cases involving legal misrepresentations. "Rank-and-file employees, unschooled in the intricacies of Federal labor laws," he argued, "cannot be assumed to recognize the falsity of statements purporting to be recitations of applicable law."

Addressing the dissenting opinion, the majority asserted that misrepresentations of any kind typically involve matters about which the employees have little or no knowledge. In the majority's view, "[t]he crucial point remains that the employees know that an election campaign is underway and . . . are sufficiently mature to take the parties' statements as campaign propaganda which may be true or false or somewhere in between." Member Jenkins characterized such reasoning as a "hear-no-evil, see-no-evil" approach, which inevitably will "invite chica-

[49] 228 NLRB 1311 (1977)
[50] 263 NLRB 127 (1982)
[51] 264 NLRB 1094 (1982)
[52] 266 NLRB 507 (Members Zimmerman and Hunter, Member Jenkins dissenting)

nery to take a rightful place in election campaign propaganda." He predicted that the majority's holding will impair the employees' ability to make an informed decision: "Absent reasonable regulation of campaign propaganda to prevent outright lies concerning material provisions of law, I fear that only the employees will suffer while each party attempts to gain some small advantage by making wildly inaccurate statements of law concerning whichever subjects are of greatest import to the electorate. In my view, only by sheerest happenstance could any election held under such conditions reflect the true desires of a majority of employees."

3. Postelection Events

In *Central Distributors*,[53] the Board affirmed its longstanding policy of refusing to consider postelection events in evaluating alleged objectionable conduct. A Board panel reconsidered an earlier decision in this case[54] deciding that its original position was inconsistent with Board law.

In the underlying representation case the employer sought to have the election rerun when a truckdriver was disenfranchised by a delay in the normal course of his duties. During the time the objections were being investigated, the truckdriver died. The regional director acknowledged that the disenfranchisement of a voter would normally require an election to be rerun but, since this particular voter could not vote in the second election, the regional director recommended that the election results stand and a certificate of representative issue. The Board originally adopted this decision without comment. In its subsequent decision, however, the Board panel set aside the election finding that the regional director had erroneously focused on the identity of the disenfranchised voter. The Board's purpose in setting aside an improperly run election and ordering a new one is to give all currently employed unit members an opportunity to vote. A change in identity of the eligible voters does not alter the fact that the original election results could not stand because a voter had been improperly disenfranchised.

4. Scope of Record on Review

The Board's Rules and Regulations limit the evidence which the Board may consider in reviewing a regional director's resolution of election objections. In cases where no hearing is held, section 102.69(g)(1)(ii) specifies that the record on review consists of the filed objections, the regional director's report or decision, all documentary evidence relied on by the regional director except statements of witnesses, any motions, rulings, or orders issued by the regional director, and any briefs submit-

[53] 266 NLRB 1021 (Members Jenkins, Zimmerman, and Hunter)
[54] 263 NLRB 1106 (1982)

ted by the parties. The Board excludes the statements of witnesses in accordance with its policy of protecting investigatory affidavits from disclosure when witnesses have not testified at a hearing. As the Supreme Court recognized in *NLRB v. Robbins Tire & Rubber Co.*,[55] the Board must maintain a policy of confidentiality in this regard in order to prevent the chilling effect which inevitably would follow if the Board disclosed the contents of investigatory affidavits. However, if a party wishes the Board to consider any documentary evidence, including affidavits, which the regional director declines to attach to his report or decision, section 102.69(g)(3) provides that such evidence may be appended to the party's exceptions. Once appended, the evidence becomes part of the record on review and is fully considered by the Board.

In *Frontier Hotel*,[56] the full Board reviewed the propriety of these provisions. Such a review became necessary when the employer, contending that the regional director's report provided the Board with an inadequate record for review, sought a de novo review of the full investigative file.

The Board stated that the objecting party carries the burden of demonstrating that its investigative evidence, if credited, would warrant setting aside the election. "In the absence of such a demonstration," the Board explained, "we are entitled to rely on the regional director's report or decision, for the material facts in such circumstances are undisputed." Thus, the Board concluded, the limitations imposed by its Rules and Regulations upon the scope of review do not deprive the objecting party of due process as such limitations merely reflect the objecting party's proper burden of proof.

The Board found further support for a limited scope of review in the policy of expeditiously resolving questions concerning representation. "Since our rules require a hearing only in cases in which material facts are in dispute," the Board stated, "hearings in all other cases would waste time, money, and effort for all concerned, while unduly delaying resolution of the question concerning representation and unjustifiably denying unit employees their right to have their election choice implemented through the appropriate certification." Accordingly, the Board affirmed the propriety of its Rules and Regulations in restricting the scope of the record on review.

In the particular case before it, the Board found that the employer presented insufficient evidence to establish a prima facie case of objectionable election interference. An evidentiary hearing was not warranted, the Board ruled, in light of the employer's failure to raise substantial or material issues of fact.

[55] 437 U S 214 (1978)

[56] 265 NLRB 343 (Chairman Van de Water and Members Fanning, Jenkins, Zimmerman, and Hunter)

F. State Regulation of Deauthorization Matters

Section 14(b) of the National Labor Relations Act provides that "[n]othing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." In other words, a state under section 14(b) may prohibit the execution of union-security agreements. Problems arise, however, when state legislation enacted pursuant to section 14(b) conflicts with Board guidelines in other areas. In *City Markets*,[57] the Board resolved such a conflict.

The union and the employer, pursuant to a Colorado statute, included a union-security provision in their collective-bargaining contract. Under Colorado law, a petition to rescind the union-shop authorization must be filed "between one hundred twenty and one hundred five days prior to the expiration of the collective bargaining agreement . . . ." Bypassing this provision, an employee petitioned the Board to conduct a deauthorization election pursuant to section 9(e)(1) of the National Labor Relations Act. The regional director determined that the petition should be granted.

Reversing the regional director's decision, the Board dismissed the petition as inappropriately filed in the wrong forum. Citing Chairman Fanning's concurrence in *Asamera Oil (U.S.) Inc.*,[58] the Board stated that "the exercise by Colorado of its Section 14(b) power to enact legislation on union security requires the Board to 'leave the Petitioner to the forum that gave it the right to vote on union security in the first instance.' "

In *Asamera Oil*, Chairman Fanning reasoned that Colorado's time limitations on union-shop deauthorization petitions, although exceeding the limitations established by the Board, were part and parcel of the regulatory scheme enacted by Colorado pursuant to section 14(b). As the Colorado limitations did not attempt to negate Federal policy authorizing challenges to union security, but merely prescribed a different time period within which such challenges could be asserted, Chairman Fanning concluded that the Colorado limitations "do not involve a subject matter which rises to the level of a Federal labor policy" and therefore should not be disturbed.

Member Jenkins dissented without comment.

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[57] 266 NLRB 1020 (Chairman Dotson and Members Zimmerman and Hunter, Member Jenkins dissenting)
[58] 251 NLRB 684 (1980)

V

Unfair Labor Practice Proceedings

A. Employer Interference With Employee Rights

Section 8(a)(1) of the Act forbids an employer "to interfere with, restrain, or coerce" employees in the exercise of their rights as guaranteed by section 7 to engage in or refrain from engaging in collective-bargaining and self-organizational activities. Violations of this general prohibition may be a derivative or byproduct of any of the types of conduct specifically identified in paragraphs (2) through (5) of section 8(a),[1] or may consist of any other employer conduct which independently tends to interfere with, restrain, or coerce employees in exercising their statutory rights. This section treats only decisions involving activities which constitute such independent violations of section 8(a)(1).

1. Representation by Stewards at Interviews

Section 9(a) of the Act, which provides for exclusive representation of employees in an appropriate bargaining unit, contains the following proviso: "*Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment."

In two cases during the 1975 report year—*Weingarten* and *Quality*[2] —the Supreme Court upheld the Board's determination that section 7 of the Act gives an employee the right to insist on the presence of his union representative at an investigatory interview which he reasonably believes will result in disciplinary action. The Court concluded that the Board's holding "is a permissible construction of 'concerted activities for . . .

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

[2] *NLRB v J Weingarten*, 420 U S 251, *Ladies Garment Workers v Quality Mfg Co*, 420 U S 276

mutual aid or protection' by the agency charged by Congress with enforcement of the Act . . . ."[3]

During the report year, the Board had occasion to apply the principles set forth in *Weingarten* and *Quality*.

In *Northwest Engineering Co.*,[4] the full Board further defined the type of interview at which *Weingarten* rights attach. One day after two employees were interviewed concerning damage to a wall and were read the company's rules and regulations, they and other employees were summoned to a meeting. One of the employees involved in the damage asked what the meeting would be about and requested a union steward. The company foreman responded that a steward would not be needed and instructed the employee to "just shut up and sit down." The foreman then distributed copies of the rules and regulations and began reading them. On reaching a rule dealing with willful hampering of production, the foreman accused the employee of being "guilty of this one." A heated discussion followed, during which the employee used abusive language. Next day, the employee was suspended for his use of abusive language.

The Board majority stated that there was no evidence that the purpose of the meeting was investigatory, finding instead that it was a general shop meeting held by the employer to express concern about the attitude of the employees toward their jobs. The majority stated:

> *Weingarten* rights do not arise simply because an employer calls a meeting of its employees to discuss a perceived problem in the way its employees are carrying out their duties. Work performance is a matter of legitimate concern to an employer. An employer surely retains the prerogative of calling a meeting of a group of employees, at which no disciplinary actions are contemplated or taken, simply to advise them of the employer's valid work performance expectations and to inform them of the possible consequences of noncompliance, without invoking the spectre of *Weingarten*.

The majority noted that, even if the meeting had served as a forum for singling out the employee, that would not alter the character of the meeting. "Absent evidence that discipline would follow," the majority observed, "[the employee's] being used as an example of an employee

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[3] *Weingarten*, supra at 260 In that case, the Supreme Court found that the right to union representation inheres in the sec 7 right to act in concert for mutual aid and protection, arises only in situations where the employee requests representation, applies only to situations where the employee reasonably believes the investigation will result in disciplinary action, may not be exercised in a manner which interferes with legitimate employer prerogatives and the employer need not justify its refusal, but may present the employee with a choice between having the interview without representation or having no interview, and imposes no duty on the employer to bargain with any union representative attending the investigatory interview

[4] 265 NLRB 190 (Chairman Van de Water and Members Fanning and Zimmerman, Members Jenkins and Hunter dissenting)

engaging in a rule infraction, while perhaps embarrassing to [the employee] and even unfair, is not enough to make *Weingarten* applicable." The Board termed it "immaterial" that the employer might have foreseen that the employee would attempt to defend himself, stating that the "exchange of accusations and denials, or the interchange of viewpoints, claims, and counterclaims, does not determine whether a *Weingarten* right exists at such a meeting; what is determinative is whether discipline reasonably can be expected to follow." The majority found that the facts here did not show that disciplinary action from the meeting was a reasonable likelihood, and dismissed the complaint.

Members Jenkins and Hunter, dissenting, found that in light of the two employees' being questioned the day before, the two had reasonable cause to fear that discipline might result when summoned to the meeting. The dissenters observed that had the meeting been limited to a reading and discussion of the employer's rules and regulations, *Weingarten* would not apply. But they found that the meeting was not so limited; rather, it was called to specify infractions of those rules and the foreman directly accused the employee of having violated several rules. Members Jenkins and Hunter asserted that such accusations of misconduct were sufficient to give rise to a right to representation under *Weingarten*. In their view, the employee was required to defend his conduct; otherwise, his silence could have been construed as an admission of guilt. In these circumstances, Members Jenkins and Hunter would have found that the meeting was an "interview," that the employee reasonably feared that discipline could result and, therefore, that the employee was entitled to the presence of his union steward. Since the employer denied the request but continued to hold the interview, and the employee was disciplined as a result of that interview, the dissenters would have found that the employer violated section 8(a)(1) of the Act.

In *Bridgeport Hospital*[5] a Board majority found that the employer did not violate section 8(a)(3) and (1) of the Act when it disciplined three employees for walking out of a meeting, which they were assured was not a disciplinary investigation, solely in protest of the employer's denial of their request that a union representative be present. The majority found that the walkout, while concerted, was not protected because it was not a protest over the employees' terms and conditions of employment. The majority found that, since the employees were not entitled to the presence of a union representative under *Weingarten*, it was their duty to remain as requested by their supervisor and hear his discussion of a matter of legitimate concern to the employer, and that by refusing to do so they gave the employer grounds for regarding them insubordinate. Members Fanning and Jenkins, dissenting, identified the issue in

[5] 265 NLRB 421 (Chairman Van de Water and Members Zimmerman and Hunter, Members Fanning and Jenkins dissenting)

this case as "whether the employees' protest was protected *notwithstanding the fact that the subject of their protest was Respondent's lawful action.*" The dissenters stated that the appropriate starting point for analysis is "not with the lawfulness of the subject of the protest, nor with the employees' 'entitlement' to that which they seek, but rather with Section 7 of the Act which provides, *inter alia*, that '[e]mployees shall have the right . . . to engage in concerted activities for . . . mutual aid or protection.' " The dissenters found the conduct to be for mutual aid and protection since the subject of the protest, i.e., "Respondent's *holding of the meeting* [to criticize the employees' job performance] without acceding to [the employees'] request that their union representative be allowed to attend," bears a relationship to the employees' interests as employees.

2. Limitations on Union Solicitation

The Board has long held that restrictions on employee solicitation, or distribution of literature, in nonwork areas when employees are not actually working are presumptively invalid. The Board also presumes that a rule limiting solicitation during the time an employee is working is for the maintenance of production and discipline and is valid, even though it is a restriction on section 7 rights. If a rule is ambiguously phrased so that it may be interpreted as prohibiting legitimate activity, it is invalid.

In two cases issuing this report year, the Board dealt with the question of whether a no-solicitation rule is invalid because it makes an exception for worthy causes such as the United Appeal.

In *Saint Vincent's Hospital*,[6] the Board found, contrary to an administrative law judge, that the employer violated section 8(a)(1) of the Act by discriminatorily enforcing its no-solicitation and no-distribution rule, and violated section 8(a)(3) and (1) by reprimanding and discharging one employee and reprimanding another for engaging in union solicitation. It found that the employer enforced its rule against the two union activists while permitting other employees to solicit for flower funds, raffles, parties, Avon products, candy, weddings, a fund for a sick employee, and the United Appeal charity. The Board found that the employer's tolerance of this nonunion solicitation constituted "substantial evidence of discrimination and demonstrate[d] that Respondent had no interest in enforcing its rule until its employees began to engage in union activities."

The Board also stated that it would reach the same result even if it considered only the evidence of discrimination arising after the date on which the employer "clarified" its rule.[7] After that date, the employer

[6] 265 NLRB 38 (Members Fanning, Jenkins, and Zimmerman)

[7] The Board found that the employer "clarified" its rule after the onset of union activity, and that the clarification "merely marked the point at which [the employer] began to strictly enforce its rule as a response" to that activity The administrative law judge had considered only the evidence of discriminatory enforcement arising after that date

enforced its rule against the two union activists, but permitted solicitation for the United Appeal charity in addition to three other instances of nonunion solicitation. The Board noted that the administrative law judge, whom the Board reversed, apparently did not consider the employer's tolerance of United Appeal solicitation to be evidence of discriminatory enforcement. The Board observed that it "has never granted a blanket exemption to all charitable solicitation," even though it has found that an employer's tolerance of "isolated" beneficent solicitation does not itself constitute sufficient evidence of discriminatory enforcement.[8] The Board concluded that nonunion solicitation tolerated by the employer cannot be dismissed as "isolated," since the United Appeal solicitations persisted over a period of several months, and since one of the other three instances continued over a significant amount of time.

In *Hammary Mfg. Corp.*,[9] the full Board reconsidered a 1981 panel decision[10] which had found that an employer's no-solicitation rule violated section 8(a)(1) of the Act. The rule prohibited solicitations, including union solicitation, on company property but allowed as "the sole exception" an annual campaign for the United Way. In the 1981 decision, the panel had found in part that the exception for the United Way campaign amounted to a disparate application which rendered the rule invalid. On reconsideration, the Board majority modified its ruling. It concluded that the level and nature of solicitations allowed as exceptions to a no-solicitation rule are to be considered in evaluating its validity, but that no per se standard should apply such that any exception to the rule would render it invalid. Accordingly, the Board modified its basis for holding that the employer restricted union solicitation in a discriminatory manner and relied solely on additional evidence that the employer had permitted solicitations for various other purposes in addition to the United Way campaign.

Member Fanning, concurring, found it unnecessary to determine whether the United Way exception was per se lawful or unlawful, noting that the facial validity of the rule was not attacked in the complaint.

In dissent, Member Jenkins reaffirmed his view that the United Way exception was an unlawful, disparate application of the no-solicitation rule. In his view the Act grants employees a statutory right to engage in union solicitation at their place of work limited only by an employer's legitimate interest in maintaining productivity and plant discipline. He found that United Way solicitation was comparable to union solicitation and the employer's provision for only the former amounted to a disparate standard against union activity not justified by the employer's interest in production and discipline. As an issue of law, he found that

[8] 265 NLRB 38, supra at 40

[9] 265 NLRB 57 (Chairman Van de Water, Members Zimmerman and Hunter, Member Fanning concurring, Member Jenkins dissenting)

[10] 258 NLRB 1319 (Members Fanning, Jenkins, and Zimmerman)

the Act itself establishes that such discrimination against employees' support of a union is per se a violation of the statute and that the Board lacks expertise in determining the validity of particular exceptions to no-solicitation rules.

3. Right of Nonemployee Organizers to Solicit

The Board also considered issues involving employer bans on nonemployee solicitation. Different standards are applicable to nonemployee union organizers who may be denied access to an employer's property completely if alternative channels of communication are available, and the employer does not discriminate against the union, because the employees' section 7 rights must be balanced against the employer's property rights.

In *Ameron Automotive Centers*,[11] a Board majority found that an employer's denial of union access to the sidewalk in front of its department store, or to its restaurant, unlawfully precluded the union from reaching employees with its message. The majority held that the administrative law judge, who had concluded that the employer violated section 8(a)(1) by promulgating a total ban on nonemployee solicitation, correctly applied the *Babcock & Wilcox*[12] criteria in finding that the union should be permitted to solicit on the sidewalk. It found that the union's alternative means for communicating with employees was severely restricted and there was only a limited intrusion upon the employer's property rights in allowing access to an area otherwise open to any member of the public.

Chairman Van de Water and Member Hunter, dissenting in part, stated that, under the *Babcock & Wilcox* criteria, the nonemployees were lawfully denied access to the sidewalk, as they found the evidence was insufficient to support the conclusion that the employees were beyond the reach of reasonable union efforts to reach them through other channels.

As for the employer's restaurant, the majority reversed the administrative law judge's finding that the *Babcock & Wilcox* balancing test should be applied to the employer's denial of nonemployee access to the restaurant. It held, however, that this denial violated section 8(a)(1). The majority stated that union solicitation could not be proscribed as long as it was conducted in a manner consistent with the purpose of the restaurant. The majority noted that nonemployees cannot in any event lawfully be barred from patronizing the restaurant as general members of the public, as contrasted with situations where nonemployee union

[11] 265 NLRB 511 (Members Fanning, Jenkins, and Zimmerman, Chairman Van de Water and Member Hunter, dissenting in part)

[12] *NLRB v Babcock & Wilcox Co*, 351 U S 105 (1956) In that decision, the Supreme Court noted that an employer "may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution " 351 U S at 112

organizers seek access to private or other areas in which an employer may generally prohibit nonemployee solicitation. Chairman Van de Water and Member Hunter agreed with this finding, but noted that a union organizer's right to speak with such employees has been limited to solicitation "only as an incident to normal use of such facilities,"[13] and does not include moving from table to table to solicit off-duty employees.

4. Union Handbilling on Company Property

Another case decided during the report year involved balancing the right of employees to publicize a product boycott and the right of a company to restrict the use of its property. In *Montgomery Ward & Co.*,[14] the Board considered the issue of whether a retail store owner violated section 8(a)(1) of the Act by not permitting handbilling on its premises by striking employees of another company.

The handbilling occurred during a primary dispute between a union and a sporting goods manufacturer. The union augmented its strike activities by distributing handbills at certain stores, including Montgomery Ward's, which carried the manufacturer's products. Montgomery Ward restricted the union's handbilling efforts to the curbs, driveway entrances, and anywhere not on its property and away from its main entrances.

In adopting an administrative law judge's findings, the Board agreed that the judge properly balanced the conflicting statutory and property interests of the employees and the company in favor of the striking employees because they had a protected section 7 right to engage in consumer boycott handbilling of the manufacturer's products on Montgomery Ward's premises in the absence of effective alternative means of reaching the public.[15] The Board concluded that Montgomery Ward's restrictions requiring that the union handbill at the curb, driveway entrances, or anywhere else not on its property substantially diluted and restricted that section 7 right, since the effectiveness of handbilling, like that of picketing, depends on its location. In reaching this conclusion, the Board found it unnecessary to consider the judge's extensive analysis and resultant findings that consumer-directed boycott picketing, area standards picketing, organizational activity, and primary economic activity are section 7 rights of equal nature and strength. The Board also found it unnecessary to consider the judge's conclusions concerning the relationship between section 8(b)(4) and (7) as a generic equivalent of section 7. Accordingly, the Board agreed with the judge that the company's restrictions violated section 8(a)(1) of the Act. In his concur-

[13] *Marshall Field & Co.*, 98 NLRB 88, 94 (1952)

[14] 265 NLRB 60 (Members Fanning, Jenkins, and Zimmerman, Chairman Van de Water concurring, Member Hunter did not participate)

[15] *Seattle-First National Bank*, 243 NLRB 898 (1979), *Hudgens v. NLRB*, 424 U.S. 507 (1976)

ring opinion, Chairman Van de Water criticized his colleagues' failure to consider the judge's analysis of the impact of the nature of section 7 activity in applying the balancing test of *Babcock & Wilcox*[16] and his ultimate finding that consumer handbilling is a section 7 right of "equal nature and strength" with area standards picketing, organizational activity, and primary economic activity. Nevertheless, Chairman Van de Water agreed with the result because, in his view, the rule enunciated in *NLRB v. Fruit & Vegetable Packers, Teamsters Local 760 (Tree Fruits, Inc.)*,[17] a case involving consumer picketing, need not enter into this case since the union's conduct consisted of consumer handbilling in support of a primary labor dispute. Moreover, since handbilling does not involve groups "patrolling" in front of the employer's establishment, such conduct is not nearly as intrusive and disruptive of a business as picketing. Therefore, Chairman Van de Water stated, since the area utilized was open to the general public and resulted in a minimal, nondisruptive intrusion on Montgomery Ward's property, the balance must be struck in favor of the employees' right to engage in consumer handbilling in support of a primary labor dispute.

5. Release of Confidential Wage Data Unprotected

In *International Business Machines Corp.*,[18] a Board panel majority held that an employer could lawfully discharge an employee for his public release of the employer's confidential wage data. The employer treated as confidential the wage data that it compiled for its internal use. The employee, who was also president of the New York Chapter of the Black Workers Association (BWA), received from an anonymous source several pages of the employer's salary guidelines. Although aware of the confidential classification of the document and of the employer's rule prohibiting the dissemination of material so classified, the employee distributed an extract from the employer's documents at a meeting of the BWA. The employer discharged the employee for distributing the data.

The majority noted that an employee's distribution of wage data would, under ordinary circumstances, constitute protected concerted activity. However, because the employer established substantial and legitimate business reasons for its policy of confidentiality, the issue became whether the interests of the employees in learning and discussing each other's wages outweighed the employer's business interests. Under the circumstances presented, the majority found the employee's actions were not protected. The majority noted that the employer did not prohibit employees from discussing their own wages or attempting to determine what

[16] *NLRB v. Babcock & Wilcox Co.* 351 U.S. 105 (1956)
[17] 377 U.S. 58 (1964)
[18] 265 NLRB 638 (Members Fanning and Zimmerman, Member Jenkins dissenting)

other employees are paid. Here, the employee knowingly distributed the employer's data, not his own. Thus, the employee's activity fell outside the protection of section 7.

In dissent, Member Jenkins found that the employee was engaged in protected concerted activity concerning racial discrimination. In this circumstance, reasoned the dissenter, the employer's legitimate business interests were insufficient to suppress the protected activity. Member Jenkins stated that the purpose of section 7 would be frustrated if employees are prohibited from using information on wages in furtherance of statutorily protected activity even in the absence of a bargaining representative. Member Jenkins concluded that the employer discharged the employee because he engaged in protected activity, thereby violating the Act.

B. Employer Discrimination For Filing Charge

In *J. W. Rhodes Department Stores*[19] the Board adopted an administrative law judge's finding that the employer violated section 8(a)(1) and (4) of the Act by filing a civil action against an employee and his father in retaliation for the employee's having filed, in good faith, a charge with the Board alleging that he was forced to resign and let go by the employer because of his involvement with dissident employees. The judge found that the employer's lawsuit alleging, among other things, libel, malicious prosecution, and abuse of process was filed solely to retaliate against the employee for filing the charge and lacked a reasonable basis in fact. Member Hunter stated his agreement with the findings of the judge adopted by the Board, and noted additionally that, although he subscribes to the principles set forth in the Board's decision in *Power Systems, Inc.*,[20] he does not agree with the results reached by the Board on the facts of that case.

C. Employer Bargaining Obligation

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

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[19] 267 NLRB 381 (Members Jenkins, Zimmerman, and Hunter)

[20] *Power Systems, Inc.* 239 NLRB 445 (1978) enf. denied 601 F.2d 936 (7th Cir. 1979)

1. Duty to Furnish Information

Section 8(d) defines the obligation to "bargain collectively" imposed by the Act as requiring that bargaining be carried on in "good faith." The statutory duty of an employer to bargain in good faith has been interpreted to include the duty to supply to the bargaining representative information which is "relevant and necessary" to the intelligent performance of its collective-bargaining duty in contract administration functions.[21] The scope of this obligation was considered by the Board this past year in a number of cases.

In *New Jersey Bell Telephone Co.*,[22] a panel reversed an administrative law judge and found that the employer violated section 8(a)(5) and (1) by refusing to supply the union with the absence and tardiness records of three employee grievants until such time as the union obtained written consent of the employees for release of the information. In doing so, the panel disagreed with the judge's finding that, because the information contained "medical" information, the employer acted legitimately in requiring signed releases before it could furnish the information to the union.

The dispute arose after three employees were tardy for a meeting and their lateness was noted in their personnel files. Investigating to determine if a grievance was warranted, the union requested that the employer supply it with the absence and tardiness records of the three employees. The employer replied that the records contained confidential information that would be released only after the employees in question signed release forms. While the employees had no objections to signing releases, the union instructed them to refuse. Grievances were filed and subsequently settled. The employer refused at all times to provide the requested information.

The panel began its analysis of the facts by first finding that the information requested was "plainly relevant and necessary for the union's performance of its statutory bargaining obligations" in that it was requested in the context of a possible grievance over tardiness notations in the records of the three bargaining unit employees. The panel then found that the records sought by the union merely reflected the reasons provided by the employees themselves for their tardiness or absence and were "in no legitimate sense of the term medical records." The tardiness and absence records sought were not of the same nature as that entitled to the cloak of confidentiality in *Detroit Edison*[23] or *Johns-Manville*,[24] where the requested records "reflected professional diagnosis and evaluations of mental and physical characteristics," the panel ruled.

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[21] See, e g , *Curtiss-Wright Corp* , 145 NLRB 152 (1963), enfd 347 F 2d 61 (3d Cir 1965)
[22] 265 NLRB 1382 (Chairman Van de Water and Members Jenkins and Hunter)
[23] *Detroit Edison Co v NLRB* , 440 U S 301 (1979)
[24] *Johns-Manville Sales Corp* , 252 NLRB 368 (1980)

On a final issue, the panel ruled that it was irrelevant that obtaining the releases from employees might have been relatively simple for the union, rejecting the judge's conclusion that the employer acted reasonably while the union was engaged in "gamesmanship" since it could have secured the information by simply allowing the employees to sign releases.

In another decision during the report year, a Board panel reviewed the respective rights and obligations of employer and employee representatives regarding health and safety information alleged to be confidential. In *Kelly-Springfield Tire Co.*,[25] the employee representative had requested a list of chemicals used in the employer's operation and information sheets setting out precautions for handling code-named chemical products. The relevance of the requested materials to the bargaining function was not disputed, but the employer defended its refusal to furnish the materials, among other reasons, on the grounds that the materials were proprietary and disclosure would harm its competitive status.

The Board panel viewed the employer's defense as a legitimate one which on its face might privilege nondisclosure or conditional disclosure of the information. Finding that the employer had violated section 8(a)(5) to the extent it failed to furnish nonproprietary information, the panel ordered the employer to supply that data, together with a cross-reference from the chemicals listed to the substances covered by the precaution sheets. To the extent the required material was proprietary, the panel, following earlier cases,[26] required the employer to bargain in good faith about furnishing the data under conditions that would safeguard its proprietary interest. The panel stated that, should the parties be unable to reach accommodation and should it be necessary, the Board would then undertake to balance the bargaining representative's right to relevant data with the employer's interest in protecting proprietary materials.

In *National Cleaning Co.*,[27] a Board panel was presented with the issue of whether the union's request that the employer furnish it with information about the employer's business relationship with two other companies, to which it had allegedly subcontracted work in violation of its collective-bargaining agreement with the union, met the requisite standard of relevance for information regarding matters occurring outside the bargaining unit represented by the union. The union had alleged that the two companies were performing services previously performed

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[25] 266 NLRB 587 (Members Jenkins, Zimmerman, and Hunter)

[26] *Minnesota Mining & Mfg Co*, 261 NLRB 27 (1982), *Borden Chemical*, 261 NLRB 64 (1982), *Colgate-Palmolive Co*, 261 NLRB 90 (1982) Member Hunter agreed with the result in the *Kelly-Springfield* case for the reasons stated in his concurrence in *Minnesota Mining*

[27] 265 NLRB 1352 (Members Fanning, Jenkins, and Zimmerman)

by the employer's own employees, and that a relationship— financial or management—was established between the employer and those two companies with the object to circumvent provisions of the agreement and undermine the union.

The administrative law judge, whose decision the Board panel reversed, found no violation in the employer's refusal to furnish the union information on its business relationship to the two companies. He recommended dismissing the complaint because he could not find a nexus between various employee complaints which the union received prior to requesting the information and the two companies about which information was requested, and because in his view the union's evidence was too remote in time to support any claim of relevancy.

In reversing the judge and finding a violation of section 8(a)(5) and (1), the panel noted that one union member, hired by the employer, had complained to the union that he was being paid by another company, named in the request for information, at a rate lower than that of the employer's other employees, while other employees had complained that they were informed by the health and welfare office in the union hall that the employer was not covering them. These employee complaints, the Board held, would raise substantial questions as to whether the employer was complying with the collective-bargaining agreement or whether it was instead giving the work to the other employer named in the request for information. The panel thus concluded that the union had a sufficient basis for its request for information with regard to the employer's relationship with the first company.

Further, in view of the naming of the second company in the employee complaints to the union, as well as the specific indication that employees hired by the employer were paid by at least one other company, the panel concluded that the union had a sufficient basis for requesting information concerning the second company as well. The panel also found that the particular items of information requested were relevant since information regarding ownership and management of all companies would make tenable the union's assertion that the employer had power to transfer employees to other companies to circumvent the collective-bargaining agreement and evidence regarding common use of equipment would relate to the union's assertion of violation of the subcontracting clause of the collective-bargaining agreement.

Finally, the panel found that the request, made 5 to 15 months after the last employee complaint was received by the union, was not too remote in time to be relevant, since the contract did not limit the time for filing grievances and the union was entitled to wait until a number of complaints had been received to determine whether a complaint was simply a clerical error or whether there was a pattern demonstrating that the employer had subcontracted bargaining unit work.

2. Work Relocation

In *Milwaukee Spring Division*,[28] based on a stipulated record, a Board panel considered whether an employer acted in derogation of its bargaining obligation under section 8(d) of the Act by deciding during the term of a collective-bargaining agreement to transfer a portion of its operations from a facility where employees were covered by a union contract to another facility where they were not, and to lay off unit employees, in order to obtain relief from the contractual wage and fringe benefit rates. The collective-bargaining agreement covered the term April 1, 1980, to March 31, 1983. In January 1982, the employer asked the union to forego a wage increase scheduled for April 1, 1982. In March 1982, the employer announced that, because of a worsening financial situation (the company had lost a $200,000 a month purchase agreement), it intended to relocate the assembly operation to its nonunion facility. The employer bargained with the union about its decision to relocate and remained willing to bargain about the effects of its decision. In late March 1982, the union presented the employer's terms on which it would retain the assembly operation at the unionized facility, and the employees rejected the proposal. The employer then announced that it would relocate on or about October 1, 1982. The employer admitted that its decision was based on a desire to secure lower wage and benefit rates during the term of the collective-bargaining agreement and thus to obtain a better return on investment, not on an inability to pay the contractual wage rates.

According to the Board, section 8(d), which defines the obligation to bargain, cautions that "the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." Here, the Board panel found, the employer decided to relocate bargaining unit work because the labor costs of performing that work at its unionized facility were greater than the labor costs of performing that work at its nonunionized facility. And, there was no question that the employer was bound by a collective-bargaining agreement which had not expired when it decided to relocate its assembly operation. The panel compared this case with *Los Angeles Marine Hardware Co.*,[29] where the Board held that, even though the employer had been confronted with a legitimate adverse economic problem which contributed to a decision to relocate, the employer had violated the Act by deciding to relocate during the time it was bound to a collective-bargaining agreement which covered and had been applied to the relocated operation. The panel concluded

[28] 265 NLRB 206 (Chairman Van de Water and Members Fanning and Jenkins)
[29] 235 NLRB 720 (1978)

that, in the instant case, even though the employer suffered a significant decline in monthly revenues, had bargained over its decision to relocate, and was willing to negotiate over the effects its decision—its unilateral decision to transfer its assembly operation and to lay off unit employees at its unionized facility during the term of its collective-bargaining agreement in order to obtain relief from the labor costs imposed by that agreement — was in derogation of its bargaining obligation under section 8(d), and hence violated section 8(a)(1), (3), and (5).

The panel noted that the employer, by its stipulation, implied that it had an obligation to bargain—an obligation which would arise only if the decision to relocate were a mandatory subject of bargaining. Consequently, the panel found that *First National Maintenance*,[30] which deals with what is a mandatory subject, had no bearing on this case.

Chairman Van de Water emphasized the parties' stipulation that the reason for the employer's decision to transfer was not an inability to pay contractual wage rates but was the comparatively higher labor costs at its unionized facility, as well as an inadequate return on investment.

In *Monongahela Steel Co.*,[31] a panel majority found it appropriate to require the employer to reestablish operations at its Monongahela plant which the employer had unilaterally and discriminatorily closed. The panel majority agreed with the administrative law judge that the employer violated section 8(a)(1), (3), and (5) by threatening employees of Monongahela with closure of plant if the union were selected, by discriminatorily closing the plant and terminating the employees because of their selection of the union, and by failing to consult with the union about the decision to close and its effects on the employees.

With regard to the remedy, the judge found that the employer did not meet its burden to show that resumption of operations at the Monongahela plant would jeopardize its continued viability. A panel majority agreed with the reestablishment remedy, relying on the employer's continued ownership of the plant, its retention and maintenance of almost all the plant equipment, the apparent availability of an experienced work force, and the fact that the employer's other plant provided a market for Monongahela's product. The majority also noted that the employer was being ordered to reestablish the very business arrangement for which it had made predictions of prosperity just days before the discriminatory closure.

Chairman Van de Water, dissenting in part, would have found that the motivating factor in the shutdown was economic and not the advent of the union; and he took the position that the reestablishment order was financially unsound and might force the employer's other plant, in

[30] *First National Maintenance Corp v NLRB*, 452 U S 666 (1981)

[31] 265 NLRB 262 (Members Fanning and Zimmerman, Chairman Van de Water dissenting in part)

Youngstown, into bankruptcy. As part of the remedy he would have ordered, Chairman Van de Water would have required the employer to establish a preferential hiring list for employees formerly employed at Monongahela and give such employees preference for hire should the plant resume operations.

3. Refusal To Bargain Following Informal Election

In *L & B Cooling, Inc.*,[32] the Board panel, reversing the administrative law judge, found that the employer violated section 8(a)(5) of the Act by refusing to bargain with the union after the latter had prevailed in a non-Board election to which the employer had acquiesced.

The employer had maintained that the election results were not binding because some of the employees in the bargaining unit did not have the opportunity to vote. Specifically, the employer contended that some seasonal employees, who had not yet been hired by the employer for the lettuce-picking season, were eligible to vote.

The panel noted that an employer who voluntarily recognizes a union that has the support of a majority of the employees in a bargaining unit is obligated to bargain in good faith with the union. Agreeing with the judge, the panel stated that the issue in the case hinged on whether the employees who did not have the opportunity to vote had a reasonable expectation of employment with the employer. The panel carefully considered the factors that the Board traditionally uses in assessing the expectation of future employment for seasonal employees and concluded, contrary to the judge, that the employees at issue did not have such an expectation. The panel reasoned that the employer recruited its seasonal employees from a large, amorphous labor pool; that there was no evidence regarding the actual season-to-season reemployment of the type of employees at issue; and that the employer had no preference for rehiring those employees. Accordingly, the panel found that the seasonal employees at issue had no reasonable expectation of employment, that the election was conducted among all employees entitled to vote, and thus that the employer violated section 8(a)(5) by not bargaining with the union.

4. Union Affiliation Vote

During the report year the full Board again considered whether an employer is relieved of its obligation to bargain with the union certified to represent its employees following that union's affiliation with another labor organization, if voting on the question of affiliation is limited to union members. The issue was first decided in *Amoco Production Co.*[33]

[32] 267 NLRB 1 (Chairman Dotson and Members Jenkins and Zimmerman)

[33] 262 NLRB 1240 (1982) (Chairman Van de Water, Members Jenkins and Hunter, Members Fanning and Zimmerman dissenting)

in which a Board majority ruled the members-only affiliation vote to be invalid and found that the employer did not violate section 8(a)(5) and (1) by abrogating, after the affiliation vote, its collective-bargaining contract with the union.

A Board majority during the report year reaffirmed the invalidity of a members-only affiliation in *Seattle-First National Bank.*[34] The facts in this case revealed that an independent local union sought affiliation with an international, but only those employees who were members of the independent local union were allowed to vote in the affiliation election. The Board majority, noting that the issue presented was the same as that in *Amoco*, concluded that an affiliation vote in which nonmembers are not permitted to vote violates fundamental due process standards. Thus, finding that the affiliation vote was improper, the majority concluded that the employer did not commit a violation by refusing to bargain with the newly affiliated union. The majority accordingly dismissed the complaint, thereby reversing a previous Decision and Order[35] finding that the employer had violated section 8(a)(5) and (1), as well as vacating an Amendment of Certification[36] reflecting the affiliation.

Members Fanning and Zimmerman, dissenting, would continue to treat an affiliation election as nothing more than "an internal union matter upon which the Board generally will not intrude," and thus, they would reaffirm the original decisions.

5. Construction Industry Bargaining Agreement

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

A prehire agreement under section 8(f), however, does not entitle a union to full bargaining rights under section 9(a) until it can show that it has attained majority support in the relevant bargaining unit. One method

[34] 265 NLRB 426 (Chairman Van de Water, Members Jenkins and Hunter, Members Fanning and Zimmerman dissenting)
[35] 245 NLRB 700 (1979)
[36] 241 NLRB 751 (1979)

the Board uses in deciding whether construction industry bargaining agreements are voidable section 8(f) contracts or binding contracts under section 9(a) is to determine whether the contract in question covers a permanent and stable unit of employees. A Board panel had occasion to decide such a matter during the report year in *Construction Erectors*,[37] where it found that a union, which had initially negotiated a section 8(f) contract with a construction industry employer, later achieved majority status in a permanent and stable work force, thereby converting the agreement into a section 9(a) contract. As a result, the Board panel further ruled, the construction industry employer had violated section 8(a)(5) of the Act by midterm modification of its collective-bargaining agreement with the union, as well as by other related refusals to bargain.

The Board's decision arose out of a remand from the U.S. Court of Appeals for the Ninth Circuit[38] which had denied enforcement of the Board's earlier Decision and Order in this case.[39] In its earlier decision, the Board had found that at the time of the signing of the most recent collective-bargaining agreement[40] the union represented a majority of the employer's employees in a permanent and stable work force. Accordingly, the employer's repudiation of that collective-bargaining agreement on February 28, 1979, violated section 8(a)(5). The Ninth Circuit found insufficient evidence to justify the Board's finding that the employer employed a permanent and stable work force on December 10, 1977, and remanded the case to the Board for a determination of whether "at some time prior to the [February 28, 1979] repudiation of the 1977 agreement the workforce in the bargaining unit had become permanent and stable and the Union obtained majority support within the unit at that time."

In its decision, the panel first noted that: "the determination of whether a work force is 'permanent and stable' is more than a mechanical exercise in tabulating the makeup, longevity, and fluctuation of a group of employees. For in making the determination, the Board ultimately is deciding whether the work force is of such a nature that a showing of majority support made at a particular point in time reasonably can be said to have significance at a subsequent time. In this regard, we do not require a showing that the work force is a stable group of employees who work for a long period of time with no fluctuation in the overall unit. . . . In short, our analysis in cases of this nature must go beyond the calculation of numbers and dates and focus upon the issue of whether the employee complement possesses sufficient continuity as to merit continued reliance on showing of majority support for the union made at any point during the relevant period." (Footnotes omitted.)

[37] 265 NLRB 786 (Chairman Van de Water and Members Fanning and Jenkins)

[38] 661 F 2d 801 (1981)

[39] 252 NLRB 319 (1980) (Chairman Fanning and Members Jenkins and Penello)

[40] The pertinent collective-bargaining agreement was signed on December 10, 1977, and was effective, by its terms, to September 1, 1980

Then, after an analysis of relevant work records, the panel found that the respondent employed a permanent and stable work force during 1978.[41] In so holding, the Board stated: "[W]e rely particularly on the fact that throughout the relevant period, Respondent moved its employees from job to job and did not regularly assign employees to single jobs and then to no subsequent jobs. Thus, the instant case is readily distinguishable from those where employees are hired on a jobsite-by-jobsite basis with little or no carryover from job to job. In addition, we also find of substantial significance the existence of a basic core group of employees utilized by Respondent throughout the relevant period. As noted, this group of employees worked approximately 75 percent of the total number of days on which ironworkers were employed and, again, moved from job to job. Concededly, there were several periods in the first half of 1978 when the exigencies of available work caused some fluctuation. The significant fact remains, however, that Respondent's work force was characterized, for the most part, by extensive employee carryover and relative consistency in the identity of the individuals being employed at any given time." (Footnotes omitted.)

Having found that the employer employed a permanent and stable work force, the Board then found "little, if any, basis for meaningful disagreement" on whether the union enjoyed majority status within the work force. In this regard, the Board found that "in any meaningful grouping of employees, the Union at all times enjoyed substantial majority support."

6. Recognition of Union in Face of Competing Union Claim

In four cases issued during the report year, the Board applied its modifications—set forth in *Bruckner Nursing Home*[42] and *RCA del Caribe*[43]—of the *Midwest Piping*[44] doctrine concerning employer neutrality in situations involving competing union claims for recognition.

