FIFTY-FIRST

ANNUAL REPORT

OF THE

NATIONAL LABOR RELATIONS BOARD

FOR THE FISCAL YEAR

ENDED SEPTEMBER 30

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LETTER OF TRANSMITTAL

NATIONAL LABOR RELATIONS BOARD,
Washington, D.C., July 29, 1988.

SIR: As provided in Section 3(c) of the Labor Management Relations Act, 1947, I submit the Fifty-First Annual Report of the National Labor Relations Board for the fiscal year ended September 30, 1986.

Respectfully submitted,

JAMES M. STEPHENS, *Chairman*

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

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I

Operations in Fiscal Year 1986

A. Summary

The National Labor Relations Board, an independent Federal agency, initiates no cases: it acts only on those cases brought before it. All proceedings originate from filings by the major segment of the public covered by the National Labor Relations Act—employees, labor unions, and private employers who are engaged in interstate commerce. During fiscal year 1986, 42,322 cases were received by the Board.

The public filed 34,435 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 7,505 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 382 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 1986, the five-member Board was composed of Chairman Donald L. Dotson and Members Wilford W. Johansen, Marshall B. Babson, and James M. Stephens; one seat was vacant. Rosemary M. Collyer served as the General Counsel.

Statistical highlights of NLRB's casehandling activities in fiscal 1986 include:

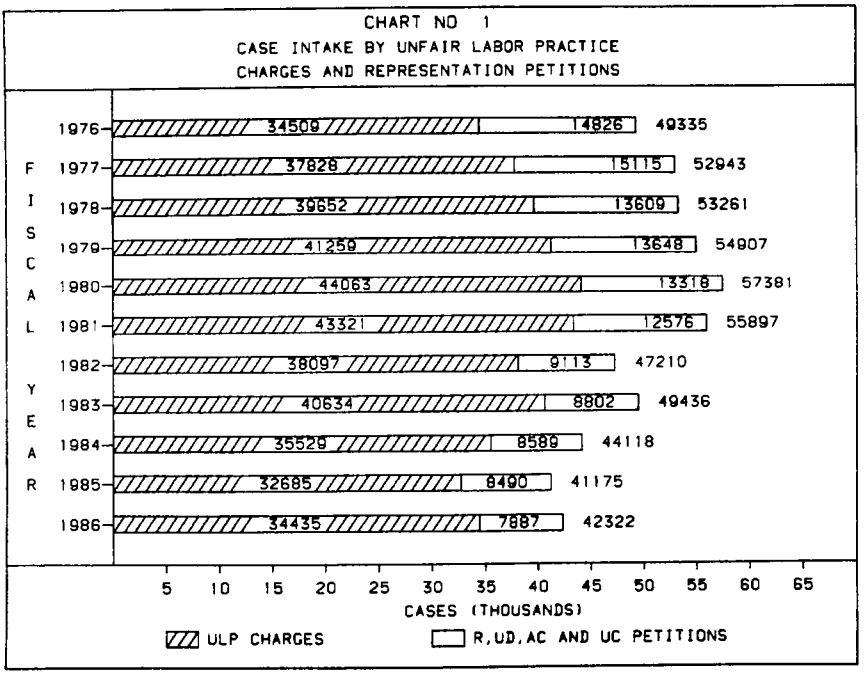
- The NLRB conducted 4,520 conclusive representation elections among some 229,573 employee voters, with workers choosing labor unions as their bargaining agents in 43.2 percent of the elections.
- Although the Agency closed 41,604 cases, 19,989 cases were pending in all stages of processing at the end of the fiscal year. The closings included 33,450 cases involving unfair labor practice charges and 7,532 cases affecting employee representation.

• Settlements, avoiding formal litigation while achieving the goal of equitable remedies in unfair labor practice situations, numbered 9,881.

• The amount of $36,289,852 in reimbursements 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 3,196 offers of job reinstatements, with 2,514 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 3,714 complaints, setting the cases for hearing.

• NLRB's corps of administrative law judges issued 764 decisions.



NLRB Administration

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

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

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

In its statutory assignment, the NLRB has two principal functions: (1) to determine and implement, through secret-ballot elections, the free democratic choice by employees concerning 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 1986.

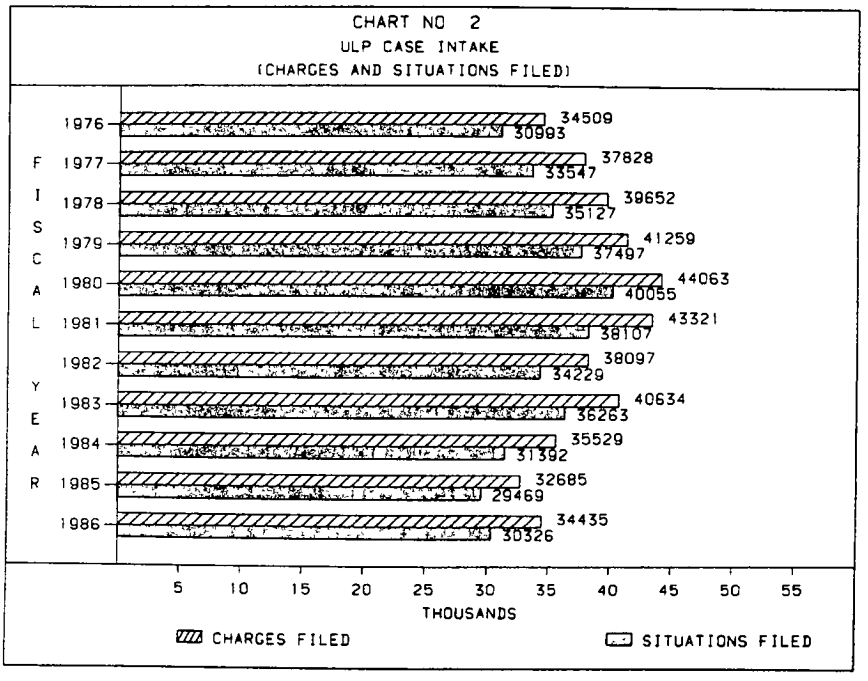
The Act's unfair labor practice provisions place certain restrictions on actions of employers and labor organizations in their relations with employees, as well as with each other. Its election provisions provide mechanics for conducting and certifying results of representation elections to determine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

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

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

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

For the conduct of its formal hearings in unfair labor practice cases, the NLRB employs administrative law judges who hear and decide cases. Administrative law judges' decisions may be



appealed to the Board by the filing of exceptions. If no exceptions are taken, the administrative law judges' orders become orders of the Board.

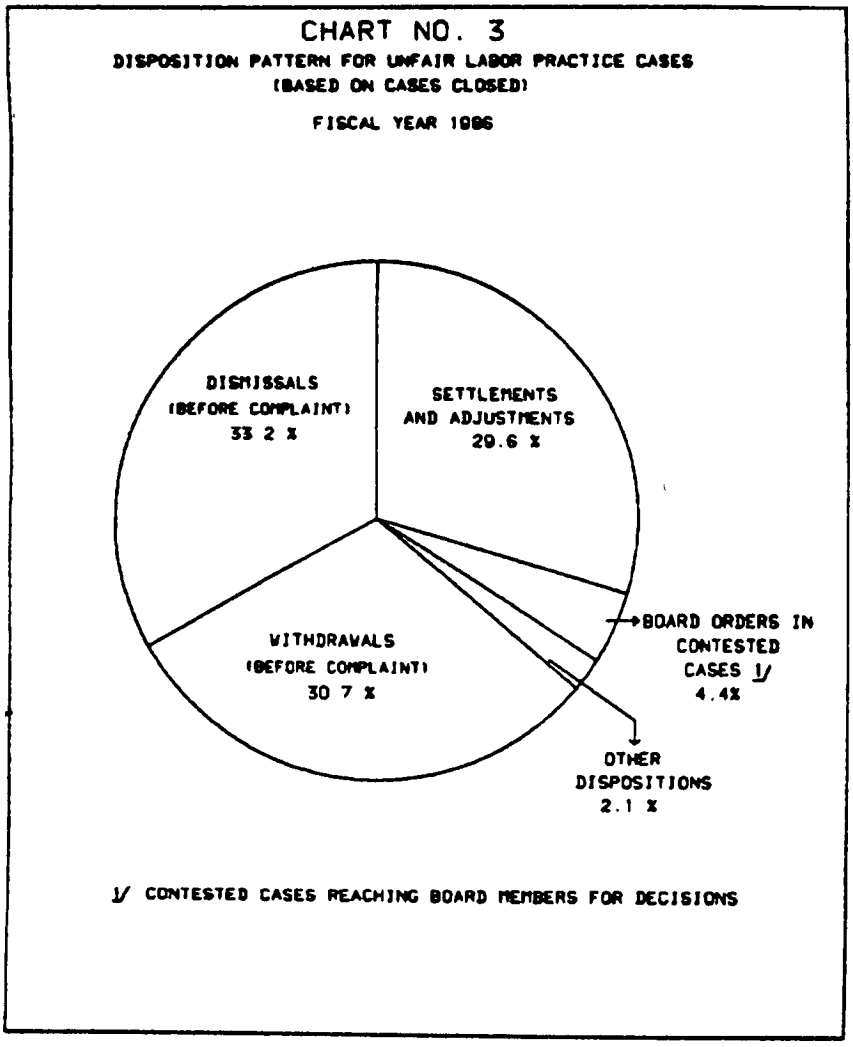
All cases coming to the NLRB begin their processing in the Regional Offices. Regional Directors, in addition to processing unfair labor practice cases in the initial stages, also have the authority to investigate representation petitions, to determine units of employees appropriate for collective-bargaining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

B. Operational Highlights

1. Unfair Labor Practices

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

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



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

More than 90 percent of the unfair labor practice cases filed with the NLRB in the field offices are disposed of in a median of some 40 days without the necessity of formal litigation before the Board. Less than 5 percent of the cases go through to Board decision.

In fiscal year 1986, 34,435 unfair labor practice charges were filed with the NLRB, an increase of 5 percent from the 32,685 filed in fiscal 1985. In situations in which related charges are counted as a single unit, there was a 3-percent increase over the preceding fiscal year. (Chart 2.)

Alleged violations of the Act by employers were filed in 24,084 cases, about 7 percent more than the 22,545 of 1985. Charges against unions increased 2 percent to 10,284 from 10,093 in 1985.

There were 67 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 12,714 such charges in 53 percent of the total charges that employers committed violations.

Refusal to bargain was the second largest category of allegations against employers, comprising 10,131 charges, in about 42 percent of the total charges. (Table 2.)

Of charges against unions, the majority (8,037) alleged illegal restraint and coercion of employees, about 78 percent, the same percentage as last year. There were 1,504 charges against unions for illegal secondary boycotts and jurisdictional disputes, an increase of 8 percent over the 1,395 of 1985.

There were 1,324 charges (about 13 percent) of illegal union discrimination against employees, a decrease of 7 percent from the 1,420 of 1985. There were 259 charges that unions picketed illegally for recognition or for organizational purposes, compared with 288 charges in 1985. (Table 2.)

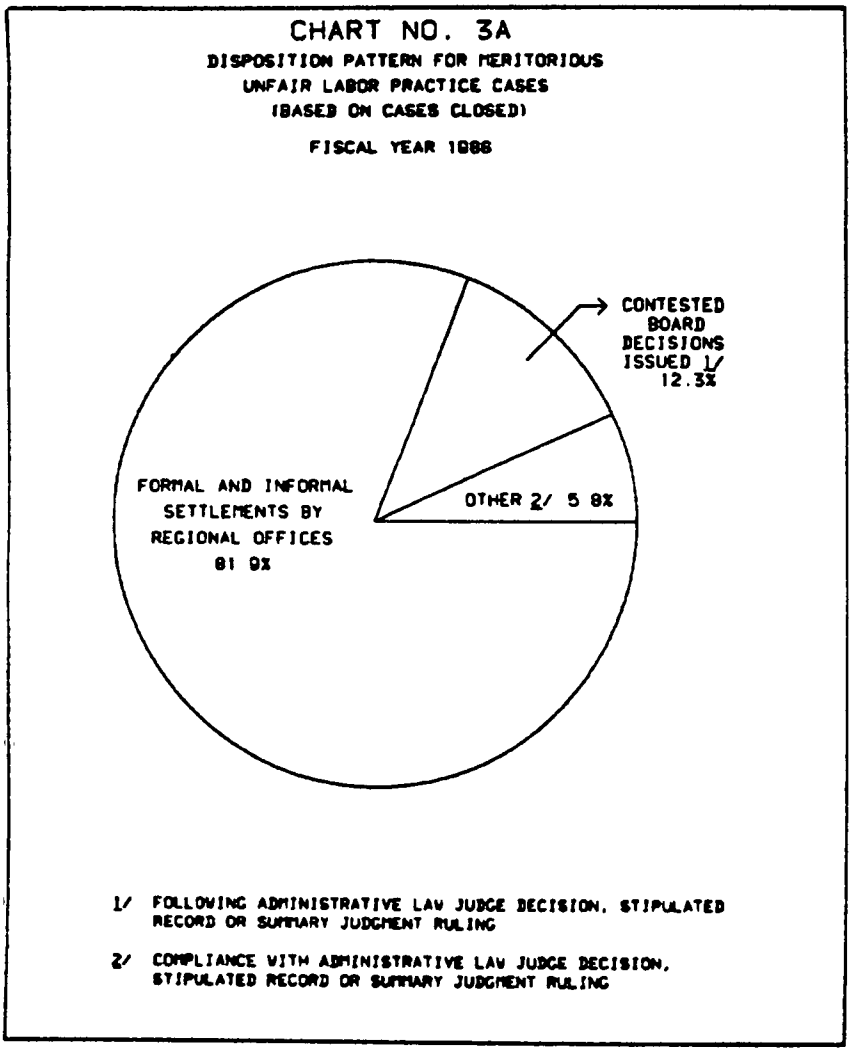
In charges filed against employers, unions led with 66 percent of the total. Unions filed 15,825 charges and individuals filed 8,259.

Concerning charges against unions, 7,117 were filed by individuals, or 69 percent of the total of 10,284. Employers filed 2,874 and other unions filed the 293 remaining charges.

In fiscal 1986, 33,450 unfair labor practice cases were closed. Some 93 percent were closed by NLRB Regional Offices, virtually the same as in 1985. During the fiscal year, 29.6 percent of the cases were settled or adjusted before issuance of administrative law judges' decisions, 30.7 percent were withdrawn before complaint, and 33.2 percent were administratively dismissed.

In evaluation of the Regional workload, the number of unfair labor practice charges found to have merit is important—the higher the merit factor the more litigation required. In fiscal 1986, 35 percent of the unfair labor practice cases were found to have merit, in fiscal year 1986 as compared to 33 percent in 1985.

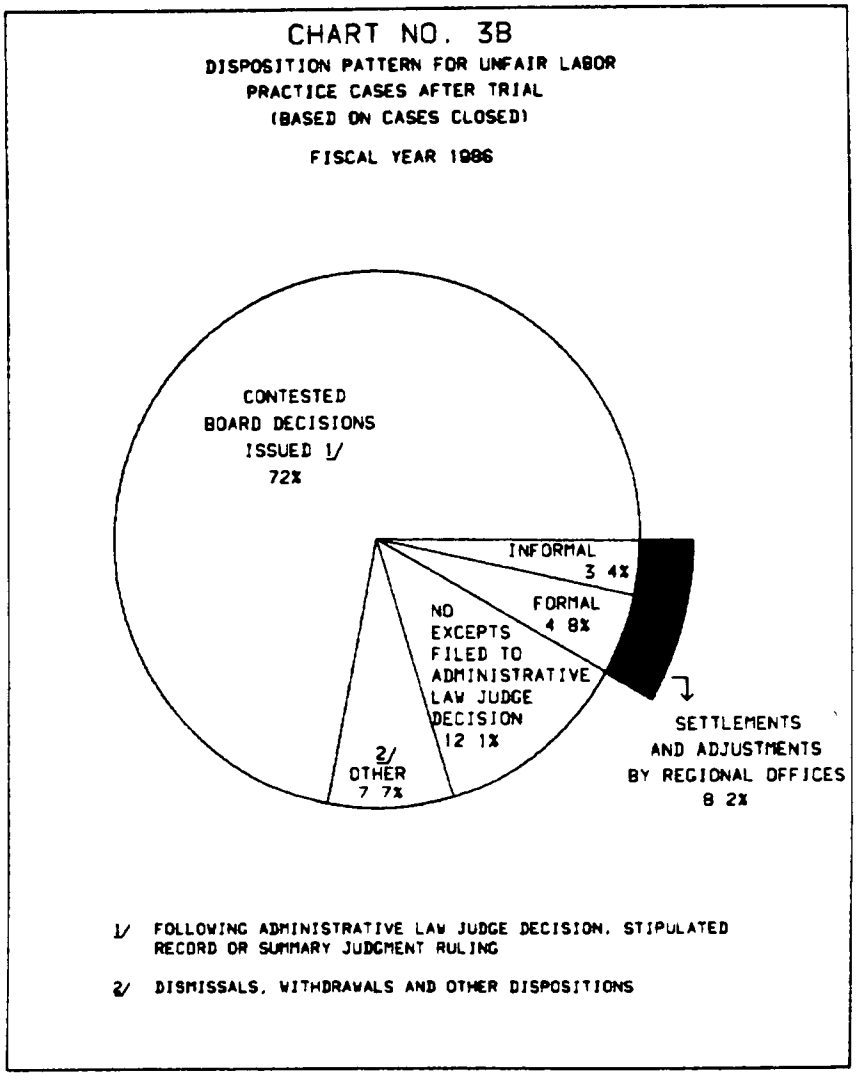
When the Regional Offices determine that charges alleging unfair labor practices have merit, attempts at voluntary resolution are stressed—to improve labor-management relations and to reduce NLRB litigation and related casehandling. Settlement ef-



forts have been successful to a substantial degree. In fiscal 1986, precomplaint settlements and adjustments were achieved in 6,780 cases, or 20.7 percent of the charges. In 1985 the percentage was 19.5. (Chart 5.)

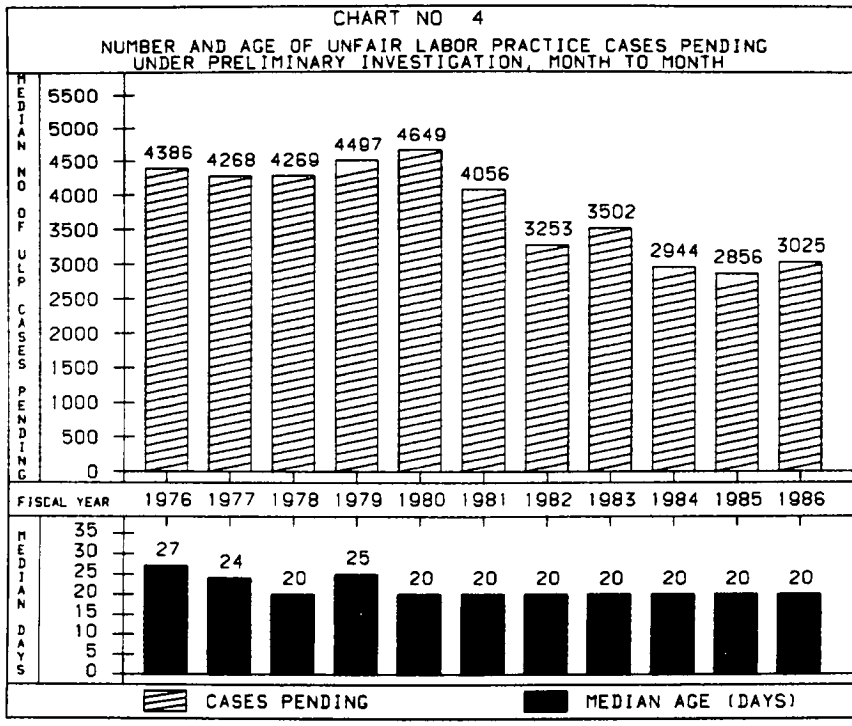
Cases of merit not settled by the Regional Offices produce formal complaints, issued on behalf of the General Counsel. This action schedules hearings before administrative law judges. During 1986, 3,714 complaints were issued, compared with 3,638 in the preceding fiscal year. (Chart 6.)

Of complaints issued, 81.4 percent were against employers, 17.5 percent against unions, and 1.1 percent against both employers and unions.



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

Additional settlements occur before, during, and after hearings before administrative law judges. The judges issued 764 decisions in 796 cases during 1986. They conducted 687 initial hearings, and 51 additional hearings in supplemental matters. (Chart 8 and Table 3A.)

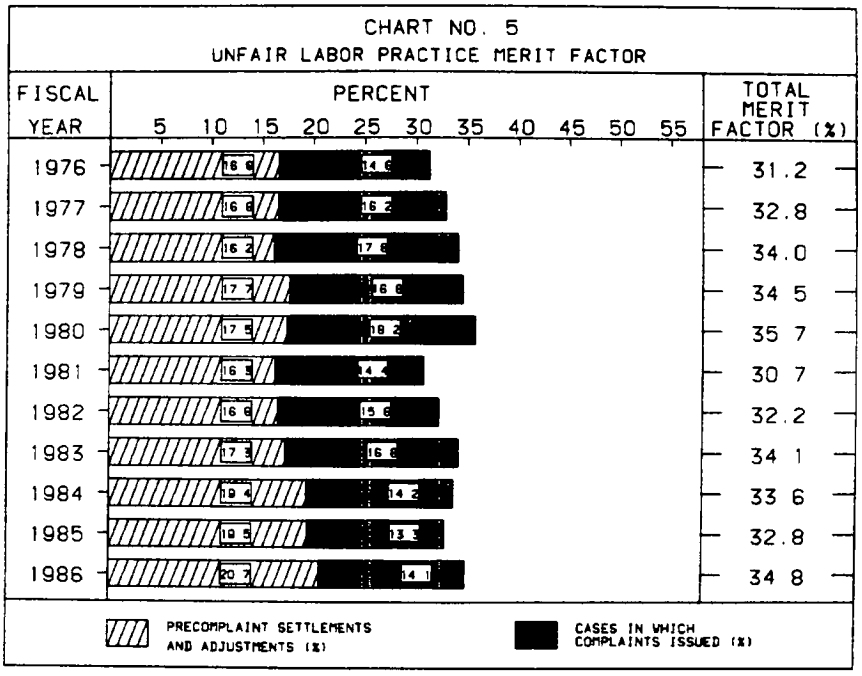


By filing exceptions to judges' findings and recommended rulings, parties may bring unfair labor practice cases to the five-member Board for final NLRB decision.

In fiscal 1986, the Board issued 925 decisions in unfair labor practice cases contested as to the law or the facts—858 initial decisions, 31 backpay decisions, 20 determinations in jurisdictional work dispute cases, and 16 decisions on supplemental matters. Of the 858 initial decision cases 679 involved charges filed against employers and 157 had union respondents.

For the year, the NLRB awarded backpay of $35.1 million. (Chart 9.) Reimbursements for unlawfully exacted fees, dues, and fines added another $1.2 million. Backpay is lost wages caused by unlawful discharge and other discriminatory action detrimental to employees, offset by earnings elsewhere after the discrimination. Some 3,196 employees were offered reinstatement, and 79 percent accepted.

At the end of fiscal 1986, there were 17,380 unfair labor practice cases being processed at all stages by the NLRB, compared with 16,395 cases pending at the beginning of the year.



2. Representation Cases

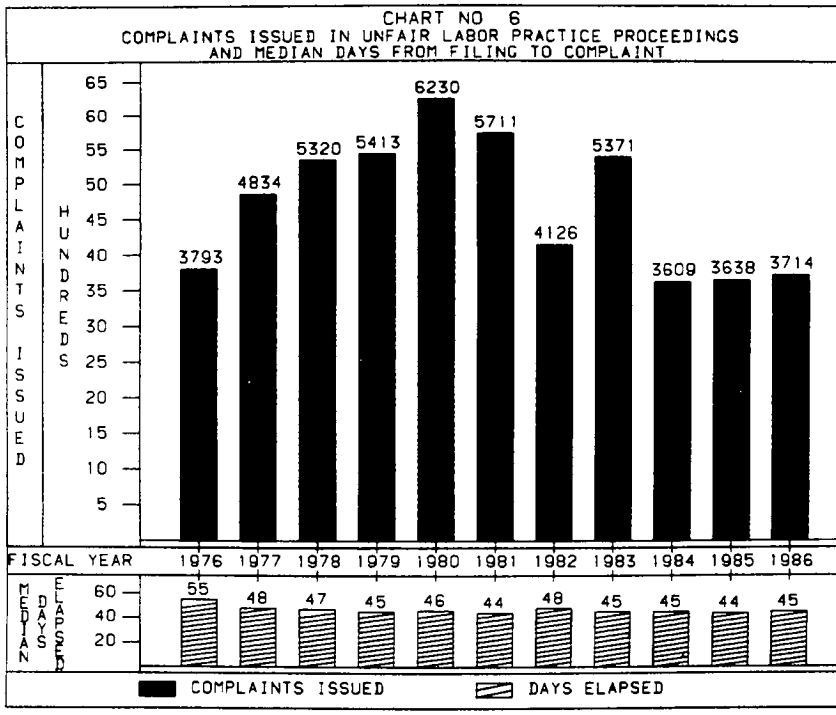
The NLRB received 7,887 representation and related case petitions in fiscal 1986, compared with 8,490 such petitions a year earlier.

The 1986 total consisted of 5,656 petitions that the NLRB conduct secret-ballot elections where workers select or reject unions to represent them in collective bargaining; 1,640 petitions to decertify existing bargaining agents; 209 deauthorization petitions for referendums on rescinding a union's authority to enter into union-shop contracts; and 355 petitions for unit clarification to determine whether certain classifications of employees should be included in or excluded from existing bargaining units.

Additionally, 27 amendment of certification petitions were filed.

During the year, 8,154 representation and related cases were closed, compared with 8,382 in fiscal 1985. Cases closed included 5,855 collective-bargaining election petitions; 1,677 decertification election petitions; 228 requests for deauthorization polls; and 394 petitions for unit clarification and amendment of certification. (Chart 14 and Tables 1 and 1B.)

The overwhelming majority of elections conducted by the NLRB followed an agreement by the parties on when, where, and among whom the voting should occur. Such agreements are



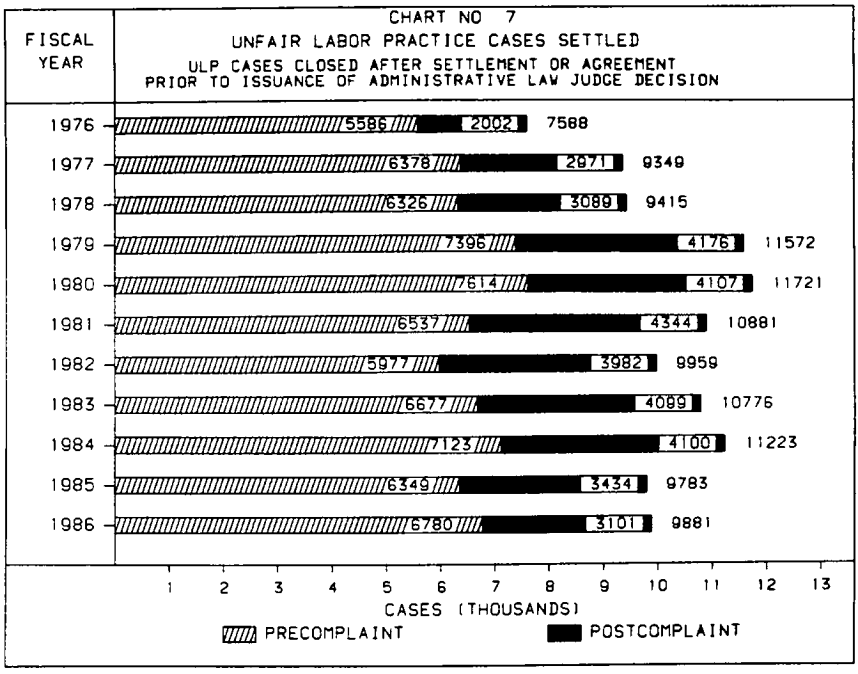
encouraged by the Agency. In 17.0 percent of representation cases closed by elections, balloting was ordered by NLRB Regional Directors following hearing on points in issue. In 20 cases, the Board directed elections after appeals or transfers of cases from Regional Offices. (Table 10.) There were seven cases which resulted in expedited elections pursuant to the Act's 8(b)(7)(C) provisions pertaining to picketing.

3. Elections

The NLRB conducted 4,520 conclusive representation elections in cases closed in fiscal 1986, compared with the 4,614 such elections a year earlier. Of 259,239 employees eligible to vote, 229,573 cast ballots, virtually 9 of every 10 eligible.

Unions won 1,951 representation elections, or 43.2 percent. In winning majority designation, labor organizations earned bargaining rights or continued as employee representatives for 91,999 workers. The employee vote over the course of the year was 106,461 for union representation and 123,112 against.

The representation elections were in two categories—the 3,663 collective-bargaining elections in which workers chose or voted down labor organizations as their bargaining agents, plus the 857

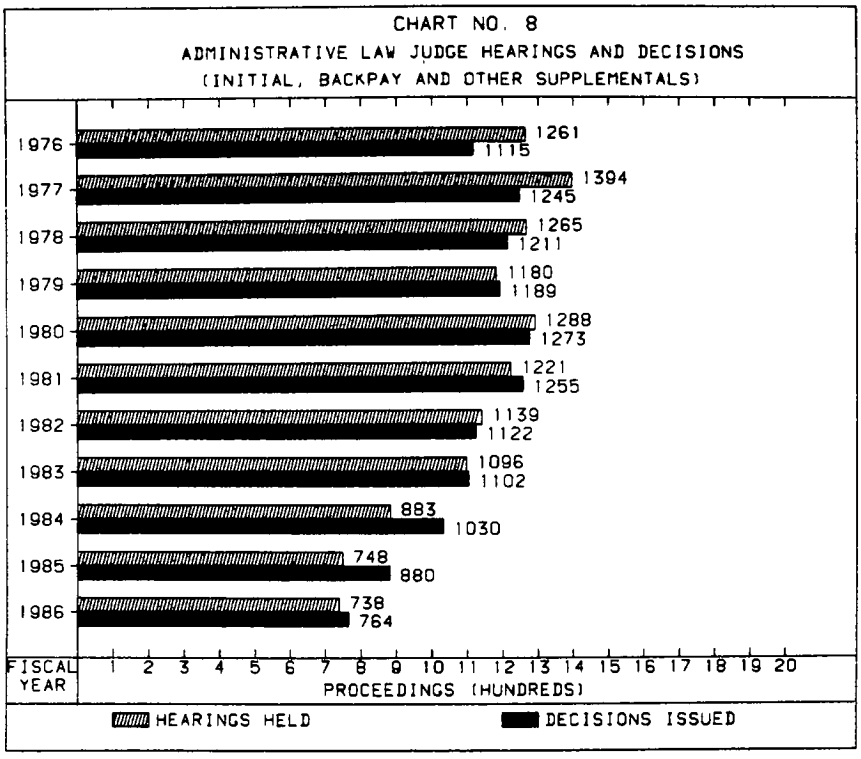


decertification elections determining whether incumbent unions would continue to represent employees.

There were 4,330 select-or-reject-bargaining-rights (one union on ballot) elections, of which unions won 1,799, or 41.6 percent. In these elections, 92,434 workers voted to have unions as their agents, while 118,745 employees voted for no representation. In appropriate bargaining units of employees, the election results provided union agents for 77,206 workers. In NLRB elections the majority decides the representational status for the entire unit.

There were 190 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 152 elections, or 80.0 percent.

As in previous years, labor organizations lost decertification elections by a substantial margin—about 3 out of 4. The decertification results brought continued representation by unions in 211 elections, or 24.6 percent, covering 15,727 employees. Unions lost representation rights for 20,494 employees in 646 elections, or 75.4 percent. Unions won in bargaining units averaging 75 employees, and lost in units averaging 32 employees. (Table 13.)



Besides the conclusive elections, there were 122 inconclusive representation elections during fiscal 1986 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 67 referendums, or 54 percent, while they maintained the right in the other 57 polls which covered 4,522 employees. (Table 12.)

For all types of elections in 1986, the average number of employees voting, per establishment, was 51 compared with 49 in 1985. About three-quarters of the collective-bargaining and decertification elections involved 59 or fewer employees. (Tables 11 and 17.)

4. Decisions Issued

a. The Board

Dealing effectively with the remaining cases reaching it from nationwide filings after dismissals, settlements, and adjustments in earlier processing stages, the Board handed down 2,032 decisions concerning allegations of unfair labor practices and questions relating to employee representation. This total compared with the 1,995 decisions rendered during fiscal 1985.

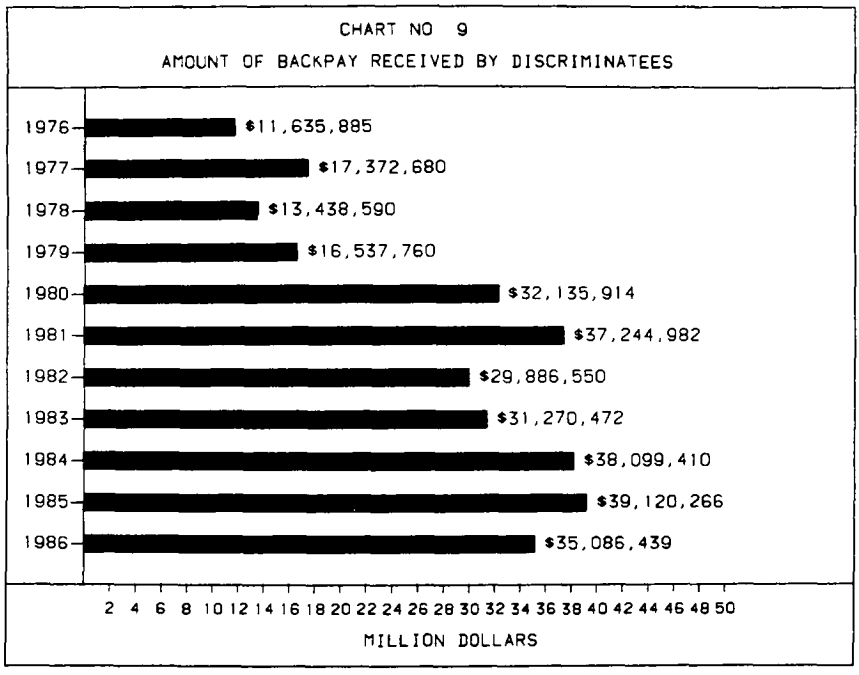


CHART NO 9
AMOUNT OF BACKPAY RECEIVED BY DISCRIMINATEES
1976 $11,635,885
1977 $17,372,680
1978 $13,438,590
1979 $16,537,760
1980 $32,135,914
1981 $37,244,982
1982 $29,886,550
1983 $31,270,472
1984 $38,099,410
1985 $39,120,266
1986 $35,086,439
2 4 6 8 10 12 14 16 18 20 22 24 26 28 30 32 34 36 38 40 42 44 46 48 50
MILLION DOLLARS

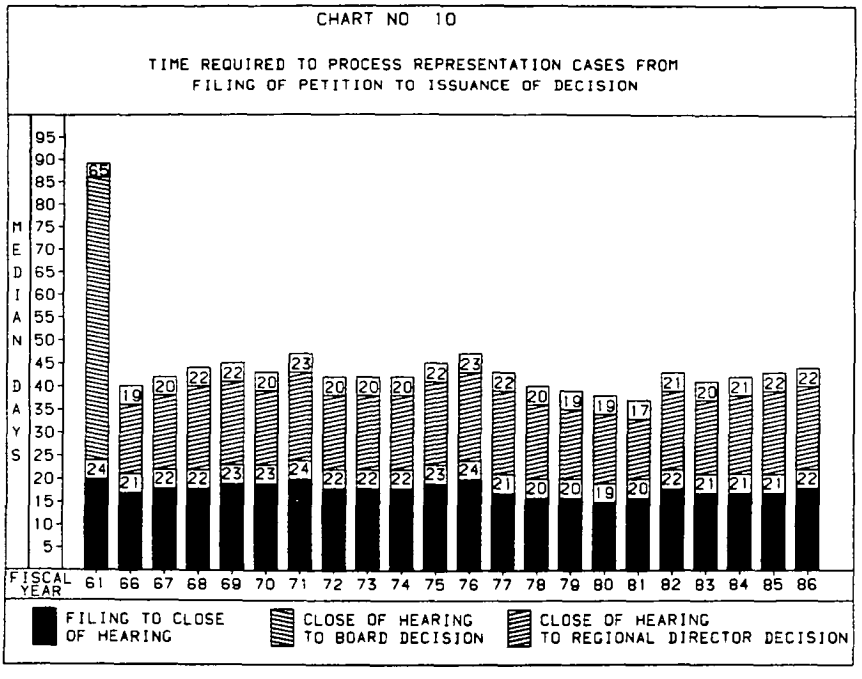
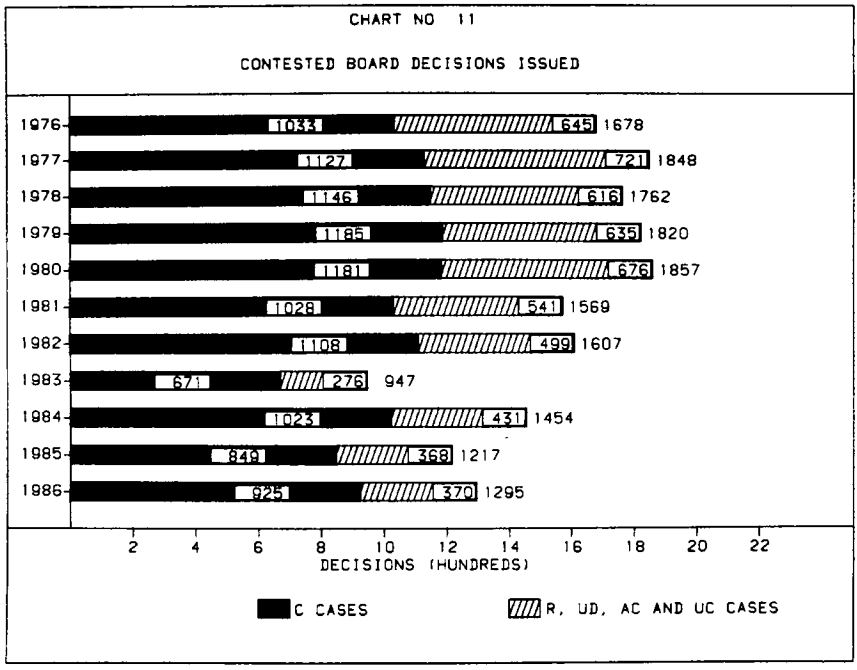


CHART NO 10
TIME REQUIRED TO PROCESS REPRESENTATION CASES FROM FILING OF PETITION TO ISSUANCE OF DECISION
MEDIAN DAYS
FISCAL YEAR 61 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86
FILING TO CLOSE OF HEARING
CLOSE OF HEARING TO BOARD DECISION
CLOSE OF HEARING TO REGIONAL DIRECTOR DECISION



A breakdown of Board decisions follows:

Total Board decisions		**2,032**
Contested decisions		**1,306**
Unfair labor practice decisions	925	
Initial (includes those based on stipulated record)	858	
Supplemental	16	
Backpay	31	
Determinations in jurisdictional disputes	20	
Representation decisions	370	
After transfer by Regional Directors for initial decision	18	
After review of Regional Director decisions	56	
On objections and/or challenges	296	
Other decisions	11	

Clarification of bargaining unit	8	
Amendment to certification	1	
Union-deauthorization	2	
Noncontested decisions		726
Unfair labor practice	292	
Representation	430	
Other	4	

The majority (64 percent) of Board decisions resulted from cases contested by the parties regarding the facts and/or application of the law. (Tables 3A, 3B, and 3C.)

In fiscal 1986 more than 12 percent of all meritorious charges and 72 percent of all cases in which a hearing was conducted reached the five-member Board for decision. (Charts 3A and 3B.) Generally, unfair labor practice cases take about 2-1/2 times longer to process than representation cases.

b. Regional Directors

NLRB Regional Directors issued 1,359 decisions in fiscal 1986, compared with 1,562 in 1985. (Chart 13 and Tables 3B and 3C.)

c. Administrative Law Judges

With a leveling in case filings alleging unfair labor practices, administrative law judges issued 764 decisions and conducted 738 hearings. (Chart 8 and Table 3A.)

5. Court Litigation

a. Appellate Courts

The NLRB is involved in more litigation in the United States courts of appeals than any other Federal administrative agency.

In fiscal 1986, 197 cases involving NLRB were decided by the United States courts of appeals compared with 189 in fiscal 1985. Of these, 83.8 percent were won by NLRB in whole or in part compared to 89.4 percent in fiscal 1985; 8.1 percent were remanded entirely compared with 6.3 percent in fiscal 1985; and 8.1 percent were entire losses compared to 4.3 percent in fiscal 1985.

b. The Supreme Court

In fiscal 1986, the Supreme Court decided one Board case which the Board lost. The Board participated as amicus in three cases and the Board's position prevailed in all three cases.

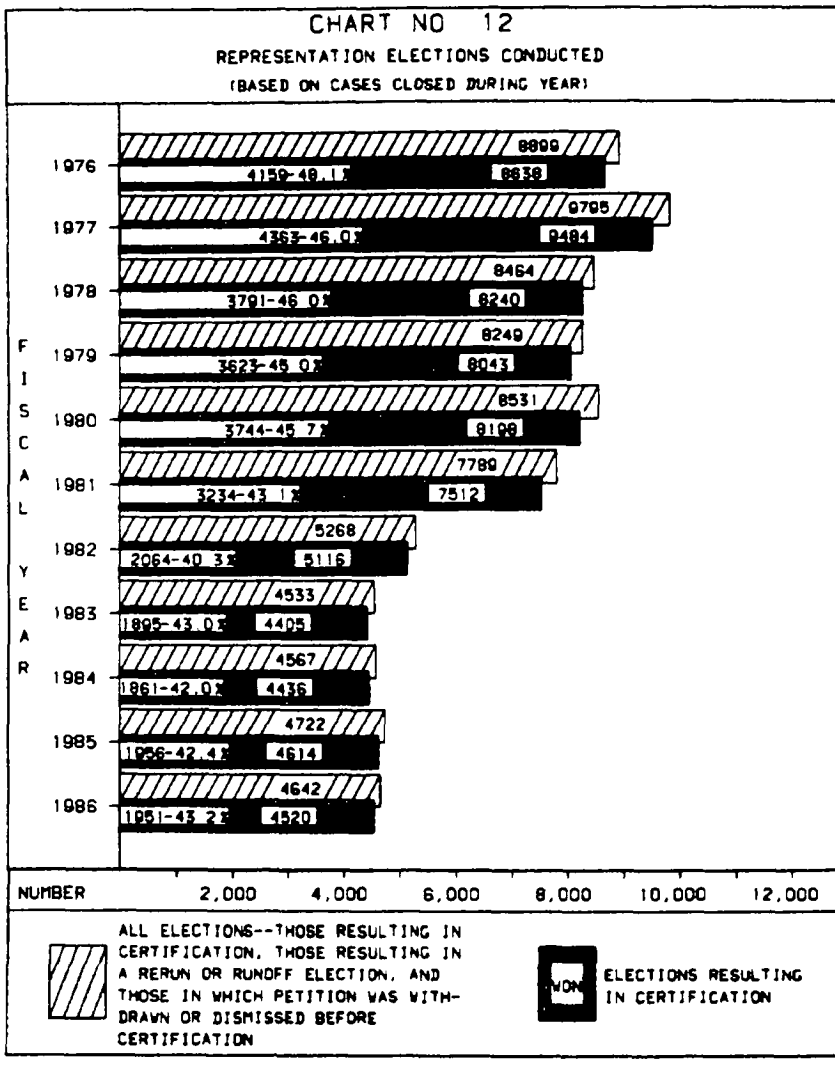
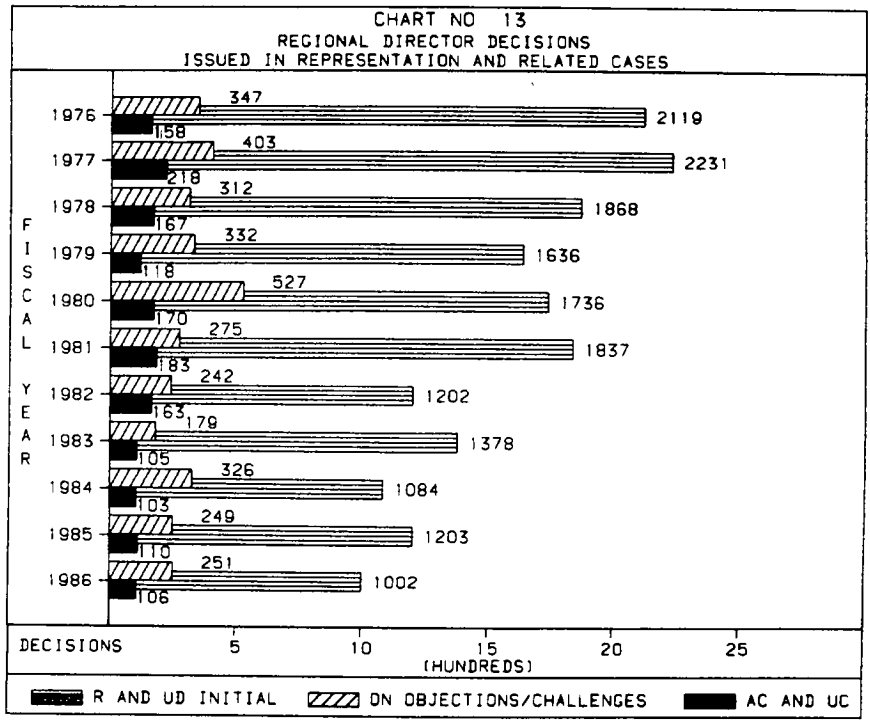


CHART NO 12
REPRESENTATION ELECTIONS CONDUCTED
(BASED ON CASES CLOSED DURING YEAR)
FISCAL YEAR
1976
1977
1978
1979
1980
1981
1982
1983
1984
1985
1986
8899
4159-48.1%
8638
9795
4363-46.0%
9484
8464
3791-46.0%
8240
8249
3623-45.0%
8043
8531
3744-45.7%
8198
7789
3234-43.1%
7512
5268
2064-40.3%
5116
4533
1895-43.0%
4405
4567
1861-42.0%
4436
4722
1956-42.4%
4614
4642
1951-43.2%
4520
NUMBER
2,000
4,000
6,000
8,000
10,000
12,000
ALL ELECTIONS--THOSE RESULTING IN CERTIFICATION, THOSE RESULTING IN A RERUN OR RUNOFF ELECTION, AND THOSE IN WHICH PETITION WAS WITHDRAWN OR DISMISSED BEFORE CERTIFICATION
WON
ELECTIONS RESULTING IN CERTIFICATION



c. Contempt Actions

In fiscal 1986, 124 cases were referred to the contempt section for consideration of contempt action. During fiscal 1986, 26 contempt proceedings were instituted. There were 14 contempt adjudications awarded in favor of the Board and there were 3 cases where compliance was directed without contempt adjudication.

d. Miscellaneous Litigation

There were 46 additional cases involving miscellaneous litigation decided by appellate, district, and bankruptcy courts. The NLRB's position was upheld in 38 cases. (Table 21.)

e. Injunction Activity

The NLRB sought injunctions pursuant to Sections 10(j) and 10(l) in 65 petitions filed with the U.S. district courts, compared with 89 in fiscal 1985. (Table 20.) Injunctions were granted in 29, or 91 percent, of the 32 cases litigated to final order.

NLRB injunction activity in district courts in 1986:

Granted	29
Denied	3
Withdrawn	3

Dismissed	0
Settled or placed on court's inactive lists	24
Awaiting action at end of fiscal year	16

C. Decisional Highlights

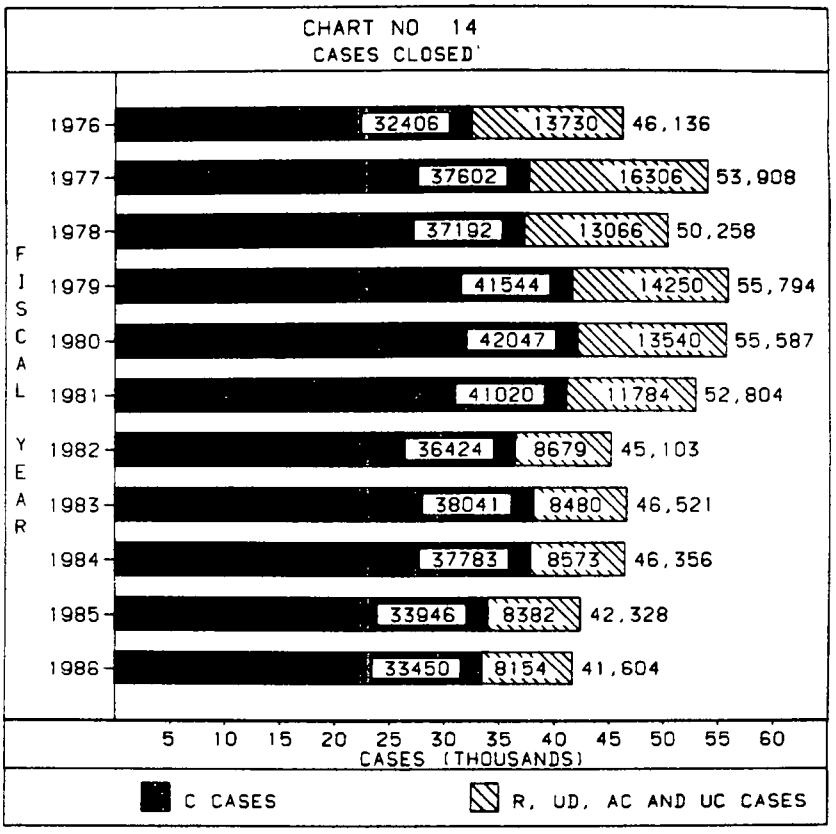
In the course of the Board's administration of the Act during the report period, it was required to consider and resolve complex problems arising from the great variety of factual patterns in the many cases reaching it. In some cases, new developments in industrial relations, as presented by the factual situation, required the Board's accommodation of established principles to those developments. Chapter II 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 eight of the decisions establishing or reexamining basic principles in significant areas.