Under the Board's *Midwest Piping* original doctrine, an employer faced with conflicting claims of two or more rival unions which give rise to a real question concerning representation violates section 8(a)(2) and (1) if it recognizes or enters into a contract with one of those unions before its right to be recognized has finally been determined by procedures provided for in the Act.[45] In subsequent *Midwest Piping* cases, the Board eliminated the *Midwest Piping* requirement that a representation petition actually be filed as a prerequisite to a finding of a "real"

[41] The Board declined to specify the point at which the work force became "permanent and stable" since it was clear to the Board that such status arose prior to the respondent's February 28, 1979 repudiation

[42] *Bruckner Nursing Home*, 262 NLRB 955 (1982)

[43] *RCA del Caribe*, 262 NLRB 963 (1982)

[44] *Midwest Piping Co*, 63 NLRB 1060 (1945)

[45] Sec 8(a)(2) of the Act 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"

or "genuine" question concerning representation, in acknowledgement of the need to recognize a rival union contest even prior to invocation of Board procedures so as to ensure the availability of the procedures and to prevent the serious possibility of employer abuse where no petition has been filed. It thus required an election whenever two or more unions possessed some support or organizational interest in the unit sought, and defined such interest as a "colorable claim" or a claim not "clearly unsupportable" or "naked." This modification of the doctrine, however, presented difficulties in precisely defining the terms "naked claim," "clearly unsupportable claim," or "colorable claim," thereby providing an opportunity for a minority union to forestall recognition of the rival majority union. Many of the circuit courts of appeals refused to enforce Board decisions based on this modified *Midwest Piping* doctrine.

Thus, after review of the Board's experience with the *Midwest Piping* doctrine, the majority in *Bruckner Nursing Home* determined that it would no longer find section 8(a)(2) violations in rival organizing situations when an employer recognizes a labor organization which has an uncoerced and unassisted majority, before a valid petition for an election has been filed. However, the Board's holding in *Bruckner* does not preclude finding an 8(a)(2) violation where the employer recognized a labor organization which did not enjoy majority support.

In *RCA del Caribe*, the companion case to *Bruckner Nursing Home*, the Board majority reexamined the *Midwest Piping* doctrine with respect to situations where an incumbent union is challenged by an "outside" union. The Board had initially held that continued negotiation of a contract after the filing of a valid election petition by another union was not a violation of section 8(a)(2) within the meaning of *Midwest Piping*.[46]

However, in *Shea Chemical Corp.*,[47] the Board reversed itself, holding that an employer, faced with a pending petition from an outside union, must cease bargaining with the incumbent union and maintain a posture of strict neutrality with respect to both unions until such time as one or the other had been certified, so as to ensure employees the greatest possible freedom in the selection of a collective-bargaining representative.

The Board in *RCA del Caribe*, however, acknowledged that the Board's efforts to promote employee free choice have been at a price to stability in bargaining relationships, particularly as the *Shea Chemical* adaptation of *Midwest Piping* has failed to accord incumbency the advantages, including the presumption of majority status, which in nonrival situations the Board has encouraged in the interest of industrial stability. The Board majority in *RCA del Caribe* thus determined that preservation of the status quo by continued bargaining with the

[46] *William D Gibson Co*, 110 NLRB 660 (1954)
[47] 121 NLRB 1027 (1958)

incumbent union is the better way to approximate employer neutrality so that the mere filing of a representation petition by an outside challenging union would no longer require or permit an employer to withdraw from bargaining or refuse to execute a contract with an incumbent.

During the report year, a Board panel had occasion to apply the modification of the *Midwest Piping* doctrine, as set forth in *Bruckner Nursing Home*, in *Great Southern Construction*.[48] The panel found that, under *Bruckner*, the employer was free to recognize whichever of two rival unions it deemed represented a majority of unit employees. The panel noted that no union had filed a valid representation petition which otherwise would have triggered the employer's duty of strict neutrality. Thus, the majority reversed the administrative law judge's decision which had been based on the Board's decision in *Midwest Piping*, and dismissed allegations that the employer violated section 8(a)(2) and (1) of the Act by granting recognition to and entering into an agreement with the respondent union, and that the respondent union violated section 8(b)(1)(A) of the Act by accepting such recognition and executing the agreement.

In *Great Southern*, a majority of the employer's construction employees signed authorization cards designating three unions to act jointly as their collective-bargaining representative. The employer refused to recognize the unions, but agreed to meet with the unions some 4 days later.

At a subsequent meeting the employer again refused the three unions' request for bargaining. Later that day the employer sent a mailgram to the unions' representative, stating that (1) it doubted that a majority of employees had selected the unions; (2) no authorized company official ever acknowledged that the unions represented a majority of the employees on February 21; and (3) the unions should petition for a Board-conducted election if they wished to establish majority status.

Shortly thereafter, the employer recognized the rival respondent union as the exclusive collective-bargaining representative of its construction employees, and entered into a collective-bargaining agreement with the rival union.

Reversing the administrative law judge, the panel applied the principles set forth in *Bruckner* and concluded that the General Counsel failed to establish that the employer and the respondent union violated the Act. The panel noted that no union had filed a valid representation petition with the Board which otherwise would have triggered the employer's duty of strict neutrality. Thus, under *Bruckner*, the employer was free to recognize whichever of the two rivals—the group of three unions or the fourth union—it deemed represented a majority of its unit employees. The panel specifically rejected the General Counsel's argument that even under *Bruckner* a violation should be found because the

[48] 266 NLRB 364 (Chairman Miller and Members Jenkins and Zimmerman)

record was devoid of evidence that the respondent union enjoyed majority support. The panel noted that (1) the parties stipulated that the employer granted recognition to the respondent union on the basis of a card check by neutral parties and (2) the judge found no record support for the respondent union's majority status solely on the basis of the General Counsel's refusal to stipulate to the majority status. The panel further stated that in the absence of evidence of coercion or unlawful employer assistance the employer granted recognition to a labor organization with an uncoerced, unassisted majority.

The panel also rejected the General Counsel's alternative argument that, even if the respondent union enjoyed majority support, such support was achieved after the unions had demonstrated to the employer that a majority supported them. In this connection, the panel stated that it was clear that the employer had no obligation of neutrality and therefore was free to recognize whichever of the two unions it deemed represented a majority of its unit employees. Here, the panel concluded that, since there was no evidence that the respondent union did not have majority status, the employer properly recognized the labor organization it perceived represented a majority of its employees.

During the report year, a Board panel in *Signal Transformer Co.*[49] had occasion to apply principles of *RCA del Caribe* in considering the bargaining obligations of an employer under section 8(a)(2), (5), and (1) and of a union under section 8(b)(1)(A) and (2), where an incumbent union is challenged by an "outside" rival. In *Signal* the incumbent union went on strike to obtain a contract. During the strike, a rival union began organizing the employees. The rival union thereafter replaced the incumbent on the picket line, and filed a representation petition with the Board. The employer then signed a collective-bargaining agreement with the rival union and withdrew recognition from the incumbent union.

The panel, adopting the administrative law judge's decision, found, inter alia, that the employer did not violate section 8(a)(5) of the Act when it withdrew recognition from the incumbent and thereafter made unilateral changes in employees' terms and conditions of employment. The judge found that the employer had clear and convincing evidence, based on objective considerations, to support a good-faith doubt concerning the incumbent's continuing majority status. The panel adopted this finding on the ground that in *RCA del Caribe* the Board noted that the rule that an employer must continue to bargain with an incumbent union during the processing of a petition by an outside union "will not preclude an employer from withdrawing recognition in good faith based on other objective considerations." While Chairman Van de Water dissented in *RCA del Caribe* with respect to the continuing duty to bargain, in *Signal Transformer* he agreed that an employer may withdraw recogni-

[49] 265 NLRB 272 (Chairman Van de Water and Members Fanning and Hunter)

tion from an incumbent based on a good-faith doubt as to the union's continuing majority status.

The panel also adopted, with a different rationale, the judge's other findings that the employer violated section 8(a)(1) and (2) by assisting and recognizing the rival union, and the rival union violated section 8(b)(1)(A) and (2) by accepting recognition and signing a contract, at a time when the incumbent union had not abandoned its claim. The panel followed *Bruckner Nursing Home* and held that it was unlawful for the employer to recognize the rival union because "an employer, *once notified of a valid petition* . . . must refrain from recognizing any of the rival unions [footnote omitted]."

In *Richmond Waterfront Terminals*,[50] a Board panel set aside an election involving a rival union and an incumbent union but disagreed as to the rationale. There, the employer and the incumbent union negotiated and signed a contract while the rival union's request for review of the regional director's dismissal of its petition was pending with the Board. The petition was subsequently reinstated. About 10 days before the election, the employer announced that although it had an "excellent contract" with the incumbent, it had "no alternative but to cease to enforce the contract" and to "revert to the old pay scale" because of the petitioner's "prodding" of the Board into reinstating the petition.

Members Fanning and Hunter agreed that although, under *RCA del Caribe*, supra, the parties could sign a contract during the pendency of a request for review, the later rescission of the contract was objectionable conduct. Consistent with his dissent in *RCA del Caribe*, Member Jenkins found the conduct objectionable under the pre-*RCA del Caribe*, "*Midwest Piping* doctrine" which he continued to adhere to with some modifications.[51]

In *Lutheran Hospital of Maryland*,[52] the respondent union which had been voluntarily recognized by and had negotiated with the respondent employer for about 5 years requested, for the first time, a written collective-bargaining agreement. Such agreement was compiled by the parties, and ratified by the employees. It was then executed on the day before an election petition was filed by the rival charging party union. The rival union had been openly organizing employees for over a month, and had sent the employer a telegram protesting alleged employee interrogation and a letter claiming majority status and requesting recognition prior to the execution of the collective-bargaining agreement.

Members Fanning and Hunter held that, consistent with *RCA del Caribe*, the employer "did not violate Section 8(a)(2) by executing the collective-bargaining agreement and would have violated Section 8(a)(5)

[50] 265 NLRB 1214 (Members Fanning, Jenkins, and Hunter)

[51] Members Fanning and Jenkins also found the letter from the employer announcing its rescission of the contract, and "placing the onus on the Petitioner for the resulting reductions of wage rates, in itself constituted coercive conduct sufficient to warrant setting the election aside."

[52] 265 NLRB 1198 (Chairman Van de Water and Members Fanning and Hunter)

had it declined to do so." Additionally, they stated, "It necessarily follows that Respondent Union did not violate Section 8(b)(1)(A) by executing the contract either." Chairman Van de Water concurred in the result on the basis of his dissenting opinion in *RCA del Caribe*, since the petition was not filed until the day after respondents signed the collective-bargaining agreement.

7. Status of U.S. Trustee

Wintz Motor Freight[53] involved the issue of whether a U.S. trustee was an alter ego or a successor in bankruptcy to the respondent. A Board panel, relying on the undisputed allegations in the U.S. trustee's exception to an administrative law judge's finding, unanimously held that the U.S. trustee was not an alter ego, a successor, or a trustee-in-bankruptcy to the respondent, a debtor-in-possession under the voluntary reorganizational provisions of Chapter 11 of the Bankruptcy Code.

D. Union Interference With Employee Rights

Even as section 8(a) of the Act imposes certain restrictions on employers, section 8(b) limits the activities of labor organizations and their agents. Section 8(b)(1)(A), which is generally analogous to section 8(a)(1), makes it an unfair labor practice for a union or its agents to restrain or coerce employees in the exercise of their section 7 rights, which generally guarantee them freedom of choice with respect to collective activities. However, an important proviso to section 8(b)(1)(A) recognizes the basic right of a labor organization to prescribe its own rules for acquisition and retention of membership.

1. Duty of Fair Representation

During the past fiscal year the Board considered an important case involving the principle that a labor organization has a duty to represent fairly all employees in a bargaining unit for which it is statutory representative.

In *Crown Zellerbach Corp.*,[54] a panel majority agreed with an administrative law judge that a union which became bargaining agent upon supplanting a rival labor organization did not breach its duty of fair representation when, after an economic strike in support of contract demands of the rival, the union proposed and negotiated a bonus computation formula that resulted in no bonus being paid to unreinstated former strikers who had been placed on a preferential hiring list.

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[53] 265 NLRB 922 (Members Fanning, Jenkins, and Zimmerman)

[54] 266 NLRB 1231 (Chairman Dotson and Member Hunter, Member Jenkins dissenting in part)

The parties' contract provided for, inter alia, a bonus payment to employees who were actively employed on the contract ratification date, based on the number of hours worked in a year's period prior to ratification. Of necessity then, employees who participated in the strike received less bonus than those who crossed the picket line and returned to work before the strike ended. The General Counsel contended that the choice of time period for computing the bonus violated the Act since that period included time when some employees were not working because they were on strike.

The panel majority concluded that this agreement did not violate the Act. The agreement required an employee to be on the active payroll as of the date the contract was ratified. The panel majority noted that this requirement was consistent with the employer's past negotiating precedent. It was this requirement, and not the bonus computation period, which, the majority noted, caused strikers who had not been reinstated not to receive a bonus.

The panel majority further concluded that the union did not breach its statutory duty of fair representation. The union acted consistent with past bargaining precedent and out of a good-faith belief that the bonus proposal would benefit a significant majority of unit employees. In light of overwhelming evidence, the panel majority did not believe that the union's failure to consider consciously the effect the bonus computation would have on unreinstated strikers converted its conduct into a breach of the duty of fair representation. Finally, the majority was not persuaded that the employer and the union engaged in conduct "inherently destructive" of employee rights, since even under the General Counsel's suggested computation period unreinstated strikers would have received no bonus, and here at least reinstated strikers did share in the bonus.

In dissent, Member Jenkins argued that the union failed to treat every employee fairly, impartially, and in good faith. He noted that the union's pursuits knowingly benefited one group of employees to the detriment of another group of employees who supported the strike efforts of a rival union. Member Jenkins found that, rather than balancing competing interests, the union arbitrarily bypassed totally the interests of the strikers. He further argued that the employer's conduct in implementing the bonus plan also penalized employees supporting the rival union in a manner inherently destructive of section 7 rights.

2. Enforcement of Internal Union Rules

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

a rule which "invades or frustrates an overriding policy of the labor laws."[55]

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

a. Restriction on Right to Resign

In *Rockford-Beloit Pattern Jobbers Assn.*,[56] the Board was asked to determine the validity of a provision in a union's constitution, known as League Law 13, that prohibited the resignation of members during a strike or lockout or when one appeared imminent. The Board, agreeing with the administrative law judge, found League Law 13 to be invalid and unenforceable.[57] In doing so, the Board relied on its decision in *Dalmo Victor*[58] where it held that "a union rule which limits the right of a union member to resign only to nonstrike periods constitutes an unreasonable restriction on a member's Section 7 right to resign" and cannot be enforced. While League Law 13 did provide for resignations during nonstrike periods, it nevertheless, as noted by the Board, prohibited such resignations once a strike had begun or when one appeared to be imminent. Under these circumstances the Board concluded that League Law 13 suffered from the same infirmity as the clause found to be unlawful in *Dalmo Victor* and was similarly invalid and unenforceable. Accordingly, it found that the fines imposed on 10 employees who had crossed a picket line and returned to work in contravention of that invalid rule were unlawful and violative of section 8(b)(1)(A) of the Act.

While agreeing that League Law 13 was not a valid provision, Member Fanning, in his separate partial concurrence and dissent, expressed the view that the mere maintenance of the rule in the union's constitution did not violate the Act. Thus, he noted that "[s]trictly internal union discipline, that is discipline which does not directly affect the employment relationship, is not regulated by the National Labor Relations Act unless it is contrary to an overriding policy in the labor laws" (footnote omitted). According to Member Fanning, League Law 13 is "a procedural rule purporting only to regulate the release of a member from the Union's rolls" and "has no effect on the employment relationship." In his view, "There is no basis for concluding that a union rule, which on its face only regulates union membership rolls, may not be maintained without violating the Act." Consequently, he would find that the maintenance of League Law 13 "should not be unlawful simply

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[55] *Scofield v NLRB*, 394 U S 423, 429 (1969), *NLRB v Shipbuilders (U S Lines Co)*, 391 U S 418 (1968)

[56] *Pattern Makers (Rockford-Beloit Pattern Jobbers Assn)*, 265 NLRB 1332 (Chairman Van de Water and Members Zimmerman and Hunter, Member Fanning, concurring and dissenting in part, Member Jenkins dissenting in part)

[57] The Board, however, found the judge's recommendation that League Law 13 be expunged from respondent's constitution to be inappropriate

[58] *Machinists Local 1327 (Dalmo Victor)*, 263 NLRB 984 (1982) (Members Fanning and Zimmerman, with Chairman Van de Water and Member Hunter concurring, Member Jenkins dissenting)

because the League sought to rely upon it to show a binding union-member compact which had, in law, been vitiated."

Relying on his dissenting opinion in *Dalmo Victor*, Member Jenkins found League Law 13 to be, contrary to the majority view, "a reasonable and narrow restriction on the employees' right to resign their union membership and ... within the ambit of the Union's control over its internal affairs." Accordingly, he would also find that "the fines imposed pursuant to League Law 13 on the 10 employees who crossed the Unions' picket lines were lawful and not in violation of the proscriptions of Section 8(b)(1)(A) of the Act."

In *NABET Local 531 (Skateboard Productions)*, the Board[59] ruled that a provision in the union's constitution establishing a 60-day waiting period during which the union may delay acting on a request for resignation was unreasonable and that the union violated section 8(b)(1)(A) by fining employees who returned to work during a boycott within 60 days of their resignations. The Board, in an earlier decision in this case,[60] had found the union's 60-day rule to be vague and ambiguous, but the Ninth Circuit denied enforcement, concluding that the 60-day rule was not ambiguous as applied to the employees in question. The court then remanded the case to the Board for a ruling on the lawfulness of the 60-day restriction.[61]

On remand, all four participants agreed that the 60-day rule was unreasonable and that the union violated section 8(b)(1)(A) when it fined two employees for returning to work during a boycott within 60 days of their resignations. In so finding, however, the Board split in its rationale along the lines set forth in *Dalmo Victor*.[62]

In the main opinion, Members Fanning and Zimmerman discussed the principles set forth in *Dalmo Victor* and noted that the 60-day rule in question did not suffer from the same infirmities as did the rule in *Dalmo Victor*. Thus, they found: "Respondent's rule does not differentiate between strike and nonstrike situations and it is a restriction with a fixed duration. In addition, the parties stipulated that the purposes sought to be achieved by the rule are to assure that all dues and other charges owing the Union are paid prior to resignation and to assure solidarity for at least a 60-day period during a strike or boycott. As noted above, these represent legitimate union interests sufficient to justify some imposition on Section 7 rights of members. Thus, we find that Respondent's rule contains several elements that are not objectionable under the Act."

Nonetheless they further found that the 60-day rule "must fall because of its excessive duration." In this regard, they cited their statement in

[59] 265 NLRB 1676 (Chairman Van de Water and Members Fanning, Zimmerman, and Hunter)
[60] 245 NLRB 638 (1979)
[61] *Broadcast Employees NABET Local 531*, No 79–7548, 108 LRRM 2104 (9th Cir 1980)
[62] *Machinists Local 1327 (Dalmo Victor)*, 263 NLRB 984 (1982)

Dalmo Victor that: "Having carefully considered the competing interests involved, we find that a rule which restricts a union member's right to resign for a period not to exceed 30 days after the tender of such a resignation reflects a reasonable accommodation between the right of union members to resign from the union and return to work, and the union's responsibility to protect the interests of employees who maintain their membership, as well as its need to dispose of administrative matters arising from such resignations."[63]

Noting that the 60-day rule extended to twice the length of time determined appropriate and reasonable in *Dalmo Victor*, they found that "neither the objectives sought to be achieved . . . nor any extraordinary circumstances justify a 60-day restriction."

In their concurring opinion, Chairman Van de Water and Member Hunter agreed that the 60-day restriction was unreasonable and that the fines violated section 8(b)(1)(A). In so doing, they cited their concurring opinion in *Dalmo Victor* and reiterated their view that "any restriction imposed upon a union member's right to resign is unreasonable and, therefore, the imposition of any fines or other discipline premised upon such restrictions violates Section 8(b)(1)(A)."

In *E. R. Stong Building Materials Co.*,[64] a Board panel majority adopted the administrative law judge's section 8(b)(1)(A) finding that the union unlawfully imposed a fine on an employee for crossing its picket line the day following his letter of resignation to the union. The union's constitution provided that a resignation must be in writing to the local's secretary treasurer and that, subject to certain financial requirements, the resignation would be effective 30 days after its receipt. The judge found that the record failed to establish that the employee had knowledge of, or had consented to, the constitutional limitations on his right to resign. In the alternative, the judge reasoned that, even if the employee either knew of or had consented to the limitations, those limitations amounted to an unreasonable restriction on the employee's section 7 right to resign his union membership.[65] The judge found that the employee was thus free to resign at will and that he clearly conveyed that intention to the union by delivering his resignation letter to the union president at the picket line.

The members of the panel majority adopted the judge's section 8(b)(1)(A) finding but for different reasons. Member Zimmerman did not rely on the judge's alternative finding that the union's rule on resignations was invalid. Rather, he relied solely on the record evidence that the employee had insufficient notice of the limitations on resignation in that he only learned of them on the day before he crossed the picket line.

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[63] 263 NLRB 984 at 987

[64] *Teamsters Local 86 (E R Stong Building Materials Co)*, 266 NLRB 1057 (Members Zimmerman and Hunter, Member Jenkins dissenting)

[65] *NLRB v Textile Workers, TWUA, Local 1029 Granite State Joint Bd (International Paper Box Machine Co)*, 409 U S 213 (1972)

Member Hunter concurred but found it unnecessary to reach the issue of sufficiency of notice. Consistent with his concurring opinion in *Machinists Local 1327 (Dalmo Victor)*,[66] Member Hunter found that any restriction on a union member's right to resign was unreasonable. Accordingly, the majority found that the union violated section 8(b)(1)(A) by fining the employee for crossing the picket line without having resigned from the union in the manner required by its constitutional provisions.

Member Jenkins dissented for the reasons set forth in his *Dalmo Victor* dissent.[67] Contrary to Member Hunter, he found that the union's restriction on resignations as applied in this instance was reasonable, limited, and within scope of the union's control over its internal affairs. Member Jenkins also found that the employee here was given adequate notice of the constitutional provision. Accordingly, he concluded that the fine imposed pursuant to the restriction was lawful.

b. Imposition of Union Discipline

In Buffalo Courier Express,[68] a Board panel found that a union violated section 8(b)(1)(A) of the Act by conducting intraunion proceedings against a member for having filed a unit clarification petition with a regional office of the Board, seeking to exclude from the unit persons that the member believed to be supervisors. The panel based this result on its overriding policy not to prevent or limit access to the Board's processes, and found that the filing of a unit clarification petition is more analogous to the filing of an unfair labor practice charge. In both types of proceedings, a record is developed upon which basis the Board makes an "objective appraisal of fixed events" in determining the merits of the proceeding. The panel therefore rejected the union's view comparing the filing of a unit clarification petition to the filing of a decertification petition, which results in an election and for which certain forms of intraunion discipline have been sanctioned.

In seeking to file the petition, the panel found, the union member sought relief from the Board to remedy a perceived wrong. The panel also ruled that the union's proceedings against the member for filing the petition unlawfully restricted his access to the Board, and that a Board determination on the petition may not properly be deemed to be an attack on the union's legitimate interest. The panel further noted that the fact that the Board's current rules and procedures did not authorize the filing of a unit clarification petition by an individual does not make the filing less deserving of protection, inasmuch as it is for the Board

[66] 263 NLRB 984 (1982) (Members Fanning and Zimmerman, Chairman Van de Water and Member Hunter concurring; Member Jenkins dissenting)

[67] See 231 NLRB 719 (1977)

[68] *Newspaper Guild Local 26 (Buffalo Courier Express)*, 265 NLRB 382 (Members Fanning, Jenkins, and Zimmerman)

and its regional offices, not private parties, to determine whether an individual is authorized to initiate proceedings with the Board.

In *Machine Stone Workers Local 89 (Bybee Stone Co.)*,[69] a Board majority agreed with the administrative law judge's conclusion that the union violated section 8(b)(1)(A) of the Act by levying $100 fines against four of its members for voting against it in a Board-conducted representation election, but did not violate section 8(b)(1)(A) by expelling those four individuals from membership due to their votes.

The case was presented to the judge on stipulated facts. At the time of the election, four of the seven voting unit employees were voluntary members of the union. The tally of ballots disclosed that all seven voters had voted against representation by the union. Thereafter, based on charges duly preferred under the union's constitution and bylaws, and tried before a duly constituted trial board, the four members were each fined $100 and expelled from the union. These disciplinary actions were imposed solely for the reason that the four members had voted against union representation in the Board-conducted election. The union's knowledge as to how its members had voted was derived from the publicly disclosed tally and not through any improper means.

The Board majority agreed with the judge's reliance on precedent holding that while the proviso to section 8(b)(1)(A) of the Act protects unions' expulsion of members who "have taken actions directly derogatory to and inconsistent with maintenance or promotion of its representational status," the "lesser discipline" of fining those members did violate section 8(b)(1)(A) since fines, unlike expulsion, do not relate to the "retention of membership" proviso language.

In partial dissent, Members Fanning and Jenkins agreed that the union's expulsion of its four members did not violate section 8(b)(1)(A) of the Act but disagreed with the majority's finding that the $100 fines violated section 8(b)(1)(A). Relying on their dissent in *Molders Local 125 (Blackhawk Tanning Co.)*,[70] Members Fanning and Jenkins argued that the majority's "qualitative" difference between fines and expulsion was illusory. They noted that expulsion resulted in the loss for each member of death benefits totaling $1700, while the fine amounted to $100 which the union never attempted to collect. Accordingly, they would have dismissed the complaint in its entirety.

E. Union Lawsuit Against Employer Association

In *Sierra Employers Assn.*,[71] the Board, disagreeing with an administrative law judge's finding, concluded that a union did not violate section

[69] 265 NLRB 496 (Chairman Van de Water and Members Zimmerman and Hunter, Members Fanning and Jenkins concurring in part and dissenting in part)

[70] 178 NLRB 208, 209 (1969)

[71] *Roofers Local 66 (Sierra Employers Assn.)*, 267 NLRB 601 (Chairman Dotson and Members Jenkins and Zimmerman)

8(b)(1)(A) of the Act by filing a state court action against an employer because the employer had filed various unfair labor practices against the union. Charging Party Sierra represented a group of employers in contract negotiations with the union. At various times during these negotiations, Sierra filed a number of unfair labor practice charges against the union. Sierra eventually withdrew all the charges.

After the parties reached agreement on a contract, the union filed a state court complaint against Sierra. The complaint alleged that Sierra had misused Board processes by filing its charges with the Board to gain an unfair advantage in the just-completed negotiations.

An administrative law judge, agreeing with the General Counsel, found that the union's conduct in filing the state court action for the purpose of retaliating against Sierra for invoking the Board's processes violated section 8(b)(1)(A) of the Act. The Board panel reversed. The panel noted that section 8(b)(1)(A) made it an unfair labor practice for a labor organization "to restrain or coerce . . . *employees* in the exercise of the rights guaranteed in section 7 [emphasis supplied]." The Board panel concluded that, because this section of the Act was plainly directed to protecting employees, it should not be expanded, absent congressional intention, to include in its scope employer protection similar to that enjoyed by employees under section 8(a)(4). The panel noted the case of *Malbaff Landscape Construction*,[72] in which the Board held that alleged union secondary activity was not properly litigable under sections 8(a)(3), 8(b)(2), and 8(b)(1)(A) of the Act. It was decided that there were specific sections of the Act which Congress intended to protect employees and other persons against certain kinds of union coercion, but that section 8(b)(1)(A) was not a backstop for those sections. Thus, the Board panel dismissed the complaint.

F. Union Causation of Employer Discrimination

Section 8(b)(2) of the Act prohibits labor organizations from causing or attempting to cause employers to discriminate against employees in violation of section 8(a)(3), or to discriminate against one to whom membership has been denied or terminated for reasons other than failure to tender their 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 under specified conditions.

During the fiscal year, the Board had several occasions to examine and define the permissible limits under section 8(b)(2) of contract clauses granting superseniority to union officials.

[72] *Plumbers Local 447 (Malbaff Landscape Construction)*, 172 NLRB 128 (1968)

In *Gulton Electro-Voice*,[73] the Board reconsidered and overruled earlier cases[74] to the extent that they had found lawful superseniority contract clauses which grant superseniority for layoff and recall to union officers who do not perform "steward or steward-like functions; i.e., grievance processing or other on-the-job contract administration responsibilities." In doing so, the Board determined that "superseniority accorded to officers who do not perform steward or other on-the-job contract administration functions is not permissible because it unjustifiably discriminates against employees for union-related reasons."

Consistent with past Board law in which the standard had been the "effective and efficient representation of employees by their collective-bargaining representatives," the administrative law judge found the superseniority contractually provided to the union's financial secretary-treasurer and recording secretary did not violate the Act because it was justified in recognition of their union service and their special position in relation to collective bargaining that benefited the whole bargaining unit. However, the Board found that neither of the two officers had any responsibilities requiring on-the-job presence to further the administration of the collective-bargaining agreement. In particular, the Board found that the financial secretary-treasurer's responsibility for administering the dues-withholding program, which included a monthly meeting with the company's financial officer at the plant, did not approach the level of responsibility necessary to help stabilize the parties' labor relations to justify the grant of superseniority. The Board reviewed the considerations justifying superseniority with respect to layoff and recall for those who perform steward-like duties, noting that it is the immediacy of attention stewards can offer, as well as the need for their continued presence on the job enabling them to carry out the primary duties of their union position, that places them in a special position. The Board also noted that superseniority is inherently discriminatory and the stewards' need to maintain an on-the-job presence does not generally apply to officers unless the officers perform steward-like functions. As neither the recording secretary nor the financial secretary-treasurer had any other duties involving on-the-job activities related to their union offices, the Board found that, by maintaining and enforcing the superseniority clauses with respect to them, the union violated section 8(b)(1)(A) and (2) of the Act and that the company violated section 8(a)(1) and (3) of the Act.

In *Niagara Machine & Tool Works*,[75] a Board panel applied the standard for superseniority granted to nonsteward union officers which the Board established in *Gulton Electro-Voice*, and found that none of the

[73] 266 NLRB 406 (Chairman Miller and Members Jenkins, Zimmerman, and Hunter)

[74] *Electrical Workers UE Local 623 (Limpco Mfg Co.)*, 230 NLRB 406 (1977), *American Can Co.*, 244 NLRB 736 (1979)

[75] 267 NLRB 661 (Chairman Dotson and Members Jenkins and Zimmerman)

union duties of the union officers at issue—the recording secretary, the sergeant-at-arms, the guide, and the trustee—either attaching to his status as a member of the executive board or specific to his particular union office, involved in-plant grievance processing or contract administration that would justify a grant of superseniority under the new standard. On this basis, it reversed the administrative law judge and found that the union and the company had violated section 8(b)(1)(A) and (2) and section 8(a)(1) and (3) of the Act, respectively, by applying a contractual superseniority clause according superseniority to three executive board members, resulting in the layoffs out of order of seniority of six other employees. It also found that the company additionally violated section 8(a)(1) of the Act by threatening another employee that he would be laid off in order to retain the fourth executive board member, who had less seniority.

In *Scovill*,[76] a Board panel applied the standards set forth in *Gulton Electro-Voice* to find that the grant of superseniority for layoff protection and "defensive" shift preference purposes was unlawful insofar as it applied to the local union's officers and officials whose normal duties did not involve day-to-day administration of the collective-bargaining agreement or any steward-like functions. The Board panel further held, however, that the defensive shift preference clause was presumptively lawful as applied to "grievance handlers" with "steward-like" duties. It pointed out that, unlike a true shift preference clause, the clause in issue was purely defensive in nature and operated to assure that an official with steward-like duties for a particular shift was able to remain on that shift. Finding that this portion of the clause was "akin to layoff protection," the Board panel reasoned that the same considerations which lead the Board to find presumptively lawful steward superseniority for layoff protection similarly mandate that steward superseniority for defensive shift maintenance should be found presumptively lawful.

G. Union Bargaining Obligation

A labor organization, as exclusive bargaining representative of the employees in an appropriate unit, no less than an employer, has a duty imposed by the Act to bargain in good faith about wages, hours, and other terms and conditions of employment. A labor organization or an employer respectively violates section 8(b)(3) or 8(a)(5) if it does not fulfill its bargaining obligation.

In *Allied Employers*,[77] a Board panel, reversing the administrative law judge, found that a union violated section 8(b)(3) by refusing to execute a contract ratified by a majority of unions that had agreed to

[76] *Auto Workers Local 561 (Scovill)*, 266 NLRB 952 (Chairman Dotson and Members Jenkins and Zimmerman)
[77] *Teamsters Local 174 (Allied Employers)*, 265 NLRB 428 (Members Jenkins, Zimmerman, and Hunter)

engage in coordinated union bargaining with a multiemployer association. The coordinated bargaining format contemplated a binding contract on ratification by a majority of the participating unions. In reversing the judge's finding that the union never manifested an unequivocal intent to be bound by coordinated bargaining, based on its agent's withdrawal of authority from the unions' overall spokesman during a union caucus and the agent's statement at the bargaining table that he was reserving his right to a separate vote on association offers, the panel observed that the association was neither privy to the former nor had any basis for construing the latter as a change from the established procedure. Rather, the panel found that the union tacitly agreed, by its participation in "coordinated bargaining like the last time," its execution of a prior contract over its members' rejection, and its failure to notify the association at any time of its rejection of the majority ratification principle, that the parties' coordinated bargaining format contemplated a binding contract upon ratification by a majority of the unions.

A Board panel considered the issue of whether pension fund trustees were agents of a union in *Universal Liquor Corp.*[78] In that case, the trustees contended that, pursuant to pension fund participation agreements, two employers were obligated to make pension fund contributions on behalf of their part-time, casual, and seasonal employees. The employers refused to tender payments for those employees, claiming that their collective-bargaining agreement with the union provided that they were required to contribute for full-time employees only. The trustees eventually refused to accept payments tendered by the employers for the full-time employees.

The panel held that the trustees, in refusing to accept the employers' contributions, were acting as agents of the union, and that they attempted to modify the employers' collective-bargaining agreements with the union in violation of section 8(b)(3). The panel first reasoned that the bargaining history, including the previous collective-bargaining agreements and its pension fund participation agreements, indicated that pension fund contributions were to be made only on behalf of full-time employees. Next, in finding that the trustees acted as agents of the union, the panel reasoned that the trustees acted pursuant to a provision in the collective-bargaining agreements giving them the authority to refuse contributions from employers who did not acquiesce in the trustees' determination of the employers' obligations. The union was willing to sacrifice the pension benefits of all employees, since it did not protest the trustees' action, and, added the panel, the union supported the trustees' erroneous interpretation of the collective-bargaining agreements and joined in the effort to collect the additional contributions to which the trustees were

[78] *Teamsters Local 449 (Universal Liquor Corp.)*, 265 NLRB 1539 (Chairman Van de Water and Members Jenkins and Hunter)

not entitled. The panel concluded that "both the trustees and the Union were thus pursuing the Union's own interest . . . ."[79]

H. Prohibited Strikes and Boycotts

The statutory prohibitions against certain types of strikes and boycotts are contained in section 8(b)(4) of the Act. Clause (i) of that section forbids unions to strike, or to induce or encourage strikes or work stoppages by any individual employed by any person engaged in commerce, or in any industry affecting commerce: and clause (ii) makes it unlawful for a union to threaten, coerce, or restrain any such person, where the actions in clause (i) or (ii) are for any of the objects proscribed by subparagraphs (A), (B), (C), or (D). Provisos to the section exempt from its prohibitions "publicity, other than picketing," and "any primary strike or primary picketing."

In *Dolphin Forwarding*,[80] the Board considered whether the Rules on Containers, negotiated by the International Longshoremen's Association (ILA) with the various employer associations representing east coast shipping lines in response to the technological innovation of containerized shipping, were merely a lawful attempt to preserve work historically performed by ILA-represented longshoremen or instead were an effort to acquire for ILA-represented longshoremen work not functionally related to their traditional work in violation of section 8(e) and section 8(b)(4)(B). This case arose out of the Supreme Court decision in *Dolphin Forwarding* and *Associated Transport*,[81] which remanded to the Board its earlier decisions[82] finding that the Rules on Containers were illegal and directed the Board to concentrate on the work of the bargaining unit employees before containerization rather than on the work performed off the piers after containerization by other employees in assessing the legality of the Rules on Containers. As a result of the Supreme Court decision, the Board consolidated nine pending cases involving the Rules on Containers and remanded them to an administrative law judge for further hearing and a decision.

The Board adopted the judge's findings that job opportunities for ILA-represented longshoremen had been greatly diminished because of containerization; that the Rules on Containers were negotiated in response to these inroads on the longshoremen's work; that the shipping lines, which were the longshoremen's immediate employers, actually

[79] In a footnote, Member Hunter stated that he "agrees that in the circumstances of this case, where the trustees in fact acted as agents for collective-bargaining purposes because they exercised authority given them by the collective-bargaining agreement, there has been a violation of Sec 8(b)(3) of the Act."

[80] *Longshoremen ILA (Dolphin Forwarding Inc)*, 266 NLRB 230 (Chairman Miller and Members Zimmerman and Hunter)

[81] *NLRB v Longshoremen ILA*, 447 U S 490 (1980)

[82] *Longshoremen ILA (Dolphin Forwarding, Inc)*, 236 NLRB 525 (1978), enf denied 613 F 2d 890 (D C Cir 1979), *Longshoremen ILA (Associated Transport, Inc)*, 231 NLRB 351 (1977), enf denied 613 F 2d 890 (D C Cir 1979)

developed, introduced, and controlled the new technology which made containerized shipping possible; and that, therefore, the ILA had, overall, a primary work-preservation objective in negotiating an agreement with the shipping lines which restricted their use of this new container technology. The Board also adopted the judge's conclusion that the application of the rules to claim the work of loading and unloading all consolidated containers coming from or going to points within 50 miles of a port was lawful. In so concluding, the judge found that ILA-represented longshoremen had traditionally performed work functionally related to this consolidation work, i.e., the work of consolidating loose cargo onto pallets, loading cargo into reusable Conex and Dravo boxes, and performing various other tasks done to prepare loose cargo for loading into the hold of a ship; that this work was actually diverted away from the pier by the shipping lines themselves, who referred small shippers to off-pier consolidators and charged lower rates for shipping cargo consolidated off the pier; and that the 50-mile limit was a rational attempt to claim only that work actually performed in the general area surrounding the port, which had previously been performed on the pier by longshoremen.

The judge further concluded that the 50-mile rule, when applied to claim unloading work done by truckers at local trucking terminals ("shortstopping") or to claim loading and unloading work done at inland warehouses, was unlawful in certain circumstances because it sought to acquire work traditionally performed by other employees which was not created by containerization. Although the Board adopted his conclusion that the Rules on Containers violated the Act as applied to shortstopping and to certain warehousing practices, the Board found it unnecessary to rely on his findings concerning the traditional work of trucking and warehousing employees because they were inconsistent with the Supreme Court's directions on remand. The Board relied instead on an analysis of the longshoremen's historical work and what happened to that work after containerization. The Board found that, in contrast to consolidation, no work was diverted away from the pier to truckers and warehouses as a result of containerization, but rather some of the traditional loading and unloading work of the longshoremen, which had historically been duplicated by trucking and warehousing employees, essentially was eliminated as a step in the cargo-handling process. Accordingly, the Board concluded that the Rules on Containers as applied to consolidation had a lawful work-preservation objective but that the rules as applied to shortstopping and certain traditional warehousing practices had an illegal work acquisition objective.

In another secondary activity decision, pursuant to a circuit court remand,[83] a Board majority in *Theatre Techniques, Inc.*,[84] declined to

[83] *Painters Local 829 v NLRB*, 655 F 2d 1267 (D C Cir 1981), denying enf to 243 NLRB 27 (1979)

[84] 267 NLRB 858 (Chairman Dotson, Members Zimmerman and Hunter, Member Jenkins dissenting)

place on the General Counsel the burden of establishing as an element of his prima facie showing in section 8(b)(4) cases that a union, at the time it exerts pressure on an employer, has actual knowledge that the employer lacks control of the disputed work except insofar as such knowledge may be inferred from proof that a union has exerted pressure on a neutral employer. The majority concluded that such an inference was fully consistent with the Supreme Court's analysis *Austin Co.*,[85] and that the Act's purposes would not be well served by finding that a union has lawfully applied coercive pressure to a neutral employer in cases where the General Counsel cannot affirmatively establish the union's knowledge of the employer's neutrality. Thus the Board concluded that, consistent with *Austin Co.*, the General Counsel in an 8(b)(4)(ii)(B) case makes out a prima facie showing of a violation if he demonstrates that a union has exerted coercive pressure on a neutral employer. If the respondent fails to effectively rebut that showing, the General Counsel has established a violation of the Act. In this regard, the Board majority explained that there may be some extraordinary circumstances in which a union may counter the General Counsel's prima facie showing by establishing that it made reasonable good-faith efforts to ascertain whether the employer on which it exerted pressure was a neutral employer and that it was denied access to this information or deliberately misled. The Board noted that these facts, unlike a union's subjective intent, are susceptible to objective proof. The Board majority emphasized that they do not envision that the instances in which this defense will be found meritorious will be many.

Member Jenkins dissented, asserting inter alia that a union cannot be held to have a secondary object absent proof that it knew that the pressured employer did not have the right to control assignment of the sought-after work. Thus, Member Jenkins concluded that nothing in *Austin Co.*, on which the majority relied, affords a basis for inferring that pressure brought against an employer with whom a union has a bargaining relationship is "tactically calculated" to prevail in a dispute which the Board presumes the union has with a stranger, where union knowledge of the stranger's role in the matter has not been proved. Member Jenkins noted that absent evidence either that a union approached neutral persons directly, as in *Austin Co.*, or that it knew its pressure would affect neutrals more than incidentally, there is no basis for inferring an unlawful object. Finally, Member Jenkins proposed that if a neutral employer is confronted with union pressure to do something

[85] *NLRB v Pipefitters Local 638 (Austin Co)*, 429 U S 507 (1977)

In *Austin Co* , the Supreme Court discussed at great length the nature of the test to be applied in secondary boycott cases and the application of that test to the facts before it, but the Court neither raised the question of whether the union there had knowledge that the employer lacked control over assignment of the work, nor did it imply that such knowledge was an essential element of a prima facie case Moreover, while the Court explicitly approved the test used by the Board, it did not indicate in any way that such a test requires affirmative proof of the union's "state of mind" at the time of the alleged unlawful conduct before a violation of sec 8(b)(4)(B) can be found

of which it is incapable, but does not know whether the union knows it is incapable, the employer could present the union with that fact. And, if it refrains from doing so, and there is no other evidence that the union knew the employer was really an innocent bystander, invocation of the Board's processes is, at best, premature, Member Jenkins said.

I. Jurisdictional Dispute Proceedings

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

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

Section 10(k) further provides that pending 8(b)(4)(D) charges shall be dismissed where the Board's determination of the underlying dispute has been complied with or the parties have voluntarily adjusted the dispute. An 8(b)(4)(D) complaint issues if the party charged fails to comply with the Board's determination. A complaint may also be issued by the General Counsel in the event recourse to the method agreed upon to adjust the dispute fails to result in an adjustment.

In order to proceed with the determination under section 10(k), the Board must find (1) that there is reasonable cause to believe that the union charged with having violated section 8(b)(4)(D) has induced or encouraged employees to strike or refuse to perform services in order to obtain a work assignment within the meaning of section 8(b)(4)(D); and (2) that a dispute within the meaning of section 10(k) currently exists. If these two conditions are met, the Board proceeds by making an affirmative award of the disputed work in accordance with the policy and criteria set forth in *Jones Construction Co.*,[86] where it was stated, "The Board will consider all relevant factors in determining who is entitled to

[86] *Machinists Lodge 1743 (J A Jones Construction)*, 135 NLRB 1402 (1962)

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. The list of factors is not meant to be exclusive, but is by way of illustration."

In *Stobeck Masonry*,[87] a Board panel awarded disputed work involving the erection and dismantling of patent scaffolding to employees represented by the Iron Workers. The factors on which this award was based included relative skills, training, and safety. In particular, however, the Board panel concluded that area practice strongly favored an award to Iron Workers-represented workers, outweighing the employer's preference to assign the work to employees represented by the Laborers. Concerning area practice, the panel found that the Iron Workers introduced evidence establishing that prevalent area practice was to assign the construction of patent scaffolding to ironworkers, whereas the Laborers never asserted that its members in fact had constructed patent scaffolding. The panel observed that the Board is reluctant to disturb a well-defined area practice in the construction industry absent some compelling reason.[88] Employer preference, the panel said, is not by itself such a reason.

In awarding the work contrary to the employer's preference, the panel noted that, although it normally accords employer preference considerable weight, it has consistently maintained that an employer's assignment of work "cannot be made the touchstone in determining a jurisdictional dispute."[89]

In *Stobeck Masonry*, the Board panel said, the employer based its preference for laborers on convenience. The panel noted that the employer presented no evidence that a contrary assignment would adversely affect its operations nor did it support its preference with considerations of skill, area practice, or economy and efficiency. The panel also noted that the employer's participation in the case was minimal. The employer never filed charges. At the hearing, it called no witnesses, introduced no exhibits, and cross-examined no witnesses. The employer left the hearing before its close and filed no brief. In these circumstances, the panel stated, the employer's preference merits little weight.

J. Picketing of Health Care Institutions

Included in the 1974 amendments to the Act, which expanded the Board's jurisdiction to cover health care institutions, was one new unfair

[87] *Iron Workers Local 880 (Stobeck Masonry)*, 267 NLRB 284 (Chairman Dotson and Members Jenkins and Zimmerman)

[88] *Carpenters District Council of Cuyahoga (Midwest Exhibitors)*, 217 NLRB 190 (1975)

[89] *Carpenters Local 1102 (Don Cartage Co.)*, 160 NLRB 1061, 1078 (1966)

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

In *Baptist Memorial Hospital Systems*,[90] a Board majority held that the notice requirements of section 8(g) applied to picketing engaged in by unions participating in sympathy picketing by unorganized employees of a health care institution. A group of employees decided to hold a demonstration at an employer facility. One of these employees contacted a union business representative and informed him of the demonstration. The business representative then called the executive director of a second union and requested aid for the demonstrators. On the day of the picketing by the unorganized employees, the union business representative and two members of the second union demonstrated with the unorganized employees. Neither the employees nor the two unions notified the employer or the Federal Mediation and Conciliation Service (FMCS) of the picketing.

The Board majority, agreeing with the administrative law judge, concluded that both unions violated section 8(g) by failing to follow the notice provisions of that section. In so deciding, the Board majority followed its decision in *Eden Park Nursing Home*,[91] wherein it reaffirmed its interpretation that section 8(g) requires that a union must comply with that section's notice provision before engaging in "*any* strike, picketing or other concerted refusal to work at *any health care institution* . . . ." The Board found the sympathy picketing in the instant case similar to that found unlawful in *Eden Park*, emphasizing that unlike *Eden Park*, where some notice was given, here there was no notice at all. Quoting *Parkway Pavilion*,[92] the Board reiterated that unions engaging in sympathy strikes and picketing were required to abide by section 8(g)'s notice provisions because, while disruption at a health care facility may not be caused by a first picketing union, the addition of other picketing unions could lead to unexpected disruption in

[90] *Service Employees Local 84 (Baptist Memorial Hospital Systems)*, 266 NLRB 335 (Chairman Miller, Members Jenkins and Hunter, Member Zimmerman dissenting)

[91] *Service Employees Local 200 (Eden Park Nursing Home)*, 263 NLRB 400 (Chairman Van de Water and Members Jenkins and Hunter, Members Fanning and Zimmerman dissenting)

[92] *Hospital Employees District 1199 (Parkway Pavilion Healthcare)*, 222 NLRB 212 (1976), enf denied 556 F 2d 558 (2d Cir 1976)

services at the health care institution. The Board held that these principles apply where a union adds its presence to otherwise unorganized picketing. The majority also concluded that the legislative history of the health care amendments required the result reached.

In his dissent, Member Zimmerman concluded that the brief participation by the sole union representative and the two members of the second union did not change the character of the basic dispute between the employer and the unorganized employees. He noted that no other employees withheld services from the employer, and that no deliveries were stopped during the demonstration. Member Zimmerman concluded that the picketing activity engaged in by the two unions was beyond the scope of section 8(g) requirements.

K. Remedial Order Provisions

1. Appropriateness of Bargaining Order

In *Ohio New & Rebuilt Parts*,[93] a Board panel agreed with the administrative law judge's finding that a *Gissel*[94] bargaining order was appropriate to remedy the effects of the employer's unfair labor practices. The union had secured authorization cards for a majority of the unit employees and, when the employer failed to respond to its request for bargaining, consented to an election, which it lost. The preelection misconduct consisted of numerous violations of section 8(a)(1), including coercively interrogating employees concerning their union activities; threatening employees with discharge, bodily harm, and the elimination of benefits if they did not vote against union representation; and implementing a more stringent attendance policy in retaliation for employees' union activities. In addition, the employer violated section 8(a)(3) by discharging the most vocal union activist 4 days after the election was held.

In evaluating the employer's conduct, the panel applied the test set out in *Gissel*, supra, to determine whether the violations the employer engaged in warranted the issuance of a bargaining order. The panel concluded that the unfair labor practices the employer committed fell into the second category delineated in *Gissel*, where the Court approved the Board's use of a bargaining order in "less extraordinary" cases where the employer's unlawful conduct has a "tendency to undermine [the Union's] majority strength and impede the election processes."[95] In reaching this conclusion, the panel emphasized that many of the employer's unfair labor practices were of an extremely serious nature. It noted that the employer's owner twice told a gathering of employees,

[93] 267 NLRB 420 (Chairman Dotson and Members Zimmerman and Hunter)
[94] *NLRB* v *Gissel Packing Co* , 395 U S 575 (1969)
[95] Id at 614

who comprised over three-fourths of the entire unit, that he would discharge them if they supported the union. The panel found that the widespread exposure of the unit employees to these threats clearly magnified the coercive impact they conveyed. More importantly, in the panel's view, the employer's subsequent discharge of the most vocal union activist demonstrated to the employees that its owner had meant what he said about discharging those who supported the union. The panel also found that the repetitious nature of the violations the employer engaged in suggested that they were part of a general campaign to destroy employee support for the union.

Thus, based on the violations it found, the panel concluded that the lingering effects of the employer's past conduct rendered uncertain the possibility that the imposition of the conventional reinstatement and backpay orders and the posting of notices to remedy the unfair labor practices would permit a fair election to be conducted. In these circumstances, it concluded that the union's designation as the collective-bargaining representative by a majority of the employees having signed authorization cards provided a more reliable test of employee representation desires than would an election. Accordingly, the panel adopted the judge's recommended order requiring the employer to recognize and bargain with the union.

In another decision, *Vinyl-Fab Industries*,[96] the full Board split over the appropriateness of a bargaining order to remedy the effects of employer unfair labor practices that included threatening employees with loss of jobs, layoffs, discharges, and more onerous working conditions if the union became the employees' bargaining representative. The respondent also violated section 8(a)(1) by soliciting and promising to remedy employee complaints.

Evaluating the illegal activity, the majority found that "[t]he serious impact of Respondent's unlawful conduct on its employees cannot be questioned." It noted that threats of job loss and more onerous working conditions "are among the most egregious and flagrant means by which an employer can dissuade employees from selecting a bargaining representative." The majority also stated that the solicitation of employee complaints with promises to remedy them "must, of necessity, have a strong coercive effect on the employees' freedom of choice."[97] The majority then examined the repeated violations of this nature engaged in by the respondent's president and plant manager from the outset of the organizing campaign.

The seriousness of the conduct was intensified, in the majority's view, by the relatively small size of the bargaining unit and the fact that the threats and solicitations were unit wide. In addition, the threats were

[96] 265 NLRB 1097 (Members Fanning, Jenkins, and Zimmerman, Chairman Van de Water and Member Hunter dissenting in part)

[97] *Apple Tree Chevrolet*, 251 NLRB 666, 668 (1980)

made by the repondent's president and plant manager and, in some instances, in the presence of a co-owner of the respondent. The majority also stated that "Respondent's actions are 'measurably heightened by the fact that the Company's unlawful activities commenced immediately on the first stirring of employee interest in the Union and were concentrated in such a brief timespan.' " Finally, the majority noted, "Respondent's unlawful course of conduct continued after the filing of the . . . petition, thus demonstrating Respondent's continued hostility toward the Union during the election campaign."

The dissenters asserted that "a bargaining order predicated on a union's card majority rather than a Board-conducted secret-ballot election ought not be routinely granted." The dissenters added that, in their view, "the majority opinion pays undue deference to previous cases in an effort to demonstrate that a bargaining order is 'compelled' by the facts presented here."

The dissenters further stated that they were reluctant to engage in a "duel of facts" in which each side cites cases that contain similar violations but differ in whether a bargaining order is issued. The dissenters argued that such analyses are dangerous because (1) each case must be decided on its own facts and (2) such analyses "inevitably result in the Board seeking to categorize the severity of individual violations in such draconian terms that our credibility is diminished and our coin of the realm 'agency expertise' is greatly debased."

After outlining the violations committed, the dissenters concluded:

> Plainly, the foregoing unfair labor practices are not *de minimis* or "technical" violations. On the other hand, we believe it significant that Respondent took no unlawful disciplinary action against any employee or group of employees. For example, Respondent did not unlawfully transfer, lay off, or discharge any employees. It did not unlawfully assist the rival union, remedy grievances, or threaten to close the plant. Had sufficient conduct of such a nature actually occurred, perhaps we would strike the balance differently. Based solely on the nature of violation that did occur, however, we are unable to conclude that Respondent's *overall* actions compel the extraordinary remedy of a bargaining order.

In *Windsor Industries,*[98] a Board majority found that a *Gissel* bargaining order was warranted on behalf of a union with an established card majority in order to remedy the effects of an employer's unfair labor practices. In agreement with the administrative law judge, the

[98] 265 NLRB 1009 (Members Fanning, Jenkins, and Zimmerman, Chairman Van de Water and Member Hunter dissenting in part)

Board majority found that the employer's discriminatory layoff of 2 employees in a total complement of 15 to 18 employees, in combination with the employer's unlawful solicitation of employee grievances and promise of benefits on the day after receiving the union's demand for bargaining, had a tendency to undermine the union's strength and made unlikely a free and fair election. The Board majority found that the employer's recall and/or offer to recall the laid-off employees 6 to 7 weeks after implementation of the discriminatory layoffs did not remove the coercive effect of the employer's unlawful action.

Contrary to the Board majority's direction of a bargaining order, dissenting Chairman Van de Water and Member Hunter did not agree that the employer's unlawful conduct was so pervasive and likely to have a lingering impact that a fair election could not be held once the employer had complied with the Board's traditional remedies.

2. Backpay Matters

The Board's usual remedy for discrimination against individual employees is an order that the employees be made whole for any losses resulting from the discrimination. In a proceeding to determine the amount of backpay due individual employees who had lost employment through an employer's violation of section 8(a) (3),[99] the Board considered the limits of the make-whole remedy ordered in their behalf and rejected a contention that it required the employer to make payments to health and welfare funds for medical claims the funds had paid for some discriminatees. The Board stated that it is not customary to order payments to health funds as part of a make-whole remedy for individual discriminatees where the individuals have not sustained losses due to lack of coverage by the funds. It distinguished the *Am-Del-Co.* case[100] where the Board had ordered a health and welfare trust fund reimbursed to the extent of premiums it would have been paid under the collective-bargaining contract during the quarters in which individual discriminatees received services from the fund. The *Am-Del-Co.* case involved not only discrimination against individuals but also unlawful conduct directed at modification or elimination of the bargaining contract. Member Jenkins dissented on the point and would have found that as part of the make-whole remedy the employer was obligated to reimburse the union for payment of medical claims for certain discriminatees.

In *Central Freight Lines*,[101] the Board (Chairman Miller, Members Jenkins, Zimmerman, and Hunter) held that only full-time workers who were employed as full-time employees throughout the entire backpay period should be used in selecting a representative group of employees

[99] *Triangle Sheet Metal Works Division*, 267 NLRB 650 (Members Zimmerman and Hunter, Member Jenkins dissenting in part)

[100] *Am-Del-Co , Inc* , 234 NLRB 1040 (1978)

[101] 266 NLRB 182

as the basis for computing gross backpay. The administrative law judge had based his formula on the average of hours worked by all employees, whether part-time or full-time and without regard to employment tenure during the entire backpay period.

The Board noted the evidence showed that the hours worked by full-time and part-time employees differed significantly, that part-time employees were paid for fewer hours for vacation and holiday pay, and that the employer maintained a full-time/part-time classification system. This evidence, according to the Board, warranted the conclusion that the average number of hours worked by those employees classified as full-time more closely approximated the number of hours the discriminatees (who were long-term, full-time employees) would have worked during the backpay period than would a formula averaging the hours worked by all employees.

In *Central Freight*, the Board (Members Jenkins, Zimmerman, and Hunter) also held that credit for the discriminatees' vacation pay should be deducted from interim earnings. The respondent's employees are entitled to a specified amount of vacation each year. However, the respondent requires that the employee must take the time off; if a vacation is not taken during the year, the time is forfeited. The judge found that the General Counsel, by deducting vacation pay amounts from discriminatees' interim earnings, credited them with double earnings for the weeks of vacation.

The Board held that the discriminatees were denied an opportunity to take their vacations as a direct result of the respondent's discrimination against them. The Board stated that awarding vacation pay would not place the discriminatees in a better pecuniary position than they otherwise would have been, but rather that not awarding vacation pay would have permitted the respondent (by means of its unlawful discrimination) to require them to forfeit their vacation time.

Chairman Miller, dissenting on the vacation pay issue, would have adopted the judge's holding. He noted that, under the respondent's policy, an employee who is entitled to 3 weeks' vacation during a year may not collect 55 weeks of pay by working 52 weeks and receiving 3 additional weeks of pay for the vacation time he did not take. Thus, had the discriminatees continued to work for the respondent, they would have earned no more than the amount specified as gross backpay. Yet, according to Miller, the majority credited them with more than that amount by deducting vacation pay from interim earnings, as well as calculating gross backpay as the maximum amount they could have earned in the respondent's employ.

In *Schnadig Corp.*,[102] a Board panel augmented the administrative law judge's recommended remedy to the extent that his recommended

[102] 265 NLRB 147 (Members Jenkins and Zimmerman, Chairman Van de Water dissenting in part)

remedy took into account the respondent's precarious financial condition. The panel affirmed the judge's finding that the respondent violated section 8(a)(5) and (1) by laying off 47 employees without affording the union an opportunity to bargain about layoffs. In his recommended remedy, however, the judge stated that a backpay remedy is inappropriate. He reasoned that the respondent was incurring large financial losses, and that counsel for the General Counsel did not request a backpay remedy.

The Board panel modified the remedy so that employees who were laid off as a result of the respondent's unlawful conduct were eligible for backpay. After emphasizing that the Board has full authority over the remedial aspects of its decisions, the panel stated, "We can discern no reason why we should not afford a remedy to any employees victimized by Respondent's unlawful conduct."

Chairman Van de Water, dissenting from the panel's decision to augment the recommended remedy, said that the majority was being "precipitous and unrealistic." Chairman Van de Water approved of the way in which the judge "tailored" his recommended remedy to the respondent's financial predicament, and urged the Board to be more flexible in fashioning its remedies.

In response to Chairman Van de Water's dissent, the majority averred that that position would encourage litigation and was not supported by the Act. The majority stated that the respondent's financial difficulties, if any, were matters to be addressed in a compliance proceeding, adding that "although the Board seldom has occasion to comment upon it, arrangements frequently are made to provide a schedule of payments for respondents that are able to demonstrate an inability to shoulder their backpay liabilities."

In *Conoco, Inc.*,[103] the Board, adopting the remedial scheme described in the court decision and Member Jenkins' dissenting opinion in *Emerson Electric Co.*,[104] held that if a disabled employee's benefits are unlawfully terminated when a strike occurs in the employee's unit, he must be recompensed for the lost benefits that, but for the strike, would have been paid until the disability ceased or his contractual right to receive benefits ran out. In so holding, the Board overruled prior law which limited such an employee's award to the benefits he would have received until he exhibited public support for the strike by, for example, appearing on a picket line. The facts in this case revealed that on January 3, 1980, an employee was rendered unable to work by a medical condition and, when the strike commenced on January 8, she was confined to a hospital. The employee began active participation in the strike on February 22 by picketing. Her doctor had authorized her return to work

[103] 265 NLRB 819 (Chairman Van de Water and Members Jenkins, Zimmerman, and Hunter, Member Fanning concurring in part and dissenting in part)

[104] 246 NLRB 1143 (1979), enfd as modified 650 F 2d 463 (1981), cert denied 455 U S 939

beginning March 25; the strike ended on April 1, and unit employees returned the following day. The administrative law judge found that the benefit plan, which stated, inter alia, that no benefits would be paid "during the time you are on strike or layoff," was too ambiguous to terminate the employee's benefits as of the commencement of the strike because she was not on strike and, following the Board's decision in *Emerson*, concluded that the respondent should pay her the benefits she would have received between January 9 and February 21, the day before she indicated public support for the strike. The Board adopted the judge's finding that the respondent violated section 8(a) (1) and (3) of the Act by terminating the employee's disability benefits at the commencement of the strike, thereby reaffirming that part of the *Emerson* decision which held that an employer may not require its disabled employees to disavow their collective-bargaining agent's strike actions in order to continue receiving disability benefits, and that the termination of disability benefits being paid to disabled employees when a strike begins constitutes an unlawful penalty based solely on the strike activities of others. However, the Board majority modified the judge's recommended remedial order to require the respondent to pay the employee the disability benefits she would have received through the last day of her disability, March 24. In so holding, the Board explained that, despite her public support for the strike, the employee was not voluntarily withholding her services in support of the labor dispute but, rather, was unable to work because of her disability. To the extent that earlier cases were inconsistent with the Board's holding, they were overruled.

Member Fanning, concurring in part and dissenting in part, agreed with the majority's conclusion that the respondent violated section 8(a) (1) and (3) of the Act by terminating the employee's benefits at the commencement of the strike, but disagreed with their extension of the remedy to March 24. He would have found, pursuant to the parties' stipulation that the employee was actively striking on February 22, that the employee was "on strike" within the meaning of the benefits plan on February 22, the date on which she began picketing, and that the respondent lawfully terminated her benefits as of that date because the only benefits accrued by her was the right to receive disability payments while she was disabled and not "on strike or layoff."

3. Reimbursement for Litigation Costs

In *Autoprod, Inc.*,[105] a Board panel concluded that traditional forms of relief are inadequate as a means of effectuating the policies of the Act where the employer exhibited a long history of intransigence and had raised incredible and patently frivolous arguments in its exceptions to

[105] 265 NLRB 331 (Members Fanning, Jenkins, and Zimmerman. Member Jenkins filed a partial dissent in which he addressed another, unrelated, issue)

the administrative law judge's decision. Rather, the panel deemed it appropriate to require the employer to reimburse the Board for the costs which were "wantonly and unnecessarily" forced upon it in the litigation of this proceeding, as a means of restoring the status quo ante.

The panel observed that the violations herein found capped a decade of contumacy, revealing a flagrant disregard for employees' rights under the Act, during which the employer flouted court-enforced orders of the Board and persistently ignored its statutory obligations. The Board had previously found that the employer sought to undermine the union's 1972 organizational campaign by unlawful interrogations and threats and by discriminatorily discharging two of the four principal employee organizers. As part of the remedy, the Board had imposed a *Gissel* bargaining order.[106] Following court enforcement of this order,[107] the union made an abortive effort to negotiate a contract and the parties held a series of meetings. Contemporaneously, the employer granted unilateral wage increases, refused to provide requested information which was relevant to the union's representative function, and finally terminated negotiations upon the filing of a decertification petition, which, in the context of these unfair labor practices, the Board found, could have reasonably been predicted to result in employee disaffection. Based on the foregoing, the Board concluded that the employer had bargained in bad faith from the inception of negotiations.[108]

Thereafter, the parties bargained and in 1977 the employer's president signed a draft agreement. It is this agreement which the administrative law judge and the Board panel in this proceeding found the employer to have repudiated while engaging in a "course of conduct designed to undermine the union and to derogate its role as a bargaining representative." Such conduct included, but was not limited to, the failure to pay an across-the-board wage increase mandated by an arbitrator's award under the contract, the failure to increase vacation benefits as agreed, the failure to make proper payments into pension and welfare funds, and the failure to furnish relevant information to the union in connection with an employee grievance.

In its exceptions, the employer, inter alia, renewed its argument, previously rejected by a court compelling arbitration under the contract and, later, by the arbitrator himself, that the employer's president had only signed the draft agreement so that it might be "reviewed" by his counsel prior to acceptance. The employer also contended that the delay in granting the vacation benefits increase was an "oversight" and that the continuing delay in making payments into the union's pension and welfare funds was "not significant."

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[106] 201 NLRB 597 (1973)
[107] 489 F 2d 752 (2d Cir 1974)
[108] 223 NLRB 773 (1976)

In these circumstances, the employer was ordered to reimburse the Board for its costs and expenses, including salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diem, and such other reasonable costs and expenses as are found appropriate.

In *Admiral Merchants Motor Freight*,[109] a Board panel stated that, while in appropriate circumstances the Board is capable of providing other than the usual remedial relief in order to rectify particular unfair labor practices,[110] the extent and character of the unfair labor practices committed by the employer did not warrant directing it to reimburse the General Counsel and the charging party for expenses incurred as a result of litigating the subject Board proceeding. The employer had dealt directly with employees and unilaterally implemented benefit changes which it asserted were compelled by its dire economic straits and a district court order to pay off debts stemming from its failure to make contributions to the Teamsters benefit funds on behalf of employees at another of its facilities. The Board based its finding on a record which showed that the employer had a history of a collective-bargaining relationship with at least two different unions, yet had not been a repeat offender of the NLRA; that the employer had not engaged in a pattern of unlawful antiunion conduct for the purpose of denying all its employees the exercise of the rights guaranteed employees by section 7 of the Act; and that while the employer's proffered justifications for its conduct may have been specious, it had not intentionally used defenses meritless on their face in a clear attempt to burden the Board or the courts. The Board therefore declined to order the extraordinary relief recommended by the judge, and simply directed the employer to cease and desist from bypassing, and refusing to bargain with, the union.

4. Order to Union to Expunge File

In *R. H. Macy & Co.*,[111] the Board found, contrary to the administrative law judge, that the respondent union had violated section 8(b)(2) and (1) (A) of the Act by unlawfully causing the employer's discharge of an employee. In addition to requiring the union to make the employee whole for any loss of pay suffered by reason of the union's discrimination against him, the Board ordered the union to expunge from its files any reference to the employee's discharge and to inform him that his unlawful discharge shall not be used as a basis for future action against him. In requiring the union to expunge from its files all references to the unlawful discharge, the Board noted that in *Sterling Sugars*[112] it had found such expunction remedies to be necessary in all cases of unlawful

[109] 265 NLRB 134 (Members Fanning, Jenkins, and Zimmerman)
[110] Citing *Tidee Products*, 194 NLRB 1234, 1236 (1972)
[111] *R. H. Macy & Co.*, 266 NLRB 858 (Members Jenkins, Zimmerman, and Hunter)
[112] 261 NLRB 472 (1982)

discipline. While noting that *Sterling Sugars* involved the unlawful discharge of an employee by his employer, the Board nevertheless held that an expunction order is just as necessary and appropriate in situations where a union has unlawfully caused an employee to be discharged, laid off, or otherwise discriminated against.[113]

L. Equal Access to Justice Act Issues

The Equal Access to Justice Act, 5 U. S. C. §504 (EAJA), and the Board's Rules promulgated thereunder,[114] permit eligible parties that prevail in litigation before the Agency and over the Agency in Federal court, in certain circumstances, to recover litigation fees and expenses from the Agency. Section 504(a) (1) provides that "an agency that conducts an adversary adjudication is required to award to a prevailing party fees and other expenses incurred by the party . . . unless the adjudicative officer of the agency finds that the position of the agency . . . was substantially justified or that special circumstances make an award unjust." Section 504(a) (2) provides that, within 30 days of a final disposition of the case, a party seeking an award must file with the agency an application which shows that the party prevailed below and is eligible under the Act to receive the award,[115] itemizes the amount sought, and alleges that the position of the agency was not substantially justified. Acting on the application, the adjudicative officer of the agency, under section 504(a)(3), may reduce the amount to be awarded, or deny an award, where the party during the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. Section 504(b) (1) (A) requires the award of fees and expenses to be "based upon prevailing market rates for the kind and quality of the services furnished," except that an "expert witness shall not be compensated at a rate in excess of the highest rate for expert witnesses paid by the agency," and "attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceeding involved, justifies a higher fee."

In *Columbia Mfg. Corp.*,[116] the Board considered the question of when an application for an award of attorney fees must be filed in order to be timely under the Equal Access to Justice Act. On October 21,

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[113] In support of its finding, the Board cited *Boilermakers Local 27 (Daniel Construction Co.)*, 266 NLRB 602 (Members Jenkins, Zimmerman, and Hunter), where it ordered an expunction remedy against a union whose unlawful conduct resulted from a discriminatory application of its hiring hall procedures The Board, in making its finding in the instant case, saw no reason for limiting the issuance of expunction orders only to those unions who discriminate through the use of unlawful hiring hall practices

[114] Rules and Regulations, secs 102 143 through 102 155

[115] 5 U S C §504(b) (1) (B) defines "party" to exclude individuals and certain enterprises from the coverage of the Act

[116] 265 NLRB 109 (Chairman Van de Water and Members Jenkins and Hunter)

1981, an administrative law judge issued an order dismissing the complaint in the underlying unfair labor practice case. On November 23, 1981—33 days after the judge issued his order dismissing the complaint—the company filed an application for an award of fees and expenses pursuant to EAJA.

The Board noted that EAJA provides that a prevailing party seeking attorney fees and other costs shall submit an application to the Board within 30 days of a final disposition in the adversary adjudication. The Board further noted, citing *Monark Boat Co.*,[117] that EAJA's 30-day filing period is a jurisdictional prerequisite which the Board is without authority to extend.

On the facts of this case (dismissal upon motion by an administrative law judge prior to issuance of a decision), section 102.27 of the Board's Rules and Regulations governed the question of "final disposition." That section, which provides for review of an order to dismiss prior to issuance of a decision, states that, "[u]nless a request for review is filed within 10 days from the date of the order of dismissal, the case shall be closed." The Board continued: "where no party files a request for review [under sec. 102.27] of an order of an administrative law judge dismissing a complaint prior to issuance of a decision, the case is considered closed as of the date of the order of dismissal." Here, since no party filed a request for review, the judge's October 21 order dismissing the complaint became the final disposition of the underlying unfair labor practice case. The company's application for fees and expenses having been filed 33 days after that order, the Board held that the company had failed to comply with the jurisdictional time period specified in EAJA. Thus, the Board was without authority to pass upon the merits of the application.

In a second decision on timeliness of an application for an EAJA award, *Hardwick Co.*,[118] a Board panel found, contrary to the administrative law judge, that the employer's application for an EAJA award was timely filed. The facts revealed that on August 11, 1982, the Board found, in agreement with the judge, that the employer had committed several violations of section 8(a)(1) of the Act, but had not violated section 8(a)(3) of the Act as alleged by the General Counsel.[119] Thereafter, on September 10, 1982, the employer filed an EAJA application as the prevailing party in the 8(a) (3) aspects of the case. On September 17, 1982, the Board, pursuant to section 102.148(b) of the Board's Rules, referred the matter to the judge, inadvertently stating that the employer's EAJA application had been filed on September 13, rather than September 10.

[117] 262 NLRB 994 (1982) (Chairman Van de Water and Members Jenkins and Hunter)
[118] 266 NLRB 663 (Members Jenkins, Zimmerman, and Hunter)
[119] 263 NLRB 302 (Members Jenkins, Zimmerman, and Hunter)

On December 29, 1982, the judge issued a supplemental decision dismissing the EAJA application as untimely filed. In dismissing the application, the judge concluded that the Board lacked jurisdiction over the application because, according to the Board's September 17 order, the application was filed 33 days after entry of the Board's August 11 final order. In so finding, the judge relied on *Monark Boat Co.*, where a panel dismissed a similar EAJA application, holding that EAJA section 504(a) (2) and section 102.148(a) of the Board's Rules establish a 30-day filing period which is a "jurisdictional prerequisite which we cannot legally extend."

A Board panel reversed the judge's dismissal of the application noting that, due to an administrative error, the Board's September 17, 1982 order inadvertently indicated that the employer's EAJA application had been filed on September 13, 1982, rather than September 10, 1982. The panel remanded the matter to the judge for further proceedings under EAJA.

In *Jim's Big M*,[120] a Board panel agreed with the administrative law judge's conclusion that the General Counsel's position in the underlying case[121] was "substantially justified" even though the credited evidence failed to establish a prima facie case and, therefore, dismissed the employer's EAJA applications. In the underlying decision, a Board panel adopted the administrative law judge's ultimate finding that the employers had not violated section 8(a) (3) by refusing to hire the employees of the former owner of the Wolf Street store. However, the panel modified the judge's rationale and found that the evidence relied on by the judge in finding a prima facie case was insufficient to "raise an inference that the employees' status as union members, rather than, for example, their status as former employees of an unsuccessful business, was in any way related to Respondent's decision not to hire them." In ruling on the EAJA applications, the panel rejected the employer's contention that the General Counsel's failure to establish a prima facie case should automatically entitle an EAJA applicant to an award under EAJA. Rather, the panel found that "the presence or absence of a *prima facie* case is not determinative of whether or not an applicant is entitled to an EAJA award." In reliance on the legislative history of EAJA and *Enerhaul, Inc.*,[122] the panel reasoned that the standard for evaluating the underlying case is "essentially one of reasonableness" and is not to be equated with "a substantial probability of prevailing"; and that "all EAJA applications shall be analyzed on a case-by-case basis." In adopting the judge's dismissal of the applications, the panel reasoned that "the evidence in the underlying case failed to establish a *prima facie* case based, in large part, on the absence of credited evidence of union

[120] 266 NLRB 665 (Members Jenkins, Zimmerman, and Hunter)
[121] 264 NLRB 1124 (1982) (Members Jenkins, Zimmerman, and Hunter)
[122] 263 NLRB 890 (former Chairman Van de Water and Members Jenkins and Hunter)

animus by the applicants." The panel observed, however, that if credited certain testimony by representatives of EAJA applicant Big M would have been sufficient evidence of union animus to support a prima facie case. The panel concluded that, in these circumstances, "the position taken by the General Counsel [in the underlying case] was reasonable" and, therefore, dismissed the applications.

In *Iowa Parcel Service*, a Board panel[123] adopted an administrative law judge's denial of an application for attorney fees and expenses filed pursuant to the Equal Access to Justice Act. The application was filed by Iowa Express Distribution, Inc., after the judge dismissed allegations that Iowa Express Distribution and Iowa Parcel Service were alter egos or a single employer. In dismissing those allegations, the judge found that the "facts here, while warranting grave suspicion, fail to establish *alter ego* status. The essential element, or substantial identity of ownership, is lacking." The evidence proffered by the General Counsel, which included evidence of an interest-free loan by Iowa Parcel Service's principal to Iowa Express Distribution, and various statements by executives of both firms, was not enough to establish that the firms had substantially identical ownership, the judge found.

In denying Iowa Express Distribution's application under the Equal Access to Justice Act, the judge stated that he could have inferred from the evidence that Iowa Express Distribution was an alter ego of Iowa Parcel Service. The cases cited by the General Counsel in support of his position were distinguishable from the instant case, the judge stated, but they did provide a substantial and legitimate basis to argue that Iowa Express Distribution was an alter ego. The judge also noted that, in a recent case, the Board held that two employers were alter egos, even though they did not have common ownership.[124] The judge concluded that the General Counsel had advanced a "novel but credible extension and interpretation of the law," and his position was, therefore, substantially justified.

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[123] 266 NLRB 392 (Chairman Miller and Members Jenkins and Hunter)

[124] *American Pacific Concrete Pipe Co.*, 262 NLRB 1223 (1982)

VI

Supreme Court Litigation

During the fiscal year 1983, the Supreme Court decided five cases in which the Board was a party. The Board participated as amicus curiae in two other cases.

A. Burden of Proof in Mixed Motive Discharge Cases

In *Transportation Management*,[1] the Supreme Court unanimously approved the Board's allocation of the burdens of proof in dual motive discharge cases under section 8(a)(1) and (3) of the Act. Under the Board's *Wright Line*[2] analysis, the General Counsel bears the burden of persuading the Board that an employer's union animus contributed to its decision to discharge an employee engaged in protected union activity. But the employer, even if it fails to rebut the General Counsel's showing, can defend by proving by a preponderance of the evidence that the discharge would have occurred regardless of the protected activity.

The Supreme Court,[3] resolving a conflict in the circuits,[4] held that the Board's *Wright Line* test was a reasonable construction of the Act. That test "extends to the employer what the Board considers to be an affirmative defense but does not change or add to the elements of the unfair labor practice that the General Counsel has the burden of proving under section 10(c)"; the General Counsel must still prove by a preponderance of the evidence that "the employee's protected conduct was a substantial or motivating factor in the adverse action" (462 U.S. at 401). The Court added that it is fair that the employer bear "the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing" (id. at 403). The Court

[1] *NLRB v Transportation Management Corp*, 462 U S 393, revg 674 F 2d 103 (1st Cir 1982)

[2] 251 NLRB 1083 (1980), enfd on other grounds 662 F 2d 899 (1st Cir 1981), cert denied 455 U S 989 (1982)

[3] Justice White delivered the opinion of the Court

[4] The Board's *Wright Line* approach had been rejected by the Second and Third Circuits, see *NLRB v New York University Medical Center*, 702 F 2d 284 (2d Cir), vacated and remanded 104 S Ct 53 (No 82-1705, Oct 3, 1983), *Behring International v NLRB*, 675 F 2d 83 (3d Cir 1982), vacated and remanded 462 U S 1126, enfd after remand 714 F 2d 291, as well as by the First See *NLRB v Wright Line*, 662 F 2d 899 (1st Cir 1981) Several circuits expressly approved the *Wright Line* test See *NLRB v Senftner Volkswagen Corp*, 681 F 2d 557 (8th Cir 1982), *NLRB v Fresno Townehouse*, 647 F 2d 905 (9th Cir 1981), *Peavy Co v NLRB*, 648 F 2d 460 (7th Cir 1981)

also noted with approval that the Board's *Wright Line* test draws heavily from the Court's own approach to mixed motive cases involving First Amendment protected expression, developed in *Mount Healthy Board of Education v. Doyle*, 429 U.S. 274 (1977).

B. Employer Discipline of Union Officials Engaged in an Unlawful Work Stoppage

Metropolitan Edison[5] presented the question whether an employer unilaterally may discipline union officials more severely than other union employees for participating in an illegal work stoppage. Members and officials of one union, not themselves in dispute with their employer, declined to cross a picket line of another union, thereby violating a no-strike clause. The employer imposed greater discipline on union officials than on members who refused to cross the picket line, arguing that a union official has a duty to ensure compliance with the terms of the collective-bargaining agreement. But the Board found that imposition of harsher sanctions on union officials violated section 8(a)(3) of the Act because it discriminates solely on the basis of union status and may well deter qualified employees from seeking union office.

The Supreme Court[6] unanimously agreed that imposition of harsher discipline on union officials for violating a no-strike clause is an unfair labor practice unless there was a "clear and unmistakable waiver" of the officials' statutory right to be free of enhanced discipline for holding union office.[7] The Court rejected the employer's contention that the union's acquiescence in harsher sanctions for officials on previous occasions, and its failure to amend the contract in the face of two prior arbitration decisions upholding such sanctions, amounted to an implicit contractual waiver. The Court found that the two arbitration awards did not "establish a pattern of decisions clear enough to convert the union's silence into binding waiver," especially in light of the provision in the bargaining agreement that "[a] decision [by an arbitrator] shall be binding . . . for the term of *this* agreement" (460 U.S. at 709).

C. Remedies for "Hot Cargo" Violations

Shepard[8] involved the question of the appropriate remedy for a violation of the Act's prohibition of so-called "hot cargo" agreements. Section

[5] *Metropolitan Edison Co v NLRB*, 460 U S 693, affg 663 F 2d 478 (3d Cir 1981), enfg 252 NLRB 1030 (1980)

[6] Justice Powell delivered the opinion of the Court

[7] The Court noted that the case did not involve union officials providing a leadership role for an illegal strike, a situation which the Board has held would support the imposition of stricter discipline on officials *Midwest Precision Castings Co* , 244 NLRB 597 (1979)

[8] *Shepard v NLRB*, 459 U S 344, affg 669 F 2d 759 (D C Cir 1981), enfg 249 NLRB 386 (1980)

8(e) makes it an unfair labor practice for an employer and union to enter into a contract in which the employer agrees not to do business with any other person. A union entered into an agreement with building contractors that required the contractors to use only union truckdrivers to haul materials. Several nonunion truck operators, who were found to be independent contractors, joined the union under protest and paid initiation fees and dues. Although the Board found the agreement violated section 8(e) and entered a cease-and-desist order, it declined to order that the protesting operators be reimbursed for amounts paid to the union.

The Supreme Court[9] upheld the Board's limited order, concluding that the Act does not require the Board automatically to fashion a make-whole remedy for a hot cargo violation. The Court noted that the Board treats cases, like *Shepard,* where there is no evidence of actual coercion differently from cases in which there is coercion, such as threats, picketing, or a strike, that would amount to a violation of section 8(b)(4). It is reasonable, the Court concluded, for the Board to reserve a remedy such as reimbursement for "these especially egregious situations" (459 U.S. at 350). Rejecting the argument that the Board was required to give "complete relief" for the unfair labor practice found, the Court explained:

> [T]he Board's "power to order affirmative relief under Section 10(c) is merely incidental to the primary purpose of Congress to stop and to prevent unfair labor practices. Congress did not establish a remedial scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct." *Automobile Workers v. Russell,* 356 U.S. 634, 642–643 (1958). [459 U.S. at 352.]

D. Union Handbilling at Shopping Centers and the Publicity Proviso

In *DeBartolo,*[10] a union handbilling campaign urged customers to boycott all the stores in a shopping center because of the union's labor dispute with the contractor building a store for one of the center's tenants. Section 8(b)(4)(B), the secondary boycott provision of the Act, makes it unlawful for a union to "threaten, coerce, or restrain" any person to cease dealing in the products of any other producer or to cease doing business with any other person. The Board, however, concluded that the handbilling was permissible under the "publicity proviso" to section 8(b)(4), which exempts publicity, other than picketing, designed

[9] Justice Rehnquist delivered the opinion of the Court. Justice O'Connor dissented.

[10] *Edward J. DeBartolo Corp. v. NLRB,* 463 U.S. 147, vacating and remanding 662 F.2d 264 (4th Cir. 1981), affg. 252 NLRB 702 (1980).

to truthfully advise the public that "products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer." The Board reasoned that there was a "symbiotic relationship" between the center and all of its tenants and thus they would derive a substantial benefit from the "product" that the contractor was building, namely, the new store.

The Supreme Court[11] unanimously rejected the Board's position. Although the Court agreed that the contractor was a producer within the meaning of the proviso, it concluded that the Board's "symbiotic relationship" analysis was inconsistent with the requirement that the primary employer's product be "distributed by" the secondary employer. The Court stated:

> That form of analysis would almost strip the distribution requirement of its limiting effect. It diverts the inquiry away from the relationship between the primary and secondary employers and toward the relationship between two secondary employers. It then tests that relationship by a standard so generous that it will be satisfied by virtually any secondary employer that a union might want consumers to boycott. Yet if Congress had intended all peaceful, truthful handbilling that informs the public of a primary dispute to fall within the proviso, the statute would not have contained a distribution requirement. [463 U.S. at 156.]

Because the Board found the handbilling to be protected under the publicity proviso, it did not decide whether the activity was a form of restraint or coercion prohibited by section 8(b)(4). The Court concluded that, until this statutory issue was decided, it was premature to consider the union's alternative argument that the handbilling was a form of speech protected by the First Amendment. The Court remanded the case for further proceedings.

E. The Board's Authority to Enjoin Retaliatory State Court Lawsuits

In *Bill Johnson's Restaurants*,[12] the Board had issued a cease-and-desist order to halt an employer's state court lawsuit for libel and other torts against employees who picketed in protest of the employer's alleged unfairness to waitresses. The Board found the suit to be in retaliation for the exercise of rights protected by the Act and further found that the suit lacked a reasonable basis, based on its view of the evidence.

[11] Justice Stevens delivered the opinion of the Court

[12] *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, vacating and remanding 660 F.2d 1335 (9th Cir. 1981), enfg 249 NLRB 155 (1980)

The Supreme Court[13] acknowledged the Board's broad authority to prohibit employer conduct intended to restrain the exercise of protected rights. But, it found that "weighty countervailing considerations"—the right of access to courts protected by the First Amendment and the interest of states in providing a civil remedy for conduct touching "deeply rooted" local interests—preclude enjoining a well-founded state lawsuit even if the motive is retaliatory. Accordingly, the Court concluded that the Board may not enjoin an employer's prosecution of a state court lawsuit, even when the employer's motive is to retaliate for the exercise of rights protected by the Act, unless the suit lacks a "reasonable basis" in fact or law.

The Court further held that the Board may not "usurp the traditional fact-finding function of the state-court jury or judge" (461 U.S. at 745) in determining the relative merits of a suit. Therefore, if the employer presents evidence showing that its lawsuit raises genuine issues of material fact or of law, the Board should stay its unfair labor practice proceeding until conclusion of the state court suit. Where the state suit is successful, the employer will also prevail before the Board, for the filing of a meritorious lawsuit, even for a retaliatory motive, is not an unfair labor practice. If the employer loses its state court lawsuit, the Board may then proceed to adjudicate the unfair labor practice case and may consider the lack of merit of the suit in judging whether it was retaliatory. It may also order reimbursement of legal fees if an unfair labor practice is found.

F. Preemption of State Court Lawsuits by Strike Replacements Against Employers

Belknap v. Hale[14] presented the question whether the Act preempts a state court action for breach of contract and misrepresentation against an employer by strike replacements who, pursuant to a strike settlement, were displaced by reinstated strikers after having accepted permanent jobs on the assurance they would not be fired to make room for returning strikers. The Supreme Court[15] held that such suits are not preempted under either the *Garmon*[16] doctrine preempting state regulation of conduct arguably prohibited or arguably protected by the Act, or the *Machinists*[17] doctrine prohibiting state interference with conduct that Congress intended should be left to the free play of economic forces.