1. Jurisdiction of the Board

In *Imperial House Condominium*[1] the Board asserted jurisdiction over a condominium, thus reaffirming its policy of extending its jurisdiction over residential condominiums and cooperatives that met a jurisdictional amount of $500,000.[2] The Board found that there was no intervening change in either the nature of condominiums and cooperatives or their unquestioned impact on interstate commerce that would warrant reversal of the Board's 7-year policy of asserting jurisdiction over such enterprises.

In two cases, the Board considered whether to assert jurisdiction over employees providing services to or for an entity exempt under Section 2(2). Reaffirming the basic test set forth in *National Transportation Services*,[3] the Board declined to assert jurisdiction over a for-profit corporation operating residential job corps centers under a contract with the Department of Labor (DOL).[4] Finding that DOL had to approve wages and benefits proposed in the corporation's budget, as well as its proposed wage ranges and benefit levels, and that DOL retained ultimate discretion to approve any changes in wage rates, benefit levels, or personnel policies, the Board concluded that the corporation lacked ultimate authority to determine primary terms and conditions of employment with the consequent inability to engage in the "give and take" necessary for meaningful bargaining with a

[1] 279 NLRB No 154
[2] *30 Sutton Place*, 240 NLRB 725 (1979)
[3] 240 NLRB 565 (1979)
[4] *Res-Care, Inc*, 280 NLRB No 78



labor organization. In the second case issued the same day,[5] the Board asserted jurisdiction over a nonprofit corporation licensed by a State to operate as a child care institution because the degree of control exercised by the employer over the employer's labor relations revealed that it retained sufficient control over the essential terms and conditions of employment to engage in meaningful bargaining.

2. Use of Temporary Replacements in a Lawful Lockout

Relying on the Supreme Court's decisions in *American Ship Building*[6] and *Brown Food Store*,[7] the Board held that absent specific proof of antiunion motivation, an employer does not violate Section 8(a)(3) and (1) by hiring temporary employees to operate its business during a lawful lockout to bring economic pressure

[5] *Long Stretch Youth Home*, 280 NLRB No 79
[6] *American Ship Building Co v NLRB*, 380 U S 300 (1965)
[7] *NLRB v Brown Food Store*, 380 U S 278 (1965)

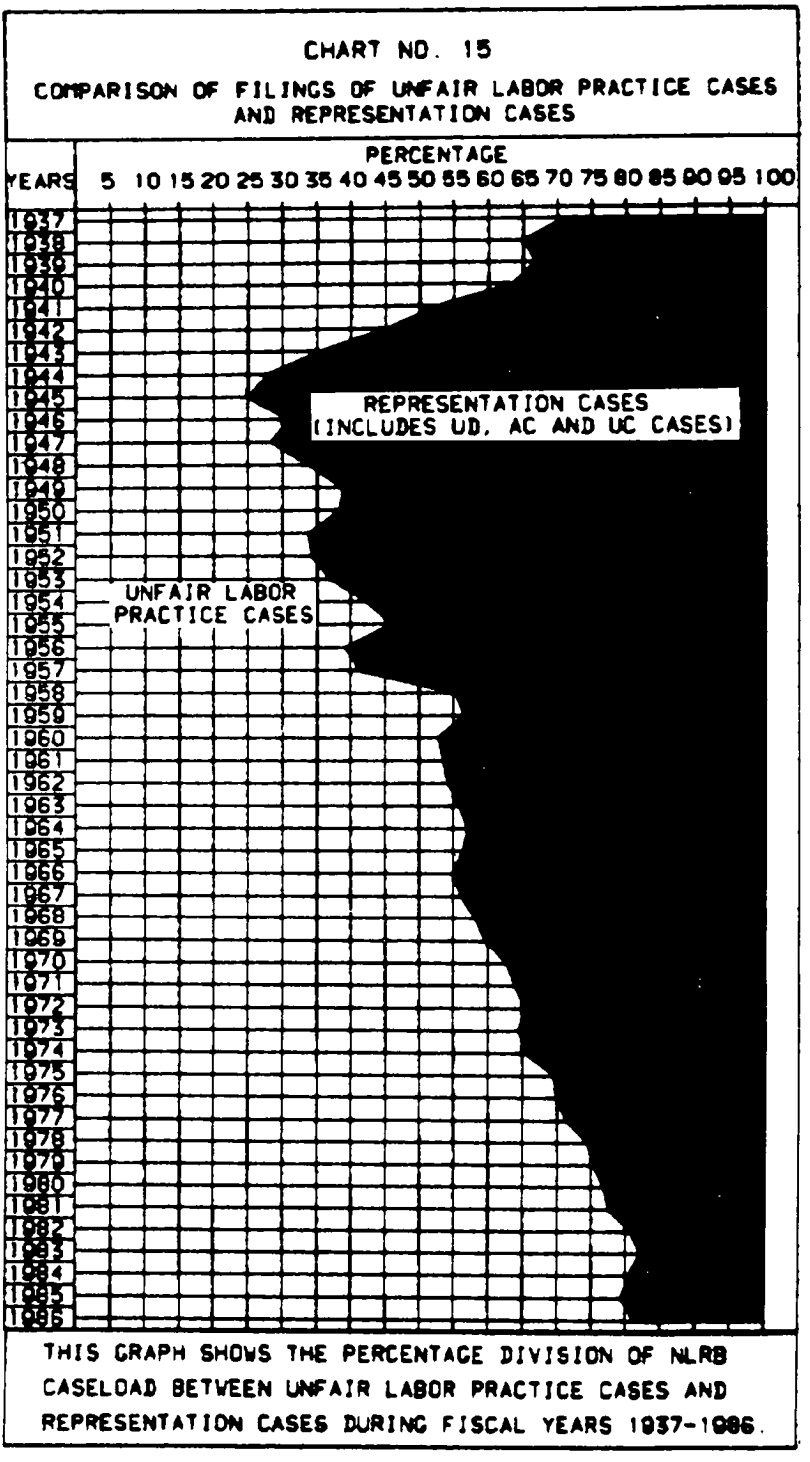


CHART NO. 15
COMPARISON OF FILINGS OF UNFAIR LABOR PRACTICE CASES AND REPRESENTATION CASES
YEARS
PERCENTAGE
5 10 15 20 25 30 35 40 45 50 55 60 65 70 75 80 85 90 95 100
REPRESENTATION CASES (INCLUDES UD, AC AND UC CASES)
UNFAIR LABOR PRACTICE CASES
1937
1938
1939
1940
1941
1942
1943
1944
1945
1946
1947
1948
1949
1950
1951
1952
1953
1954
1955
1956
1957
1958
1959
1960
1961
1962
1963
1964
1965
1966
1967
1968
1969
1970
1971
1972
1973
1974
1975
1976
1977
1978
1979
1980
1981
1982
1983
1984
1985
1986
THIS GRAPH SHOWS THE PERCENTAGE DIVISION OF NLRB CASELOAD BETWEEN UNFAIR LABOR PRACTICE CASES AND REPRESENTATION CASES DURING FISCAL YEARS 1937-1986.

to bear in support of a legitimate bargaining position when use of temporary employees (1) is a measure reasonably adapted to the achievement of a legitimate employer interest, and (2) has only a comparatively slight adverse effect on protected employee rights.[8] The Board rejected the argument that it should require more proof of an employer's legitimate purpose in such a case or should engage in balancing an employer's interests against employee rights to determine whether the Act has been violated, even in the absence of independent proof of unlawful employer motivation.

3. Interrogation and Discharge in a Maritime Setting

The Board had occasion to consider application of the Supreme Court's decision in *Southern Steamship*[9] in a case involving alleged unlawful interrogation and discharge of a cargo ship's radio electronics officer by the ship's captain when he learned that during a routine transmission the radio officer requested the Board's telephone number.[10] Finding that *Southern Steamship* did not preculde analysis of the facts under established labor law principles, the Board held that, although the captain, who controlled and was responsible for use of the ship's communications equipment, was justified in asking whether the equipment had been used in an unauthorized manner, his repeated question concerning what had prompted the radio officer to ask for the Board's telephone number was not relevant to the captain's responsibilities and, in the circumstances, such questions had a reasonable tendency to coerce the radio officer. The radio officer's discharge for refusing to answer why he wanted to contact the Board was found violative of Section 8(a)(4) and (1).

4. Merger of Multilocation Bargaining Units

In a case[11] involving application of the Board's "merger doctrine" under which the Board determines whether the parties have agreed to merge separately certified or recognized units into one overall unit, the Board held that a small unit consisting of 24 employees at the employer's operation in Virginia was merged into a much larger unit of 193 employees. The Board concluded that the intent of the parties was to include the employees at both locations in one overall bargaining unit. This intent was evidenced by the employer's voluntary recognition of the union and application of the then-governing bargaining agreement at the Virginia operation on its opening; by negotiation of a new contract applicable uniformly to both locations; and by a continued 4-year history of bargaining on a multilocation basis. Consequently, the employer's withdrawal of recogni-

[8] *Harter Equipment*, 280 NLRB No 71
[9] *Southern Steamship Co v NLRB*, 316 U S 31 (1942)
[10] *Sea-Land Service*, 280 NLRB No 84
[11] *Gibbs & Cox*, 280 NLRB No 110

tion from the union as to the Virginia contractual bargaining unit, its insistence to impasse that the bargaining unit exclude the Virginia employees, and its unilateral grant of wage increases and other benefits to them violated Section 8(a)(5) and (1).

5. Financial Core Membership

In *Gordon Construction*,[12] during an economic strike an employee filed a notice with the union stating that he changed his standing to "financial core membership" and would not be subjected to union fines or assessments if he chose to cross the picket line. The union informed the employee that it did not recognize his request for change in membership status. The employee crossed the picket line and went to work. The union charged the employee with violating the union's constitution and bylaws by crossing a picket line during an authorized strike and working. The union found the employee guilty, fined him, and told him that failure to pay the fine would result in expulsion. However, the Board found that the employee clearly and unequivocally limited his affiliation with the union to the payment of prescribed fees and dues, placing him outside the ambit of the union's authority to fine him, and that the union's sanctions violated the Act. The Board concluded that "it is necessary to distinguish the concepts of full membership and financial core membership." (277 NLRB at 531.) The Board cited *Hershey Foods Corp.*[13] for the principle that "financial core membership permits an employee to maintain a dues-paying association with the union that will protect him against the threat of discharge under Section 8(a)(3) of the Act when the collective-bargaining agreement contains a union-security provision." (277 NLRB at 531.) The Board stated that "[i]f the designation of financial core or dues paying only membership is to impart any significance then it must be recognized that it does not rise to the level of full membership for all purposes, but rather is a limited affiliation which excludes the employee from certain rights accorded to full members and also removes him from the reach of union fines."[14] The Board held that because the disciplined employee notified the union of his change in membership status prior to crossing the picket line and returning to work, the union's bringing charges and imposing a fine against him violated Section 8(b)(1)(A). The Board supported its conclusion with its decision in *Tacoma Boatbuilding.*[15]

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[12] *Carpenters Seattle Council (Gordon Construction)*, 277 NLRB 530

[13] 207 NLRB 897 (1973), enfd 513 F 2d 1083 (9th Cir 1975)

[14] Id , citing *Pattern Makers League v NLRB*, 473 U S 95 fn 16 (1985)

[15] *Carpenters Local 470 (Tacoma Boatbuilding)*, 277 NLRB 513

D. Financial Statement

The obligations and expenditures of the National Labor Relations Board for the fiscal year ended September 30, 1986, are as follows:

Personnel compensation[16]	$90,930,837
Personnel benefits	10,964,368
Travel and transportation of persons	3,166,651
Transportation of things	107,710
Rent, communications, and utilities	18,264,259
Printing and reproduction	234,586
Other services	3,864,184
Supplies and materials	912,493
Equipment	546,771
Insurance claims and indemnities	139,151
Total obligations and expenditures	$129,131,010

[16] Includes $109,010 for reimbursables

II

Jurisdiction of the Board

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

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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 when it is shown that the Board's "outflow-inflow" standards are met 25 NLRB Ann Rep 19–20 (1960) But see *Sioux Valley Empire Electric Assn*, 122 NLRB 92 (1958), regarding the treatment of local public utilities

A. Residential Condominiums and Cooperatives

In *Imperial House Condominium*,[6] a Board majority reaffirmed the unanimous Board decision in *30 Sutton Place Corp.*,[7] and asserted jurisdiction over a "typical" condominium, which was a nonprofit association incorporated under state law. The majority held that it will continue to assert jurisdiction over residential condominiums and cooperatives that meet the established jurisdictional amount.

The Board majority rejected dissenting Chairman Dotson's and Member Johansen's view that the Board should return to the rule of declining to assert jurisdiction over residential condominiums as was the Board's practice before 1979, as set forth in *Point East Condominium Owners Assn.*[8] The dissent contended that condominiums are not businesses, that condominium owners are the functional equivalent of individual homeowners, and that Congress did not intend to "extend the Board's authority to cover efforts, individual or collective, to obtain private home maintenance, repair, or related services."

While conceding that condominiums are not "engaged in business" as a retail operation, the Board majority found that the relationship of the condominium as a business enterprise to its employees, as well as to its various suppliers of goods and services, is no different from that of any similar business enterprise and is inextricably in interstate commerce.

The majority also noted the collective nature of a condominium which serves to take the enterprise outside the sphere of individual action; that the Board has often asserted jurisdiction over enterprises in which a collection of individuals has banded together to purchase what can be characterized as personal goods and services, e.g., private athletic clubs,[9] nonprofit golf and country clubs,[10] electrical cooperatives,[11] agricultural cooperatives;[12] and the fact that condominium unit owners are purchasing repair and related services for their dwellings is no more reason to decline to assert jurisdiction over condominiums than the fact that a portion of apartment dwellers' monthly rents is a basis to decline to assert jurisdiction over residential apartment houses.

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[6] 279 NLRB No 154 (Members Dennis, Babson, and Stephens, Chairman Dotson and Member Johansen dissenting)

[7] 240 NLRB 752 (1979) (then Chairman Fanning and Members Penello, Murphy, and Truesdale) The Board overruled *Point East Condominium Owners Assn*, 193 NLRB 6 (1971), and extended its jurisdiction to include residential condominiums and cooperatives and established a jurisdictional amount of $500,000 per annum, which is comparable to that established for the apartment house, motel, and hotel industries 44 NLRB Ann Rep 37 (1979)

[8] 193 NLRB 6 (1971), 37 Ann Rep 31 (1972)

[9] *Denver Athletic Club*, 164 NLRB 677 (1967)

[10] *Woodland Hills Country Club*, 146 NLRB 330 (1964)

[11] *Central Electric Cooperative*, 113 NLRB 1059 (1955)

[12] *Potato Growers Cooperative*, 115 NLRB 1281 (1956)

In its reaffirmation of *30 Sutton Place*, the Board majority noted that there has been no intervening change in either (1) the nature of the condominiums and cooperatives or (2) their unquestioned impact on interstate commerce that would warrant reversal of the Board's 7-year policy of asserting jurisdiction over such enterprises. The Board majority concluded that it would not be appropriate for the Board to withdraw its jurisdictional authority from a substantial segment of the national economy and thereby deny the Act's protection to the significant number of employees employed in this industry.

B. Exempt Entity Issues

In *Res-Care, Inc.*,[13] the Board majority reaffirmed, but elaborated on, the basic test enunciated in *National Transportation Service*,[14] for determining when assertion of jurisdiction over an employer providing services to or for an exempt entity is appropriate.

National Transportation provided a twofold inquiry: "whether the employer itself meets the definition of 'employer' in Section 2(2) of the Act and, if so . . . 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." (240 NLRB at 565.)

The Board notes that Res-Care itself is not exempt from the Board's jurisdiction under Section 2(2); thus, the only inquiry is whether, in exercising its discretion, the Department of Labor (an exempt entity) controls the employment conditions of Res-Care's employees.

The Board examined not only the control over essential terms and conditions of employment retained by the employer, but also the scope and degree of control exercised by the exempt entity over the employer's labor relations, to determine whether the employer is capable of engaging in meaningful collective bargaining.

In *Singer Co.*,[15] the Board had asserted jurisdiction over an employer whose contract with the Department of Labor to operate residential job corps centers was virtually identical to the one in this case. The Board majority here found that in *Singer* adequate weight was not given to the scope and degree of control exercised by the exempt entity over the employer's labor relations; and that the extent of control retained by the employer in isolation placed no weight on the job corps employer's lack of a final say concerning the primary economic aspects of its relation-

[13] 280 NLRB No 78 (Chairman Dotson and Members Dennis, Johansen, and Babson, Member Stephens concurring and dissenting)

[14] 240 NLRB 565 (1979)

[15] 240 NLRB 965 (1979) (Reaffirmed in *Management & Training Corp*, 265 NLRB 1152 (1982), and *Teledyne Economic Development Co*, 265 NLRB 1216 (1982))

ship with its employees—the setting of wages and benefits—and understated the degree of economic control possessed by the Department of Labor.

The Board noted that, in this case, although wage and benefit levels for each job classification are set initially in the employer's operating budget, the budget must be approved by the Department of Labor and, once approved, becomes the basis for the contract price. The Department of Labor must approve wage ranges, including a maximum wage for each classification, as well as the substantive terms of several employee benefits. The employer must also obtain approval before making changes in these approved wage and benefit levels. Thus, the Board majority found that, in every sense, it is the Department of Labor, not the employer which retains ultimate discretion for setting wage and benefit levels of the job corps center, and thus effectively precludes Res-Care from engaging in meaningful collective bargaining.[16] Accordingly, the Board majority specifically overruled *Singer* and declined to assert jurisdiction.

Member Stephens, concurring and dissenting, would assert jurisdiction over the employer. Although he agrees with the majority's reaffirmation of the basic "control" test of *National Transportation Service*, in his view, the majority has exaggerated the significance of powers possessed by the Department of Labor and the degree to which it stands as an impediment to real bargaining. As a Government contracting entity, it reviews and approves the operations of the contractor, including aspects of its employment practices; but, in his view, reservation of that authority, without more, is an insufficient basis for denying jurisdiction.

In another decision during the report year concerning jurisdiction, *Cape Girardeau Care Center*,[17] a Board panel held that a nursing home organized as a private, general not-for-profit corporation was not an exempt employer. The county approved the employer's formation of the nursing home so that the employer could obtain tax-exempt bonds and not to create the employer as a department or administrative arm of the county. Responsibility for policy-making was vested in a board of directors which had no "direct personal accountability" to county officials or the general public as the county had authority only to approve the directors and no authority to appoint or to remove them. Approval for the appointment of directors was to ensure tax exempt financing of the sale of the home and was not pursuant to a statute or county ordinance.

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[16] The majority notes that it does not require a finding that the exempt entity is a joint employer to withhold the assertion of jurisdiction 280 NLRB No 78, slip op at 10, fn 12 Compare *ARA Services*, 221 NLRB 64 (1965)

[17] 278 NLRB No 143 (Chairman Dotson and Members Dennis and Johansen)

C. Nonprofit, Charitable Institution

In *Long Stretch Youth Home*,[18] the Board considered the question of whether jurisdiction should be asserted over a nonprofit, charitable institution providing residential medical, educational, and social services for teenage boys referred to the employer by the State. In so doing, the Board majority again reaffirmed its conclusion in *St. Aloysius Home*[19] that the only basis for declining jurisdiction over a charitable institution is a finding that its activities do not have a sufficient impact on interstate commerce to warrant the exercise of the Board's jurisdiction;[20] and analyzed whether the employer has sufficient control over the employment conditions of its employees to enable it to bargain effectively with a labor organization, under the test set forth in *National Transportation Service*,[21] reaffirmed by *Res-Care, Inc.*,[22] issued the same day.

The Board distinguished *Res-Care*, finding that, in the instant case, the exempt entity does not exercise ultimate discretion over wage and benefit levels. While the employer submits for agency approval minimum-maximum salary ranges (along with other personnel policies it may have) at its initial license application, the state agency does not maintain strict standards for the content of those policies, and the employer largely determines for itself what those salaries and other policies will be. The state agency's minimum and maximum salary ranges are merely guidelines, as is its "policy" suggesting a percentage limit of the employer's budget for salaries. Further, the wage and benefit levels are not directly tied to funding, and computation of the compensation received by the employer from the State is not determined by the proposed operating budget. Thus, the State has little or no control over the setting of salaries, the content of the benefits provided, or the content of other personnel policies, so long as the employer satisfies minimum standards and qualifications.

The Board noted that the minimal limitations on the employment conditions imposed by the agency for child care workers are primarily designed to ensure that the employees remain able to provide the facility's residents with adequate supervision and care and do not significantly limit or disable the employer from bargaining over terms and conditions of employment.[23] Accord-

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[18] 280 NLRB No 79 (Members Dennis, Johansen, and Babson, Member Stephens concurring, Chairman Dotson dissenting)

[19] 224 NLRB 1344 (1976)

[20] See also *Volunteers of America*, 272 NLRB 173 (1984), enfd 777 F 2d 1386 (9th Cir 1985)

[21] 240 NLRB 565 (1979)

[22] 280 NLRB No 78 (Chairman Dotson and Members Dennis, Johansen, and Babson, Member Stephens concurring and dissenting)

[23] The majority also stated it did not give any weight to the State's control of certain operational aspects of the company (setting of school curriculum, enforcing child abuse legislation, conducting a general review of resource allocation among services areas), as the exempt entity is monitoring the provision of services under its licensing program, not limiting in any substantive way the discretion retained by the employer over its own labor relations 280 NLRB No 79, slip op at 14, fn 15

ingly, the Board asserted jurisdiction over the employer because it retains substantial control over economic matters which are central to the employer-employee relationship and which enable it to engage in meaningful collective bargaining.

Member Stephens concurred in the result, citing his concurring and dissenting opinion in *Res-Care, Inc.* Chairman Dotson, dissenting, would return to the policy of *Ming Quong Children's Center*,[24] and decline to assert jurisdiction over this nonprofit, charitable institution unless it has been demonstrated that operations such as this as a particular class have a massive impact on interstate commerce.[25] He finds no such showing here. Moreover, even if this employer were not a nonprofit, charitable institution, he would not assert jurisdiction as he disagrees with the majority's interpretation of the state agency's review authority and finds the ultimate authority for determining primary terms and conditions of its employees' employment belongs to the exempt agency.

D. Educational or Retail Entity

In *College of English Language*,[26] the Board considered whether, for the purpose of setting the discretionary monetary jurisdictional amount, the employer, engaged in the teaching of English as a second language to foreign language students with the object of qualifying them for admission into American colleges and universities, was more properly characterized as an educational institution or a retail establishment.

The Board found that to make the determination whether the Board's discretionary $1 million standard for educational institutions should be applied to the employer's operation, the employer's "teaching English" objective did not end the inquiry, and that it must look closely at the characteristics common to entities to which this jurisdictional standard has previously been applied. In this regard, the Board found no evidence that the employer is accredited by any educational organization or group.

While noting that the Board is not bound by classifications or categorizations made by other governmental bodies, the Board found significant the fact that the employer, once approved for operation under a state education code provision for "nondegree, occupational education," is now authorized under a revised statutory provision applied to institutions offering programs falling somewhere between vocational and advocational and designed to assist consumers who seek redress. Under the revised statute, the employer is expressly exempt from coverage under provisions applying to institutions having educational, profession-

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[24] 210 NLRB 899 (1974)

[25] See dissenting opinions in *Salvation Army of Massachusetts*, 271 NLRB 195 (1984), and *Alan Short Center*, 267 NLRB 886 (1983)

[26] 277 NLRB 1065 (Chairman Dotson and Members Dennis and Johansen)

al, technical, or vocational objectives, and explicitly prohibited from representing that the State has made any evaluation, recognition, accreditation, approval, or endorsement of the institution or education offered. Further, the employer has a nonacademic, age-based qualification for admission, requires miniscule hours in attendance for graduation as compared to other institutions the Board has found educational, and, only on request, gives diplomas which are accepted as evidence of proficiency in English at only five colleges or universities. In addition, the revised regulations authorizing the employer's operations set no requirement as to the quality and content of courses or the qualifications and character of instructors and administrators, leaving the future quality of instruction provided by the employer to self-regulation and market pressures.

On these facts, the Board found the employer substantially dissimilar from the institutions denominated educational to which the $1 million jurisdictional standard had been applied, and more properly classified as a retail establishment providing services to customers and warranting application of the $500,000 jurisdictional standard for retail operations.

III

Board Procedure

A. 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 *MacDonald's Industrial Products*,[1] a Board panel had occasion to determine the validity of an employer's affirmative defense that an 8(a)(1) and (3) complaint be dismissed because the underlying charge was untimely filed. Specifically, the respondent asserted that the 6-month limitation period set forth in Section 10(b) includes the day of the alleged offense. In denying the respondent's motion for summary judgment, the Board, relying on the "controlling" law of *Laborers Local 264 (D & G Construction), Glacier Lincoln-Mercury*, and *Luzerne Hide & Tallow Co.*,[2] held that "computation of Section 10(b) of the Act's 6-month limitation period properly begins the day following the commission of the alleged unfair labor practice."[3]

In *Safety-Kleen Corp.*,[4] the Board panel majority affirmed the judge's dismissal of a charge as being untimely filed under Section 10(b)'s 6-month statute of limitations. It found the charging party was on "notice of facts that created a suspicion" such that he should have filed his unfair labor practice charge within 6 months from the date of his discharge.

According to the facts, the respondent mistakenly believed in early October 1984 employee Arthur Wilson was instigating a union campaign, and discharged him 10 October 1984 on the asserted reason that he was not meeting his sales quota. In April 1985, however, Wilson learned from his former supervisor that the reason for his discharge was "the union." He filed his unfair labor practice charge 6 August 1985.

The judge dismissed the charge as untimely filed, finding that Section 10(b)'s limitations period began to run 10 October 1984. Member Babson and Stephens agreed, finding he was on "notice

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[1] 281 NLRB No 91 (Members Johansen, Babson, and Stephens)

[2] 216 NLRB 40 fn 1, 43 (1975), 189 NLRB 640, 643 (1971), and 89 NLRB 989, 990 (1950), respectively

[3] The Board cited its Rules and Regulations, Sec 102 114

[4] 279 NLRB No 159 (Members Babson and Stephens, Member Dennis dissenting)

of facts that created a suspicion" sufficient to warrant requiring him to file his charge within 6 months of his discharge. They found that Wilson knew he had discussed unions with other employees twice, that, according to one employee, he "should not mention union," and that his discharge was oddly timed—occurring right after his completion of a training seminar to improve his performance.

The majority also adopted the judge's finding that the "fraudulent concealment" theory did not warrant tolling the running of the limitations period because the "mere giving of a pretextual or exculpatory reason, or the failure to reveal the true reason, or all of the reasons for unlawful conduct does not, standing alone, constitute fraud." (Id., slip op. at 5.)

Member Dennis dissented, and would have remanded the case to the judge for further proceedings. She found that Wilson had no reason to suspect the respondent fired him for union conduct, and that the 6-month limitations period of Section 10(b) did not begin to run until Wilson first learned in April 1985 that his discharge may have violated the Act.

B. Language of the Charge

In *Clark Equipment Co.*,[5] the full Board considered whether the printed language of the charge form was sufficient to support the numerous complaint allegations that the employer violated Section 8(a)(1). The original and amended charge contained only allegations of 8(a)(3) and (5) conduct and did not include any specific allegations of independent 8(a)(1) conduct. Therefore, the independent 8(a)(1) allegations of the complaint were dependent solely on the printed language of the charge form NLRB–401 that "by the above acts and other acts, the above-named employer has interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act."

The Board adopted the judge's findings that the 8(a)(1) allegations were properly raised by the complaint and, therefore, were not time-barred by Section 10(b) of the Act.[6] However, the Board footnoted that, notwithstanding this result, it wanted to stress the guidelines in the Casehandling Manual, Sec. 10064.5, which provide: "if the allegations of the charge are too narrow," an amendment should be sought, and that if an amendment is not filed, "the case should be reappraised in this light, and the complaint issued, if any, should cover only matters *related* to the specifications of the charge." (Emphasis in original.)

Applying its decision in *Clark Equipment Co.*, a Board panel in *G. W. Galloway Co.*[7] reversed an administrative law judge's find-

[5] 278 NLRB No 85 (Chairman Dotson and Members Dennis, Johansen, Babson, and Stephens)
[6] *Texas Industries*, 139 NLRB 365 (1962), enfd in relevant part 336 F 2d 128 (5th Cir 1964)
[7] 281 NLRB No 38 (Chairman Dotson and Members Babson and Stephens)

ing that Section 10(b) barred consideration of an 8(a)(1) complaint allegation. The judge had found that the complaint was factually unrelated to an 8(a)(3) and (1) allegation contained in the underlying charge alleging that the employer discriminatorily discharged an employee because of his union or other protected concerted activities. The complaint that issued subsequently alleged only that the employer unlawfully threatened employees with termination. The judge found that the allegation set forth in the complaint was unrelated to the allegation set forth in the charge. Because no other charge or amended charge was filed within the 6-month period following the date of the alleged unlawful threat, the judge found that Section 10(b) barred further proceedings.

The Board found that the judge erred by failing to consider and apply longstanding precedent interpreting the significance of the printed allegation contained in the Board's standard "Charge Against Employer" form asserting that: "By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in section 7 of the Act." The Board held that the 8(a)(1) allegation contained in a complaint was properly raised by the foregoing printed "other acts" allegation set forth in the charge and that Section 10(b) did not bar consideration of that allegation. As it noted in *Clark Equipment*, the Board expressly stressed the importance of following the guidelines set forth in the General Counsel's Casehandling Manual regarding the filing of amended charges in appropriate circumstances.

C. Conduct of Counsel at Trial

In *Baddour, Inc.*,[8] the Board found that the administrative law judge's ruling which limited the participation of one of the respondent's counsel to assisting at counsel's table was not an abuse of the judge's discretion and authority under Sections 102.35 and 102.44(a) of the Board's Rules. The judge had repeatedly warned both counsel for the respondent about arguing after his evidentiary rulings, objecting to questions that the judge previously ruled were proper, needlessly interrupting witnesses' testimony, and making unnecessary statements on the record. These warnings included specific cautions that such conduct would lead to exclusion of counsel. On the 10th day of the hearing, the judge made his ruling limiting participation after the counsel involved persisted in arguing a point despite the judge's instructions to cease and remain quiet. The Board concluded that, under all the circumstances, the ruling was not improper, stating "While we are sensitive to the important role of the attorney-advocate in the administration of justice, we are equally attuned to the interest

[8] 281 NLRB No 84 (Members Johansen, Babson, and Stephens)

furthered by the orderly development of issues and evidence in hearing." It noted that "the Respondent's interests were adequately protected by the judge's willingness to grant the Respondent continuing objections to lines of inquiry considered improper by the Respondent." The Board further found "no merit in Respondent's contention that counsel's repeated objections and argument after adverse rulings were warranted." (Id., slip op. at 2, fn. 2.)

D. Alleged Failure of Service

In *Hopkins Hardware*,[9] the Board reversed the administrative law judge's conclusion that a backpay specification and notice of hearing should be dismissed based on failure of service. The respondent, a partnership comprised of Edgar and Kathleen Mantha, was represented by a California attorney in the underlying unfair labor practice case. The Manthas sold their California business, however, and moved to Canada before the decision finding, inter alia, that the respondent violated the Act by unlawfully discharging certain employees. The Regional Director subsequently issued the backpay specification and notice of hearing and served copies of the specification and notice by registered mail addressed to the respondent's post office box in Canada and, by certified mail, to the California attorney who represented respondent in the underlying unfair labor practice case.

The judge noted that the Federal Rules of Civil Procedure do not provide for service of process in a foreign country unless a statute expressly authorizes such service. He thus concluded that because the Act did not contain such an express provision and the respondent, a resident of Canada, had not consented to be served, service of the specification and notice on the respondent was invalid.

Contrary to the judge, the Board determined that rule 4 of the Federal Rules of Civil Procedure was not controlling and, therefore, did not operate to bar its jurisdiction over the respondent because that rule "deals primarily with service of summons and of original process rather than the service of subsequent pleadings after original jurisdiction has been established." (Id. at fn. 9.) The Board then emphasized that the respondent's California attorney had not moved to withdraw as respondent's counsel and that the respondent did not notify the Board, until after issuance of the backpay specification, that the California attorney who was served no longer represented respondent. "In these circumstances," the Board indicated, "service upon the Respondent's California attorney by registered mail was a form of notice reasonably calculated to give the Respondent knowledge of the proceeding and an opportunity to be heard." (Id. slip op. at 5.) Ac-

[9] 280 NLRB No 146 (Chairman Dotson and Members Johansen and Babson)

cordingly, the Board concluded that "valid and sufficient service was made upon Respondent when a copy of the backpay specification and notice of hearing was served upon . . . their attorney of record in this proceeding by registered mail." (Id., slip op. at 6.)

E. "Party" to Proceeding

In *Clarence E. Clapp*,[10] the Board affirmed its longstanding policy of refusing to consider objections to an election when they are filed by individual employees. A Board panel held that an eligible voter who claimed in a postelection letter that he was denied an opportunity to cast a ballot because the Board agent closed the polls early was not a "party" to the proceeding.

The Board agent in charge of the election had prepared a stipulation, executed by the parties prior to the voting, which provided that the polls would be closed before the previously scheduled closing time in the event all eligible voters had cast ballots. The stipulation also contained the provision that the individual who had subsequently filed the postelection letter would not appear at the polls to vote. The Board agent conducted the election and left the polling area approximately 10 minutes before the scheduled closing time of the polls, and approximately 9 minutes before the individual in issue appeared to cast his ballot.

The Acting Regional Director found that closing the polls before the closing time set forth in the notice of election was directly contrary to the NLRB Casehandling Manual[11] which provides that the polls may not be closed even when it may appear that 100 percent of the eligible voters have voted. The Acting Regional Director concluded that the early closing of the polls insured the disenfranchisement of the individual in issue whose vote would have been determinative, the election had to be set aside, the previously issued certification of results should be revoked, and a second election should be held to enable all eligible voters to have an opportunity to cast a ballot.

In reversing the Acting Regional Director, the Board panel held that individual employees are not "parties" within the definition of "party" set forth in Section 102.8 of the National Labor Relations Board's Rules and Regulations.[12]

The Board panel dismissed the individual's postelection letter as a purported objection made by an individual who was not a "party" to the proceeding and, without reaching the merits in the proceeding, certified the results of the election.

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[10] 279 NLRB No 51 (Chairman Dotson and Members Dennis and Johansen)

[11] Sec 11324

[12] *Westinghouse Electric Corp*, 78 NLRB 315 (1948)

F. Effect of Unappealed "R" Case

In *Hydro Conduit Corp.*,[13] the Board held that a decision and direction of election in a representation case did not foreclose consideration of an unfair labor practice case alleging violations of Section 8(a)(5).

The respondent and the union had been parties to collective-bargaining agreements over a number of years. On the expiration of the most recent agreement, the respondent filed a representation petition. Shortly thereafter the union filed a charge alleging a violation of Section 8(a)(5). The Regional Director issued a decision and direction of election in which he found that the respondent made a prima facie showing of objective considerations supporting a reasonable doubt concerning the union's continued majority support and that a question concerning representation therefore existed. He then recommended dismissal of the unfair labor practice charge.

Although the union did not seek review of the Regional Director's decision in the representation case, it did appeal the dismissal of the 8(a)(5) charge. This appeal was granted by the General Counsel who directed the Regional Director to issue a complaint. After a hearing on the issues raised by the complaint, the judge concluded that he was foreclosed from finding a violation of Section 8(a)(5) by the unappealed decision of the Regional Director in the representation case.

The Board disagreed with the judge's analysis, stressing that the Regional Director's decision in the representation case was based on an administrative determination that the employer made a prima facie showing of objective considerations supporting a reasonable doubt about the union's continuing majority support. Such an administrative determination is not litigable and for that reason the Board has long held that the Regional Director's finding "is not to be regarded as determinative of an employer's obligation to engage in further bargaining, or necessarily dispositive of a related refusal-to-bargain charge filed by an incumbent collective-bargaining representative."[14]

The Board held that the union's failure to appeal the Regional Director's decision in the representation case was not material because even if an appeal had been made, the union, not having access to the respondent's evidence, would have been limited to an assertion that the respondent's "objective considerations" were inadequate. The Board's action on such an appeal would have been based solely on the finding of a prima facie showing by the employer which was not subject to litigation. In such circumstances, the Board's determination on the appeal would be

[13] 278 NLRB No 164 (Chairman Dotson and Members Dennis and Johansen)

[14] Id , slip op at 3, citing *U S Gypsum Co*, 161 NLRB 601, 602, fn 3 (1966)

no more dispositive of the unfair labor practice allegations than was the Regional Director's decision.

The Board concluded that the unappealed decision in the representation case was not controlling. "To hold otherwise would result in a denial of due process. For while an administrative determination is proper in a representation case where no violation of law is at issue, it is not proper in a case which involves allegations that unfair labor practices have been committed. In such cases, the Act requires that the parties be afforded an opportunity to fully litigate all the relevant issues."[15]

[15] Id., slip op. at 4

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 the 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. 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.

In *Mario Saikhon, Inc.*,[1] the Board panel concluded that individuals who work on field packing machines are employees and not "agricultural laborers" within the meaning of Section 2(3) of the Act.

The employer grows, harvests, packs, and ships broccoli, cantaloupes, and other agricultural commodities. The employer harvests and packs the produce of other growers as well as its own. Prior to late 1983, the employer transported harvested broccoli and cantaloupes to an off-the-field packing shed where the cantaloupes were culled, sorted by size, and packed, and the broccoli were culled, secured in bunches, and packed. In late 1983 the employer stopped packing broccoli and cantaloupes in the packing shed and began performing the same operation in the growing fields on field packing machines. Both the union that represented the packing shed employees and the union that represented the field employees sought recognition from the employer as the representative of the employees who worked on the field packing machines. In response, the employer filed two RM petitions. One petition sought an election among, inter alia, employees engaged in packing, closing, loading, and box-making on the cantaloupe packing machine. The other petition sought an election among, inter alia, employees engaged in trimming, bunching, packing, closing, and loading on the broccoli field packing machine. The Regional Director concluded that the packing machine employees were exempt agricultural laborers and dismissed the petitions. The Board granted the employer's request for review.

The Supreme Court has recognized that the term "agriculture" as used by the Board has two meanings. The primary meaning includes farming in all its branches; for example, cultivation and tillage of the soil. The second, broader meaning includes practices performed by a farmer or on a farm incidental to or in conjunction with farming operations.[2]

The panel agreed with the Acting Regional Director's conclusion that the field packing operation did not fall within the secondary meaning of agriculture. The panel cited well-settled Board law that "employees will not be found exempt agricultural employees under the secondary definition where, as here, a regular and substantial portion of their work effort is directed toward hauling or processing the crops of a grower other than the

[1] 278 NLRB No 166 (Chairman Dotson and Members Dennis and Stephens)

[2] See *Farmers Reservoir & Irrigation Co v McComb*, 337 U S 755, 762–763 (1949)

grower by whom they are employed." (278 NLRB, slip op. at 6–7.)

The panel did not agree, however, with the Acting Regional Director's conclusion that the individuals at issue were agricultural laborers within the primary definition because they are engaged in "harvesting." For the purpose of applying the agricultural exemption, "harvesting" is defined as all operations customarily performed in connection with the removal of crops from their growing position, but does not extend to operations subsequent to and unconnected with the actual process whereby crops are severed from their attachment to the soil or otherwise reduced to possession. The panel pointed out that "[t]he Board has held that employees who sort and pack produce in an off-the-farm packing shed are not engaged in direct farming operations of the type enumerated in the primary definition of agriculture." (Id., slip op. at 7.) The panel concluded that these functions do not become primary when they are performed in the open air in the field itself in close proximity to the workers who actually sever the crop from the ground and in one continuous operation with the severing function. The panel conceded that the definition of harvesting is not limited to severing the crop from the soil, but can extend to other activities such as gathering severed crops to a central collection point. The panel concluded, however, that (id., slip op. at 8):

> We cannot find by analogy to the gathering of severed crops that the packing operation is now part of the actual process whereby the crops are severed or otherwise reduced to possession. The gathering of crops is a natural extension of severing the crops from the soil and therefore can be reasonably characterized as part of a single process whereby crops are reduced to possession. The culling, sorting by size, bunching, and packing of crops, on the other hand, is an operation demonstrably different in kind and distinct from severing the crops from the soil that achieves more than merely reducing the crops to possession.

Accordingly, the Board reinstated the employer's RM petitions and remanded the case for further appropriate action.

In *Trustees of Boston University*,[3] the Board, found that the department chairmen and full-time faculty of Boston University were managerial because they possessed managerial authority nearly identical to that possessed by the faculty in *Yeshiva University*,[4] and as such are not employees protected by the Act. It adopted the recommended order of the judge that the university's chapter of the American Association of University Profes-

[3] 281 NLRB No 115 (Chairman Dotson and Members Johansen, Babson, and Stephens)

[4] *NLRB v Yeshiva University*, 444 U S 672 (1980) See 45 Ann Rep 17–176 (1980)

sors may not act as bargaining representative for full-time faculty members.

Applying the criteria enunciated in *Yeshiva*, the Board stated (281 NLRB No. 115, slip op. at 1–2):

> [T]he faculty has absolute authority over such matters as grading, teaching methods, graduation requirements, and student discipline. Additionally, the faculty is the moving force and almost always effectively controls matriculation requirements, curriculum, academic calendars, and course schedules. The faculty also plays an effective and determinative role in recommending faculty hiring, tenure, promotions, and reappointments.[3] All of the matters listed are important facets of university policy. That ultimate authority for decision making at the University rests with the president and board of trustees does not alter the fact that, in practice, faculty decisions on all those policy matters are effectuated in the great majority of instances. Nor does the fact that the administration occasionally has made and implemented policy decisions without faculty input detract from the collegial managerial authority consistently exercised by the faculty.

[3] We particularly not [sic] their authority to effectively veto curriculum and personnel decisions

Accordingly, the Board dismissed the complaint that the university had refused to bargain with the Association in violation of Section 8(a)(5).

2. Health Care Unit

In *Baker Hospital*,[5] the Board granted review of a Regional Director's decision and direction of election and concluded that, under the standard set forth in *St. Francis Hospital (St. Francis II)*,[6] there was an insufficient disparity-of-interests between the business clericals and activities and social services directors and the petitioned-for unit to warrant excluding the clericals and directors from the unit.

The Board stated that the traditional community-of-interests analysis does not apply in the health care industry when more is required to justify a separate unit than in a traditional industrial or commercial facility. Instead, a stricter standard applies which "focuses on the disparity-of-interests among employee groups which would inhibit the fair representation of employee interests." Quoting from the *St. Francis* decision the Board in *Baker* explained that "the appropriateness of the petitioned-for unit is judged in terms of normal criteria [citations omitted], but sharper than usual differences (or 'disparities') between the wages, hours, and working conditions, etc., of the requested employees and

[5] 279 NLRB No 38 (Chairman Dotson and Members Dennis, Johansen, and Babson)
[6] 271 NLRB 948 (1984)

those in an overall professional or nonprofessional unit must be established to grant the unit."

The Board noted that the disparity-of-interests test responds to the congressional directive to avoid undue proliferation of collective-bargaining units in the health care field by attempting to accommodate broader units. The Board found that the disparity-of-interests test balances the interests served by the congressional directive and the employees' right to representation.

In *North Arundel Hospital Assn.*,[7] the Board considered the appropriateness of a unit limited solely to the employer's registered nurses, applying the "disparity of interests" test as defined in *St. Francis Hospital.* In so doing, the Board found that the smallest appropriate unit must consist of all the employer's professional employees, including the registered nurses, contrary to the Regional Director's determination that a "strong disparity exists between the registered nurses and all other professional employees, and that the registered nurses' interests in collective bargaining are distinctly different from those of the other professional employees."[8] (279 NLRB No. 48, slip op. at 2–3.)

The Board noted that certain benefits unique to the nursing department were not only applicable to the registered nurses, but to the nonprofessional employees of that department as well. Moreover, although the Regional Director found little evidence of interchange of duties or functions between registered nurses and other professionals, the Board stated that "it is clear that this lack of interchange is inherent to the health care industry because all of the professional employees—including registered nurses—have received specialized education and training in their own fields so as to make job interchange impossible, or even illegal, where state certification or licensure is required." (Id., slip op. at 4.)[9] Thus, all the employer's professional employees share common policies and procedures and a sufficient degree of interaction and contact to warrant finding that the smallest appropriate unit for bargaining must be an overall professional unit.

3. Merged Unit

In *Green-Wood Cemetery*,[10] the Board considered whether a petitioned-for unit of office clerical employees was inappropriate for a decertification election on the basis that the unit had merged with a unit of field employees. The union was certified on 25 May 1979 as the exclusive bargaining representative of the employer's 110 field employees, and a 3-year collective-bargaining agreement was executed on 24 July 1979. The unit descrip-

[7] 279 NLRB No 48 (Chairman Dotson and Members Dennis, Johansen, and Babson)

[8] The Regional Director based his conclusions in part on the registered nurses' direct patient care responsibilities, which the Board noted has long been rejected as a basis for making unit determinations in this industry

[9] See *NLRB v St Francis Hospital*, 601 F 2d 404, 419 (9th Cir 1979)

[10] 280 NLRB No 157 (Members Johansen, Babson, and Stephens, Chairman Dotson dissenting)

tion in the contract's recognition clause specifically excluded office clerical employees. Following a card check later in 1979, however, the employer voluntarily recognized the union as the exclusive bargaining representative of the office clerical employees. On 10 December 1979 the parties executed a collective-bargaining agreement which, in addition to containing a number of provisions applicable to clericals only, incorporated the field employees' agreement by deleting the exclusion of the office clerical employees from the recognition clause.

The Regional Director found that the petitioned-for unit was inappropriate on the basis that a merger had occurred. In addition, he found further evidence that the units had been merged from the facts that during 1982 contract negotiations the union had a single negotiating committee for all employees, held a single contract proposal meeting for all employees, and held a single ratification vote. The Regional Director also noted that the parties entered into a single contract extension, that there were no separate sessions for proposals related to the clericals, and—most important—that the parties retained the merged recognition clause from the 1979 agreement. Finally, the Regional Director noted that since 1979 the union had a single shop steward for all employees and that there were no written or oral statements by either party expressing an intention to maintain separate units. Relying on *Scott Paper Co.*,[11] *Armstrong Rubber Co.*,[12] and *W. T. Grant Co.*,[13] the Regional Director found that the parties intended to merge the field employees and office clerical employees into a single overall unit. Thus, applying the well-settled rule that the unit appropriate in a decertification election must be coextensive with the certified or recognized unit,[14] the Regional Director concluded that only a merged unit of field employees and office clerical employees is appropriate in this case.

The Board panel majority agreed. Relying on *Gibbs & Cox*,[15] the panel majority found that the parties' entire course of conduct following recognition of the office clerical unit in 1979 established an intent to merge the office clerical unit with the field employees unit. Voting with the panel majority, Member Stephens noted that this case, strictly speaking, did not involve the "merger doctrine" because the clericals did not seek separate certification and were never expressly recognized as a separate unit for bargaining purposes. The panel majority concluded that finding the appropriate unit in the decertification election to encompass the field employees as well as the office clerical employees best achieved the "reasonable balance the Board seeks to

[11] 257 NLRB 699 (1981)
[12] 208 NLRB 513 (1974)
[13] 179 NLRB 670 (1969)
[14] *Campbell Soup Co.*, 111 NLRB 234 (1935)
[15] 280 NLRB No 110

achieve between the aims of assuring freedom of employees' choice and fostering established bargaining relationships."[16]

Chairman Dotson, dissenting, disagreed with the panel majority's conclusion that the petitioned-for office clerical unit by itself was inappropriate for conducting the decertification election. The Chairman stated that he did not adhere to the merger doctrine in determining the appropriate unit in cases involving the Section 7 rights of employees to reject or change their bargaining representative. Citing the formula originally set forth in his dissent in *Gibbs & Cox*, the Chairman stated: "Absent unusual circumstances, any unit that was appropriate for the purpose of selecting a bargaining representative remains appropriate for the purpose of rejecting that representative or obtaining a new one."[17]

4. Multiemployer Unit

In *Vincent Electric Co.*,[18] a panel majority found that an employer which signed an IBEW "Letter of Assent-A" thereby authorized a multiemployer association to act as its collective-bargaining representative and agreed to become part of a multiemployer bargaining group. The panel majority therefore dismissed a petition for a deauthorization election in a bargaining unit confined to the employees of the single employer.

The employer signed an IBEW Letter of Assent-A following a strike and picketing by its employees. The employer also negotiated a separate memorandum of understanding under the terms of which it was permitted to pay then-existing wages and benefits for 6 months or until work on existing contracts was completed. The Regional Director found that the memorandum negotiated with the union demonstrated individual rather than group bargaining, and belied the clear evidence of required unequivocal intent to be mutually bound in a multiemployer unit. Thus, he found that the employer did not authorize the group to negotiate future contracts on its behalf but merely adopted, with substantial modifications, the results of the negotiations between the union and the multiemployer association. The Regional Director directed a deauthorization election in a unit confined to the employees of the employer.

The panel majority noted that IBEW local unions have been utilizing letters of assent identical in all material respects to the letter of assent signed by this employer for over 20 years, and the Board has consistently held that an employer which executes such a letter has agreed to become part of a multiemployer bargaining group. It found those precedents to apply to this case. The majority did not find the employer's execution of the separate memorandum of understanding to demonstrate that the em-

[16] Id., slip op. at 6

[17] 280 NLRB No. 157, slip op. at 7

[18] 281 NLRB No. 122 (Members Johansen and Babson, Chairman Dotson dissenting)

ployer did not intend to pursue group bargaining. Permitting the employer to pay its current wages for 6 months or until its current contracts were completed is in no way inconsistent with an intention to be bound by group bargaining, it found. The Letter of Assent-A looks toward future contracts as well as the current one, and the memorandum also provides that all future jobs are to be performed under the multiemployer association's contractual terms, the majority noted.

Dissenting Chairman Dotson agreed with the Regional Director that the employer never intended to become, nor did it ever become, part of a multiemployer bargaining group. He observed that the creation of a multiemployer bargaining unit is consensual, and must be voluntarily entered into by the employers and the union. Here, he found that although the employer ostensibly authorized the multiemployer association to bargain on its behalf by signing the Letter of Assent-A, it at the same time engaged in a course of individual bargaining demonstrating a contrary intent. The employer's execution of the Letter of Assent-A does not constitute clear evidence of the intent to be bound by group bargaining when its actions were blatantly contrary to the delegation of bargaining authority it was signing, he concluded. Lacking evidence of that intent, he would find that it has not been shown that Vincent Electric became part of the multiemployer group and would find a unit confined to the employees of that employer is appropriate and direct a deauthorization election in the single employer unit.