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[13] Justice White delivered the opinion of the Court Justice Brennan filed a concurring opinion

[14] *Belknap, Inc v Hale*, 113 LRRM 3057, affg *Hale v Belknap*, No 80-CA-1630-MR (Ky Ct App Apr 24, 1981)

[15] Justice White delivered the opinion of the Court Justice Blackmun filed an opinion concurring in the judgment Justice Brennan, joined by Justices Marshall and Powell, dissented

[16] *San Diego Building Trades Council v Garmon*, 359 U S 236 (1959)

[17] *Machinists v Wisconsin Employment Relations Commission*, 427 U S 132 (1976)

In so holding, the Court rejected the position taken by the Board as amicus curiae that exposing employers to state court liability for failure to deliver permanent jobs would burden an employer's right and ability to obtain strike replacements and frustrate the Federal policy of encouraging strike settlements, many of which provide for the return of strikers even though it may result in the discharge of replacements. The Court explained that the employer may protect itself against suits like this by promising permanent employment to replacement employees, subject only to settlement with the union or to a Board unfair labor practice order directing reinstatement of strikers. In the Court's view, such contracts would create a sufficiently permanent arrangement to permit the employer who prevails in an economic strike to keep replacements he has hired, in preference to returning strikers, if he desires to do so.

The dissenting justices concluded that lawsuits by strike replacements were forbidden by general preemption policies and that if such suits are allowed "employers will be subject to potentially conflicting state and federal regulation of their activities; the efficient administration of the National Labor Relations Act will be threatened; and the structure of the economic weapons Congress has provided to parties to a labor dispute will be altered."

G. Preemption of a Supervisor's Suit Against a Union for Tortiously Inducing his Discharge

Operating Engineers v. Jones[18] involved the question whether a state court action by a supervisor (Jones) alleging that a union induced his discharge was preempted by the Act. Jones, believing that the union persuaded the company to fire him out of hostility due to his prior nonunion employment, filed an unfair labor practice charge under section 8(b)(1). After the charge was dismissed by the regional director on the ground that there was insufficient evidence to establish that the union had caused Jones' discharge or had coerced the company in the selection of its bargaining representative, Jones filed suit in Georgia state court rather than appeal to the General Counsel. The suit alleged that the union had interfered with his employment contract by coercing the company into breaching the contract. The Georgia Court of Appeals, reversing the trial court, found that the suit was not preempted because the state had a strong local interest in protecting citizens' contractual rights and because the cause of action, which sounded in tort, was so unrelated to the concerns of the Federal labor laws that it would not interfere with the administration of those laws.

[18] *Operating Engineers Local 926 v Jones*, 112 LRRM 3272, revg 159 Ga App 693, 285 S E 2d 30 112 LRRM 3272 (1981)

The Supreme Court,[19] agreeing with the position of the Board as amicus curiae, held that the suit was preempted by the Act. Specifically, the Court concluded that the union's conduct arguably violated section 8(b)(1)(A), because it is not unusual for workers in the construction industry, such as Jones, to fluctuate between supervisory and nonsupervisory positions, and thus it was not unlikely that Jones would from time to time serve in a nonsupervisory position and that he might be intimidated by the union's conduct once he again became a statutory employee. The union's conduct also arguably violated section 8(b)(1)(B), since it appeared that Jones would have collective-bargaining responsibilities on the job in question. Nor could preemption be avoided on the theory that the regional director concluded that the Board lacked jurisdiction to adjudicate the complaint because of Jones' supervisory status. For the regional director addressed the merits of the complaint and dismissed only on evidentiary grounds.

The dissenting justices concluded that the state and Federal controversies were not identical, and therefore the state claims were not preempted under the Court's analysis in *Sears, Roebuck & Co.*[20]

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[19] Justice White delivered the opinion of the Court Justice Rehnquist, joined by Justices Powell and O'Connor, dissented

[20] *Sears, Roebuck & Co v Carpenters*, 436 U S 180 (1978)

VII

Enforcement Litigation

A. Board Jurisdiction

In *Lighthouse for the Blind*,[1] the Fifth Circuit held that the Board acted within its statutory power in asserting jurisdiction over the industrial division of the employer, a charitable nonprofit corporation that provides services to and carries on programs for individuals with visual impairments. The court therefore enforced the Board's order that the employer bargain with the union. The court noted that the Board's assertion of jurisdiction over sheltered workshops has hinged upon an ad hoc determination of whether the essential nature of the workshop is "rehabilitative" or "typically industrial." In light of the commercial and business characteristics of the employer's workshop, including the fact that continued workshop employment was contingent upon typical business criteria and the nature of the working conditions and benefits provided to the division employees, the court found the Board's decision consistent with *Goodwill Industries*[2] and *Cincinnati Assn. for the Blind*.[3] Noting that there is no congressional policy that collective bargaining is totally inconsistent with rehabilitative activity, the court concluded that the Board could properly find that the individuals working in the division workshop were "employees" within the meaning of the Act.

The 1974 health care amendments to the Act[4] made nonprofit hospitals subject to the Act and therefore to the Board's jurisdiction. In *Mid American Health Services*,[5] the Board held that there was a "clearly expressed affirmative intention that [it] assert jurisdiction . . . [over] health care institutions operated by religious institutions in general." The constitutionality of the Act's coverage of and the Board's jurisdiction over religiously owned or affiliated health care institutions, however, was not free from doubt in light of the Religion Clauses of the First Amendment. The issue was reviewed in *NLRB v. Catholic Bishop of Chicago*[6] where the Supreme Court held that Congress did not intend

[1] *NLRB v Lighthouse for the Blind of Houston*, 696 F 2d 399

[2] *Goodwill Industries of Southern California*, 231 NLRB 536 (1977)

[3] *Cincinnati Assn for the Blind*, 235 NLRB 1448 (1978), enfd 672 F 2d 567 (6th Cir 1982), cert denied 103 S Ct 78

[4] Pub L 93–360, 88 Stat 395 Sec 2 (2)

[5] 247 NLRB 752 (1980)

[6] 440 U S 490 (1979)

that the Act apply to parochial schools and therefore that the Board's assertion of jurisdiction was improper. While that holding rested on a statutory interpretation of the Act, the Court, in the process of so ruling, expressly noted the possibility of the Act as being in conflict with the First Amendment prohibitions had it determined that Congress did intend to cover the parochial schools: "[A]ssertion of jurisdiction . . . constitutes some degree of intrusion into the administration of the affairs of church-operated schools . . . [and] could run afoul of the Religion Clauses and hence preclude jurisdiction on constitutional grounds."

In *St. Elizabeth Community Hospital v. NLRB*,[7] the Ninth Circuit reviewed the Board's order to a church-operated hospital, owned by an order of the Catholic Church, requiring that the hospital bargain with a duly certified union. The hospital challenged the jurisdictional basis of the Board's order on the related First Amendment grounds that jurisdiction resulted in excessive entanglement of the Agency in religion and that the order infringed on the "free exercise of religion." The court, in agreement with the Board, determined that Congress intended to extend coverage of the Act to church-operated hospitals: "The legislative history indicates an affirmative intention of Congress to subject church-operated hospitals to Board jurisdiction . . . ." Accordingly, the court was compelled to address, directly, the constitutional issues raised by the Board's jurisdiction unlike in *Catholic Bishop of Chicago*, where it was found that church-operated schools were not intended to be covered by the Act.

As a factual matter, the religious environment at the hospital was plain: "Crucifixes, Bibles, and other religious symbols appear throughout the hospital, hospital meetings begin with prayer, and prayer is said over the public address system twice daily." To determine the constitutional propriety of the Board's jurisdiction in that situation, the court relied on the analysis prescribed by the Supreme Court in *Lemon v. Kurtzman*,[8] which required that the statute in question have a secular purpose, that the primary effect of the statute not advance or inhibit religion, and that it not result in excessive entanglement of government in religion. The court found that the first two criteria of the analysis were "easily" met by the statute and Board jurisdiction. Evaluation of the Board's jurisdiction with respect to the prohibition against "excessive entanglement" was considered in light of "the character and purpose of the institution affected, the nature of the activity the government mandates, and the resulting relationship between government and the religious organization." Under each of those factors the court concluded that Board jurisdiction over the hospital was proper. The primary purpose of the hospital was "like that of any secular hospital . . . devoted to

[7] 708 F 2d 1436
[8] 403 U S 602 (1971)

medical care for the sick"; Board jurisdiction could only result in "incidental intrusion" when "specific charges" are filed with the Board concerning the "limited area of collective bargaining and labor relations"; and given those boundaries, "there [was] no prospect of continuing government surveillance." The religious environment at the hospital was not deemed to be controlling on the issue since neither patients nor employees were required to profess to the Catholic faith, neither patients nor employees were required to participate in the religious activities at the hospital, half the seats on the board of directors could be occupied by persons having no relation to the Catholic faith, and neither the church nor the church order that owned and operated the hospital contributed financial support to the hospital. With respect to the hospital's claim that Board jurisdiction violated the "free exercise" clause, the court disagreed, noting that the Act does not prohibit the religious activities at the hospital on the one hand, and, on the other, Catholicism does not require the commission of unfair labor practices.

The court distinguished the situation that obtains with hospitals from that which obtains with parochial schools, as in *Catholic Bishop* and *Lemon* where Board jurisdiction and state aid, respectively, were disallowed by the Supreme Court. It noted that the hospital, unlike a church-operated school, was not engaged primarily in the propagation and indoctrination of Catholicism. Finally, the court observed that its decision was consistent with those in other circuits addressing the constitutional propriety of Board jurisdiction over church-affiliated health care institutions. *Tressler Lutheran Home for Children v. NLRB*;[9] *NLRB v. St. Louis Christian Home.*[10] Subsequently, the Seventh Circuit concurred in finding that Board jurisdiction did not violate the Religion Clauses of the First Amendment. *St. Elizabeth Hospital v. NLRB.*[11]

B. Board Procedure

1. Collateral Estoppel

In three cases decided during the year, the courts were required to consider whether certain Board unfair labor practice proceedings were barred by the doctrines of res judicata or collateral estoppel. In *Penntech Papers, Inc. v. NLRB*,[12] the First Circuit rejected the employer's claim that the Board's finding of single employer status for three separate corporations was precluded by a prior finding by a district court in a section 301 suit (29 U.S.C. § 185) that the corporations were not alter egos of one another. The court reasoned that while the Board might

[9] 677 F 2d 302 (3d Cir 1982)
[10] 663 F 2d 60 (8th Cir 1981)
[11] 715 F 2d 1193 (7th Cir)
[12] 706 F 2d 18

have been collaterally estopped from making its finding were the issues essentially the same, the issues of alter ego and single employer are sufficiently distinct so as to make the doctrine inapplicable. On the other hand, in *NLRB v. United Technologies Corp.*,[13] the Second Circuit concluded that the Board was collaterally estopped from finding unlawful a limited ban on employees' solicitation rights contained in the employer's collective-bargaining agreement with the union where the Board and the court had found the same ban lawful in a case decided 10 years previously. The court disagreed with the Board that an intervening decision of the Supreme Court in *NLRB v. Magnavox*,[14] which had held contractual bans generally to be unlawful, had rendered the earlier decision unsound. The court ruled that the *Magnavox* decision applied only to total bans on employees' solicitation rights and not to the limited ban involved in the case before it. In *Marlene Industries Corp. v. NLRB*,[15] the Sixth Circuit held that the decision of a special master in a contempt proceeding that the employer had not engaged in conduct violative of the court's judgment barred the Board from finding in a later unfair labor practice case that the same conduct was unlawful. The court concluded that the findings of the special master were essential to his ultimate determination; that the fact that the burden of proof in the contempt proceeding was higher did not alter the essential nature of the master's findings; and that there were no special circumstances which would justify withholding application of the doctrine.

2. Privilege

In *Drukker Communications*,[16] the court considered the Board's withholding relevant testimony of a Board agent. The outcome of the underlying Board election turned on whether "motor route carriers" were included in the unit by virtue of a preelection stipulation including "drivers." On the basis of conflicting testimony by company and union counsel as to an alleged understanding reached at the preelection conference, the hearing officer found that the motor route carriers were eligible voters. The company had subpoenaed a Board agent who was present at the conference, but the subpoena was quashed on the basis of a claim of privilege. In discussing the claim, the court recognized that a privilege exists to avoid enmeshing Board agents in the disputes between the parties, thereby impairing the highly sensitive and delicate role played by the agents in processing unfair labor practice and representation cases. The court found, however, that no real likelihood existed here of such impairment, noting several factors: The issue on which the testimony was sought was central to the case, and pertained, not to the

[13] 706 F 2d 1254
[14] 415 U S 322 (1974)
[15] 712 F 2d 1011
[16] *Drukker Communications, Inc v NLRB*, 700 F 2d 727 (D C Cir)

internal deliberations of the agency, but to an external event that an agency employee had witnessed. The issue was quite specific as opposed to a generalized search for helpful evidence. The version of the events that the testimony was sought to support was "highly plausible," since the company had contended early in the poststipulation proceeding that while the carriers were "drivers," they were not employees, and the company had substantial arguments for that position. The testimony was of unique value, since the Board agent was the only available impartial witness. The Board agent was being asked to testify about events which the parties would reasonably have expected him to observe and report to the regional director, whose approval was sought for the stipulation. Finally, although the testimony had been sought in a representation case, where the regional director was impartial, the issue became critical in a proceeding in which the Government was pressing an unfair labor practice complaint while withholding evidence that might demonstrate innocence. The court held that the "cumulative effect of all these considerations is to render the privilege inapplicable to this case."

C. Definitions

1. Employee

Statutory protection extends to "employees" as they are defined in section 2 of the Act. Section 2 specifically excludes from coverage "any individual having the status of an independent contractor." This past year, two courts addressed the issue of whether certain categories of workers—namely, taxicab drivers and hotel bandleaders and musicians—should be classified as "employees."

In *Associated Diamond Cabs*[17] the Eleventh Circuit rejected a regional director's determination that taxicab drivers who leased cabs daily were "employees" within the meaning of the Act. Relying on common law agency principles, the court applied a broadly interpreted "control test," one that "considers all of the circumstances of the relationship" between the drivers and the company. Accordingly, the court considered three aspects of the control test: first, whether the company had the "right to control" the drivers' job performance regardless of whether it, in fact, exercised control; second, whether the company controlled the manner, means, and details of that performance; and finally, whether the company's control was merely "oversight of control exercised by a regulatory governmental body."

Upon review of the record, the court found that the drivers, unlike most employees, had invested in the tools of their trade by paying the company a daily leasing fee for their cabs. The court also found that the

[17] *NLRB v Associated Diamond Cabs*, 702 F 2d 912

company's supervision of its drivers was minimal because it did not impose a minimum number of daily driving hours, it did not enforce a dress code or rules of conduct, and it rarely disciplined its drivers. Additionally, the court did not view the company's requirement that all drivers submit trip sheets as evidence of control. As the record indicated, the company collected the sheets only to conform with city regulations requiring that such sheets be available for inspection. Finally, the court gave greater weight than did the regional director to language in the lease agreement expressly defining the driver as an "independent contractor free from interference or control on the part of the lessor."

In *Hilton International Co.*[18] the Second Circuit applied similar agency principles to determine the status of hotel bandleaders and musicians. Disagreeing with the Board, the court concluded that hotel band musicians who work "steady engagements" are not hotel employees but, rather, are employees of their bandleaders who are independent contractors. The court recognized that the hotels exercised control over the type of music to be played and the time and location at which it is performed. The court concluded, however, that mere control over the band's "final product" was not dispositive of an employer/employee relationship. Rather, the court looked at who controlled the "manner and means" of the musicians' performances. The court found that bandleaders, not hotel management, hired, fired, and disciplined the musicians. Additionally, the leaders selected the band's music and orchestrated the manner in which it was performed. In sum, because the hotel did not exert any significant authority over the manner and means of the musicians' performance, the court concluded that the musicians were employees of their bandleaders and not employees of the hotel.

2. Employer

Whether two separate business entities may be regarded as a single employer for the purposes of the Labor Act is an issue that may arise in a variety of contexts. One such context concerns the bargaining obligations of a "double-breasted" operation—one in which two related firms engage in similar operations, one bidding as a nonunion contractor, the other bidding as a union contractor. Where the Board finds that two such businesses constitute a single employer because of interrelation of operations, common management, centralized control of labor relations, and common ownership, it may also find that the union and the nonunion employees constitute a single bargaining unit and consequently that all the employees are entitled to the wages and benefits of the union contract. In one such case,[19] the employer did not seriously dispute the Board's finding of single employer status under these criteria. Rather, it argued

[18] *Hilton International Co v NLRB*, 690 F 2d 318

[19] *NLRB v Al Bryant, Inc*, 711 F 2d 543 (3d Cir)

that the Board should be required to find "subterfuge" in the use of the double-breasted operation—for example, transfer of traditionally "union" work to the nonunion side. In rejecting this argument, the court noted that a contractor engaged in a double-breasted operation can bid through its union company on jobs that require union contractors but can underbid a unionized company through its second operation on jobs that do not require a union contractor. The court held that where, as in this case, the same employees are shifted back and forth between a union and a nonunion payroll, the benefits that the employees reap from the union's collective-bargaining agreement can be diluted. The court also noted that such an arrangement can create confusion and disputes since the employee may be paid different wages on different days, depending on which entity had the employee on the payroll for that day. The court held that the "Board should be free to apply its expertise . . . to hold that when factual prerequisites of finding a single employer and appropriate unit are present [a breach of the bargaining duty occurs] even without proof that union work was transferred to the nonunion side."

In another case,[20] the finding of single employer status—here based on an "alter ego" theory—concerned liability for an unfair labor practice. During a national coal strike, the employer arranged a sale of his coal trading business to a corporation formed by a former driver. The actual sale depended on the approval of a loan from the Small Business Administration. In the interim the parties agreed that the new corporation would lease the trucks, but the original employer would remain liable for taxes, licenses, and loan payments. The SBA loan was approved but later canceled, and the original employer sold the trucks to a third party. While the lease was in effect, the strike ended, but the lessee refused to reinstate some strikers for what the Board found were discriminatory reasons. The Board further found that in view of the degree of control of the operation maintained by the original operator under the lease, the lessor was the alter ego of the lessee and hence was liable for remedying the unfair labor practice. In disagreeing, the court applied a motivational test, holding that before such liability may be imposed, the record must show that the transferor expected to receive or actually received a benefit from the transfer "related to the elimination of its labor relations." Finding no such evidence, the court denied enforcement of the Board's order in this respect.

D. Representation Issues

In *Midland*[21] the Board returned to the standard for treating alleged campaign misrepresentations that had been adopted in *Shopping Kart*,[22]

[20] *Alkire v NLRB*, 716 F 2d 1014 (4th Cir)
[21] *Midland Life Insurance Co* , 263 NLRB 127 (1982)
[22] *Shopping Kart Food Market*, 228 NLRB 1311 (1977)

then abandoned in *General Knit.*[23] Under that standard, the Board will not set aside elections because of misleading campaign statements absent the use of forged documents or altered Board documents. During the year, panels of the Fifth,[24] Seventh,[25] Eighth,[26] Ninth,[27] and Eleventh[28] Circuits held that the Board acted within its discretion in adopting that standard, and no circuit held to the contrary.

Section 9 of the Act empowers the Board to make determinations concerning appropriate units for bargaining. Where, however, the employer and the union have reached agreement as to what constitutes an appropriate unit and the unit later becomes subject to Board scrutiny, the Board does not exercise its full statutory discretion. Rather, it simply determines whether the unit agreed upon is consistent with the Act and with Board policy. In *Cardox,*[29] the Third Circuit approved of this approach. The court held, however, that the Board could not make such a finding implicitly, by finding that an employer unlawfully withdrew recognition from the union it had voluntarily recognized, but must make an express finding that the unit was appropriate.

The Board has consistently refused to count ballots which identify the voters casting the ballots. In *Sioux Products v. NLRB,*[30] the Seventh Circuit reviewed a Board holding involving an election ballot which was marked with a "smiling face" immediately below the properly marked "no" box. The court disagreed with the Board's conclusion that since the extraneous marking was not inadvertently made, it therefore constituted an unacceptable risk of voter identification. Finding that the Board's decision was inconsistent with prior Board decisions holding that the danger of identification is minimal when extraneous marks merely emphasize the intent of the voter, the court held that the Board abused its discretion in invalidating the "smiling face" ballot.

E. Unfair Labor Practices

1. Discharge for Concerted Activity

In *Faulkner Hospital,*[31] the First Circuit agreed with the Board that an employee was engaged in concerted activity when he provided a written statement to a second employee, who worked for a subcontractor of the employer, regarding circumstances relevant to the second

[23] *General Knit of California*, 239 NLRB 619 (1978)
[24] *NLRB v Rollıgon Corp* , 702 F 2d 589, 594–595
[25] *NLRB v Milwaukee Brush Mfg Co* , 705 F 2d 257, 258
[26] *NLRB v Monark Boat Co* , 713 F 2d 355
[27] *NLRB v Yellow Transportation Co* , 709 F 2d 1342
[28] *Certainteed Corp v NLRB*, 714 F 2d 1042
[29] *NLRB v Cardox Division of Chemetron Corp* , 699 F 2d 148
[30] 703 F 2d 1010
[31] *NLRB v Faulkner Hospital*, 691 F 2d 51

employee's discharge and to a pending grievance of that discharge. The employee, a security guard, had written an incident report noting that he had encountered an off-duty employee of the subcontractor on the employer's premises and that the second employee appeared to be intoxicated. When the guard learned that the second employee had been discharged for drinking on the employer's property and that his report had been interpreted to indicate that he had actually seen liquor in the second employee's possession, he made repeated unsuccessful attempts to persuade his superiors to permit the correction of what he considered a misuse of the report. Thereafter, the guard gave the second employee a statement for use at an unemployment compensation hearing saying that he had not actually seen alcohol in the second employee's possession. When the employer learned that the statement was to be used in the second employee's pending grievance, the guard was discharged. The First Circuit enforced the Board's decision that the guard was engaged in concerted activity, rejecting the employer's argument that the second employee was properly discharged and therefore the guard did not act in concert with a statutory employee. The court concluded that the company's argument amounted to an assertion that any employee who aided a discharged "ex-employee" in an unsuccessful grievance of that discharge could himself be discharged, thereby severely crippling employee participation in the grievance-arbitration process. The court, noting both that the employee had sought to persuade his superiors to correct what he considered a misuse of the report and that the employer was closely allied with the subcontractor in effecting the second employee's discharge, also rejected the employer's claim that the discharge was motivated by a legitimate concern over business credibility and not by a desire to thwart mutual aid and protection among employees.

In a case[32] involving employees who were discharged for leaving their outdoor jobsite because it was raining, the Second Circuit held that an employee walkout is concerted activity under *Washington Aluminum*[33] only when it is "in support of some demand, however poorly articulated, communicated in some fashion at some relevant time to the employer." Denying enforcement of the Board's order, the court concluded that because the employees never communicated any demand for change in terms and conditions of employment, their action was distinguishable from that of the employees in *Washington Aluminum*. Asserting that the effect of the Board's decision was to create a per se rule that employees may leave work "concertedly" whenever they decide there is something undesirable about working on a particular day, the court held that an employer is at least entitled to some notice of the employees' grievance so he may respond with a proposal of his own.

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[32] *NLRB v Marsden*, 701 F 2d 238

[33] *NLRB v Washington Aluminum Co*, 370 U S 9 (1962)

In *Weingarten*[34] the Supreme Court held that an employee's request for a union representative to be present at an interview the employee reasonably believes will result in disciplinary action constitutes protected concerted activity. In *E. I. du Pont de Nemours & Co. v. NLRB*,[35] the Ninth Circuit denied enforcement of a Board decision that an employee at a nonunion facility engaged in concerted activity when he refused to sign an acknowledgment that he had read an "interview record" of performance deficiencies unless a coemployee was present to act as a witness. While emphasizing that it was not foreclosing the possibility that a request for a fellow employee may be found to be concerted in a nonunion setting, the court held that the single employee making such a request in a nonunion facility must be first shown to have acted as part of a group. Noting that there was no history of group activity and no indication of future group activity, including any indication that any other employee would respond to the request, the court termed the possibility of concerted activity wholly speculative.

Where honoring a picket line at the premises of another employer is otherwise protected, the right to engage in such picketing may be waived by a collective-bargaining agreement. In *U.S. Steel*,[36] an employee of U.S. Steel honored a picket line by railroad employees picketing the railroad that served U.S. Steel's Gary plant. The collective-bargaining agreement between U.S. Steel and the Steelworkers contained a no-strike clause stating not only that there "shall be no strikes, work stoppages, or interruption or impeding of work," but also that no "employee shall participate in any such activities." In addressing the issue of whether this clause waived the employee's right to engage in a sympathy strike, the court first considered the doctrine of "coterminous application," which the Board had often applied in these cases. The doctrine regards a no-strike clause as coterminous with the contract's arbitration clause, and since the subject of a strike at one employer's premises can virtually never be arbitrated under another employer's contract, sympathy strikes normally fall outside general no-strike provisions construed under the doctrine. The court noted that the doctrine had its origin in implying a no-strike obligation from an express arbitration clause.[37] The court further noted that, where an employer is seeking to enjoin a strike, coterminous application is also invoked to ensure that, if the strike is enjoined, arbitration may be compelled. Otherwise, the narrow exception from the prohibition against labor injunctions under Norris-LaGuardia[38] provided by the power invested

[34] *NLRB v J Weingarten*, 420 U S 251 (1975)

[35] 707 F 2d 1076

[36] *U S Steel Corp v NLRB*, 711 F 2d 772 (7th Cir)

[37] See *Teamsters Local 174 v Lucas Flour Co* , 369 U S 95 (1962), *Gateway Coal Co v Mine Workers*, 414 U S 368 (1974)

[38] 47 Stat 70, 29 U S C § 104

in Federal courts to enforce collective-bargaining agreements[39] would be inapplicable.

Since the instant case involved neither implying a no-strike clause nor enjoining a strike, the court regarded coterminous application as inapplicable. Nevertheless, the court recognized that in applying general principles of contract interpretation to an integrated no-strike/arbitration clause the scope of one might affect interpretation of the other. Here, however, the clauses were in different contract sections.

In finding that the no-strike clause here waived the employee's right to honor the picket line, the court noted first that the broad language of the no-strike clause is not limited either by its own language or by other contract terms to arbitrable disputes. Second, the court noted that, in the preamble to the contract, the parties expressed their acute awareness "of the impact upon the industry and its employees of the sizeable penetration of the domestic steel market by foreign producers" and the need "to work cooperatively to meet the challenge posed by principal foreign competitors," a concern implemented by a provision for joint union-management advisory committees, to promote among other things "orderly and peaceful relations with the employees, to *achieve uninterrupted operations in the plants* . . . ." (Emphasis added by the court.) In this context the court found the no-strike clause to constitute a clear and unmistakable waiver of the right to honor a stranger picket line.

2. Discharge of Supervisors

By virtue of the 1947 amendments, supervisors are excluded from the protection of the Act. Nevertheless, employer discipline of a supervisor may violate the Act because of its impact on employee rights. An employer, for example, may violate the Act by discharging a supervisor for refusing to commit an unfair labor practice. In one case[40] the supervisor had voluntarily attended union meetings and had signed an authorization card. Later, when questioned by company officials, she denied any knowledge of union activity. Still later, however, she admitted attending a union meeting along with company employees but refused to name them. The court accepted the Board's findings that the supervisor was discharged, not for her own union activity, but because she refused to identify the employees present and that her discharge therefore violated Section 8(a)(1) of the Act. The court noted that it would have been an unfair labor practice for the company to send the supervisor to engage in surveillance of the union meeting and held, in agreement with the Board, that asking the supervisor about the employees at the meeting she had attended voluntarily was no different.

For a number of years, the Board also had held unlawful the dis-

[39] See *Boys Markets v Retail Clerks Local 770*, 398 U S 235 (1970)
[40] *Howard Johnson Co v NLRB*, 702 F 2d 1 (1st Cir)

charge of a supervisor as part of "a pattern of conduct aimed at coercing employees in the exercise of their Section 7 rights."[41] In *Parker-Robb*[42] the administrative law judge found a violation under that theory where a supervisor was discharged after he had attended a union meeting and questioned the discharge, assertedly for "economic reasons," of employees who had also engaged in union activities. In rejecting that finding, the Board abandoned the "pattern of conduct" line of cases, noting that such cases involve a supervisor who engaged in union activity and was discharged contemporaneously with employees whose discharge was unlawful because their activity was protected. The Board observed that the "pattern of conduct" cases apparently stemmed from an extension of *Pioneer Drilling Co.*,[43] where the employees depended for employment on the continued employment of the drillers who hired and supervised them, and the Board found that the discharge of the driller-supervisors was a device to rid the employer of union adherents. In *Parker-Robb* the Board determined that this extension was confusing and unwarranted. The union sought review.[44] In affirming the Board, the court first noted that its role was not to determine whether the Board's new construction of the Act was preferable, but whether it was "reasonably defensible" rather than "fundamentally inconsistent with the structure of the Act." The court further noted that the "pattern of conduct" cases had met with criticism in the reviewing courts largely because they accorded too little weight to the employer's right to demand loyalty from supervisors. The court approvingly noted that after reviewing "pattern of conduct" the Board had "drawn a new line between the employee's and employer's rights that attempts to accommodate both" and that the Board had done this "openly and has explained in full detail why it is changing course."

F. The Bargaining Obligation

One of the duties imposed by the bargaining obligation is to furnish information relevant and necessary to bargaining or contract administration so that the requesting party can act in an informed fashion. Several cases dealt with this duty.

The District of Columbia Circuit, which recently decided an important group of cases on the duty to furnish race and sex data,[45] decided another group on the duty to furnish information about the nature and effects of potentially hazardous materials and chemicals handled by bargaining unit members.[46] The court recognized that the information sought

[41] *Brothers Three Cabinets*, 248 NLRB 828, 829 (1980)
[42] *Parker-Robb Chevrolet*, 262 NLRB 402 (1982)
[43] 162 NLRB 918 (1967), enfd in pertinent part 391 F 2d 961, 962–963 (1968)
[44] *Automobile Salesmen Local 1095*, 711 F 2d 383 (D C Cir)
[45] 46 NLRB Ann Rep 121 (1981)
[46] *Oil Workers Local 6–418 v NLRB*, 711 F 2d 348

was relevant to the unions' right to bargain about conditions of employment affecting the health and safety of employees and rejected arguments addressed to the unions' actual motivation and to the alleged burdensomeness of providing the information sought. The court also rejected the argument that providing the records sought would violate the employees' right to privacy, noting that the Board's orders permit the deletion of any information that could reasonably be used to identify specific employees. Concerning the employers' claims that some of the data sought constituted trade secrets, the court accepted the Board's conclusion that the information possibly involving trade secrets constituted a small portion of the total and that the blanket refusal to produce any information precluded meaningful bargaining over the conditions under which proprietary information might be disclosed. Accordingly, it enforced the Board's order requiring bargaining in good faith as to this information. The court recognized that if conditions could be devised—either by the parties or the Board—to accommodate both the employers' confidentiality interest and the unions' interest in obtaining relevant information, production will likely be required, but that if no such conditions could be created the Board might sanction the employers' refusal to disclose trade secrets. The court rejected the unions' attack on the Board's decision to defer to further bargaining on this issue rather than itself decide which information was disclosable. The court held that, where requested information is both relevant and subject to a legitimate confidentiality interest, the Board's reliance, in the first instance, on a longstanding bargaining relationship for the development of an accommodation does not contravene the Board's statutory obligation to resolve unfair labor practice charges.

In *General Motors*[47] the Sixth Circuit considered a union's request for all the original timestudy sheets used in setting the standard number of units required to be produced per shift. The court agreed with the Board's rejection of the company's argument that while relevant, the information was not necessary, as evidenced by the parties' having resolved several thousand production standard grievances without the disclosure of such information. The court held that the fact that the union historically had not fully exercised its statutory right to information did not defeat that right when it was asserted.

In *Leonard B. Hebert, Jr. & Co.*,[48] the Fifth Circuit enforced the Board's decision that 10 employers were required to furnish a union with information that would assist it in determining whether the employers were utilizing double-breasted operations—that is, where two related firms engage in similar operations, one bidding as a nonunion contractor and one bidding as a union contractor—in order to evade obligations

[47] *General Motors Corp v NLRB*, 700 F 2d 1083

[48] *NLRB v Leonard B Hebert, Jr & Co*, 696 F 2d 1120

under a collective-bargaining agreement. Although the companies involved in the case denied double breasting, in recent years the union was presented with evidence that tended to indicate otherwise. Officials of the union, for example, had been informed by a third party that many construction contractors in the area were utilizing double-breasted operations. Former union employees had also told a union official that they were relinquishing their union membership in order to work for a nonunion counterpart of one of the employers. The Fifth Circuit, in enforcing the Board's order, noted that, although the information sought was not presumptively relevant to the bargaining representative's duties, the union had met its initial burden of showing relevancy. The court concluded that the information would assist the union in making an informed choice whether to pursue legal means by which it could hold nonunion companies to the terms of the collective-bargaining agreement. The court, applying the liberal, discovery-type standard set forth in *Acme Industrial Co.*,[49] rejected the employers' contentions that the information was irrelevant because the union already knew that one or more of the respondent employers utilized double-breasted operations and that the union could have discovered if any of the other companies were involved in double breasting by filing a unit clarification petition.

G. Remedial Orders

In *Gissel*,[50] the Supreme Court affirmed the Board's authority to issue an order requiring an employer to bargain with a union, even though it had not won a Board election, where the Board finds that the employer has committed violations of the Act that are "of such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be held."

In two cases three-judge panels affirmed the Board's findings of unfair labor practices, as well as its findings that the unions involved had achieved a card majority. The panels denied enforcement of the *Gissel* remedy, however, on the ground that the Board had failed to explicate sufficiently why a bargaining order, rather than some other remedial order, was necessary. In both cases, the courts of appeals ordered rehearing in banc—that is, before all the active judges of the circuit. In both cases, following rehearing the Board's order was enforced in full. In one case,[51] the Fourth Circuit, by a vote of five to four, noted that to facilitate review, the Board is required only to state "what unfair labor practices the order is intended to redress and [to indicate] in general

[49] *NLRB v Acme Industrial Co*, *385 U S 432, 435*–436 (1967)
[50] *NLRB v Gissel Packing Co*, 395 U S 575, 614 (1969)
[51] *NLRB v Maidsville Coal Co*, 718 F 2d 658

why traditional remedies are inadequate in the circumstances." The court held that the Board met this standard by summarizing the unfair labor practices found and by noting the small size of the employee complement and the substantial percentage of the work force subjected to the employer's unlawful terminations and other unfair labor practices. In the other case,[52] a panel of the Third Circuit had initially remanded the case for the Board to consider whether changes in the membership of the bargaining unit since the union obtained its authorization cards would cast doubt on the propriety of a bargaining order "at this late date." After the Board accepted the remand and reviewed the personnel changes, it affirmed its bargaining order and again sought enforcement; a panel again denied enforcement of the bargaining order, finding that the Board's statement of reasons for a bargaining order was insufficient. The court, by a vote of seven to three, enforced the Board's order. The court found that by summarizing the unfair labor practices, which culminated in a meeting at which the employer unlawfully "obliterated" the union's support by promising retroactive wage increases that subsequently were granted to almost all employees, the Board had supported its conclusion that the possibility of securing a fair election through traditional remedies was slight. With respect to the changes in employee complement and the passage of time, the court accepted as sufficient the Board's explanation that the unlawful conduct was the kind that "in the Board's experience, tends to have a continuing effect on employee freedom of choice long after the conduct has ended." The Board also noted that a substantial portion of the present employee complement had been subjected to the unlawful conduct and that the unlawful conduct had not been remedied.

In a case[53] in which a supervisor's physical assault on an employee was found to be an unfair labor practice, the employee was still disabled from the assault at the time of the hearing. The Board's order required the employer to make the employee whole for any loss of earnings that he "may have suffered, or will suffer" as a result of the unlawful conduct. The employer challenged the backpay order as beyond the Board's authority, relying principally on the Board's longstanding policy against giving backpay for loss of work as a consequence of a union's picket line violence. The court noted that the Board initially premised this policy on the insufficiency of statutory authority, but later relied on the existence—and greater scope—of a tort remedy, as well as on the "risk of inhibiting the right of employees to strike to such an extent as to substantially diminish that right."[54] The court also adverted to a number of cases in which the Board has ordered an employer to pay backpay for relatively

[52] *NLRB v Keystone Pretzel Bakery*, 696 F 2d 257

[53] *Graves Trucking, Inc v NLRB*, 692 F 2d 470 (7th Cir)

[54] *Union de Tronquistas, Local 901 (Lock Joint Pipe Co)*, 202 NLRB 399 (1973)

short periods of disability where the injury or illness was attributable to an unfair labor practice. The court concluded, however, that an open-ended award like the one here goes about as far as possible in supplanting the loss of earnings portion of a tort recovery and contemplates continued hearings on questions of the continued disability and its cause and extent—issues outside the Board's normal fare. Accordingly, the court concluded that Board orders of this sort should be of limited duration. After considering a number of possible limitations, the court settled on 2 years as a period that would provide a substantial remedy but would minimize the need for the Board to make determinations about the nature and extent of the disability.

VIII

Injunction Litigation

Section 10(j) and 10 (l) authorize application to the U.S. district court, by petition on behalf of the Board, for injunctive relief pending hearing and adjudication of unfair labor practice charges by the Board.

A. Injunctive Litigation Under Section 10(j)

The Agency had considerable success before the U.S. district courts during the fiscal year in a series of section 10(j) cases involving employer relocations of operations which were alleged to have violated section 8(a)(3) and (5) of the Act under the rationale of the Board's decision in *L.A. Marine Hardware.*[1] In one such case, *Eisenberg v. Suburban Transit Corp.*,[2] the employer had a labor contract covering its bus driver employees. During the term of the contract, and without the union's agreement, the employer transferred certain of its routes and drivers to another terminal controlled by a related company which maintained lower wages and benefits. In agreement with the Board, the district court concluded that there was reasonable cause to believe that the employer's work transfer was motivated by a desire to evade the wages and benefits of the labor agreement; accordingly, the court concluded, under *L.A. Marine Hardware* the respondent unlawfully had effected a modification of the contract in violation of section 8(d)/8(a)(5) and 8(a)(3) of the Act.[3] It then determined that an injunction compelling the employer to restore the status quo ante by placing the drivers back under the terms of the union's labor contract was just and proper to prevent an irreparable erosion of the union's strength. On appeal, the Third Circuit affirmed without opinion.[4] Two other district courts granted broad 10(j) relief in similar work relocation cases.[5]

Another important district court decision was rendered in *Fuchs v. Jet Spray Corp.*[6] There, the employer allegedly committed such serious

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[1] *Los Angeles Marine Hardware Co* , 235 NLRB 720 (1978), enfd 602 F 2d 1302 (9th Cir 1979)

[2] 112 LRRM 2708, 97 LC Para 10,132 (D N J)

[3] The district court also relied on *Zipp v Bohn Heat Transfer Group*, 110 LRRM 3013 (C D Ill 1982), where injunctive relief was granted on the same theory of violation See the discussion in the 1982 Annual Report

[4] 720 F 2d 661 (3d Cir)

[5] *Kobell v Thorsen Tool Co* , 112 LRRM 2397 (M D Pa), *Gottfried v Echlin, Inc* , 113 LRRM 2349, 99 LC Para 10,596 (E D Mich), stay denied 113 LRRM 3028, 99 LC Para 10,597 (E D Mich), appeal pending (6th Cir)

[6] 560 F Supp 1147 (D Mass), appeal pending (1st Cir)

and pervasive unfair labor practices in response to a union's organizational campaign that a fair election would not be possible. Accordingly, in its 10(j) petition, the Board sought an interim remedial bargaining order.[7] The district court found reasonable cause to believe that the employer had committed a variety of serious violations of the Act, including, e.g., promising and implementing employee benefits, soliciting grievances and promising to remedy them, polling employees as to their union sympathies, creating and dealing with an employee committee, and discharging and disciplining employees to discourage the union organizing activities. The court further concluded that injunctive relief was just and proper to restrain the employer's pervasive and ongoing violations, as well as to require the employer to offer interim reinstatement to three alleged discriminatees[8] and to cease dealing with the employee committee. Citing *Solien v. Merchants Home Delivery Service*, 557 F.2d 622, 627 (8th Cir. 1977), the court rejected the employer's argument that relief should be denied because of the Board's alleged delay in filing its 10(j) petition. However, finding that the size of the bargaining unit and, therefore, the union's card majority, was in serious dispute, the district court declined to grant an interim bargaining order.

B. Injunctive Litigation Under Section 10(1)

During the past year a circuit court addressed, for the first time, the issue whether a district court in a section 10(1) proceeding may order a hiatus in all picketing, including ostensibly lawful picketing, as a means of remedying the effects of unlawful picketing. In *Miller v. Food & Commercial Workers Local 498*,[9] the Ninth Circuit reversed that portion of a district court's 10(1) injunction which forbade all picketing for any purpose for a period of 30 days from issuance of the order.[10] The appellate court held that a "district court has jurisdiction to order a hiatus in all picketing under sec. 10(1) only when presumptively legitimate picketing would perpetuate the effects of prior illegal activity." Enjoining even lawful picketing on any other basis, the court feared, would be difficult to reconcile with the First Amendment. Accordingly, the court concluded that the district court could have ordered a hiatus if it had found either that the uninterrupted continuation of even lawful picketing would serve as a signal to employees of suppliers to continue to

[7] See generally *Seeler v Trading Port, Inc* , 517 F 2d 33 (2d Cir 1975)

[8] The court found insufficient evidence of illegal discrimination with respect to a fourth discharged employee, and denied him interim reinstatement

[9] 708 F 2d 467 (9th Cir)

[10] The union did not appeal from the district court's finding that there was reasonable cause to believe the union had engaged in recognitional picketing in violation of sec 8(b) (7) of the Act or from that portion of the order enjoining, pending Board litigation, any further picketing for that unlawful purpose

support the unlawful objective of the prior picketing, or that a hiatus was necessary "to restore the status quo by counteracting the hardship [to the targeted employer] created by the unlawful picketing." Since the district court had "made no findings of fact specifically directed toward its decision to halt all picketing for thirty days," the court of appeals remanded the case to the district court. The lower court was instructed that if, on remand, it again concluded that something more than an injunction against unlawful picketing activity was appropriate, "it must carefully tailor its injunction in order to permit the maximum amount of legitimate activity while erasing the illegal . . . conduct and its deleterious impact."

IX

Contempt Litigation

In FY 1983, 115 cases were referred to the Contempt Litigation Branch for consideration for contempt or other appropriate action to achieve compliance with outstanding court decrees. During the same period, 23 civil contempt proceedings were instituted; these included 4 motions for assessment of fines and 3 motions for writs of body attachment.[1] Twenty contempt adjudications were awarded in favor of the Board, including two where compliance fines were assessed and three in which writs of body attachment issued; in addition, three proposed adjudications are pending before the courts of appeals upon the special masters' recommendations.[2] Four cases were consummated by

[1] *NLRB v Ashland Construction Co* , in No 82-1750 (7th Cir) (civil contempt against respondent and alter ego for failure to produce records necessary to compute backpay), *NLRB v D V C Industries*, in No 82-1360 (7th Cir) (civil contempt against employer and alter ego for failure to produce payroll records necessary to compute backpay), *NLRB v Danielle Sportswear*, in No 82-1669 (4th Cir) (civil contempt for failure to execute and apply contract, furnish payroll records and post notices), *NLRB v Ellingson's Sport Center*, in No 80-7450 (9th Cir) (civil contempt for engaging in surface bargaining, threats, promises of benefit, and coercive interrogation), *NLRB v Garrett Freight Lines, Inc (I)*, in No 82-2167 (10th Cir) (civil contempt for failure to post notices, provide payroll records, and make compliance reports), *NLRB v Garrett Freight Lines* (II), in No 82-7577 (9th Cir) (civil contempt for failure to provide payroll records), *NLRB v Hyde Park Construction Co* , in No 82-1108 (6th Cir) (civil contempt for failure to make payments to fringe benefit funds), *NLRB v Ironworkers Local 45*, in No 82-3524 (3d Cir) (civil contempt for discriminating in hiring hall by referring members over nonmembers and bypassing members for arbitrary reasons), *NLRB v Local 695, Teamsters*, in Nos 78-1391 and 78-1681 (7th Cir) (civil contempt for picket line misconduct in violation of consent judgment), *NLRB v Nagle Industries*, in No 81-1104 (6th Cir) (civil contempt for failure to execute agreed-upon contract), *NLRB v Nelson Metal Fabricating Co* , in Nos 82-3029 and 80-1236 (3d Cir) (civil contempt for failure to pay interest on backpay and Board costs), *NLRB v Patrick & Co* , in No 82-7262 (9th Cir) (civil contempt for engaging in surface bargaining and failure to pay the Board's court costs), *NLRB v Phelps Cement Products*, in Nos 81-4150 and 81-4180 (2d Cir) (civil contempt for failure of company and its president to bargain and post notices), *NLRB v Rick's Construction Co* , in No 82-7088 (9th Cir) (civil contempt of reinstatement provision of judgment, and for failure to provide payroll records and post notices), *NLRB v Transportation by Lamar, Inc* , in No 82-1144 (7th Cir) (civil contempt against employer and alter ego and principal officers or owners for failure to supply payroll records necessary to compute backpay), *NLRB v Transportation Management*, in Nos 82-1854 and 82-1002 (1st Cir) (in civil contempt for failure to offer reinstatement, produce records, and post and mail notices), *NLRB v Building & Construction Trades Council*, in Nos 81-2485, 74-1143, 80-2056 (3d Cir) (assessment of conditional fine for violation of purgation order prohibiting secondary boycott activity), *NLRB v Dominion Tool & Die Co* , in No 78-1187 (6th Cir) (assessment of fines for failure to obey purgation order requiring bargaining), *NLRB v Local 32B-32J (I & II)*, in Nos 78-4160 and 78-4166 (2d Cir) (assessment of fines for violation of secondary boycott provisions of judgment), *NLRB v Oldwick Materials*, in No 81-1101 (3d Cir) (assessment of fines for violation of bargaining provision of judgment), *NLRB v Craw & Sons*, in No 80-2443 (3d Cir) (body attachment for failure to comply with purgation order requiring payment of backpay provisions of judgment), *NLRB v Laborers Fund Corp* , in No 81-7401 (9th Cir) (body attachment for violation of purgation order requiring recission of unilateral changes and restoration of benefits in compliance with the judgment), *NLRB v Sally Lyn Fashions*, in No 81-1520 (3d Cir) (body attachment for failure to comply with purgation order requiring backpay pursuant to judgment)

[2] *NLRB v Dawson Masonry*, in No 81-7407 (11th Cir) (civil contempt order against respondent, alter ego, and individual respondent, including a $100/day prospective fine for failure to pay backpay), *District 1199 (Community General and Woodhull Nursing)* (civil contempt against union and officers, imposing fine of $15,000 per dispute and $2500 per additional incident plus Board costs for 8(b)(1)(A) conduct), *NLRB v Garrett Freight Lines (I)*, in No 82-2167 (10th Cir) (default summary contempt adjudication, including $1000 & $100/day prospective fines for failure to post

(continued)

settlement orders requiring compliance,[3] while seven others were discontinued upon full compliance.[4] In one case, the Board's petition was denied on its merits[5] and, in three, petitions were voluntarily withdrawn.[6] A motion for entry of a protective order was filed in one case[7] and a motion for discovery in another case.[8] A protective order was granted in one case[9] and denied in another,[10] while in a third case, the court refused to grant the Board's motion for discovery.[11] Finally, after referral to the Contempt Branch, voluntary compliance was achieved in 26 cases during the fiscal year without the necessity of filing a contempt petition while, in 45 others, it was determined that contempt was not warranted.

Several of the proceedings during the fiscal year warrant comment.

(continued)
notices and provide backpay records), *NLRB v Laborers Fund*, in No 81-7401 (9th Cir) (summary adjudication in civil contempt including prospective fine of $1000 & $100/day for failure to rescind unilateral changes and to restore benefits), *NLRB v Lloyd Well d/b/a Pere Marquette Park Lodge*, in No 78-2468 (7th Cir) (civil contempt for failure to pay backpay), *NLRB v Local 45, Ironworkers*, in No 82-3524 (3d Cir) (civil contempt adjudication, imposing prospective fines of $5000 & $500/day for discriminatory and arbitrary operation of a hiring hall), *NLRB v Local 829, Carpenters*, in No 80-7410 (9th Cir) (civil consent contempt adjudication for violation of secondary boycott provisions of judgment), *NLRB v J Ray McDermott*, in No 77-1171 (5th Cir) (consent contempt adjudication after favorable special master's ruling, imposing costs and attorneys' fees, and a prospective fine of $15,000 & $500/day for surface bargaining violations), *NLRB v Robert Cashdollar d/b/a Nelson Metal Fabricating*, in No 83-3334 (3d Cir) (civil contempt order, including prospective fines of $1000/day), *NLRB v Tosto*, in No 81-1573 (6th Cir) (employer and additional respondents in civil contempt for failure to make payments to contractual fringe benefit funds), *NLRB v Shaw College*, in No 77-1729 (6th Cir) (civil contempt consent adjudication for bargaining and reinstatement violations), *NLRB v Tupco*, in Nos 75-1371 and 75-1851 (11th Cir) (civil contempt consent adjudication against employer and additional respondents imposing a daily fine and a prospective fine of $25,000 for continued 8(a)(1) and (3) violations and refusal to pay backpay and reinstate benefits), *NLRB v United Contractors* (I) & (II), in No 75-1954 (7th Cir) (corporation and president found in civil contempt, imposed prospective fine of $5000 & $1000/day for 8(a)(3) and (5) violations), *NLRB v Western Truck*, in No 81-7066 (9th Cir) (summary contempt adjudication, imposed fine of $5000 and prospective fine of $500/day for failure to abide by bargaining, notice-posting, and record-production provisions of judgment), *NLRB v Blevins Popcorn*, in No 75-1748 (D C Cir) (assessing fine, costs, and fees and increasing prospective fines to $1000/day for surface bargaining violations), *NLRB v Dominion Tool*, in No 78-1187 (6th Cir) (assessing $15,000 fine and increasing prospective fines, and costs and fees for bargaining violations), *NLRB v Craw & Sons*, in No 80-2443 (3d Cir) (body attachment for failure to comply with purgation order requiring payment of backpay), *NLRB v Lee Simmons*, in No 80-7181 (9th Cir) (body attachment for violation of protective restraining order respecting dissipation of assets), *NLRB v Sally Lyn Fashions*, in No 81-1520 (3d Cir) (body attachment for failure to pay backpay), *NLRB v Aquabrom*, in No 77-1732 (6th Cir) (recommendation of special master to adjudge successor in contempt of bargaining decree), *NLRB v Perschke Hay & Grain*, in No 78-1741 (7th Cir) (special master recommended finding of contempt for failure to pay backpay), *NLRB v Southwestern Bell*, in No 78-1911 (5th Cir) (special master recommended finding of contempt for 8(a)(1) and (5) conduct—failure to permit union steward to actively participate in investigatory interview which could lead to discipline, failure to provide records needed for grievance)

[3] *NLRB v Empire Shirt*, in No 79-1902 (11th Cir) (reinstatement), *NLRB v Fotomat*, in No 77-1742 (6th Cir) (consent order entered, including fines of $5000 per violation & $1000/day and Board costs) (bargaining), *NLRB v Fugazy Corp* , in No 81-4103 (2d Cir) (consent decree for $6100 in backpay) (reinstatement), *NLRB v Haddon House Food Products*, in No 79-1619 (D C Cir) (consent decree including $1000 & $1000/day prospective fine) (notice posting)

[4] *NLRB v D V C Industries*, No 82-1360 (7th Cir), *NLRB v Jaline Togs*, No 79-4036 (2d Cir), *NLRB v M & B Contracting*, No 80-1077 (6th Cir), *NLRB v Oldwick Materials*, No 81-1101 (3d Cir), *NLRB v Patrick & Co* , No 82-7262 (9th Cir), *NLRB v Pignotti Sheet Metal*, No 81-2033 (8th Cir), *NLRB v Transportation Management*, Nos 82-1854 and 82-1002 (1st Cir)

[5] *NLRB v Great Lakes Steel*, No 78-1299 (6th Cir)

[6] *NLRB v General Motors*, No 81-3091 (3d Cir), *NLRB v J & M Gonzalez*, No 79-4055 (2d Cir), *NLRB v Local 6, Musicians*, No 80-2650 (9th Cir)

[7] *NLRB v M & B Contracting*, No 80-1077 (6th Cir)

[8] *NLRB v Streator Glass*, No 81-2381 (7th Cir)

[9] *NLRB v Shaw College*, No 77-1729 (6th Cir)

[10] *NLRB v M & B Contracting*, No 80-1077 (6th Cir)

[11] *NLRB v Steinerfilm, Inc* , No 81-1437, 702 F 2d 14 (1st Cir 1983)

In three of these cases, body attachment was required to secure compliance. In *Sally Lyn Fashions*,[12] discussed in the 1982 Report, the court, in sustaining its special master, found that the respondents had failed to satisfy their burden of establishing their financial inability to comply with the reinstatement and backpay provisions of the court's earlier judgments, and reserved jurisdiction to issue writs of attachment against offending respondents in the event of continued noncompliance. Thereafter, upon the Board's application, the court directed the arrest and incarceration of respondents' principals until substantial compliance could be achieved.[13] In *Craw & Sons*,[14] the court, upon an audit by an independent accountant retained by the court's special master, rejected the respondent's claim of financial inability to comply with a backpay judgment. When respondent nevertheless refused to satisfy the judgment, the court directed the arrest of the respondent's secretary-treasurer, who was incarcerated until the judgment was satisfied.[15] In the third case, *Simmons & Simmons*,[16] the Ninth Circuit issued a writ of body attachment against the respondent because he dissipated assets in violation of a protective restraining order and failed to provide records to the Board to enable it to monitor his compliance with the protective order.[17]

Two cases of significance involving employers' bargaining obligations were issued during the fiscal year. In *J. Ray McDermott*,[18] the Fifth Circuit adopted the special master's report finding that the company had bargained in bad faith by implementing a scheme to engage in sham and sterile bargaining with the intention of causing negotiations to fail, and thus avoiding consummation of a collective-bargaining agreement. In purgation, the court imposed prospective fines of $5000 per violation and an additional fine of $500 per day for any future violations, and awarded the Board its costs and attorneys' fees. In the second case,[19] a "third stage" civil contempt proceeding discussed in the 1981 Report, the special master, after remand by the court to reconsider his original decision absolving respondent of contempt, issued his report sustaining the Board's allegations of unlawful surface bargaining and improper withdrawal of recognition against Blevins Popcorn Company.[20] In adopting the master's report, the court, as part of its purgation order, assessed

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[12] *NLRB v Sally Lyn Fashions, Inc et al*, order of Aug 10, 1982, in No 81-1520, 112 LRRM 3088 (3d Cir), adopting the report of Special Master Raymond J Durkin, United States Magistrate, issued July 23, 1982, 112 LRRM 3039, recommending adjudication in civil contempt of the judgments of Jan 3, 1979, in No 78-2481, and Oct 1, 1980, in No 80-2067

[13] Unreported order of Nov 15, 1982

[14] *NLRB v LeRoy W Craw, Jr , Vernon F Craw and Daniel G Leonard d/b/a Craw & Sons*, No 80-2443 (3d Cir)

[15] Unreported order of Oct 28, 1982

[16] *NLRB v Lee Simmons and Beverly McKinstry Simmons, a partnership d/b/a Elmendorf & Fort Richardson Barber Concessions*, No 80-7181

[17] Unreported order of July 26, 1983

[18] *NLRB v J Ray McDermott & Co , Inc* , unreported order of Feb 18, 1983

[19] *NLRB v Blevins Popcorn Company*, No 75-1748, 659 F 2d 1173 (D C Cir)

[20] Report of Special Master Lawrence S Margolis, 117 LRRM 2342 (Oct 5, 1982)

and increased the amount of noncompliance fines which had been prospectively imposed in a prior contempt proceeding;[21] imposed an additional conditional fine of $50,000 to be remitted upon full compliance with the court's orders; and directed reimbursement of the Board's litigation expenses and the union's costs incurred in the course of its participation in the unsuccessful collective-bargaining negotiations.

Finally, in *Steinerfilm*,[22] the First Circuit issued a noteworthy decision involving the Board's request for postjudgment discovery. In that case, the Board had sought a discovery order to ascertain whether the respondent employer had employed an undercover agent to engage in unlawful surveillance of its employees' renewed union activities in violation of an outstanding First Circuit decree. The court held that the case law did not support "the issuance of such an order absent either a contempt or an unlawful labor practice proceeding, or a showing that a company is attempting to avoid financial liability for backpay."[23] On the Board's petition for rehearing, the court reaffirmed its order denying discovery in the absence of a contempt proceeding, a provision in the underlying decree directing discovery, or other special circumstances. The court thus overturned a longstanding practice of the Board of instituting pre-contempt discovery proceedings, a practice that had, theretofore, received nearly uniform judicial sanction by the circuit courts.[24]

[21] 96 LRRM 2857 (Sept 16, 1977)

[22] *NLRB v Steinerfilm, Inc* , 702 F 2d 14 (1st Cir)

[23] 702 F 2d at 15

[24] See, for example, *NLRB v Dixon*, 189 F 2d 38, 39 (8th Cir 1951) See also *NLRB v Deena Artware*, 361 U S 398, 404 (1960)

X

Special and Miscellaneous Litigation

A. Litigation Involving the Board's Jurisdiction

In one case, the State of Florida filed suit in district court seeking declaratory and injunctive relief from the Board's assertion of jurisdiction over players and parimutuel employees in the state-regulated jai alai industry. The district court found that it had subject matter jurisdiction to determine the claim, and held that the Board had not abused its discretion under section 14(c)(1) of the Act by asserting jurisdiction over the jai alai players and parimutuel employees.[1] The district court also rejected Florida's contention that the Tenth Amendment of the Constitution barred application of the Act to labor disputes in the jai alai industry. The Board appealed the issue of the district court's subject matter jurisdiction, and the State appealed the section 14(c)(1) and Tenth Amendment issues.

On appeal, the Eleventh Circuit found that the general rule barring district court review of Board representation proceedings applied only to Florida's effort to enjoin the Board representation proceeding, not to the State's request for declaratory relief.[2] The circuit court ruled that *Boire v. Greyhound Corp.*[3] only limits the power of a district court to review or stay a Board election or certification of its results. Here, Florida was separately seeking a declaration that the Board lacked legal authority to regulate labor disputes in the jai alai industry. The circuit court concluded that the district court had authority under 28 U.S.C. §1331 to consider the complaint, and that *Boire v. Greyhound* was no bar to that claim. With respect to the substantive issues, the court of appeals upheld the Board's assertion of jurisdiction over the jai alai players noting, in particular, the Board's distinction between their employment characteristics and those of employees at race tracks over whom the Board had declined to assert jurisdiction. The court also held

[1] *Florida Board of Business Regulation v NLRB*, 497 F Supp 599 (M D Fla 1980)
[2] *Florida Board of Business Regulation v NLRB*, 686 F 2d 1362 (11th Cir 1982)
[3] 376 U S 473 (1964)

that the Tenth Amendment did not bar this exercise of jurisdiction over employers in the jai alai industry because the Board was attempting to regulate a private business rather than the State of Florida. As to the parimutuel employees in the jai alai industry, the circuit court found that the Board abused its discretion by treating those employees differently from the same type employees at race tracks without having made any factual findings describing the differences between them. The court also noted the State's proffered evidence that the employment characteristics of parimutuel workers in both industries were the same in many respects.

In *New York Racing Assn. v. NLRB*,[4] the Racing Association (NYRA) petitioned the Board to assert jurisdiction over employers in the horse racing industry and to repeal or amend the Board's "horse racing rule." (29 CFR §103.3 (1980)). NYRA also petitioned the Board's Region 29 for an investigation and certification of collective-bargaining representative under section 9 of the Act. The Board denied the petition to amend its rule, stating its intention to "continue to decline to assert jurisdiction over labor disputes in these [horse racing and dog racing] industries."[5] The Board also refused to assert jurisdiction over the representation petition, relying upon the published Rule 103.3. NYRA subsequently filed suit in the district court to review the Board's decisions. The district court ruled that it had jurisdiction to review the Board's determination; that the Board's initial promulgation of Rule 103.3 and subsequent decision not to amend that rule disregarded statutory limitations on the Board's discretion; and that the Board had abused its discretion in relying upon its rule to dismiss the election petition.

The Second Circuit reversed the district court's assertion of jurisdiction, rejecting NYRA's reliance upon *Florida Board of Business Regulation*, supra. The circuit court ruled that the district court had no jurisdiction to review the Board's promulgation of the horse racing rule, the Board's subsequent refusal to repeal or amend the rule, or the Board's dismissal of the representation petition. Concerning the Board's horse racing rule and its subsequent refusal to amend that rule, the Second Circuit noted that the Administrative Procedure Act (APA) is not an independent grant of subject matter jurisdiction. The circuit court further observed that under the APA, 5 U.S.C. Section 701, courts generally are without jurisdiction to review an agency's rules or decisions where there is clear evidence that Congress intended such actions to be unreviewable. The court of appeals concluded that the statutory language of section 14(c) of the NLRA, together with its legislative history, supplied ample evidence that Congress intended the Board's exercise of discretion under that provision to be unreviewable. In the absence of extraordinary circumstances, or any evidence that the

[4] 708 F 2d 46 (2d Cir), cert denied 104 S Ct 276

[5] 243 NLRB 314, 315 (1979)

Board acted contrary to a clear statutory mandate, the Second Circuit accordingly ruled that the district court lacked jurisdiction to review the substance of the Board's rule or the Board's decision not to repeal or amend it. The complained-of procedure by which the Board reached its decision was found to be reasonable and proper. Concerning the Board's refusal to entertain the election petition, the circuit noted that Board actions under section 9 are not subject to judicial review unless, after an election is held, the Board has taken the further step, not present here, to bring an unfair labor practice proceeding under section 10 of the Act based upon the result of the representation proceeding. The court found that neither section 9(c)(1) nor section 14(c)(1) of the Act provided a basis for district court review under *Leedom v. Kyne*,[6] since section 9 "has been interpreted . . . to afford the Board great latitude in determining whether or not to proceed with a hearing," and the language of section 14(c) "mandates nothing." Accordingly, the Second Circuit ruled that the district court was without jurisdiction to review the Board's actions.

B. Litigation Involving Preemption

In *People of the State of Illinois ex rel. John A. Barra v. Archer Daniels Midland Co.*,[7] the Illinois State's attorney filed an action against Archer Daniels Midland in state court. The complaint alleged that a nonunion contractor hired by Archer Daniels to replace a striking union contractor was a strikebreaker as defined by the Illinois Strikebreakers Act. Under this state law, employers were prohibited from hiring a "professional strikebreaker in the place of any employee during any period when a lockout or strike is in progress." The complaint further alleged that the State was considering criminal charges against Archer Daniels, but that "substantial doubt exist[ed]" as to whether the NLRA preempted the Illinois law. The complaint requested the court issue a declaratory judgment determining whether sections 7 and 8 of the NLRA preempt the Illinois Strikebreakers Act. Archer Daniels caused the case to be removed to federal district court where the Board intervened. The district court entered an order declaring the Illinois law was preempted by the Federal labor laws.

On appeal, the Seventh Circuit held that the Declaratory Judgment Act does not confer Federal jurisdiction over a suit for declaration of rights under state law; that in the absence of any threat of a suit based on Federal law, there was no basis for using the Declaratory Judgment Act to bring this suit in, or remove it to, Federal court; and that the

[6] 358 U S 184 (1958)
[7] 704 F 2d 935 (7th Cir)

Declaratory Judgment Act does not confer jurisdiction to issue advisory opinions in the absence of an actual controversy. Accordingly, the circuit court vacated the lower court's judgment and remanded the case with directions to dismiss the complaint for lack of subject matter jurisdiction.

C. Litigation Under the Bankruptcy Code

In *Tucson Yellow Cab Co. v. NLRB*[8] the Bankruptcy Appellate Panel for the Ninth Circuit reversed a bankruptcy court order[9] enjoining the Board from issuing a backpay or other remedial order against the debtor-respondent. The appellate panel, relying upon its prior opinion in *In re Adams Delivery Service*,[10] ruled that the bankruptcy court was without jurisdiction to determine the amount of backpay appropriate to remedy unfair labor practice conduct. The panel held that the award of backpay, while possibly becoming a monetary claim against the estate in bankruptcy, is aimed at rectifying employer or union misconduct which lies within the exclusive authority of the Board. It remains the "limited right of the bankruptcy court" to examine the allowability of such claims, as it does all other claims, and to determine their relative priority. The appellate panel rejected the lower court's finding that the unfair labor practice case against Tucson Yellow Cab constituted a threat to the assets of the debtor's estate sufficient to warrant enjoining the Board's proceeding. The panel explained that a backpay award cannot be perceived as a threat merely because the Board, and not the bankruptcy court, is authorized by Congress to assess the amount required to make employees whole for losses incurred from unfair labor practice conduct. Accordingly, the panel concluded, even though it might greatly increase the amount of priority obligations which will be payable from the estate, the Board's issuance of a backpay remedy forms no basis for an injunction of the administrative proceeding.

A similar effort by a debtor-respondent to enjoin unfair labor practice proceedings was dismissed by the Bankruptcy Court for the District of Massachusetts in *In re GHR Energy Corp.*[11] Initially, the bankruptcy court noted that the automatic stay provisions of the Bankruptcy Code (11 U.S.C. §362) are not applicable to Board proceedings. The court then rejected the debtor's assertion that an injunction was warranted because, in the debtor's view, the Board's proceeding raised a "cloud" on the debtor's title to its refinery. The court noted that a purchaser could take the refinery with such a "cloud" regardless of the stage of

[8] 27 B R 621 (B A P 9th Cir)
[9] 21 B R 166 (B C D Ariz 1982)
[10] 24 B R 589 (B A P 9th Cir 1982)
[11] Docket 4-83-00056 (Adv No 4-83-0201) (B C D Mass May 17)

Board proceedings at the time of closing. The assets of the estate would thus be "threatened" to the same extent whether or not there issued a temporary stay of the pending unfair labor practice hearing. The bankruptcy court also rejected the debtor's suggestion that an injunction should issue because the debtor was then unable to satisfy a backpay remedy. Quoting *Tucson Yellow Cab Co.*, supra, the bankruptcy court stated, "we do not agree that the issuance of a backpay order forms . . . a threat, even though that order may greatly enhance the amount of priority obligations payable from the estate." Lastly, in granting the Board costs for defending against the injunction action, the bankruptcy court remarked that the debtor had waited until the last working day before the scheduled unfair labor practice hearing in order to file its request for injunctive relief.

D. Litigation Involving the Equal Access to Justice Act[12]

In *Stanley Spencer v. NLRB*,[13] the Circuit Court for the District of Columbia affirmed a district court ruling that the parties prevailing in an underlying district court proceeding were not entitled to attorneys' fees under the Equal Access to Justice Act (EAJA) (28 U.S.C. §2412) because the Board's position in the underlying case was substantially justified. The plaintiffs in the underlying court proceeding were a group of engineers seeking review of the Board's dismissal of a decertification petition and a separate unit clarification petition. For relief the plaintiffs had sought a declaration that they were "professionals" within the meaning of section 2(12) of the Act, plus an injunction compelling the Board to supply them a separate representation election. While the Board's motion to dismiss was pending in district court, the Board responded to a new decertification petition filed by the plantiffs. In view of the plaintiffs' "unique situation," the Board reconsidered and ordered the requested election. The district court subsequently granted the Board's request to dismiss the suit as moot. The plaintiffs then filed an application for costs and attorneys' fees under the EAJA. The district court acknowledged that the plaintiffs had succeeded in obtaining the relief sought, but denied the fees application because the court concluded that the Board had shown its position was substantially justified.

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[12] The Equal Access to Justice Act (EAJA) Title II of Pub L No 96-481, 94 Stat 2325 (1980), 5 U S C §504 (allowing fee awards to an eligible prevailing party in an administrative adversary adjudication where the agency's position was not substantially justified), and 28 U S C §2412 (allowing fee awards to an eligible prevailing party in a civil action against the United States under the same standard) was repealed by its own terms on Oct 1, 1984 5 U S C §504(c), 28 U S C §2412(c) The repealed provisions continued to apply through final disposition of any adversary adjudication or civil action initiated before the date of repeal (Ibid) On August 5, 1985, Congress enacted Public Law 99-80 effectively reviving and modifying the EAJA expired provisions

[13] 712 F 2d 539 (D C Cir)

On appeal, the circuit court affirmed the district court's ruling. The circuit court initially noted that the EAJA permits the Government to avoid fees liability to a prevailing party if the Government can show that its "position" was substantially justified. The court determined that this "position" meant the agency's litigation position rather than its underlying action. The circuit court noted that the Board's position in the district court was consistent with clearly established law that the district court lacked subject matter jurisdiction. The circuit court also observed the Board's district court litigation was neither burdensome, nor time-consuming. Finally, the court noted that the Board's litigation position was consistent with established Board policy. Accordingly, the circuit court concluded that the Board's position in the underlying lawsuit was substantially justified.

In *Tyler Business Services v. NLRB*,[14] the Fourth Circuit granted an award of attorneys' fees to a party which had prevailed in an enforcement proceeding. The court noted that the standard for review under the EAJA does not establish a presumption that the Board's position was not substantially justified simply because it lost the enforcement case. Nor should the Board be required to establish that its decision to litigate was based upon a substantial probability of prevailing. However, the court of appeals concluded, the Board's position in support of its petition for enforcement had lacked a "reasonable factual basis" and was not substantially justified. In the underlying case the Board had reversed the administrative law judge and found that an employee was discriminatorily discharged because he had engaged in protected activity in making remarks concerning his employer to a customer. The court found that the Board had never explained either the employee's inability to recall discussing conditions of employment with the customer or his denial that he had engaged in protected activity. The court of appeals limited the award to those fees incurred in the court proceedings, including the preparation and prosecution of the motion for attorneys' fees. The rate of recovery was limited to $75 per hour. The court granted fees for work performed in the enforcement proceeding prior to October 1, 1981, the effective date of the EAJA. Recovery of fees incurred in the litigation before the Board was not allowed because the administrative proceeding was not pending on the effective date of the EAJA.

In *Monark Boat Co. v. NLRB*,[15] the Eighth Circuit reviewed a Board order dismissing an application for attorneys' fees under 5 U.S.C. §504. The court affirmed the Board's adoption of an administrative law judge's decision dismissing the application as untimely because the application was not received by the Board within the prescribed 30-day period

[14] 695 F 2d 73 (4th Cir)
[15] 708 F 2d 1322 (8th Cir)

under the EAJA. 5 U.S.C. §504(a)(2). The court held that the Board did not abuse its discretion in finding that it received the fees application 31 days after entry of final order in the unfair labor practice proceeding. The court agreed with the Board that the EAJA, as a waiver of immunity statute, must be strictly construed and that the 30-day limitation was a mandatory jurisdictional condition. Finally, the court found that the Board's regulations (29 CFR §§102.114(b), 102.148(a)) reasonably interpreted the EAJA by requiring actual receipt by the deadline.

In *Enerhaul, Inc. v. NLRB*,[16] the Eleventh Circuit reversed the Board's decision dismissing an application for attorneys' fees under the EAJA (5 U.S.C. §504). In the underlying proceeding, the administrative law judge found that the General Counsel had established a prima facie violation by showing that the discharge was in part motivated by the employee's protected activity of complaining about job safety conditions. The administrative law judge held, however, that the discharge would have occurred even in the absence of the protected concerted activity and therefore recommended dismissal of the complaint. No exceptions were filed and the Board adopted the recommended order dismissing the complaint.

Thereafter, the Board upheld the administrative law judge's dismissal of the company's application for fees under the EAJA (5 U.S.C. §504) on the basis of the reasonableness of the General Counsel's position, particularly in light of the finding of a prima facie case in the unfair labor practice proceeding.

The Eleventh Circuit initially noted that review of an agency fee determination is very limited, allowing the court to modify the determination only if the court finds that agency's failure to make an award was an abuse of discretion. 5 U.S.C. §504(c)(2). Yet, after review of the Board's EAJA decision, the court of appeals held that the Board's dismissal of the fees application was an abuse of discretion. The court found that the General Counsel's position in the unfair labor practice proceeding was unreasonable and not substantially justified because it relied upon a theory which had "been clearly and repeatedly rejected" by the circuit court. The court of appeals thus held that the Board abused its discretion in finding that the General Counsel's prosecution was substantially justified because the General Counsel's position, in the court's view, was "unreasonable under the law" of the circuit. The Board's petition for rehearing was denied.

E. Privacy Act Case

In *David A. Nixon v. NLRB*,[17] the United States District Court for the District of Kansas granted the Board's motion for summary judgment,

[16] 710 F 2d 748 (11th Cir.)
[17] 112 LRRM 3199 (D. Kans.)

denying the plaintiff access to records and information collected by a Board investigator during an internal investigation of a Board regional office. The plaintiff, an attorney in the regional office, contended that under the Privacy Act (5 U.S.C. §552a (d)(1)) he was entitled to examine and copy the notes and official report of the investigation. The court held that the plaintiff had no right to the notes in question because they were the investigator's personal property and were not "contained within the system" for purposes of 5 U.S.C. §552a (d)(1). The court ruled that the Board was not required to disclose the official report because it was not maintained in a file retrievable under the plaintiff's name. The entire investigatory file, including the report, was also found to be exempt from disclosure because it was compiled in anticipation of litigation. Finally, the court found that it lacked jurisdiction under the Privacy Act to grant additional relief sought by the plaintiff, including enjoining the Board from continuing the investigation and requiring the Board to disclose its purpose.

F. Enforcement of Board Subpoenas

In *NLRB v. G.H.R. Energy Corp.*,[18] the Fifth Circuit affirmed a district court decision enforcing Board subpoenas duces tecum and ad testificandum. The subpoenas were issued to the General Counsel in an unfair labor practice proceeding to compel two respondent companies to produce documents and testimony concerning whether they constituted an integrated enterprise and single employer within the meaning of the Act. The court of appeals summarized the legal standards for subpoena enforcement proceedings: (1) a district court is required to uphold the subpoena if production of the requested evidence relates to a matter under investigation or in question, and if the evidence is described with sufficient particularity and (2) a district court's enforcement order must be affirmed by the circuit court unless the lower court abused its discretion. The appellate court rejected the companies' argument that the Board subpoenas were insufficiently particular and were irrelevant to the unfair labor practice allegations. The court found that the subpoenas' broad language was simply the result of the nature of the unfair labor practice issues. The court noted that under settled law, in order to determine whether two companies constitute a single employer, the Board must look for evidence of interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control. Additionally, the court observed that determination of the bargaining unit issue in the unfair labor practice proceeding required examination of such factors as bargaining history, opera-

[18] 707 F 2d 110 (5th Cir)

tional integration, geographic proximity, common supervision, similarity in job functions and degree of employee interchange. In short, the court concluded, the two companies had put their entire business relationship at issue by denying the General Counsel's allegations that they constituted a single employer, and that certain employees of the two companies constituted an appropriate bargaining unit. The court of appeals additionally noted that the General Counsel had acted reasonably by offering to limit the burden of the disputed subpoenas by examination of records at the companies' places of business and by seeking mutually convenient scheduling for the testimony of the subpoenaed witnesses.

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APPENDIX

GLOSSARY OF TERMS USED IN STATISTICAL TABLES

The definitions of terms contained in this glossary are not intended for general application but are specifically directed toward increasing comprehension of the statistical tables that follow Thus the definitions are keyed directly to the terms used in such tables

Adjusted Cases

Cases are closed ss "adjusted" when an informal settlement agreement is executed and compliance with its terms is secured (See "Informal Agreement,",this glossary) In some instance, a written agreement is not secured but appropriate remedial action is taken so as to render further proceeding unnecessary A central element in an "adjusted" case is the agreement of the parties to settle differences without recourse to litigation

Advisory Opinion Cases

See "Other Cases—AO" under "Types of Cases "

Agreement of Parties

See "Informal Agreement" and "Formal Ageement," this glossary. The term "agreement" includes both types.

Amendment of Certification Cases

See "Other Cases—AC" under "Types of Cases "

Backpay

Amounts of money paid or to be paid employees as reimbursement for wages lost because they were discriminatorily discharged or unlawfully denied employment, plus interest on such money Also included is payment for bonuses, vacations, other fringe benefits, etc , lost because of the discriminatary acts, as well as interest thereon. All moneys noted in table 4 have been reported as paid or owing in cases closed during the fiscal year (Installment payments may protract some payments beyond this year and some payments may have actually been made at times considerably in advance of the date a case was closed; i e , in a prior fiscal year.)

Backpay Hearing

A supplementary hearing to receive evidence and testimony as to the amount of backpay due discriminatees under a prior Board or court decree

Backpay Specification

The formal document, a "pleading," which is served on the parties when the regional director and the respondent are unable to agree as to the amounts of backpay due discriminatees pursuant to a Board order or court decree requiring payment of such backpay. It sets forth in detail the amount held by the regional director to be owing each discriminatee and the method of computation employed. The specification is accompanied by a notice of hearing setting a date for a backpay hearing

Case

A "case" is the general term used in referring to a charge or petition filed with the Board. Each case is numbered and carries a letter designation indicating the type of case. See "Types of Cases."

Certification

A certification of the results of an election is issued by the regional director or the Board If a union has been designated as the exclusive bargaining representative by a majority of the employees, a certification of representative is issued. If no union has received a majority vote, a certification of results of election is issued

Challenges

The parties to an NLRB election are entitled to challenge any voter. At the election site, the challenged ballots are segregated and not counted when other ballots are tallied. Most frequently, the tally of unchallenged ballots determines the election and the challenged ballots are insufficient in number to affect the results of the election The challenges in such a case are never resolved, and the certification is based on the tally of (unchallenged) ballots.

When challenged ballots are determinative of the result, a determination as to whether or not they are to be counted rests with the regional director in the first instance, subject to possible appeal to the Board. Often, however, the "determinative" challenges are resolved informally by the parties by mutual agreement. No record is kept of nondeterminative challenges or determinative challenges which are resolved by agreement prior to issuance of the first tally of ballots.

Charge

A document filed by an employee, an employer, a union, or an individual alleging that an unfair labor practice has been committed. See "C Case" under "Types of Cases."

Complaint

The document which initiates "formal" proceedings in an unfair labor practice case. It is issued by the regional director when he or she concludes on the basis of a completed investigation that any of the allegations contained in the charge have merit and adjustment or settlement has not been achieved by the parties. The complaint sets forth all allegations and information neceasary to bring a case to hearing before an administrative law judge pursuant to due process of law The complaint contains a notice of hearing, specifying the time and place of hearing

Election, Runoff

An election conducted by the regional director after an initial election, having three or more choices on the ballot, has turned out to be inconclusive (none of the choices receiving a majority of the valid votes cast). The regional director conducts the runoff election between the choices on the original ballot which received the highest and the next highest number of votes

Election, Stipulated

An election held by the regional director pursuant to an agreement signed by all the parties concerned. The agreement provides for the waiving of hearing and the establishment of the appropriate unit by mutual consent Postelection rulings are made by the Board.

Eligible Voters

Employees within an appropriate bargaining unit who were employed as of a fixed date prior to an election, or are otherwise qualified to vote under the Board's eligibility rules

Fees, Dues, and Fines

The collection by a union or an employer of dues, fines, and referral fees from employees may be found to be an unfair labor practice under section 8(b)(1)(A) or (2) or 8(a)(1) and (2) or (3), where, for instance such moneys were collected pursuant to an illegal hiring hall arrangement, or an invalid or unlawfully applied union-security agreement, where dues were deducted from employees' pay without their authorization, or, in the case of fines, where such fines restrained or coerced employees in the exercise of their rights. The remedy for such unfair labor practices usually requires the reimbursement of such moneys to the employees.

Fines

See "Fees, Dues, and Fines "

Formal Action

Formal actions may be documents issued or proceedings conducted when the voluntary agreement of all parties regarding the disposition of all issues in a case cannot be obtained, and where dismissal of the charge or petition, not warranted. Formal actions, are, further, those in which the decision-making authority of the Board (the regional director in representation cases), as provided in sections 9 and 10 of the Act, must be exercised in order to achieve the disposition of a case or the resolution of any issue raised in a case. Thus, formal action takes place when a Board decision and consent order is issued pursuant to a stipulation, even though the stipulation constitutes a voluntary ageement.

Formal Agreement (in unfair labor practice cases)

A written agreement between the Board and the other parties to a case in which hearing is waived and the specific terms of a Board order agreed upon. The agreement may also provide for the entry of a consent court decree enforcing the Board order.

Compliance

The carrying out of remedial action as agreed upon by the parties in writing (see "Formal Agreement," "Informal Agreement"); as recommended by the administrative law judge in the decision, as ordered by the Board in its decision and order, or decreed by the court

Dismissed Cases

Cases may be dismissed at any stage They are dismissed informally when, following investigation, the regional director concludes that there has been no violation of the law, that there, insufficient evidence to support further action, or for a variety of other reasons. Before the charge is dismissed, however, the charging party is given the opportunity to withdraw the charge by the administrative law judge, by the Board, or by the courts through their refusal to enforce orders of the Board.

Dues

See "Fees, Dues, and Fines."

Election, Consent

An election conducted by the regional director pursuant to an agreement signed by all parties concerned. The agreement provides for the waiving of a hearing, the establishment of the appropriate unit by mutual consent, and the final determination of all postelection issues by the regional director.

Election, Directed

Board-Directed

An election conducted by the regional director pursuant to a decision and direction of election by the Board. Postelection rulings are made by the regional director or by the Board.

Regional Director-Directed

An election conducted by the regional director pursuant to a decision and direction of election issued by the regional director after a hearing. Postelection rulings are made by the regional director or by the Board.

Election, Expedited

An election conducted by the regional director puruant to a petition filed within 30 days of the commencement of picketing in a situation in which a meritorious 8(b)(7)(C) charge has been filed The election is conducted under priority conditions and without a hearing unlees the regional director believes the proceeding raises questions which cannot be decided without a hearing.

Postelection rulings on objections and/or challenges are made by the regional director and are final and binding unless the Board grants an appeal on application by one of the parties.

Election, Rerun

An election held after an initial election has been set aside either by the regional director or by the Board.

Informal Agreement (in unfair labor practice cases)

A written agreement entered into between the party charged with committing an unfair labor practice, the regional director, and (in most cases) the charging party requiring the charged party to take certain specific remedial action as a basis for the closing of the case Cases closed in this manner are included in "adjusted" cases

Injunction Petitions

Petitions filed by the Board with respective U S district courts for injunctive relief under section 10(j) or section 10(e) of the Act pending hearing and adjudication of unfair labor practice charges before the Board Also, petitions filed with the U S. court of appeals under section 10(e) of the Act.

Jurisdictional Disputes

Controversies between unions or groupings of employees as to which employees will perform specific work. Cases involving jurisdictional disputes are received by the Board through the filing of charges alleging a violation of section 8(b)(4)(D). They are initially processed under section 10(k) of the Act which is concerned with the determination of the jurisdictional dispute itself rather than with a finding as to whether an unfair labor practice has been committed Therefore, the failure of a party to comply with the Board's determination of dispute is the basis for the issuance of an unfair labor practice complaint and the processing of the case through usual unfair labor practice precedures

Objections

Any party to an election may file objections alleging that either the conduct of the election or the conduct of a party to the election failed to meet the Board's standards. An election will be set aside if eligible employee-voters have not been given an adequate opportunity to cast their ballots, in secrecy and without hindrance from fear or other interference with the expression of their free choice.

Petition

See, "Representation Cases." Also see "Other Cases—AC, UC, and UD" under "Types of Cases."

Proceeding

One or more cases included in a single litigated action. A "proceeding" may be a combination of C and R cases consolidated for the purpose of hearing.

Representation Cases

This term applies to cases bearing the alphabetical designations RC, RM, or RD (See "R Cases" under "Types of Cases," this glossary, for specific definitions of these terms.) All three types of cases are included in the term "representation" which deals generally with the problem of which union, if any, shall represent employees in negotiations with their employer. The cases are initiated by the filing of a petition by a union, an employer, or a group of employees.

Representation Election

An election by secret ballot conducted by the Board among the employees in an appropriate collective-bargaining unit to determine whether the employees wish to be represented by a particular labor organization for purposes of collective bargaining. The tables herein reflect only final elections which result in the issuance of a certification of representative if a union is chosen, or a certification of results if the majority has voted for "no union."

Situation

One or more unfair labor practice cases involving the same factual situation These cases are proceseed as a single unit of work. A situation may include one or more CA cases, a combination of CA and CB cases, or combination of other types of C cases. It does not include representation cases

Types of Cases

General: Letter designations are given to all cases depending upon the subsection of the Act allegedly violated or otherwise describing the general nature of each case Each of the letter designations appearing below is descriptive of the case it is associated with

C Cases (unfair labor practice cases)

A case number which contains the first letter designation C, in combination with another letter, i e , CA, CB, etc., indicates that it involves a charge that an unfair labor practice has been committed in violation of one or more subsections of section 8.

CA: A charge that an employer has committed unfair labor practices in violation of section 8(a)(1), (2), (3), (4), or (5), or any combination thereof.

CB: A charge that a labor organization has committed unfair labor practices in violation of section 8(b)(1), (2), (3), (5), or (6), or any combination thereof.

CC A charge that a labor organization has committed unfair labor practices in violation of section 8(b)(4)(i) and/or (A), (B), or (C), or any combination thereof.

CD: A charge that a labor organization has committed an unfair labor practice in violation of section 8)(b)4)(i) or (ii)(D) Preliminary actions under section 10(k) for the determination of jurisdictional disputes are processed as CD cases. (See "Jurisdictional Disputes" in this glossary.)

CE· A charge that either a labor organization or an employer, or both jointly, have committed an unfair labor practice in violation of section 8(e)

CG. A charge that a labor organization has committed unfair labor practices in violation of section 8(g).

CP A charge that a labor organization has committed unfair labor practices in violation of section 8(b)(7)(A), (B), or (C), or any combination thereof.

R Cases (representation cases)

A case number which contains the first letter designation R, in combination with another letter, i.e., RC, RD, RM, indicates that it is a petition for investigation and determination of a question concerning representation of employees, filed under section 9(c) of the act.

RC. A petition filed by a labor organization or an employoe alleging that a question concerning representation has arisen and seeking an election for determination of a collective-bargaining representative

RD: A petition filed by employees alleging that the union previously certified or currently recognized by the employer as their collective-bargaining representative no longer represents a majority of the employees in the appropriate unit and seeking an election to determine this

RM: A petition filed by an employer alleging that a question concerning representation has arisen and seeking an election for the determination of a collective-bargaining representative

Other Cases

AC· (Amendment of Certification cases): A petition filed by a labor organization or an employer for amendment of an existing certification to reflect changed circumstances, such as changes in the name or affiliation of the labor organization involved or in the name or location of the employer involved.