B. Election Objections

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.

Electioneering is permissible under the Act. 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 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.

1. Threats of Violence

In *Sequatchie Valley Coal Corp.*,[19] the Board considered an employer's objection to an election which alleged that supporters of the union threatened voters with violence if they did not support the union.

The hearing officer found that an employee who supported the union, Seals, told employee Smith, in the presence of a third employee, that if Smith did not support the union he would "burn him out." Smith discussed the threat with other employees up to the date of the election. An employee who had earlier asked Smith to sign an authorization card asked if he had decided to go for the union. When Smith replied "No," the employee told him he had better hurry up and make up his mind before they "sicked" Seals on him.

On another occasion during the critical period, a third union supporter said that the union would strike if it did not get a contract within 2 or 3 months. When Smith replied that he would still go to work, the employee said "that's when the killing would start." Smith asked the employee if he would kill a man over that. The employee answered that "he wouldn't have to, that the union people have people in the woods to do that."

In the week before the election, another union supporter told Smith that if a named employee had had an antiunion meeting, "either George [an employee] would have shot him or Preacher [another employee] would have grabbed him and choked the life out of him." (Id., slip op. at 3.)

The Board found that "a series of serious threats was made throughout the election period and disseminated among a significant number of employees. Further, the threats were of an extremely serious nature, including threats of killing and bodily harm, which the Board does not take lightly even when made to one employee." (Ibid.) The Board found the cumulative effect of the threats created an atmosphere of fear which precluded a fair election and ordered a new election.

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[19] 281 NLRB No 108 (Members Johansen and Babson, Chairman Dotson concurring)

2. Alleged Union Misconduct

In *Dart Container*,[20] a Board panel held that a union does not interfere with a representation election by promising strike benefits and other benefits as an incident of union membership. The union, Teamsters Local 748, had distributed during its organizational campaign leaflets guaranteeing employees that they would be eligible for strike benefits, emphasizing the size of the union's strike fund, advising employees that the union provided free legal help to all its members, and promising to continue to do so after the election.

The panel initially found that the union had not improperly conditioned the benefits on preelection support; should the union have won the election, all employees were potentially eligible.[21] The panel then considered the substance of the union's promises.

The panel concluded that the union's strike-benefits guarantee did not interfere with the election, stating: "The extent to which a union may be able to withstand strikes is a natural employee concern, and we have long held that promising strike benefits—even generous benefits—does not impair free choice."

In finding that the union had not interfered with the election by advising employees that it provides free legal help to all its members and promising to continue to do so after the election, the panel distinguished *Crestwood Manor*,[22] on which the employer relied. In that case, the Board found objectionable the union's promise to hold a $100 raffle in the event it won the election. In *Dart Container*, by contrast, the union promised to provide free legal help only as an incident of union membership. The panel found that this kind of promise "does not suggest to employees that their votes are being purchased." The panel further found, "Just as an employer can call attention to benefits that its employees in the proposed unit currently enjoy, so, too, can a union point out the benefits its members currently enjoy." (277 NLRB at 1370.)

The Board certified the union as the exclusive representative of the employer's production and maintenance employees, truckdrivers, and warehousemen.

In *Worths Stores Corp.*,[23] a Board panel, reversing the Regional Director, found that an altered facsimile ballot circulated by the petitioner did not tend to mislead employees into believing that the Board favored the petitioner, and therefore that the election should not be set aside.

The document at issue was prepared by union organizer Rosemary Behrman and was mailed to all eligible voters on 29 April

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[20] 277 NLRB 1369 (Chairman Dotson and Members Dennis and Babson)

[21] The panel contrasted *NLRB v Savair Mfg Co*, 414 U S 270 (1973), in which the Supreme Court found that the union in that case interfered with an election by limiting an offer to waive initiation fees to those employees who demonstrated support for the union before the election

[22] 234 NLRB 1097 (1978)

[23] 281 NLRB No 160 (Chairman Dotson and Members Babson and Stephens)

1986, prior to the 15 May 1986 election. The document was enclosed in envelopes which included the petitioner's name and return address. At the top of the document, the word "Congratulations" twice appeared in bold print and capital letters, forming a semicircle around salutations to each employee and general information regarding secret-ballot elections. Directly below was specific information concerning the date, time, and place of the election; a list of benefits for which employees could bargain; and instructions for employees with questions to call "Rosemary" at the home and work telephone numbers provided. The bottom part of the document consisted of a facsimile of a portion of the Board's official ballot. An "X" appeared in the "Yes" box, and the petitioner's name was placed above the box.

To determine whether the altered ballot was misleading, the panel applied the two-part analysis set forth in *SDC Investment*.[24] Pursuant to *SDC*, an altered ballot which, on its face, clearly identifies the party responsible for its preparation is not objectionable; if, however, the source is not clearly identified, it is necessary to examine the nature and contents of the material on a case-by-case basis to determine whether the document is misleading.

Under the first part of the *SDC* analysis, the panel found that the reference to "Rosemary" on the face of the document did not sufficiently identify the petitioner as the source of the altered ballot. Distinguishing *Professional Care Centers*,[25] on the basis of the specificity of the information provided, the panel noted in this case that Rosemary's last name was not provided, her union title or affiliation was not indicated on the document, and there was no direct statement indicating that the petitioner was the preparer of the document.

Citing *C. J. Krehbiel Co.*,[26] the panel found, under the second part of the *SDC* analysis, that, on the basis of both content and physical placement, the document was not misleading. Regarding the content of the partisan additions, the panel found that it would be unreasonable for an employee to assume that the Board would include congratulatory headings and individualized salutations on its official publication and, therefore, that the "partisan stance" of the document was readily apparent. Regarding the document's physical appearance, the panel, citing *Rosewood Mfg. Co.*,[27] found that it was clear that the sample ballot had been cut from another form and added to the partisan material. Contrasting *SDC*, the panel found that the document before it did not appear "official." Thus, the panel observed that the printed material was not centered on the page, markings from a photocopy machine were evident, the official Board form number was

[24] 274 NLRB 556 (1985)
[25] 279 NLRB No 106
[26] 279 NLRB No 114
[27] 278 NLRB No 103

barely evident, and the sample ballot was only a partial reproduction.

Finally, the panel considered extrinsic evidence in examining the nature and contents of the document. The panel found that the employees' familiarity with the name "Rosemary," gained from a prior union leaflet, together with the fact that a clearly partisan document was mailed in union envelopes, further supported the conclusion that the employees would not think that the material came from the Board, or that the Board in any way endorsed the petitioner.

3. Third-Party Conduct

In *Electra Food Machinery*,[28] a Board panel considered the employer's objection that third-party threats of physical harm and property damage to known or suspected antiunion employees created a general atmosphere of fear and reprisal that interfered with the election. Contrary to the hearing officer's recommendation that the objectionable conduct be overruled on the ground that there was no evidence that the employees acted in fear of threats being carried out, the Board pointed out that the test is an objective one and that the threats were widespread and continued over a 2-month period up to election day and reasonably tended to create a general atmosphere of fear and reprisal rendering a free election impossible.

In *Otterbacher Mfg.*,[29] the Board considered the effect on an election of a third-party's assertion about the employer's reaction to union organization of its employees.

In April 1985, the employer's president, Gary Otterbacher, interviewed a law firm and a management consultant about representing the employer in the Steelworkers organizing campaign. After he was informed that the law firm had been chosen, the management consultant billed the employer $900 which the employer refused to pay.

During the first week of May a copy of a memorandum typed on the management consultant's letterhead was anonymously posted on an employer bulletin board. The memorandum stated, inter alia: "Without the union to help them, the employees are going to be fired and abused simply because they sou[ght] the union to represent them, and the fact that they might vote against the union in the election will not stop Otterbacher." The memorandum asserted that the consultant had refused to represent the employer because of Otterbacher's plans and that "without the Steelworkers to help them, they don't stand a chance."

The employer removed the memorandum the same afternoon that it was posted. Within 2 days, Otterbacher called meetings of all the employees in which he explained that the consultant was

[28] 279 NLRB No 40 (Chairman Dotson and Members Dennis and Babson)
[29] 279 NLRB No 160 (Members Babson and Stephens, Member Johansen concurring)

angry because he had not been hired and denied the memorandum's allegations.

Analyzing the facts on a third-party interference basis, the hearing officer concluded that the consultant's memorandum created an atmosphere of fear and coercion which interfered with employee free choice and recommended that the election be set aside.

The Board found that there was no evidence which linked the petitioner to the production or posting of the memorandum and found that mere reference to it in campaign literature did not create responsibility.

Evaluating the facts on an objective basis, the Board overturned the hearing officer's finding and certified the election. Specifically, the Board noted that the single, third-party assertion was posted for a short time, that Otterbacher soon explained the consultant's motive and denied any intent to retaliate against the employees.

The Board's decision in *Frates Inc.*,[30] was distinguished because that employer was responsible for the memorandum detailing a plant closure plan if that union won the election and because the employer did not disavow the memorandum. The present case was likened to *U.S. Electrical Motors*,[31] in which the Board found no atmosphere of fear based on a third-party's newspaper article which implied that the employer would close if the union won.

4. Employer Raffle

In *National Gypsum Co.*,[32] a Board panel, inter alia, sustained the union's objection alleging that the employer interfered with the election by conducting raffles for employees shortly before the election was held. The record showed that on two occasions in March 1985, before the election was held on 14 March, the employer conducted simultaneous raffles at three different plant locations. Employee participation in raffles was voluntary. Those wishing to participate filled out entry forms that required them to answer multiple choice questions about subjects discussed in the employer's campaign and to give their names or social security numbers. A winner was drawn at each of the six raffles from among the contestants who had perfect scores on the questions. Prizes for the first raffles were cash sums of $261 each; prizes for the second raffles were television sets valued about $270 each.

The panel concluded that the raffles and the accompanying prizes, in the circumstances, tended to interfere with employee free choice in the election. In so concluding, the panel noted that the raffles were conducted and the prizes, which were of substantial value, were awarded within 2 weeks before the election.

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[30] 230 NLRB 952 (1977)

[31] 261 NLRB 1343 (1982)

[32] 280 NLRB No 116 (Chairman Dotson and Members Dennis and Babson)

The panel also relied on the evidence that participants in the raffles were required to identify themselves on the entry forms, thereby enabling the employer to know which employees participated and which did not, and which employees were familiar with its campaign material. The panel found that this information indicated to the employer where additional campaign efforts should be focused and afforded the potential for directing pressure at particular employees. Accordingly, the panel sustained the union's objection and set aside the election.

5. Bilingual Balloting

In *Unibilt Industries*,[33] the Board reversed a Regional Director's decision and held that an election need not be set aside when bilingual ballots were not provided. During the election, a 7-year Vietnamese worker entered the lunchroom voting area to fill out his timecard. The Board agent told him if he did not intend to vote, he must leave the area. He left. The investigation revealed that he did not speak English fluently and did not understand the agent's verbal directive, but did understand the motion to leave. The Regional Director found that he was not afforded an opportunity to obtain information about the election because there were no foreign language notices or ballots. The Board reversed, finding that neither party notified the Regional Director that bilingual materials were necessary and that it is the parties' responsibility to notify the Board that they are needed. The Board also stated that the employer was in the best position to know of the need for foreign language materials.

6. Picket Misconduct

In *Avis Rent-A-Car System*,[34] the Board held that a union is responsible for the actions of its authorized pickets even if not specifically authorized or specifically forbidden.

The petitioner represented the employer's Philadelphia, Pennsylvania mechanics. In 1981, the petitioner filed a representation petition seeking to also represent the employer's shuttlers, employees who pick up and return cars from the employer's Norwitch Drive facility in Philadelphia to the employer's other Philadelphia locations.

Because of an impasse in negotiations, the mechanics unit struck on 18 September 1981. Only the mechanics picketed the Philadelphia locations. On 22 October 1981 the election among the shuttler unit was held, which the union won. The employer's election objections generally alleged that because of strike misconduct attributable to the union, a general atmosphere of fear and reprisal was created that interfered with employee free

[33] 278 NLRB No 117 (Members Dennis, Johansen, and Babson)
[34] 280 NLRB No 60 (Members Dennis and Babson, Chairman Dotson dissenting)

choice in the election. Members Dennis and Babson disagreed, and certified the union. Chairman Dotson dissented.

The facts are undisputed. Briefly, when the strike began, the petitioner immediately set up a picket line at the Norwitch Drive facility. The pickets engaged in the following acts of picket line misconduct that Chairman Dotson and Member Dennis attributed to the Petitioner. Thus, on 22 September and again on 24 September 1981 pickets blocked a gasoline truck from entering the facility to make a delivery. An unidentified picket delayed cars entering the facility for up to 5 minutes, slapped the rear fender of these cars with his hand, and put picket signs on the window of a rental car that stalled on the main driveway. On several other occasions, pickets either slapped or spit next to cars that crossed the picket line and entered the facility. And in two instances, employees who worked as shuttlers during the strike had some damage done to their cars while parked outside that facility. Finally, on election day, employer officials founded roofing nails on the driveway or on other areas of the facility.

A majority disagreed with the hearing officer's conclusions that the union was not responsible for the misconduct of the unidentified picket, for the damage done to the cars of two employees who worked as shuttlers during the strike, and for the scattering of roofing nails on several days during the strike. The majority observed that when a union authorizes a picket line, "it is required to retain control over the picketing . . . [and] it must bear the responsibility for . . . misconduct." They found that the Petitioner was responsible for the unidentified picket's misconduct because a union has "an affirmative obligation to control the actions" of such pickets. In examining the testimony, they found it "reasonable to infer" that the petitioner knew the pickets were scattering nails but failed to take "more effective steps to prevent this misconduct." They also found that the petitioner's pickets were responsible for damage to the cars because neither car had been damaged on other occasions while parked inside the facility during the strike. Member Babson dissented, and found that the conduct engaged in by the unidentified picket and by unknown perpetrators had not been shown to be attributable to the union. He agreed with the hearing officer that the union could only be held accountable for blocking the entrances. He further stated, however, that even if all the conduct were attributable to the union, it did not rise to the level of objectionable conduct sufficient to set aside the election.

Members Dennis and Babson agreed with the hearing officer, however, that the petitioner's misconduct, when considered cumulatively, did not reasonably tend to interfere with the shuttler's free and uncoerced choice in the election. They found that although the strike lasted about 6 weeks, "there were very few incidents of misconduct and those that did occur were relatively mild, were not directed at the shuttlers, and were limited for the

most part to the first week of the strike." (Id., slip op. at 6.) The majority also found that other acts of misconduct occurring after the first week—the spitting next to, or slapping of, cars crossing the picket lines; two instances of property damage to the personal cars of employees crossing the picket lines; and some nail scattering—also did not interfere with the election. The majority also found that the employer failed to demonstate that knowledge of these incidents was disseminated among the voters, and further observed that no voter witnessed any of the picket line misconduct.

Finally, the majority emphasized, contrary to the dissent's assertion, that it was not tolerating the picket line misconduct in the case. It stated that the issue was not whether the Petitioner violated the Act by engaging in the picket line misconduct, but "whether the misconduct interfered with the shuttlers' free choice in the election." (Id., slip op. at 9.) They noted there was no evidence that any shuttler witnessed any instance of picket line misconduct, and stated that the dissent merely assumed that "all or almost all the shuttlers worked during the strike and would have observed or learned of the picket line misconduct." (Id., slip op. at 10.) Under the circumstances, the majority stated it would not assume dissemination.

Chairman Dotson dissented. While agreeing with Member Dennis that the petitioner was responsible for the unidentified picket's misconduct, for the damage done to the car of two employees, and for the scattering of roofing nails on several days during the strike, he also found that such misconduct required a new election. The Chairman found that the petitioner's misconduct sent a "loud and clear" message to the voters: "do not oppose the Petitioner."

And, unlike Members Dennis and Babson, the Chairman found that the petitioner's picket line misconduct was known to a "substantial number" of shuttlers. Accordingly, the Chairman would have set the election aside.

V

Unfair Labor Practices

The Board is empowered under Section 10(c) of the Act to prevent any person from engaging in any unfair labor practice (listed in Sec. 8) affecting commerce. In general, Section 8 prohibits an employer or a union or their agents from engaging in certain specified types of activity which Congress has designated as unfair labor practices. The Board, however, may not act to prevent or remedy such activities until an unfair labor practice charge has been filed with it. Such charges may be filed by an employer, an employee, a labor organization, or any other person irrespective of any interest he or she might have in the matter. They are filed with the Regional Office of the Board in the area where the alleged unfair labor practice occurred.

This chapter deals with decisions of the Board during fiscal year 1986 which involved novel questions or set precedents that may be of substantial importance in the future administration of the Act.

A. Employer Interference With Employee Rights

Section 8(a)(1) of the Act forbids an employer "to interfere with, restrain, or coerce" employees in the exercise of their rights as guaranteed by Section 7 to engage in or refrain from engaging in collective-bargaining and self-organizational activities. Violations of this general prohibition may be a derivative or by-product 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. Forms of Employee Activity Protected

The forms that protected concerted activity may take are numerous. The following cases decided by the Board during the past year provide a representative sample of the types of activity it examined.

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

In *Meyers Industries*,[2] on remand from the U.S. Court of Appeals for the District of Columbia Circuit, the Board reconsidered its decision in *Meyers I*,[3] in which a Board majority reversed the judge's finding that an employer violated Section 8(a)(1) by discharging an employee for engaging in concerted activity of refusing to drive an unsafe vehicle and in reporting the vehicle to state authorities. The court's remand, requiring reconsideration by the Board in light of the Supreme Court's decision in *City Disposal*,[4] was accepted by the Board as the law of the case, whereupon it decided to adhere to its original decision and again dismissed the complaint.

The Board, on analyzing labor legislation enacted over the years and Supreme Court decisions and citing applicable treatises, concluded that it is protection for joint employee action that lies at the heart of the Act, and that the *Meyers I* definition requiring some linkage to group action in order for conduct to be concerted was a logical reading of Section 7. Further, the Board found *Meyers I* to be consistent with the Supreme Court's decision in *City Disposal*, which the Board found established several guiding principles concerning what might constitute a permissible definition of concerted activities. First, such a definition would include some, but not all, individual activity; second, inasmuch as an essential component of Section 7 is its collective nature, a definition of concerted activity should reflect this component as well; and, third, like the Board in *Meyers I*, the Supreme Court in *City Disposal* separated the concept of "concerted activities" and "mutual aid or protection." Keeping these objectives in mind, the Board found its definition struck a reasonable balance.

In response to the court of appeals' opinion raising several questions concerning whether individual activity was covered by the *Meyers I* definition, the Board found *NLRB v. Lloyd A. Fry Roofing*[5] distinguishable because, unlike in that case, there was no evidence that the employee in the instant case at any relevant time or in any manner joined forces with any other employee, or by his activities intended to enlist the support of other employees in a common endeavor.

Similarly, the Board discerned no basis on which the *Meyers I* standard deviated from cases noted by the court of appeals in which concerted activity was found when an individual, not a designated spokesman, brought a group complaint to the attention of management. The Board also found cases subsequent to *Meyers I* cited by the court of appeals, not contrary to the principle therein that the questions of whether an employee has engaged in concerted activity is a factual one, and when the record

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[2] 281 NLRB No 118 (Chairman Dotson and Members Babson and Stephens)
[3] 268 NLRB 493 (1984)
[4] *NLRB v City Disposal Systems*, 465 U S 822, 835 (1984)
[5] 651 F 2d 442 (6th Cir 1981)

evidence demonstrates *group* activities, whether "specifically authorized" in a formal agency sense, or otherwise, the Board shall find the conduct to be concerted.

Also in response to the court of appeals' opinion, the Board stated that it intended *Meyers I* to be read as fully embracing the view of concertedness exemplified by the *Mushroom Transportation*[6] line of cases, and reiterated that its definition of concerted activity in *Meyers I* encompasses those circumstances in which individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.

While acknowledging that efforts to involve the protection of statutes benefiting employees are efforts engaged in for purpose of "mutual aid or protection," the Board considered the separate "concerted activity" issue and found that the doctrine of constructive concerted activity stemming from an employee's invocation of a statute could not be regarded as the extension of concerted activity in a realistic sense because the relationship between some kinds of individual conduct and collective employee action may be "so attenuated" as not to mandate inclusion of that conduct in the "concerted activity" clause.

With respect to the question whether overall public policy considerations should require the Board to protect purely individual activity aimed at receiving employer compliance with other statutes that benefit employees, the Board noted that, although it has the duty to construe labor laws to accommodate the purposes of other Federal laws, it was not empowered, as noted in *Meyers I*, to correct all immorality or illegality arising under Federal and state laws.

Finally, the Board did not view the discharge of the employee herein as having a "chilling effect" on the exercise of Section 7 rights by other employees. He acted alone and without an intent to enlist the support of other employees, and the record failed to establish that his purely individual activities were "related to other employees' concerted activities." Even assuming that an otherwise lawful discharge may have some remote incidental effect on other employees, such an incidental effect does not render the discharge lawful.

In *Quality C.A.T.V.*,[7] a Board panel dealt with the question of whether an employer violated Section 8(a)(1) when it discharged two linemen who refused to continue to install television strands on utility poles after they had become wet from a rain shower.

Installation work had been interrupted by the shower and, at the supervisor's suggestion, the crew went to a nearby restaurant to wait out the shower. The two linemen involved in the work refusal decided not to climb poles anymore that day when their

[6] *Mushroom Transportation Co v NLRB*, 330 F 2d 683 (3d Cir 1964)

[7] 278 NLRB No 156 (Members Dennis and Johansen, Chairman Dotson dissenting)

truck became disabled and they had to walk to the restaurant in the rain. When the crew returned to the worksite after the rain subsided, the two linemen refused the supervisor's instructions to return to work.

The panel majority found that the two linemen had acted in concert to protest the requirement that they climb poles when wet, a condition of their employment. The majority reasoned that the protest over an employment condition was protected activity whether the participants acted because of concern over their safety, their personal comfort, or the unsympathetic attitude of their supervisor. The majority noted that the employees carried out the protest in a permissible manner, without violence and without preventing the employer from operating with other employees.

Chairman Dotson dissented, taking the position that the concerted conduct was unprotected because it did not relate to working conditions, but rather to issues of personal conflict between the linemen and their supervisor.

In *United Technologies Corp.*,[8] a panel majority found, on the basis of the parties' stipulated facts, that the respondent did not violate Section 8(a)(1) by maintaining and enforcing a sign display rule for its Southington plant employees. This rule permitted the common display of union materials on employee vehicles, including "bumper stickers, window stickers, or similar ornamentation," but prohibited "purposely conspicuous displays intended to attract attention to promote a candidacy, organization or product."

The respondent applied this rule to a situation involving employee Joseph Gallagher. Gallagher had driven his van to the respondent's Southington facility and parked it in an employee parking lot there. Affixed to one side of his van was a 4- by 6-foot sign advocating a coworker's union president candidacy. Applying its sign display rule, the respondent refused to allow Gallagher to park his van, with the union election campaign sign attached, on company property. Thereafter, a complaint issued alleging that the respondent violated Section 8(a)(1) because its sign display rule prohibited its employees from engaging in protected union solicitation in nonwork areas on nonworktime. The panel majority dismissed the complaint in its entirety.

Although the panel majority found that Gallagher was engaged in protected concerted activity, they disagreed with the General Counsel that the respondent's sign display rule was overly broad and unduly infringed on employees' Section 7 rights. In doing so, the majority first observed that the respondent's rule was not a complete prohibition against the display of union material. Thus, applying the balancing test of *Firestone Tire & Rubber Co.*,[9] the majority determined that the respondent's

[8] 279 NLRB No 135 (Chairman Dotson and Member Johansen, Member Dennis dissenting)
[9] 238 NLRB 1323 (1978)

rule was a reasonable accommodation between the employees' Section 7 rights and the respondent's managerial interest in preventing its employee parking lots from being transformed into havens for distracting billboards for all causes imaginable.

Member Dennis dissented, asserting, inter alia, that the respondent had furnished no evidence of special circumstances that require restricting employee displays in order to protect managerial rights. Member Dennis noted that absent such evidence the respondent may not impair employee exercise of Section 7 rights on its property in nonwork areas during nonworktime. She further attacked the majority's reliance on the fact that the respondent's display rule permitted other forms of union communication.

In *Trover Clinic*,[10] the Board held that the distribution of a cartoon with a message related to working conditions constituted protected concerted activity.

The employer operated an outpatient health care center. The clinic administrator asked an employee if she had distributed a certain cartoon. The cartoon depicted a nervous looking character and contained the caption: "I've been beaten, kicked, lied to, cussed at, swindled, taken advantage of and laughed at, but the only reason I hang around this place is to see what happens next!" When the employee replied that she had not distributed the cartoon, the clinic administrator stated that the distribution of material similar to the cartoon could be grounds for dismissal.

A panel majority concluded that the distribution of the cartoon constituted protected concerted activity, and that the clinic administrator's description of that activity as possible grounds for discharge violated Section 8(a)(1).

The majority noted that the distribution of literature by employees in an employer's facility during nonworking times and in nonworking areas constitutes protected concerted activity provided the literature falls within the scope of the "mutual aid or protection" clause of Section 7. The Board found that the cartoon was related to the employees' working conditions, and therefore its distribution was protected. The Board further found that the cartoon's message was not of the type to remove it from the protection of the Act, and that the employer did not establish the type of circumstances that would render the cartoon unprotected.

Chairman Dotson, dissenting, found the cartoon unprotected because he thought it did not bear any relationship to the employees' working conditions.

In *Mitchell Manuals*,[11] the Board reversed the administrative law judge's dismissal of a complaint alleging that the respondent violated Section 8(a)(1) by discharging employees who authored

[10] 280 NLRB No 2 (Members Dennis and Johansen, Chairman Dotson dissenting)
[11] 280 NLRB No 23 (Members Dennis and Babson, Chairman Dotson dissenting)

and distributed a letter to the chairman of the board of the respondent's parent corporation and others.

The judge found that the writing and distribution of the letter was not protected activity within the meaning of the Act, after determining that the evidence was insufficient to establish the letter's direct relation to the employees' work conditions. In reaching this conclusion, the judge commented that the letter was rather "a complaint against the integrity of the Respondent's product and the competency and good faith of local management—vis-a-vis conditions of employment—because of management's failure to make the organizational changes which the writers propose[d]." (Id., JD slip op. at 6.)

Contrary to the judge, the Board concluded that the letter "addressed matters directly related to the employees' job interests and [was] therefore protected by Section 7 of the Act." Although recognizing that the letter was "couched in terms of criticism," the Board emphasized that "the thrust of the letter [was] the employees' proposal for increasing the professionalism of their jobs." (Ibid.) Three paragraphs in the letter addressed employee concerns about wages, education, and training. The Board stated that in subsequent paragraphs "the employees essentially tie[d] the asserted defects in the [Respondent employer's] labor research to what they contend[ed was] the Respondent's poor treatment of . . . employees." (Ibid.)

In addition, the Board concluded that the letter "was part of and related to the ongoing labor dispute which became manifest at [previous employee] meetings," even though it only referred to one of the key job-related issues (wages) discussed at those meetings. (Ibid.) Noting that employees in the respondent's "collision department" wrote the letter, which proposed a new "labor department," the majority commented that "the new department was proposed with the expectation that the collision department employees would staff the new department. . . . [T]he proposal to create the department . . . thoroughly intertwined with the letter writers' request that their jobs be upgraded. . . ." (Id. at fn. 5.) The Board recognized that when employee protests are related to management concerns and have only an attenuated relationship to terms and conditions of employment, they may fall outside the Act's protection, but declined to find that rule applicable here.

The Board rejected the respondent's contention that the letter, which was sent to the chairman of the board and the president of the respondent's parent corporation, should be analyzed as a communication to a third party, noting that cases cited by the respondent involved "clearly distinguishable" circumstances in which employees disparaged the employer's product to customers or the public. In addition, the Board emphasized that "even to the extent that the Respondent's letter might be considered analogous to a third party appeal, the appeal was clearly tied to

the employee's own working conditions and . . . manifestly part of an ongoing labor dispute." (Id. at fn. 7.) Consequently, the Board found that the respondent violated Section 8(a)(1) by discharging the collision department employees who authored the letter.

In *Pete O'Dell & Sons Steel,*[12] the Board found an employer in violation of Section 8(a)(1) when it discharged an employee for giving testimony in a U.S. Army Corps of Engineers (Corps) investigation designed to bring the respondent into compliance with the Davis-Bacon Act.

The employee's cooperation with the Corps' investigation constituted concerted activity, the Board held, because the employee acted with the assistance of the union and the union had initially contacted the Corps regarding wages. In finding that the employer linked the wage complaint to concerted or union activity, the Board relied on the employer's threats that the laborers would be replaced with ironworkers if they voted the union in and that all laborers would be replaced with ironworkers unless the employee signed a letter to the Corps stating that the employee did not perform any ironwork or use any ironworker's tools.

Additionally, the Board relied on the timing of the employer's threats and interrogation of the employee's attandance at union meetings during the summer of the union's organizing drive and the employer's explanation for the layoff, the following February, that the employee was being laid off "because of people running their mouth to the Corps." (Id. at 1358.)

In *Zack Co.,*[13] a Board panel majority passed on an alleged 8(a)(1) layoff. It agreed with the administrative law judge that the General Counsel established a prima facie case that the alleged discriminatees were laid off for requesting their union to file a grievance against the respondent and that the respondent did not establish that it would have discharged the employees absent that request. The panel majority affirmed the judge's findings that these employees were not as unproductive as the respondent claimed, and that the respondent did not consistently discipline employees for insufficient production.

Chairman Dotson, dissenting, assuming arguendo that the General Counsel made a prima facie case, found that the respondent rebutted it by showing that the employees spent more time talking than working and that most of the work force talked about their grievance request resulting in decreased production. He noted that the alleged discriminatees had disrupted the work force and production for 2 days. The Chairman further found that the respondent had laid off employees in the past for production-related reasons and, contrary to the judge, did not be-

[12] 277 NLRB 1358 (Chairman Dotson and Members Dennis and Johansen)
[13] 278 NLRB No 134 (Members Johansen and Babson, Chairman Dotson dissenting)

lieve it necessary for the respondent to prove with "historical predictability" its approach to disciplinary problems; it being sufficient that the respondent showed it had meted out similar discipline for similar conduct.

2. Permissible Employer Speech

In *Kawasaki Motors Mfg. Corp.*,[14] a Board panel upheld an employer's right under the standards of *Gissel*[15] to make statements concerning plant closure or relocation during election campaign if such statements were premised on "undisputed, objective economic fact." In so finding, the Board reversed the administrative law judge.

As part of the employer's preelection campaign strategy, it held employee meetings throughout 2 workdays. The plant manager spoke about the employer's poor financial condition, including the payroll decrease, layoffs, a short workweek, overstocked inventory, and losses. He displayed charts to support his statements. The plant had never had a profit since its opening in 1975; and that since 1979 the financial situation had been declining, with 1981 being the worst year for losses.

The plant manager then introduced the company president who reinforced the bleak financial portrait. The president said: "Last August Mr. Ando and I came here. We had some big problems that needed to be corrected, a $36,000,000 loss in seven years. At that time we had to make a decision either to change the plant to make it profitable or to close the plant." (280 NLRB No. 53, slip op. at 2.) He further stated that because the plant would no longer be subsidized by the parent company, continued losses would compel the company's discontinuance. He contrasted the plant's poor productivity with plants in developing countries such as Thailand, the Phillipines, and Iran. He said that the goal for this year was to break even or make a profit. He spoke about the poor American economy for 1982 and the corresponding difficulties in motorcycle sales which had damaged the Company and necessitated its reductions in personnel and production. He ended with: "We have many problems in the plant and we must improve more and more. I do not like more new problems. Please understand our serious situation. I think at first we must survive. Survival is the most important thing." (Id., slip op. at 3.)

The plant manager then stated (ibid.):

> As Mr. Saeki said, this plant has to become profitable if it is to survive. The Japanese did not build this plant for the purposes of losing millions of dollars every year. The Japanese did not build this plant so that we could make motorcycles to put in boxes and store in warehouses. What bothers me the most is that I have heard some of you complain about various little

[14] 280 NLRB No 53 (Chairman Dotson and Members Dennis and Johansen)
[15] *NLRB v Gissel Packing Co*, 395 U S 575 (1969)

problems. I am not saying they aren't real problems, but the problems that I have heard about are nothing compared to the very real problem that is facing all of us. We decided to give you these figures and information so that you would know where this plant really stands.

The panel disagreed with the administrative law judge's conclusion that, under the standards of *Gissel*, "no reasonable employee who sat through the foregoing meetings . . . could have been so dense as to have missed the Employer's message that, if the UAW won the upcoming election, the Respondent's plant would close and their jobs no doubt would be moved to Japan." The panel found that said statements were "premised upon undisputed, economic fact" because (id., slip op. at 5)

[e]mployees were presented with information and figures on the Respondent's losses, layoffs, payroll decreases, shortened workweek, and overstocked inventory. These figures graphically depicted the Respondent's poor financial situation. The Respondent's officials clearly created the impression that any decision to close the plant would be based on its profitability and competitive status in the world market. Their predictions of possible closure were not based on reasons unrelated to economic necessities.

In dismissing these 8(a)(1) allegations, the Board found that the respondent's statements were "expository in nature and constituted speech protected by Section 8(c) of the Act." (Ibid.)

In *Long-Airdox Co.*,[16] the General Counsel alleged that the respondent's director of sales had unlawfully threatened employees with layoffs by stating several customers had warned they would discontinue their patronage if the respondent became organized. In support of the complaint allegation, the General Counsel presented the testimony of several employees and one of the respondent's major customers.

The administrative law judge relied on their testimony in finding that the respondent had threatened employees with loss of business and jobs because their director of sales' remarks, when placed in a "labor relations setting," were "not shown to have been based on demonstratively probable consequences beyond its control" (ibid.), citing *NLRB v. Gissel Packing Co.*[17]

The Board panel disagreed. It cited cases finding "well established that employer predictions of adverse consequences arising from sources outside his control are required to have an objective factual basis in order to be permissible under Section 8(a)(1)." (277 NLRB at 1158.) Here, the Board found that the respondent's director of sales' comments to several employees had

[16] 277 NLRB 1157 (Members Dennis, Johansen, and Babson)
[17] 395 U.S. 575, 617-619 (1969)

a factual basis and, therefore, were squarely protected by Section 8(c).

The Board found that his statement that a customer would be "very apprehensive of ever sending any work down to a group of people that tried to close them down every two or three years," was corroborated by the customer's testimony that he had "concerns about his company's ability to receive equipment if a strike occurred" and, in general, about possible "interruption and efficiency of the work force" in connection with product delivery. (Ibid.) On the other hand, the Board found that comments to employees that customers would "refrain from sending any repair work" if the respondent became organized and that customers had policies not to send work to a "union company" were not based on objective facts, and therefore violated Section 8(a)(1).

The Board observed that although the customer testified to his "concerns" regarding unionization at the respondent's plant, the customer failed to confirm the comment about the company policy to refrain from sending work to unionized companies altogether.

3. Other Issues

In *Sunnyvale Medical Clinic*,[18] the Board restated the standard for determining whether an employer's interrogation of an employee about union activity is unlawful.

In this case, employee Rothweiler and another employee went together on their own initiative to Personnel Director Easterly to discuss personnel matters. At the end of the discussion, Rothweiler, without comment, handed Easterly a completed dues-deduction authorization card. Easterly asked Rothweiler to remain in the office. When the other employee left the office, Easterly closed the office door. Easterly then asked Rothweiler why she had joined the union. Rothweiler replied that she felt that the employees needed help. Easterly explained to Rothweiler that the employer wanted to get rid of the union. Easterly asked Rothweiler why the employees had not gone to her (Easterly). Rothweiler replied that they had, and that nothing was being done. The conversation then ended. Rothweiler characterized her conversation with Easterly as "friendly" and "casual," and her relationship with Easterly as "friendly."

The Board panel majority affirmed the administrative law judge's finding that Easterly's questioning of Rothweiler was not unlawful. In doing so, the panel majority approved of the judge's application of the longstanding test, which had been recently reiterated in *Rossmore House*,[19] for determining the lawfulness of

[18] 277 NLRB 1217 (Chairman Dotson and Member Johansen, Member Dennis dissenting)
[19] 269 NLRB 1176 (1984)

employer interrogations of employees about their union activity; i.e., whether, under all the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. The panel majority specifically approved of the judge's application of this standard even though Rothweiler, unlike the questioned employee in *Rossmore House*, was not an open and active union supporter.

The majority elaborated that the specific purpose of the Board's decision in *Rossmore House* was to reject the previously held view that an employer's interrogation of open and active union supporters about union sympathies was per se unlawful. The panel majority also stated that an important additional purpose of the Board's decision in *Rossmore House* was "to signal disapproval of a per se approach to allegedly unlawful interrogations in general, and to return to a case-by-case analysis which takes into account the circumstances surrounding an alleged interrogation and does not ignore the reality of the workplace." (277 NLRB at 1217.)

The majority noted that the Board in *Rossmore House* outlined some areas of inquiry in regard to allegedly unlawful interrogations, stressing that these and other relevant factors were not to be mechanically applied in each case. Thus, the Board in *Rossmore House* mentioned the background; the nature of the information sought; the identity of the questioner; and the place and method of interrogation.

Assessing the facts in *Sunnyvale* in light of these areas of inquiry, the majority noted first that although Rothweiler was not an open and active union supporter, she was also not intent on keeping her support for the union hidden from the employer; second, there was no history of employer hostility towards or discrimination against union supporters; third, the nature of Easterly's questions were general and nonthreatening; fourth, Easterly and Rothweiler had a friendly relationship, and their conversation in question was casual and amicable. Taking these factors into consideration, the panel majority found that the conversation Rothweiler and Easterly engaged in was "an instance of lawful, casual questioning which, under the circumstances, might be expected to occur between supervisors and employees who work closely together."

In dissent, Member Dennis asserted that the panel majority had strayed from the principles established in *Rossmore House*, by de-emphasizing what she determined to be the principal circumstance addressed in *Rossmore House*—whether the questioned employee is a self-proclaimed union adherent—and by relying instead on what she determined to be "lesser, or secondary, criteria." Member Dennis said the Board majority in *Rossmore House* had stated that the Board would "weigh the setting and nature of interrogations involving *open and active union supporters*" (emphasis in original), and had gone on, by way of example in *Rossmore*

House, to identify the following four criteria as relevant: (1) the background; (2) the nature of the information sought; (3) the identity of the question; and (4) the place and method of interrogation.

Member Dennis stated that although these four criteria and any other relevant factors may be considered in cases not involving open union adherents, it was in her view nevertheless clear from the context in which these four criteria appeared in *Rossmore House* that they remained secondary to the question of whether the interrogated employee was a self-proclaimed union adherent, and that these other four criteria should be considered only after the question of self-proclaimed union adherence is given due weight.

Member Dennis further stated that "[o]rdinarily, an employer's questioning an employee who is not a self-proclaimed union adherent *does* 'tend to restrain, coerce, or interfere' with statutory rights" (emphasis in original), and that "It should be the exceptional case, not the routine one, in which, based on secondary criteria alone, an employee who has not volunteered his views may be questioned about his union activities or beliefs." (Id. at 1219.) Applying these principles to the facts in *Sunnyvale*, Member Dennis found that because Rothweiler was not a self-proclaimed union adherent, the employer's questioning her was inherently coercive absent some unusual additional circumstances, which Member Dennis found not to be present in the case at hand.

In *Advertiser's Mfg. Co.*,[20] a Board panel considered whether an employer's discharge of a supervisor because of the union activities of her son violated Section 8(a)(1). The judge found that the discharge was unlawful in that it was motivated by the union support of her son and was part of a pattern of conduct aimed at coercing employees in the exercise of their Section 7 rights. Subsequent to the judge's decision, the Board in *Parker-Robb Chevrolet*,[21] expressly overruled the "pattern of conduct" cases relied on by the judge. *Parker-Robb*, however, preserved an exception in situations when the act of supervisory discharge itself severely and directly impinged on the employees' exercise of Section 7 rights.

The Board held that *Consolidated Foods Corp.*[22] and *Golub Bros. Concessions*[23] fall within the exemption mentioned in *Parker-Robb*. In those two decisions, the Board found that employers had unlawfully discharged supervisors because of the union activities of employees who were members of the discriminatees' immediate family and not as the result of any participation in union or concerted activities by the supervisors.

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[20] 280 NLRB No 128 (Chairman Dotson and Members Johansen and Babson)
[21] 262 NLRB 402 (1982)
[22] 165 NLRB 953 (1967)
[23] 140 NLRB 120 (1962)

The Board noted that the direct, severe, and unmistakable thrust of the supervisors' discharge was to interfere with those employee relatives in the exercise of their rights and that the Board does not lack the power to protect those employees. Accordingly, the Board found that the employer unlawfully discharged the supervisor because of her son's union activities.

In *Resistance Technology,*[24] the Board considered the issue of whether a management official's instructions to a supervisor to engage in unlawful interrogation of employees about their union activities and sympathies are, standing alone, unlawful.

Personnel Manager Lambert asked Production Supervisor Storey to find out who had signed union authorization cards, how many people had attended a recent union organizational meeting, what the "general feeling" was, and the names of the employees who had attended the meeting. Storey told Lambert that she (Storey) could not do what Lambert was asking. Lambert insisted that Storey do so. Shortly thereafter, Storey repeated her conversation with Lambert to employee Krueger.

The administrative law judge found two separate unfair labor practices based on the above facts: (1) Lambert's instructions to Storey to interrogate employees about their union activities and sentiments, and (2) Storey's disclosure of these instructions to employee Krueger. The Board unanimously affirmed the judge's finding of an unfair labor practice based on Storey's disclosure to Krueger, but the Board majority did not affirm the judge's finding of an unfair labor practice based on Lambert's instructions to Storey, without more.

In dismissing that latter allegation, the Board majority overruled *Cannon Electric Co.*[25] to the extent that it held that an employer may be found to have violated the Act when the employer instructs its supervisors to commit unlawful acts, even if those instructions are neither carried out nor disclosed to the employees. Rather, the Board majority in *Resistance Technology* held that action taken in contemplation of committing an unfair labor practice is not, without more, an unfair labor practice.

The Board found that the mere issuance of instructions, even if to perform unlawful acts, to supervisors to find out the identity of union supporters and the union sympathies of employees cannot in itself interfere with, restrain, and coerce employees in the exercise of their statutory rights when those instructions are neither carried out nor disclosed to the employees. The majority stated that it would not extend the reach of the Act into such intramanagerial activity.

Rather, the Board majority expressed its agreement with principles espoused earlier by its decision in *General Engineering.*[26]

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[24] 280 NLRB No 117 (Chairman Dotson and Members Dennis and Johansen, Members Babson and Stephens dissenting)

[25] 151 NLRB 1465, 1468 (1965)

[26] 131 NLRB 648 (1961)

In that case, the employer's general manager instructed a supervisor to "get rid of" the employees responsible for union activities, using pretextual reasons. The instructions were neither carried out nor disclosed to the employees. The Board there expressly affirmed *Florida Builders*,[27] and held that "unexecuted instructions to a supervisor to discriminate against employees who are unaware of the instructions do not have any impact upon the employees and therefore cannot interfere with the exercise of the rights guaranteed them by Section 7 of the Act." (131 NLRB at 649.)

Dissenting Members Babson and Stephens took the position that it was unnecessary under the circumstances to decide whether instructions to supervisors to violate the Act are proscribed by Section 8(a)(1), when those instructions were neither executed nor disclosed, because the record in the instant case established that Lambert's instructions to Storey were disclosed to employee Krueger and other employees, by Storey. Members Babson and Stephens said the aspect of *Cannon Electric* overruled by the majority in the instant case was dictum, as the instructions in question in *Cannon Electric* were in fact carried out and were also found to have been disclosed to the employees. Thus, in their view, the issue of lawfulness of instructions which were neither executed nor disclosed was not presented either in the instant case or in *Cannon Electric*.

In *Golden Fan Inn*,[28] a Board panel dismissed a complaint that the employer violated Section 8(a)(1) of the Act by adding people to the payroll and thereby to the *Excelsior* list in order to dilute the union's support.

The majority disagreed with the administrative law judge's interpretation of a remark made by the employer's general manager to its employee in charge of the payroll. The remark was that the respondent would be redoing some rooms on the first floor of the motel and that the maintenance supervisor would bring in a number of people to work on Saturdays "to fix up the rooms and beef up the payroll." The majority noted that the judge found that during the same time period the respondent "did indeed begin construction for an addition of 48 new rooms to the motel," and that the Respondent "had a legitimate business reason for hiring a number of additional employees . . ., i.e., the need to perform significant maintenance work." (Id., slip op. at 8.)

The majority held that the remark primarily relied on by the judge in finding that the respondent acted unlawfully "is at least as susceptible to, and in our view more susceptible to, a finding that it merely expressed the Respondent's legitimate intention to add employees to perform needed maintenance. The context, re-

[27] 111 NLRB 786 (1955)

[28] 281 NLRB No 35 (Chairman Dotson and Member Johansen, Member Stephens, dissenting in part)

ferred to by the judge, was as much about the needed maintenance work as about the representation election. [The] remark, on its face, referred to 'fixing up' the rooms. Certainly, if additional people were hired to do needed repairs, the payroll would be increased." (Id., slip op. at 9.)

Contrary to the judge, who relied on the remark as a linchpin for the finding of unit packing by the respondent, the majority found the comment to be "ambiguous and clearly insufficient to support a finding that the Respondent acted unlawfully to dilute the Union's support." (Ibid.)

The majority agreed with the judge that the true question is why the disputed individuals were added since the inclusion on the *Excelsior* list of an ineligible voter, without more, cannot sustain a violation.

The majority noted the general disarray of the respondent's payroll system which might conceivably have resulted in an inaccurate *Excelsior* list prepared by a clerical employee in reliance thereupon.

"With this fact as a backdrop," the majority stated, "the General Counsel's case 'is all the weaker.'" The majority found that the inclusion of two supervisors on the *Excelsior* list "particularly where, as here, the status of the disputed supervisors is clearly debatable—falls far short of showing an unlawful purpose." It asserted that "[o]ther disputed individuals were listed by the Respondent as additions to its maintenance personnel. However, maintenance work was needed and as to those maintenance employees who cast challenged ballots, we find infra that most of them were eligible voters." (Id., slip op. at 10.)

The majority found that the circumstances surrounding other disputed individuals such as the cooks or a maid, were insufficient to support the finding of a violation. The majority found "[c]onsidering that the cooks and [the maid] had previously worked for the Respondent—viewed in light of the Respondent's extremely disorganized payroll and personnel records—no inference of unlawful purpose is warranted." (Id., slip op. at 10–11.)

In dismissing the allegation of the complaint, the majority stated "[a]bsent the judge's unwarranted reliance on [the] remark, we are left only with a somewhat inaccurate *Excelsior* list. However, given the longstanding chaotic state of the Respondent's payroll and personnel records, we cannot find on the record before us that the preparation and submission of the Respondent's *Excelsior* list was a product of an unlawful purpose." (Id., slip op. at 11.)

Member Stephens, in his dissent, would have affirmed the judge's finding of unlawful unit packing by the respondent. He would have found an inference of unlawful unit packing warranted based on the "Respondent's bad faith in adding several individuals to the *Excelsior* list who were obviously ineligible to vote." (Id., slip op. at 19.) He declined to accept the majority's

view that the "beef up the payroll" statement was so ambiguous as not to prove unlawful intent, and said the judge "was entitled to view the statement in the context in which it was made and to draw [this] reasonable, if not the only, inference as to the Respondent's intent." (Id., slip op. at 20.)

Member Stephens would have found that "the evidence shows that at least half of the new hires did not perform any renovation work at the motel prior to or during the eligibility period," contrary to the Respondent's defense of renovation of the motel. Furthermore, he would have found that "the Respondent offered no evidence to show that business growth or other special factors justified increasing the nonmaintenance staff positions." (Ibid.)

In *National Micronetics,*[29] a Board panel held that distribution of the Board decision in *Oxford Pickles*[30] was not an unlawful or objectionable threat of reprisals, relying on *CBS Records Division*[31] and overruling *Glassmaster Plastics Co.*[32] to the extent it was inconsistent.

The employer had distributed to all employees photocopies of the Board decision in *Oxford Pickles* as reported at 77 LRRM 1049, with a handwritten statement at the top saying: "HERE'S THE FACTS from the NATIONAL LABOR RELATIONS BOARD—THEY ARE NEUTRAL. THIS IS THE LAW—READ IT." Portions of the LRRM headnotes and the text of the decision had been underlined and characterized as "FACT #1[, 2, 3, 4]" or "TRUE" in the margins. The highlighted portions stated that a union must obtain the employer's assent to gain improved benefits and that an employer is not required to agree to any of the union's proposals during collective bargaining, does not have to retain all current benefits during bargaining, is not prevented from moving its plant for economic reasons by the presence of a union, and may permanently replace economic strikers.

The Board found that these were accurate statements of the law and held that the employer had a right to disseminate such information, especially as the union had misstated the law on these points during the election campaign and the employer had merely distributed the Board decision to rebut the union's misrepresentations. The Board stated that "distributing accurate copies of a Board decision with portions highlighted and characterized as 'true' can in no way be construed as an illegal threat or as objectionable conduct." (277 NLRB at 994.)

National Micronetics also involved threats to close unprofitable plants if the union won the election. The Board panel held that the employer's statements were not merely permissible predic-

[29] 277 NLRB 993 (Chairman Dotson and Members Dennis and Babson)
[30] 190 NLRB 109 (1971)
[31] 223 NLRB 709, 717 at fn 18 (1976)
[32] 203 NLRB 944 (1973)

tions of the possible effects of unionization, but rather were illegal and objectionable threats. The Board noted that an employer may properly raise the possibility that a loss of jobs could result from unionization by pointing out specific effects of unionization that might cause it to become unprofitable, such as higher wages or production losses during strikes. The Board found, however, that in this case the employer had not pointed to any objective facts likely to change as a result of unionization, thus causing it to become unprofitable. Instead, the employer had merely noted that its Kingston plants were already uncompetitive when compared to its plants in California and Mexico and to its Japanese suppliers, and had stated that it could easily relocate these unprofitable plants if the union won the election. The Board found these statements illegal and objectionable, especially in the context of the employer's other repeated and explicit threats to close the Kingston plant and relocate the work in California if the union won the election.