AO (Advisory Opinion cases). As distinguished from the other types of cases described above, which are filed in and processed by regional offices of the Board, AO or "advisory opinion" cases are filed directly with the Board in Washington and seek a determination as to whether the Board would or would not assert jurisdiction, in any given situation on the basis of its current standards over the party or parties to a proceeding pending before a state or territorial agency or a court. (See subpart H of the Board's Rules and Regulations, Series 8, as amended.)

UC. (Unit Clarification cases) A petition filed by a labor organization or an employer seeking a determination as to whether certain classification of employees should or should not be included within a presently existing bargaining unit.

UD· (Union Deauthorization case): A petition filed by employees pursuant to section 9(e)(1) requesting that the Board conduct a referendum to determine whether a union's authority to enter into a union-shop contract should be rescinded

UD Cases

See "Other Cases—UD" under "Types of Cases."

Unfair Labor Practice Cases

See "C Cases" under "Types of Cases "

Union Deauthorization Cases

See "Other Cases—UD" under "Types of Cases."

Union-Shop Agreement

An agreement between an employer and a labor organization which requires membership in the union as a condition of employment on or after the 30th day following (1) the beginning of such employment or (2) the effective date of the agreement, whichever is the later.

Unit, Appropriate Bargaining

A grouping of employees in a plant, firm, or industry recognized by the employer, agreed upon by the parties to a case, or designated by the Board or its regional director, as appropriate for the purposes of collective bargaining.

Valid Vote

A secret ballot on which the choice of the voter is clearly shown

Withdrawn Cases

Cases are closed as "withdrawn" when the charging party or petitioner, for whatever reasons, requests withdrawal of the charge or the petition and such request is approved.

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Readers are encouraged to communicate with the Agency as to questions on the tables by writing to the Office of the Executive Secretary, National Labor Relations Board, 1717 Pennsylvania Avenue, NW , Washington, D.C. 20570.

Table 1.—Total Cases Received, Closed, and Pending, Fiscal Year 1983 [1]

	Total	Identification of filing party					
		AFL–CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
	All cases						
Pending October 1, 1982	*23,000	8,755	2,566	1,027	1,253	7,545	1,854
Received fiscal 1983	49,436	15,080	5,021	1,792	2,220	20,170	5,153
On docket fiscal 1983	72,436	23,835	7,587	2,819	3,473	27,715	7,007
Closed fiscal 1983	46,521	14,255	4,695	1,682	2,078	19,339	4,472
Pending September 30, 1983	25,915	9,580	2,892	1,137	1,395	8,376	2,535
	Unfair labor practice cases[2]						
Pending October 1, 1982	*19,956	7,443	2,099	873	1,017	6,933	1,591
Received fiscal 1983	40,634	11,936	3,462	1,422	1,604	18,023	4,187
On docket fiscal 1983	60,590	19,379	5,561	2,295	2,621	24,956	5,778
Closed fiscal 1983	38,041	11,233	3,200	1,304	1,500	17,225	3,579
Pending September 30, 1983	22,549	8,146	2,361	991	1,121	7,731	2,199
	Representation cases[3]						
Pending October 1, 1982	*2,839	1,257	460	152	222	523	225
Received fiscal 1983	8,078	2,966	1,523	355	569	1,901	764
On docket fiscal 1983	10,917	4,223	1,983	507	791	2,424	989
Closed fiscal 1983	7,808	2,853	1,462	361	535	1,879	718
Pending September 30, 1983	3,109	1,370	521	146	256	545	271
	Union-shop deauthorization cases						
Pending October 1, 1982	*89	----	----	----	----	89	----
Received fiscal 1983	241	----	----	----	----	241	----
On docket fiscal 1983	330	----	----	----	----	330	----
Closed fiscal 1983	231	----	----	----	----	231	----
Pending September 30, 1983	99	----	----	----	----	99	----
	Amendment of certification cases						
Pending October 1, 1982	*13	8	0	0	4	0	1
Received fiscal 1983	38	19	4	3	11	1	0
On docket fiscal 1983	51	27	4	3	15	1	1
Closed fiscal 1983	36	20	4	3	8	1	0
Pending September 30, 1983	15	7	0	0	7	0	1
	Unit clarification cases						
Pending October 1, 1982	*103	47	7	2	10	0	37
Received fiscal 1983	445	159	32	12	36	4	202
On docket fiscal 1983	548	206	39	14	46	4	239
Closed fiscal 1983	405	149	29	14	35	3	175
Pending September 30, 1983	143	57	10	0	11	1	64

[1] See glossary for definitions of terms Advisory opinion (AO) cases not included See table 22
[2] See table 1A for totals by types of cases
[3] See table 1B for totals by types of cases
* Revised, reflects lower figures than reported pending Sept 30, 1982, in last year's annual report Revised totals result from post-report adjustments to last year's "on docket" and/or "closed" figures

Table 1A.—Unfair Labor Practice Cases Received, Closed, and Pending, Fiscal Year 1983 [1]

	Total	Identification of filing party					
		AFL–CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
	CA cases						
Pending October 1, 1982	*16,236	7,352	2,088	857	941	4,979	19
Received fiscal 1983	28,995	11,838	3,433	1,407	1,503	10,799	15
On docket fiscal 1983	45,231	19,190	5,521	2,264	2,444	15,778	34
Closed fiscal 1983	27,454	11,118	3,179	1,284	1,399	10,460	14
Pending September 30, 1983	17,777	8,072	2,342	980	1,045	5,318	20
	CB cases						
Pending October 1, 1982	*2,687	62	10	13	33	1,934	635
Received fiscal 1983	8,973	52	25	10	69	7,187	1,630
On docket fiscal 1983	11,660	114	35	23	102	9,121	2,265
Closed fiscal 1983	8,324	67	18	12	66	6,730	1,431
Pending September 30, 1983	3,336	47	17	11	36	2,391	834
	CC cases						
Pending October 1, 1982	*638	15	1	2	21	12	587
Received fiscal 1983	1,676	26	3	2	19	25	1,601
On docket fiscal 1983	2,314	41	4	4	40	37	2,188
Closed fiscal 1983	1,420	27	2	4	24	24	1,339
Pending September 30, 1983	894	14	2	0	16	13	849
	CD cases						
Pending October 1, 1982	*169	11	0	1	2	2	153
Received fiscal 1983	414	11	1	2	8	6	386
On docket fiscal 1983	583	22	1	3	10	8	539
Closed fiscal 1983	370	12	1	3	6	4	344
Pending September 30, 1983	213	10	0	0	4	4	195
	CE cases						
Pending October 1, 1982	*113	0	0	0	19	1	93
Received fiscal 1983	74	0	0	0	1	1	72
On docket fiscal 1983	187	0	0	0	20	2	165
Closed fiscal 1983	90	0	0	0	2	1	87
Pending September 30, 1983	97	0	0	0	18	1	78
	CG cases						
Pending October 1, 1982	*18	0	0	0	0	0	18
Received fiscal 1983	39	0	0	0	0	1	38
On docket fiscal 1983	57	0	0	0	0	1	56
Closed fiscal 1983	40	0	0	0	0	0	40
Pending September 30, 1983	17	0	0	0	0	1	16
	CP cases						
Pending October 1, 1982	*95	3	0	0	1	5	86
Received fiscal 1983	463	9	0	1	4	4	445
On docket fiscal 1983	558	12	0	1	5	9	531
Closed fiscal 1983	343	9	0	1	3	6	324
Pending September 30, 1983	215	3	0	0	2	3	207

[1] See Glossary for definitions of terms

* Revised, reflects lower figure than reported pending Sept 30, 1982, in last year's annual report Revised totals result from post-report adjustments to last year's "on docket" and/or "closed" figures

Table 1B.—Representation Cases Received, Closed, and Pending, Fiscal Year 1983[1]

	Total	Identification of filing party					
		AFL–CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
		RC cases					
Pending October 1, 1982	*2,088	1,247	458	152	222	9	----
Received fiscal 1983	5,410	2,963	1,521	354	561	11	----
On docket fiscal 1983	7,498	4,210	1,979	506	783	20	----
Closed fiscal 1983	5,209	2,846	1,460	360	529	14	----
Pending September 30, 1983	2,289	1,364	519	146	254	6	----
		RM cases					
Pending October 1, 1982	*225	----	----	----	----	----	225
Received fiscal 1983	764	----	----	----	----	----	764
On docket fiscal 1983	989	----	----	----	----	----	989
Closed fiscal 1983	718	----	----	----	----	----	718
Pending September 30, 1983	271	----	----	----	----	----	271
		RD cases					
Pending October 1, 1982	*526	10	2	0	0	514	----
Received fiscal 1983	1,904	3	2	1	8	1,890	----
On docket fiscal 1983	2,430	13	4	1	8	2,404	----
Closed fiscal 1983	1,881	7	2	1	6	1,865	----
Pending September 30, 1983	549	6	2	0	2	539	----

[1] See glossary for definition of terms

* Revised, reflects lower figures than reported pending Sept 30, 1982, in last year's annual report Revised totals result from post-report adjustments to last year's "on docket" and/or"closed" figures

Table 2.—Types of Unfair Labor Practices Alleged, Fiscal Year 1983

	Number of cases showing specific allegations	Percent of total cases
A Charges filed against employers under sec 8(a)		
Subsections of sec 8(a) Total cases	28,995	100 0
8(a)(1)	4,973	17 2
8(a)(1)(2)	273	0 9
8(a)(1)(3)	10,345	35 7
8(a)(1)(4)	253	0 9
8(a)(1)(5)	8,475	29 2
8(a)(1)(2)(3)	224	0 8
8(a)(1)(2)(4)	3	0 0
8(a)(1)(2)(5)	127	0 4
8(a)(1)(3)(4)	685	2 4
8(a)(1)(3)(5)	3,317	11 4
8(a)(1)(4)(5)	23	0 1
8(a)(1)(2)(3)(4)	28	0 1
8(a)(1)(2)(3)(5)	137	0 5
8(a)(1)(2)(4)(5)	2	0 0
8(a)(1)(3)(4)(5)	95	0 3
8(a)(1)(2)(3)(4)(5)	35	0 1
Recapitulation[1]		
8(a)(1)[2]	28,995	100 0
8(a)(2)	829	2 9
8(a)(3)	14,866	51 3
8(a)(4)	1,124	3 9
8(a)(5)	12,211	42 1
B Charges filed against unions under sec 8(b)		
Subsections of sec 8(b) Total cases	11,526	100 0
8(b)(1)	6,121	53 1
8(b)(2)	147	1 3
8(b)(3)	647	5 6
8(b)(4)	2,090	18 1
8(b)(5)	7	0 1
8(b)(6)	15	0 1
8(b)(7)	463	4 0
8(b)(1)(2)	1,491	12 9
8(b)(1)(3)	403	3 5
8(b)(1)(5)	13	0 1
8(b)(1)(6)	5	0 0
8(b)(2)(3)	7	0 1
8(b)(2)(6)	2	0 0
8(b)(3)(5)	3	0 0
8(b)(3)(6)	1	0 0
8(b)(1)(2)(3)	85	0 7
8(b)(1)(2)(5)	6	0 1
8(b)(1)(2)(6)	8	0 1
8(b)(1)(3)(5)	4	0 0
8(b)(1)(3)(6)	5	0 0
8(b)(2)(3)(5)	1	0 0
8(b)(1)(2)(3)(5)	1	0 0
8(b)(1)(2)(3)(6)	1	0 0

	Number of cases showing specific allegations	Percent of total cases
Recapitulation[1]		
8(b)(1)	8,143	70 6
8(b)(2)	1,749	15 2
8(b)(3)	1,158	10 0
8(b)(4)	2,090	18 1
8(b)(5)	35	0 3
8(b)(6)	37	0 3
8(b)(7)	463	4 0
B1 Analysis of 8(b)(4)		
Total cases 8(b)(4)	2,090	100 0
8(b)(4)(A)	187	8 9
8(b)(4)(B)	1,352	64 7
8(b)(4)(C)	21	1 0
8(b)(4)(D)	414	19 8
8(b)(4)(A)(B)	95	4 5
8(b)(4)(A)(C)	3	0 1
8(b)(4)(B)(C)	13	0 6
8(b)(4)(A)(B)(C)	5	0 2
Recapitulation[1]		
8(b)(4)(A)	290	13 9
8(b)(4)(B)	1,465	70 1
8(b)(4)(C)	42	2 0
8(b)(4)(D)	414	19 8
B2 Analysis of 8(b)(7)		
Total cases 8(b)(7)	463	100 0
8(b)(7)(A)	114	24 6
8(b)(7)(B)	20	4 3
8(b)(7)(C)	321	69 3
8(b)(7)(A)(C)	4	0 9
8(b)(7)(B)(C)	3	0 6
8(b)(7)(A)(B)(C)	1	0 2
Recapitulation[1]		
8(b)(7)(A)	119	25 7
8(b)(7)(B)	24	5 2
8(b)(7)(C)	329	71 1
C Charges filed under sec 8(e)		
Total cases 8(e)	74	100 0
Against unions alone	74	100 0
D Charges filed under sec 8(g)		
Total cases 8(g)	39	100 0

[1] A single case may include allegations of violations of more than one subsection of the Act Therefore, the total of the various allegations is greater than the total number of cases

[2] Sec 8(a)(1) is a general provision forbidding any type of employer interference with the rights of the employees guaranteed by the Act, and therefore is included in all charges of employer unfair labor practices

Table 3A.—Formal Actions Taken in Unfair Labor Practice Cases, Fiscal Year 1983 [1]

Types of formal actions taken	Cases in which formal actions taken	Formal actions taken by type of case											
		Total formal actions taken	CA	CB	CC	CD		CE	CG	CP	CA combined with CB	C combined with representation cases	Other C combinations
						Jurisdictional disputes	Unfair labor practices						
10(k) notices of hearings issued	108	103				103							
Complaints issued	6,477	5,371	4,445	614	234		0	9	5	46	10	3	5
Backpay specifications issued	180	140	0	0	0		0	0	0	0	0	0	0
Hearings completed, total	1,415	1,147	954	114	19	51	2	0	1	4	1	0	1
Initial ULP hearings	1,314	1,064	895	91	18	51	2	0	1	4	1	0	1
Backpay hearings	71	59	39	19	1		0	0	0	0	0	0	0
Other hearings	30	24	20	4	0		0	0	0	0	0	0	0
Decisions by administrative law judges, total	1,477	1,102	979	97	21		0	0	0	3	0	1	1
Initial ULP decisions	1,364	1,016	899	94	18		0	0	0	3	0	1	1
Backpay decisions	95	73	70	1	2		0	0	0	0	0	0	0
Supplemental decisions	18	13	10	2	1		0	0	0	0	0	0	0
Decisions and orders by the Board, total	1,641	1,122	894	122	46	41	0	1	0	1	4	10	3
Upon consent of parties													
Initial decisions	162	102	56	30	16		0	0	0	0	0	0	0
Supplemental decisions	0	0	0	0	0		0	0	0	0	0	0	0
Adopting administrative law judges' decisions (no exceptions filed)													
Initial ULP decisions	475	349	301	33	15		0	0	0	0	0	0	0
Backpay decisions	0	0	0	0	0		0	0	0	0	0	0	0
Contested													
Initial ULP decisions	897	602	493	42	7	41	0	1	0	1	4	10	3
Decisions based on stipulated record	45	38	18	12	8		0	0	0	0	0	0	0
Supplemental ULP decisions	14	11	8	3	0		0	0	0	0	0	0	0
Backpay decisions	48	20	18	2	0		0	0	0	0	0	0	0

[1] See Glossary for definitions of terms

Table 3B.—Formal Actions Taken in Representation and Union Deauthorization Cases, Fiscal Year 1983[1]

Types of formal actions taken	Cases in which formal actions taken	Formal actions taken by type of case				
		Total formal actions taken	RC	RM	RD	UD
Hearings completed, total	1,453	1,334	1,061	87	186	13
Initial hearings	1,283	1,179	925	83	171	13
Hearings on objections and/or challenges	170	155	136	4	15	0
Decisions issued, total	1,595	1,421	1,150	139	132	24
By regional directors	1,516	1,355	1,099	131	125	23
Elections directed	1,195	1,047	844	83	120	22
Dismissals on record	321	308	255	48	5	1
By Board	79	66	51	8	7	1
Transferred by regional directors for initial decision	21	16	14	1	1	0
Elections directed	12	10	10	0	0	0
Dismissals on record	9	6	4	1	1	0
Review of regional directors' decisions						
Requests for review received	738	736	616	39	81	0
Withdrawn before request ruled upon	0	0	0	0	0	0
Board action on requests ruled upon, total	448	424	378	14	32	5
Granted	82	78	73	1	4	5
Denied	362	342	302	13	27	0
Remanded	4	4	3	0	1	0
Withdrawn after request granted, before Board review	0	0	0	0	0	0
Board decision after review, total	58	50	37	7	6	1
Regional directors' decision						
Affirmed	23	19	14	2	3	0
Modified	20	17	15	1	1	0
Reversed	15	14	8	4	2	1
Outcome						
Election directed	19	12	8	1	3	1
Dismissals on record	39	38	29	6	3	0

[1] See Glossary for definitions of terms

Table 3B.—Formal Actions Taken in Representation and Union Deauthorization Cases, Fiscal Year 1983[1]—Contd.

Types of formal actions taken	Cases in which formal actions taken	Formal actions taken by type of case				
		Total formal actions taken	RC	RM	RD	UD
Decisions on objections and/or challenges, total	999	941	831	34	76	12
By regional directors	209	172	150	6	16	7
By Board	790	769	681	28	60	5
In stipulated elections	748	729	646	27	56	5
No exceptions to regional directors' reports	578	561	511	15	35	4
Exceptions to regional directors' reports	170	168	135	12	21	1
In directed elections (after transfer by regional director)	42	40	35	1	4	0
Review of regional directors' supplemental decisions						
Request for review received	54	53	48	1	4	0
Withdrawn before request ruled upon	0	0	0	0	0	0
Board action on request ruled upon, total	55	47	42	1	4	0
Granted	7	7	6	0	1	0
Denied	47	39	35	1	3	0
Remanded	1	1	1	0	0	0
Withdrawn after request granted, before Board review	0	0	0	0	0	0
Board decision after review, total	0	0	0	0	0	0
Regional directors' decisions						
Affirmed	0	0	0	0	0	0
Modified	0	0	0	0	0	0
Reversed	0	0	0	0	0	0

[1] See Glossary for definitions of terms

Table 3C.—Formal Actions Taken in Amendment of Certification and Unit Clarification Cases, Fiscal Year 1983 [1]

Types of formal actions taken	Cases in which formal actions taken	Formal actions taken by type of case	
		AC	UC
Hearings completed	105	5	93
Decision issued after hearing	117	5	100
By regional directors	110	5	100
By Board	0	0	0
Transferred by regional directors for initial decision	0	0	0
Review of regional directors' decisions Requests for review received	12	1	9
Withdrawn before request ruled upon	0	0	0
Board action on requests ruled upon, total	12	3	6
Granted	3	1	2
Denied	8	1	3
Remanded	1	1	1
Withdrawn after request granted, before Board review	0	0	0
Board decision after review, total	0	0	0
Regional directors' decisions			
Affirmed	0	0	0
Modified	0	0	0
Reversed	0	0	0

[1] See Glossary for definitions of terms

Table 4.—Remedial Actions Taken in Unfair Labor Practice Cases Closed, Fiscal Year 1983 [1]

Action taken	Total all	Remedial action taken by—											
		Employer						Union					
		Total	Pursuant to—					Total	Pursuant to—				
			Agreement of parties		Recommendation of administrative law judge	Order of—			Agreement of parties		Recommendation of administrative law judge	Order of—	
			Informal settlement	Formal settlement		Board	Court		Informal settlement	Formal settlement		Board	Court
A By number of cases involved	[2] 11,754												
Notice posted	8,131	7,525	6,620	164	43	481	217	606	521	23	0	49	13
Recognition or other assistance withdrawn	34	34	19	8	0	4	3						
Employer-dominated union disestablished	12	12	7	1	0	2	2						
Employees offered reinstatement	1,312	1,312	1,099	41	13	96	63						
Employees placed on preferential hiring list	137	137	121	5	2	7	2						
Hiring hall rights restored	47							47	44	0	0	3	0
Objections to employment withdrawn	35							35	33	0	0	2	0
Picketing ended	406							406	394	5	0	7	0
Work stoppage ended	79							79	77	1	0	1	0
Collective bargaining begun	2,334	2,162	1,963	47	0	89	63	172	168	2	0	0	2
Backpay distributed	7,057	6,263	5,758	93	21	263	128	794	747	10	1	24	12
Reimbursement of fees, dues, and fines	4,905	4,147	3,913	42	4	128	60	758	726	6	1	17	8
Other conditions of employment improved	905	0	0	0	0	0	0	905	886	5	3	10	1
Other remedies	0	0	0	0	0	0	0	0	0	0	0	0	0

B By number of employees affected													
Employees offered reinstatement, total	6,029	6,029	5,139	147	32	364	347						
Accepted	5,091	5,091	4,624	73	10	128	256						
Declined	938	938	515	74	22	236	91						
Employees placed on preferential hiring list	769	769	600	120	20	16	13						
Hiring hall rights restored	129							129	84	0	0	42	3
Objections to employment withdrawn	32							32	30	0	0	2	0
Employees receiving backpay													
From either employer or union	18,229	17,888	15,851	598	74	896	469	341	280	23	0	37	1
From both employer and union	96	96	32	0	0	64	0	96	32	0	0	64	0
Employees reimbursed for fees, dues, and fines													
From either employer or union	2,504	1,615	940	23	0	643	9	889	407	0	0	2	480
From both employer and union	3	3	3	0	0	0	0	3	3	0	0	0	0
C By amounts of monetary recovery, total	$32,071,532	$31,360,864	$20,485,086	$2,911,304	$351,977	$5,249,084	$2,363,413	$710,668	$421,236	$106,682	0	$53,772	$128,978
Backpay (includes all monetary payments except fees, dues, and fines)	31,270,472	30,809,462	20,086,268	2,909,041	351,977	5,102,608	2,359,568	461,010	203,412	106,682	0	51,531	99,385
Reimbursement of fees, dues, and fines	801,060	551,402	398,818	2,263	0	146,476	3,845	249,658	217,824	0	0	2,241	29,593

[1] See Glossary for definition of terms Data in this table are based on unfair labor practice cases that were closed during fiscal year 1983 after the company and/or union had satisfied all remedial action requirements

[2] A single case usually results in more than one remedial action, therefore, the total number of actions exceeds the number of cases involved

Table 5.—Industrial Distribution of Cases Received, Fiscal Year 1983 [1]

Industrial group [2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Food and kindred products	1,925	1,611	1,195	387	22	4	1	0	2	292	198	23	71	12	0	10
Tobacco manufacturers	107	104	79	25	0	0	0	0	0	2	1	1	0	1	0	0
Textile mill products	212	166	145	19	0	1	0	0	1	45	35	5	5	0	0	1
Apparel and other finished products made from fabric and similar materials	340	283	226	52	2	1	1	0	1	52	30	3	19	2	0	3
Lumber and wood products (except furniture)	565	420	361	37	15	4	3	0	0	142	78	22	42	0	1	2
Furniture and fixtures	483	392	336	46	7	1	1	0	1	86	60	8	18	2	0	3
Paper and allied products	464	401	319	79	2	1	0	0	0	57	42	2	13	1	0	5
Printing, publishing, and allied products	975	754	590	148	5	9	1	0	1	182	109	12	61	7	3	29
Chemicals and allied products	780	639	521	98	15	5	0	0	0	132	88	8	36	2	0	7
Petroleum refining and related industries	261	220	175	32	6	4	2	0	1	31	15	2	14	3	1	6
Rubber and miscellaneous plastic products	791	660	364	290	3	0	1	0	2	123	100	7	16	3	2	3
Leather and leather products	562	543	298	242	2	1	0	0	0	15	15	0	0	3	0	1
Stone, clay, glass, and concrete products	669	513	408	91	7	4	0	0	3	146	90	15	41	4	0	6
Primary metal industries	1,082	899	642	217	36	3	0	0	1	168	120	12	36	5	2	8
Fabricated metal products (except machinery and transportation equipment)	1,485	1,168	925	198	27	15	1	0	2	290	178	18	94	17	0	10
Machinery (except electrical)	1,642	1,303	1,033	240	11	14	0	0	5	313	207	29	77	4	4	18
Electrical and electronic machinery, equipment, and supplies	879	748	550	191	5	2	0	0	0	118	84	5	29	3	0	10
Aircraft and parts	366	349	195	154	0	0	0	0	0	14	9	1	4	0	0	3
Ship and boat building and repairing	289	272	169	82	16	2	0	0	3	17	12	2	3	0	0	0
Automotive and other transportation equipment	820	700	477	216	2	3	0	0	2	109	88	5	16	9	1	1
Measuring, analyzing, and controlling instruments, photographic, medical, and optical goods, watches and clocks	416	349	273	69	4	2	0	0	1	60	37	3	20	5	0	2
Miscellaneous manufacturing industries	1,657	1,384	884	452	32	9	3	0	4	259	184	20	55	5	2	7
Manufacturing	16,770	13,878	10,165	3,365	219	85	14	0	30	2,653	1,780	203	670	88	16	135

Metal mining	285	268	89	178	1	0	0	0	0	14	10	2	2	1	0	2
Coal mining	660	627	397	195	16	6	0	0	13	32	29	1	2	0	0	1
Oil and gas extraction	154	126	51	10	59	1	0	0	5	25	14	1	10	3	0	0
Mining and quarrying of nonmetallic minerals (except fuels)	166	149	52	13	68	16	0	0	0	17	12	3	2	0	0	0
Mining	1,265	1,170	589	396	144	23	0	0	18	88	65	7	16	4	0	3
Construction	5,885	5,358	2,760	1,225	879	219	23	0	252	503	292	125	86	7	0	17
Wholesale trade	3,446	2,663	1,989	575	63	16	7	0	13	743	464	82	197	16	5	19
Retail trade	5,122	3,897	3,152	586	86	10	5	0	58	1,115	600	174	341	58	2	50
Finance, insurance, and real estate	788	621	465	104	36	7	3	0	6	161	109	16	36	3	0	3
U S Postal Service	1,281	1,273	1,092	180	1	0	0	0	0	7	4	0	3	0	1	0
Local and suburban transit and interurban highway passenger transportation	990	852	628	221	3	0	0	0	0	128	107	5	16	5	4	1
Motor freight transportation and warehousing	2,419	2,014	1,629	283	65	12	7	0	18	383	255	29	99	9	1	12
Water transportation	308	249	134	94	11	4	4	0	2	46	38	3	5	2	1	10
Other transportation	712	624	262	324	20	3	1	0	14	85	58	6	21	1	0	2
Communication	977	726	530	174	15	6	0	0	1	229	161	15	53	8	0	14
Electric, gas, and sanitary services	575	464	357	91	13	2	0	0	1	88	59	4	25	2	1	20
Transportation, communication, and other utilities	5,981	4,929	3,540	1,187	127	27	12	0	36	959	678	62	219	27	7	59
Hotels, rooming houses, camps, and other lodging places	1,232	1,071	797	253	13	4	0	0	4	152	116	8	28	4	0	5
Personal services	306	216	172	38	5	1	0	0	0	85	50	6	29	4	0	1
Automotive repair, services, and garages	461	306	260	39	5	1	0	0	1	148	101	11	36	4	0	3
Motion pictures	276	240	150	82	2	2	1	0	3	35	28	1	6	0	0	1
Amusement and recreation services (except motion pictures)	465	367	254	83	16	2	4	0	8	93	55	11	27	0	0	5
Health services	2,713	1,978	1,644	265	19	1	0	39	10	633	490	24	119	11	5	86
Educational services	232	176	159	14	0	0	0	0	3	44	31	5	8	1	0	11
Membership organizations	487	423	235	163	12	5	2	0	6	41	30	4	7	1	0	22
Business services	1,791	1,386	1,084	244	36	9	2	0	11	387	328	16	43	7	1	10
Miscellaneous repair services	161	110	79	24	5	0	1	0	1	47	31	4	12	1	1	2
Legal services	167	143	81	61	1	0	0	0	0	20	18	0	2	2	0	2

Table 5.—Industrial Distribution of Cases Received, Fiscal Year 1983 [1]—Continued

Industrial group [2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Museums, art galleries, and botanical and zoological gardens	18	16	9	0	4	2	0	0	1	2	2	0	0	0	0	0
Social services	260	167	150	17	0	0	0	0	0	83	72	2	9	2	0	8
Miscellaneous services	111	87	71	14	1	0	0	0	1	23	15	2	6	0	0	1
Services	8,680	6,686	5,145	1,297	119	27	10	39	49	1,793	1,367	94	332	37	7	157
Public administration	218	159	98	58	2	0	0	0	1	56	51	1	4	1	0	2
Total, all industrial groups	49,436	40,634	28,995	8,973	1,676	414	74	39	463	8 078	5,410	764	1,904	241	38	445

[1] See Glossary for Definitions of terms
[2] Source Standard Industrial Classification, Statistical Policy Division, Office of Management and Budget, Washington, 1972

Table 6A.—Geographic Distribution of Cases Received, Fiscal Year 1983 [1]

Division and State [2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Maine	149	115	96	15	3	0	0	0	1	33	30	0	3	0	0	1
New Hampshire	104	90	69	21	0	0	0	0	0	14	11	0	3	0	0	0
Vermont	48	34	26	7	1	0	0	0	0	12	12	0	0	0	0	2
Massachusetts	1,540	1,272	932	231	69	28	2	2	8	252	212	5	35	3	2	11
Rhode Island	133	102	70	24	6	2	0	0	0	24	12	5	7	1	0	6
Connecticut	798	662	507	134	12	6	1	2	0	121	97	7	17	6	2	7
New England	2,772	2,275	1,700	432	91	36	3	4	9	456	374	17	65	10	4	27
New York	4,633	3,799	2,301	1,253	120	51	9	5	60	765	598	56	111	16	0	53
New Jersey	1,774	1,349	1,024	230	51	34	1	2	7	393	314	21	58	13	2	17
Pennsylvania	2,609	2,170	1,508	499	82	55	5	3	18	405	299	23	83	13	1	20
Middle Atlantic	9,016	7,318	4,833	1,982	253	140	15	10	85	1,563	1,211	100	252	42	3	90
Ohio	2,867	2,390	1,806	459	75	34	1	3	12	429	302	21	106	26	1	21
Indiana	1,869	1,662	1,215	392	26	21	0	0	8	191	125	11	55	5	3	8
Illinois	2,990	2,486	1,714	568	129	28	8	0	39	474	314	44	116	15	3	12
Michigan	2,424	1,991	1,496	395	61	19	1	0	19	403	288	20	95	15	1	14
Wisconsin	1,102	890	710	158	19	1	0	0	2	189	124	12	53	7	4	12
East North Central	11,252	9,419	6,941	1,972	310	103	10	3	80	1,686	1,153	108	425	68	12	67
Iowa	420	336	250	63	16	2	1	0	4	72	48	5	19	0	0	12
Minnesota	639	426	331	34	26	3	3	0	9	194	121	12	61	6	0	13
Missouri	1,681	1,456	1,048	301	64	24	0	0	19	206	137	11	58	12	1	6
North Dakota	67	46	40	5	0	0	0	0	1	19	13	4	2	1	0	1
South Dakota	23	16	14	2	0	0	0	0	0	7	5	0	2	0	0	0
Nebraska	175	146	122	20	4	0	0	0	0	27	11	5	11	1	0	1
Kansas	300	256	208	39	6	3	0	0	0	41	15	10	16	0	0	3
West North Central	3,305	2,682	2,013	484	116	32	4	0	33	566	350	47	169	20	1	36

Table 6A.—Geographic Distribution of Cases Received, Fiscal Year 1983 [1]—Continued

Division and State [2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Delaware	107	81	68	7	5	1	0	0	0	26	22	0	4	0	0	0
Maryland	829	703	497	198	3	1	0	3	1	109	90	6	13	1	0	16
District of Columbia	292	227	182	41	2	2	0	0	0	50	44	2	4	0	1	14
Virginia	582	483	411	72	0	0	0	0	0	92	78	4	10	0	1	6
West Virginia	595	519	373	102	17	9	0	0	18	71	50	9	12	1	0	4
North Carolina	446	380	319	60	0	1	0	0	0	62	41	3	18	0	2	2
South Carolina	187	162	133	27	1	0	1	0	0	25	18	0	7	0	0	0
Georgia	929	802	632	165	2	1	1	1	0	124	95	11	18	0	0	3
Florida	1,012	853	672	150	18	10	3	0	0	153	109	8	36	0	1	5
South Atlantic	4,979	4,210	3,287	822	48	25	5	4	19	712	547	43	122	2	5	50
Kentucky	817	720	589	100	17	4	0	3	7	80	56	9	15	2	4	11
Tennessee	838	698	555	127	10	4	0	0	2	132	88	10	34	0	0	8
Alabama	492	373	283	78	5	0	0	0	7	115	94	6	15	1	1	2
Mississippi	251	206	177	29	0	0	0	0	0	43	30	3	10	0	0	2
East South Central	2,398	1,997	1,604	334	32	8	0	3	16	370	268	28	74	3	5	23
Arkansas	251	182	158	22	1	1	0	0	0	69	43	2	24	0	0	0
Louisiana	470	393	255	100	20	6	2	3	7	74	51	5	18	0	0	3
Oklahoma	380	327	257	62	7	1	0	0	0	49	23	6	20	2	0	2
Texas	1,499	1,271	931	311	13	10	0	0	6	218	176	7	35	2	2	6
West South Central	2,600	2,173	1,601	495	41	18	2	3	13	410	293	20	97	4	2	11

Montana	212	152	99	35	10	1	1	0	6	45	29	3	13	5	0	10
Idaho	153	80	69	7	2	2	0	0	0	50	31	7	12	3	0	20
Wyoming	60	50	35	15	0	0	0	0	0	9	5	2	2	0	0	1
Colorado	706	619	481	127	8	2	0	0	1	83	44	7	32	1	0	3
New Mexico	203	156	114	40	2	0	0	0	0	42	25	5	12	2	0	3
Arizona	534	463	336	112	13	2	0	0	0	69	38	14	17	0	0	2
Utah	117	90	62	27	1	0	0	0	0	27	20	2	5	0	0	0
Nevada	548	499	353	127	16	0	0	1	2	47	31	0	16	0	2	0
Mountain	2,533	2,109	1,549	490	52	7	1	1	9	372	223	40	109	11	2	39
Washington	1,590	1,180	876	226	57	5	5	1	10	374	146	53	175	12	0	24
Oregon	707	458	340	65	38	5	2	0	8	220	75	54	91	15	1	13
California	7,456	6,185	3,818	1,519	618	29	26	6	169	1,175	627	240	308	36	2	58
Alaska	264	215	124	68	14	4	0	0	5	43	34	3	6	2	0	4
Hawaii	266	211	152	48	3	1	0	2	5	48	36	5	7	7	0	0
Guam	3	0	0	0	0	0	0	0	0	3	2	1	0	0	0	0
Pacific	10,286	8,249	5,310	1,926	730	44	33	9	197	1,863	920	356	587	72	3	99
Puerto Rico	263	186	144	33	3	1	1	2	2	64	57	4	3	9	1	3
Virgin Islands	32	16	13	3	0	0	0	0	0	16	14	1	1	0	0	0
Outlying Areas	295	202	157	36	3	1	1	2	2	80	71	5	4	9	1	3
Total, all States and areas	49,436	40,634	28,995	8,973	1,676	414	74	39	463	8,078	5,410	764	1,904	241	38	445

[1] See Glossasy for definitions of terms
[2] The States are grouped according to the method used by the Bureau of the Census, U S Department of Commerce

Table 6B.—Standard Federal Administrative Regional Distribution of Cases Received, Fiscal Year 1983 [1]

Standard Federal Regions [2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Connecticut	798	662	507	134	12	6	1	2	0	121	97	7	17	6	2	7
Maine	149	115	96	15	3	0	0	0	1	33	30	0	3	0	0	1
Massachusetts	1,540	1,272	932	231	69	28	2	2	8	252	212	5	35	3	2	11
New Hampshire	104	90	69	21	0	0	0	0	0	14	11	0	3	0	0	0
Rhode Island	133	102	70	24	6	2	0	0	0	24	12	5	7	1	0	6
Vermont	48	34	26	7	1	0	0	0	0	12	12	0	0	0	0	2
Region I	2,772	2,275	1,700	432	91	36	3	4	9	456	374	17	65	10	4	27
Delaware	107	81	68	7	5	1	0	0	0	26	22	0	4	0	0	0
New Jersey	1,774	1,349	1,024	230	51	34	1	2	7	393	314	21	58	13	2	17
New York	4,633	3,799	2,301	1,253	120	51	9	5	60	765	598	56	111	16	0	53
Puerto Rico	263	186	144	33	3	1	1	2	2	64	57	4	3	9	1	3
Virgin Islands	32	16	13	3	0	0	0	0	0	16	14	1	1	0	0	0
Region II	6,809	5,431	3,550	1,526	179	87	11	9	69	1,264	1,005	82	177	38	3	73
District of Columbia	292	227	182	41	2	2	0	0	0	50	44	2	4	0	1	14
Maryland	829	703	497	198	3	1	0	3	1	109	90	6	13	1	0	16
Pennsylvania	2,609	2,170	1,508	499	82	55	5	3	18	405	299	23	83	13	1	20
Virginia	582	483	411	72	0	0	0	0	0	92	78	4	10	0	1	6
West Virginia	595	519	373	102	17	9	0	0	18	71	50	9	12	1	0	4
Region III	4,907	4,102	2,971	912	104	67	5	6	37	727	561	44	122	15	3	60

Alabama	492	373	283	78	5	0	0	0	7	115	94	6	15	1	1	2
Florida	1,012	853	672	150	18	10	3	0	0	153	109	8	36	0	1	5
Georgia	929	802	632	165	2	1	1	1	0	124	95	11	18	0	0	3
Kentucky	817	720	589	100	17	4	0	3	7	80	56	9	15	2	4	11
Mississippi	251	206	177	29	0	0	0	0	0	43	30	3	10	0	0	2
North Carolina	446	380	319	60	0	1	0	0	0	62	41	3	18	0	2	2
South Carolina	187	162	133	27	1	0	1	0	0	25	18	0	7	0	0	0
Tennessee	838	698	555	127	10	4	0	0	2	132	88	10	34	0	0	8
Region IV	4,972	4,194	3,360	736	53	20	5	4	16	734	531	50	153	3	8	33
Illinois	2,990	2,486	1,714	568	129	28	8	0	39	474	314	44	116	15	3	12
Indiana	1,869	1,662	1,215	392	26	21	0	0	8	191	125	11	55	5	3	8
Michigan	2,424	1,991	1,496	395	61	19	1	0	19	403	288	20	95	15	1	14
Minnesota	639	426	331	54	26	3	3	0	9	194	121	12	61	6	0	13
Ohio	2,867	2,390	1,806	459	75	34	1	3	12	429	302	21	106	26	1	21
Wisconsin	1,102	890	710	158	19	1	0	0	2	189	124	12	53	7	4	12
Region V	11,891	9,845	7,272	2,026	336	106	13	3	89	1,880	1,274	120	486	74	12	80
Arkansas	251	182	158	22	1	1	0	0	0	69	43	2	24	0	0	0
Louisiana	470	393	255	100	20	6	2	3	7	74	51	5	18	0	0	3
New Mexico	203	156	114	40	2	0	0	0	0	42	25	5	12	2	0	3
Oklahoma	380	327	257	62	7	1	0	0	0	49	23	6	20	2	0	2
Texas	1,499	1,271	931	311	13	10	0	0	6	218	176	7	35	2	2	6
Region VI	2,803	2,329	1,715	535	43	18	2	3	13	452	318	25	109	6	2	14
Iowa	420	336	250	63	16	2	1	0	4	72	48	5	19	0	0	12
Kansas	300	256	208	39	6	3	0	0	0	41	15	10	16	0	0	3
Missouri	1,681	1,456	1,048	301	64	24	0	0	19	206	137	11	58	12	1	6
Nebraska	175	146	122	20	4	0	0	0	0	27	11	5	11	1	0	1
Region VII	2,576	2,194	1,628	423	90	29	1	0	23	346	211	31	104	13	1	22
Colorado	706	619	481	127	8	2	0	0	1	83	44	7	32	1	0	3
Montana	212	152	99	35	10	1	1	0	6	45	29	3	13	5	0	10
North Dakota	67	46	40	5	0	0	0	0	1	19	13	4	2	1	0	1
South Dakota	23	16	14	2	0	0	0	0	0	7	5	0	2	0	0	0
Utah	117	90	62	27	1	0	0	0	0	27	20	2	5	0	0	0
Wyoming	60	50	35	15	0	0	0	0	0	9	5	2	2	0	0	1
Region VIII	1,185	973	731	211	19	3	1	0	8	190	116	18	56	7	0	15

Table 6B.—Standard Federal Administrative Regional Distribution of Cases Received, Fiscal Year 1983 [1]—Continued

Standard Federal Regions [2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Arizona	534	463	336	112	13	2	0	0	0	69	38	14	17	0	0	2
California	7,456	6,185	3,818	1,519	618	29	26	6	169	1,175	627	240	308	36	2	58
Hawaii	266	211	152	48	3	1	0	2	5	48	36	5	7	7	0	0
Guam	3	0	0	0	0	0	0	0	0	3	2	1	0	0	0	0
Nevada	548	499	353	127	16	0	0	1	2	47	31	0	16	0	2	0
Region IX	8,807	7,358	4,659	1,806	650	32	26	9	176	1,342	734	260	348	43	4	60
Alaska	264	215	124	68	14	4	0	0	5	43	34	3	6	2	0	4
Idaho	153	80	69	7	2	2	0	0	0	50	31	7	12	3	0	20
Oregon	707	458	340	65	38	5	2	0	8	220	75	54	91	15	1	13
Washington	1,590	1,180	876	226	57	5	5	1	10	374	146	53	175	12	0	24
Region X	2,714	1,933	1,409	366	111	16	7	1	23	687	286	117	284	32	1	61
Total, all States and areas	49,436	40,634	28,995	8,973	1,676	414	74	39	463	8,078	5,410	764	1,904	241	38	445

[1] See Glossary for definitions of terms
[2] The States are grouped according to the 10 standard Federal administrative regions

Table 7.—Analysis of Methods of Disposition of Unfair Labor Practice Cases Closed, Fiscal Year 1983 [1]