Finally, in *National Micronetics*, the Board panel found that the employer had unlawfully threatened to permanently replace unfair labor practice strikers when it stated that employees could be permanently replaced in *any* strike not just an economic strike. Contrary to the judge, however, the Board did not find that the employer had misrepresented strikers' reinstatement rights merely by telling employees they were subject to permanent replacement during a strike, without fully detailing their reinstatement rights under *Laidlaw.*[33] Following *Eagle Comtronics,*[34] the Board noted that the employer had not actually misrepresented striking employees' *Laidlaw* rights and found that the employer's statement would not have been an unlawful or objectionable threat if it had been limited to economic strikers.

In *Dahl Fish Co.,*[35] a Board panel adopted the administrative law judge's recommendation (in conformity with the Supreme Court's decision in *Bill Johnson's Restaurants,*[36] that the allegation that the respondent violated Section 8(a)(1) by bringing a lawsuit against the union in retaliation for the union's filing of an amended charge be severed from the complaint pending resolution of the lawsuit in the state courts. After the State of Washington Supreme Court had ruled on the lawsuit, the panel affirmed the administrative law judge's finding in her supplemental decision that by bringing this suit the respondent violated Section 8(a)(1).

The State Supreme Court reversed the lower court and granted the union's motion for summary judgment. It found that the Respondent could prove no set of facts consistent with the complaint, which would entitle it to relief.

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[33] 171 NLRB 1366 (1968), enfd 414 F 2d 99 (7th Cir 1969), cert denied 397 U S 920 (1970)
[34] 263 NLRB 515 (1982)
[35] 279 NLRB No 150 (Chairman Dotson and Members Dennis and Babson)
[36] 461 U S 731 (1983)

The administrative law judge dismissed the respondent's argument that the *Bill Johnson* decision precluded the Board from relying on the state courts' finding but required that the Board make a finding that the state litigation was baseless before it could determine whether bringing the lawsuit violated the Act. The judge found that *Bill Johnson* permits the Board to adopt the State's finding that the respondent's lawsuit was without merit in determining whether the lawsuit was filed in retaliation for the union's filing of unfair labor practice charges.

The judge further found that the protection of the Act extends to the union, and allowing an unjustified lawsuit to be brought against the union would be an illogical restraint under the Act; that there is a nexus between the right of the union to amend its charge and the protection of the employees' rights under the Act, and to decide otherwise would be in violation of their Section 7 rights; and that the State Supreme Court's decision was meritorious. The judge then reviewed the record concerning this allegation, found that the respondent brought the lawsuit in response to the union having filed the amended charge, and concluded that the lawsuit was retaliatory and violated Section 8(a)(1).

In *Sea-Land Service*,[37] the Board considered the effect of the Supreme Court's limitation of the Board's discretion to prescribe remedies under the Act in maritime settings in *Southern Steamship Co. v. NLRB*.[38] In this case, Members Babson and Dennis held that *Southern Steamship* does not preclude the Board from applying traditional labor law analysis to shipboard occurrences, and found that the respondent, a shipping concern, violated Section 8(a)(1) of the Act when the master of one of its ships, Captain Fleeger, interrogated a shipboard radioman, Dunleavy, regarding the alleged unauthorized use of the ship's radio to obtain the telephone number of the Board's New Orleans office and to contact the Board in New Orleans.

Dunleavy was charged with transmitting all radio messages from the ship, but was prohibited from sending messages unauthorized by Captain Fleeger. Fleeger attempted repeatedly to discover whether Dunleavy had made the unauthorized call, what had prompted the call, and on what authority he had done so. Finding Dunleavy's responses unsatisfactory, Captain Fleeger ultimately conducted a shipboard trial, pursuant to his authority under Federal law, to investigate the unauthorized use of the radio and Dunleavy's refusal to respond to his direct order, as captain of the ship, to answer questions about the call.

After a hearing, the administrative law judge dismissed the complaint, finding that Captain Fleeger's acts accorded with and were motivated by the ultimate and complete authority over dis-

[37] 280 NLRB No 84 (Members Babson and Dennis, Chairman Dotson, dissenting)

[38] 316 U S 31 (1942) The Court held that Sec 10(c) of the Act does not authorize the Board to order the reinstatement of seamen discharged for a mutinous strike under the Federal criminal code

cipline, conferred by Federal statute on the master of a ship, and the corresponding need to investigate any unauthorized use of the ship's radio. Moreover, the judge reasoned, the interrogation and discipline of Dunleavy were proper under the Act because Dunleavy's acts involved significant safety considerations in a maritime setting, considerations to which the Board should defer under *Southern Steamship.*

Members Babson and Dennis disagreed. They found that, although "the maritime setting is one important factor" in evaluating the respondent's actions, it does not render traditional labor law analysis inapplicable. In *Southern Steamship*, the panel majority noted, the Court held that the Board abused its discretion by ordering the reinstatement of striking seamen discharged under Federal antimutiny act, but it also upheld the Board's bargaining order and stressed that its decision did not preclude the redress of grievances under the Act in maritime settings.

Members Babson and Dennis then distinguished between those of Captain Fleeger's questions arising out of this legitimate need to monitor precisely the use of the ship's radio and those that strayed into areas protected by Section 7. They held that Fleeger's asking Dunleavy what prompted his call to the Board constituted coercive interrogation because Fleeger's responsibility for the proper use of the radio was satisfied by finding out whether Dunleavy had used it and did not entitle him to delve into Dunleavy's reasons for trying to contact the Board. Moreover, Fleeger violated Section 8(a)(3) and (1) by discharging Dunleavy for refusing to respond to the unlawful inquiries. The majority recognized that Fleeger made lawful inquiries of Dunleavy as well, but held that the legal and illegal motives for discharging Dunleavy could not be separated. Under *NLRB v. Transportation Management Corp.*,[39] the majority held, the wrongdoing employer must bear the risk created by his own wrongdoing.

Chairman Dotson dissented, finding that Fleeger's inquiries did not coerce Dunleavy in his exercise of Section 7 rights because Captain Fleeger had no union animus and his questions were not prompted by an interest in the content of the conversation. Moreover, Chairman Dotson found, Dunleavy refused to answer all Fleeger's questions. Therefore, according to the Chairman, the panel majority merely presumed a linkage between the question concerning Dunleavy's reasons for contacting the Board and his Section 7 rights. Similarly, Chairman Dotson found Dunleavy's discharge lawful because it was not prompted by Dunleavy's refusal to state why he had made the call to the Board and because it occurred at sea, "where Captain Fleeger's responsibility for all radio messages and the crew's obedience of the captain's orders were sacrosanct."

[39] 462 U S 393 (1983)

B. Employer Assistance to Labor Organization

Section 8(a)(2) makes it unlawful for an employer "to dominate or interfere with the formation or administration of any labor oraganization or contribute financial or other support to it." During the report year, one noteworthy case involving a violation of this section issued.

In *Postal Service*,[40] a Board panel held that the Postal Service violated Section 8(a)(1) and (2) when it refused to honor the revocation of dues-checkoff assignments by employees having effectively resigned their union membership.

The checkoff at issue authorized and directed the Postal Service to assign to the union from any salary earned "such regular and periodic membership dues as the union may certify as due and owing" from the employee. The authorization also contained a provision that it was irrevocable for successive periods of 1 year, unless written notice was given by the employee during an open period occurring prior to the expiration of each 1-year period.

When an employee validly resigned his union membership, he also informed the Postal Service that the dues-checkoff assignment was to be revoked immediately notwithstanding that the revocation request was not made during the designated open period. The Postal Service refused to honor the request. The Board found that the Postal Service violated the Act because the terms of the checkoff authorization provided for the payment of dues as a quid pro quo for union membership and not for other financial obligations, such as "financial core" payments in lieu of membership.

Accordingly, the Board held that when the employee executing the authorization validly resigned his union membership, the financial obligation underlying the execution of the authorization—the agreement to have membership dues assigned to the union—ceased to exist for purposes of dues checkoff. The Board noted that it is established Board law that although a resignation of union membership ordinarily does not revoke a checkoff authorization, a resignation will revoke a checkoff authorization by operation of law when, as here, the authorization itself makes payment of dues a quid pro quo for union membership. This is true whether the resignation is made during the designated open period for revocation set forth in the authorization or at some other time.

The Board rejected the Postal Service's contention that section 1205 of the Postal Reorganization Act (PRA) mandated a different result concerning the Postal Service than might be warranted concerning other employers. The Board noted that the PRA does not mandate that checkoff authorizations are irrevocable

[40] 279 NLRB No 8 (Chairman Dotson and Members Johansen and Stephens)

per se for 1 year irrespective of the nature of the contractual obligation undertaken in the authorization and that the PRA was not inconsistent with well-established Board principles.

The Board emphasized that it was not holding in this case that under the Act and the PRA all dues-checkoff authorizations are revocable at will on effective resignation from union membership. Instead, it noted that it was holding only that those dues-checkoff authorizations linking payment of dues to union membership are revocable when that link—union membership—ceased to exist by virtue of an effective resignation from membership.

C. Employer Discrimination Against Employees

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

1. Rights of Strikers to Reinstatement

In *Pacific Mutual Door Co.*,[41] a Board panel adopted, under a somewhat altered rationale, the administrative law judge's finding that the employer violated Section 8(a)(3) and (1) by unlawfully refusing to reinstate two striking employees.[42]

During an economic strike by its drivers, the employer contracted with a driver leasing company for the service of drivers to temporarily replace its striking employees. Under the terms of this lease agreement, either the employer or the driver leasing company could cancel the contract on 30-day written notice. When the picketing stopped and the union requested unconditional reinstatement on behalf of the drivers, the employer claimed that its contract with the driver leasing company did not allow cancellation on such short notice; it was considering permanently subcontracting its driving work; and it was placing its drivers on temporary layoff while it considered its long-term options. Subsequently, the employer rejected the striking drivers attempts to return to work and notified the union that it tentatively decided to permanently subcontract its driving work. Following unsuccessful efforts by the union and employer to reach agreement on the permanent subcontracting proposal, the employer executed a 1-year agreement with the driver leasing company for

[41] 278 NLRB No 120 (Chairman Dotson and Members Dennis and Johansen)

[42] The Board denied reinstatement to the two remaining strikers on the basis of strike misconduct *Clear Pine Moldings*, 268 NLRB 1044 (1984)

driving services, approximately 3 weeks after the drivers unconditionally sought reinstatement.

The panel agreed with the judge that the employer's "obligation to reinstate the striking drivers arose with the Union's unconditional offer, on the strikers' behalf, to return to work, which occurred at a time when their jobs were still in existence and no permanent replacements had been hired." (Id., slip op. at 7.) However, contrary to the judge, who found that the 30-day cancellation provision in the employer's temporary lease agreement delayed for this interval the employer's obligation to reinstate the striking drivers, the panel held that the reinstatement obligation commenced on the date that the 1-year agreement was executed.

Thus, once the initial contract for temporary replacements was supplanted by the contract, "the arrangement for the services of *temporary* replacements ceased, [and] the reinstatement obligation matured." (Id., slip op. at 8.) And, inasmuch as the employer and driver leasing company were joint employers, the panel found that the employer "retained control of employees who began to perform the work of the unreinstated drivers on a permanent basis after the unreinstated drivers unconditionally requested reinstatement . . . that the jobs of the unreinstated drivers were not eliminated and that the Respondent in essence hired new employees instead of reinstating [the two strikers]." (Id., slip op. at 15.) Accordingly, the panel found that the employer's matured obligation to reinstate the two strikers was not obviated by the contract and that the employer violated Section 8(a)(3) and (1) by refusing to reinstate strikers when the contract was executed.

In *Highlands Medical Center*,[43] the Board, although adopting the administrative law judge's conclusion that the employer did not violate the Act by discharging two guards for refusing to perform certain tasks which would require crossing a picket line, did so based on a finding that the guards were engaged in a partial refusal to work.

A bargaining unit of service and maintenance employees of the employer established a picket line as a part of its strike against the employer in support of its labor agreement negotiations. During the strike, the employer required its guards to aid in transporting nonstriking employees through the picket line and in cleaning up the debris of glass, nails, and tacks from the entranceway to the employer's facility, tasks which the Board found "are in the scope of job duties generally required of guards." Two guards, who were on duty and despite warnings from the employer, refused to perform these tasks because they would require crossing the picket line. Because of their refusals, both were discharged.

[43] 278 NLRB No 160 (Chairman Dotson and Members Dennis and Johansen)

The judge concluded that the discharges were not violative because "guards who ally themselves with strikers are not protected by Section 7 of the Act." He reasoned that Congress intended in legislating Section 9(b)(3) that an employer is entitled to the undivided loyalty of the guards to protect its property and personnel during a strike. A guard's decision to ally himself with the strikers is a violation of this principle.

The Board based its conclusion on the fact that the guards were engaged in an unprotected partial strike. The Board and courts have repeatedly found a partial refusal to work as unprotected. As the Board stated, "to contenance such conduct would be to allow employees 'to do what we would not allow any employer to do, that is to unilaterally determine conditions of employment.'"[44]

Audubon Health Care Center,[45] also is cited by the Board. It held: "While employees may protest and ultimately seek to change any term or condition of their employment by striking or engaging in a work stoppage, the strike or stoppage must be complete, that is, the employees must withhold all their services from their employer. They cannot pick and choose the work they will do or when they will do it. Such conduct constitutes an attempt by the employees to set their own terms and conditions of employment in defiance of their employer's authority to determine those matters and is unprotected.

2. Hiring Temporary Replacement Employees

In *Harter Equipment*,[46] the Board considered whether an employer violated Section 8(a)(3) and (1) by hiring temporary replacements after lawfully locking out permanent employees for the sole purpose of bringing economic pressure to bear in support of a legitimate bargaining position.

After reviewing the Supreme Court's decision in *American Ship Building Co.*,[47] and *Brown Food Store*,[48] the Board majority agreed with the plurality opinion of former Members Kennedy and Penello in *Ottawa Silica*,[49] which held that the employer's use of temporary replacements to continue its business operations during a lawful lockout in support of the employer's bargaining position did not violate Section 8(a)(3) and (1). In so doing, the majority overruled *Inland Trucking Co.*[50] The majority noted that in light of *American Ship Building* there no longer exists any meaningful distinction regarding effects between lawful "offensive" and lawful "defensive" economic weaponry.

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[44] *Valley City Furniture Co*, 110 NLRB 1589, 1594–1595 (1954), enfd 230 F 2d 947 (6th Cir 1956)
[45] 268 NLRB 135, 137 (1983)
[46] 280 NLRB No 71 (Chairman Dotson and Members Johansen and Babson, Member Dennis dissenting)
[47] 380 U S 300 (1965)
[48] 380 U S 278 (1965)
[49] 197 NLRB 449 (1972)
[50] 179 NLRB 350 (1969)

Further, the majority, relying on *Brown Food Store*, did not see how the employer's operation with temporary replacements implies hostile motivation any more than the lawful lockout itself. The majority further found that the use of temporary employees to remain in operation after a lawful lockout was a measure reasonably adapted to the achievement of a legitimate business end.

Accordingly, the majority concluded that an employer does not violate Section 8(a)(3) and (1), absent specific proof of antiunion motivation, by using temporary employees to engage in business operations during an otherwise lawful lockout initiated for the sole purpose of bringing economic pressure to bear in support of a legitimate bargaining position.

Member Dennis, dissenting, believed that the majority erred in stating broadly that after *American Ship Building* there no longer exists any meaningful distinction regarding effects between lawful "offensive" and lawful "defensive" economic weaponry. She noted that the Court in *Brown Food Store* rejected the squarely presented opportunity to hold temporary replacement use lawful on the same basis as the lockout itself.

Rather, Member Dennis believed that the Court implicitly recognized that allowing an employer to take the offensive and temporarily replace locked-out employees renders nugatory the employees' right to strike and places an unacceptable burden on employees' right to engage in collective bargaining and union activities. Member Dennis would, therefore, find that the employer's use of temporary replacements under these circumstances unlawful as inherently destructive of rights guaranteed in Sections 7 and 13.

3. Rules Prohibiting the Wearing of Union Insignia

In *Malta Construction Co.*,[51] a Board panel affirmed an employee's right to wear union insignia at work. In reversing the administrative law judge, the Board found an employer's rule prohibiting insignia (other than its own logo) on its hardhats to be invalid.

At the time of the unfair labor practice, the employee, a crane operator, wore his requisite company hardhat with two union strikers affixed to it while working. He also placed union stickers on his crane. On the employer's demand that he remove all strikers or leave, the employee removed the stickers from his crane but not from his hardhat. The employee was discharged.

The Board rejected, as without merit, the employer's defense that its complete prohibition of insignia on its hardhats was necessary to enable it to identify its employees; to protect its property from defacement; and to preserve its image during its employees public contact. The Board, concluding that the employer failed to establish any special circumstances based on legitimate

[51] 276 NLRB 1494 (Member Dennis and Johansen, Chairman Dotson dissenting in part)

production or safety reasons to justify prohibition, found that the employer violated Section 8(a)(3).

Chairman Dotson, dissenting in part, would have found, like the judge, the employer's prohibition of insignia on its hardhats to be valid. Like the majority, Chairman Dotson would utilize a *Republic Aviation*[52] balancing test. But contrary to his colleagues, he concluded that "on the facts of this particular case the employees' right to wear the union insignia was not significantly curtailed in that they had ample alternative methods which they could and did utilize to display their union adherence." (276 NLRB at 1496.)

Chairman Dotson was of the view that in this case "it cannot be maintained that the Company's rule prohibiting the wearing of decals on the safety hat deprived the employees of the right to identify themselves with the Union for purposes of organizing other employees."[53] He would have affirmed the administrative law judge's dismissal of the 8(a)(3) allegation.

In *Mesa Vista Hospital*,[54] a Board panel adopted the administrative law judge's 8(a)(1) finding that an employer's rule prohibiting the wearing of insignia in "working or patient care areas" is unlawful.

The judge concluded that the employer's rule was unlawfully broad. In doing so, he accorded little weight to the testimony of the employer's medical director and chief executive officer and found that it did not establish a business justification for the rule.

The panel agreed with the judge's finding of a violation of Section 8(a)(1) but for reasons different from that put forth by the judge. Using the approach endorsed by the Supreme Court in *NLRB v. Baptist Hospital*[55] and *Beth Israel Hospital v. NLRB*,[56] the panel concluded that the employer failed to meet the burden of establishing an adverse impact on patient care in those areas of the hospital where the ban on insignia applied.

The panel noted that the rule by its own definition prohibited employees from wearing insignia in all areas except for three locations within the hospital—employee lounges, parking areas, and the cafeteria during scheduled employee meal hours and when no patients were present. To have demonstrated an adverse impact on patient care in those areas of the hospital where the ban applied, the employer had to establish that employees and patients had contact in such areas.[57]

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[52] 324 U S 793, 797–798 (1945)

[53] Citing *Standard Oil Co*, 168 NLRB 153, 161 (1967)

[54] 280 NLRB No 27 (Chairman Dotson and Members Dennis and Stephens)

[55] 422 U S 773 (1979)

[56] 437 U S 483 (1978)

[57] The employer contended only that patients may be harmed by exposure to contentious insignia The employer did not contend that the wearing of insignia by employees in locations inaccessible to patients presented any risk of an adverse impact on patient care, another ground on which this type of restriction may be challenged See *Baptist Hospital*, supra at 781 fn 11

However, the employer introduced virtually no evidence concerning other areas of the hospital, outside immediate patient care areas, in which the ban was applicable, and the panel was unwilling to assume that patients had contact with employees in every part of the hospital except the three areas set forth in the rule. Consequently, the panel found that the rule was overly broad with respect to location and violative of Section 8(a)(1).

4. Other Discrimination Issues

In *Lone Star Industries*,[58] a Board panel found that the respondent violated Section 8(a)(3) and (1) by changing its policy for assigning work, including overtime, after a strike.

The respondent's policy for 23 years had been to assign work on the basis of seniority. Approximately 1 month after the strike began, the respondent changed to a rotation system of assigning work that eliminated entirely the factor of seniority. The Board panel, accepting that the General Counsel did not prove actual antiunion motivation in this change in policy, concluded that the question under *NLRB v. Great Dane Trailers*[59] was whether it had some effect on the exercise of employee rights and, if so, whether the Respondent came forward with an adequate business justification.

In considering the effect on employee rights, the Board panel focused on the message that the policy change implicitly conveyed to employees with respect to the price of engaging in the protected, concerted activity of striking. It noted that the employees witnessed the abandonment, while they were on strike, of a policy of 23 years' standing that gave them economic advantage over later-hired employees, such as strike replacements. The employees might reasonably fear that during a future strike, the respondent would make other changes in seniority-based practices that would work to the benefit of strike replacements and that it would retain those changes after the strike. Furthermore, the employees would be continually reminded of such possible losses every time they lost out on work that would have been theirs under the old system.

Consequently, the Board panel found that the change in policy had at the very least a "comparatively slight" adverse effect on employee rights and, therefore, the issue under *Great Dane* was whether the respondent had a "legitimate and substantial business justification" for its conduct. The panel found the respondent's explanation that the new system was more equitable to junior drivers did not constitute such business justification. Accordingly, it found that even assuming that the adverse effect on employees' rights was only "comparatively slight," the respondent's change in policy was unlawful.

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[58] 279 NLRB No 78 (Members Dennis, Johansen, and Stephens)
[59] 388 U S 26 (1967)

In *Metropolitan Edison Co.*,[60] a Board panel found that 14 employees who refused to cross another union's picket line were not engaged in protected activity under Section 502 of the Act because the picketing did not present abnormally dangerous working conditions for the employees. An administrative law judge had concluded that the company had violated Section 8(a)(3) and (1) by issuing disciplinary warnings to 14 employees who refused to cross the picket line.

The employees in question were represented by the Electrical Workers (IBEW) and were covered by a collective-bargaining agreement which contained a broad no-strike clause. A Roofers local union picketed at the company's facility to protest the presence of a nonunion firm which was performing roofing renovation work on the company's building. The Roofers picketed with between 150 and 200 individuals.

The judge found that the picketing was characterized by mass picketing and blocking of entrances, damage to vehicles, and threats and abusive language directed at the company's personnel. Roofing nails dumped onto driveways by the pickets caused flat tires on numerous cars. Pickets also dented several cars by kicking them, and scratched some cars as they tried to enter the premises. Nevertheless, 566 of the company's 625 employees who worked at the facility crossed the picket line and reported to work on time. Another 45 employees crossed the line and reported to work 1 hour late.

Only 14 employees did not report to work until after the picketing ceased. They did not cross the line because of fear of injury to themselves or to their vehicles. Instead of crossing the line and going to work, these employees met with their union's president to discuss what they should do. The 14 employees who attended this meeting returned to the company's facility in the late morning, reporting to work after the pickets had dispersed. About a week later each of the 14 employees was issued a written "record of disciplinary action" slip which formally warned the employee because "[y]ou failed to report to work at your scheduled time and place until the pickets had cleared the area or the picketing activity had ceased." (Id., slip op. at 5.)

As a threshold matter, the judge found that the Roofers' picketing was unlawful secondary activity under Section 8(b)(4) and, therefore, even absent a contractual waiver, the company's employees' refusal to cross the picket line did not constitute protected sympathy strike activity under Section 7. Nevertheless, the judge found that the employees were engaged in protected activity by virtue of Section 502, which provides that "the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees [shall not] be deemed a

[60] 279 NLRB No 47 (Chairman Dotson and Members Dennis and Stephens)

strike under this Act." In this regard, the judge cited the Roofers' mass blocking of entrances, property damage, and threats of violence, as well as what he found to be the Roofers' local's "demonstrated and reported proclivity for engaging in picket line violence."

In reversing, the Board found that, even assuming that picket line violence and threats of such violence may constitute "abnormally dangerous conditions" under Section 502, the evidence did not support the judge's conclusion that Roofers' picketing presented abnormally dangerous working conditions for the 14 employees. The Board noted that the test for determining if conditions are "abnormally dangerous" under Section 502 is an objective one; the state of mind of the employees invoking Section 502's protection is not what is controlling. The Board stated that there was no evidence of physical assault against any person, and that pickets did not swing at, kick, or follow any employees attempting to cross the line and report to work.

Further, the Board found that the threats and damage to employees' vehicles did not rise to the level of danger contemplated under Section 502. Finally, while stating that it was not dispositive, the Board held that it was significant that 611 of the company's 625 employees reported to work before the picketing ceased. Accordingly, the Board concluded that the employees' failure to report to work was unprotected and, therefore, the company's discipline meted out to them was not unlawful.

In *Sachs Electric Co.*,[61] a panel majority found, contrary to an administrative law judge, that deferral to a labor-management committee's decision was appropriate because, under the standards for deferral set forth by the Board in *Olin Corp.*,[62] the committee had adequately considered the statutory question of whether an employee union steward had been discriminatorily laid off for complaining about the employer's failure to abide by the contractual requirement concerning the assignment of overtime work.

The judge had declined to defer on the ground that the committee only had been presented with the question of whether the employee's activities as a union steward, rather than as an employee, had led to his layoff.[63] The panel majority, however, found that the contractual question, whether the employee was laid off for his activities as union steward, and the statutory question, whether the layoff resulted from protected activities engaged in as an employee, were factually parallel.

Thus, the majority noted that the conduct allegedly engaged in by the employee as union steward, and which the union had as-

[61] 278 NLRB No 121 (Chairman Dotson and Member Johansen, Member Dennis dissenting in part)

[62] 268 NLRB 573 (1984)

[63] On the merits of the case, the judge concluded that the layoff of the employee violated Sec 8(a)(1) of the Act

serted to the committee was the cause for the layoff, was virtually identical to the conduct which the General Counsel claimed the employee had engaged in in his employee capacity and which purportedly led to his layoff. The majority further stated that except for the fact that the contractual grievance referred to the grievant as a steward, although the complaint before the Board referred to him as an employee, the contractual and statutory issues were clearly identical, and that resolution of both issues rested on the same set of facts and circumstances.

In a separate partial dissent, Member Dennis disagreed with the majority's finding that the contractual and statutory issues were factually parallel. Thus, she noted that the grievance considered by the committee alleged that under section 2.15 of the contract, which provides that union stewards would be the last laid off, the employee had been improperly laid off. The committee, in her view, "did not address, nor did it have the power to address, any issue of discrimination against [the employee] on account of his contract complaints as an employee, because the sole article of the labor agreement allegedly violated protects only stewards." (278 NLRB No. 121, slip op. at 7.) For this reason, she found that issues involved in the grievance and unfair labor practice proceedings were not factually paralleled and would not defer. On the merits of the case, Member Dennis would, in agreement with the judge, find that the layoff violated Section 8(a)(1).

In *ACTIV Industries*,[64] the Board held that the General Counsel need not show a correlation between each employee's union activity and his or her discharge in order to establish an 8(a)(3) and (1) violation when the General Counsel alleges that their mass discharge, and not their selection for discharge, was unlawful.[65] The Board said that the General Counsel's burden in such cases is to establish that the mass discharge was ordered to discourage union activity or in retaliation for the protected activity of some of the employees.

The Board found that the General Counsel had met her burden in *ACTIV*. The employer discharged more than one-third of its work force only 9 days after the union, Teamsters Local 992, began its organizational campaign. All but one of the discharged employees had received an average to excellent job performance evaluation shortly before they were discharged. The plant manager, on whose recommendation the employer's president relied in making some of the discharges, admitted antiunion animus in making other discharge selections. Finally, an employee overheard a supervisor state that the union was the reason for the discharges.

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[64] 277 NLRB 356 (Chairman Dotson and Members Dennis and Babson)

[65] The Board cited *Pyro Mining Co*, 230 NLRB 782 fn 2 (1977), and *Birch Run Welding & Fabricating*, 761 F 2d 1175, 1180 (6th Cir 1985)

In *Harte & Co.*,[66] the Board found that a collective-bargaining agreement should be extended to employees at a new facility where transferrees from the old facility constituted a substantial percentage of the new work force on the date that the transfer process was substantially completed.

In this case, the employer relocated from a facility in Brooklyn, New York, to one in Bound Brook, New Jersey. The union had been the exclusive bargaining representative of Harte's Brooklyn employees since 1947. When the employer entered into an agreement to purchase Bound Brook from a competitor, it informed the union's negotiators. The parties negotiated a new collective-bargaining agreement in Brooklyn, including an addendum giving Brooklyn employees the option to transfer and retain seniority or to take severance pay.

The parties also agreed to extend the agreement's coverage to Bound Brook when that facility began operations. The contract contained a union-security clause requiring membership 30 days after the effective date of the contract or after date of hire, whichever was later.

The union solicited employee signatures on union membership cards from among employees who worked at the Bound Brook facility prior to transfer of ownership. It informed several employees there that nonjoining employees would lose their jobs, making no apparent mention of the 30-day grace period.

Dismantling and transfer of equipment from Brooklyn to Bound Brook did not begin until 3 months later because of an upsurge in orders before the relocation. Brooklyn employees were moved incrementally over the next 7 months. After the last transfer, Bound Brook had a work force of 197 employees, 98 of whom had been transferred from Brooklyn. Shortly thereafter, both buildings comprising the Brooklyn facility had been sold.

The judge found that the Bound Brook facility became fully operational before a sufficient number of Brooklyn employees had been transferred so as to constitute 40 percent of its employee complement. The judge found that by extending recognition to the union at that time, the employer violated Section 8(a)(2) and (1) and that by accepting recognition in these circumstances the union violated Section 8(b)(1)(A). Because the contract contained a union-security clause, he also found the employer violated Section 8(a)(3) and (1), and the union violated Section 8(b)(1)(A) and (2).

The judge found an additional violation of Section 8(b)(1)(A) in the union representatives' statement to newly hired Bound Brook employees that nonjoiners would lose their jobs. He found a derivative 8(a)(1) violation by the company because these statements were made on company premises, obviously with compa-

[66] 278 NLRB No 128 (Chairman Dotson and Members Dennis and Johansen)

ny permission, and after the company had told the new employees the Brooklyn contract would be applied to them.

The Board reversed on all but the final 8(b)(1)(A) finding. It summarized Board precedent in relocation cases as follows: "an existing contract will remain in effect after a relocation if the operations at the new facility are substantially the same as those at the old and if transferees from the old plant constitute a substantial percentage—approximately 40 percent or more—of the new plant employee complement." (Id., slip op. at 6.) The Board acknowledged that previous relocation decisions had not addressed the appropriate point in time for measuring whether a substantial percentage of the new work force is composed of transferees from the prior location. It observed, however, that "in each case where we have found that the contract remained in effect at the new location, transferees constituted a substantial percentage of the new work force *on the date that the transfer was substantially completed.*" (Id., slip op. at 8.) Here, it found that the employer's move from Brooklyn to Bound Brook was the date the final employer transfer took place. Therefore, it found that the extension of the collective-bargaining agreement to cover Bound Brook employees was lawful and that neither party violated the Act by its extension.

The Board stated that "in any relocation situation answering the question whether the union representing the employees at the former location should continue to represent the workers at the new location involves balancing the newly hired employees' interest in choosing whether or not to have union representation against the transferees' interest in retaining the fruits of their collective activity." (Id., slip op. at 9–10.)

In this case, the Board found the tension between these interest to be especially great because the employer operated its Bound Brook facility for 4 months before Brooklyn employees began to transfer permanently and for another 4 months before the transfer process was completed. For this reason, it examined additional factors contributing to its "willingness to tip the scales" in favor of allowing application of the Brooklyn contract to Bound Brook: (1) the parties acted in good faith; (2) the 8-month transfer period, was not unreasonable in view of the unexpected upsurge in orders; (3) Harte's acquisition of the Bound Brook facility was dependent on the closing of Brooklyn; and (4) national labor policy favors industrial stability achieved through the collective-bargaining process. The parties' actions "demonstrate the wisdom of such a policy": the parties worked out an agreement satisfying the employer's requirement for skilled labor and the union's and employees' concerns for retaining jobs and benefits.

In adopting the 8(b)(1)(A) finding concerning statements made by the union to new Bound Brook employees, the Board noted that "before a union may seek an employee's discharge for failure to comply with an 8(a)(3)-proviso-sanctioned provision, it must

afford the employee a reasonable time to comply with such provision and also inform the delinquent employee of the amount owed, the method used to compute such amount, and the manner in which the obligation may be satisfied." (Id., slip op. at 13.)

Because no such opportunities were provided here, the Board found that the Union's statements constituted unlawful threats. Having found that the extension of the collective-bargaining agreement to Bound Brook was lawful, however, it dismissed the derivative 8(a)(1) allegations, finding that the company's statement to newly hired Bound Brook employees was lawful and the union representatives' presence on company premises was authorized.

D. Employer Bargaining Obligation

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

1. Independent Contractors

In *Drukker Communications*,[67] a Board panel, pursuant to a circuit court order remanding the Board's previous decision for reconsideration,[68] determined that delivery contract holders utilized by the respondent for delivery of newspapers to subscriber were independent contractors and thus excluded from the bargaining unit.

The Board noted that the common law "right of control" test is applicable in determining independent contractor status, i.e., if the person for whom services are performed controls only the results to be accomplished, rather than the manner and means of accomplishing the results, the individual performing the services is an independent contractor rather than an employee.

The Board also noted various similarities between the respondent's business relationship with the delivery contract holders and the relationships leading to the Board's conclusion of independent contractor status in *Fort Wayne Newspapers*[69] and *Thomson Newspapers*.[70] Thus, the delivery contract holders hired their own helpers and made all decisions concerning the helpers' employment. They were free to hold other jobs and to make deliveries for other clients while on their routes. They obtained replacements on their own if they were unable to work, and they

[67] 277 NLRB 418 (Chairman Dotson and Members Dennis and Johansen)
[68] 700 F 2d 727 (D C Cir 1983), remanding 258 NLRB 734 (1981)
[69] 263 NLRB 854 (1982)
[70] 273 NLRB 350 (1984)

determined the location where they would pick up the newspapers to be delivered. They were obliged to provide and maintain their own vehicles, and were not required to display the respondent's insignia on their vehicles.

The respondent did not regularly supervise them, did not withhold taxes, and did not provide them with any of the benefits afforded to its employees. The delivery contract holders purchased the newspapers from the respondent and resold them to subscribers and, in doing so, were free to alter the profit margin between the purchase and resale price; they also absorbed the loss on any newspapers not sold. With respect to subscribers, the delivery contract holders extended credit and terminated service independently, and they shifted subscribers among themselves.

The Board also noted that some factors in the delivery contract holders' employment situation tended to indicate an employer-employee relationship. Their contracts with the respondent were oral and terminable at will, and they did not sell the respondent a proprietary interest in their customer lists at the termination of the contracts. The respondent requested submission of the customer lists on a biannual basis, required that deliveries be made at a reasonable hour, and provided bags to protect the newpapers in bad weather. The respondent did not require them to carry liability insurance, and it retained some control over their compensation by providing weekly stipends to ensure the profitability of their routes. However, the Board found this evidence outweighed by the factors above tending to establish the delivery contract holders as independent contractors, and consequently excluded them from the bargaining unit.

In *Precision Bulk Transport,*[71] the Board panel unanimously reversed the administrative law judge's finding that the company violated Section 8(a)(1) by coercively interrogating a prospective employee regarding his union sentiments and Section 8(a)(5) and (1) by refusing to recognize and bargain with the union as the exclusive bargaining agent of its owner-operator truckdrivers. The panel based its dismissal of the complaint on its finding that owner-operators who lease their equipment to the company are independent contractors not entitled to the Act's protections rather than employees within the meaning of Section 2(3).

Precision Bulk Transport is a carrier engaged in interstate trucking services. In 1982, when it agreed to purchase Harmon Trucking Company, it told Harmon's drivers it intended that they should all become independent contractors. The union, which had represented Harmon's drivers, requested Precision to bargain with it. Precision refused.

The administrative law judge, in finding that owner-operators are employees, applied the common law right-of-control test and relied on the Board's analysis in *Mitchell Bros. Truck Lines*[72] and

[71] 279 NLRB No 60 (Chairman Dotson and Members Dennis and Stephens)
[72] 249 NLRB 476 (1980)

Robbins Motor Transportation.[73] In those cases the Board found that the pervasive scheme of governmental regulations in the trucking industry resulted in substantial company control and constituted a significant factor in finding that owner-operators were employees. Subsequent to the judge's decision in the instant case, however, the Board in *Air Transit*[74] and *Don Bass Trucking*[75] rejected arguments that Government-imposed regulations constituted company control over drivers. In *Don Bass Trucking* the Board explicitly overruled *Mitchell Bros.* to the extent it was inconsistent.

The panel in *Precision* continued to follow *Don Bass Trucking.* It found that the lease agreement provision that the leased truck shall be exclusively controlled by Precision "is consistent with the written lease requirements mandated by Federal Interstate Commerce Commission regulations." (279 NLRB No. 60, slip op. at 3.) Although the panel found that the lease provision that the equipment will not be used for any purpose other than conducting Precision's business except on Precision's direct order went beyond the control imposed by law, it concluded that this factor was "insufficient to support a finding that owner-operators are statutory employees, in light of the record evidence showing the owner-operators enjoy certain freedoms and bear certain risks consistent with the operation of an independent business." (Id., slip op. at 3–4.)

The panel concluded, "The owner-operators here are independent contractors because the Employer has not retained the right to control the actual manner and means by which the owner-operators perform their services." (Id., slip op. at 6.)

In reaching its conclusion, the panel relied on a number of factors, including the following. The owner-operators purchase, maintain, and insure their own rigs, except that Precision is legally required to purchase general liability insurance. They pay their own highway use taxes, mileage taxes, fuel taxes, fines, and license and permit fees. Precision pays the owner-operators a percentage of gross revenues; it makes no deductions from their checks, pays no benefits, and does not provide FICA, unemployment, or workers compensation contributions on their behalf. Precision does not exercise day-to-day supervision over the drivers hauling activities and does not impose disciplinary, safety, or reporting rules beyond those required by law. Finally, owner-operators are free to accept or reject loads, can select the States in which they operate, and have hired replacement drivers.

In *H & H Pretzel Co.*,[76] a Board panel, reversing the administrative law judge, found that individuals who performed services

[73] 225 NLRB 761 (1976)
[74] 271 NLRB 1108 (1984)
[75] 275 NLRB 1172 (1985)
[76] 277 NLRB 1327 (Chairman Dotson and Member Babson, Member Dennis concurring in part and dissenting in part)

for the employer as dealer/distributors were employees within the meaning of the Act and not independent contractors. It further held that the respondent violated Section 8(a)(5) by withdrawing recognition and refusing to bargain with the union on behalf of its dealer/employees.

Originally, the employer, a wholesale distributor of snack foods, employed driver-salesmen who were represented by the union and covered by a collective-bargaining agreement. While negotiating for a new agreement, the employer proposed that the status of its drivers be converted from employees to independent contractors. After the parties had bargained to impasse, the employer converted its operation into a distributor-dealership and executed individual agreements with what it termed "dealers" to sell and deliver snack products.

The panel majority stated that in determining the status of individuals alleged to be "independent contractors," the Board applies a "right of control" test. If the person for whom the services are performed retains the right to control the manner and means by which the results are to be accomplished, the person who performs the services is an employee. If only the results are controlled, the person performing the services is an independent contractor.

Applying this test, the panel concluded that the employer so extensively controlled the manner and means utilized by its dealers in accomplishing the result that the dealers were employees and not independent contractors. For instance, the panel noted that in its agreement with the dealers, the employer set the workweek, the frequency of customer calls, dictated the color and design of the vehicles used, and even regulated the personal hygiene of the dealers and the cleanliness of their vehicles.

In light of the extensive control of the manner and means of the result to be achieved by the dealers, the panel concluded that the dealers are the employer's employees and not independent contractors. It further held that the respondent was obligated to recognize and bargain with the union on behalf of its dealer/employees following the conversion, and that its failure to do so was violative of Section 8(a)(5).

Dissenting in part, Member Dennis did not agree with the judge and the majority that the respondent lawfully refused the union's request for certain financial information; that the parties had in fact reached impasse; or that the respondent lawfully terminated employees after implementing the independent contractor plan.

2. Successor Employer

In *Evergreen Lumber Co.*,[77] the Board considered whether preferred stock issued by a company was a financing device to pur-

[77] 278 NLRB No 99 (Chairman Dotson and Members Dennis and Johansen)

chase the operating assets of another company and to convert a bank note should be treated as an equity or a liability in the computation of the company's net worth.

A complaint issued against the respondent alleging that it was a successor employer that violated Section 8(a)(5) by refusing to recognize and bargain with the union. The judge dismissed the complaint. No exceptions were filed to the judge's decision.

The respondent subsequently filed an application under the Equal Access to Justice Act (EAJA). In determining whether Evergreen met the net worth limitation for EAJA awards, an issue arose concerning whether the company's "minority interest in subsidiaries" should be considered an equity or a liability. The "minority interest in subsidiaries" consisted of preferred stock that Evergreen had issued to another company in exchange for its operating assets, and preferred stock Evergreen had issued to convert a note payable to a bank.

The General Counsel contended that the "minority interest in subsidiaries" reflected ownership and should be treated as an equity interest. Evergreen detailed how the stock was used as a purchasing tool, and submitted an affidavit of a certified public accountant who had examined the financial statements of Evergreen and its affiliates. According to the accountant, inclusion of the "minority interest in subsidiaries" would incorrectly present the Company's net worth, and that generally accepted accounting principles required that the item be listed as a liability.

The Board found that the General Counsel did not directly refute the evidence of the certified public accountant as applied specifically to the case. The Board thus concluded that the treatment of "minority interest in subsidiaries" as a liability in computing the net worth of the company was not improper in the particular circumstances of the case.

In *Bay Diner*,[78] the Board found that because a successor employer stands in the shoes of the predecessor vis-a-vis the union, the bargaining obligation of the predecessor devolved on the respondent, a successor employing all of the predecessor's employees and purchasing the predecessor's operation with full knowledge of the predecessor's unremedied unfair labor practices.[79] The Board found likewise that the remedial provision of the Board's order against the predecessor applies to the successor.

The respondent had refused the union's January 1982 bargaining demand on the grounds that the union, certified as the bargaining representative of the predecessor's employees in March 1979, had lost its majority support. The Board found, contrary to the judge, that an extension of the certification year was not warranted as the predecessor had met with the union on three occasions during the certification year, the predecessor had never

[78] 279 NLRB No 77 (Members Johansen, Babson, and Stephens)

[79] Citing *Harley-Davidson Co*, 273 NLRB 1531 (1985) *Southern Moulding*, 219 NLRB 119 (1975)

been charged with an overall refusal to bargain, and the successor's acquisition of the predecessor and its refusal to bargain with the union following the expiration of the certification year.

The Board found the union did not enjoy an irrebuttable presumption of majority status. Nonetheless, it held the successor's refusal to bargain was unlawful under the principles of *Celanese Corp.*,[80] which foreclose an employer from raising the majority issue even after the certification year has expired "[i]n a context of illegal antiunion activities, or other conduct by the employer aimed at causing disaffection from the union."

The Board found that because the predecessor's unfair labor practices were of such a character as to affect the union's status and cause employee disaffection and were unremedied at the time of the successor's takeover, any challenge to the union's majority status would be fatally tainted until the adverse effects of the unfair labor practices had been dissipated and the successor had bargained for a reasonable period thereafter.

The Board further held that even assuming the successor's October 1981 offer of reinstatement to two discriminatees and notice posting was sufficient to dispel the lingering effects of the earlier unfair labor practices, the bargaining relationship was thereafter entitled to a reasonable period, following expiration of the posting period, during which it might have an opportunity, for the first time, to bear fruit through good-faith bargaining. The Board found that despite the successor's then-current obligation to bargain with the union, it ignored the union's bargaining demand, thereby violating Section 8(a)(5).

In *Armco, Inc.*,[81] a successor employer argued that it was not obligated to bargain with the union which had represented the employees of the predecessor's coke facility because those employees had been accreted to its systemwide unit of steelworkers represented by a rival union. A Board panel rejected the argument, finding that the coke facility employees constituted an appropriate unit.

Although the successor had made the coke facility one of its many operating and maintenance departments and consolidated the coke facility personnel and labor relations functions with those of the other departments, the panel concluded the changes had not obliterated the separate identity of the coke facility employees. Their jobs required special experience and skills and presented special work hazards. Because of these differences in their working conditions, the geographic separation of the coke facility, and its long history of separate bargaining, coke facility employees continued to have a community of interest separate from the successor's other employees.

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[80] 95 NLRB 664, 673 (1951)

[81] *Armco, Inc*, 279 NLRB No 143 (Members Dennis and Babson, Chairman Dotson dissenting in part)

Dissenting in part, Chairman Dotson agreed that to accrete the historically separate unit of coke facility employees into an overall steel-producing unit was improper. He considered either a single overall unit or a separate coke facility unit to be appropriate in the circumstances, and took the further position that the competing claims of the two unions raised a question concerning representation that should be resolved by a self-determination election for the coke facility.

Chairman Dotson said, "I would find that Respondent Armco was required to refrain both from recognizing Respondent Steelworkers *and* from recognizing Charging Party OCAW [Oil, Chemical and Atomic Workers] following the acquisition," adding, "Because Respondent Armco need not and indeed must not recognize and bargain with either Union until the question concerning representation is resolved it follows that Respondent Armco did not violate Section 8(a)(5) and (1) when it refused to bargain with OCAW."

In *Myers Custom Products,*[82] the Board, based on a stipulated record, dismissed a complaint alleging the respondent was a successor employer and violated Section 8(a)(5) by failing to recognize the union.

The respondent purchased Gibbons Enclosures on 14 September 1984. Before the purchase, the respondent interviewed Gibbons' employees. On 17 September 1984 the respondent commenced operations. It hired 13 individuals, 9 of whom had worked for Gibbons. Gibbons had 21 employees when it ceased operations on 14 September 1984. By 12 November 1984, the respondent had hired 13 more employees, only 2 of whom had worked for Gibbons.

When the union, which had represented Gibbons' employees, requested bargaining in October 1984, the respondent refused, stating that it planned to use a work force of 22 to 25 employees in the near future. The parties stipulated that the respondent determined that it would take 2 to 3 months to select and train a full employee complement.

The Board, emphasizing the parties' stipulation, held that "when the Respondent began operations, it planned, with a reasonable degree of certainty, a substantial increase in the number of unit employees within a relatively short time" (id., slip op. at 5). And at the end of a short time the respondent had hired 25 employees, 10 of whom had worked for Gibbons.

The Board held, "Under these circumstances, we believe it appropriate to maximize the number of employees selecting a bargaining representative by delaying determination of the bargaining obligation for the short duration of the planned work force expansion. Accordingly, because on 12 November 1984 only a minority of the Respondent's unit employees had been unit em-

[82] 278 NLRB No 92 (Members Dennis, Babson, and Stephens)

ployees of Gibbons, the Respondent was not obligated to recognize or bargain with the Union." (Ibid.)

3. Relocation

In *Morco Industries*,[83] the Board ordered an employer to bargain over the effects, but not the decision, to transfer operations. On its sua sponte request, while an earlier order[84] in the same case was pending before the United States Court of Appeals for the Fifth Circuit, the Board recalled and reconsidered the case in light of the intervening Supreme Court decision of *First National Maintenance Corp. v. NLRB*,[85] and the Board's decision in *Otis Elevator*, 269 NLRB 891 (1984), interpreting *First National Maintenance*.[86] In its earlier decision, the Board had ordered the employer to bargain over both the decision and effects of its transfer of work from its Pinellas Park, Florida plant to its Long Beach, Mississippi plant.

The employer fabricates stainless steel cafeteria equipment at its Pinellas Park plant and decided in 1978 to open the Long Beach plant to accommodate a large increase in business with no room for expansion in Florida. Initially, the employer assured the union representing Pinellas Park employees that the new plant would have no impact on their existing unit.

After construction of the new plant had begun, the employer decided to use its skilled Pinellas Park work force to make relatively sophisticated equipment for a cafeteria project in Atlanta. It therefore transferred the standard work being done in Pinellas Park to Long Beach. Because of a delay in work at the Atlanta project, the employer decided to lay off five Pinellas Park employees on 31 January 1980 and two more on 29 February 1980. The employer did not comply with the union's request to bargain about the layoffs and work transfer.

Applying pre-*Otis* precedent, the judge stated that employees "have a substantial interest in protecting [their] livelihood, and the duty to bargain over any such a decision which adversely affects that livelihood . . . places only a minimal burden on the employer." (279 NLRB No. 100, JD slip op. at 12.) The duty to bargain over such a decision, the judge added, "attaches only where the decision has a foreseeably adverse effect upon the bargaining unit." (Id., slip op. at 13.)

Applying these principles, the judge found that the employer violated Section 8(a)(5) by failing to alert the union when it learned of the Atlanta project delay about the nature of its allocation decision and by not giving the union an opportunity to bargain over that decision and its effects.

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[83] 279 NLRB No 100 (Chairman Dotson and Members Dennis and Johansen)
[84] 255 NLRB 146 (1981)
[85] 452 U S 666 (1981)
[86] 269 NLRB 891 (1984)

The Board's 1981 decision adopted the judge's decision, but on reconsideration the Board reversed. Applying *Otis*, the Board stated that "[w]here a [managerial] decision turns on a change in the scope, nature, or direction of a significant facet of the enterprise, the Act does not impose an obligation to bargain." (279 NLRB No. 100, slip op. at 3.)

Here, the Board concluded, that "the decision to transfer work turned entirely on the need to expand the Respondent's metal fabrication facilities, and . . . this expansion involved a change in the nature and scope of this facet of the enterprise." (Ibid.) Specifically, the Board found that at the time of the expansion the Pinellas Park physical plant had "reached its absolute limits for expansion," and lack of fabrication facilities was causing the employer to lose orders. The Board also noted a $950,000 capital investment in the Long Beach plant, enabling the company to reach a new market. Finally, the Board noted that the employer had "not sought to undermine the status of the Union or escape the labor costs embodied in the contract." (Id., slip op. at 4.)

Accordingly, the Board concluded that the respondent did not violate Section 8(a)(5) and (1) by failing to notify or bargain with the union over its decision to transfer work between plants. It did, however, find that the employer's failure to bargain over the effects of the decision violated Section 8(a)(5) and ordered the employer to do so. This order was accompanied by a limited backpay requirement "designed both to make whole the employees for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent." (Id., slip op. at 5.)