Method and stage of disposition	All C cases			CA cases		CB cases		CC cases		CD cases		CE cases		CG cases		CP cases	
	Number	Percent of total closed	Percent of total method	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed
Total number of cases closed	38,041	100 0	0 0	27,454	100 0	8,324	100 0	1,420	100 0	370	100 0	90	100 0	40	100 0	343	100 0
Agreement of the parties	10,632	27 9	100 0	8,539	31 1	1,315	15 7	624	43 9	8	2 1	34	37 7	19	47 5	93	27 1
Informal settlement	10,410	27 4	97 9	8,366	30 4	1,278	15 3	614	43 2	6	1 6	34	37 7	19	47 5	93	27 1
Before issuance of complaint	6,533	17 2	61 4	5,129	18 6	854	10 2	450	31 6	[2]		17	18 8	15	37 5	68	19 8
After issuance of complaint, before opening of hearing	3,803	10 0	35 8	3,182	11 5	413	4 9	156	10 9	6	1 6	17	18 8	4	10 0	25	7 2
After hearing opened, before issuance of administrative law judge's decision	74	0 2	0 7	55	0 2	11	0 1	8	0 5	0		0		0		0	
Formal settlement	222	0 6	2 1	173	0 6	37	0 4	10	0 7	2	0 5	0		0		0	
After Issuance of complaint, before opening of hearing	128	0 3	1 2	93	0 3	27	0 3	6	0 4	2	0 5	0		0		0	
Stipulated decision	24	0 1	0 2	20	0 0	2	0 0	1	0 0	1	0 2	0		0		0	
Consent decree	104	0 3	1 0	73	0 2	25	0 3	5	0 3	1	0 2	0		0		0	
After hearing opened	94	0 2	0 9	80	0 2	10	0 1	4	0 2	0		0		0		0	
Stipulated decision	16	0 0	0 2	15	0 0	1	0 0	0		0		0		0		0	
Consent decree	78	0 2	0 7	65	0 2	9	0 1	4	0 2	0		0		0		0	
Compliance with	978	2 6	100 0	839	3 0	101	1 2	19	1 3	6	1 6	4	4 4	1	2 5	8	2 3

Table 7.—Analysis of Methods of Disposition of Unfair Labor Practice Cases Closed, Fiscal Year 1983 [1]—Continued

Method and stage of disposition	All C cases			CA cases		CB cases		CC cases		CD cases		CE cases		CG cases		CP cases	
	Number	Percent of total closed	Percent of total method	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed
Administrative law judge's decision	43	0 1	4 4	37	0 1	5	0 0	1	0 0	0		0		0		0	
Board decision	640	1 7	65 4	546	1 9	64	0 7	16	1 1	5	1 3	1	1 1	1	2 5	7	2 0
Adopting Administrative law judge's decision (no exceptions filed)	353	0 9	36 1	291	1 0	39	0 4	10	0 7	5	1 3	1	1 1	1	2 5	6	1 7
Contested	287	0 8	29 3	255	0 9	25	0 3	6	0 4	0		0		0		1	0 2
Circuit court of appeals decree	286	0 8	29 2	248	0 9	32	0 3	2	0 1	1	0 2	2	2 2	0		1	0 2
Supreme Court action	9	0 0	0 9	8	0 0	0		0		0		1	1 1	0		0	
Withdrawal	13,337	35 1	100 0	9,499	34 5	3,089	37 1	543	38 2	1	0 2	30	33 3	11	27 5	164	47 8
Before issuance of complaint	12,707	33 4	95 3	8,971	32 6	3,002	36 0	530	37 3	[2]		29	32 2	11	27 5	164	47 8
After issuance of complaint, before opening of hearing	541	1 4	4 1	449	1 6	78	0 9	12	0 8	1	0 2	1	1 1	0		0	
After hearing opened, before administrative law judge's decision	82	0 2	0 6	74	0 2	7	0 0	1	0 0	0		0		0		0	
After administrative law judge's decision, before board decision	1	0 0	0 0	0		1	0 0	0		0		0		0		0	
After board of court decision	6	0 0	0 0	5	0 0	1	0 0	0		0		0		0		0	
Dismissal	12,725	33 5	100 0	8,564	31 1	3,818	45 8	234	16 4	0		22	24 4	9	22 5	78	22 7

Before issuance of complaint	12,468	32 8	98 0	8,346	30 4	3,784	45 4	232	16 3	[2]		22	24 4	8	20 0	76	22 1
After issuance of complaint, before opening of hearing	146	0 4	1 1	115	0 4	27	0 3	1	0 0	0		0		1	2 5	2	0 5
After hearing opened, before administrative law judge's decision	12	0 0	0 1	11	0 0	1	0 0	0		0		0		0		0	
By administrative law judge's decision	1	0 0	0 0	1	0 0	0		0		0		0		0		0	
By board decision	93	0 2	0 7	86	0 3	6	0 0	1	0 0	0		0		0		0	
Adopting administrative law judge's decision (no exceptions filed)	72	0 2	0 6	66	0 2	5	0 0	1	0 0	0		0		0		0	
Contested	21	0 1	0 2	20	0 0	1	0 0	0		0		0		0		0	
By circuit court of appeals decree	3	0 0	0 0	2	0 0	1	0 0	0		0		0		0		0	
By supreme court action	2	0 0	0 0	1	0 0	1	0 0	0		0		0		0		0	
10(k) actions (see table 7A for details of dispositions)	355	0 9	0 0	0		0		0		355	95 9	0		0		0	
Otherwise (compliance with order of administrative law judge or board not achieved—firm went out of business)	14	0 0	0 0	13	0 0	1	0 0	0		0		0		0		0	

[1] See table 8 for summary of disposition by stage See glossary for definitions of terms
[2] CD cases closed in this stage are processed as jurisdictional disputes under sec 10(k) of the act See table 7A

Table 7A.—Analysis of Methods of Disposition of Jurisdictional Dispute Cases Closed Prior to Unfair Labor Practice Proceedings, Fiscal Year 1983

Method and stage of disposition	Number of cases	Percent of total closed
Total number of cases closed before issuance of complaint	355	100 0
Agreement of the parties—informal settlement	140	39 4
Before 10(k) notice	104	29 3
After 10(k) notice, before opening of 10(k) hearing	35	9 9
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	1	0 3
Compliance with board decision and determination of dispute	4	1 1
Withdrawal	138	38 9
Before 10(k) notice	118	33 2
After 10(k) notice, before opening of 10(K) hearing	9	2 5
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	11	3 1
After Board decision and determination of dispute	0	0 0
Dismissal	73	20 6
Before 10(k) notice	64	18 0
After 10(k) notice, before opening of 10(k) hearing	5	1 4
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	2	0 6
By Board decision and determination of dispute	2	0 6

Table 8.—Disposition by Stage of Unfair Labor Practice Cases Closed, Fiscal Year 1983 [1]

Stage of disposition	All C cases		CA cases		CB cases		CC cases		CD cases		CE cases		CG cases		CP cases	
	Number	Percent of cases closed	Number	Percent of cases closed	Number	Percent of cases closed	Number	Percent of cases closed	Number	Percent of cases closed	Number	Percent of cases closed	Number	Percent of cases closed	Number	Percent of cases closed
Total number of cases closed	38,041	100 0	27,454	100 0	8,324	100 0	1,420	100 0	370	100 0	90	100 0	40	100 0	343	100 0
Before issuance of complaint	32,063	84 3	22,451	81 8	7,641	91 8	1,212	85 4	355	95 9	68	75 6	34	85 0	308	89 8
After issuance of complaint, before opening of hearing	4,618	12 1	3,839	14 0	545	6 5	175	12 3	9	2 4	18	20 0	5	12 5	27	7 9
After hearing opened, before issuance of administrative law judge's decision	262	0 7	220	0 8	29	0 3	13	0 9	0		0		0		0	
After administrative law judge's decision, before issuance of Board decision	45	0 1	38	0 1	6	0 1	1	0 1	0		0		0		0	
After Board order adopting administrative law judge's decision in absence of exceptions	431	1 1	362	1 3	45	0 5	11	0 8	5	1 4	1	1 1	1	2 5	6	1 7
After Board decision, before circuit court decree	322	0 8	288	1 0	27	0 3	6	0 4	0		0		0		1	0 3
After circuit court decree, before Supreme Court action	289	0 8	250	0 9	33	0 4	2	0 1	1	0 3	2	2 2	0		1	0 3
After Supreme Court action	11	0 0	9	0 0	1	0 0	0		0		1	1 1	0		0	

[1] See Glossary for definitions of terms

Table 9.—Disposition by Stage of Representation and Union Deauthorization Cases Closed, Fiscal Year 1983 [1]

Stage of disposition	All R cases		RC cases		RM cases		RD cases		UD cases	
	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed
Total number of cases closed	7,808	100 0	5,209	100 0	718	100 0	1,881	100 0	231	100 0
Before issuance of notice of hearing	1,549	19 8	702	13 5	264	36 7	583	31 0	132	57 2
After issuance of notice, before close of hearing	5,251	67 2	3,761	72 2	364	50 7	1,126	59 8	73	31 6
After hearing closed, before issuance of decision	39	0 5	30	0 6	2	0 3	7	0 4	0	0 0
After issuance of regional director's decision	918	11 8	676	13 0	86	12 0	156	8 3	25	10 8
After issuance of Board decision	51	0 7	40	0 7	2	0 3	9	0 5	1	0 4

[1] See Glossary for definition of terms

Table 10.—Analysis of Methods of Disposition of Representation and Union Deauthorization Cases Closed, Fiscal Year 1983 [1]

Method and stage of disposition	All R cases		RC cases		RM cases		RD cases		UD cases	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total, all	7,808	100 0	5,209	100 0	718	100 0	1,881	100 0	231	100 0
Certification issued, total	4,766	61 0	3,478	66 8	304	42 3	984	52 3	129	55 8
After										
Consent election	143	1 8	95	1 8	10	1 4	38	2 0	6	2 6
Before notice of hearing	60	0 8	41	0 8	3	0 4	16	0 9	6	2 6
After notice of hearing, before hearing closed	82	1 1	53	1 0	7	1 0	22	1 2	0	0 0
After hearing closed, before decision	1	0 0	1	0 0	0	0 0	0	0 0	0	0 0
Stipulated election	3,872	49 6	2,840	54 5	222	30 9	810	43 1	98	42 4
Before notice of hearing	4	0 1	3	0 1	0	0 0	1	0 1	30	13 0
After notice of hearing, before hearing closed	3,856	49 4	2,829	54 3	221	30 8	806	42 8	68	29 4
After hearing closed, before decision	12	0 2	8	0 2	1	0 1	3	0 2	0	0 0
Expedited election	6	0 1	0	0 0	6	0 8	0	0 0	0	0 0
Regional director directed election	706	9 0	512	9 8	66	9 2	128	6 8	24	10 4
Board directed election	39	0 5	31	0 6	0	0 0	8	0 4	1	0 4
By withdrawal, total	2,328	29 8	1,453	27 9	270	37 6	605	32 2	79	34 2
Before notice of hearing	1,122	14 4	585	11 2	166	23 1	371	19 7	74	32 0
After notice of hearing, before hearing closed	1,137	14 6	806	15 5	100	13 9	231	12 3	5	2 2
After hearing closed, before decision	15	0 2	13	0 2	0	0 0	2	0 1	0	0 0
After regional director decision and direction of election	49	0 6	44	0 8	4	0 6	1	0 1	0	0 0
After board decision and direction of election	5	0 1	5	0 1	0	0 0	0	0 0	0	0 0
By dismissal, total	714	9 1	278	5 3	144	20 1	292	15 5	23	10 0
Before notice of hearing	357	4 6	73	1 4	89	12 4	195	10 4	22	9 5
After notice of hearing, before hearing closed	176	2 3	73	1 4	36	5 0	67	3 6	0	0 0
After hearing closed, before decision	11	0 1	8	0 2	1	0 1	2	0 1	0	0 0
By regional director's decision	163	2 1	120	2 3	16	2 2	27	1 4	1	0 4
By Board decision	7	0 1	4	0 1	2	0 3	1	0 1	0	0 0

[1] See Glossary for definitions of terms

Table 10A.—Analysis of Methods of Disposition of Amendment of Certification and Unit Clarification Cases Closed, Fiscal Year 1983

	AC	UC
Total, all	36	405
Certification amended or unit clarification	8	67
Before hearing	0	0
By regional director's decision	0	0
By Board decision	0	0
After hearing	8	67
By regional director's decision	8	67
By Board decision	0	0
Dismissed	14	109
Before Hearing	0	13
By regional director's decision	0	13
By Board decision	0	0
After hearing	14	96
By regional director's decision	14	96
By Board decision	0	0
Withdrawn	14	229
Before hearing	0	226
After hearing	14	3

Table 11.—Types of Elections Resulting in Certification in Cases Closed, Fiscal Year 1983 [1]

Type of case	Total	Type of election				
		Consent	Stipulated	Board-directed	Regional director-directed	Expedited elections under 8(b)(7)(C)
All types, total						
Elections	4,481	178	3,481	38	763	21
Eligible voters	213,076	3,840	161,488	4,442	43,016	290
Valid votes	183,834	3,355	139,343	3,972	36,905	259
RC cases						
Elections	3,241	108	2,550	29	543	11
Eligible voters	164,925	2,044	124,520	3,749	34,392	220
Valid votes	142,360	1,821	107,292	3,342	29,704	201
RM cases						
Elections	242	11	161	0	63	7
Eligible voters	6,623	615	4,645	0	1,324	39
Valid votes	5,523	558	3,905	0	1,030	30
RD cases						
Elections	922	54	730	7	128	3
Eligible voters	38,370	1,092	30,737	639	5,871	31
Valid votes	33,425	905	26,909	582	5,001	28
UD cases						
Elections	76	5	40	2	29	
Eligible voters	3,158	89	1,586	54	1,429	
Valid votes	2,526	71	1,237	48	1,170	

[1] See Glossary for definitions of terms

Table 11A.—Analysis of Elections Conducted in Representation Cases Closed, Fiscal Year 1983

Type of election	All R elections				RC elections				RM elections				RD elections			
	Elections conducted				Elections conducted				Elections conducted				Elections conducted			
	Total elections	Withdrawn or dismissed before certification	Resulting in a rerun or runoff	Resulting in certification[1]	Total elections	Withdrawn or dismissed before certification	Resulting in a rerun or runoff	Resulting in certification	Total elections	Withdrawn or dismissed before certification	Resulting in a rerun or runoff	Resulting in certification	Total elections	With drawn or dismissed before certification	Resulting in a rerun or runoff	Resulting in certification
All types	4,533	52	76	4,405	3,353	49	63	3,241	246	1	3	242	934	2	10	922
Rerun required			63				53				2				8	
Runoff required			13				10				1				2	
Consent elections	175	2	0	173	110	2	0	108	11	0	0	11	54	0	0	54
Rerun required			0				0				0				0	
Runoff required			0				0				0				0	
Stipulated elections	3,531	38	52	3,441	2,628	36	42	2,550	163	0	2	161	740	2	8	730
Rerun required			42				35				1				6	
Runoff rquired			10				7				1				2	
Regional director-directed	763	12	17	734	569	11	15	543	64	1	0	63	130	0	2	128
Rerun required			15				13				0				2	
Runoff required			2				2				0				0	
Board-directed	39	0	3	36	32	0	3	29	0	0	0	0	7	0	0	7
Rerun required			3				3				0				0	
Runoff required			0				0				0				0	
Expedited—sec 8(b)(7)(C)	25	0	4	21	14	0	3	11	8	0	1	7	3	0	0	3
Rerun required			3				2				1				0	
Runoff required			1				1				0				0	

[1] The total of representation elections resulting in certification excludes elections held in UD cases which are included in the totals in table 11

Table 11B.—Representation Elections in Which Objections and/or Determinative Challenges Were Ruled On in Cases Closed, Fiscal Year 1983

	Total elections	Objections only		Challenges only		Objections and challenges		Total objections [1]		Total challenges [2]	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
All representation elections	4 533	289	6 4	121	2 7	48	1 1	337	7 4	169	3 7
By type of case											
In RC cases	3,353	258	7 7	100	3 0	25	0 7	283	8 4	125	3 7
In RM cases	246	1	0 4	20	8 1	15	6 1	16	6 5	35	14 2
In RD cases	934	30	3 2	1	0 1	8	0 9	38	4 1	9	1 0
By type of election											
Consent elections	175	0		21	12 0	3	1 7	3	1 7	24	13 7
Stipulated elections	3,531	207	5 9	100	2 8	39	1 1	246	7 0	139	3 9
Expedited elections	25	0		0		0		0		0	
Regional director-directed elections	763	76	10 0	0		3	0 4	79	10 4	3	0 4
Board-directed elections	39	6	15 4	0		3	7 7	9	23 1	3	7 7

[1] Number of elections in which objections were ruled on, regardless of number of allegations in each election
[2] Number of elections in which challenges were ruled on, regardless of individual ballots challenged in each election

Table 11C.—Objections Filed in Representation Cases Closed by Party Filing, Fiscal Year 1983 [1]

	Total		By employer		By union		By both parties[2]	
	Number	Percent by type	Number	Percent by type	Number	Percent by type	Number	Percent by type
All representation elections	386	100 0	143	37 0	240	62 2	3	0 8
By type of case								
RC cases	327	100 0	133	40 7	193	59 0	1	0 3
RM cases	16	100 0	2	12 5	12	75 0	2	12 5
RD cases	43	100 0	8	18 6	35	81 4	0	0 0
By type of election								
Consent elections	3	100 0	0	0 0	3	100 0	0	0 0
Stipulated elections	290	100 0	109	37 6	178	61 4	3	1 0
Expedited elections	0		0		0		0	
Regional director-directed elections	82	100 0	34	41 5	48	58 5	0	0 0
Board-directed elections	11	100 0	0	0 0	11	100 0	0	0 0

[1] See Glossary for definitions of terms
[2] Objections filed by more than one party in the same cases are counted as one

Table 11D.—Disposition of Objections in Representation Cases Closed, Fiscal Year 1983 [1]

	Objections filed	Objections withdrawn	Objections ruled upon	Overruled		Sustained [2]	
				Number	Percent of total ruled upon	Number	Percent of total ruled upon
All representation elections	386	49	337	274	81 3	63	18 7
By type of case							
RC cases	327	44	283	227	80 2	56	19 8
RM cases	16	0	16	15	93 8	1	6 2
RD cases	43	5	38	32	84 2	6	15 8
By type of election							
Consent elections	3	0	3	3	100 0	0	0 0
Stipulated elections	290	44	246	202	82 1	44	17 9
Expedited elections	0	0	0	0		0	
Regional director-directed elections	82	3	79	65	82 3	14	17 7
Board-directed elections	11	2	9	4	44 4	5	55 6

[1] See Glossary for definitions of terms
[2] See table 11E for rerun elections held after objections were sustained In 2 elections in which objections were sustained, the cases were subsequently withdrawn Therefore, in these cases no rerun elections were conducted

Table 11E.—Results of Rerun Elections Held in Representation Cases Closed, Fiscal Year 1983 [1]

	Total rerun elections [2]		Union certified		No union chosen		Outcome of original election reversed	
	Number	Percent by type	Number	Percent by type	Number	Percent by type	Number	Percent by type
All representation elections	60	100 0	14	23 3	46	76 7	11	18 3
By type of case								
RC cases	50	100 0	14	28 0	36	72 0	10	20 0
RM cases	2	100 0	0	0 0	2	100 0	0	0 0
RD cases	8	100 0	0	0 0	8	100 0	1	12 5
By type of election								
Consent elections	0		0		0		0	
Stipulated elections	39	100 0	12	30 8	27	69 2	7	17 9
Expedited elections	3	100 0	1	33 3	2	66 7	1	33 3
Regional director-directed elections	15	100 0	1	6 7	14	93 3	3	20 0
Board-directed elections	3	100 0	0	0 0	3	100 0	0	0 0

[1] See Glossary for definitions of terms
[2] More than 1 rerun election was conducted in 3 cases, however, only the final election is included in this table

Table 12.—Results of Union-Shop Deauthorization Polls in Cases Closed, Fiscal Year 1983

Affiliation of union holding union-shop contract	Number of polls					Employees involved (number eligible to vote) [1]					Valid votes cast			
	Total	Resulting in deauthorization		Resulting in continued authorization		Total eligible	In polls				Total	Percent of total eligible	Cast for deauthorization	
		Number	Percent of total	Number	Percent of total		Resulting in deauthorization		Resulting in continued authorization				Number	Percent of total eligible
							Number	Percent of total	Number	Percent of total				
Total	76	51	67 1	25	32 9	3,158	1,677	53 1	1,481	46 9	2,526	80 0	1,307	41 4
AFL-CIO unions	50	32	64 0	18	36 0	2,017	957	47 4	1,060	52 6	1,588	78 7	725	35 9
Teamsters	17	14	82 4	3	17 6	326	217	66 6	109	33 4	287	88 0	262	80 4
Other national unions	4	3	75 0	1	25 0	45	26	57 8	19	42 2	40	88 9	13	28 9
Other local unions	5	2	40 0	3	60 0	770	477	61 9	293	38 1	611	79 4	307	39 9

[1] Sec 8 (a)(3) of the Act requires that to revoke a union-shop agreement a majority of the employees eligible to vote must vote in favor of deauthorization

Table 13.—Final Outcome of Representation Elections in Cases Closed, Fiscal Year 1983 [1]

Participating unions	Total elections [2]	Elections won by unions						Elections in which no representative chosen	Employees eligible to vote						In elections where no representative chosen
		Percent won	Total won	AFL-CIO unions	Teamsters	Other national unions	Other local unions		Total	In elections won	In units won by				
											AFL-CIO unions	Teamsters	Other national unions	Other local unions	
	A All representation elections														
AFL–CIO	2,590	41 4	1,071	1,071				1,519	127,713	47,541	47,541				80,172
Teamsters	1,219	38 3	467		467			752	35,078	12,119		12,119			22,959
Other national unions	104	51 0	53			53		51	5,540	2,539			2,539		3,001
Other local unions	282	47 5	134				134	148	18,245	9,700				9,700	8,545
1-union elections	4,195	41 1	1,725	1,071	467	53	134	2,470	186,576	71,899	47,541	12,119	2,539	9,700	114,677
AFL–CIO v AFL–CIO	33	75 8	25	25				8	3,984	3,250	3,250				734
AFL–CIO v Teamsters	44	77 3	34	16	18			10	3,062	2,713	1,312	1,401			349
AFL–CIO v national	15	73 3	11	6		5		4	1,548	952	351		601		596
AFL–CIO v local	59	83 1	49	20			29	10	6,970	5,335	2,101			3,234	1,635
Teamsters v national	1	100 0	1		1	0		0	43	43		43	0		0
Teamsters v local	19	73 7	14		5		9	5	1,055	694		282		412	361
Teamsters v Teamsters	6	83 3	5		5			1	320	210		210			110
National v local	1	100 0	1			1	0	0	600	600			600	0	0
National v national	2	100 0	2			2		0	364	364			364		0
Local v local	20	90 0	18				18	2	2,669	2,524				2,524	145
2-union elections	200	80 0	160	67	29	8	56	40	20,615	16,685	7,014	1,936	1,565	6,170	3,930
AFL–CIO v AFL–CIO v Local	2	100 0	2	1			1	0	1,592	1,592	60			1,532	0
AFL–CIO v Teamsters v national	1	100 0	1	1	0	0		0	50	50	50	0	0		0
AFL–CIO v Teamsters v local	1	100 0	1	0	1		0	0	84	84	0	84		0	0
AFL–CIO v national v local	1	100 0	1	0		1	0	0	86	86	0		86	0	0
AFL–CIO v local v local	4	100 0	4	1			3	0	768	768	260			508	0
Local v local v local	1	100 0	1				1	0	147	147				147	0
3 (or more)-union elections	10	100 0	10	3	1	1	5	0	2,727	2,727	370	84	86	2,187	0
Total representation elections	4,405	43 0	1,895	1,141	497	62	195	2,510	209,918	91,311	54,925	14,139	4,190	18,057	118,607

Table 13.—Final Outcome of Representation Elections in Cases Closed, Fiscal Year 1983 [1]—Continued

Participating unions	Total elections [2]	Elections won by unions						Elections in which no representative chosen	Employees eligible to vote						In elections where no representative chosen
		Percent won	Total won	AFL-CIO unions	Teamsters	Other national unions	Other local unions		Total	In elections won	In units won by				
											AFL-CIO unions	Teamsters	Other national unions	Other local unions	
	B Elections in RC cases														
AFL–CIO	1,856	47 8	888	888				968	93,713	34,045	34,045				59,668
Teamsters	891	45 0	401		401			490	28,034	10,104		10,104			17,930
Other national unions	84	54 8	46			46		38	4,537	2,303			2,303		2,234
Other local unions	220	54 1	119				119	101	16,235	9,089				9,089	7,146
1-union elections	3,051	47 7	1,454	888	401	46	119	1,597	142,519	55,541	34,045	10,104	2,303	9,089	86,978
AFL–CIO v AFL–CIO	32	75 0	24	24				8	3,921	3,187	3,187				734
AFL–CIO v Teamsters	41	75 6	31	14	17			10	3,011	2,662	1,270	1,392			349
AFL–CIO v national	13	69 2	9	4		5		4	1,509	913	312		601		596
AFL–CIO v local	52	86 5	45	17			28	7	6,343	5,069	1,909			3,160	1,274
Teamsters v national	1	100 0	1		1	0		0	43	43		43	0		0
Teamsters v local	15	73 3	11		4		7	4	997	647		265		382	350
Teamsters v Teamsters	5	80 0	4		4			1	286	176		176			110
National v local	1	100 0	1			1	0	0	600	600			600	0	0
National v national	2	100 0	2			2		0	364	364			364		0
Local v local	18	88 9	16				16	2	2,605	2,460				2,460	145
2-union elections	180	80 0	144	59	26	8	51	36	19,679	16,121	6,678	1,876	1,565	6,002	3,558
AFL–CIO v AFL–CIO v local	2	100 0	2	1			1	0	1,592	1,592	60			1,532	0
AFL–CIO v Teamsters v national	1	100 0	1	1	0	0		0	50	50	50	0	0		0
AFL–CIO v Teamsters v local	1	100 0	1	0	1		0	0	84	84	0	84		0	0
AFL–CIO v national v local	1	100 0	1	0		1	0	0	86	86	0		86	0	0
AFL–CIO v local v local	4	100 0	4	1			3	0	768	768	260			508	0
Local v local v local	1	100 0	1				1	0	147	147				147	0
3 (or more)-union elections	10	100 0	10	3	1	1	5	0	2,727	2,727	370	84	86	2,187	0
Total RC elections	3,241	49 6	1,608	950	428	55	175	1,633	164,925	74,389	41,093	12,064	3,954	17,278	90,536

	C Elections in RM cases														
AFL–CIO	144	19 4	28	28				116	4,106	1,204	1,204				2,902
Teamsters	74	17 6	13		13			61	1,862	573		573			1,289
Other national unions	4	50 0	2			2		2	76	44			44		32
Other local unions	12	41 7	5				5	7	238	116				116	122
1-union elections	234	20 5	48	28	13	2	5	186	6,282	1,937	1,204	573	44	116	4,345
AFL–CIO v AFL–CIO	1	100 0	1	1				0	63	63	63				0
AFL–CIO v Teamsters	2	100 0	2	1	1			0	16	16	7	9			0
AFL–CIO v local	4	75 0	3	2			1	1	204	196	122			74	8
Local v local	1	100 0	1				1	0	58	58				58	0
2-union elections	8	87 5	7	4	1	0	2	1	341	333	192	9	0	132	8
Total RM elections	242	22 7	55	32	14	2	7	187	6,623	2,270	1,396	582	44	248	4,353
	D Elections in RD cases														
AFL–CIO	590	26 3	155	155				435	29,894	12,292	12,292				17,602
Teamsters	254	20 9	53		53			201	5,182	1,442		1,442			3,740
Other national unions	16	31 3	5			5		11	927	192			192		735
Other local unions	50	20 0	10				10	40	1,772	495				495	1,277
1-union elections	910	24 5	223	155	53	5	10	687	37,775	14,421	12,292	1,442	192	495	23,354
AFL–CIO v Teamsters	1	100 0	1	1	0			0	35	35	35	0			0
AFL–CIO v national	2	100 0	2	2		0		0	39	39	39		0		0
AFL–CIO v local	3	33 3	1	1			0	2	423	70	70			0	353
Teamsters v local	4	75 0	3		1		2	1	58	47		17		30	11
Teamsters v Teamsters	1	100 0	1		1			0	34	34		34			0
Local v local	1	100 0	1				1	0	6	6				6	0
2-union elections	12	75 0	9	4	2	0	3	3	595	231	144	51	0	36	364
Total RD elections	922	25 2	232	159	55	5	13	690	38,370	14,652	12,436	1,493	192	531	23,718

[1] See Glossary for definition of terms

[2] Includes each unit in which a choice as to collective-bargaining agent was made, for example, there may have been more than one election in a single case, or several cases may have been involved in one election unit

Table 14.—Valid Votes Cast in Representation Elections, by Final Results of Election, in Cases Closed, Fiscal Year 1983 [1]

Participating unions	Total valid votes cast	Valid votes cast in elections won						Valid votes cast in elections lost					
		Votes for unions					Total votes for no union	Votes for unions					Total votes for no union
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions	
						A All representation elections							
AFL–CIO	111,676	27,711	27,711				13,232	23,261	23,261				47,472
Teamsters	30,905	7,205		7,205			3,140	6,310		6,310			14,250
Other national unions	4,873	1,479			1,479		733	930			930		1,731
Other local unions	14,846	5,324				5,324	2,550	2,113				2,113	4,859
1-union elections	162,300	41,719	27,711	7,205	1,479	5,324	19,655	32,614	23,261	6,310	930	2,113	68,312
AFL–CIO v AFL–CIO	2,646	1,806	1,806				150	247	247				443
AFL–CIO v Teamsters	2,675	2,150	979	1,171			247	95	47	48			183
AFL–CIO v national	1,234	706	358		348		33	157	87		70		338
AFL–CIO v local	6,056	4,475	2,070			2,405	201	514	253			261	866
Teamsters v national	38	38		26	12		0	0		0	0		0
Teamsters v local	894	524		195		329	52	105		34		71	213
Teamsters v Teamsters	258	188		188			5	21		21			44
National v local	499	499			311	188	0	0			0	0	0
National v national	347	343			343		4	0			0		0
Local v local	2,190	1,948				1,948	100	66				66	76
2-union elections	16,837	12,677	5,213	1,580	1,014	4,870	792	1,205	634	103	70	398	2,163
AFL–CIO v AFL–CIO v local	1,137	1,128	530			598	9	0	0			0	0
AFL–CIO v Teamsters v national	47	47	45	2	0		0	0	0	0	0		0
AFL–CIO v Teamsters v local	75	74	30	41		3	1	0	0	0		0	0
AFL–CIO v national v local	71	71	2		67	2	0	0	0		0	0	0
AFL–CIO v local v local	700	695	315			380	5	0	0			0	0
Local v local v local	141	140				140	1	0				0	0
3 (or more)-union elections	2,171	2,155	922	43	67	1,123	16	0	0	0	0	0	0

Total representation elections	181,308	56,551	33,846	8,828	2,560	11,317	20,463	33,819	23,895	6,413	1,000	2,511	70,475
B Elections in RC cases													
AFL–CIO	82,281	20,383	20,383				8,774	17,559	17,559				35,565
Teamsters	24,712	5,987		5,987			2,568	5,033		5,033			11,124
Other national unions	3,984	1,332			1,332		659	716			716		1,277
Other local unions	13,230	5,003				5,003	2,387	1,873				1,873	3,967
1-union elections	124,207	32,705	20,383	5,987	1,332	5,003	14,388	25,181	17,559	5,033	716	1,873	51,933
AFL–CIO v AFL–CIO	2,596	1,756	1,756				150	247	247				443
AFL–CIO v Teamsters	2,624	2,100	950	1,150			246	95	47	48			183
AFL–CIO v national	1,196	668	333		335		33	157	87		70		338
AFL–CIO v local	5,474	4,278	1,945			2,333	171	372	118			254	653
Teamsters v national	38	38		26	12		0	0		0	0		0
Teamsters v local	840	479		182		297	52	103		34		69	206
Teamsters v Teamsters	225	157		157			3	21		21			44
National v local	499	499			311	188	0	0			0	0	0
National v National	347	343			343		4	0			0		0
Local v local	2,143	1,906				1,906	95	66				66	76
2-union elections	15,982	12,224	4,984	1,515	1,001	4,724	754	1,061	499	103	70	389	1,943
AFL–CIO v AFL–CIO v local	1,137	1,128	530			598	9	0				0	0
AFL–CIO v Teamsters v national	47	47	45	2	0		0	0	0	0	0		0
AFL–CIO v Teamsters v local	75	74	30	41		3	1	0	0	0		0	0
AFL–CIO v national v local	71	71	2		67	2	0	0	0		0	0	0
AFL–CIO v local v local	700	695	315			380	5	0	0			0	0
Local v local v local	141	140				140	1	0				0	0
3 (or more)-union elections	2,171	2,155	922	43	67	1,123	16	0	0	0	0	0	0
Total RC elections	142,360	47,084	26,289	7,545	2,400	10,850	15,158	26,242	18,058	5,136	786	2,262	53,876
C Elections in RM cases													
AFL–CIO	3,390	683	683				344	562	562				1,801
Teamsters	1,576	376		376			75	297		297			828
Other national unions	75	28			28		16	0			0		31
Other local unions	203	63				63	27	35				35	78
1-union elections	5,244	1,150	683	376	28	63	462	894	562	297	0	35	2,738

Table 14.—Valid Votes Cast in Representation Elections, by Final Results of Election, in Cases Closed, Fiscal Year 1983 [1]—Continued

Participating unions	Total valid votes cast	Valid votes cast in elections won						Valid votes cast in elections lost					
		Votes for unions					Total votes for no union	Votes for unions					Total votes for no union
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions	
AFL-CIO v AFL-CIO	50	50	50				0	0	0				0
AFL-CIO v Teamsters	16	15	4	11			1	0	0	0			0
AFL-CIO v local	172	136	80			56	30	2	2			0	4
Local v local	41	37				37	4	0				0	0
2-union elections	279	238	134	11	0	93	35	2	2	0	0	0	4
Total RM elections	5,523	1,388	817	387	28	156	497	896	564	297	0	35	2,742
D Elections in RD cases													
AFL-CIO	26,005	6,645	6,645				4,114	5,140	5,140				10,106
Teamsters	4,617	842		842			497	980		980			2,298
Other national unions	814	119			119		58	214			214		423
Other local unions	1,413	258				258	136	205				205	814
1-union elections	32,849	7,864	6,645	842	119	258	4,805	6,539	5,140	980	214	205	13,641
AFL-CIO v Teamsters	35	35	25	10			0	0	0	0			0
AFL-CIO v national	38	38	25		13		0	0	0		0		0
AFL-CIO v local	410	61	45			16	0	140	133			7	209
Teamsters v local	54	45		13		32	0	2		0		2	7
Teamsters v Teamsters	33	31		31			2	0		0			0
Local v local	6	5				5	1	0				0	0
2-union elections	576	215	95	54	13	53	3	142	133	0	0	9	216
Total RD election	33,425	8,079	6,740	896	132	311	4,808	6,681	5,273	980	214	214	13,857

[1] See glossary for definitions of terms

Table 15A.—Geographic Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1983

Division and State [1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		
Maine	13	8	3	2	0	3	5	568	501	302	127	22	0	153	199	430
New Hampshire	11	5	3	1	1	0	6	487	413	227	154	32	41	0	186	251
Vermont	8	3	2	1	0	0	5	192	159	69	23	46	0	0	90	48
Massachusetts	154	83	45	30	0	8	71	7,487	5,794	3,025	1,549	1,098	55	323	2,769	4,046
Rhode Island	14	6	4	1	0	1	8	725	599	278	228	21	0	29	321	274
Connecticut	69	40	20	11	0	9	29	7,104	6,528	3,419	1,149	198	0	2,072	3,109	5,246
New England	269	145	77	46	1	21	124	16,563	13,994	7,320	3,230	1,417	96	2,577	6,674	10,295
New York	398	205	123	46	5	31	193	21,537	16,393	10,140	5,512	1,140	744	2,744	6,253	13,088
New Jersey	195	81	46	23	0	12	114	9,156	7,994	3,882	2,324	887	0	671	4,112	3,127
Pennsylvania	224	99	49	30	5	15	125	10,801	9,652	4,609	2,781	750	203	875	5,043	3,545
Middle Atlantic	817	385	218	99	10	58	432	41,494	34,039	18,631	10,617	2,777	947	4,290	15,408	19,760
Ohio	258	102	61	35	5	1	156	10,846	9,807	4,539	3,429	633	336	141	5,268	3,847
Indiana	111	40	24	12	0	4	71	5,083	4,759	2,097	1,605	320	19	153	2,662	1,857
Illinois	238	78	44	18	2	14	160	7,873	6,843	3,013	1,786	389	8	830	3,830	2,441
Michigan	263	107	58	33	4	12	156	11,174	9,735	4,759	3,326	802	132	499	4,976	4,291
Wisconsin	119	42	18	14	0	10	77	4,408	3,954	1,810	1,182	325	10	293	2,144	1,457
East North Central	989	369	205	112	11	41	620	39,384	35,098	16,218	11,328	2,469	505	1,916	18,880	13,893
Iowa	42	16	9	5	1	1	26	1,822	1,698	657	531	90	21	15	1,041	398
Minnesota	123	56	39	13	0	4	67	4,829	4,149	2,016	1,594	302	0	120	2,133	2,412
Missouri	138	61	35	23	2	1	77	5,391	4,814	3,138	2,020	872	47	199	1,676	3,076
North Dakota	8	6	4	2	0	0	2	255	246	88	59	29	0	0	158	41
South Dakota	5	5	5	0	0	0	0	136	124	82	82	0	0	0	42	136
Nebraska	13	4	1	3	0	0	9	495	426	159	126	33	0	0	267	41
Kansas	20	5	1	3	0	1	15	626	521	218	36	120	0	62	303	124
West North Central	349	153	94	49	3	7	196	13,554	11,978	6,358	4,448	1,446	68	396	5,620	6,228

Table 15A.—Geographic Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1983—Continued

Division and State [1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		
Delaware	13	3	2	1	0	0	10	603	542	186	168	9	9	0	356	27
Maryland	22	9	5	2	0	2	13	1,705	1,508	697	480	48	0	169	811	573
District of Columbia	9	7	5	1	0	1	2	227	197	132	123	7	0	2	65	161
Virginia	23	12	9	1	1	1	11	1,102	1,008	459	359	38	20	42	549	437
West Virginia	41	20	13	6	1	0	21	1,384	1,216	747	466	105	32	144	469	753
North Carolina	47	14	13	1	0	0	33	7,079	6,672	2,763	1,450	1,313	0	0	3,909	877
South Carolina	15	9	8	0	1	0	6	2,049	1,849	894	587	108	199	0	955	1,139
Georgia	91	41	31	6	4	0	50	5,132	4,520	2,138	1,667	355	116	0	2,382	2,036
Florida	83	36	23	9	1	3	47	4,316	4,002	1,886	1,169	411	16	290	2,116	1,659
South Atlantic	344	151	109	27	8	7	193	23,597	21,514	9,902	6,469	2,394	392	647	11,612	7,662
Kentucky	54	26	14	8	2	2	28	2,458	2,257	1,124	811	270	13	30	1,133	1,098
Tennessee	93	43	25	16	1	1	50	5,509	4,854	2,223	1,597	503	69	54	2,631	1,898
Alabama	46	17	16	0	1	0	29	3,783	3,223	1,341	1,313	19	9	0	1,882	587
Mississippi	28	16	14	1	0	1	12	3,010	2,758	1,549	1,516	31	0	2	1,209	2,057
East South Central	221	102	69	25	4	4	119	14,760	13,092	6,237	5,237	823	91	86	6,855	5,640
Arkansas	34	14	11	1	1	1	20	2,745	2,527	1,183	934	87	58	104	1,344	1,180
Louisiana	36	11	4	7	0	0	25	1,371	1,191	468	239	219	0	10	723	263
Oklahoma	24	9	7	2	0	0	15	709	652	232	214	18	0	0	420	211
Texas	122	73	58	9	0	6	49	5,421	4,742	2,756	1,963	452	0	341	1,986	3,489
West South Central	216	107	80	19	1	7	109	10,246	9,112	4,639	3,350	776	58	455	4,473	5,143

Montana	17	5	3	1	0	1	12	326	292	95	67	19	0	9	197	74
Idaho	18	5	5	0	0	0	13	1,919	1,649	845	781	52	12	0	804	1,504
Wyoming	9	1	1	0	0	0	8	234	206	61	56	3	2	0	145	5
Colorado	49	22	19	3	0	0	27	2,301	1,926	985	860	111	14	0	941	1,297
New Mexico	25	14	13	1	0	0	11	727	626	382	307	43	0	32	244	524
Arizona	37	19	7	8	0	4	18	1,578	1,341	630	331	230	0	69	711	695
Utah	14	4	2	2	0	0	10	314	276	112	101	11	0	0	164	55
Nevada	22	9	4	3	0	2	13	1,481	1,337	624	341	200	0	83	713	803
Mountain	191	79	54	18	0	7	112	8,880	7,653	3,734	2,844	669	28	193	3,919	4,957
Washington	189	64	47	14	2	1	125	6,483	5,468	3,233	1,582	226	368	1,057	2,235	4,013
Oregon	120	39	21	11	3	4	81	3,699	3,187	1,338	1,016	142	71	109	1,849	1,223
California	612	256	150	66	12	28	356	25,577	21,595	10,352	6,691	1,959	410	1,292	11,243	10,690
Alaska	25	11	4	6	1	0	14	440	354	149	80	43	26	0	205	173
Hawaii	28	16	7	3	3	3	12	1,670	1,361	841	316	54	419	52	520	824
Guam	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Pacific	974	386	229	100	21	36	588	37,869	31,965	15,913	9,685	2,424	1,294	2,510	16,052	16,923
Puerto Rico	29	14	2	2	3	7	15	3,401	2,717	1,352	471	42	81	758	1,365	721
Virgin Islands	6	4	4	0	0	0	2	170	146	66	62	4	0	0	80	89
Outlying areas	35	18	6	2	3	7	17	3,571	2,863	1,418	533	46	81	758	1,445	810
Total, all States and areas	4,405	1,895	1,141	497	62	195	2,510	209,918	181,308	90,370	57,741	15,241	3,560	13,828	90,938	91,311

[1] The States are grouped according to the method used by the Bureau of the Census, U S Department of Commerce

Table 15B.—Geographic Distribution of Collective-Bargaining Elections Held in Cases Closed, Fiscal Year 1983

Division and State [1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		
Maine	13	8	3	2	0	3	5	568	501	302	127	22	0	153	199	430
New Hampshire	8	5	3	1	1	0	3	459	385	223	150	32	41	0	162	251
Vermont	8	3	2	1	0	0	5	192	159	69	23	46	0	0	90	48
Massachusetts	137	78	41	29	0	8	59	6,773	5,227	2,795	1,393	1,042	55	305	2,432	3,936
Rhode Island	10	4	2	1	0	1	6	391	350	139	105	5	0	29	211	76
Connecticut	62	38	20	10	0	8	24	6,892	6,339	3,324	1,110	189	0	2,025	3,015	5,162
New England	238	136	71	44	1	20	102	15,275	12,961	6,852	2,908	1,336	96	2,512	6,109	9,903
New York	353	194	117	44	5	28	159	19,646	14,731	9,439	5,109	1,053	627	2,650	5,292	12,517
New Jersey	171	78	46	20	0	12	93	8,663	7,530	3,722	2,275	780	0	667	3,808	3,064
Pennsylvania	192	89	43	27	5	14	103	9,662	8,657	4,154	2,398	692	203	861	4,503	3,231
Middle Atlantic	716	361	206	91	10	54	355	37,971	30,918	17,315	9,782	2,525	830	4,178	13,603	18,812
Ohio	200	89	51	33	4	1	111	8,112	7,337	3,412	2,403	540	328	141	3,925	2,985
Indiana	83	34	20	10	0	4	49	3,683	3,455	1,499	1,056	277	19	147	1,956	1,141
Illinois	189	72	40	17	2	13	117	6,826	5,902	2,700	1,541	352	8	799	3,202	2,213
Michigan	199	95	50	29	4	12	104	8,602	7,638	3,887	2,555	727	122	483	3,751	3,627
Wisconsin	88	38	15	13	0	10	50	3,550	3,174	1,474	900	271	10	293	1,700	1,223
East North Central	759	328	176	102	10	40	431	30,773	27,506	12,972	8,455	2,167	487	1,863	14,534	11,189
Iowa	33	12	7	4	1	0	21	1,658	1,548	602	506	75	21	0	946	322
Minnesota	95	45	31	11	0	3	50	3,312	2,889	1,390	1,055	243	0	92	1,499	1,241
Missouri	102	52	28	21	2	1	50	4,218	3,786	2,666	1,655	771	41	199	1,120	2,596
North Dakota	8	6	4	2	0	0	2	255	246	88	59	29	0	0	158	41
South Dakota	4	4	4	0	0	0	0	48	46	36	36	0	0	0	10	48
Nebraska	5	2	1	1	0	0	3	346	292	118	111	7	0	0	174	22
Kansas	13	5	1	3	0	1	8	350	308	140	24	54	0	62	168	124
West North Central	260	126	76	42	3	5	134	10,187	9,115	5,040	3,446	1,179	62	353	4,075	4,394