In *Brown Co.*,[87] the Board held that an employer violated Section 8(a)(5) when it unilaterally discontinued its cement hauling operations and transferred work out of the bargaining unit in the face of a work-preservation clause.

The case was decided in a supplemental decision on remand from the United States Court of Appeals for the Ninth Circuit. In its initial decision,[88] the Board held that the employer violated Section 8(a)(3) by transferring its cement hauling work to a subsidiary to escape contractual wage obligations. The Board had also declined to defer to the ruling of a joint labor-management grievance committee, as had been recommended by an administrative law judge, because members of the joint committee had interests directly in conflict with those of the grievant.

The court held that the Board did not abuse its discretion by declining to defer to the joint committee, but that the employer's actions should be judged not on the basis of statutory mandates

[87] 278 NLRB No 113 (Chairman Dotson and Members Dennis and Babson)
[88] 243 NLRB 769 (1979)

but by examining the relevant collective-bargaining agreement to determine whether transfer of work was permissible.

On remand, the Board affirmed its decision not to defer in accepting the court's opinion as the law of the case. Examining the contractual issues, the Board first noted that both *Milwaukee Spring Division*[89] (*Milwaukee Spring II*) and *Otis Elevator*,[90] had issued since the court's remand.

In *Milwaukee Spring II*, the contract did not contain any prohibition to the transfer of work, and therefore the employer did not violate Section 8(a)(5) by relocating work after bargaining to impasse. In contrast, this contract contained a provision that "[i]t is the intent of the parties to protect the work performed by employees in the bargaining unit."

The Board found that no powers retained by the employer elsewhere in the contract authorized it to eliminate an entire job classification and transfer all cement hauling work out of the bargaining unit, as it had done. The Board rejected contentions by the employer that industry practice and past practice sanctioned the employer's action. Thus, the Board concluded that the transfer of work was a unilateral midterm modification of the parties' contract.

The second question in the Board's inquiry into whether the transfer of work violated the Act was whether it was a mandatory bargaining subject. In this regard, the Board relied on the finding in its earlier decision that the employer's action was for "the sole purpose of escaping from its wage obligations under the existing collective-bargaining contract." (278 NLRB No. 113, slip op. at 6.) Thus, it concluded that the employer's decision "turned on labor costs," as stated in *Otis Elevator*, a "critical" indicator that the decision was subject to mandatory bargaining.

Finally, the Board found that the union did not consent to the proposed change either in its communications with the employer or by its failure to press the grievance after an unfavorable decision by the joint committee. Specifically, the Board stated that the bargaining history does not evidence a waiver of "its right to the benefits of its bargain" under the work-preservation clause of the contract and noted additionally that a union is not required to bargain at all about midterm changes. Accordingly, the Board found that the employer's action violated Section 8(a)(5).

In *Metropolitan Teletronics*,[91] the employer, faced with serious economic difficulties, decided to close its New York City and Union City, New Jersey facilities and relocate them both to single facility in Jersey City, New Jersey.

While the employer's New York employees were striking over failed contract negotiations, the employer began moving the New York facility's goods and equipment to Jersey City. The

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[89] 268 NLRB 601 (1984)

[90] 269 NLRB 891 (1984)

[91] 279 NLRB No 134 (Members Dennis and Stephens, Chairman Dotson dissenting)

employer, however, had not informed the union representing its New York employees of the decision to close and relocate. The union inquired in writing about the New York operations and, 3 days after the move began, the employer replied by offering to bargain about the effects of its decision. An exchange of letters followed, with each party expressing a willingness to meet and bargain over the effects.

Approximately 1 month after the move, the parties held a meeting at which they stated their respective positions. The employer followed up the meeting by sending the union an offer letter and, subsequently, sent another letter stating that it had not received a reply to the offer from the union. The union then replied by rejecting the employer's offer. The union made no counteroffer and bargaining thereupon ceased.

The judge found that the employer satisfied its effects bargaining obligation by offering, after the move, to bargain about the decision's effects and subsequently exchanging proposals with the union.

Contrary to the judge, the Board majority found that the employer's obligation to engage in meaningful effects bargaining with the union required timely notice to the union of the decision to close and relocate. It held that by concealing its decision from the union until after it began to vacate the New York City facility, the employer failed to provide timely notice and thus denied the union an opportunity to bargain at a time when it retained at least a measure of bargaining power.

The employer's belated offer to bargain with the union (after the unfair labor practices deprived the union of bargaining power) was no substitute for timely notice of the decision and good-faith bargaining before closing, the Board stated. It concluded that by failing to notify the union of its decision to close and relocate its New York City operation in a timely manner, the employer failed to bargain in good faith about the decision's effect and thereby violated Section 8(a)(5) of the Act.

Dissenting Chairman Dotson, like the judge, would find that the employer's efforts to bargain after moving satisfied its obligation to engage in effects bargaining. He stated that there is no reason to assume, as the majority apparently did, that any different result would have occurred had effects bargaining commenced at any earlier date. The employer's failure to give the union preclosure notification does not, in his view, present a per se 8(a)(5) violation because preclosure notice in this case would not have affected the union's ability to extract concessions.

Chairman Dotson said the employer's dire financial situation left the union with little meaningful chance of extracting substantial concessions before the move to Jersey City; that those chances may also have been poor after the move cannot render the employer's premove position a violation of Section 8(a)(5). He stated that if no real loss of bargaining power is shown, the

mere timing of the notice becomes irrelevant and cannot, by itself, create an 8(a)(5) violation.

In response, the panel majority explained that the timely notice rule is not a per se rule because an employer can avoid 8(a)(5) liability by demonstrating that emergency circumstances justified late notice to the union. Further, it was not clear to the majority that bargaining over concessions involving substantial cost to the employer is the only form of bargaining the Board protects under Section 8(a)(5). Without speculating on the results of the preclosure bargaining had it occurred, the majority found that the union suffered a disadvantage to its bargaining position by being denied the opportunity to bargain at a time when it still represented employees on whom the employer relied for services.

4. Duty to Furnish Information

In *Cowles Publishing Co.*,[92] a panel majority adopted the judge's conclusion that the respondent violated Section 8(a)(1) and (5) by refusing to execute a contract with the union or provide it with requested information concerning the unit employees.

The majority agreed with the judge that the respondent's reliance on the lack of contact between it and the union from April to November 1981 was misplaced. It found that this was not an objective basis for the respondent to doubt the union's continuing majority. It noted that only once during the material period was there a change in the union representative and that there was no showing that employee grievances remained unresolved during this time.

The majority further noted the respondent's claim that it had received complaints during this period from the employees because the union did not respond to phone calls and letters in a "timely fashion or not at all" and found that this indicated that the respondent knew that the union had responded to employee complaints. It observed that the union indicated a desire to represent the employees and that throughout the period a designated union representative was on the premises.

The majority concluded that the union's failure to seek additional bargaining during this period could be explained by the respondent's implementation of the agreed-on conditions and the union's abandonment of its insistence on a union-security clause—the major point of contention.

Chairman Dotson, dissenting, found that during the material period, the union engaged in no visible functions at the plant; the union steward informed the respondent that the union did not represent him in his own wage negotiations; the bargaining unit experienced considerable turnover of unit employees; and the

[92] 280 NLRB No 105 (Members Dennis and Stephens, Chairman Dotson dissenting)

union acceded to an agreement different in several respects from the respondent's position.

In *Getty Refining Co.*,[93] a Board panel considered whether an employee recreation fund was a mandatory bargaining subject concerning which an employer was required to furnish information.

The employer had voluntarily established the fund when it began operations about 30 years earlier, to partially support employee social events and group recreational activities. Management had administered the fund at its discretion, and included in the employee relations manual a description of its policy of supporting social and recreational activities. Over the years the fund financed large winter parties, retirement party tickets, and various sports activities. It had not been the subject of collective bargaining.

While the employer and the union were negotiating a new collective-bargaining agreement, the union requested information about the fund's income and expenditures. The employer declined the request, contending the information did not concern a mandatory bargaining subject because the fund was designed only to enhance the lives of employees. The union took the position that the fund was a mandatory bargaining subject relevant to its representational duties, particularly negotiating for contract modifications.

The panel majority concluded that the fund, which had existed for many years and was publicized in the employee relations manual as an employee benefit, was a mandatory bargaining subject. Therefore, it found that the employer violated Section 8(a)(5) by refusing to furnish information about the fund. The majority viewed the fund as a wage enhancement feature of the employees' compensation structure that constituted a substantial part of the economic package available to employees.

Chairman Dotson dissented. He viewed the fund as a gratuity, and noted that the fund did not grant sums to individual employees, but to group activities, and the sums were not computed on the basis of employee performance, seniority, or other employment-related factors.

5. Union Access

In *Cincinnati Enquirer*,[94] a Board panel adopted the judge's finding that the employer "violated Section 8(a)(1) by discriminatorily denying the Union . . . access to company-owned employee mailboxes." (Ibid.)

The union had been certified as the collective-bargaining representative of the employees on 24 December 1984. In January 1985 the union had requested permission to use the mailboxes to

[93] 279 NLRB No 126 (Members Dennis and Babson, Chairman Dotson dissenting)
[94] 279 NLRB No 149 (Chairman Dotson and Members Dennis and Johansen)

distribute its literature. The employer refused to allow the new union to have access to them, stating "that it allowed only company-sponsored organizations to use the mailboxes." (Id. slip op. at 2.)

The Board determined that this assertion was incorrect because the employer had granted access to other employee organizations and to the prior union. To remedy this violation, the Board ordered the employer to cease and desist from discriminatorily denying the union access to the mailboxes. The notice mandated that the employer "WILL NOT . . . enforce a rule prohibiting [the union] from using our employees' mailboxes for the distribution of union literature to employees."

6. Withdrawal of Recognition

In *Boaz Carpet Yarns*,[95] the Board held that the employer's insistence on a broad management-rights clause and its refusal to agree to a mandatory arbitration clause or to the union's proposals on dues checkoff and seniority were not sufficient grounds for finding a refusal to bargain in good faith in violation of Section 8(a)(5). Distinguishing the case from *NLRB v. A-1 King Size Sandwiches*,[96] the Board noted, among other things, that the employer here, unlike the employer in *A-1 King*, was not coupling its management-rights clause with insistence on a no-strike clause and a zipper clause.

The Board also held in *Boaz* that the employer did not violate Section 8(a)(5) by withdrawing recognition from the union subsequent to the presentation of an employee petition repudiating the union and a secret-ballot poll that the employer conducted after it received the petition. The petition, signed by 97 employees out of a unit of 130–140 employees, was presented on 4 June 1984. The employer soon thereafter filed an election petition with the Board. The union then filed 8(a)(5) charges based on its claim that the employer had engaged in surface bargaining during the contract negotiations. The Regional Director dismissed the election petition subject to reinstatement pending the disposition of the unfair labor practice charges.

Thereafter, on 23 July, the employer posted a notice informing the employees that it had sought to obtain a Board election based on the employee petition and that it could make changes in working conditions if it reached impasse or agreement with the union or if the employees voted in an election to decertify the union. The employer also stated that it might be able to make such changes if it could prove that the union had lost majority support among the employees and that its lawyers were going to "research the possibilities." On 25 July the employer announced that it would conduct a secret-ballot election the next day; it

[95] 280 NLRB No 4 (Chairman Dotson and Member Dennis, Member Johansen concurring in part and dissenting in part)

[96] 732 F 2d 872 (11th Cir 1984), enfg 265 NLRB 850 (1982)

then conducted such an election/poll. Following that election, in which a majority of the employees voted against the union, the employer withdrew recognition.

The Board held that the 23 July notice did not violate Section 8(a)(1) because it simply stated the law regarding unilateral changes of working conditions and did not promise benefits in exchange for rejecting the union. The Board also found that the poll was lawful because it was carried out under appropriate safeguards and was conducted simply to verify what already appeared, based on the 4 June petition, to be a disavowal of the union by an overwhelming majority of the employees. Under the circumstances of the case, the Board found no problem in the employer's failure to notify the union of the poll.

Member Johansen, concurring and dissenting in part, found the 23 July notice to be an unlawful promise of benefits, but concluded that withdrawal of recognition was lawful because the employer had a basis for good-faith doubt of majority (the 4 June petition) before it posted the notice or conducted its poll.

7. Bad-Faith Bargaining

In *Hedaya Bros.*,[97] a panel found that the totality of the employer's conduct, both before and throughout the course of collective-bargaining negotiations, established that it bargained in bad faith.

The parties participated in four bargaining sessions. The Board found that the employer committed several 8(a)(1) violations, both before and after the bargaining had commenced, including statements that it would close rather then deal with the union; it was not going to sign a contract; and it was better for employees to work without a union because they would still get the "same benefits but they would not get a raise." The employer's president also told employees that he would not negotiate and would be forced to close if a union won the election.

The Board found that such statements reflected an "unwillingness to engage in serious collective bargaining and imply that the Respondent alone would determine terms and conditions of employment." (Id. at 945.)

The Board also observed that the respondent's economic benefit proposals, all of which reduced the amounts currently received by employees, and its proposals to freeze or reduce wages demonstrated conduct consistent with earlier statements that if employees rejected unionization, benefits would be maintained and implying a reduction otherwise.

Chairman Dotson emphasized that he was not attempting to evaluate the reasonableness of the respondent's bargaining proposals. Likewise, Member Babson emphasized that he also would not attempt to evaluate the reasonableness of bargaining propos-

[97] 277 NLRB 942 (Chairman Dotson and Members Dennis and Babson)

als in determining a party's good faith, but agreed that the totality of the respondent's conduct indicated that it had failed to bargain in good faith.

Finally, the Board found that other unlawful conduct supported its finding. The Board found that the respondent's unilateral elimination of several holidays itself violated Section 8(a)(5) and (1), and clearly indicated bad faith.

8. Obligation to Recognize

In *Without Reservation*,[98] a Board panel adopted the judge's finding that an employer had violated Section 8(a)(5) and (1) by refusing to bargain with the union following a card count, indicating that a majority of the employees supported the union.

The parties agreed to a card count as a means of showing that the union represented a majority of employees, and further agreed that the employer would recognize the union if the count demonstrated majority support. Following the count, although there was no assertion that the cards were invalid or that the count was inaccurate, the employer requested verification of the signatures on the cards. The employer, however, failed to cooperate with the union's attempt to verify some of the signatures with the result that verification of all the cards was never made.

Relying on *Snow & Sons*,[99] the judge found the fact that not all the cards were verified was no basis for invalidating the count when there was no evidence showing that the employer had a reasonable basis to doubt the validity of the signatures or otherwise question the union's majority status. The judge thus found the employer's obligation to bargain had been established by the card count and that its subsequent refusal to accede to the union's request to bargain following the count violated the Act.

9. Expired Contract Terms

In *Service Electric Co.*,[100] the Board found, in agreement with the judge, that an employer did not violate Section 8(a)(5) by refusing to accede to a union's demand that it apply the terms of an expired contract to its economic strike replacements.

The judge found that the strike was still continuing and that, accordingly, the employer remained free to pay the replacements whatever wages it deemed necessary to retain their services—irrespective of whether those wages were higher or lower than the wages which prevailed under the expired contract. The judge further found that, even assuming that the strike had ended, under all the circumstances, including the fact that half the strikers had still not offered to return, the employer was justified in refusing to accede to the union's demand.

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[98] 280 NLRB No 165 (Members Johansen, Babson, and Stephens)
[99] 134 NLRB 709 (1961)
[100] 281 NLRB No 107 (Chairman Dotson and Members Johansen and Stephens)

In adopting the judge's findings, Chairman Dotson noted that in his view under no circumstances would the Act require an employer to apply preexisting terms of employment to its economic strike replacements upon the strike's termination. Member Stephens noted that he found it unnecessary to pass on whether the strike had ended because he agreed with the judge that, even if it had, under the specific circumstances of this case, the employer's conduct was justified.

10. Unilateral Contract Changes

In *Rapid Fur Dressing*,[101] a panel majority found that the employer violated Section 8(a)(5) and (1) when, during the term of its collective-bargaining agreement with the union, it unilaterally, without notice to or agreement of the union, discontinued its contractually required payments to an employee vacation fund and an employee pension plan.

The panel majority held that Sections 8(a)(5) and (1) and 8(d) prohibit an employer, who is a party to an existing collective-bargaining agreement, from modifying the terms and conditions of employment established by that agreement without obtaining the consent of the union, and that pension plans and vacation benefits are well within the scope of this prohibition against unilateral midterm modifications of a collective-bargaining agreement.

In dissent, Chairman Dotson first observed that a breach of contract may be, but is not necessarily, an unfair labor practice. In the Chairman's view, the Board has failed to strike a balance between situations in which the Board deems a dispute to be one of contract breach and leaves the parties to their judicial remedies and those situations in which the Board acts to remedy a fundamental abrogation of a bargaining obligation and finds an unfair labor practice. Rather, the Chairman said, the Board in virtually every situation intervenes to interpret and enforce a contract by finding that a breach of contract constitutes a unilateral change in violation of Section 8(a)(5) and (1).

The Chairman stated that he would prefer to restore "a proper and healthy balance between those matters involving significant statutory issues, and thus properly resolved by the Board and those disputes best resolved by the parties in other forums." (Id., slip op. at 13–14.)

In response to the Chairman's dissent, the panel majority agreed with the principle that not every breach of contract constitutes an unfair labor practice; the panel majority stated that they differed with the Chairman only in the application of that principle to the facts of the instant case.

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[101] 278 NLRB No 126 (Members Dennis and Babson, Chairman Dotson dissenting)

11. Subjects for Bargaining

In *Borden, Inc.*,[102] the Board affirmed the judge's decision that the employer violated Section 8(a)(5) by premising a severance pay agreement on the employees' signing a general release which included waiver of all health and safety claims. The employer is a producer of polyvinylchloride (PVC) and related products.

The union and employer had a contract covering the employer's Leonminster, Massachusetts facility, including a provision for negotiating a severance agreement in the event of a plant closing. The employer laid off employees and eventually shut down production functions at the plant. The employer eventually agreed to discuss severance pay with the union. The parties essentially reached agreement on a clause whereby employees would choose between retaining their layoff status and recall rights or receiving severance pay. The union would not agree to a general release to be signed by all employees because the PVC produced at Leonminster was a known or suspected carcinogen whose use is governed by OSHA regulations. The employer gave the union a deadline in which to sign the agreement and, when the union did not sign, negotiations ceased.

The violation was found because a production shutdown at the Leonminster facility required the employer to bargain over shutdown effects, and the employer bargained to impasse over a nonmandatory subject (the general release). The affirmed judge's decision, in rejecting the argument that the severance pay and release issues were so dependent as to make both mandatory, observed that severance pay can be paid without the execution of a release.

12. Merger of Units

In *Gibbs & Cox*,[103] the Board reaffirmed its merger doctrine, which holds that the parties to a collective-bargaining agreement can by agreement merge separately certified or recognized units into one overall unit.

The judge found and the Board majority agreed that the respondent violated Section 8(a)(1) and (5) by withdrawing recognition from the union regarding the Arlington, Virginia segment of the contractual bargaining unit, by insisting to impasse that the bargaining unit exclude Arlington employees, and by unilaterally granting wage increases and other benefits to Arlington employees.

In 1946 the Board certified the union as the exclusive representative of its New York employees, then its sole location. Thereafter, the Respondent opened various field offices outside New York. The employees in these offices were treated as part

[102] 279 NLRB No 59 (Members Dennis, Babson, and Stephens)

[103] 280 NLRB No 110 (Members Johansen, Babson, and Stephens, Chairman Dotson and Member Dennis dissenting)

of the New York bargaining unit. In 1976 the respondent opened an Arlington office to be designated a division and recognized the union on the basis of a card check. The existing collective-bargaining agreement was applied to them.

In 1978 the respondent established another division at Newport News, Virginia. There, too, the company recognized the union and applied the 1975–1980 contract to the employees.

In late 1979, the Newport News employees became dissatisfied with the union and, in June 1980, another labor organization filed a representation petition asserting the employees at Newport News constituted a separate appropriate unit. The Regional Director agreed and directed an election in a separate unit. In dicta, the Regional Director indicated that the Arlington employees also constituted a separate appropriate unit.

In 1979 the Arlington employees began expressing dissatisfaction with the union. Both Arlington and New York management were aware of the problems. By 1 August 1980, the date negotiations commenced for a new contract, management was also aware that 5 of the 24 unit employees in Arlington had revoked dues-checkoff authorizations. Thirteen other employees had not joined the union. Thus, only six Arlington employees were members of the union as of 1 August. At the same time, there were 193 members in New York.

At the first negotiating session the respondent refused to bargain on behalf of the Arlington employees because it claimed the Board had found them to be a separate unit and because of its conclusion that a majority of the Arlington employees did not wish to be represented by the union. On 25 August the respondent announced and implemented wage increases and other benefits for the Arlington employees.

The judge found that the parties intended to include both Arlington and New York employees in one overall bargaining unit. The majority affirmed the judge's application of the Board's merger doctrine, under which the Board determines whether the parties have agreed to merge separately certified or recognized units into one overall unit.

Accordingly, the Board found the expressed disgruntlement of 18 employees in a bargaining unit of 217 provided the respondent with insufficient objective considerations for doubting the union's continuing majority status. The majority reaffirmed the importance of stability in bargaining relationships and found that in such circumstances "greater latitude should be accorded the *collective* rights of employees to pursue and preserve the pattern of representation of their choosing." (Id., slip op. at 6.)

The majority faults the dissent for viewing the Arlington unit from the vantage point of the time it was created. The majority states, "to characterize the unit from the vantage point of any period of time but the one presently under consideration is to disturb the reasonable balance the Board seeks to achieve between

the aims of assuring freedom of employees' choice and fostering established bargaining relationship." (Ibid.)

Dissenting Chairman Dotson and former Member Dennis would hold that "absent unusual circumstances, any unit that was appropriate for the purpose of selecting a bargaining representative remains appropriate for the purpose of rejecting that representative or obtaining a new one."

The dissent cited instances where the Board's deference to bargaining history has not been absolute. (Id., slip op. at 17–18.) The dissenters note that in *NLRB v. Magnavox Co. of Tennessee*,[104] the Supreme Court stated that although a union is free to waive employee rights "in the economic area," this is not true when employees' right "to exercise their choice of a bargaining representative is involved—whether to have no bargaining representative, or to retain the present one, or to obtain a new one."

The dissent found that "because this case involves the Section 7 right of employees to refrain from having a bargaining representative, *Magnavox* instructs that the union has no authority to waive it." (280 NLRB No. 110, slip op. at 19.)

Finally, the dissent deemed it inappropriate to speak, as the majority did, of balancing a basic statutory right—to refrain from collective action—against merely a general statutory policy of maintaining industrial stability.

13. Multiemployer Bargaining

In *Watson-Rummell Electric Co.*,[105] the Board found one ineffective and one effective notice of withdrawal from a multiemployer bargaining association under the criteria established in *Retail Associates*.[106]

In October 1975 a representative of the Respondent signed a letter of assent which authorized the local chapter of the National Electrical Contractors Association (NECA) to bargain in the respondent's behalf. The letter of assent allowed the respondent to terminate by giving written notice to NECA and the union "at least one-hundred-fifty (150) days prior to the then current anniversary date" of the multiemployer contract. The contracts in question were effective between 1 June 1978–31 May 1981 and 1 June 1981–31 May 1983.

On 17 February 1981 a NECA representative hand-delivered to the union a letter dated 31 December 1980 from the respondent which advised the union of the respondent's desire to terminate the 1975 letter of assent. The union rejected the letter because it gave only 103 days' notice before the anniversary date.

After 31 May 1981, the respondent refused to apply the terms and conditions of the succeeding multiemployer contract, utilize the union's hiring hall, or make union-dues checkoffs. On 27 De-

[104] 415 U S 322, 325 (1974)
[105] 277 NLRB 1401 (Chairman Dotson and Members Dennis and Johansen)
[106] 120 NLRB 338 (1958)

cember 1981 the respondent sent another letter to the union indicating its intention to terminate the 1975 letter of assent.

The Board agreed with the judge's conclusion that the respondent's 31 December 1980 letter of termination was untimely because it did not provide the 150-day notice agreed to in the 1975 letter of assent. The Board also found the respondent violated Section 8(a)(5) by its unilateral change in terms of employment when it refused to honor the collective-bargaining agreement after 31 May 1981.

The Board reversed the judge and found the respondent's 27 December 1981 termination letter effective, stating "Board policy as established in *Retail Associates*, supra, merely requires that an employer's attempt to withdraw from a multiemployer bargaining relationship be timely and unequivocal." (277 NLRB at 1401.)

The Board disagreed with the judge's finding that the respondent's continuing unilateral change violation interfered with timely and unequivocal termination letter, stating: "It is not Board policy to invalidate an employer's attempt to withdraw from a multiemployer bargaining relationship based solely on concurrent unfair labor practice." (Ibid.)

14. Notice Provisions

In *Schaeff Namco, Inc.*,[107] a Board panel considered the application of Section 8(d)'s notice and waiting provisions to a wage-reopener clause incorporated into a collective-bargaining agreement.

The clause, which had been modified by a settlement agreement between the company and the union, stated that the contract would be reopened for a period of 14 days during which the sole topic of negotiations would be hourly wages. The clause provided further that "either party may initiate economic action to support its position, i.e., a strike or a lockout" during this 14-day period, but that if "no action is taken and no agreement is reached, the Company shall put into effect its wage offer for the next year . . . ."

During the 14-day reopener period the company proposed a 10-percent wage reduction. After the union presented this proposal to its membership, a majority of the employees voted to reject the offer and to authorize strike action. The union then informed the respondent of these events and notified the Federal Mediation and Conciliation Service (FMCS) of the dispute. Although the parties met one more time during the wage-reopener period, they were unable to reach agreement concerning wages. The respondent implemented its 10-percent wage-reduction offer after the wage-reopener period had ended.

[107] 280 NLRB No 150 (Members Johansen, Babson, and Stephens)

Having found that the respondent had not bargained in good faith before implementing the wage reduction, the judge did not decide whether Section 8(d)'s provisions applied to the clause, though he stated that they would appear to apply. The Board panel reversed this conclusion and rejected the General Counsel's argument that the Respondent's unilateral implementation of the wage reduction had violated the waiting requirements of Section 8(d)(4).

The panel acknowledged that the Supreme Court had found that Section 8(d)'s provision apply to contract-reopener clauses in *NLRB v. Lion Oil Co.*[108] It concluded, however, that the Court was addressing only reopener clauses which permit a modification or termination of the contract because Section 8(d), by its terms, is activated only when a party seeks to terminate or modify the contract.

As the parties' contract clause had provided that the respondent "shall" put its wage offer into effect if the parties failed to reach an agreement and failed to take economic action, the panel found that the respondent had acted pursuant to the contract when it implemented the wage reduction. Accordingly, it concluded that the respondent had not modified or terminated the contract and that Section 8(d)'s requirements were therefore inapplicable.

The panel also rejected the General Counsel's alternative argument that as Section 8(d) prohibited the union from striking, the union had initiated all the economic action it could lawfully take and the contract clause therefore precluded the respondent from implementing its offer. The panel concluded that had the union struck in support of its wage offer, it would not have violated Section 8(d) because its wage offer would not constitute a modification of the contract. Instead, the strike would have occurred in order to obtain an objective which the contract had not settled and, pursuant to *Mine Workers Local 9735 v. NLRB*,[109] Section 8(d) would have been inapplicable. The union therefore did not initiate the economic action it could have lawfully taken. Accordingly, the contract required that the respondent implement its wage offer as the parties had neither reached an agreement nor initiated economic action.

15. Alleged Direct Dealing

In *Putnam Buick*,[110] Chairman Dotson and Member Dennis, reversing the administrative law judge, found that the employer did not exceed its 8(c) rights and did not violate Section 8(a)(5) by communicating noncoercively with its unit employees concerning the progress of collective-bargaining negotiations.

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[108] 352 U S 282 (1957)
[109] 258 F 2d 146 (D C Cir 1958)
[110] 280 NLRB No 101 (Chairman Dotson and Member Dennis, Member Johansen dissenting)

After the employer held its first negotiation session with the union, it had a meeting with its unit employees to inform them of the details of its proposal to the union. A month later the employer called the employees to another meeting to inform them of the status of negotiations and to suggest, "it's up to you guys what you want, an IRA or a pension. If you want an IRA, I am willing to fight for you." (Id., slip op. at 3.)

Subsequently, the employer called still another meeting and introduced a representative from Merrill Lynch and an insurance broker who respectively explained the benefits of an IRA and the benefits of the hospital surgical and insurance plan which the employer had previously presented to the union. The Board found that, under the circumstances, the employer did not engage in unlawful direct dealing, nor did the communications tend to undermine the union's representative status.

Member Johansen, dissenting, argued that the employer appealed to its employees to engage in direct bargaining when Vice President Corso told employees that if they wanted proposed increases in company contributions for their pensions to go into an IRA established for each employee, rather than into the union pension fund, he would "fight" to get the IRA. His remarks clearly invited employees to discuss with him their desires regarding the IRA, according to Member Johansen. The meeting with the stock and insurance brokers was likewise another attempt at direct dealing, he said. Member Johansen concluded that rather than direct these presentations to the union negotiators who were in a position to evaluate, accept, and recommend the proposals to the employees, and who alone had authority to act, the employer bypassed the union and made its appeal directly to the employees.

16. Other Issues

In *Postal Service*,[111] the Board dealt with the question of whether an employee's union must be given the opportunity to be present when the Postal Service adjusts or attempts to adjust Equal Employment Opportunity (EEO) complaints with individual unit employees when the same incidents or course of conduct comprising those complaints are concurrently the subject of contractual grievances under the parties' collective-bargaining agreement.

EEO administrative regulations which apply to the Postal Service provide for an aggrieved employee's right of consultation with an EEO counselor to try to resolve the matter on an informal basis before a formal complaint of discrimination is filed. The precomplaint counseling procedure is a required first step in the EEO process, and the applicable regulations specify that an EEO counselor shall not reveal the identity of an ag-

[111] 281 NLRB No 138 (Members Johansen, Babson, and Stephens)

grieved person except when authorized to do so by the aggrieved person until the agency has accepted a formal complaint of discrimination.

The panel considered the conflict between this EEO regulation, which assures anonymity of the complainant at the precomplaint stage of the EEO process, and Section 9(a), which requires that the bargaining representative be given an opportunity to be present at the adjustment of grievances of employees it represents. The clear statutory mandate of Section 9(a) must prevail over the EEO administrative regulations, the panel decided. Therefore, it concluded that the Postal Service violated Section 8(a)(5) and (1) when it adjusted or attempted to adjust contract grievances with individual unit employees without affording the employees' collective-bargaining representative the opportunity to be present at the adjustments.

The consolidated proceeding encompassed cases arising in Phoenix, Arizona, and Columbus, Ohio. In the Phoenix case, the Phoenix Metro Area local union filed contract grievances on behalf of four employees who had received notices of termination. The grievances alleged violations of sections of the parties' collective-bargaining agreement, including sections dealing with discrimination. Each of the individuals additionally filed EEO requests for counseling. Each employee was offered a settlement at the precomplaint meeting with the EEO counselor, which purported to settle all grievances; three of the four signed the settlement agreements. The union was neither notified of nor invited to participate in the EEO grievance adjustment process. It continued to process the contract grievances. One grievance was resolved, and the remaining three were pending arbitration at the time of the hearing. The Postal Service had not attempted to raise the settlements as a bar to further proceedings under the contract, but reserved the right to do so.

In the Columbus case, an employee who was suspended filed both an EEO precomplaint form and a contract grievance regarding the suspension. An EEO settlement meeting was held at which the employee executed a settlement of the EEO precomplaint whereby the suspension would be removed from her personnel record. The Columbus area local union was not notified of and did not participate in the meeting. The union continued processing the contract grievance through which the employee sought to recover backpay. When the contract grievance came to arbitration, the Postal Service asserted the EEO precomplaint resolution as a defense, and the arbitrator ruled that the matter was not arbitrable.

The Postal Service was doing more in these cases than simply adjusting EEO complaints, the panel found. It was also attempting to adjust, or in some instances adjusting, concurrent grievances under the terms of its contract with the union through its internal EEO procedures. The panel noted that it did not need to

decide whether the union would have a right to be present at grievance adjustments with individual employees in which no contract grievance had been filed because in all the incidents at issue contract grievances had been filed.

Member Johansen did not agree that "an attempt to adjust grievances" at an employee's request, without more, transcends Section 9(a)'s reservation of the right of employees to present grievances to their employer without the intervention of the bargaining representative. Members Babson and Stephens did not dispute that under the first proviso to Section 9(a) employees have the right to present grievances to their employer without the intervention of the bargaining representative. However, they concluded that under the second proviso to that section, the collective-bargaining representative must be given an opportunity to be present at a conference with an individual employee at which the individual is offered a final settlement of a pending contract grievance, whether this attempt at adjustment results in the employee's acceptance of the settlement or not.

In *Adolph's Construction Co.*,[112] the employer allegedly failed and refused to make contributions to various benefits funds, as required by the collective-bargaining agreement, in violation of Sections 8(a)(5) and (1) and 8(d). The employer did not respond to these complaint allegations, nor did it respond to the Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted.

In granting the Motion for Summary Judgment, Members Dennis and Johansen saw no need to consider dissenting Chairman Dotson's concerns that the matter should be resolved judicially as a contract violation rather than through the Board's unfair labor practice procedures. The majority saw the Chairman's concerns as moot, insofar as the employer made no response or defense to the complaint.

In *Sisters of Mercy Health Corp.*,[113] the Board panel found that an employer was not obligated to recognize or reinstitute a bargaining relationship with a union, which during the term of the contract had unequivocally disclaimed any interest in further representing unit employees by transferring jurisdiction over the bargaining unit to another local.

The Board noted that the union did not engage in any action inconsistent with its disclaimer for 2 months. Under these circumstances, the Board concluded that the employer could refuse to recognize the union and the unit employees' representative and that this union could not thereafter resurrect its bargaining status.

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[112] 279 NLRB No 53 (Members Dennis and Johansen, Chairman Dotson dissenting)

[113] 277 NLRB 1353 (Chairman Dotson and Members Dennis and Johansen)

E. Union Interference with Employee Rights

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

A Board panel found that a union breached its duty of fair representation in violation of Section 8(b)(1)(A) by willfully failing to pursue an employee's grievance in *Linden Maintenance.*[114] The underlying facts showed that after the employee was denied reinstatement by the employer following hospitalization and a period of recovery, he sought the assistance of Local 3036 (the respondent). In March 1982 the employee was referred to the respondent's acting vice president, who told him that the respondent would take his case to arbitration. A few weeks later the employee received the respondent's assurance that his grievance was "already going through arbitration." The employee called the respondent two or three times thereafter and left messages for the respondent's representatives whom he had seen. Not receiving any response, the employee asked other representatives of the respondent in the summer of 1982 about the status of his grievance. He was told that they would ask the respondent's acting vice president about the matter, the acting vice president would take care of it, and the respondent had rejected the employer's offer of a part-time position on his behalf. The employee returned to the respondent's office in March 1983 to inquire again about his grievance and learned that the respondent had neglected it, but would take care of it. When the employee still did not hear from the respondent, he filed a charge on 4 April 1983.

The administrative law judge found that the charge was time barred by Section 10(b) and, relying on *Office Employees Local 2*[115] and *Teamsters Local 692 (Great Western Unifreight),*[116]

[114] *Service Employees Local 3036 (Linden Maintenance)*, 280 NLRB No 115 (Chairman Dotson and Member Babson, Member Dennis concurring in part and dissenting in part)

[115] 268 NLRB 1353 (1984), affd sub nom *Eichelberger v NLRB*, 765 F 2d 851 (9th Cir 1985)

[116] 209 NLRB 446 (1974)

found that the respondent had not breached its duty of fair representation. The Board panel reversed both of these conclusions. Although agreeing with the judge that Section 10(b) is tolled until the charging party has actual or constructive notice of the alleged unfair labor practice, the panel disagreed with the judge's conclusion that the respondent's failure to return the employee's phone calls during the summer of 1982 gave the employee actual or constructive notice of the respondent's alleged unfair labor practice. Noting that the burden of establishing notice rests with the party raising the affirmative defense of Section 10(b), the panel concluded that the evidence was insufficient to establish that the employee knew or should have known in the summer of 1982 that his grievance was not being pursued. Rather, the panel found that the employee did not have notice until March 1983, when he was told that his grievance had been neglected, and that the charge was therefore timely filed 1 month later.

The panel members also concluded that the respondent's failure to process the grievance constituted arbitrary conduct and perfunctory treatment of the grievance in violation of Section 8(b)(1)(A). They focused on the fact that the respondent had promised to take the grievance to arbitration, reassured the employee that it was processing the grievance, and thereafter abandoned the grievance without providing any explanation for or evidence of discretion in abandoning it. In reaching its conclusion, the panel distinguished two cases relied on by the judge. The panel found *Office Employees Local 2*, supra, distinguishable because the union in that case had not pursued a grievance because it had decided that an employee's complaints lacked merit, and *Teamsters Local 692*, supra, was found distinguishable because the union in that case had never committed itself to process the grievance to arbitration.

Having found the violation, the Board panel ordered the respondent to request the employer to reinstate the employee and, if the employer refused, to pursue the remaining stages of the grievance procedure, including arbitration. In formulating this remedy, the panel recognized that as a result of the respondent's misconduct in handling the employee's grievance, the respondent might be unable to obtain an arbitrator's resolution of the employee's grievance. Relying on *Mack-Wayne Closures*,[117] the panel majority ordered that, in the event the grievance could not be pursued, the respondent should make the employee whole for any loss of pay he might have suffered as a result of the respondent's violation of its duty to represent him fairly. Member Dennis dissented from this portion of the remedy. On the basis of her dissent in *Mack-Wayne Closures*, supra, she would find that absent evidence that the employee's grievance was meritorious, the backpay award was speculative and unwarranted.

[117] *Rubber Workers Local 250 (Mack-Wayne Closures)*, 279 NLRB No 165

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."[118]

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. Resignation of Union Membership

In *Tracy American Ready Mix*,[119] a Board panel reversed an administrative law judge's finding that a union lawfully charged, tried, and fined an employee because he returned to work during a strike before his resignation became effective. During an economic strike, an employee, who initially joined the strike, decided to abandon it and accept reemployment. About midnight, before he returned to work the following day, he left a notarized letter in the union's night deposit box. The union discovered the letter the next day about 8 a.m., shortly after its office opened for business. The employee reported to work the same morning, about 6:50.

The union thereafter fined the employee $500 and placed him on probation until the collective-bargaining agreement expired for allegedly violating its constitution and bylaws. The Board panel, citing *Pattern Makers League v. NLRB*,[120] found that the union could not lawfully discipline the employee for his postresignation conduct and then addressed the issue whether the employee's resignation was effective when the union received it or when the employee left it in the union's possession the night before he returned to work.

Disagreeing with the administrative law judge, the Board panel concluded that the resignation was effective at the time of deposit. The panel, noting that it was not bound by common law contract rules, nonetheless found useful guidance in Restatement 2d, *Contracts* § 68 (1981), under which such a resignation would be considered received when left in the designated depository. Consequently, the panel deemed the employee's resignation effective as of its deposit in the box, rather than later, when a union agent retrieved it.

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

[119] *Teamsters Local 439 (Tracy American Ready Mix)*, 281 NLRB No 164 (Chairman Dotson and Members Johansen and Stephens)

[120] 473 U S 95 (1985)

The panel concluded that when the employee returned to work he was no longer a union member and therefore not subject to discipline by the union. Accordingly, the panel found that the union violated Section 8(b)(1)(A) by preferring charges against and fining the employee for postresignation conduct.

In *Gordon Construction*,[121] the Board reversed the administrative law judge's dismissal of complaint and found that the union (the respondent) violated Section 8(b)(1)(A) of the Act by processing internal union charges and fining an employee for crossing and working behind the respondent's picket line after the employee had tendered his resignation from full membership status in the union.

At the outset of a strike called by the respondent, an employee working for the struck employer hand-delivered to the respondent a letter reading, in part, as follows:

> I, Sam Viskovich, do hereby change my union membership status to "Financial Core Membership" also known as: "Dues Paying Only Membership" in accord with *NLRB v. Hershey Food Corp.* . . . and other Federal Statutory and Administrative Law. This change is effective immediately. I shall continue to tender to the union the regular and periodic dues required of me. It is my understanding that effective immediately I will not be subject to union fines or assessments if I choose to cross the picket line.

The respondent's representative replied that the union did not recognize this type of letter and asked why he did not simply resign from the union. Viskovich stated that he was not going to resign. The respondent reiterated that it did not recognize the letter and advised Viskovich to "do what [he] had to do" and that the union would do the same. Viskovich left the respondent's office, crossed the union's picket line, and reported to work for the struck employer. Thereafter, the respondent brought charges against the employee for violating its rules against members working behind its picket lines and fined him.

The administrative law judge found that the employee's intent was not clear and unequivocal because his verbal assertions contradicted the message in the letter. He concluded that in such circumstances the employee remained amenable to the union's discipline and, therefore, dismissed the complaint.

The Board disagreed and found that the letter effectively conveyed Viskovich's desire to limit his association with the union to the payment of prescribed dues and fees. This concept of "financial core membership," recognized in *Union Starch & Refining Co.*[122] and further described in *Hershey Foods Corp.*,[123] per-

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[121] *Carpenters Seattle Council (Gordon Construction)*, 277 NLRB 530 (Chairman Dotson and Members Dennis and Babson)

[122] 87 NLRB 779 (1949), enfd 186 F.2d 1008 (7th Cir. 1951)

[123] 207 NLRB 897 (1973), enfd 513 F.2d 1083 (9th Cir. 1975)

mits an employee to maintain a dues-paying affiliation with a union which will protect him against the threat of discharge under Section 8(a)(3) through operation of a union-security clause. This limited union association operates not only to deny financial core members certain rights and privileges of full union membership, but also immunizes such persons from the threat of union discipline and fines. In circumstances described in the instant case, the union's bringing charges against Viskovich and imposing a fine against him after he had informed the union of his change in membership status amounts to an unlawful restraint on his Section 7 right to refrain from union activity in violation of Section 8(b)(1)(A).

In a similar case dealing with financial core membership, *Tacoma Boatbuilding*,[124] a Board panel concluded that the respondent unions' efforts to discipline financial core members, to the extent that the discipline was for actions subsequent to the receipt of their financial core letters, violated Section 8(b)(1)(A) of the Act. The evidence showed that the unions conducted an economic strike against the employer. At various dates during the strike, 30 employees, who were union members, submitted, or tried to submit, to their respective unions a completed copy of a form letter that provides in pertinent part as follows:

> I am an employee of Tacoma Boatbuilding Co. in Tacoma, Washington. This letter will serve as notification that I am changing my membership status in _____ (name and number of local) from that of a "full" member to that of a "financial core" member. As a "financial core" member, I will continue to pay to the union all initiation fees and dues uniformly required of all members for maintaining membership. I am not resigning from the union, I am only changing my membership status. I will not, henceforth, be subject to any obligations of membership other than that of paying uniformly required dues and initiation fees required of all _____ (name of union) members.

The employees then returned to work for the employer. Thereafter, the unions initiated internal union charges and in most cases imposed fines against these employees for crossing a sanctioned picket line.

Contrary to the judge, the panel concluded that the phrase, "I am not resigning" cannot be read in isolation from the rest of the sentence and the letter as a whole. The panel found that before and after the phrase, the letter clearly sets forth that the employee will only accept the status of a financial core member, and the obligations of a financial core member are stated as only that of paying uniformly required dues and fees. The panel emphasized

[124] *Carpenters Local 470 (Tacoma Boatbuilding)*, 277 NLRB 513 (Chairman Dotson and Members Dennis and Babson)

that financial core membership has long been recognized as distinct from full membership. It thus concluded that the form letter submitted by the employee members reasonably placed the respective unions on notice that the members were resigning from full union membership.

In *Hearst Corp.*,[125] a Board panel found, contrary to a judge, that a union violated Section 8(b)(1)(A) and (2) of the Act by demanding that the employer continue deducting dues from the wages of employees who lawfully resigned their membership in the union.[126] Relying on language in the parties' collective-bargaining agreement pertaining to dues checkoff, and on the dues-checkoff form itself, the Board panel found that the payment of dues by employees was a quid pro quo for union membership and was not intended to meet any other financial obligation, such as "financial core" payments. The Board concluded that when the employees terminated their membership in the union, their resignations had the effect of revoking their dues-checkoff authorizations, and any dues-paying obligation that had been incurred by them pursuant to such authorizations ceased to exist by operation of law on the date of their resignations.

b. Imposition of Union Discipline

The Board held in *Hanson Plumbing*[127] that a union violated Section 8(b)(1)(A) of the Act by fining two members employed by a neutral subcontractor because they crossed and worked behind a lawful primary picket line established by another union at a common construction jobsite. The employer was a plumbing subcontractor on the site. A Carpenters local began picketing at the site in furtherance of its primary labor dispute with the general contractor at the site. The employer did not employ any employees represented by the Carpenters, and at no time did the Carpenters have a labor dispute with the employer.

The employer's employees at the jobsite were represented by the Plumbers. Two of these employees, who were members of the Plumbers, crossed the picket line and performed their regular plumbing duties for the employer. The Plumbers did not have a labor dispute with the general contractor and did not picket at the jobsite. There was no evidence that a reserved gate system was established at the site. About a month later, the Plumbers fined the two employees $1000 each because they had violated the union's bylaws and working rules and the union's constitution by crossing and working behind the Carpenters' picket line.

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[125] 281 NLRB No 113 (Chairman Dotson and Members Johansen and Babson)

[126] The Board panel, however, agreed with the judge on the basis of the Board's decision in *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984), that the union's restriction on resignation was unlawful and that the union violated Sec 8(b)(1)(A) by refusing to acknowledge its member's resignations and by maintaining and enforcing the unlawful provision in its constitution

[127] *Plumbers (Hanson Plumbing)*, 277 NLRB 1231 (Chairman Dotson and Members Johansen and Babson)

The Board rejected the Plumbers' contention that the fines were a purely internal union matter privileged under the proviso to Section 8(b)(1)(A), which permits unions to prescribe their own rules with respect to acquisition or retention of membership. The Plumbers argued that fining its members for crossing lawful primary picket lines of sister unions serves the Plumbers' legitimate interest in obtaining cooperation from those sister unions if the Plumbers require aid in any future strike or boycott activity.

The Board stated that it had no difficulty with the proposition that unions have a legitimate interest in having members honor picket lines, whether in direct furtherance of a primary labor dispute or in sympathetic support of the primary union. It also recognized that there are situations in which a union may lawfully enforce this legitimate interest in fining members who have crossed picket lines. Nevertheless, the Board decided that, under the test set forth by the Supreme Court in *Scofield v. NLRB*, 394 U.S. 423 (1969), the Plumbers' fines at issue impaired a policy Congress has imbedded in the labor laws, specifically the policy against the application of secondary pressure on neutral employers embodied in Section 8(b)(4) of the Act.

The Board found that the direction of the Plumbers' fines exclusively at employees of an undisputedly neutral employer clearly disclosed an objective proscribed by Section 8(b)(4)(B). According to the Board, "A natural and apparent object of the Respondents' fining of the [two employee-members] was to force them to stop working for the neutral [employer] and in turn to cause [the employer] to cease doing business with [the general contractor]. (277 NLRB at 1232.) In addition, the Board concluded that the absence of a reserved gate system at the common situs did not diminish the proscribed secondary objective of the Plumbers' fines. The Board stated (id. at 1233):

> Section 8(b)(4) places a burden on *labor organizations* to conduct themselves in primary disputes in such ways as will not needlessly entangle neutral employers. The absence of a reserved gate may have the consequence of extending the permissible physical limits of the primary labor dispute on a common situs, but neutral subcontractors on the situs remain neutrals protected by Section 8(b)(4) against conduct which has a clear and direct proscribed secondary objective even when there is no reserved gate.

The Board emphasized that its finding was restricted to the circumstances presented by the case, and that it was not passing on the legality of sympathetic appeals by secondary unions in situations involving employees of a primary employer, employees making deliveries to a primary employer, and employees engaged in work "related to" the operations of a primary employer.

In *Mueller Co.*,[128] a Board panel adopted the administrative law judge's finding that the union acted in contravention of a no-retaliation agreement when it charged, tried, and fined one of its members. The union engaged in a strike against the employer, Mueller Co., from "11 July 1980 to about 3 November 1980 . . . . As part of a strike settlement, the employer and Local 208 signed a no-retaliation agreement in which they agreed that they would not retaliate against any employee." (Id., slip op. at 5.) The strike ended soon afterwards. During the strike, union member Bill Nicholson crossed the picket line and returned to work. The union charged, tried, and fined him for doing so.

The judge found that the agreement "was not signed under duress and that it was integrated into the collective-bargaining agreement." (Id., slip op. at 7.) The judge also found that by signing the agreement, the union "waived any right it may have had to discipline an employee about strike-related activity." The Board found that the union's "action in charging, trying, and fining employee Bill Nicholson contravened the no-retaliation agreement and thus was a violation of Section 8(b)(1)(A). (Ibid.) The Board ordered the union to cease and desist from violating this agreement, to remove the charge from its records, and to refund the fine, with interest.

3. Other Forms of Interference

In *Todd Pacific*,[129] a Board panel found that a union had violated Section 8(b)(2) and (1)(A) by causing an employee to resign his leadman position. The employer's shipfitter leadman, a nonsupervisory position, engaged in a heated argument with another employee. As a result of the argument, the union stewards told the employer that they wanted the leadman transferred to another ship and "busted back to mechanic." On numerous subsequent occasions the union repeated its requests for the employer to transfer and or demote the leadman. The union stated that they were going "to get his lead hat" and "to write a grievance against him." Consequently, the employer transferred the leadman to another ship. The union informed the leadman that they still wanted his leadman hat taken away; they wanted him punished; and if they had to, they would go for his job. The employee relinquished his leadman position stating it was due to union harassment.

The judge found that the union violated Section 8(b)(2) and (1)(A) by attempting to cause the employer to transfer and to demote the leadman; and Section 8(b)(1)(A) by telling the leadman and a fellow employee that they were going to cause his transfer and demotion and were going to file internal union

[128] *Sheet Metal Workers Local 208 (Mueller Co.)*, 278 NLRB No 87 (Chairman Dotson and Members Dennis and Johansen)

[129] *Shipbuilders Local 9 (Todd Pacific)*, 279 NLRB No 87 (Chairman Dotson and Members Dennis and Babson)

charges against him. The judge, however, found that the relinquishment of the leadman position was a voluntary uncoerced act for which the respondent was not liable.

The panel reversed the judge with respect to the demotion. It noted that the union's unlawful retaliatory pressure on the employer and on the leadman continued unabated even after he was transferred to another ship and that the continued coercion was consistent with the repeatedly stated purpose of the union's agents to deprive the employee of his leadman position. Accordingly, the Board panel found that the employee's resignation was not voluntary, but rather a constructive demotion caused by the union's unlawful coercion.

In *Goodyear Tire & Rubber Co.*,[130] the Board adopted an administrative law judge's determination that a union violated Section 8(b)(1)(A) and (2) and that an employer violated Section 8(a)(3) and (1) by maintaining, applying, and enforcing a clause in their collective-bargaining agreement which granted top seniority to certain officials of the union even though such officials did not perform on-the-job contract administration duties or participate in the grievance process.

The contract provided that the union's executive board and various union officials, including the treasurer, would be accorded seniority preference for purposes of shift preference, surplus, and layoff. Under the rule enunciated in *Gulton Electro-Voice, Inc.*, 266 NLRB 406 (1983), such grants of "super-seniority" will be found lawful only when those individuals, as union agents, must be on the job to accomplish duties directly related to administering the collective-bargaining agreement, including grievance processing.

The administrative law judge reviewed the duties and responsibilities of the members of the executive board and the treasurer and found that they did not meet this standard. The executive board's duties relate solely to internal union matters with one exception: the Board is empowered to hear appeals of grievants whose grievances have been determined by the grievance committee ineligible for the final step of arbitration. These appeals, numbering approximately 8 to 10 a year, take place at the union's office and do not involve any representative of the employer. In sum, it is itself an internal union matter, albeit related to the grievance process, but not one which required the presence of the union officials' presence on the job to accomplish or which furthered the processing of the grievance with the employer. The treasurer's duties, as set forth in the union constitution and bylaws, include nothing which could be construed as contract effectuation or grievance-processing responsibilities. However, the collective-bargaining agreement provided that the treasurer performs duties relative to the dues-checkoff provision, makes

[130] 278 NLRB No 98 (Chairman Dotson and Members Johansen and Stephens)

weekly visits to the plant to pick up the dues check from the employer, and has access to the plant for the purpose of investigating grievances.

The judge concluded that none of these responsibilities can accurately be characterized as materially related to on-the-job enforcement and administration of the contract. The collection of dues is a purely ministerial act concerning an internal function and, the Board added in footnote, one that could be accomplished on nonwork time before, after, or between shifts. The Board also stated that the exchange of information between the employer and the treasurer concerning employees' status as relating to dues checkoff did not require his physical presence at the facility, but could as easily be accomplished by telephone or mail communication. Finally, the treasurer's being allowed plant access to investigate grievances was not part of any on-going assignment or part of his regular treasurer's duties; instead it was merely a provision *permitting* his access to the plant in the event that he would become involved in the investigation of a grievance. Accordingly, the judge determined that there was no showing that these union officials warranted seniority preference by virtue of their regular responsibilities.

In *Daly, Inc.*,[131] the Board affirmed an administrative law judge's decision that the union violated Section 8(b)(1)(A) and (2) of the Act when it "endtailed" employees at a recently organized plant behind employees with longer union membership when both groups were relocated to a third site. The judge noted that a union can choose between the divergent interests of its members as long as the choice is not arbitrary or in bad faith, but that the union must show objective justification for its conduct beyond placating the desires of the majority at the expense of the minority. The judge found the union could not side with one group because of its greater numbers and longer union membership. Despite the absence of a hostile motive, the judge found the union's refusal to consider dovetailing in effect penalized the newly organized employees for the past exercise of the right to refrain from union activity.

In *General Contractors*,[132] the Board affirmed the administrative law judge's conclusion that the respondent unions violated Section 8(b)(1)(A) of the Act by refusing to furnish two of the respondent's members with information regarding their places on a job opening referral list for high-rise work and the position of "Working Teamster Foreman."

The two members involved in this dispute addressed letters to the respondent requesting information about other members who had applied for or received high-rise work through the respondent, as well as the identities of other members whom the re-

[131] *Teamsters Local 42 (Daly, Inc.)*, 281 NLRB No 132 (Members Johansen, Babson, and Stephens)

[132] *Teamsters Local 282 (General Contractors)*, 280 NLRB No 86 (Chairman Dotson and Members Dennis and Babson)

spondent would consider for referral to such work before considering their request. The parties stipulated that the only position sought by the two members was that of working teamster foreman. Although no evidence revealed the existence of a referral list for this particular position, the administrative law judge found that the respondent had breached its duty of fair representation in refusing to provide the information sought.

The Board adopted the judge's rationale on this issue, stating that "a union has an obligation to deal fairly with an employee's request for job referral information and that an employee is entitled to access to job referral lists to determine his relative position in order to protect his referral rights." The Board further emphasized that despite the lack of evidence regarding the existence of a formal referral list for Working Teamster Foremen, "the respondent ha[d] not demonstrated that it ha[d] none of the information requested in any form or that it would be unduly burdensome for it to compile at least some of it." In reaching this conclusion, the Board additionally focused on the respondent's admission that some of its officers and business agents maintained hiring lists that were not binding upon employers, but might "fall within the purview of the information request." (Id., slip op. at 7.)

In *New York Telephone*,[133] the Board reversed the administrative law judge and found the union violated Section 8(b)(1)(A) of the Act by maintaining "a policy of providing the employees with dues-checkoff authorization cards as the sole means of satisfying their obligations to the Union." (Id., slip op. at 2.) The Board found the policy existed because the union's "*sole* membership application" provided no alternative to checkoff payments, the union's secretary had sent a letter to the Board's Regional Office essentially admitting all employees are required to sign the checkoff card/membership form, and the union was able only to produce oral evidence identifying 27 persons (in a unit of thousands) as cash dues payers. The Board found the evidence of 27 dues payers did not rebut the General Counsel's proof that the checkoff card policy existed.

In *Carpenters Local 608*,[134] the Board agreed with the administrative law judge's decision finding that the union violated Section 8(b)(1)(A) and (2) of the Act by refusing to allow dissident members of the union access to the union's hiring hall records. In reaching this conclusion the Board did not consider, and did not rely on, the judge's discussion concerning a union's obligations in operating a nonexclusive hiring hall. When the hall is exclusive, the union must operate the hall fairly. When union members reasonably believe that the hall is not operating fairly, then, on request, the union must make available the hiring hall records for

[133] *Communications Workers Local 1101 (New York Telephone)*, 281 NLRB No 64 (Chairman Dotson and Members Babson and Stephens)

[134] 279 NLRB No 99 (Chairman Dotson and Members Dennis and Johansen)

the inspection of those members who believe themselves to have been treated unfairly.

F. Union Coercion of Employer

Section 8(b)(1)(B) of the Act makes it an unfair labor practice for a union to coerce or restrain an employer in the selection of its representative for the purposes of collective bargaining or the adjustment of grievances.

In *Canyon Valley Electric*,[135] the Board considered the recurring question of whether a union's discipline of a member who is an employer's grievance representative violates Section 8(b)(1)(B). The member's offense was that he worked for a nonunion employer, but the union neither had nor sought a collective-bargaining relationship with the employer whose grievance representative it disciplined. The Board previously had held that such discipline restrained a member's employer in violation of Section 8(b)(1)(B), but the Ninth Circuit had disagreed and denied enforcement.[136] Noting that the Board had not followed the Ninth Circuit's position and recently had filed a petition for certiorari on this very issue, the Board here found a violation.

The union also contended that the discipline administered here, expulsion from the union, was purely an internal matter insulated by the proviso to Section 8(b)(1)(A) which preserves the right of unions to prescribe their own rules regarding membership. However, the Board found controlling a line of cases holding the 8(b)(1)(A) proviso to be inapplicable to Section 8(b)(1)(B), which section protects the freedom of employers to choose their representatives unimpeded by coercive union pressures on the representatives to cease working for them.

In *Womack, Inc.*,[137] the Board found that peaceful picketing of an employer's chief negotiator does not in itself violate Section 8(b)(1)(B). The employer, Milton J. Womack Inc., timely withdrew its authorization to negotiate from a multiemployer bargaining association and commenced contract negotiations with the union on a single-employer basis. After 15 bargaining sessions, the union began picketing several Womack jobs at the homes of its chief negotiator Henry Nevin Bretz and the majority stockholder with signs reading "Carpenters LU #1098; No Contract No Work; Milton J. Womack; No dispute with any other Employer." The employer filed 8(b)(1)(B) charges with the Board on the basis that the picketing interfered with its selection of bargaining representatives.

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[135] *Electrical Workers IBEW Local 497 (Canyon Valley Electric)*, 281 NLRB No 158 (Chairman Dotson and Members Johansen, Babson, and Stephens)

[136] *Electrical Workers IBEW Local 73 (Chewelah Contractors)*, 231 NLRB 809 (1977), enf denied 621 F 2d 1035 (9th Cir 1980)

[137] *Carpenters Local 1098 (Womack, Inc.)*, 280 NLRB No 102 (Members Dennis and Johansen, Chairman Dotson dissenting)

The Board adopted the administrative law judge's recommended dismissal of the complaint. The judge stated that "there was no showing that the Union sought to require Womack to continue in a multi-employer relationship such as the one it held previously in the [multiemployer association], and there was no showing that the Union sought to have Womack select another chief negotiator other than Henry Nevin Bretz." The union's sole objective, the judge found, "was the one expressed on its picket signs, i.e., to obtain a contract." The judge also observed that no personal action was taken against Bretz—this distinguishing cases where internal union discipline was imposed against a member supervisor. He also noted the union engaged in no violence, threats, or misconduct. In addition, the judge found that Bretz was himself "the employer for all practical purposes" because for over 6 years he had been "the final authority in Womack's operations." (Id., JD slip op. at 3.)

In adopting the judge's recommended dismissal, the Board noted that the judge had "examined the wording of the picket signs supporting a lawful economic objective, the timing of the picketing in relation to impasse in negotiations, and the peaceful and restrained nature of the demonstration." The Board stated that these factors "bear materially on our conclusion that peaceful picketing in these circumstances does not constitute restraint or coercion within the meaning of the Act." It therefore found it unnecessary to pass on the judge's finding that Bretz was "the employer for all practical purposes." (Id., fn. 1.)

Chairman Dotson dissented, stating that the judge's reasoning is "plainly wrong." First, the Chairman noted that the employer's intent is immaterial in an 8(b)(1)(B) analysis: "The proper test is whether the Respondent's conduct may affect adversely the employer's collective-bargaining representative in the performance of his duties." (Id., slip op. at 3–4.) He thus found that the picketing "carried the foreseeable likely effect of interfering with his duties as the Employer's collective-bargaining representative." (Id., slip op. at 4.) The dissent also took issue with the judge's finding that Bretz was the employer himself, noting that an individual must hold a substantial financial interest in the company to negate the applicability of Section 8(b)(1)(B), and that Bretz' financial interest was "miniscule."

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 Sections 8(b)(3) or 8(a)(5) if it does not fulfill its bargaining obligation.

In two cases issued during the report year, the Board considered whether a party may insist to impasse on the use of a recording device during grievance meetings.

In *Bell Telephone*,[138] the Board found, contrary to an administrative law judge, that the union violated Section 8(b)(3) of the Act by its insistence, over the employer's objections, on tape recording grievance discussions between the parties. Relying on its decision in *Bartlett-Collins*,[139] the Board found that the duty to bargain in good faith applies not only to negotiations, but to any meeting in which questions arising under the collective-bargaining agreement will be discussed. In reaching this finding, the Board observed that grievance meetings are similar to collective-bargaining negotiations in both character and methodology. Like contract negotiations, a grievance meeting is an informal mechanism used to address employee concerns when the ultimate goal is to reach agreement or settlement. Disagreement over the threshold issue of whether a recording device can be used which is preliminary and subordinate to substantive matters can stifle discussion from its inception. The Board thus concluded that the need for an objective means of replicating facts is outweighed by the adverse effects on the bargaining process.

Similarly, in *Hutchinson Fruit Co.*,[140] the Board, citing *Bell Telephone*, supra, found that the employer's insistence to impasse on the nonmandatory subject of tape recording grievance meetings violated Section 8(a)(5) and (1) of the Act. The Board observed that to hold otherwise would only serve to defeat its statutory obligation to encourage meaningful collective bargaining and the resolution of industrial disputes.

In *Signal Delivery*,[141] the Board considered, on the basis of a stipulated record, whether (1) the union violated its duty to bargain with the employers by insisting on the arbitration of grievances seeking to merge three separate bargaining units by dovetailing seniority lists; and (2) the union restrained or coerced employees by attempting to apply the terms of collective-bargaining agreements to employees other than those for whom the agreements were negotiated.

For many years the union was the designated exclusive bargaining representative of employees employed by Signal Delivery Service in two separate units: Signal's "home delivery" service, which operated out of two facilities; and its "city shuttle" operation, which operated out of one facility. The union also was the designated exclusive bargaining representative of two units of employees employed by Leaseway Trucking, Inc.: Leaseway's

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[138] *Pennsylvania Telephone Guild (Bell Telephone)*, 277 NLRB 501 (Chairman Dotson and Members Dennis and Johansen)

[139] 237 NLRB 770 (1978), enfd 639 F 2d 652 (10th Cir 1981), cert denied 452 U S 961 (1981)

[140] 277 NLRB 497 (Chairman Dotson and Members Hunter and Dennis)

[141] *Chicago Truck Drivers (Signal Delivery)*, 279 NLRB No 122 (Chairman Dotson and Members Dennis and Babson)

"home delivery" operation and its "general cartage" division, which provided drivers for Signal's city shuttle operation. Signal and Leaseway for years have been party to concurrent collective-bargaining agreements with the union covering these separate units of employees, and each unit has had a separate seniority list. No employee at any of these facilities had ever been bumped from one of the seniority lists to another. Moreover, during the most recent contract negotiation, no party made any proposals to merge or dovetail any of the separate seniority lists.

In April 1983 employees of Signal's home delivery operation filed a grievance seeking to exercise their seniority rights to transfer to the city shuttle operation. At the first grievance hearing, the union stated its position that three seniority lists—Signal's home delivery, Signal's city shuttle, and Leaseway's general cartage—should be dovetailed. At the second grievance hearing Signal contended that the "merger" issue was not grievable, but rather that it was a matter for future contract negotiations. The union again contended that the three seniority lists should be combined into one. In August 1983 the union filed a demand for arbitration, in which Signal refused to participate, and Signal thereafter filed an unfair labor practice charge.

In October 1983 the union filed a grievance against Leaseway on behalf of a Leaseway employee who was barred by Signal from its city shuttle operation. At a grievance meeting in January 1984, the union referred to the Signal employees' grievance of April 1983 and contended that the Signal and Leaseway employees should be considered as one. Leaseway's position like Signal's was that the matter was not grievable, but rather was a subject for future contract negotiations. In January 1984 the union filed a demand for arbitration, in which Leaseway refused to participate, and Leaseway thereafter filed an unfair labor practice charge. The two cases were consolidated before the Board.

The Board panel, agreeing with the General Counsel, found that the union's insistence on the arbitration of grievances seeking to merge three historically separate bargaining units was violative of Section 8(b)(1)(A) and (3) of the Act. Relying on *Utility Workers Local 111 (Ohio Power Co.)*,[142] the panel noted that an employer and a union may voluntarily agree to merge separate bargaining units; but that the enlargement of a bargaining unit is not a mandatory subject of bargaining; therefore one party may not insist on a change in the scope of an existing bargaining unit. The Board panel also relied on *Electrical Workers IBEW Local 323 (Active Enterprises)*,[143] in which the Board found that a union's insistence, inter alia, that the terms and conditions of employment governing employees in the employer's "commercial" unit be applied to the "residential" unit violated Section 8(b)(3)

[142] 203 NLRB 230, 238 (1973)
[143] 242 NLRB 305 (1979)

because the union could not lawfully demand the merger of the two historically separate units without the employer's consent. The panel further relied on the Board's finding in *Active Enterprises*, above, that the union's conduct in seeking to enforce through the grievance-arbitration procedure the terms of the commercial agreement against the employees in the residential unit had the effect of restraining and coercing employees in violation of Section 8(b)(1)(A). The panel therefore ordered the union to "[w]ithdraw its grievance and arbitration demands, which seek to compel Signal and Leaseway to merge their separate established bargaining units by dovetailing separate seniority lists or otherwise." (279 NLRB No. 122, slip op. at 12.)

In *C & P Telephone*,[144] a Board panel adopted an administrative law judge's conclusion that the union violated Section 8(b)(3) and (d) of the Act by unilaterally deciding not to abide by a contract provision concerning the preparation, use, and shared costs of an official transcript at nonexpedited arbitration hearings conducted pursuant to the grievance arbitration provisions of the collective-bargaining agreement. The union and the employer were parties to a series of collective-bargaining agreements from 1951 to 1983, when the instant controversy arose. During that time, the parties had a court reporter present for every nonexpedited arbitration hearing conducted pursuant to their contracts. Just after the close of negotiations for the 1983 agreement, the union informed the employer of its intention not to agree to the preparation, use, or shared costs of an official transcript at future nonexpedited arbitration hearings. The employer filed unfair labor practice charges with the Board, a complaint issued, and a hearing was held before an administrative law judge.

The judge found, and the Board agreed, that "inasmuch as questions concerning preparation, use, and cost-sharing of transcripts of arbitration hearings are substantive components of the parties' grievance arbitration procedure, they are mandatory subjects of bargaining." Accordingly, by refusing to continue to agree to this practice, the union unilaterally changed the terms and conditions of employment during the life of the parties' collective-bargaining agreement in violation of Section 8(d) of the Act, thereby violating Section 8(b)(3) of the Act.

H. Illegal Secondary Conduct

The statutory prohibitions against certain types of strikes and boycotts are contained in Section 8(b)(4). Clause (i) of that section forbids unions to strike, or to induce or encourage strikes or work stoppages by an individual employed by any person engaged in commerce, or in any industry affecting commerce; and

[144] *Communications Workers (C & P Telephone)*, 280 NLRB No 9 (Chairman Dotson and Members Johansen and Babson)

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 *Hormel & Co.*,[145] the Board adopted an administrative law judge's finding that the union violated Section 8(b)(4)(ii)(B) by picketing and handbilling at seven banks in furtherance of the union's primary labor dispute with the employer, a manufacturer of meat products. The Board, however, found that the judge erred in his analysis of the legality of the handbilling. Specifically, the Board reversed the judge's conclusion that the banks "distribute" products of the employer within the meaning of the publicity proviso to Section 8(b)(4), and therefore found that the publicity proviso did not apply to the union's handbilling.

The union represented employees at one of the employer's plants in Minnesota, and the parties had collective-bargaining agreements for a number of years. After unsuccessful negotiations for a new contract, the union struck the employer. In furtherance of this strike, the union engaged in picketing and handbilling at seven banks located in Minnesota, Wisconsin, and Iowa. Four of these banks were subsidiaries of a holding company and the other three were subsidiaries of another holding company. The picket signs and handbills used by the union characterized the banks and the holding companies as "corporate allies" of the employer involved in the making of the employer's labor policy. Only three of the banks had direct banking business with the employer. One of the banks held stock in the employer, but it did so in a fiduciary capacity for employee stock ownership and pension plans. An officer of one of the holding companies was on the employer's board of directors, and the employer's chief executive officer was on the boards of two of the banks.

The Board affirmed the judge's findings that the banks were neutral and secondary employers, and that the picketing was coercive and had the "cease doing business" object proscribed by Section 8(b)(4)(ii)(B). With respect to the handbilling, the Board agreed with the judge's findings that the handbills were coercive and had a "cease doing business" object and, therefore, unless privileged under the publicity proviso, violated Section 8(b)(4)(ii)(B). The judge had concluded that the banks "distribute" products produced by the employer—namely, "revenues"—and therefore it was necessary to determine whether the union's handbills comported with the publicity proviso. He proceeded to find that the handbills did not comport with the proviso's truthfulness requirement because they misleadingly claimed that the

[145] *Food & Commercial Workers Local P-9 (Hormel & Co.)*, 281 NLRB No 135 (Chairman Dotson and Members Johansen and Babson)

banks were responsible together with the employer for the actions being protested by the union.

Contrary to the judge, the Board held that the handbilling did not fall within the ambit of the publicity proviso because there is no basis for finding that the banks distribute the employer's products. The Board found no support for the judge's reasoning that simply because three of the banks received money from the employer for banking services and distributed money deposited by the employer, all seven banks and their parent holding companies are distributors of the employer's products. The Board pointed out that the employer produces meat products, and that the banks did not distribute or have any connection to the chain of distribution of the food products produced by the employer. The Board added that the employer "produces" revenue only in the general sense that any business does—by selling its products to customers. The Board stated (id., slip op. at 7–8):

> To find that [the employer] produces revenue within the meaning of the publicity proviso could mean that any person or business that has any contact with any money generated by [the employer] is a distributor of [the employer's] products, and therefore may be enmeshed in any of [the employer's] primary labor disputes. Such a result would be at odds with the plain meaning and purpose of the limitation of protection in the proviso to "publicity that is designed to create consumer pressure on secondary employers who distribute the primary employer's products."

In *Emery Air Freight*,[146] a Board panel considered whether the Teamsters' filing of a grievance against Emery violated Section 8(b)(4)(ii)(B). Emery, which had moved its Chicago facility from O'Hare International Airport to a new facility near Des Plaines, Illinois, terminated its drayage work contract with Stepina Motor Service and contracted with DPD, a subsidiary of Ryder Trucks, to do its drayage work. The employees of Emery were represented by the Teamsters, the employees of Stepina were represented by the Chicago Truck Drivers, Helpers, and Warehouse Workers' Union, Independent (CTDU), and the employees of DPD were not represented by either the Teamsters or CTDU. The Teamsters threatened Emery officials that Emery would be struck in Chicago and elsewhere if Emery subcontracted the drayage work to a company that did not have a contract with the Teamsters or CTDU. In addition, former Stepina employees picketed Emery on the first day that Emery used its Des Plaines facility and DPD as its drayage contractor, and Emery's employees represented by the Teamsters voted not to cross the CTDU picket line and remained off work.

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[146] *Teamsters Local 705 (Emery Air Freight)*, 278 NLRB No 168 (Chairman Dotson and Members Johansen and Babson)

The Teamsters filed a grievance against Emery, alleging that Emery violated its contract with the Teamsters "by contracting out drivers' work to a company which is not paying those employees area benefits and wages which are received by drivers under the agreement." (Id., slip op. at 4.) The grievance was heard by an "Eight Man Board," which sustained the grievance. Emery thereafter filed a Section 301 suit in Federal district court seeking to overturn the decision of the "Eight Man Board," and the Teamsters filed a counterclaim.

The Board panel reversed the judge and found that the Teamsters' filing of a grievance against Emery violated Section 8(b)(4)(ii)(B) and that the Supreme Court's decision in *Bill Johnson's*[147] was inapplicable to this case. The panel noted the Court's observation in its *Bill Johnson's* decision that its holding did not apply to suit that "has an objective that is illegal under federal law."[148] Assuming, without deciding, that *Bill Johnson's* is applicable to the filing of a grievance, the panel found that the Teamsters' grievance against Emery had an unlawful objective and therefore that the Court's decision was not applicable to this case.

The panel reasoned (278 NLRB No. 168, slip op. at 6–7):

> The work that is the subject of the grievance has, at least since 1959, never been done by Emery's employees but rather by Stepina's employees. Thus, the Respondent, which has never had a contract with Stepina, has never represented the employees who did this work. Under these circumstances, the Respondent's grievance cannot be intended to preserve existing bargaining unit jobs, thereby establishing a legitimate work preservation object. Rather, in the context of the Respondent's threats and strike against Emery, which as found above had an unlawful secondary objective, the Respondent's filing of the grievance was but a further attempt to force Emery to cease doing business with DPD. Accordingly, we find the Respondent's filing of the grievance to be violative of Section 8(b)(4)(ii)(B).

In *Stewart Construction*,[149] a Board panel concluded that a section of a collective-bargaining agreement between the union and the Southern California Drywall Contractors Association violated Section 8(e) of the Act to the extent it authorized the union to use self-help to enforce secondary restrictions on replacing contractors. The section provided, in essence, that when work on a project commenced by one contractor is stopped by the union because of the contractor's failure to meet his contract obligations, the union could refuse to permit persons to work on the

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

[148] Id at 737 fn 5

[149] *Painters Local 36 (Stewart Construction)*, 278 NLRB No 138 (Chairman Dotson and Members Dennis and Babson)

project and could remove workers who have started working until the wages and fringe benefits owed by the original contractor have been paid. The section further provided that workers could be furnished to a contractor commencing work at the jobsite upon execution of an agreement obligating the general contractor to pay the indebtedness.

In this case, Class A Construction, a subcontractor on a construction project in Los Angeles, was replaced by the general contractor after Class A's employees were ordered by the union to cease working because Class A had become delinquent in its trust fund contributions under the contract. Gypsum Enterprises was hired by the general contractor to replace Class A, but on several occasions Gypsum's employees ceased work at the direction of the union. The union informed the general contractor that for Gypsum to come on the jobsite, it would have to assume Class A's trust fund liabilities. The Board concluded that the union violated Section 8(b)(4)(A) and (B) of the Act by inducing the employees of Gypsum, a neutral employer in the union's dispute with Class A, not to work for Gypsum to force Gypsum to cease doing business with the general contractor and to force Gypsum to pay Class A's delinquencies, thus enforcing the self-help contract provisions that violated Section 8(e) of the Act. The Board further concluded that the union violated Section 8(b)(4)(B) of the Act by threatening the general contractor, also a neutral in the union's dispute with Class A, that the union would engage in a work stoppage against Gypsum, thus impeding progress on the construction project because of Gypsum's failure to pay Class A's trust fund debts.

To remedy these violations, the Board ordered the union to cease and desist from maintaining or enforcing the self-help aspects of the section of the contract found to violate Section 8(e) of the Act to the extent they apply to contracting restrictions. It further ordered the union to cease and desist from inducing or encouraging employees of Gypsum, the general contractor, or any other person to refuse to perform services or coercing or restraining Gypsum, the general contractor or any other person where an object thereof is forcing an employer to enter into an agreement with self-help aspects violative of Section 8(e) of the Act or forcing Gypsum, the general contractor, or any other person to cease dealing in the products of any other producer or to cease doing business with Class A or any other person.

I. Remedial Order Provisions

1. Bargaining Orders

During the report year the Board issued two interesting decisions concluding that orders requiring employers to bargain were necessary to remedy unfair labor practices they had committed.

In *Studio S.J.T.*,[150] a Board panel adopted as warranted an administrative law judge's recommendation for a bargaining order under *NLRB v. Gissel Packing Co.*,[151] based on the extensive unlawful conduct of the employer's owners and managing operators. The Board pointed out that the two top employer officials assembled the employees and told them the union organizing campaign was anticompany sabotage and then announced improved wages and benefits to discourage union activities and threatened to shut the plant down if the employees selected the union as their bargaining representative. The owners subsequently conducted widespread coercive interrogation concerning employees' union sentiments and deputized an employee to obtain employee revocations of union authorizations and to abuse, harass, and intimidate the two leading union proponents. The owners meted out physical abuse, threats of bodily harm, and discharge to one of the leading union adherents, false personnel evaluation, elimination of supplementary earnings, and a discriminatory layoff to the other. In addition, they made it known that union activists would be discharged, and ultimately terminated all of the office employees and half the production employees.

The panel found that "such widespread, repetitive, and blatant violations by top management officials . . . [including] physical abuse and threats of bodily harm against the most prominent union proponent . . . by their nature have a lingering impact on the employees [and] are not fully dissipated by conventional remedies, and make highly unlikely the possibility of conducting a fair election." The Board accordingly concluded in these circumstances that "the signed authorizations by a majority of the employees constitute a more reliable indicator than an election of their representative desires." (277 NLRB at 1189.)

Member Dennis, in a footnote, expressed her agreement with the *Gissel* bargaining order based on her concurring opinion in *Regency Manor Nursing Home*,[152] and noting that the employer's highly coercive unfair labor practices—in the small office and production units of two and seven employees, respectively—were undoubtedly brought to everyone's attention.

Similarly, in *Bridgeway Oldsmobile*,[153] a Board panel adopted the conclusion of an administrative law judge that, under *Gissel Packing Co.*, a bargaining order was necessary to remedy the effects of the employer's unfair labor practices. The union had obtained authorization cards from four employees who were part of a six-man bargaining unit. After the union requested and was denied voluntary recognition, an election was held but the ballots were impounded pending resolution of the charges.

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[150] 277 NLRB 1189 (Chairman Dotson and Members Dennis and Babson)
[151] 395 U S 575 (1969)
[152] 275 NLRB 1261 (1985)
[153] 281 NLRB No 165 (Chairman Dotson and Members Johansen and Babson)

The employer's preelection misconduct consisted of numerous violations of Section 8(a)(1), including coercive interrogation of employees, threats of discharge and plant closure, inferences that selection of the union would be futile, creating the impression that employees were under surveillance, and hiring additional employees to pack the unit and undermine the union's majority. In addition, the employer violated Section 8(a)(3) by discharging an employee whom it thought was responsible for organizing its employees. Reasoning that the employer's unfair labor practices fell into the second category described in *Gissel* as "less extraordinary" yet still having a "tendency to undermine [the union's] majority strength and impede the election process,"[154] the panel agreed that a bargaining order was appropriate.

The panel observed that threats of discharge and store closure, interrogations, surveillance, and discharge are acts that employees are unlikely ever to forget and serve as a "longlasting and perhaps permanent reminder to the current work force that if they renew union activity they too will suffer the same consequences as their predecessors." (281 NLRB No. 165, slip op. at 5.) The panel rejected the employer's contentions that employee turnover and the departure of its management officials who perpetrated the unlawful acts made the prospects of ensuring a fair second election "extremely good." With respect to employee turnover, the panel found the employer's argument "rings hollow because the turnover . . . was 'a direct and obvious product of the Respondent's own unlawful conduct.'" (Ibid.) With regard to the argument concerning the departure of the management personnel who committed the violations, the panel noted that those officials were acting pursuant to the "marching orders" of the employer's majority owner. Because he continued to be the majority owner and there was no reason to believe that the current management was not "armed with the same orders" to violate the Act, the panel determined that the chances of holding a fair rerun election were not good. Accordingly, the panel concluded that "the employees' sentiment, once expressed through [authorization] cards, would, on balance, be better protected by a bargaining order"[155] than by any possible combination of the Board's traditional remedies.

The Board in *Long-Airdox Co.*,[156] affirmed the administrative law judge's 8(a)(5) and (1) finding based on a *Gissel* bargaining order recommendation. The Board observed that the respondent's threats to discharge employees, to close the plant, and to refuse to bargain and to force employees out on strike and replace them, as well as statements concerning loss of customers, are threats that the Board and the courts have long recognized

[154] Quoting 395 U S at 614
[155] Quoting 395 U S 614–615
[156] 277 NLRB 1157 (Members Dennis, Johansen, and Babson)

to be "hallmark violations." These highly coercive remarks affected 7 of 28 employees.

The Board further noted that threats of plant closure are "one of the most coercive actions which a company can take in seeking to influence an election." Less serious violations affected the same employees plus two others, and were committed by the respondent's top management officials, including its personnel administrator, its plant and general manager, its plant superintendent, and its director of sales. Finally, the Board found that the respondent's plant and general manager continued to engage in unlawful conduct after the election was over and the union's objections were pending.

The Board concluded that the respondent's violations were "severe in nature, extensive in number, and affected a significant number of bargaining unit employees." They also noted the "swiftness and timing" of the unlawful conduct which began the day after the union demanded recognition and continued until after the election. The Board concluded that the possibility of erasing the lingering effects of the unfair labor practices and of conducting a fair election by use of traditional means was slight, and adopted the administrative law judge's recommended bargaining order.

Member Dennis agreed that a bargaining order was an appropriate remedy because the analysis was consistent with her concurring opinion in *Regency Manor Nursing Home.*[157]

2. Reinstatement

a. Undocumented Aliens

In *Sure-Tan, Inc.*,[158] the panel reconsidered certain remedial issues on remand from the Supreme Court.[159] The Court first upheld the Board's finding,[160] enforced by the court of appeals,[161] that the employer violated Section 8(a)(3) of the Act by constructively discharging its undocumented alien employees through reporting them to the Immigration and Naturalization Service in retaliation for participating in union activities. However the Court held that the court of appeals exceeded its reviewing authority by modifying several aspects of the Board's remedial order and remanded the proceeding to enable the Board to formulate an appropriate remedy consistent with the Court's opinion.

The Board's original order with respect to the discriminatory discharges provided the conventional remedy of reinstatement and backpay with a compliance hearing to determine questions of

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[157] 275 NLRB 1261 (1985)
[158] 277 NLRB 302 (Chairman Dotson and Members Dennis and Babson)
[159] *Sure-Tan, Inc v NLRB*, 467 U S 883 (1984)
[160] 234 NLRB 1187 (1978)
[161] 672 F 2d 592 (7th Cir 1982)

availability for work of undocumented aliens no longer in the United States. The circuit court modified the Board's order by conditioning acceptance of a reinstatement offer and the accrual of backpay on an individual discriminatee's lawful presence in the United States. The court further expanded the Board's order to require that offers of reinstatement to the Mexican nationals be written in Spanish, be delivered in a verifiable fashion, and be held open for 4 years in order to afford the discriminatees a reasonable time to obtain lawful entry and working papers. The court also decided that the Board should set a minimum amount of backpay that the employer must pay in any event and suggested an amount equal to 6 months' backpay. The Board's final order incorporated all the modifications, specifically including the latter suggested amount.

The employer challenged before the Supreme Court only those portions of the Board's final order which provided for minimum backpay and which detailed the language, acceptance period, and delivery method of the reinstatement offers. The Court approved the conditioning of reinstatement offers on the discriminatees' legal reentry into the United States. The Court further held that the minimum backpay award in the absence of any evidence concerning the discriminatees' actual economic losses or lawful availability for work exceeded the limits of the court of appeals' authority under Section 10(c) of the Act. The Court also held that the court of appeals exceeded its authority with respect to the other enlargements of the Board's original order and should have remanded these issues to the Board.

After reconsideration of the issues pertaining to the form of the reinstatement offers, the Board panel agreed with the court of appeals that, in the circumstances of this case where the Spanish-speaking discriminatees' last known locations were in Mexico, it is at most, in the Supreme Court's words, a "trivial burden" on the employer to draft the offers in Spanish and to verify their receipt. The Board panel also agreed with the court of appeals that 4 years is a reasonable period during which to hold the job offers open given the lengthy time required for Mexican nationals to acquire immigrant visas. Accordingly, the Board's supplemental order was identical to the circuit court order with the minimum backpay provisions deleted as required by the Supreme Court.

b. Discharged Strikers

In *PRC Recording Co.*,[162] the Board ordered reinstatement for unlawfully discharged strikers to jobs different from those they held when they went on strike. The administrative law judge found and the Board agreed that the respondent violated Section 8(a)(5) and (1) by unilaterally destroying the old job combination

[162] 280 NLRB No 77 (Members Dennis and Johansen, Chairman Dotson dissenting)

system and implementing the new system in the absence of a bona fide impasse in bargaining. Under usual Board law, strikers must be reinstated to the jobs they held at the time of a strike or to substantially equivalent jobs. In this case the jobs the strikers held at the time of the strike were created as the result of unlawful unilateral changes and in fact were the reasons for the strike. The administrative law judge found and the Board majority agreed that the respondent's offer of reinstatement to those jobs was invalid and that it was necessary to order the restoration of the status quo ante as it existed under the expired contract to the extent feasible in the absence of evidence showing that to do so would impose an unfair burden on the respondent.[163] The judge reasoned that "[t]o hold that mere bargaining in such circumstances is an adequate substitute for wider remedial action would unwarrantedly relieve Respondent of its statutory obligation to maintain existing benefits during negotiations and unjustifiably ignore the rights of employees who may have been adversely affected by the Respondent's breach of that duty." (Id., JD slip op. at 98.)

In his dissent, Chairman Dotson states that the respondent's offer of reinstatement was valid and should serve to toll the respondent's backpay liability. He stated that although "the terms of employment effective immediately prior to the strike were based on certain unlawful unilateral modifications, no party has raised the contention that these terms of employment were so onerous to justify an employee withholding services on the basis of a constructive discharge." (Id., slip op. at 9.) The Chairman finds that "[i]t is clear from the record that the Respondent is now unable, due to its irrevocable destruction of the employees' classification system, to offer the strikers reinstatement on the basis of terms of employment fully identical to that preexisting the unlawful unilateral changes." (Id., slip op. at 9–10.) He notes that in these circumstances the backpay "would have no termination date given that the strikers would be able to continue to reject the Respondent's reinstatement offers with no tolling of the Respondent's backpay obligations." (Id., slip op. at 10.)

c. Forfeiture

In *Sahara Datsun*,[164] a Board panel held that a leading employee organizer who had been illegally discharged nevertheless forfeited his right to reinstatement when he subsequently attempted to undermine his former employer by informing the bank that obtains financing for the employer's customers that the employer was falsifying its customers' credit applications. The panel held that this former employee also forfeited his right to bargain with the employer as a union representative by engaging

[163] The judge left any proof of "unfair burden" to the compliance stage of the proceeding.
[164] 278 NLRB No. 148 (Chairman Dotson and Members Dennis and Johansen).

in this conduct, and by publishing unfounded accusations in a union newsletter that the employer's owners were engaged in prostitution and drug trafficking.

The employer, an automobile dealer, discharged the employee soon after it received the union's petition for an election to represent the employer's car salesmen, and the panel agreed with the administrative law judge that the discharge was prompted by the employee's union activity. About a month before the election, the discharged employee visited the bank that grants financing to the employer's customers based on applications the customers submit to the employer. The former employee asked a loan officer at the bank if he was aware that the employer, and in particular its finance and insurance manager, "was falsifying the applications that the customers fill in," and in particular, was "falsifying the income that the customers show on there, and, specifically, the W-2 forms" that were sent to the bank to verify customer income. The former employee showed the loan officer his card, which identified the former employee as a union officer. The loan officer subsequently called the employer's finance and insurance manager, who denied the former employee's accusations. The loan officer, who had primary responsibility for the employer's accounts, also testified that he knew of no information which would support such allegations, and that in fact the bank rarely even asked the employer to submit W-2 forms with its customers' credit applications.

About 2 months after the election, the former employee wrote and distributed a newsletter to all the employees who had been eligible to vote in the election. The newsletter accused the employer's two principal owners of selling and using cocaine and engaging in sex with prostitutes.

The judge found that the former employee forfeited his right to reinstatement when he published the newsletter. In addition, although the judge ordered the employer to bargain with the union, he found that the former employee was not entitled to bargain with the employer as a union representative because of the unfounded allegations he published in the newsletter.

The Board agreed that the former employee was not entitled to reinstatement, but found that he forfeited his right to reinstatement at an earlier date, when he communicated his allegations concerning the employer's credit practices to the employer's lending institution. The panel based its conclusion on *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard Broadcasting)*,[165] in which the Supreme Court held that even if the employees are arguably engaged in protected activity, their activity is unprotected if it involves a malicious attack on the product or reputation of their employer, and if they are discharged their discharge is for "cause" under Section 10(c) of the Act.

[165] 346 U S 464 (1953)

The panel conceded that the former employee's actions were arguably related to issues in the campaign for union representation because they related to the employees' concerns about actions of the employer's managers that affected employees' sales commissions. The panel concluded, however, that because the employee had little or no factual basis for his accusations against the employer, and because those allegations could have ruined a longstanding business relationship, his actions were primarily intended to disparage the reputation of the employer's managers in the eyes of the bank. Thus, the panel found that the employer would have been justified in discharging the employee for "cause" as of the date he made his allegations and, therefore, he was not entitled to reinstatement as of that date.

The panel also agreed that the former employee was not entitled to act as a union representative, but expanded on the judge's rationale. The judge concluded that the former employee was not entitled to bargain with the employer for the same reasons that caused him to forfeit his right to reinstatement. The Board panel, however, relied on the standards set forth in *Fitzsimmons Mfg. Co.*,[166] a Board case that held that an employer did not refuse to bargain in good faith in violation of Section 8(a)(5) of the Act when it refused to meet with a union representative who had threatened violence against a management representative during a prior meeting. The panel cautioned that because of the protections of Section 7 of the Act, the circumstances in which the Board will recognize an employer's right to refuse to meet with a particular union representative are extremely limited. Nevertheless, the panel held that the Board will recognize such a right when an individual "engages in conduct directed at the employer or its representatives which engenders such ill will that it weakens the fabric of the relationship to the extent that good-faith bargaining is impossible." (278 NLRB No. 148, slip op. at 9.)

The panel concluded that, by making his unfounded accusations to the employer's lending institution and by publishing the scurrilous and unfounded accusations against the employer's owners in the union newsletter, the former employee created such an atmosphere of ill will between himself and the employer that good-faith bargaining would be futile, if not impossible, if the employer were required to bargain with him as a union representative. The panel emphasized the personal nature of the allegations in the newspaper, as well as the fact that all the employee's allegations were aimed at particular members of the employer's management, some of whom could be expected to participate in negotiations with the union. Under the circumstances, the panel agreed that the employer should not be required to meet or negotiate with this particular individual as a union representative.

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[166] 251 NLRB 375 (1980), affd sub nom *Auto Workers v NLRB*, 670 F 2d 663 (6th Cir 1982)

3. Backpay Issues

In *Ad Art, Inc.*,[167] the Board held that denial of all backpay was warranted to a claimant who abused the Board's process by withholding relevant evidence, by testifying falsely, by destroying records to cover up his misstatements, and by attempting to prevent a witness from testifying truthfully. Because of the foregoing conduct by the claimant, the Board found that the case was governed by its decisions in *Great Plains Beef Co.*[168] and *M. J. McCarthy Motor Sales Co.*,[169] denying all backpay when the conduct of a discriminatee renders it impossible to give credence to information he furnished to the Board and thus makes calculation of backpay impossible. The Board noted that in *American Navigation Co.*,[170] it held, as a general rule, that the Board should deny backpay only for those calendar quarters in which a discriminatee intentionally concealed interim employment. In *American Navigation*, the Board noted, it had expressly indicated that it would continue to deny all backpay to claimants whose intentionally concealed employment could not be attributed to a specific quarter or quarters because of the claimant's deception. The Board found that the instant facts fell within the foregoing exception to the *American Navigation* rule regarding intentional concealment of interim earnings.

Chairman Dotson agreed that the claimant was entitled to no backpay but disagreed with the reaffirmation of the backpay formula established in *American Navigation*. The Chairman stated that, in his view, a claimant who perpetrated a fraud on the Board's processes was entitled to no backpay in *all* circumstances. The Chairman stated that *American Navigation* neither comported with the Board's traditional status quo ante backpay principles nor served the public interest in ensuring the integrity of the Board's compliance procedure and the encouragement of voluntary compliance.

Member Stephens agreed that the denial of all backpay was appropriate under the line of cases preserved in *American Navigation*. Member Stephens stated that these cases were not logically limited to concealment of interim earnings, but would apply to willful misrepresentations concerning any category of information bearing on backpay that affects the backpay calculation in all backpay quarters. Member Stephens noted that the claimant's testimony was discredited not only concerning interim earnings but also concerning other issues that affected determination of backpay and that these issues cut across all of the quarters for which the claimant sought backpay.

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[167] 280 NLRB No 114 (Members Dennis, Johansen, and Babson, Chairman Dotson and Member Stephens filed concurring opinions)

[168] 255 NLRB 1410 (1981)

[169] 147 NLRB 605 (1964)

[170] 268 NLRB 426 (1983)

In *Hacienda Hotel & Casino*,[171] Members Dennis and Johansen adopted the judge's backpay remedy formula where the discriminatee's claim acknowledged that her Federal income tax returns did not reflect accurately her income. The discriminatee admitted underreporting the tip income she earned as a waitress. The judge relied on the testimony of witnesses other than that of the discriminatee in arriving at a backpay formula not based solely on the tax returns. The Board panel majority reasoned that the Act would be frustrated if the respondent, as wrongdoer, benefited from the tax returns' underreported income. The accuracy of the tax returns are a matter for the Internal Revenue Service.

Chairman Dotson disagreed, believing that the formula effectively condones the discriminatee's tax concealment. Further, the Board should not ignore other and equally important Congressional objectives.

4. Order Against Trustee in Bankruptcy

In *Ohio Container Service*,[172] a Board panel issued a remedial order against a trustee in bankruptcy for noncontractual violations of Section 8(a)(3) and (1)[173] committed by the employer. In so doing, the Board found it unnecessary to decide whether the trustee was a successor to or an alter ego of the employer.[174]

The employer had ceased operations in January 1982, and the trustee, appointed in June of that year, began to liquidate the company's assests. He did not operate the company as an ongoing business, nor was he specifically authorized to do so. The General Counsel contended that the trustee was either a successor to or an alter ego of the employer; the trustee denied being either one.

The panel distinguished the case from *Bildisco*,[175] in which the Supreme Court was concerned with whether a debtor-in-possession commits an unfair labor practice by unilaterally rejecting a collective-bargaining agreement before formal rejection by the bankruptcy court. In the instant proceeding, there was no allegation of an 8(a)(5) violation and no evidence that the parties had entered into a collective-bargaining agreement; the only allegations were of noncontractual 8(a)(3) and (1) violations. Accordingly, the panel saw nothing in *Bildisco* to preclude the issuance of a remedial order against the trustee, regardless of the term used to describe his status.

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[171] 279 NLRB No 84 (Members Dennis and Johansen, Chairman Dotson dissenting)

[172] 277 NLRB 305 (Chairman Dotson and Members Dennis and Babson)

[173] The violations had been stipulated, as had the amounts of backpay owing to three unlawfully discharged employees

[174] Cf *NLRB v Bildisco & Bildisco*, 465 U S 513 (1984), in which the Supreme Court also found it unnecessary to decide the issue

[175] Id

The panel directed the employer to make the three discriminatees whole for their lost earnings.[176] However, it did not require their reinstatement because two of the employees already had been reinstated and the backpay specification indicated that the backpay period of the third ended on the date the company effectively had ceased operations. Because the employer's operations had ceased and the trustee was liquidating its assets, the panel required notices to be mailed to employees rather than posted.

5. Order for Union Failure to Execute Contract

In *Hyatt Management*,[177] the Board considered the appropriate remedy for a union's failure to execute an agreed-on contract. The contract agreed on by the parties, which was to run from 1 January 1984 to 31 December 1986, provided for wage increases for the employees in exchange for increased management-rights provisions. The charging party asserted that in order for it to obtain the 3-year contract for which it bargained, the Board's remedy had to extend the contract to run for 3 years from the date on which the respondent executed the agreement. The respondent, on the other hand, asserted that the contract must be made retroactive to its originally intended date of execution.

After finding the respondent's refusal to execute the contract to be an 8(b)(3) violation, the Board addressed the remedy issue. The Board ordered that the respondent execute the contract agreed on to run from execution date, until the contract's expiration date. The Board acknowledged that such a remedy required the charging party to forgo the benefits of its newly obtained management-rights provisions for the period of the contract which had already expired and likewise required the unit employees to forgo the increased wages they would have received during that same period. Extending the contract to run for a 3-year period was impossible, however, as it would give the parties contractual terms for which they never bargained, i.e., it would apply particular wages, terms, and conditions of employment for a period of time different from that during which the parties intended those wages, terms, and conditions to apply. Likewise, making the contract retroactive to its originally intended date of execution was impossible because there was no way to retroactively grant the charging party the benefits of its new management-rights clause—presumably the quid pro quo for the giving of wage increases. Hence the only practical remedy which the Board had the power to give was to order that the respondent

[176] The parties stipulated that the trustee, as an individual, would not be monetarily liable or responsible for any other remedial action for any unfair labor practices, and that his responsibility for such remedial action would not exceed the scope of his powers and duties as trustee in bankruptcy

[177] *Operating Engineers Local 30 (Hyatt Management)*, 280 NLRB No 18 (Chairman Dotson and Members Johansen and Stephens)

execute the contract agreed on to run until the contract's expiration date.

J. Deferral to Arbitration

The jurisdiction of the Board over unfair labor practices is exclusive under Section 10(a) of the Act and is not "affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." However, consistent with the Congressional policy to encourage utilization of agreements to arbitrate grievance disputes, the Board, in the exercise of its discretion, will under appropriate circumstances withhold its processes in deference to an arbitration procedure.

The Board has long held that, when an issue presented in an unfair labor practice proceeding has previously been decided in an arbitration proceeding, the Board will defer to the arbitration award if the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act.[178]

In the seminal case of *Collyer Insulated Wire*,[179] the Board majority articulated several factors favoring deferral: a dispute arising within the confines of a long and productive collective-bargaining relationship; lack of employer animosity to employees' exercise of protected rights; a contract providing for arbitraton in a very broad range of disputes; an arbitration clause which clearly encompasses the dispute at issue; employer willingness to utilize arbitration to resolve the dispute; and a dispute which is eminently suited to resolution by arbitration. In years following *Collyer*, the Board further refined the deferral doctrine and applied it to other situations, including cases involving 8(a)(3) allegations.

During the report year a Board panel had occasion to consider whether deferral to an arbitration award was warranted under its *Spielberg* and *Raytheon Co.*[180] criteria, as recently enunciated in *Olin Corp.*[181] In *Anderson Sand & Gravel Co.*,[182] the administrative law judge found that the case was not subject to deferral under *Olin* because the arbitration panel was not presented with the facts or law relevant to resolving the unfair labor practice issue and because the award was clearly repugnant to the purposes and policies of the Act. In rejecting the judge's analysis of the issue, the Board found, as required by *Raytheon*, that the contractual and statutory issues were factually parallel and that the arbitration panel was presented generally with the facts relevant

[178] *Spielberg Mfg Co*, 112 NLRB 1080, 1082 (1955)
[179] 192 NLRB 837 (1971)
[180] 140 NLRB 883 (1963)
[181] 268 NLRB 573 (1984)
[182] 277 NLRB 1204 (Chairman Dotson and Members Dennis and Johansen)

to resolving the unfair labor practice. In reaching this finding, the Board stressed that under *Olin* the arbitrator need only be "generally presented with the facts relevant to resolving the statutory issue and it additionally observed that, in the absence of any evidence to the contrary, it is reasonable to conclude that resolution of the contractual issue requires the same evidence relevant to resolving the unfair labor practice issue. Finally, the Board reiterated its position, as set forth in *Olin*, that it will not substitute its judgment for that of the arbitrator in resolving contractual issues. Rather, it will inquire only into whether the arbitrator adequately considered the unfair labor practice issues. Accordingly, because the evidence before the arbitration panel was essentially the same evidence necessary for a determination of the merits of the unfair labor practice charge, the Board concluded that the case was appropriate for deferral to the grievance arbitration award.