Delaware	11	3	2	1	0	0	8	502	460	177	168	9	0	0	283	27
Maryland	19	8	5	1	0	2	11	1,638	1,441	666	479	18	0	169	775	523
District of Columbia	8	6	5	1	0	0	2	224	195	130	123	7	0	0	65	158
Virginia	21	12	9	1	1	1	9	905	828	416	356	38	20	2	412	437
West Virginia	35	16	9	6	1	0	19	1,137	1,021	632	363	93	32	144	389	538
North Carolina	37	10	9	1	0	0	27	6,045	5,680	2,277	964	1,313	0	0	3,403	457
South Carolina	10	7	6	0	1	0	3	791	741	390	191	0	199	0	351	624
Georgia	81	38	29	6	3	0	43	4,607	4,086	1,973	1,571	352	50	0	2,113	1,846
Florida	66	27	15	8	1	3	39	3,608	3,306	1,534	898	338	16	282	1,772	1,155
South Atlantic	288	127	89	25	7	6	161	19,457	17,758	8,195	5,113	2,168	317	597	9,563	5,765
Kentucky	44	23	12	7	2	2	21	1,401	1,254	640	333	264	13	30	614	683
Tennessee	76	38	22	15	0	1	38	4,020	3,611	1,716	1,206	459	0	51	1,895	1,494
Alabama	38	17	16	0	1	0	21	2,430	2,154	877	849	19	9	0	1,277	587
Mississippi	22	15	13	1	0	1	7	2,549	2,317	1,344	1,331	11	0	2	973	1,928
East South Central	180	93	63	23	3	4	87	10,400	9,336	4,577	3,719	753	22	83	4,759	4,692
Arkansas	20	8	6	1	1	0	12	1,099	986	386	299	29	58	0	600	290
Louisiana	27	8	3	5	0	0	19	949	802	315	134	175	0	6	487	193
Oklahoma	16	7	5	2	0	0	9	544	497	162	144	18	0	0	335	111
Texas	108	67	53	8	0	6	41	4,968	4,337	2,572	1,789	447	0	336	1,765	3,274
West South Central	171	90	67	16	1	6	81	7,560	6,622	3,435	2,366	669	58	342	3,187	3,868
Montana	8	4	2	1	0	1	4	186	157	47	30	8	0	9	110	47
Idaho	12	4	4	0	0	0	8	1,838	1,576	821	757	52	12	0	755	1,493
Wyoming	6	1	1	0	0	0	5	199	175	55	50	3	2	0	120	5
Colorado	29	14	14	0	0	0	15	1,448	1,172	593	502	77	14	0	579	678
New Mexico	18	12	12	0	0	0	6	506	427	276	243	1	0	32	151	364
Arizona	30	17	7	6	0	4	13	1,241	1,058	506	323	114	0	69	552	498
Utah	11	3	1	2	0	0	8	230	194	73	62	11	0	0	121	37
Nevada	16	9	4	3	0	2	7	1,337	1,219	596	337	176	0	83	623	803
Mountain	130	64	45	12	0	7	66	6,985	5,978	2,967	2,304	442	28	193	3,011	3,925

Table 15B.—Geographic Distribution of Collective-Bargaining Elections Held in Cases Closed, Fiscal Year 1983—Continued

Division and State [1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		
Washington	108	46	31	12	2	1	62	3,955	3,415	2,349	754	170	368	1,057	1,066	2,487
Oregon	76	28	16	5	3	4	48	2,462	2,142	879	686	47	71	75	1,263	686
California	478	220	126	59	10	25	258	20,933	17,627	8,642	5,286	1,767	349	1,240	8,985	9,143
Alaska	22	11	4	6	1	0	11	409	328	145	76	43	26	0	183	173
Hawaii	23	15	6	3	3	3	8	1,624	1,323	824	300	53	419	52	499	812
Guam	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Pacific	707	320	183	85	19	33	387	29,383	24,835	12,839	7,102	2,080	1,233	2,424	11,996	13,301
Puerto Rico	28	14	2	2	3	7	14	3,387	2,708	1,352	471	42	81	758	1,356	721
Virgin Islands	6	4	4	0	0	0	2	170	146	66	62	4	0	0	80	89
Outlying areas	34	18	6	2	3	7	16	3,557	2,854	1,418	533	46	81	758	1,436	810
Total, all States and areas	3,483	1,663	982	442	57	182	1,820	171,548	147,883	75,610	45,728	13,365	3,214	13,303	72,273	76,659

[1] The states are grouped according to the method used by the Bureau of the Census, U S Department of Commerce

Table 15C.—Geographic Distribution of Decertification Elections Held in Cases Closed, Fiscal Year 1983

Division and State [1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		
Maine	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
New Hampshire	3	0	0	0	0	0	3	28	28	4	4	0	0	0	24	0
Vermont	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Massachusetts	17	5	4	1	0	0	12	714	567	230	156	56	0	18	337	110
Rhode Island	4	2	2	0	0	0	2	334	249	139	123	16	0	0	110	198
Connecticut	7	2	0	1	0	1	5	212	189	95	39	9	0	47	94	84
New England	31	9	6	2	0	1	22	1,288	1,033	468	322	81	0	65	565	392
New York	45	11	6	2	0	3	34	1,891	1,662	701	403	87	117	94	961	571
New Jersey	24	3	0	3	0	0	21	493	464	160	49	107	0	4	304	63
Pennsylvania	32	10	6	3	0	1	22	1,139	995	455	383	58	0	14	540	314
Middle Atlantic	101	24	12	8	0	4	77	3,523	3 121	1,316	835	252	117	112	1,805	948
Ohio	58	13	10	2	1	0	45	2,734	2,470	1,127	1,026	93	8	0	1,343	862
Indiana	28	6	4	2	0	0	22	1,400	1,304	598	549	43	0	6	706	716
Illinois	49	6	4	1	0	1	43	1,047	941	313	245	37	0	31	628	228
Michigan	64	12	8	4	0	0	52	2,572	2,097	872	771	75	10	16	1,225	664
Wisconsin	31	4	3	1	0	0	27	858	780	336	282	54	0	0	444	234
East North Central	230	41	29	10	1	1	189	8,611	7,592	3,246	2,873	302	18	53	4,346	2,704
Iowa	9	4	2	1	0	1	5	164	150	55	25	15	0	15	95	76
Minnesota	28	11	8	2	0	1	17	1,517	1,260	626	539	59	0	28	634	1,171
Missouri	36	9	7	2	0	0	27	1,173	1,028	472	365	101	6	0	556	480
North Dakota	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
South Dakota	1	1	1	0	0	0	0	88	78	46	46	0	0	0	32	88
Nebraska	8	2	0	2	0	0	6	149	134	41	15	26	0	0	93	19
Kansas	7	0	0	0	0	0	7	276	213	78	12	66	0	0	135	0
West North Central	89	27	18	7	0	2	62	3,367	2,863	1,318	1,002	267	6	43	1,545	1,834

Table 15C.—Geographic Distribution of Decertification Elections Held in Cases Closed, Fiscal Year 1983—Continued

Division and State [1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		
Delaware	2	0	0	0	0	0	2	101	82	9	0	0	9	0	73	0
Maryland	3	1	0	1	0	0	2	67	67	31	1	30	0	0	36	50
District of Columbia	1	1	0	0	0	1	0	3	2	2	0	0	0	2	0	3
Virginia	2	0	0	0	0	0	2	197	180	43	3	0	0	40	137	0
West Virginia	6	4	4	0	0	0	2	247	195	115	103	12	0	0	80	215
North Carolina	10	4	4	0	0	0	6	1,034	992	486	486	0	0	0	506	420
South Carolina	5	2	2	0	0	0	3	1,258	1,108	504	396	108	0	0	604	515
Georgia	10	3	2	0	1	0	7	525	434	165	96	3	66	0	269	190
Florida	17	9	8	1	0	0	8	708	696	352	271	73	0	8	344	504
South Atlantic	56	24	20	2	1	1	32	4,140	3,756	1,707	1,356	226	75	50	2,049	1,897
Kentucky	10	3	2	1	0	0	7	1,057	1,003	484	478	6	0	0	519	415
Tennessee	17	5	3	1	1	0	12	1,489	1,243	507	391	44	69	3	736	404
Alabama	8	0	0	0	0	0	8	1,353	1,069	464	464	0	0	0	605	0
Mississippi	6	1	1	0	0	0	5	461	441	205	185	20	0	0	236	129
East South Central	41	9	6	2	1	0	32	4,360	3,756	1,660	1,518	70	69	3	2,096	948
Arkansas	14	6	5	0	0	1	8	1,646	1 541	797	635	58	0	104	744	890
Louisiana	9	3	1	2	0	0	6	422	389	153	105	44	0	4	236	70
Oklahoma	8	2	2	0	0	0	6	165	155	70	70	0	0	0	85	100
Texas	14	6	5	1	0	0	8	453	405	184	174	5	0	5	221	215
West South Central	45	17	13	3	0	1	28	2,686	2,490	1,204	984	107	0	113	1,286	1,275

Montana	9	1	1	0	0	0	8	140	135	48	37	11	0	0	87	27
Idaho	6	1	1	0	0	0	5	81	73	24	24	0	0	0	49	11
Wyoming	3	0	0	0	0	0	3	35	31	6	6	0	0	0	25	0
Colorado	20	8	5	3	0	0	12	853	754	392	358	34	0	0	362	619
New Mexico	7	2	1	1	0	0	5	221	199	106	64	42	0	0	93	160
Arizona	7	2	0	2	0	0	5	337	283	124	8	116	0	0	159	197
Utah	3	1	1	0	0	0	2	84	82	39	39	0	0	0	43	18
Nevada	6	0	0	0	0	0	6	144	118	28	4	24	0	0	90	0
Mountain	61	15	9	6	0	0	46	1,895	1,675	767	540	227	0	0	908	1,032
Washington	81	18	16	2	0	0	63	2,528	2,053	884	828	56	0	0	1,169	1,526
Oregon	44	11	5	6	0	0	33	1,237	1,045	459	330	95	0	34	586	537
California	134	36	24	7	2	3	98	4,644	3,968	1,710	1,405	192	61	52	2,258	1,547
Alaska	3	0	0	0	0	0	3	31	26	4	4	0	0	0	22	0
Hawaii	5	1	1	0	0	0	4	46	38	17	16	1	0	0	21	12
Guam	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Pacific	267	66	46	15	2	3	201	8,486	7,130	3,074	2,583	344	61	86	4,056	3,622
Puerto Rico	1	0	0	0	0	0	1	14	9	0	0	0	0	0	9	0
Virgin Islands	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Outlying Areas	1	0	0	0	0	0	1	14	9	0	0	0	0	0	9	0
Total, all States and areas	922	232	159	55	5	13	690	38,370	33,425	14,760	12,013	1,876	346	525	18,665	14,652

[1] The States are grouped according to the method used by the Bureau of the Census, U S Department of Commerce

Table 16.—Industrial Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1983

Industrial group [1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		
Food and kindred products	168	71	33	33	0	5	97	10,948	9,142	4,886	2,638	1,073	95	1,080	4,256	5,205
Tobacco manufacturers	1	0	0	0	0	0	1	48	43	20	0	20	0	0	23	0
Textile mill products	19	5	4	0	0	1	14	4,041	3,778	1,478	904	471	0	103	2,300	641
Apparel and other finished products made from fabric and similar materials	24	7	7	0	0	0	17	2,371	2,073	1,096	938	0	0	158	977	720
Lumber and wood products (except furniture)	80	30	24	2	1	3	50	4,692	4,298	2,102	1,484	290	61	267	2,196	2,165
Furniture and fixtures	37	16	10	6	0	0	21	2,665	2,372	1,157	940	176	0	41	1,215	874
Paper and allied products	33	15	11	3	1	0	18	1,671	1,578	785	504	173	66	42	793	741
Printing, publishing, and allied products	98	38	31	0	0	7	60	3,390	3,028	1,274	1,021	117	0	136	1,754	897
Chemicals and allied products	79	28	16	7	3	2	51	5,289	4,954	2,250	1,099	962	79	110	2,704	964
Petroleum refining and related industries	26	9	6	3	0	0	17	2,266	1,964	876	816	47	0	13	1,088	1,126
Rubber and miscellaneous plastic products	58	18	11	5	0	2	40	3,381	3,079	1,335	1,081	193	0	61	1,744	895
Leather and leather products	11	4	3	0	0	1	7	591	547	241	151	1	55	34	306	240
Stone, clay, glass, and concrete products	64	33	16	11	1	5	31	4,308	3,850	1,946	1,300	288	17	341	1,904	1,570
Primary metal industries	94	46	29	6	1	10	48	4,137	3,624	2,123	1,219	343	1	560	1,501	2,369
Fabricated metal products (except machinery and transportation equipment)	168	63	44	16	1	2	105	7,200	6,556	2,923	2,425	407	32	59	3,633	2,155
Machinery (except electrical)	185	82	50	23	3	6	103	8,622	7,403	3,734	2,464	830	65	375	3,669	4,259
Electrical and electronic machinery, equipment, and supplies	76	27	19	5	2	1	49	7,166	6,561	2,979	2,306	414	235	24	3,582	2,247
Aircraft and parts	68	32	23	5	2	2	36	4,436	3,790	2,011	1,445	424	33	109	1,779	2,145
Ship and boat building and repairing	5	1	1	0	0	0	4	1,180	934	301	259	8	0	34	633	32
Automotive and other transportation equipment	12	5	5	0	0	0	7	861	733	306	280	10	0	16	427	172
Measuring, analyzing, and controlling instruments, photographic, medical, and optical goods, watches and clocks	30	15	4	6	2	3	15	1,761	1,632	848	600	85	26	137	784	996
Miscellaneous manufacturing industries	205	84	48	24	1	11	121	9,836	8,831	4,844	3,116	968	21	739	3,987	5,267
Manufacturing	1,541	629	395	155	18	61	912	90,860	80,770	39,515	26,990	7,300	786	4,439	41,255	35,680

Metal mining	4	0	0	0	0	0	4	276	245	60	55	3	2	0	185	0
Coal mining	15	7	1	1	4	1	8	867	811	544	106	42	379	17	267	461
Oil and gas extraction	17	3	3	0	0	0	14	616	438	176	170	6	0	0	262	115
Mining and quarrying of nonmetallic minerals (except fuels)	13	7	3	4	0	0	6	286	274	156	55	94	7	0	118	205
Mining	49	17	7	5	4	1	32	2,045	1,768	936	386	145	388	17	832	781
Construction	211	99	74	14	3	8	112	4,316	3,526	1,714	1,411	194	47	62	1,812	1,621
Wholesale trade	417	158	61	83	6	8	259	12,021	10,791	5,018	3,006	1,720	86	206	5,773	4,766
Retail trade	590	202	133	56	1	12	388	17,467	14,690	6,309	4,550	1,242	38	479	8,381	5,704
Finance, insurance, and real estate	83	36	22	4	1	9	47	2,743	2,376	1,143	741	115	65	222	1,233	974
U S Postal Service	2	0	0	0	0	0	2	132	108	39	39	0	0	0	69	0
Local and suburban transit and interurban highway passenger transportation	65	29	15	12	0	2	36	3,814	3,122	1,585	841	588	0	156	1,537	1,836
Motor freight transportation and warehousing	194	84	11	66	3	4	110	3,979	3,450	1,703	250	1,286	38	129	1,747	1,797
Water transportation	24	13	8	1	2	2	11	761	663	460	290	45	97	28	203	556
Other transportation	46	20	5	12	0	3	26	1,103	969	514	122	264	0	128	455	479
Communication	159	84	67	4	2	11	75	6,090	5,318	2,963	2,482	82	129	270	2,355	4,082
Electric, gas, and sanitary services	55	29	20	9	0	0	26	1,435	1,324	609	445	160	0	4	715	647
Transportation, communication, and other utilities	543	259	126	104	7	22	284	17,182	14,846	7,834	4,430	2,425	264	715	7,012	9,397
Hotels, rooming houses, camps, and other lodging places	73	28	27	0	1	0	45	5,436	4,384	1,850	1,485	52	228	85	2,534	1,692
Personal services	49	20	10	10	0	0	29	1,846	1,380	784	416	306	0	62	596	1,090
Automotive repair, services, and garages	84	38	14	22	0	2	46	1,708	1,517	711	337	347	0	27	806	678
Motion pictures	16	6	6	0	0	0	10	377	319	110	78	14	9	9	209	40
Amusement and recreation services (except motion pictures)	36	9	8	1	0	0	27	2,695	2,460	848	795	26	6	21	1,612	207
Health services	378	207	147	18	9	33	171	34,904	28,923	16,424	9,620	935	1,281	4,588	12,499	19,363
Educational services	32	18	12	1	0	5	14	4,336	3,804	1,974	404	2	0	1,568	1,830	3,690
Membership organizations	18	14	4	0	0	10	4	588	487	387	92	4	0	291	100	444
Business services	180	93	53	16	10	14	87	6,892	5,523	2,728	1,310	263	334	821	2,795	2,644
Miscellaneous repair services	23	14	12	2	0	0	9	539	475	296	272	24	0	0	179	403
Museums, art galleries, botanical and zoological gardens	2	2	0	0	1	1	0	76	67	54	0	0	20	34	13	76
Legal services	8	6	4	0	0	2	2	224	196	91	74	3	0	14	105	101

Table 16.—Industrial Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1983—Continued

Industrial group [1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		
Social services	42	28	21	3	0	4	14	2,004	1,674	993	911	48	0	34	681	1,380
Miscellaneous services	12	5	2	1	1	1	7	987	746	396	275	38	8	75	350	430
Services	953	488	320	74	22	72	465	62,612	51,955	27,646	16,069	2,062	1,886	7,629	24,309	32,238
Public administration	16	7	3	2	0	2	9	540	478	216	119	38	0	59	262	150
Total, all industrial groups	4,405	1,895	1,141	497	62	195	2,510	209,918	181,308	90,370	57,741	15,241	3,560	13,828	90,938	91,311

[1] Source Standard Industrial Classification, Statistical Policy Division, Office of Management and Budget, Washington 1972

Table 17.—Size of Units in Representation Cases Closed, Fiscal Year 1983 [1]

Size of unit (number of employees)	Number eligible to vote	Total elections	Percent of total	Cumulative percent of total	Elections in which representation rights were won by								Elections in which no representative was chosen	
					AFL-CIO unions		Teamsters		Other national unions		Other local unions			
					Number	Percent by size class	Number	Percent by size class	Number	Percent by size class	Number	Percent by size class	Number	Percent by size class
	A Certification elections (RC and RM)													
Total RC and RM elections	171,548	3,483	100 0		982	100 0	442	100 0	57	100 0	182	100 0	1,820	100 0
Under 10	4,641	836	24 0	24 0	237	24 1	175	39 6	13	22 8	31	17 0	380	20 9
10 to 19	11,087	801	23 0	47 0	233	23 7	120	27 1	9	15 8	38	20 9	401	22 0
20 to 29	10,738	448	12 9	59 9	138	14 1	46	10 4	8	14 0	28	15 4	228	12 5
30 to 39	10,109	295	8 5	68 4	81	8 2	29	6 6	5	8 8	15	8 2	165	9 1
40 to 49	8,432	191	5 5	73 9	46	4 7	18	4 1	3	5 2	6	3 3	118	6 5
50 to 59	9,144	169	4 9	78 8	54	5 6	6	1 4	2	3 5	13	7 2	94	5 2
60 to 69	7,825	122	3 5	82 3	40	4 1	7	1 5	1	1 8	4	2 2	70	3 8
70 to 79	6,876	92	2 6	84 9	23	2 3	9	2 0	2	3 5	4	2 2	54	3 0
80 to 89	6,570	78	2 2	87 1	18	1 9	6	1 4	4	7 0	5	2 7	45	2 4
90 to 99	4,600	49	1 4	88 5	13	1 3	2	0 5	1	1 8	2	1 1	31	1 7
100 to 109	5,210	50	1 4	89 9	18	1 9	3	0 7	3	5 2	2	1 1	24	1 3
110 to 119	4,441	39	1 1	91 0	10	1 0	1	0 2	0		5	2 7	23	1 3
120 to 129	4,577	37	1 1	92 1	8	0 8	3	0 7	0		3	1 7	23	1 3
130 to 139	3,909	29	0 8	92 9	10	1 0	1	0 2	1	1 8	3	1 7	14	0 8
140 to 149	4,296	30	0 9	93 8	12	1 2	2	0 5	0		2	1 1	14	0 8
150 to 159	3,863	25	0 7	94 5	5	0 5	2	0 5	0		3	1 7	15	0 8
160 to 169	2,465	15	0 4	94 9	1	0 1	1	0 2	0		3	1 7	10	0 5
170 to 179	3,133	18	0 5	95 4	2	0 2	1	0 2	0		0		15	0 8
180 to 189	1,836	10	0 3	95 7	1	0 1	1	0 2	0		1	0 5	7	0 4
190 to 199	2,139	11	0 3	96 0	3	0 3	0		0		0		8	0 4
200 to 299	17,756	74	2 1	98 1	17	1 7	5	1 1	0		4	2 2	48	2 6
300 to 399	8,957	26	0 8	98 9	5	0 5	2	0 5	3	5 2	2	1 1	14	0 8
400 to 499	6,257	14	0 4	99 3	2	0 2	1	0 2	1	1 8	2	1 1	8	0 4
500 to 599	6,027	11	0 3	99 6	3	0 3	1	0 2	0		1	0 5	6	0 3
600 to 799	1,250	2	0 1	99 7	0		0		1	1 8	0		1	0 1
800 to 999	2,705	3	0 1	99 8	1	0 1	0		0		1	0 5	1	0 1
1,000 to 1,999	10,012	7	0 2	100 0	1	0 1	0		0		3	1 7	3	0 2
2,000 to 2,999	2,693	1	0 0	100 0	0		0		0		1	0 5	0	

Table 17.—Size of Units in Representation Cases Closed, Fiscal Year 1983 [1]—Continued

Size of unit (number of employees)	Number eligible to vote	Total elections	Percent of total	Cumulative percent of total	Elections in which representation rights were won by								Elections in which no representative was chosen	
					AFL-CIO unions		Teamsters		Other national unions		Other local unions			
					Number	Percent by size class	Number	Percent by size class	Number	Percent by size class	Number	Percent by size class	Number	Percent by size class
	B Decertification elections (RD)													
Total RD elections	38,370	922	100 0		159	100 0	55	100 0	5	100 0	13	100 0	690	100 0
Under 10	1,535	291	31 6	31 6	14	8 8	13	23 6	0		3	23 1	261	37 8
10 to 19	2,953	213	23 1	54 7	30	18 9	19	34 6	2	40 0	2	15 4	160	23 2
20 to 29	2,942	122	13 2	67 9	23	14 5	6	10 9	1	20 0	4	30 7	88	12 8
30 to 39	2,386	69	7 5	75 4	16	10 1	6	10 9	1	20 0	0		46	6 7
40 to 49	1,814	41	4 4	79 8	13	8 2	2	3 6	0		0		26	3 8
50 to 59	1,726	32	3 5	83 3	8	5 0	4	7 4	0		0		20	2 9
60 to 69	1,943	30	3 3	86 6	10	6 3	2	3 6	0		2	15 4	16	2 3
70 to 79	1,115	15	1 6	88 2	6	3 7	0		0		0		9	1 3
80 to 89	1,695	20	2 2	90 4	6	3 7	1	1 8	0		1	7 7	12	1 7
90 to 99	1,124	12	1 3	91 7	4	2 5	1	1 8	0		0		7	10
100 to 109	630	6	0 7	92 4	1	0 6	0		1	20 0	0		4	0 6
110 to 119	457	4	0 4	92 8	2	1 3	0		0		0		2	0 3
120 to 129	628	5	0 5	93 3	4	2 5	0		0		0		1	0 1
130 to 139	264	2	0 2	93 5	2	1 3	0		0		0		0	
140 to 149	576	4	0 4	93 9	2	1 3	0		0		0		2	0 3
150 to 159	309	2	0 2	94 1	2	1 3	0		0		0		0	
160 to 169	995	6	0 7	94 8	1	0 6	1	1 8	0		1	7 7	3	0 4
170 to 199	2,037	11	1 2	96 0	0		0		0		0		11	1 6
200 to 299	4,322	18	2 0	98 0	7	4 4	0		0		0		11	1 6
300 to 499	5,427	14	1 5	99 5	4	2 5	0		0		0		10	1 5
500 to 799	2,504	4	0 4	99 9	3	1 9	0		0		0		1	0 1
800 and over	988	1	0 1	100 0	1	0 6	0		0		0		0	

[1] See glossary for definition of terms

Table 18.—Distribution of Unfair Labor Practice Situations Received, by Number of Employees in Establishments, Fiscal Year 1983 [1]

Size of establishment (number of employees)	Total number of situations	Total		Type of situations																	
		Percent of all situations	Cumulative percent of all situations	CA		CB		CC		CD		CE		CG		CP		CA–CB combinations		Other C combinations	
				Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class
Total	[2]36,263	100 0	—	25,605	100 0	6,938	100 0	1,388	100 0	314	100 0	59	100 0	33	100 0	360	100 0	1,378	100 0	188	100 0
Under 10	10,649	29 4	29 4	6,893	26 9	2,402	34 6	634	45 7	134	42 7	34	57 6	3	9 1	205	56 9	271	19 7	73	38 8
10–19	3,431	9 5	38 9	2,656	10 4	422	6 1	151	10 9	31	9 9	8	13 6	0		39	10 8	93	6 7	31	16 5
20–29	2,791	7 7	46 6	2,122	8 3	405	5 8	109	7 9	28	8 9	3	5 1	0		26	7 2	81	5 9	17	9 0
30–39	1,946	5 4	52 0	1,493	5 8	265	3 8	77	5 5	18	5 7	3	5 1	1	3 0	21	5 8	53	3 8	15	8 0
40–49	1,228	3 4	55 4	957	3 7	154	2 2	55	4 0	8	2 5	0		2	6 1	9	2 5	39	2 8	4	2 1
50–59	1,460	4 0	59 4	1,064	4 2	256	3 7	53	3 8	17	5 4	2	3 4	0		12	3 3	45	3 3	11	5 9
60–69	990	2 7	62 1	747	2 9	147	2 1	32	2 3	7	2 2	0		1	3 0	11	3 1	40	2 9	5	2 7
70–79	739	2 0	64 1	586	2 3	106	1 5	17	1 2	2	0 6	1	1 7	2	6 1	2	0 6	21	1 5	2	1 1
80–89	601	1 7	65 8	472	1 8	89	1 3	9	0 6	7	2 2	1	1 7	1	3 0	2	0 6	20	1 5	0	
90–99	327	0 9	66 7	265	1 0	40	0 6	5	0 4	2	0 6	0		2	6 1	0		12	0 9	1	0 5
100–109	1,535	4 2	70 9	1,036	4 0	328	4 7	64	4 6	10	3 2	1	1 7	6	18 2	13	3 6	72	5 2	5	2 7
110–119	187	0 5	71 4	166	0 6	14	0 2	0		0		0		0		1	0 3	6	0 4	0	
120–129	440	1 2	72 6	338	1 3	69	1 0	10	0 7	0		1	1 7	1	3 0	1	0 3	20	1 5	0	
130–139	211	0 6	73 2	174	0 7	30	0 4	1	0 1	1	0 3	0		0		0		4	0 3	1	0 5
140–149	164	0 5	73 7	137	0 5	20	0 3	1	0 1	0		0		0		0		4	0 3	2	1 1
150–159	658	1 8	75 5	472	1 8	122	1 8	14	1 0	4	1 3	1	1 7	0		6	1 7	39	2 8	0	
160–169	173	0 5	76 0	134	0 5	20	0 3	7	0 5	1	0 3	0		0		0		10	0 7	1	0 5
170–179	189	0 5	76 5	146	0 6	30	0 4	8	0 6	1	0 3	0		0		1	0 3	2	0 1	1	0 5
180–189	135	0 4	76 9	112	0 4	19	0 3	0		0		0		0		0		4	0 3	0	
190–199	59	0 2	77 1	41	0 2	14	0 2	1	0 1	0		0		0		0		3	0 2	0	
200–299	1,797	5 0	82 1	1,284	5 0	363	5 2	29	2 1	11	3 5	2	3 4	2	6 1	1	0 3	102	7 4	3	1 6
300–399	1,187	3 3	85 4	797	3 1	274	3 9	21	1 5	5	1 6	0		3	9 1	2	0 6	79	5 7	6	3 2
400–499	670	1 8	87 2	467	1 8	152	2 2	10	0 7	1	0 3	1	1 7	1	3 0	1	0 3	35	2 5	2	1 1
500–599	711	2 0	89 2	491	1 9	155	2 2	8	0 6	3	1 0	1	1 7	1	3 0	1	0 3	48	3 5	3	1 6
600–699	398	1 1	90 3	269	1 1	93	1 3	9	0 6	2	0 6	0		0		1	0 3	24	1 7	0	
700–799	213	0 6	90 9	144	0 6	45	0 6	2	0 1	2	0 6	0		1	3 0	0		18	1 3	1	0 5
800–899	229	0 6	91 5	142	0 6	51	0 7	14	1 0	4	1 3	0		1	3 0	0		17	1 2	0	
900–999	125	0 3	91 8	83	0 3	28	0 4	3	0 2	0		0		0		0		10	0 7	1	0 5
1,000–1,999	1,276	3 5	95 3	846	3 3	335	4 8	16	1 2	3	1 0	0		3	9 1	4	1 1	68	4 9	1	0 5
2,000–2,999	564	1 6	96 9	335	1 3	167	2 4	6	0 4	1	0 3	0		1	3 0	0		53	3 8	1	0 5
3,000–3,999	313	0 9	97 8	194	0 8	84	1 2	6	0 4	8	2 5	0		0		0		21	1 5	0	
4,000–4,999	180	0 4	98 2	117	0 5	47	0 7	4	0 3	0		0		0		0		12	0 9	0	
5,000–9,999	408	1 1	99 3	252	1 0	120	1 7	4	0 3	1	0 3	0		1	3 0	1	0 3	28	2 0	1	0 5
Over 9,999	279	0 7	100 0	173	0 7	72	1 0	8	0 6	2	0 6	0		0		0		24	1 7	0	

[1] See Glossary for definitions of terms
[2] Based on revised situation count which absorbs companion cases, cross-filing, and multiple filings

Table 19.—Ligitation for Enforcement and/or Review of Board Orders, Fiscal Year 1983 and Cumulative Totals, Fiscal Years 1936–1983

	Fiscal year 1983									July 5, 1935–Sept 30, 1983	
	Number of proceedings [1]					Percentages					
	Total	Vs employers only	Vs unions only	Vs both employers and unions	Board dismissal [2]	Vs employers only	Vs unions only	Vs both employers and unions	Board dismissal [2]	Number	Percent
Proceedings decided by U S courts of appeals	372	337	30	2	3						
On petitions for review and/or enforcement	338	307	26	2	3	100 0	100 0	100 0	100 0	8,907	100 0
Board orders affirmed in full	237	209	23	2	3	68 1	88 5	100 0	100 0	5,686	63 8
Board orders affirmed with modification	27	27	0	0	0	8 8	0 0	0 0	0 0	1,334	15 0
Remanded to Board	20	20	0	0	0	6 5	0 0	0 0	0 0	426	4 8
Board orders partially affirmed and partially remanded	12	10	2	0	0	3 3	7 7	0 0	0 0	163	1 8
Board orders set aside	42	41	1	0	0	13 3	3 8	0 0	0 0	1,298	14 6
On petitions for contempt	34	30	4	0	0	100 0	100 0				
Compliance after filing of petition, before court order	7	7	0	0	0	23 3	0 0				
Court orders holding respondent in contempt	20	17	3	0	0	56 7	75 0				
Court orders denying petition	1	1	0	0	0	3 3	0 0				
Court orders directing compliance without contempt adjudication	3	3	0	0	0	10 0	0 0				
Contempt petition withdrawn without compliance	3	2	1	0	0	6 7	25 0				
Proceedings decided by U S Supreme Court [3]	5	3	2	0	0	100 0	100 0			239	100 0
Board orders affirmed in full	3	2	1	0	0	66 7	50 0			144	60 3
Board orders affirmed with modification	1	0	1	0	0	0 0	50 0			18	7 5
Board orders set aside	1	1	0	0	0	33 3	0 0			39	16 3
Remanded to Board	0	0	0	0	0	0 0	0 0			19	8 0
Remanded to court of appeals	0	0	0	0	0	0 0	0 0			16	6 7
Board's request for remand or modification of enforcement order denied	0	0	0	0	0	0 0	0 0			1	0 4
Contempt cases remanded to court of appeals	0	0	0	0	0	0 0	0 0			1	0 4
Contempt cases enforced	0	0	0	0	0	0 0	0 0			1	0 4

[1] "Proceedings" are comparable to "cases" reported in annual reports prior to fiscal 1964 This term more accurately describes the data inasmuch as a single "proceeding" often includes more than one "case." See Glossary for definitions of terms

Table 19A.—Proceedings Decided by Circuit Courts of Appeals on Petitions for Enforcement and/or Review of Board Orders, Fiscal Year 1983, Compared With 5-Year Cumulative Totals, Fiscal Years 1978 Through 1982 [1]

Circuit courts of appeals (headquarters)	Total fiscal year 1983	Total fiscal years 1978–1982	Affirmed in full				Modified				Remanded in full				Affirmed in part and remanded in part				Set aside			
			Fiscal Year 1983		Cumulative fiscal years 1978–1982		Fiscal Year 1983		Cumulative fiscal years 1978–1982		Fiscal Year 1983		Cumulative fiscal years 1978–1982		Fiscal Year 1983		Cumulative fiscal years 1978–1982		Fiscal Year 1983		Cumulative fiscal years 1978–1982	
			Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total all circuits	338	2,046	237	70 1	1,321	64 6	27	8 0	248	12 1	20	5 9	118	5 8	12	3 6	52	2 5	42	12 4	307	15 0
1 Boston, Mass	12	99	11	91 7	60	60 6	0	0 0	17	17 2	0	0 0	3	3 0	1	8 3	4	4 0	0	0 0	15	15 2
2 New York, N Y	29	132	21	72 4	83	62 9	2	6 9	18	13 6	0	0 0	8	6 1	2	6 9	3	2 3	4	13 8	20	15 1
3 Phila , Pa	35	202	29	82 8	137	67 8	2	5 7	19	9 4	1	2 9	14	6 9	2	5 7	5	2 5	1	2 9	27	13 4
4 Richmond, Va	22	157	12	54 6	91	58 0	3	13 6	27	17 2	2	9 1	9	5 7	1	4 5	2	1 3	4	18 2	28	17 8
5 New Orleans, La	26	248	20	77 0	160	64 5	1	3 8	34	13 7	1	3 8	10	4 1	1	3 8	6	2 4	3	11 6	38	5 3
6 Cincinnati, Ohio	43	281	26	60 5	180	64 1	5	11 6	31	11 0	2	4 7	17	6 0	1	2 3	3	1 1	9	20 9	50	17 8
7 Chicago, Ill	34	191	14	41 1	102	53 4	4	11 8	38	19 9	4	11 8	9	4 7	0	0 0	3	1 6	12	35 3	39	20 4
8 St Louis, Mo	21	144	17	80 9	95	65 9	3	14 3	21	14 6	1	4 8	5	3 5	0	0 0	4	2 8	0	0 0	19	13 2
9 San Francisco, Ca	68	401	50	73 5	286	71 3	6	8 8	27	6 7	5	7 4	26	6 5	2	2 9	15	3 8	5	7 4	47	11 7
10 Denver, Colo	9	75	8	88 9	47	62 7	0	0 0	6	8 0	1	11 1	7	9 3	0	0 0	3	4 0	0	0 0	12	16 0
11 Atlanta, Ga [2]	24	13	18	75 0	9	69 2	1	4 2	2	15 4	1	4 2	0	0 0	0	0 0	0	0 0	4	16 6	2	15 4
Washington, D C	15	103	11	73 4	71	68 9	0	0 0	8	7 8	2	13 3	10	9 7	2	13 3	4	3 9	0	0 0	10	9 7

[1] Percentages are computed horizontally by current fiscal year and total fiscal years
[2] Commenced operations October 1, 1981

Table 20.—Injunction Litigation Under Section 10(e), 10(j), and 10(l), Fiscal Year 1983

	Total proceedings	Injunction proceedings		Total dispositions	Disposition of injunctions						Pending in district court Sept 30, 1983
		Pending [1] in district court Oct 1, 1982	Filed in district court fiscal year 1983		Granted	Denied	Settled	Withdrawn	Dismissed	Inactive	
Under Sec 10(e) Total	[1] 6	0	6	6	4	0	0	2	0	0	0
Under Sec 10(j) Total	39	0	39	39	13	6	18	2	0	0	0
8(a)(1)	2	0	2	2	0	1	1	0	0	0	0
8(a)(1)(2)	1	0	1	1	0	1	0	0	0	0	0
8(a)(1)(2)(3)(5)	3	0	3	3	2	1	0	0	0	0	0
8(a)(1)(3)	5	0	5	5	2	1	1	1	0	0	0
8(a)(1)(3)(4)	1	0	1	1	0	0	1	0	0	0	0
8(a)(1)(3)(5)	13	0	13	13	7	0	6	0	0	0	0
8(a)(1)(5)	12	0	12	12	0	2	9	1	0	0	0
8(b)(1)	2	0	2	2	2	0	0	0	0	0	0
Under Sec 10(l) Total	71	0	71	69	27	10	26	0	4	2	2
8(b)(4)(A)(B)	3	0	3	3	0	0	2	0	0	1	0
8(b)(4)(B)	39	0	39	37	17	3	16	0	1	0	2
8(b)(4)(D)	16	0	16	16	6	4	6	0	0	0	0
8(b)(7)(A)	1	0	1	1	0	0	1	0	0	0	0
8(b)(7)(C)	10	0	10	10	2	3	1	0	3	1	0
8(e)	2	0	2	2	2	0	0	0	0	0	0

[1] In courts of appeals

Table 21.—Miscellaneous Litigation Involving NLRB; Outcome of Proceedings in Which Court Decision Issued in Fiscal Year 1983

Type of litigation	Number of Proceedings								
	Total-all courts			In courts of appeals			In district courts		
	Number decided	Court determination		Number decided	Court determination		Number decided	Court determination	
		Upholding Board position	Contrary to Board position		Upholding Board position	Contrary to Board position		Upholding Board position	Contrary to Board position
Totals—all types	51	46	5	21	20	1	30	26	4
NLRB-initiated actions or interventions	5	3	2	2	2	0	3	1	2
To enforce subpoena	0	0	0	0	0	0	0	0	0
To defend Board's jurisdiction	3	3	0	2	2	0	1	1	0
To prevent conflict between NLRA and Bankruptcy Code	2	0	2	0	0	0	2	0	2
Action by other parties	34	33	1	17	16	1	17	17	0
To review non-final orders	10	10	0	10	10	0	0	0	0
To restrain NLRB from	24	23	1	7	6	1	17	17	0
Proceeding in R case	8	7	1	3	2	1	5	5	0
Proceeding in unfair labor practice case	11	11	0	2	2	0	9	9	0
Enforcing subpoena	2	2	0	2	2	0	0	0	0
Filing of Proof of Claim in BK	3	3	0	0	0	0	3	3	0
To compel NLRB to	12	10	2	2	2	0	10	8	2
Issue complaint	4	4	0	0	0	0	4	4	0
Take action in R Case	0	0	0	0	0	0	0	0	0
Comply with Freedom of Information Act [1]	4	2	2	0	0	0	4	2	2
Other	2	2	0	1	1	0	1	1	0
To pay fees under Equal Access to Justice Act	1	1	0	1	1	0	0	0	0
To comply with Privacy Act	1	1	0	0	0	0	1	1	0

[1] FOIA cases are categorized as to court determination depending on whether NLRB substantially prevailed

Table 22.—Advisory Opinion Cases Received, Closed, and Pending, Fiscal Year 1983 [1]

	Total	Number of cases			
		Identification of petitioner			
		Employer	Union	Courts	State Boards
Pending October 1, 1982	2	1	1	0	0
Received fiscal 1983	8	6	2	0	0
On docket fiscal 1983	10	7	3	0	0
Closed fiscal 1983	10	7	3	0	0
Pending Sept 30, 1983	0	0	0	0	0

[1] See Glossary for definition of terms

Table 22A.—Disposition of Advisory Opinion Cases, Fiscal Year 1983 [1]

Action taken	Total Cases closed
	10
Board would assert jurisdiction	1
Board would not assert jurisdiction	0
Unresolved because of insufficient evidence submitted	0
Dismissed	8
Withdrawn	1

[1] See Glossary for definition of terms

Table 23.—Time Elapsed for Major Case Processing Stages Completed, Fiscal Year 1983; and Age of Cases Pending Decision, September 30, 1983

Stage	Median days
I Unfair labor practice cases	
A Major stages completed—	
1 Filing of charge to issuance of complaint	45
2 Complaint to close of hearing	156
3 Close of hearing to issuance of administrative law judge's decision	118
4 Administrative law judge's decision to issuance of Board decision	324
5 Filing of charge to issuance of Board decision	658
B Age [1] of cases pending administrative law judge's decision, September 30, 1983	360
C Age [1] of cases pending Board decision, September 30, 1983	521
II Representation cases	
A Major stages completed—	
1 Filing of petition to notice of hearing issued	8
2 Notice of hearing to close of hearing	13
3 Close of hearing to—	
Board decision issued	250
Regional director's decision issued	20
4 Filing of petition to—	
Board decision issued	320
Regional director's decision issued	43
B Age [2] of cases pending Board decision, September 30, 1983	359
C Age [2] of cases pending regional director's decision, September 30, 1983	30

[1] From filing of charge
[2] From filing of petition

Table 24.—NLRB Activity Under the Equal Access to Justice Act, Fiscal Year 1983

I Applications for fees and expenses before the NLRB	
A Filed with Board	52
B Hearings held	2
C Awards ruled on	
1 By administrative law judges	
Granting	5
Denying	45
2 By Board	
Granting	-0-
Denying	37
D Amount of fees and expenses in cases ruled on by Board	
Claimed	$220,712
Recovered	$ 23,941
II Applications for fees and expenses before the circuit courts of appeals	
A Awards ruled on	
Granting	1
Denying	10
B Amounts of fees and expenses recovered pursuant to court award	$16,490

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