A Board panel in *Earl C. Smith, Inc.*[183] considered whether it should defer to an arbitration decision by the Ohio Joint State Committee. The employer unilaterally modified its 1979–1982 collective-bargaining agreement, dealt directly with employees, and failed to bargain with the union.

The union filed a grievance and the committee issued a decision stating that the employer was to comply with the 1982–1985 contract. The employer's employees received no backpay on the basis of the grievance.

The Board panel agreed with the judge's finding that the committee's decision was "clearly repugnant" to the Act. It noted that under no interpretation consistent with the Act could the committee have resolved these 8(a)(5) violations merely by ordering compliance with a successor contract not at issue or in effect at the time of the employer's conduct. Accordingly, the panel concluded that the Committee's decision was "palpably wrong" and, therefore, found it to be clearly repugnant to the Act and deferral to the decision inappropriate.

K. Equal Access to Justice Act

The Equal Access to Justice Act, 5 U.S.C. § 504 (EAJA), and the Board rules promulgated thereunder,[184] 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

[183] 278 NLRB No 100 (Chairman Dotson and Members Dennis and Johansen)
[184] Board Rules and Regulations, Secs 102 143 through 102 155

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 and is eligible under the Act to receive the award,[185] 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 *Sonicraft, Inc.*,[186] the Board dismissed an application for fees under the EAJA where the applicant challenged the "position of the agency" in a representation proceeding, which formed the basis for an 8(a)(5) complaint. The employer filed objections to an election that the union won in 1981 contending, inter alia, that the union had improperly induced employees to support it by violating a consent election agreement by using more than the agreed on number of election observers without consent or knowledge of the employer and with the acquiescence of the Board agent conducting the election. The objection urged the Board to find, consistently with the 1980 decision of the United States Court of Appeals for the Ninth Circuit in *Frontier Hotel v. NLRB*,[187] that the alleged imbalance of observers was a material breach of the parties' preelection agreement warranting setting aside the election. The Board overruled the employer's objections, adopting the Regional Director's recommendation, based on *Westinghouse Appliance Co.*[188] that a mere imbalance of union observers is insufficient to warrant setting aside an election. The Board subsequently granted the General Counsel's motion for summary judgment, finding that the company violated Section 8(a)(5), and ordered it to bargain with the union.[189]

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[185] 5 U S C § 504(b)(1)(B) defines "party" to exclude individuals and certain enterprises from the coverage of the Act

[186] 281 NLRB No 90 (Chairman Dotson and Members Johansen and Babson)

[187] 625 F 2d 193

[188] 182 NLRB 481 (1970)

[189] 266 NLRB No 189 (1983) (unpublished)

While the case was pending before the United States Court of Appeals for the Seventh Circuit, the Board moved to recall the case for reconsideration. On grant of the Board's motion, the Board remanded to an administrative law judge for a hearing on the election observer issue and other objections. The judge issued a supplemental decision finding the observer imbalance to be objectionable and recommending that the election be set aside. The Board adopted the judge's findings and recommendations and vacated the earlier certification.[190] The employer then filed an application for fees under EAJA.

The Board adopted a decision by an administrative law judge recommending dismissal of the company's EAJA application. Preliminarily, the judge rejected the General Counsel's contention that fees and costs for an essentially nonadversarial representation proceeding are nonrecoverable under 1986 amendments to EAJA. The judge reasoned that, although representation proceedings are not themselves "adversarial adjudications," within the meaning of EAJA, the Board's certification of representative was the basis for an unfair labor practice complaint. The judge found, however, that the Regional Director and the Board were "substantially justified" within the meaning of EAJA in initially overruling the observer objection. The judge noted that, under the applicable precedent at that time, *Westinghouse Appliance*, supra, an observer imbalance is unobjectionable. Subsequent to the certification order in this case, *Best Products Co.*[191] signaled a change in the legal standard applied to the issue of observer imbalance, citing for the first time the Ninth Circuit's 1980 *Summa Corp.*, supra, decision. The judge also considered significant the fact that the union was ultimately found to have used an observer to release voters from their work stations and this issue had never been raised on objections prior to certification.

The Board adopted the judge's recommended dismissal of the application. In a footnote, the Board's decision responded to arguments by the employer that it had been prejudiced by the failure of the Regional Director to transmit investigative witness statements to the Board at the time the union was first certified and that such procedure was contrary to the law of the Seventh Circuit. The Board noted that such a procedure would have been contrary to the NLRB Rules and Regulations reviewed by the Board in *Frontier Hotel*,[192] and thereafter approved by the Seventh Circuit. In view of its denial of the employer's EAJA application, the Board found it unnecessary to pass on such questions raised by the General Counsel as whether an award under EAJA involving both a representation proceeding and an unfair labor practice proceeding should extend to costs incurred in connection with the former.

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[190] 276 NLRB 407 (1985)
[191] 269 NLRB 578 (1984)
[192] 265 NLRB 343 (1982), enfd 734 F 2d 21 (9th Cir 1984)

In *University of New Haven*,[193] a Board panel disagreed with the administrative law judge's conclusion that the General Counsel was not "substantially justified" in prosecuting a complaint alleging that the university violated Section 8(a)(5) of the Act by, among other acts, withdrawing recognition from the union immediately after the issuance of the Supreme Court's opinion in *NLRB v. Yeshiva University*.[194] In the underlying case,[195] the Board adopted the judge's conclusion that, in light of *Yeshiva*, the university faculty members were not "employees" under the Act and accordingly that the complaint be dismissed.

In finding that the General Counsel had shown that it was "substantially justified" in proceeding on the complaint, the panel found that significant differences existed between Yeshiva and University of New Haven, with respect to faculty control. Although the faculty at University of New Haven held authority to make effective recommendations regarding promotions, tenure, sabbatical leave, and hiring, it did not, as in *Yeshiva*, have authority over such matters as tuition, enrollment levels, student absence policies, school locations, faculty terminations, and the grading system and academic calendars. The panel further noted that other evidence at New Haven suggested the absence of managerial status, such as a hierarchical decision-making network and a history of collective bargaining. In addition, the panel found that this case turned in part on credibility and that the General Counsel had presented evidence which, if credited, might have significantly influenced the outcome of the underlying case. Finally, the panel found that the General Counsel tried and briefed the case at a time when *Yeshiva* had only recently transformed the law regarding the managerial status of faculty members and that the General Counsel was faced with unsettled case law and few guidelines to direct him. Thus, the Board found that it was a close case and that the General Counsel's position was "substantially justified" in law and fact.

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[193] 279 NLRB No 43 (Chairman Dotson and Members Dennis and Stephens)

[194] 444 U S 172 (1980)

[195] 267 NLRB 939 (1983)

VI

Supreme Court Litigation

During fiscal year 1986, the Supreme Court decided one case in which the Board was a party. The Board participated as amicus curiae in three other cases, all presenting questions of NLRA preemption.

A. Right of Nonmember Employees to Vote in Union Affiliation Election

Seattle-First National Bank[1] involved a Board rule requiring that all bargaining unit employees, including those who are not union members, be permitted to vote on the affiliation of their union representative with another union as a precondition of the newly affiliated union's right to continued recognition as the unit employees' bargaining representative.

Financial Institution Employees of America (FIEA), an independent union certified to represent certain employees of the Seattle-First National Bank, sought affiliation with an international union. FIEA scheduled an affiliation election and informed bargaining unit employees that those eligible to vote would be union members currently in good standing and nonmembers who joined before the balloting began. A majority of those voting approved the affiliation. At the union's request, the Board, applying its then-current rule,[2] amended FIEA's certification and ordered the bank to bargain with the affiliated union.

The Board then determined in another pending case[3] to change its old rule; it concluded that affiliation is not a purely internal union matter but affects the right of all bargaining unit employees to choose their bargaining representative and that therefore all unit employees, not just union members, must be allowed to vote in an affiliation election. Applying its new rule to the FIEA affiliation, the Board vacated the amended certification

[1] *NLRB v Food & Commercial Workers Local 1182 (Seattle-First National Bank)*, 475 U S 192, affg 752 F 2d 356 (9th Cir 1984)

[2] In *Amoco Production Co*, 239 NLRB 1195 (1979) (*Amoco I*), the Board had held that the affiliation of an independent union with an international union was an internal union matter on which nonmembers were not entitled to vote Accordingly, if the vote were conducted with adequate due process (e g , proper notice to all members and reasonable precautions to maintain the secrecy of the ballot), it would justify amendment of the certification, provided that there was substantial continuity between the pre- and post-affiliation union

[3] *Amoco Production Co*, 262 NLRB 1240 (1982) (*Amoco II*), reversing 239 NLRB 1195 (1979)

and dismissed the union's refusal-to-bargain charge. On the union's appeal, the Ninth Circuit[4] found that the Board's new rule was inconsistent with the Act.

Resolving a conflict in the circuits,[5] the Supreme Court[6] held that the Board exceeded its authority under the Act in requiring that nonunion employees be allowed to vote on affiliation before the Board will order an employer to bargain with an affiliated union.

The Court stated that, under the Act, a certified union must be recognized as the exclusive bargaining representative of all employees in the bargaining unit, and that the Board cannot discontinue that recognition without first determining that the affiliation raises a "question of representation" (i.e., a question whether the certified union still is the choice of a majority of the employees in the unit), and then conducting an election to decide the question. The Court acknowledged that, in some cases, "a new affiliation may substantially change a certified union's relationship with the employees it represents," and that "[t]hese changed circumstances may in turn raise a 'question of representation'" and thus "require that the Board exercise its authority to conduct a representation election." (475 U.S. at 202.) However, in many cases, "a majority of employees will continue to support the union despite any changes precipitated by affiliation," and in those cases "[t]he recognized union may legitimately claim to succeed as the employees' duly selected bargaining representative." (Id. at 203.) The Court concluded (ibid.):

> The Act balances these competing concerns by authorizing the Board to conduct a representation election *only* where affiliation raises a question of representation. 29 U.S.C. § 159(c). Conversely, where affiliation does not raise a question of representation, the statute gives the Board no authority to act. The Board's new rule upsets the accommodation drawn by the statute by effectively decertifying the reorganized union even where affiliation does not raise a question of representation. [Emphasis in original.]

The fact that "an affiliation may affect a union's representation of the bargaining unit even if it does not raise a question of representation" was not, in the Court's view, sufficient to justify the Board's new rule. (Id. at 205.) For, "a union makes many decisions that may 'affect' its representation of nonmember employees"; it "may decide to call a strike, ratify a collective-bargaining agreement, or select union officers and bargaining representatives." But, "[t]he Act allows union members to control the

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[4] 752 F 2d 356 (1984)

[5] Two circuits had upheld the Board's new rule *Food & Commercial Workers Local 881 (May Department Stores) v NLRB*, 774 F 2d 752 (7th Cir 1985), *Oil Workers Local 4-14 (Amoco) v NLRB*, 721 F 2d 150, 152-153 (5th Cir 1983)

[6] Justice Brennan delivered the opinion of the Court Chief Justice Burger filed a concurring opinion

shape and direction of their organization, and '[n]on-union employees have no voice in the affairs of the union.'" (Ibid.) "[D]issatisfaction with the decisions union members make," the Court concluded, "may be tested by a Board-conducted election only if it is unclear whether the reorganized union retains majority support." (Id. at 205–206.)

Finally, the Court observed that the Board's new rule contravenes the Act's assumption that stable bargaining relationships are best maintained by allowing an affiliated union to continue representing a bargaining unit unless the Board finds that the affiliation raises a question of representation. It "effectively gives the employer power to veto an independent union's decision to affiliate," even though "the union succeeds the organization the employees chose, the employees have made no effort to decertify the union, and the employer presents no evidence to challenge the union's majority status." (Id. at 209.)

B. Preemption Cases

1. Use of State Spending Power to Enforce Compliance With the NLRA

In *Wisconsin v. Gould*,[7] a unanimous Supreme Court[8] held that the NLRA preempts a state law disqualifying an employer who has repeatedly violated the Act from doing business with the State.

The Court observed that, under the *Garmon* rule,[9] which bars state regulation of activity arguably protected or prohibited by the NLRA, States are prevented not only from establishing standards that are inconsistent with the substantive requirements of the Act, but also from providing their own remedies for prohibited or arguably prohibited conduct. The Court found that debarment from doing business with the State "functions unambiguously as a supplmental sanction" (475 U.S. at 288) for violations of the NLRA, and thus conflicts with the Act's "comprehensive regulation of industrial relations" (ibid.) no less than would a clearly preempted state law prohibiting private parties from doing business with Federal law violators.

The Court rejected the State's contention that the statute was simply an exercise of its spending power, and thus protected from preemption under the "market participant" doctrine.[10] Noting the State's concession that the statute's purpose was to deter Federal labor law violations and reward "fidelity to the law," the Court concluded that the statute before it could not "plausibly be defended" as a response to state economic or pro-

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[7] *Wisconsin Department of Industry v Gould, Inc*, 475 U S 282, affg 750 F 2d 608 (7th Cir 1984)

[8] Justice Blackmun delivered the opinion of the Court

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

[10] See *Hughes v Alexandria Scrap Corp*, 426 U S 794 (1976)

curement needs.[11] Rather, the Court said, its "manifest purpose and inevitable effect is to enforce the requirements of the NLRA," thereby assuming for the State "a role Congress reserved exclusively for the Board" (id. at 291).

2. Local Action Limiting Employer's Right to Self-Help

Golden State v. Los Angeles[12] involved the second NLRA preemption principle, articulated by the Supreme Court in *Machinists v. Wisconsin Employment Relations Commission*,[13] which precludes state and municipal regulation of conduct that Congress intended to remain unregulated.

In *Golden State*, the city of Los Angeles conditioned renewal of a taxicab franchise on the company's prompt settlement of a strike by its cabdrivers over the terms of a new labor agreement. The company brought suit in Federal district court, contending that the city's action was preempted by the NLRA. The district court granted summary judgment for the city, and the court of appeals affirmed. In the latter court's view, the activity regulated was only a peripheral or incidental concern of labor policy and, accordingly, traditional municipal regulation was not precluded.

The Supreme Court[14] reversed. The Court summarized its conclusion in *Machinists* that (475 U.S at 614):

> [A]lthough the labor-management relationship is structured by the NLRA, certain areas intentionally have been left "'to be controlled by the free play of economic forces'" . . . . States are therefore prohibited from imposing additional restrictions on economic weapons of self-help, such as strikes or lockouts . . . unless such restrictions presumably were contemplated by Congress.

The Court found that both parties to the underlying labor dispute had exerted permissible economic pressure. The union was entitled to time its strike to coincide with the city's decision on franchise renewal, and the employer was entitled to obtain bargaining concessions from the union by withstanding the strike. But, the Court concluded, the bargaining process that Congress had intentionally left unregulated was "thwarted" when the city

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[11] The Court noted that the state law debarred repeat violators from doing business with the State for a period of 3 years, regardless of the circumstances or situs of the violations Thus, the state law was essentially punitive and inconsistent with the Federal enforcement framework, which limits the Board to issuing remedial orders The Court further observed that four other States had passed statutes disqualifying Federal labor law violators from competing for state contracts, and that each additional state law "further detracts from the 'integrated scheme of regulations' created by Congress" (id at 288–289)

[12] *Golden State Transit Corp v Los Angeles*, 475 U S 608, reversing 754 F 2d 830 (9th Cir 1985)

[13] 427 U S 132 (1976)

[14] Justice Blackmun delivered the opinion of the Court Justice (now Chief Justice) Rehnquist filed a dissenting opinion

"imposed a positive durational limit" on the employer's exercise of economic self-help (id. at 615).[15]

The Court rejected the city's contention that it was not regulating labor, but simply exercising a traditional municipal function of issuing taxicab franchises. The Court observed that it had previously held that a State may not insure uninterrupted public transportation by prohibiting a strike by the employees of a privately owned bus company.[16] Although those cases involved the right to strike expressly protected by Section 7 of the Act, the Court said that States were also precluded from restricting, on public interest grounds, a transportation employer's ability to resist a strike.

3. State Law Denying Unemployment Benefits to Employees Idled by Strikes they "Financed"

In *Baker v. General Motors*,[17] the Supreme Court[18] rejected a preemption challenge to a Michigan statute making an employee ineligible for unemployment compensation if he has provided "financing," by means other than the payment of regular union dues, for a strike that causes his unemployment.

In anticipation of a "strike emergency" when its collective-bargaining agreements with General Motors, Ford, and Chrysler expired, the UAW voted to augment its existing strike insurance fund. Thereafter, UAW members were required to pay additional "emergency dues" substantially in excess of normal monthly dues. Negotiations between GM and UAW resulted in an agreement on national issues without a strike, but three UAW locals then struck GM foundries over local issues. The strikers received benefits from the UAW strike fund, augmented by the emergency assessments. As a result of the local strikes, operations were curtailed at 24 other functionally integrated GM plants, and employees at those plants were temporarily laid off. The laid-off employees filed claims for unemployment insurance benefits, which were ultimately denied by the Michigan Supreme Court on the ground that the emergency dues payments constituted "financing" of the strikes that caused the claimants' unemployment, thus making them ineligible for unemployment compensation

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[15] The Court noted that it had previously concluded that, in some areas of labor relations, Congress contemplated state regulation of matters left unregulated by the NLRA, e g , the provision of minimum health benefits for all insured employees, *Metropolitan Life Insurance Co v Massachusetts*, 471 U S 724 (1985), and the extension of unemployment benefits to strikers, *New York Telephone Co v New York Labor Department*, 440 U S 519 (1979) However, it noted that the city had pointed to no evidence of such congressional intent with respect to the conduct at issue in this case (121 LRRM at 3237)

[16] *Bus Employees v Missouri*, 374 U S 74 (1963), *Bus Employees v Wisconsin Employment Relations Board*, 340 U S 383 (1951)

[17] *Baker v General Motors Corp* , 122 LRRM 2737, affg 420 Mich 463 (1984)

[18] Justice Stevens delivered the opinion of the Court Justice Brennan, joined by Justices Marshall and Blackmun, filed a dissenting opinion

under the Michigan statute.[19] The court rejected the contention that such disqualification was barred by the NLRA because it inhibited the exercise of rights guaranteed by Section 7 of the Act.

The Court affirmed, relying on its analysis in *New York Telephone Co.*[20] of Congress' intent in 1935, when it enacted both the NLRA and the Social Security Act (which provides for Federal funding of approved state unemployment compensation programs). It noted that the legislative history of both Acts indicates that Congress had "expressly authorized 'a substantial measure of diversity' . . . among the States concerning the payment of unemployment compensation to workers idled as the result of a labor dispute" and, in that connection, had intended to "tolerate" some conflict with Federal labor policy (122 LRRM at 2742). The Court added that, although *New York Telephone* involved an employer's challenge to a state law providing unemployment benefits to striking employees, it was clear from that decision that a "State may, but need not, compensate actual strikers." (Ibid.) Although the employees in *Baker* had not struck, the Court, noting that the state court had found that their unemployment was the reasonably foreseeable result of their payment of special strike assessments, concluded that their claims were no stronger than those of actual strikers.

The Court distinguished its holding in *Nash v. Florida Industrial Commission*[21] that an employee discharged for filing a charge with the Board could not be denied unemployment benefits under a state statute disqualifying unemployment "due to a labor dispute." It observed that, in *Nash*, the unemployment was due to an unlawful act by the employer and accordingly involuntary, although in *Baker* the claimants' unemployment was "entirely attributable to the voluntary use of the union's bargaining resources—untainted by any unlawful conduct by the employer." (122 LRRM at 2743.) The Court concluded that although "federal law protects the employees' right to authorize such a strike . . . [it] does not prohibit the States from deciding whether or not to compensate the employees who thereby cause their own unemployment" (ibid.).[22]

The dissenting Justices were of the view that "States may disqualify unemployed individuals for 'financing' a labor dispute only where they agree to pay special dues specifically to finance the particular strike that caused their employment." To the extent the Michigan statute exceeds this limitation—by denying

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[19] The state court found that—based on the purpose, the amount, and the timing of the emergency dues—it was reasonably foreseeable that the payments would be used to finance the labor disputes that caused the claimants' unemployment Thus, there was a "meaningful connection" between the payments and the strikes (Id at 2740)

[20] *New York Telephone Co v New York Labor Department,* 440 U S 519 (1979)

[21] 389 U S 235 (1967)

[22] The Court cautioned that it was expressing no opinion on whether employees might be disqualified for unemployment compensation solely because "they paid regular union dues required as a condition of employment " (Id at 2744)

benfits to an individual for financing a dispute that was merely "foreseeable" at the time the contribution was made—it was pre-empted by the NLRA. (Id. at 2745.)

VII

Enforcement Litigation

A. Board Deferral to Arbitration

Section 10(a) of the Act provides that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." Section 203(d) of the Act provides, however, that binding arbitration is "the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." Accordingly, the Board has long exercised its discretion to defer to the arbitral process in appropriate cases. Recently, the Board revised its standards for such deferral in *Olin Corp.*[1] with respect to arbitration decisions and in *United Technologies Corp.*[2] with respect to contractual provisions for arbitration when the process has not been completed. Several of these deferral decisions came before the courts of appeals.

In one case,[3] the company had discharged the employee, Lewis, for improper conduct and abusive language after she confronted her supervisor about a transfer to which she objected. The union filed a grievance on Lewis' behalf, which proceeded through two steps to a request that an arbitrator be selected. Negotiations ensued in which the employer offered reinstatement without backpay or seniority, which was rejected. Through internal proceedings, the union determined that the grievance procedure had been satisfied by the offer of reinstatement and that the union would not pursue arbitration. The union, however, neither advised the employer of this decision nor withdrew its request for the selection of an arbitrator. At this point, the employee filed an unfair labor practice charge with the Board concerning her discharge. The Board concluded that because the arbitral process had been invoked and had not run its full course, deferral was appropriate under *United Technologies.* The court affirmed, holding that the Board's policy and its application was a proper and reasonable exercise of the Board's discretion. The court rejected the employee's contention that the union's internal

[1] 268 NLRB 573 (1984)
[2] 268 NLRB 557 (1984)
[3] *Lewis v NLRB,* 800 F 2d 818 (8th Cir)

decision not to proceed made its interests adverse to hers. The court concluded that the Board's retention of jurisdiction to review the result of the arbitral process afforded sufficient protection for her interests. As the Board had requested, however, the court remanded the case to the Board to reconsider the terms under which it retained jurisdiction.

In another case,[4] the employee, Nevins, had been occasionally employed in the past as a driver and, according to Nevins, as a driver's helper. The employer denied that he had ever employed Nevins as a helper and stated that if Nevins had acted as a helper, it was without the employer's knowledge or approval. On 5 January 1981 the employer terminated the driver that Nevins allegedly was assisting, refused to give Nevins the driver's job, and undertook the driver's job himself, refusing to employ Nevins as a helper. Nevins filed a grievance claiming that the employer had paid him subscale wages for his work as a helper in the past and had improperly terminated him as a driver. An arbitrator found, in accordance with the employer's claim, that the employer had never employed Nevins as a helper and hence never underpaid him. The arbitrator also found that Nevins' prior job as an occasional driver was discontinued for legitimate reasons. Nevins also filed an unfair labor practice charge in which he alleged that the owner had discriminated against him with respect to his wages as a helper because he was not a member of the union and had also constructively discharged him on 5 January 1981 by offering him a job as a helper but only if he would accept less than the contract wage and work off the books. The Board dismissed the complaint, finding that the arbitrator had resolved the issues against Nevins. The court reversed on the ground that *Olin Industries* requires, among other things, that the issues before the arbitrator and the issues before the Board be factually parallel. The court agreed with the Board that the facts underlying the arbitrator's decision regarding Nevins' past employment as a helper were factually parallel to those underlying the first unfair labor practice issue. The court held, however, that the facts with respect to Nevins' alleged termination as a helper on 5 January 1981 were not parallel to the issues before the arbitrator and were not considered by him. In so finding, the court held that it was immaterial that Nevins may have consciously withheld the issue of the constructive discharge from the arbitral proceeding because the test in *Olin Corp.* has no such qualification.

In another case involving *Olin Corp.*,[5] employee Darr was discharged for altering her break schedule without permission so that she could join others in protesting the confiscation of a union petition she was circulating and for refusing to go home

[4] *Nevins v NLRB*, 796 F 2d 14 (2d Cir)
[5] *Darr v NLRB*, 801 F 2d 1404 (D C Cir)

after she was initially suspended for that conduct. She filed a grievance under the "just cause" provision of the collective-bargaining agreement. She also filed an unfair labor practice charge, but the Board deferred consideration of the charge pending the arbitration. The arbitrator divided his analysis into the "contract issues" and the "NLRA issues." Interpreting the contract, the arbitrator found that Darr's discharge was without "just cause" because her conduct did not interfere with production and was provoked by the wrongful confiscation of the petition. He found that her refusal to leave after being suspended constituted insubordination. He ordered reinstatement without backpay for the 9 months she was off the job. Turning to the Act the arbitrator indicated that those issues were for the Board and the courts, but observed that because the company's "primary motive" for the disciplinary action was Darr's union activity, the Board would probably find a violation and award reinstatement with backpay. In the unfair labor practice case the administrative law judge concluded that the discipline was imposed because of Darr's union activities which were so inextricably intertwined with the alleged insubordination that no discipline was warranted. He thus concluded that the arbitrator's interpretation of the contract as warranting discipline was "repugnant to the Act" and hence not entitled to deferral. The Board reversed, concluding that the arbitrator's balancing of the competing claims was appropriate and that the failure to accord a "make whole" remedy did not render the decision repugnant to the Act.

The court first noted that the Board has always awarded backpay when it ordered reinstatement. The court reasoned that the answer to whether the Board may defer to an arbitrator's award that is doctrinally different from Board precedent may well depend on why the Board defers. After analyzing Board precedent with respect to deferral, the court concluded that the Board has seemed to interweave four theories for deferral: collateral estoppel, limited review of the arbitrator's application of the Act, deference to contract interpretation by the arbitrator, and a theory that the parties to the collective-bargaining agreement have waived their statutory rights. The court concluded that it could not clearly discern from the Board's decision here why it deferred in this case. Accordingly, the court remanded for the Board to explicate the basis for its deferral.

In a Ninth Circuit case,[6] the employee, Garcia, was discharged after he refused to obey a supervisor's order to tap his horn when he stopped to make residential deliveries. Garcia objected because state law forbids honking unless necessary for safety. The union filed a grievance, and the arbitration panel reduced the discipline to a 10-day suspension. The union then grieved the company's horn-tapping policy as violative of the

[6] *Garcia v NLRB*, 785 F 2d 807

collective-bargaining agreement's provision that no employee could be required to violate traffic laws. The panel denied the grievance because the company agreed to assume full responsibility for any citations issued. Garcia then filed an unfair labor practice charge, which the Board dismissed on the ground that it would defer to the arbitral panel. In so finding, the Board concluded that the General Counsel had failed to show that the arbitral award was "clearly repugnant" to the Act. This was true because Garcia might have had a more reasonable alternative means of enforcing his contractual rights—such as obeying the order and filing a grievance—and because under *City Disposal*[7] an employee's refusal to obey might not be protected under the Act if an employee has a more reasonable alternative means to secure contractual rights. The Ninth Circuit reversed, holding that the arbitration award, in punishing Garcia for refusing to break the law, was contrary to public policy and that the Board should not have deferred to a decision condoning such punishment. The court also concluded that Garcia's refusal to follow the employer's order to break the law was a reasonable means of enforcing his contractual rights under *City Disposal.*

In an Eleventh Circuit case,[8] the employee, Taylor, was discharged for refusing to drive a truck he contended was unsafe after two mechanics had inspected it and certified it as safe to drive. The collective-bargaining agreement authorized employees to refuse to operate any vehicle that was "not in safe operating condition . . . unless such refusal was unjustified." Taylor's grievance protesting the discharge was referred to a first-level grievance panel which held a hearing and heard testimony from Taylor and from company witnesses but became deadlocked and hence could not issue a decision. The grievance was referred automatically to a second-level panel that issued a decision stating without discussion that the grievance was denied. Taylor then filed a charge with the Board alleging that he was discharged for engaging in concerted activity when he refused to drive an "unsafe truck." On remand from the Board to reconsider the applicability of *Olin Corp.*, the administrative law judge found that the issue in the arbitration decision was "factually parallel" to the statutory issue, that the first-level panel was presented generally with the facts relevant to resolving the statutory issue, and that the transcript of that hearing was made available to the second-level panel after the first deadlocked. Nevertheless he found insufficient basis for finding that the second-level panel was presented with the facts and that it "adequately considered the issue." The Board reversed, finding that under *Olin Corp.* the second-level panel's consideration must be deemed adequate on these facts, absent contrary evidence from the General Counsel.

[7] *NLRB v City Disposal Systems*, 465 U S 822 (1984)
[8] *Taylor v NLRB*, 786 F 2d 1516

The court reversed, disapproving the Board's *Olin Corp.* standard and holding that "[d]eferral to an arbitral finding is not justified when the arbitrator did not address or resolve a distinct statutory claim." On petition for rehearing, the Board pointed out again that in this case the contract right and the statutory right were congruent. Thus, when the collective-bargaining agreement provided that employees should not be required to drive unsafe trucks, Taylor's refusal to drive would be protected concerted activity under the Act if he reasonably and in good faith believed the truck unsafe.[9] His refusal would be protected under the collective-bargaining agreement unless it was "unjustified." In sum, an arbitral finding that his action was "unjustified" amounts to a finding that it was "unreasonable." The Board also pointed out that if it had refused to defer under the facts of this case, it would have been reversed by the District of Columbia Circuit, but that the Eleventh Circuit had not even addressed the other circuit's views.[10] The petition was denied without comment.

B. Employer Interference with Employee Rights

Section 7 of the Act guarantees employees the right to refuse to cross a lawful picket line. The right of employees to engage in such a "sympathy strike" may be waived by the union that represents them, but waiver of this statutory right must be "clear and unmistakable." The issue in *Indianapolis Power*[11] was whether the broad no-strike clause contained in the applicable collective-bargaining agreement was sufficient to constitute such a waiver.

In 1978, the Board held in *Operating Engineers Local 18 (Davis-McKee)*[12] that a contractual no-strike clause is not a clear and unmistakable waiver of the right to engage in sympathy strikes unless the clause specifically mentions "sympathy strikes" or unless extrinsic evidence independently establishes that the union intended the clause to include such a waiver. In *Indianapolis Power*,[13] the Board overruled *Davis-McKee* and held that a broad no-strike clause would be read to encompass sympathy strikes unless the contract as a whole or extrinsic evidence indicated otherwise.

The District of Columbia Circuit approved the Board's new approach which it characterized as "treat[ing] waiver of sympathy strikes essentially as a matter of straightforward contract interpretation." (797 F.2d at 1031.) Initially, the court rejected the union's contention that the "clear and unmistakable" standard required something more than simply placing an objective interpre-

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[9] *NLRB v City Disposal Systems*, 465 U S 822, 839–844 (1984)

[10] See *American Freight System v NLRB*, 722 F 2d 828 (D C Cir 1983)

[11] *Electrical Workers IBEW Local 1395 (Indianapolis Power) v NLRB*, 797 F 2d 1027 (D C Cir)

[12] 238 NLRB 652 (1978)

[13] 273 NLRB 1715 (1985)

tation on a contract. The court noted that this contention, although "not without intuitive appeal," had been rejected by the Supreme Court in both *NLRB v. Rockaway News Supply Co.*[14] and *Mastro Plastics Corp. v. NLRB.*[15]

The court found that the Board's new approach was consistent with Federal labor policy. The court noted that a union is free to enter into agreements limiting recourse to economic weapons in exchange for "gains it considers of more value to its members,"[16] and that waiver of the right to engage in sympathy strikes therefore is not disfavored. In the court's view, Federal labor policy was "more threatened" by determining whether the right to engage in sympathy strikes had been waived according to "artificial rules of construction" than by "the Board's practice of giving effect to the clear import of contractual language." (797 F.2d at 1031.) The court reasoned that "[a] grudging or stilted interpretation of collective bargaining agreements tends to encroach upon the fundamental national policy favoring the ordering of the employer-employee relationship by voluntary bargaining rather than governmental fiat . . . [and] injects into the collective bargaining process an uncertainty that diminishes the prospects for successful bargaining." (Id. at 1031–1032.) For the same reasons, the court rejected the union's contention that the standards governing the question of waiver in cases arising under the Act should be more demanding than the ordinary standards of contract interpretation applied by the courts in cases arising under Section 301.

The court also found that the Board's new approach was consistent with the leading cases involving waiver of the statutory right to strike. The court discerned a spectrum running from *Mastro Plastics*, in which the Supreme Court refused to find a waiver of the right to strike over serious unfair labor practices that undermined the very existence of the bargaining relationship, to *Lucas Flour,*[17] in which the Supreme Court implied a waiver of the right to strike from the existence of an arbitration clause. The court determined that a waiver of the right to engage in sympathy strikes lies between these polar extremes and that *Rockaway News* "establishes, at a minimum, that nothing in the Act prevents the Board or a court from finding a waiver of the right to honor picket lines in a contractual no-strike clause of sufficient breadth." (797 F.2d at 1034.)

The court rejected the union's argument that because a union's no-strike pledge is the quid pro quo for the employer's agreement to arbitrate, a no-strike clause ordinarily is intended to waive the right to strike only over those matters which are subject to arbitration and, therefore, does not cover sympathy

[14] 345 U S 71, 79 (1953)
[15] 350 U S 270, 279 (1956)
[16] *Metropolitan Edison Co v NLRB*, 460 U S 693, 707 (1983)
[17] *Teamsters Local 174 v Lucas Flour Co*, 369 U S 95 (1962)

strikes. The court observed that although this common sense principle is reasonably applied in cases like *Lucas Flour*, in which the no-strike obligation is implied from the agreement to arbitrate, it offers little help in cases involving the interpretation of an express no-strike clause, when the question "[u]ltimately . . . depends on the intent of the contracting parties." (Ibid.)[18]

The court rejected the union's further argument that the parties in the instant case necessarily intended the no-strike clause to be read in light of *Davis-McKee* because *Davis-McKee* was the prevailing law at the time the agreement was negotiated. The court noted that the clause was first agreed to before *Davis-McKee*—when the Board "was quite willing to find a waiver of the right to honor picket lines in a general no-strike clause" (id. at 1035)—and refused to speculate that the parties intended to incorporate *Davis-McKee* when they carried the language forward unchanged and without discussion. The court further noted that, at the time the agreement was negotiated, *Davis-McKee* had already been rejected by the Seventh Circuit, where the agreement had been negotiated, ratified, and signed. Most important, observed the court, "it is simply wrong to assume that 'the law' to which parties refer in entering collective bargaining agreement is exclusively, or even primarily, Board law. . . . [for those] agreements are interpreted by arbitrators and courts as well." (Id.)

Finally, the court found that the language of the no-strike clause, which referred to "any strike, picketing, sit-down, stay-in, slow-down, or other curtailment of work or interference with the operation of the Company's business," (id. at 1028) was on its face fully sufficient to warrant the Board's finding that the clause waived the right to engage in sympathy strikes. The court noted, however, that the union had introduced evidence that the parties had asserted differing interpretations of the no-strike clause when they first negotiated it and that the administrative law judge concluded that the parties had "agreed to disagree" over whether the clause covered sympathy strikes. The court noted that this finding, if accepted, would be controlling concerning the parties' intent, but that the Board had not expressly considered it. Accordingly, the court remanded the case for the Board to do so.

C. The Bargaining Obligation

In *Columbus Electric Co.*,[19] the company had paid employees a Christmas bonus for about 40 years, but the bonus was never the subject of a collective-bargaining agreement. When the company and the union negotiated their 1982 collective-bargaining agreement, the company tendered a "zipper clause" stating that the agreement superceded all prior agreements and understandings, oral or written, expressed or implied, and would control the

[18] 797 F 2d at 1034, quoting *Gateway Coal Co v Mine Workers*, 414 U S 368, 382 (1974)

[19] *Electrical Workers IBEW Local 1466 (Columbus Electric Co) v NLRB*, 795 F 2d 150 (D C Cir)

entire relationship. The clause also stated that for the life of the agreement, the union waived its right to negotiate with respect to any rights contained in the agreement. The union responded by asking for a list of such agreements, but the company stated that there were so many it would be virtually impossible to list them and that the company wanted to "wipe the slate clean." The union then filed an unfair labor practice charge alleging that the company's refusal to provide the list was a refusal to bargain, but the General Counsel refused to issue a complaint. Ultimately the parties reached agreement on a contract that contained the zipper clause but did not mention the Christmas bonus. Two months later the company announced that it was discontinuing the Christmas bonus and the union filed another unfair labor practice charge alleging that the unilateral discontinuance of the bonus was a refusal to bargain. The Board, reviewing the contract, noted that it addressed "an entire spectrum of issues," including a number of specific provisions concerning wages and compensation. Accordingly, the Board concluded that the zipper clause constituted a "clear and unmistakable waiver" of the union's right to bargain over the Christmas bonus. In agreeing with the Board, the court recognized that the Christmas bonus had become a condition of employment and that the company could not terminate it without giving the union notice and an opportunity to bargain about the termination. The court also noted that the Board had relied entirely on the sweeping nature of the integration clause, rather than on the second clause stating that the union had "waived" its right to bargain. The court also agreed that the sweeping nature of the integration clause reached not only agreements, but also practices, noting that in its appeal to the General Counsel of the Regional Director's refusal to issue a complaint based on the refusal to provide a list of agreements, the union observed that the company's position was "broad" because it covered "past practices" along with other agreements.

Two cases dealt with the right of a union that represents employees to visit the workplace. In one case[20] the plant had a room containing two large fans that forced air into the plant's burners. No one was stationed in the room, but employees entered it regularly and sometimes spent the whole day. Due to the high noise levels in the fan room, the company furnished ear protectors and required their use; however, the protectors sometimes slipped off when worn over hardhats. Until 1982 the plant burned oil and the fans ran full speed only about 60 percent of the time. With conversion to coal in 1982, however, the fans ran at that level 95 percent of the time. When the union sent an industrial hygienist to the plant to survey possible hazards created by the conversion to coal, the company denied him access to the fan room. Prior to this case, the Board had treated such requests

[20] *NLRB v Holyoke Water Co*, 778 F 2d 49 (1st Cir)

for access by an incumbent union as simple requests for information, an approach set forth in *Winona Industries.*[21] Here, however, overruling *Winona* to the extent that it set forth an inconsistent analysis, the Board balanced the union's need for access against the Employer's interest in preventing invasion of its property, and found that the union was entitled to access. The court agreed with the Board that on the record presented the union was entitled to access under either test. The court noted that even under an information test, the union must establish the relevance of the information and if the employer raises a legitimate objection on the basis of burdensomeness or some other ground, the union must attempt to reach some type of compromise with the employer about the form, extent, or timing of disclosure. Here, the court found that the information was relevant, for the record showed that even short exposures to high noise levels can cause loss of hearing, stress, hypertension, nervousness, and irritability. The court further agreed with the Board that the company failed to provide the union with the relevant information. To show noise levels, the company tendered the results of two tests. One measured the average noise levels to which individual employees were exposed in the plant during an 8-hour period, but the union was interested in the noise levels in the fan room. The second test was made in the fan room after the union filed its charge with the Board by a company employee who was not an industrial hygienist. That test may have been affected by the exact location of the measuring apparatus and by the positioning of doors and louvers. The union's experts' recommendations, moreover, must be based in part on direct observation of employee work patterns. Accordingly, the court agreed with the Board that the union reasonably insisted on obtaining access for its own hygienist. The court found it unnecessary to reach the propriety of the more stringent balancing test.

In the other case,[22] the union wanted access to the trailers from which NBC broadcast most sporting events, in order to police compliance with the collective-bargaining agreement. The trailers, some 8 by 40 feet, contained the television monitors and other necessary equipment. The personnel there included a producer, who was in overall charge of the facility; a director and an assistant, represented by the union; and various technicians. The union contended that producers were doing unit work by "cueing" technicians in the performance of certain broadcast functions in violation of the contract. In preparation for an arbitration of a grievance based on this contention, the union sought to have an observer present in the trailer during the televising of a golf match from Bay Hill, Florida. NBC objected that the union members who were in the trailer could report violations,

[21] 257 NLRB 695 (1981)
[22] *NLRB v National Broadcasting Co*, 798 F 2d 75 (2d Cir)

but the union contended that the directors and assistants, who were freelancers, would be reluctant to antagonize management by complaining to the union. Despite NBC's objections, the union sent the observer, who entered the trailer and remained unobserved until he was paged an hour later. He was asked to leave and was denied access the next day. The Board, again applying the new balancing test, concluded that the union's need for information outweighed NBC's right to control access to its property. In accordance with that test, however, the Board narrowed the administrative law judge's recommended order by stating that the access be confined to "reasonable times and places." The court approved both the Board's new test and its application here.

D. Secondary Boycotts

In *DeBartolo Corp. v. NLRB*,[23] the Supreme Court addressed the scope of the "publicity proviso" to Section 8(b)(4) in the context of secondary handbilling. A union distributed handbills at a large shopping mall urging consumers not to patronize the shops in the mall. One of the tenants, Wilson, had contracted for the construction of a store at the mall by a contractor, High, who the union alleged paid substandard wages. The Board had found that the handbilling was protected by the publicity proviso to the Act's prohibition of secondary boycotts, which provides that nothing in the secondary boycott section shall be construed as prohibiting publicity other than picketing, "for the purpose of truthfully advising the public, including consumers and members of a labor organization," about a labor dispute with a producer of a product.[24] The Fourth Circuit affirmed.[25] The Supreme Court reversed, holding that the union's conduct fell outside the protection of the publicity proviso because the distribution of a product was not involved. The Court remanded without deciding whether the distribution of the handbills violated the Act or, if so, whether the Act was constitutional under the first amendment.

On remand the Board found that by distributing handbills urging potential customers not to shop at the mall, the union coerced mall tenants with an object of forcing them to cease doing business with DeBartolo, the owner of the mall, in order to force DeBartolo and Wilson to cease doing business with High, thereby violating the secondary boycott provisions of the Act. On review the Eleventh Circuit denied enforcement.[26]

The court began with the proposition that an act of Congress should not be construed to violate the Constitution "if any other

[23] 463 U S 147 (1983)
[24] *Florida Gulf Coast Building Trades Council*, 252 NLRB 702 (1980)
[25] *DeBartolo v NLRB*, 662 F 2d 264 (4th Cir 1981)
[26] *Florida Gulf Coast Building Trades Council v NLRB*, 796 F 2d 1328

possible construction remains available."[27] The court then noted that speech does not lose its protection simply because it seeks to embarrass others or to coerce them into action. The court also noted that although labor picketing is entitled to less protection than pure speech, the handbilling here was peaceful and orderly and contained none of the elements that justify restrictions on picketing. Next the court observed that the handbills were not coercive with respect to the listener—that is, the potential customers—and did not seek to have anyone do anything that was illegal. The court concluded that if the Act were interpreted as prohibiting such pure speech, serious constitutional questions would arise.

The court then turned to an examination of the legislative history. The court noted that the present language was added to the secondary boycott provisions when Congress was closing three loopholes, none of which involved consumer picketing or handbilling, and that the legislative history reflects concern about only those loopholes. The court determined that a basis for finding an intent to outlaw handbilling could be found only in the publicity proviso itself and then only if the proviso is construed as an exception to a prohibition against nonpicketing appeals generally. The court concluded, however, that the proviso was drafted simply to make clear that the only union conduct discussed in the legislative history—namely, secondary union action against a retail store selling a struck manufacturer's product—would not be prohibited.

Accordingly, the court decided that the proviso was not a true exception—only an example of conduct left unrestricted by the amendments—and hence it provides no basis for finding an intent to outlaw the sort of handbilling involved here.

E. Remedial Orders

The Supreme Court in *Gissel*[28] approved the Board's practice of issuing bargaining orders when the union has lost a Board election following employer unfair labor practices that make the possibility of holding another, fair election remote. In *NLRB v. Balsam Management Co.*,[29] the Second Circuit, which has carefully scrutinized such bargaining orders, approved a *Gissel* order despite a 100-percent turnover in the bargaining unit after the election. First, the court approved the Board's explication of the reason that the unfair labor practices warranted such an order. With respect to the turnover, the court noted that three of the six current employees were hired while the unlawfully discharged employees were picketing the company, and hence they presumably were aware of their employer's past treatment of em-

[27] *NLRB v Catholic Bishop of Chicago*, 440 U S 490, 500 (1979)
[28] *NLRB v Gissel Packing Co*, 395 U S 575 (1969)
[29] 792 F 2d 29

ployees who chose to be represented by a union. The court also noted that the turnover was caused by the unfair labor practices and that it "would defy reason to permit an employer to deflect a *Gissel* bargaining order on the ground of employee turnover when that turnover resulted from the employer's unlawful discharge of all the members of the bargaining unit." (Id. at 34.) The court rejected the employer's contention that the responsibility for the 100-percent turnover should be placed on the discharged employees because they rejected offers of reinstatement. The court noted that the first such "offer" was conditioned on the employees' renunciation of the union. The second offer, although appropriate in form, was not made until 4 months after the discharges, at a time when the employees had been forced to take alternative employment and the employer had hired replacements. The court held that under the circumstances "the purported offers of reinstatement did not constitute a mitigating circumstance sufficient to prevent issuance of a bargaining order." (Ibid.)

VIII

Injunction Litigation

A. Injunctive Litigation Under Section 10(j)

Section 10(j) of the Act empowers the Board, in its discretion, after issuance of an unfair labor practice complaint against an employer or a labor organization, to petition a U.S. district court for appropriate, temporary injunctive relief or restraining order in aid of the unfair labor practice proceeding while the case is pending before the Board. In fiscal 1986, the Board filed a total of 41 petitions for temporary relief under the discretionary provision of Section 10(j): 37 against employers and 4 against labor organizations. Of this number, together with petitions pending in court at the beginning of this report period, injunctions were granted by the courts in 21 cases and denied in 3 cases. Of the remaining cases, 11 were settled prior to court action, 2 were withdrawn based on changed circumstances, and 9 remained pending further processing by the court.

Injunctions were obtained against employers in 18 cases and against labor organizations in 3 cases. The cases against employers involved a variety of alleged violations, including interference with nascent union organizational activity, conduct designed to undermine an incumbent union's representational status, and bad-faith bargaining. The cases against unions involved several instances of serious picket-line misconduct during labor disputes when local authorities appeared unable to control the misconduct.

Several cases decided during the past year were of sufficient interest to warrant particular attention.

In *Eisenberg v. Lenape Products*,[1] the Third Circuit affirmed a district court's refusal to order the interim reinstatement of a group of unorganized employees who there was reasonable cause to believe had been discharged for concertedly protesting the conditions under which they were required to work. In reliance on the Third Circuit's recent decision in *Kobell v. Suburban Lines*,[2] the district court had concluded that interim reinstatement was unnecessary because the employees constituted a "small and intimate unit" and were therefore capable of resuming

[1] 781 F 2d 999

[2] 731 F 2d 1076 (1984)

their activities in the event that the Board ultimately ordered their reinstatement. A panel majority of the court of appeals held that the district court's failure to grant the injunctive relief requested was not an "abuse of discretion." The majority concluded that "[t]he district court's finding that the size and intimacy of this group, like the group in *Suburban Lines*, will enable them to start up where they left off is not clearly erroneous."[3] Moreover, the majority found "no evidence in the record to establish that other employees will be discouraged from engaging in concerted activity in the interim."[4]

Circuit Judge Becker, who authored the opinion in *Suburban Lines*, dissented. In his view, although it was reasonable to infer that the long-established bargaining relationship in *Suburban Lines* could be reestablished after an eventual Board order, that situation contrasted markedly with the instant case involving "an inchoate group . . . discharged upon its first collective action."[5] Considering it likely that the employer's conduct would succeed in discouraging employees from engaging in protected activities, Judge Becker would have reversed the district court and directed issuance of the injunction sought by the Board.

In *Eisenberg v. Tyler Distribution Centers*,[6] 10(j) relief was sought when the employer allegedly had illegally assisted a labor organization by improperly recognizing and entering into a labor agreement with it before the employer had commenced normal operations at the plant involved. Citing *Kroger Co.*, 275 NLRB 1478, 1479–1480 (1985), the district court found reasonable cause to believe that the employer's "premature" recognition of the union violated Section 8(a)(2) of the Act. It concluded that 10(j) relief to enjoin the employer's continued recognition of the union and enforcement of its labor agreement during the pendency of the administrative proceedings before the Board would serve two valid purposes: first, the injunction would prevent the assisted union from becoming so "entrenched" in the unit that the Board's ultimate remedial order would be ineffective; and second, it would allow the "opening up [of] the process to a [prompt] fair union representational election." The court specified that the employer could move to vacate the injunction if an election were not held within 60 days, provided that the employer had not in that period further interfered with employees' free exercise of their statutory rights.

Two cases decided during the year presented the common issue of the appropriateness of an interim restoration of operations when there was reason to believe the operations were relocated to other of the employer's facilities to cripple a union's organizing campaign or to avoid dealing with a newly certified

[3] 781 F 2d at 1005
[4] Ibid
[5] Id at 1006–1007
[6] Civil No 86–153 (DRD) (D N J)

union. In the first case, *Gottfried v. Crotty Corp.*,[7] the employer allegedly had engaged in a campaign of egregious unlawful conduct during an organizing drive sufficient to warrant a remedial bargaining order under *NLRB v. Gissel Packing Co.*[8] The court found reasonable cause to believe that, in addition to engaging in widespread 8(a)(1) violations, including coercive interrogations and threats, as well as illegally establishing and assisting an "employee committee" in violation of Section 8(a)(2), the employer also discriminatorily closed and relocated to another State two departments in the plant at issue and terminated the substantial number of the unit employees who previously had performed that work. The court concluded that the interim reestablishment of the two departments, the return of the work illegally transferred, and the reinstatement of the discharged employees were necessary to preserve the Board's ability to fully remedy the violations alleged. The court also granted an affirmative bargaining order in favor of the organizing union, as well as an order to require the employer to cease dealing with the unlawfully assisted employee committee. In the second case, *Nelson v. Professional Eye Care*,[9] shortly after a union was certified in a small unit of employees, the employer allegedly discriminatorily relocated a portion of the unit work, including equipment, to a facility in another State and laid off several unit employees.[10] Although the court granted a cease-and-desist order, including a prohibition against further unilateral changes in working conditions, the court refused to order the interim restoration of the relocated work and reinstatement of the laid-off employees. The court concluded that "the circumstances [were] not so extreme" to justify such relief. In the court's view, the issues were "better resolved by the Board itself," which would then be able to "rectify any adversities occasioned by the relocation of work and equipment."[11]

In *Asseo v. Pan American Grain Co.*,[12] and *Schneid v. Apple Glass Co.*,[13] district courts granted interim bargaining orders in circumstances in which there was reasonable cause to believe a union had obtained a card majority in an appropriate unit but the employer allegedly had engaged in a serious and pervasive unfair labor practice campaign effectively destroying the union's majority support and precluding the holding of a fair election. Significantly, these cases arose within the jurisdiction of the First and Seventh Circuits, respectively, neither of which had yet passed

[7] File No K86-28 (W D Mich)
[8] 395 U S 575 (1969)
[9] CV-85-205-BU-JFB (D Mont)
[10] The case involved a widespread campaign of 8(a)(1) threats and harassment which revealed the employer's union animus
[11] The Board has appealed from that portion of the order denying affirmative injunctive relief Docket No 86-3558 (9th Cir)
[12] Civil No 85-2399 (RLA) (D P R), appeal pending, Docket No 86-1119 (1st Cir)
[13] 123 LRRM 2329 (N D Ill)

on the appropriateness of *Gissel*-style bargaining orders as interim relief in 10(j) proceedings.[14]

Two cases decided by district courts involved employer conduct designed to undermine an incumbent union's representational status in the affected unit. In *Hirsch v. Tube Methods*,[15] the court found reasonable cause to believe that the employer had refused to bargain in good faith with the union by asserting during bargaining that there would be no collective-bargaining agreement; unilaterally implementing changes in working conditions shortly after the expiration of the parties' most recent labor agreement; refusing to recognize the union as the exclusive representative of all employees in the historical bargaining unit; refusing to provide the union information relevant to bargaining; and insisting that no negotiations could continue unless the union first withdrew unfair labor practice charges filed with the Board. The court concluded that injunctive relief was warranted because the employer's "glaring" and "defiant" violation of its duty to bargain in good faith could "destroy the effectiveness of the Union rapidly" and, with the passage of time required for Board adjudication, could nullify the Board's ultimate remedial power. Accordingly, the court entered a cease-and-desist order and affirmatively directed the employer to rescind, at the union's option, any unilateral changes in working conditions implemented after the expiration of the parties' last agreement, except for the elimination of union security and dues checkoff.[16] Likewise, in *Gottfried v. Samuel Frankel*,[17] the court found reasonable cause to believe that after termination of an economic strike, the employer embarked on a pervasive campaign of threats and harassment against returning strikers and the union's key employee officials in the facility, including imposing on them onerous work, staffing, and seniority schedules, forcing returning strikers, but not strike replacements, to undergo orientation and training programs, closely surveilling the protected activities of union stewards, interrogating and threatening employees supporting the union or filing grievances, and removing certain established work benefits, including access to personal telephones, coffee, and bathroom privileges. Concluding that broad relief was just and proper to restore and preserve the status quo ante pending final

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[14] The Second and Sixth Circuits have approved the grant of such interim relief, while the Fifth Circuit has ruled that it was not an abuse of discretion to deny such relief Compare, e g , *Seeler v Trading Port, Inc* , 517 F 2d 33 (2d Cir 1975), and *Levine v C & W Mining Co* , 610 F 2d 432 (6th Cir 1979), with *Boire v Pilot Freight Carriers*, 515 F 2d 1185 (5th Cir 1975), cert denied 426 U S 934 (1976) See generally 45 NLRB Ann Rep 205-207 (1980) Although a panel of the Seventh Circuit initially affirmed a *Gissel*-style bargaining order as interim relief in *Wilson v Liberty Homes*, 108 LRRM 2699 (1981), affg 500 F Supp 1120 (W D Wisc 1980), the panel subsequently vacated its decision as moot and withdrew it from publication when it learned that, at the time it issued its decision, the Board had already rendered its final decision and order (257 NLRB 1411 (1981)) dismissing as nonmeritorious the most serious charges against the employer 109 LRRM 2492, 673 F 2d 1333 (1982)

[15] 125 LRRM 2198 (E D Pa)

[16] See *Bethlehem Steel Co* , 136 NLRB 1500 (1962), affd in relevant part 320 F 2d 615 (3d Cir 1963), cert denied 375 U S 984 (1964)

[17] No 85-CV-75709-DT (E D Mich), appeal pending, Docket Nos 86-1278 and 1472 (6th Cir)

Board adjudication, the court ordered the employer to cease and desist from its unlawful conduct and to restore and maintain the preexisting working conditions.

Finally, three employers were adjudicated in civil contempt of court for failing to comply with the terms of outstanding 10(j) decrees.

In *Fuchs v. Workroom for Designers*,[18] the court adjudicated both the corporate employer and its chief officer in civil contempt by their refusal, inter alia, to properly reinstate employees as ordered in an original 10(j) decree and a consent purgation decree entered in an earlier civil contempt proceeding. The court ordered the respondents to purge themselves of contempt by paying compensatory damages in the form of backpay to the employees improperly denied reinstatement and paying to the Board and the charging party union the amounts they expended in investigating, preparing, and litigating the contempt proceedings, including attorneys' fees and expenses and salaries of Board personnel. The court also ordered that the matter be referred to the U.S. Attorney for a determination of whether criminal charges should be brought against the respondents. Similarly, in *Asseo v. Pan American Grain Co.*,[19] the court adjudicated a corporate employer, several of its officers, and its attorney in civil contempt of a 10(j) order[20] for, inter alia, failing to reinstate discriminatees, willfully delaying bargaining, threatening employees with discharge for testifying in an unfair labor practice proceeding, failing to provide the union with requested information relevant to collective bargaining, issuing discriminatory warnings to employees under a discriminatorily implemented absenteeism policy, and discharging employees because of their support for the union. In purgation, the court ordered the respondents to reinstate the discriminatees and pay them backpay as compensatory damages, to rescind the absenteeism policy and remove all discriminatory warnings to employees, to bargain in good faith with the union, and to reimburse the Board its investigation and litigation expenses. The court also established a schedule of compliance fines to be assessed in the event of future contumacies. Lastly, in *Squillacote v. U.S. Marine Corp.*,[21] the corporate employer and an officer were adjudicated in civil contempt of a 10(j) bargaining order for bypassing the union and dealing directly with employees concerning mandatory subjects of collective bargaining, for refusing promptly to provide relevant information to the union for purposes of bargaining, and for making denigrating remarks to employees concerning the union in an attempt to undermine the union. The court issued an appropriate purgation

[18] Civil Action Nos 82-0370-F and 83-0220-F (D Mass)

[19] Civil No 85-2399 (RLA) (D P R), appeal pending, Docket No 86-1806 (1st Cir)

[20] See fn 12, supra

[21] Civil Action No 84-C-498 (E D Wisc), appeal pending, Docket No 86-2003 (7th Cir) The original 10(j) decision is reported at 116 LRRM 2663 (1984) See 49 NLRB Ann Rep 142 (1984)

order, including the reimbursement of the Board's litigation expenses.

B. Injunctive Litigation Under Section 10(l)

Section 10(l) imposes a mandatory duty on the Board to petition for "appropriate injunctive relief" against a labor organization or its agent charged with violation of Section 8(b)(4)(A), (B), and (C),[22] or Section 8(b)(7),[23] and against an employer or union charged with a violation of Section 8(e),[24] whenever the General Counsel's investigation reveals "reasonable cause to believe that such charge is true and a complaint should issue." In cases arising under Section 8(b)(7), however, a district court injunction may not be sought if a charge under Section 8(a)(2) of the Act has been filed alleging that the employer had dominated or interfered with the formation or administration of a labor organization and, after investigation, there is "reasonable cause to believe such charge is true and that a complaint should issue." Section 10(l) also provides that its provisions shall be applicable, "where such relief is appropriate," to threats or other coercive conduct in support of jurisdictional disputes under Section 8(b)(4)(D) of the Act. In addition, under Section 10(l) a temporary restraining order pending the hearing on the petition for an injunction may be obtained, without notice to the respondent, upon a showing that "substantial and irreparable injury to the charging party will be unavoidable" unless immediate injunctive relief is granted. Such ex parte relief, however, may not extend beyond 5 days.

In this report period, the Board filed 40 petitions for injunctions under Section 10(l). Of the total caseload, comprised of this number together with 8 cases pending at the beginning of the period, 15 cases were settled, 1 continued in an inactive status, 2 were withdrawn, and 11 were pending court action at the close of the report year. During this period, 19 petitions went to final order, the courts granting injunctions in 17 cases and denying them in 2 cases. Injunctions were issued in 13 cases involving secondary boycott action proscribed by Section 8(b)(4)(B), as well as in instances involving a violation of Section 8(b)(4)(A),

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[22] Sec 8(b)(4)(A), (B), and (C), as enacted by the Labor Management Relations Act, 1947, prohibited certain types of secondary strikes and boycotts, strikes to compel employers or self-employed persons to join labor or employer organizations, and strikes against Board certifications of bargaining representatives These provisions were enlarged by the 1959 amendments of the Act (Title VII of Labor-Management Reporting and Disclosure Act) to prohibit not only strikes and the inducement of work stoppages for these objects but also to proscribe threats, coercion, and restraint addressed to employers for these objects, and to prohibit conduct of this nature when an object was to compel an employer to enter into a hot cargo agreement declared unlawful in another section of the Act, Sec 8(e)

[23] Sec 8(b)(7), incorporated in the Act by the 1959 amendments, makes organizational or recognitional picketing under certain circumstances an unfair labor practice

[24] Sec 8(e), also incorporated in the Act by the 1959 amendments, makes hot cargo agreements unlawful and unenforceable, with certain exceptions for the construction and garment industries

which proscribes certain conduct to obtain hot cargo agreements barred by Section 8(e). Injunctions were granted in two cases involving jurisdictional disputes in violation of Section 8(b)(4)(D). Injunctions were also issued in two cases to proscribe alleged recognitional or organizational picketing in violations of Section 8(b)(7).

Of the two in which injunctions were denied, one involved secondary picketing activity by labor organizations and the other involved a hot cargo agreement.

A rare case implicating the 8(a)(2) proviso to Section 10(l) was decided during the past fiscal year. In *Kobell v. Food & Commercial Workers Local 23*,[25] the Third Circuit affirmed an injunction prohibiting a union from engaging in recognitional picketing of an employer in violation of Section 8(b)(7)(C), notwithstanding a prior charge, found meritorious by the Region, that the employer had unlawfully recognized and signed a contract with a rival union in violation of Section 8(a)(2). Before the Regional Director petitioned for the 10(l) injunction, the 8(a)(2) complaint had been settled, albeit over the objections of the picketing union. In the 10(l) proceeding, the union argued that the 8(a)(2) settlement was legally invalid because it was reached without according the union a requested opportunity for a hearing on its objections to the settlement, as required by Third Circuit precedent.[26] Therefore, the union argued, the 8(a)(2) complaint remained legally outstanding, and the proviso to Section 10(l) barred the issuance of the injunction.

The court of appeals, accepting the district court's factfinding "that the Section 8(a)(2) 'charge . . . [had] been fully remedied by the . . . Settlement Agreement,'"[27] concluded that the possibility of procedural irregularities in the settlement process did not preclude an otherwise valid application for 10(l) injunctive relief. The purpose the 8(a)(2) proviso to Section 10(l) was

> to prevent an unlawfully assisted union from enjoying the benefits and advantages of its illegal assistance while, at the same time, an unassisted, competing union is being enjoined from organizational or recognitional picketing.[28]

Accordingly, once the employer's unlawful conduct had "ceased and been fully remedied," 10(l) relief was available even though the 8(a)(2) proceeding "might be returned to the Board at some time in the future."[29]

In *Scott v. Teamsters Local 70 (Chipman Freight Services)*,[30] a district court denied an injunction in a case which presented the

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[25] 788 F 2d 189

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

[27] 788 F 2d at 194

[28] Id at 195

[29] Ibid

[30] CV-85-5706 RFP (N D Calif)

unusual question whether a union violates Section 8(b)(4)(B) by picketing an employer on behalf of a group of independent contractors who do business with that employer. The employer, a trucking company, had contracts with a number of owner-operators of trucks to haul containerized freight to and from the Port of Oakland. In July 1985 the employer told the drivers they would have to sign new contracts in order to continue driving for it. Most of the drivers refused, and instead enlisted the aid of a union to picket the employer's facilities to protest its failure to permit the drivers to work under the terms of their old contracts. The employer responded by filing an 8(b)(4)(B) charge alleging that, because the picketing was being conducted on behalf of owner-operators, not employees within the meaning of the Act, the picketing was not protected by the primary strike proviso to Section 8(b)(4)(B). Relying on the Board's recent decision in *Production Workers Union of Chicago (Checker Taxi Co.)*,[31] the Regional Director petitioned for 10(l) injunctive relief. Concluding that the drivers had a primary dispute with Chipman and that there was no merit to "the argument that picketing by 'independent contractors' is secondary activity simply because it lies outside the traditional employer-employee relationship," the district court found no reasonable cause to believe the union's picketing violated the Act. Although the court acknowledged that the Board's *Checker Taxi* decision was "quite analogous," it refused to "defer to this NLRB precedent which is untested by judicial review and which is so plainly antithetical to the purposes of § 8(b)(4)(B)."

The Board appealed and sought an immediate injunction pending appeal, arguing that the district court exceeded its authority by refusing to find reasonable cause to believe the Act was violated in the face of controlling Board precedent. On November 15, 1985, the Ninth Circuit granted the injunction pending appeal.[32] Thereafter, the parties stipulated to a stay of the appeal pending court review of the Board's decision in *Checker Taxi*. That stay remained in effect through the end of this fiscal year.[33]

In *D'Amico v. Painters District Council 51 (Manganaro Corp.)*,[34] a district court issued a 10(l) injunction against a union for striking two construction employers to force them to agree to contract clauses requiring the employers to apply the contracts to the employees of any other business entity in which the signatory employer,

> through its officers, directors, partners, owners, or stockholders, exercises directly or indirectly (including but not limited

[31] 273 NLRB 1178 (1984)

[32] Docket No 85-2753

[33] The Court of Appeals for the District of Columbia denied enforcement of the Board's decision in *Checker Taxi* on June 13, 1986 793 F 2d 323 Thereafter, the stay of the Board's appeal in *Chipman* was continued pending the Board's decision whether to seek certiorari in *Checker Taxi*

[34] 120 LRRM 3473 (D Md)

to management, control, or majority ownership through family members), management, control, or majority ownership.

The clause was sought by the union in response to a diminution in work opportunities for its members brought about in part by the practice of "double-breasting," a practice under which a unionized company operates a separate, nonunion business entity to bid for nonunion construction work. The district court ruled that the Board reasonably could find the clause violated Section 8(e) because it would apply even in circumstances in which commonly owned businesses were otherwise wholly "separate and distinct operations, [and] would require a nonsignatory parent company and all its subsidiaries to conform to the terms of a collective-bargaining agreement signed only by one of the parent's subsidiaries."[35] Moreover, the court held that the Board reasonably could conclude that the clause was not protected by the construction industry proviso to Section 8(e) on the basis that the clause was "a potentially offensive weapon to expand bargaining units and deny employees of separate employers rights by automatically extending collective-bargaining agreements to include the employees of nonsignatory parent or co-subsidiary companies."[36] Accordingly, the court found reasonable cause to believe that the union violated Section 8(b)(4)(A) and (B) of the Act by striking to obtain such a clause, and found it would be "just and proper" to enjoin such conduct pending the Board's resolution of the underlying administrative proceeding.

A similar issue was presented in *Garner v. Plumbers Local 469 (Schneider)*,[37] in which the district court dismissed a 10(l) petition premised on charges that the union and the employer had violated Section 8(e) of the Act by entering into a labor agreement which provided that the terms of the agreement must be applied to the employees of any related business entity (here, a wholly-owned subsidiary of the employer) whether or not that business entity was, in law, a wholly separate employer. When the subsidiary refused to apply the contract to its employees, the union filed a grievance against that entity, as well as a civil action in U.S. district court seeking to enforce the agreement. The district court held that it would be inappropriate to issue a 10(l) decree enjoining the union from proceeding with its lawsuit. According to the court, under the Supreme Court's decision in *Bill Johnson's Restaurants v. NLRB*,[38] the union had a right of

[35] Id at 3477

[36] Id at 3479, citing *Connell Construction Co v Plumbers & Steamfitters*, 421 U S 616, 632 (1975)

[37] CIV 86-1045 PHX EHC (D Ariz)

[38] 461 U S 731 (1982)

access to the court to litigate its contractual claim, and the employer could raise in that lawsuit its argument that the disputed clause was unenforceable under Section 8(e).[39]

[39] The Board's appeal from this decision was pending in the Ninth Circuit at the close of the fiscal year (No 86-2715)

IX

Contempt Litigation

In fiscal year 1986, 124 cases were referred to the Contempt Litigation Branch for consideration of contempt or other appropriate action to achieve compliance with court judgments, as compared to 135 cases in fiscal year 1985. Voluntary compliance was achieved in 15 cases during the fiscal year, without the necessity of filing a contempt petition, while in 60 others it was determined that contempt action was not warranted.

During fiscal 1986, there were 24 civil contempt proceedings instituted[1] and 1 proceeding in which both civil and criminal

[1] *NLRB v Gonzalez*, Nos 79–4055 and 84–4124 (2d Cir) (civil contempt for failure to pay backpay), *NLRB v Perschke Hay & Grain*, No 78–1741 (7th Cir) (renewed body attachment for failure to pay backpay under terms acceptable to Board pursuant to previously issued writ of attachment), *NLRB v. Shearer*, No 86–3042 (3d Cir) (civil contempt for failure to satisfy backpay liability, offer reinstatement to employees, bargain with union, supply company records, and post Board notices), *NLRB v GML Drywall*, No 85–1426 (8th Cir) (civil contempt for failure to maintain and give effect to collective-bargaining agreement, furnish information to union needed to ensure compliance with agreement, and provide Board with records necessary to calculate backpay, *NLRB v Ritter's Painting Co*, No 85–1470 (8th Cir.) (civil contempt for failure to furnish to union bargaining information), *NLRB v Lumber & Mill Employers Assn*, No 83–7117 (9th Cir) (civil contempt for refusing to furnish union with list of the names and addresses of all employer-members of respondent association), *NLRB v Teamsters Local 295 (Pinto Trucking)*, Nos 74–1631, 74–2098, and 74–2132 (2d Cir) (civil contempt for engaging in secondary boycott activity), *NLRB v Sentry Detective Agency*, No 85–7081 (9th Cir) (civil contempt for failure to offer reinstatement, expunge references to discharges from company records, furnish records to calculate backpay, and post Board notices), *NLRB v Fancy Trims*, No 85–4016 (2d Cir) (civil contempt for failure to offer reinstatement, furnish records necessary to calculate backpay, recognize and bargain with the union, and post Board notices), *NLRB v. Kelly Construction*, No 84–5893 (6th Cir) (civil contempt for failure to offer reinstatement to discriminatees, to expunge references from personnel files of company, to recall discriminatees, to make records available to calculate backpay, to post notices, and to notify Region respecting status of compliance), *NLRB v Hospital Employees District 1199, et al*, Nos 81–4031 and 84–8083 (2d Cir) (civil contempt against union and body attachment against the union's president, Doris Turner, for failure to mail copies of court notice and prior contempt adjudication to union members and employers and failure to file requisite reports detailing their compliance efforts), *NLRB v Holyoke Water Power Co*, No 85–1226 (1st Cir) (civil contempt for failure to give access to plant by union's industrial hygienist and to post Board notices in absence of stay of mandate), *NLRB v Roofers Local 30, et al*, Nos 78–1260, 79–2649, and 84–3107 (3d Cir) (civil contempt for assessment of fines imposed against union by prior contempt adjudication and imposition of prospective noncompliance fines against union business agents Steven Traitz Jr. and Richard Schlenberg for engaging in threatening conduct, physical violence, and destruction of property), *NLRB v WBKB-TV Channel 11, et al*, No 85–5871 (6th Cir) (civil contempt against company and its president for failure to properly reinstate employees and pay backpay, to rescind unilateral changes, to provide union with information needed for bargaining, to abide by agreed-upon contract, to expunge employee discipline and discharge notices from personnel records, to properly post Board notices, and to make compliance reports to Regions and for making further unilateral changes), *NLRB v Gentzler Tool & Die Corp*, Nos 84–5699, 85–5830, and 85–5850 (6th Cir) (civil contempt for failure to execute and give retroactive effect to collective-bargaining agreement and to make whole employees for loss of contract benefits), *NLRB v. James K Sterritt, Inc., et al*, Nos 75–4044 and 76–4253 (2d Cir.) (renewed body attachment and assessment of compliance fines and

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sanctions were sought,[2] as compared to 31 civil proceedings in fiscal year 1985. These included one motion for the assessment of fines,[3] two motions for writs of body attachment,[4] and two motions in which both fines assessment and body attachment were requested.[5] Seventeen contempt or equivalent adjudications were awarded in favor of the Board,[6] including 3 in which compliance

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Board costs and fees imposed by prior contempt adjudication against James K Sterritt, civil contempt against additional respondents for aiding and abetting Sterritt in evading prior judgments and imposing joint and several liability on them for payment of backpay and Board costs and fees), *NLRB v Marriott In-Flite Services*, No 82-4165 (2d Cir) (civil contempt for encouraging and assisting employees in a decertification campaign, unlawfully promising benefits, and interfering with an employee's right to wear union insignia), *NLRB v Food & Commercial Workers Local 1357*, No 85-3152 (3d Cir) (civil contempt for failure to offer proper reinstatement), *NLRB v J & S Air Freight*, No 84-3005 (7th Cir) (civil contempt for refusing to execute collective-bargaining agreement), *NLRB v Laborers Local 324*, No 85-7485 (9th Cir) (civil contempt for failure to restore employee to proper position on out-of-work hiring hall list, expunge reference to her removal from list from union's records, make hiring hall records available to compute backpay, and notify employers that union has no objection to discriminatee's employment), *NLRB v Newspaper & Mail Deliverers of New York & Vicinity*, No 86-4004 (2d Cir.) (civil contempt for failure to post, mail, and publish Board notices and to make compliance reports to the Region), *NLRB v Allied Riggers*, Nos 85-5493 and 86-5066 (6th Cir) (civil contempt for failure to pay backpay and make pension contributions), *NLRB v Amason, Inc*, No 84-1561 (4th Cir) (civil contempt for failure to properly reinstate employee, to expunge reference to discharge from personnel records, to furnish backpay records, and to post Board notices), *NLRB v. Wayne Drapery Service*, No 85-5141 (6th Cir.) (civil contempt for failing to furnish records, to pay insurance and pension contributions to union, to remit previously withheld union dues, and to post Board notices).

[2] *NLRB v. Laborers Fund Corp, et al*, No 81-7401 (9th Cir) (civil and criminal contempt against Fund, Fund Administrator David Johnson, and Victor Van Bourg, legal counsel for the Fund, seeking assessment of noncompliance fines imposed by prior adjudication for failure to comply with prior contempt adjudications by unilaterally changing terms and conditions of employment and failing to maintain terms of collective-bargaining agreement)

[3] *NLRB v. Roofers Local 30, et al*, Nos 78-1260, 79-2649, and 84-3107 (3d Cir)

[4] *NLRB v Perschke Hay & Grain*, No 78-1741 (7th Cir), *NLRB v Hospital Employees District 1199, et al*, Nos 81-4031 and 84-8083 (2d Cir)

[5] *NLRB v James K. Sterritt, Inc., et al*, Nos 75-4044 and 76-4253 (2d Cir), *NLRB v Laborers Fund Corp., et al*, No 81-7401 (9th Cir)

[6] *NLRB v National Glass & Metal Co, et al*, No 85-3215 (3d Cir) (consent order directing company and its president, Gerald Clabbers, to bargain with named union or its successor and imposing prospective noncompliance fines of $7500 per violation and $500 per day), *NLRB v. Greater Kansas City Roofing*, No 84-1415 (10th Cir) (default contempt adjudication against Judith Clark, sole proprietor, for failure to abide by terms of collective-bargaining agreement, to make records available to Board to compute backpay, and to post notices, order imposing prospective noncompliance fines of $500 per day and directing reimbursement of Board's costs and attorneys' fees), *NLRB v Delta Metal Crafters Corp, et al*, No 85-3409 (3d Cir) (default civil contempt adjudication against James Metal Products Corporation and James Demas (named respondents) for violation of prior contempt adjudication for failure to pay backpay; order imposing $1000-per-day prospective noncompliance fines and directing reimbursement of Board's costs and attorneys' fees); *NLRB v Mine Workers Local 2496, et al. (Samoyed Energy)*, No 85-5307 (6th Cir.) (consent civil contempt adjudication against unions and James Scott, former president of Local 2496, for 8(b)(1)(A) misconduct, order imposing $7500-per-violation prospective noncompliance fine against the unions and $750 against Scott and any other officer, organizer, or employee of unions or any picket or other person acting in concert or participation), *NLRB v Hospital Employees District 1199, et al*, Nos 81-4031 and 84-8083 (2d Cir) (writ of body attachment against the union's president, Doris Turner, and imposition of prospective noncompliance fines against respondents for failure to mail copies of court notice and prior contempt adjudication to union members and employers), *NLRB v. Iron Workers Local 45, et al*, No 85-3379 (3d Cir) (consent civil contempt adjudication assessing against union $4000 suspended fine imposed by prior contempt adjudication for unlawful operation of hiring hall, imposing increased propective noncompliance fine against union of $10,000 per violation and against its business agent, James Kearney, of $500 per violation, and establishing, in the event of future violations, the appointment by the Board of a hiring hall monitor, to be compensated by the union), *NLRB v Ritter's Painting Co*, No 85-1470 (8th Cir) (default contempt adjudication on default for failure to provide information to union, and imposing prospective noncompliance fine of $100 per day and directing reimbursement of Board's costs and attorneys' fees), *NLRB v Fancy Trims, Inc*, No 85-4016 (2d Cir) (default contempt adjudication for failure to offer reinstatement, provide records necessary to calculate backpay, bargain with union, and post notices,

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fines were assessed[7] and 1 in which a writ of body attachment issued.[8] Six motions for protective restraining orders were filed,[9] four protective orders were entered,[10] and three motions for protective orders were denied.[11] Three motions for discovery

order imposing prospective noncompliance fines of $10,000 per violation and $1000 per day and directing reimbursement of Board's costs and attorneys' fees), *NLRB v Harris-Teeter Super Markets*, Nos. 79-1612 and 79-1792 (D C Cir) (consent order for 8(a)(1) conduct, imposing prospective noncompliance fine of $10,000 per violation and directing reimbursement of Board's costs and attorneys' fees of $8000, *NLRB v. Teamsters Local 295 (Pinto Trucking)*, Nos 74-1631, 74-2098, 74-2132 (2d Cir) (consent civil contempt adjudication assessing $20,000 in fines imposed by prior contempt adjudication for engaging in secondary boycott activity and imposing increased prospective noncompliance fines of $12,500 per violation and $3500 per day), *NLRB v. Holyoke Water Power Co*, 793 F 2d 18 (1st Cir) (civil contempt adjudication for failure to comply absent stay, despite filing petition for writ of certiorari, order imposing prospective noncompliance fine of $100 per day in event compliance is not fully initiated within 10 days and directing reimbursement of Board's costs and attorneys' fees), *NLRB v GML Drywall*, No 85-1426 (8th Cir) (consent contempt adjudication for violation of bargaining obligations against various respondents and alter ego corporation, order imposing prospective noncompliance fines of $2000 per day and prohibiting formation or operation of disguised continuance to avoid obligations under adjudication), *NLRB v Lumber & Mill Employers Assn*, No 83-7117 (9th Cir) (civil contempt adjudication for failure to furnish union with list of members of respondent association, order directing reimbursement of Board's costs and attorneys' fees), *NLRB v Plumbers Local 195, et al*, No. 83-4087 (5th Cir) (consent order respecting 8(b)(1)(A) misconduct, order imposing prospective noncompliance fines of $5000 per violation and $1000 per day against the union and $500 per violation and $100 per day against its business agent, Jerry Little, with a further fine of up to $10,000 for an egregious violation), *NLRB v Philadelphia & Vicinity Building Trades Council, et al*, Nos. 85-3418 (3d Cir) (consent contempt adjudication against Council and Anthony Marrongelle for engaging in 8(b)(1)(A) and 8(b)(4)(B) conduct, order assessing against Council $100,000 of noncompliance fine imposed by prior contempt adjudication, $50,000 of which is suspended on condition of future compliance, imposing increased prospective noncompliance fine against Council of $50,000 per violation and $2000 per day, and imposing prospective noncompliance fine of $1000 per violation against Marrongelle and any other representative or employee of the Council responsible for Council picketing), *NLRB v Tasman Sea*, No 80-7126 (9th Cir) (consent contempt adjudication for failure to make payments to fringe benefit funds, order imposing prospective noncompliance fines of $5000 per violation and $500 per day and directing payment of $3000 in partial reimbursement of Board's costs and attorneys' fees), *NLRB v. Mobile Home Estates*, No. 82-1240 (6th Cir) (consent contempt adjudication for 8(a)(1) and (5) conduct, order imposing prospective noncompliance fine of $5000 per violation)

[7] *NLRB v Iron Workers Local 45 et al*, No 85-3379 (3d Cir), *NLRB v Teamsters Local 295 (Pinto Trucking)*, Nos 74-1631, 74-2098, 74-2132 (2d Cir), *NLRB v Philadelphia & Vicinity Building Trades Council, et al*, No 85-3418 (3d Cir)

[8] *NLRB v Hospital Employees District 1199, et al.*, Nos 81-4031 and 84-8083 (2d Cir)

[9] *NLRB v. ABC Cab Co*, No 85-7164 (9th Cir.), *NLRB v Amason, Inc*, No 84-1561 (4th Cir), *NLRB v. Shearer*, No 86-3042 (3d Cir), *NLRB v James K Sterritt, Inc., et al.*, Nos 75-4044 and 76-4253 (2d Cir), *NLRB v Laborers Fund Corp., et al.*, No. 81-7401 (9th Cir), *NLRB v Mashkin Freight Lines, et al.*, No 84-4180 (2d Cir)

[10] *NLRB v. Mashkin Freight Lines, et al*, No 84-4180 (2d Cir.) (restraining transfer or distribution of up to $5 million in funds received by respondents and third parties in settlement of independent litigation), *NLRB v Amason, Inc.*, No 84-1561 (4th Cir), *NLRB v Shearer*, No 86-3042 (3d Cir), *NLRB v. James K Sterritt, Inc., et al.*, Nos 75-4044 and 76-4253 (2d Cir)

[11] *NLRB v. Laborers Local 282 (Fruin-Colnon Corp)*, No 85-1308 (8th Cir) (order denying Board's motion for protective restraining order, without prejudice to Board's seeking relief in bankruptcy court), *NLRB v ABC Cab Co*, No 85-7164 (9th Cir) (denied as moot), *NLRB v Laborers Fund Corp., et al*, No 81-7401 (9th Cir) (denied as moot)

orders were filed[12] and three discovery orders were entered,[13] while one motion for discovery was denied.[14]

During the fiscal year, the Board collected $121,000 in fines and $152,000 in backpay, and recouped in excess of $92,000 in court costs and attorneys' fees incurred in contempt litigation.

A number of the proceedings during the fiscal year were noteworthy. In *District 1199*,[15] an unusual dispute arose over implementation of the terms of a 1985 contempt adjudication entered against the respondent union and its officers. The contempt adjudication had resolved numerous 8(b)(1)(A) charges stemming from a violent and highly publicized strike against 30 New York City area hospitals. The adjudication required, among other things, that the union immediately mail a compliance notice and a copy of the adjudication to each of its 50,000 members. When the Board learned in February 1986 that the mailing had not taken place, the union was told that mailing had to be accomplished immediately or new contempt proceedings would be brought. The union replied with a promise to mail these documents to its membership, but not until after a Labor Department-supervised election scheduled for April 1986, in which the union's president and other officers previously adjudicated in contempt were standing for reelection.

Inasmuch as it was evident that the union was unwilling to comply immediately because of the potential adverse impact of the mailing on the union leadership's reelection prospects, the Board filed a motion for a writ of body attachment and the imposition of prospective compliance fines against the union's president, seeking her immediate arrest and incarceration as a means of coercing compliance. In mid-March the court of appeals entered an order granting the Board's motion "unless the Union, District 1199, complies with the [mailing requirement] within 14 days from the date of this order." On the final day of the 14-day grace period—and some 2 weeks prior to the internal union election—the union mailed copies of the compliance notice and contempt adjudication to its membership.

In *Holyoke Water Power*,[16] the court ruled that a respondent must immediately comply with a court judgment, once mandate

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[12] *NLRB v. Kenneth Curry Co*, Nos 83-2426 and 84-2513 (8th Cir); *NLRB v Pipeline Workers Local 38, et al*, No 385-31727-M-7 (Bankr. N D Tex), *NLRB v. Uncle John's Pancake House*, No 84-7578 (9th Cir)

[13] *NLRB v Kenneth Curry Co*, Nos 83-2426 and 84-2513 (8th Cir.) (discovery order regarding financial status and ability to comply and potential derivative liability of others); *NLRB v Pipeline Workers Local 38, et al*, No 385-31727-M-7 (Bankr N D Tex) (order authorizing and directing examination pursuant to Rule 2004 and for issuance of subpoenas in aid of examination); *NLRB v. Uncle John's Pancake House*, No 84-7578 (9th Cir) (order granting Board's motion for discovery concerning alter ego or successorship and designating special master to supervise discovery).

[14] *NLRB v Benchmark Industries*, No 82-4452 (5th Cir) (order denying Board's motion for an order authorizing postjudgment discovery concerning potential derivative liability and for appointment of a special master to supervise such discovery)

[15] See fn 6, supra

[16] See fn 6, supra.

has issued, even if a respondent intends to seek, or has actually sought, Supreme Court review of the court of appeals' ruling. Thus, in *Holyoke*, the court adjudged the respondent in contempt for its failure to comply with the affirmative provisions of an enforced Board order even though, at the time of its failure to comply, the respondent's petition for certiorari had not been acted on by the Supreme Court. As the court explained, "[t]he mandate having been neither withdrawn nor stayed, said order is in full force and effect, regardless of respondent's unilateral action in seeking certiorari. In fact, even if the Court should grant certiorari, the order would remain in effect, absent an order from that Court, or this one."[17]

During the year the Board took an aggressive stance toward several respondents who resorted to bankruptcy proceedings in an effort to avoid their backpay obligations. In *Shearer*,[18] for example, the Board filed a contempt petition alleging that the respondents had instituted a Chapter 7 proceeding for the sole purpose of defrauding the Board in its efforts to collect backpay, and had filed false schedules and financial statements in bankruptcy court in furtherance of a scheme to evade compliance. With the cooperation of the trustee in bankruptcy, the Board ultimately obtained a contempt settlement with the principal respondents which provided not only for payment of full backpay and interest to the discriminatees, but also for payment to the trustee in bankruptcy, on behalf of unsecured creditors, of the amount owed to such creditors. In *James K. Sterritt, Inc.*,[19] another case in which a respondent improperly resorted to bankruptcy procedures, the Board actively participated in the bankruptcy proceeding in a successful effort to forestall the respondents' fraudulent efforts to obtain a discharge of its backpay obligation. For example, the Board fully utilized its right as a creditor to conduct a searching examination of the debtor under Rule 2004 of the Bankruptcy Rules. This procedure, which the Board intends to invoke more frequently in future cases, affords an excellent opportunity to determine the debtor's true financial condition and to scrutinize suspicious transfers of assets to family members and alter ego corporations—evidence which bears directly on the debtor's ability to pay backpay owed to the Board.

Finally, in a case involving the improper operation of an exclusive hiring hall, the Board utilized a novel approach to ensure future compliance with the Act and the court's mandate. Thus, in *Iron Workers Local 45*,[20] the respondent union had engaged in a pervasive practice of discrimination against nonmembers and of arbitrarily "backdooring" or bypassing applicants in making job referrals. Among the contempt sanctions imposed against the

[17] 793 F 2d at 18.
[18] See fn 1, supra
[19] See fn 1, supra
[20] See fn 6, supra

union, in the event of a recurrence of such practices, was a provision permitting the Board to appoint a monitor to oversee the operation of the union's hiring hall. The contempt adjudication entered by the court specified that the monitor would be present in the hiring hall on a daily basis, would be paid by the union at a prescribed hourly rate, and would report exclusively to the Regional Director.

X

Special and Miscellaneous Litigation

A. Litigation Involving the Board's Jurisdiction

In *Jose A. Blanco v. NLRB*,[1] the District Court for the District of Columbia dismissed a request for injunctive and mandamus relief, finding that it lacked jurisdiction to review the complained-of Board representation decision to hold in abeyance a decertification petition pending resolution of related unfair labor practice charges. The International Association of Machinists and Aerospace Workers, Local 1894 had filed an unfair labor practice charge with the Board alleging that Marriott In-Flite Services, Inc. violated Section 8(a)(1) of the Act by various antiunion activities. While this charge was being investigated, employee Blanco filed a decertification petition with the Board. After the complaint issued on the union's charges, the Regional Director notified Blanco that the decertification petition was being dismissed based on his supervisory status. On Blanco's request for review, the Board remanded the representation case for a hearing on his supervisory status. While the representation case was pending on remand, the unfair labor practice complaint was amended to add allegations of supervisory involvement in the decertification petition process. The Regional Director then invoked the Board's blocking charge rule to hold the decertification petition in abeyance in view of the unfair labor practice complaint. The Board affirmed the Regional Director's decision. The district court, in dismissing plaintiff's complaint, first noted the settled rule that Federal district courts are generally without jurisdiction to review Board orders in representation proceedings. The court then rejected plaintiff's argument that the case fell within the *Leedom v. Kyne*[2] exception. The court explained that representation case hearings and investigations under Section 9 of the Act are particularly within the Board's discretion; "the nature and scope of those proceedings were intentionally not specified in the Act but were developed in light of the Board's experience and expertise." The court noted in particular that this was not a situation where the decertification petition had been automatically dismissed because the union had filed blocking

[1] 641 F Supp 415
[2] 358 U S 184 (1958)

charges. Instead, the court observed, the Board's exercise of the blocking charge rule was "well considered." The Board's use of the blocking charge rule was also noted to have been in accord with the important policy of prescribing "laboratory conditions." The court also rejected plaintiff's argument that the Board's actions violated its constitutional rights. The court found that the Board had sufficiently justified the application of the blocking charge rule "since the legitimacy of the decertification petition is dependent upon the resolution of the unfair labor practice case." In any event, the court ruled, raising a constitutional issue concerning the Board's procedure where judicial review will be available in the court of appeals is insufficient to confer jurisdiction on the district court.

B. Litigation Involving the General Counsel's Prosecutorial Authority

In two cases this year, the courts considered the issue of whether the withdrawal of an unfair labor practice complaint by the General Counsel pursuant to an informal settlement agreement prior to the commencement of a hearing constitutes Agency action subject to judicial review. In *Jackman v. NLRB*,[3] the General Counsel issued a complaint on a charge alleging that a company had rendered unlawful assistance to and recognized a union which was lacking majority support and, further, that the company had unlawfully discharged Jackman because of his protected concerted activity. Prior to commencement of a hearing on the complaint, the General Counsel entered into an informal settlement agreement with the company over the objection of the charging party. The charging party filed a petition with the Sixth Circuit for review of the General Counsel's decision contending that the settlement should have provided for Jackman's reinstatement plus additional backpay. The Sixth Circuit held that the General Counsel's decision to settle the case prior to commencement of the hearing was an exercise of the General Counsel's final unreviewable discretion pursuant to Section 3(d) of the Act. The court noted that Section 10(f) provides for judicial review only of a "final order of the Board," and that the informal settlement is not subject to approval by the Board and does not provide for an order requiring action to remedy alleged wrongdoing. The court further recognized the settled principle that the General Counsel's exercise of Section 3(d) authority concerning issuance of an unfair labor practice complaint is not subject to judicial review. The court reasoned that this unreviewable authority "must include the power to determine whether a complaint can be successfully prosecuted and, if he thinks not, to drop it."[4]

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[3] 784 F 2d 759 (6th Cir)

[4] 784 F 2d at 764, quoting *Teamsters Local 282 v NLRB*, 339 F 2d 795, 799 (2d Cir 1964)

In contrast, in *Food & Commercial Workers Local 23 v. NLRB*,[5] the Third Circuit concluded that it had jurisdiction to review the General Counsel's postcomplaint informal settlement decision. The court specifically relied on the prior Third Circuit decision in *Leeds & Northrup Co. v. NLRB*.[6] In *Leeds & Northrup*, the court had reasoned that the Agency's decision to approve a formal settlement agreement is subject to judicial review, and that the absence of a formal order of the Board should not preclude review of a decision to withdraw a complaint.[7] The *Leeds & Northrup* court found that once a complaint issues, the statutory scheme contemplates reviewable Board action because Congress could not have intended the courts of appeals to be powerless to review quasi-judicial administrative action. After finding jurisdiction to review the General Counsel's decision, the *Leeds & Northrup* court held once a complaint has issued, the charging party is entitled to an evidentiary hearing on its objections to a proposed settlement agreement, whether the agreement was formal or informal. In *Food & Commercial Workers Local 23*, the court stated that it could discern no distinction between *Leeds* and the case before it. The court noted that Local 23's objections raised no material issues of fact, but rather procedural matters or discretionary determinations concerning the remedy, and it recognized that an evidentiary hearing might therefore result in any empty formality. It also specifically noted the existence of "ostensible precedents" including *Jackman v. NLRB*, supra, and *Cuyahoga Valley Railway Co. v. United Transportation Union*[8] which were in conflict with the *Leeds & Northrup* decision. Nonetheless, the Third Circuit concluded that it was required to follow its prior decision with respect to both the jurisdictional issue and the need for an evidentiary hearing.

C. Litigation Under the Bankruptcy Code

In *Nicholas, Inc. v. NLRB*,[9] two distinct issues were raised: (1) whether the Board's unfair labor practice hearing violated the automatic stay provision in the Bankruptcy Code (11 U.S.C. § 362(a)(1)), and (2) whether the bankruptcy court could enjoin the unfair labor practice hearing pursuant to 11 U.S.C. § 105. The court found that the continuance of the unfair labor practice hearing did not violate the automatic stay provision of the Bankruptcy Code because the hearing fell within the exception created by Congress in 11 U.S.C. § 362(b)(4) for an action of a governmental unit to enforce its regulatory powers. The court recognized that the Board's hearing was not a proceeding to enforce

[5] 788 F 2d 178
[6] 357 F 2d 527 (3d Cir 1966)
[7] 357 F 2d at 531
[8] 106 S Ct 286 (1985)
[9] 55 B R 212 (Bankr N J)

a money judgment against the debtor company, and accordingly concluded that the exception to the automatic stay provision was applicable. On the second issue, the court declined to issue a discretionary stay of the unfair labor practice hearing pursuant to 11 U.S.C. § 105. The court stressed the distinctions between the jurisdiction of the bankruptcy court and the Board and stated that only the Board has jurisdiction to decide unfair labor practice cases. The court also found that *NLRB v. Bildisco & Bildisco*[10] should not be construed to apply to Board cases such as this involving allegations of unfair labor practices unrelated to a collective-bargaining agreement. Finally, the court found that the debtor company failed to establish that the unfair labor practice proceeding would threaten the assets of the estate, a necessary prerequisite for a discretionary injunction pursuant to Section 105 of the Code. The court rejected the debtor company's assertion that litigation expenses incurred during the unfair labor practice hearing were such threats, citing the Third Circuit's holding in *In re Davis,*[11] that litigation expenses are not threats to the assets of the estate.

In *In re Wheeling-Pittsburgh Steel Corp. v. Pennsylvania Human Relations Commission,*[12] the bankruptcy court granted the Board's motion to dismiss the debtor's complaint seeking to enjoin unfair labor practice hearings as violations of the automatic stay provision of the Bankruptcy Code. On essentially the same rationale as *Nicholas, Inc.*, the bankruptcy court here ruled that the Board proceedings were exempt from the automatic stay under Section 365(b)(4) of the Code. The entry of judgment against the debtor company and the Board's back-to-work orders were determined, moreover, not to be the equivalent of an enforcement of a money judgment. The determination was based on the court's adoption of the holding in *Penn Terra v. Department of Environmental Resources*[13] that an enforcement of a money judgment involves a remedy for a past harm. The court reasoned that the back-to-work order of the Board here prevents future harm: continued unemployment as a result of a wrongful termination. The court also held that the debtor's complained-of monetary costs for litigating the Board proceeding could not be considered as overriding Congress' direction in Section 362(b)(4) of the Code to permit Government agencies to investigate and prosecute actions pursuant to their respective police powers. Finally, the court refused to consider enjoining the Board under Section 105 of the Bankruptcy Code because the debtor company's complaint relied only on the automatic stay provision in the Code.

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[10] 465 U S 513 (1984)
[11] 691 F 2d 176, 178 (3d Cir 1982)
[12] 63 B R 641 (Bankr W D Pa)
[13] 733 F 2d 267 (3d Cir 1984)

D. Litigation Under the Freedom of Information Act

In *United Technologies Corp. v. NLRB*,[14] the company sought to obtain documents which would disclose (1) the identity of an employee who had supplied a Board agent with stolen copies of company documents shortly before a scheduled unfair labor practice hearing, and (2) the identity of the Board agent who had received the documents. The Board, in its discretion, supplied the company with a sanitized version of an internal memorandum relating how the incident had occurred. Portions of the memorandum containing opinions and recommendations of the Board agent, as well as the names of the company employee and Board agent involved, were deleted. The District Court for the District of Connecticut granted the Board's motion for summary judgment finding that the withheld document portions are protected under Exemptions 5 and 7(D) of the Freedom of Information Act (the FOIA). The Second Circuit affirmed on the basis of Exemption 7(D) alone. Initially, the circuit court ruled that although there was no express promise of confidentiality, the purloined document was provided to the Board agent under conditions that gave rise to a justified expectation of confidentiality on the part of the employee informant. The court noted, in particular, that the Board agent immediately returned the stolen documents to the employee who had delivered them and that the Board agent explained the seriousness of the employee's situation. The court rejected the Company's argument that the informant could not be considered a confidential source if he was a potential witness in the anticipated unfair labor practice hearing. The court reasoned that the term "confidential source" includes an informant who is promised or reasonably expects confidentiality unless and until the agency actually calls him as a witness at trial, regardless of whether the underlying enforcement proceeding has been dismissed before hearing, is pending, or has been completed. Because an agency should be able to grant confidentiallity to its sources to encourage their cooperation with the law enforcement process, the Exemption 7(D) protection from disclosure should not be denied to every person who *might* be witnesses at trial. Because, in this case, the source did not testify in any hearing, the court concluded that the Company was not entitled to disclosure of his or her identity. The court also concluded that the company was not entitled to the name of the Board agent involved because revelation of the Board agent's name would enable the Company to obtain by indirect means what Exemption 7(D) precluded it from obtaining directly. Finally, the circuit court agreed with the district court that the Board had not waived the 7(D) protection by disclosing the employee's name to the union involved in the unfair labor practice proceed-

[14] 777 F 2d 90 (2d Cir)

ing. The court explained that the privilege belongs to the beneficiary of the promise of confidentiality, and it continues until he or she waives it.

In *R. Eddie Wayland v. NLRB*,[15] the District Court for the Middle District of Tennessee denied the plantiff's motion for an award of attorney's fees and expenses under the FOIA. In the underlying decision,[16] the court had held that 17 of 25 requested documents were protected from disclosure under Exemption 5; it required redaction of information in 8 documents that fell within Exemption 7(D); and it required further redaction of 3 witness' statements containing information exempt under Exemption 7(C). Relying on *Falcone v. IRS*,[17] the court determined that an award of fees based on the hours plaintiff, as a pro se attorney, expended in prosecuting the FOIA action was clearly precluded. With regard to the hours expended by plaintiff's law partner, the court decided that the plaintiff was not entitled to fees because (a) the Board's withholding had a reasonable basis in law and (b) there was little or no public benefit to be derived from plaintiff's prosecution of the action.

E. Litigation Under the Equal Access to Justice Act

In *American Concrete Pipe Co. v. NLRB*,[18] the Ninth Circuit overruled the Board's determination that the petitioner was not eligible for an award under the Equal Access to Justice Act (the EAJA). Initially, the court considered whether to apply to this case the 1985 amendments to the EAJA which raised from $5 million to $7 million the net worth ceiling for eligibility for an award. If the eligibility amendment applied, the petitioner would have been eligible even under the Board's method of calculating net worth. If the amendment did not apply, the petitioner exceeded the old $5 million ceiling under the Board's calculations. The court held that the eligibility amendment did not apply because the litigation underlying the EAJA application had been concluded prior to the effective date of the amendments. The court relied on its reasoning in *Tongol v. Donovan*[19] that a case was not "pending" within the meaning of the EAJA when, as here, only the liability for attorney fees was undecided. The court also relied on Representative Kastenmeier's statement regarding the appropriate application of the 1985 amendments.[20] Looking then to the method for calculating the net worth of an EAJA petitioner, the court held that the net worth may reflect accumulated depreciation under regularly accepted accounting principles. The court rejected the Board's reliance on a statement

[15] No 3-85-0553
[16] 627 F Supp 1473
[17] 714 F 2d 646 (6th Cir 1983)
[18] 788 F 2d 586
[19] 762 F 2d 727 (9th Cir 1985)
[20] 131 Cong Rec H4762 (1985)

in the legislative history of the EAJA that "in determining the value of assets, the cost of acquisition rather then fair market value should be used."[21] The case was remanded to the Board for a determination as to the merits of the petition for an EAJA award.

In *Longshoremen ILA (New York Shipping) v. NLRB*,[22] the court of appeals held that the petitioners were not entitled to an award under the EAJA, 28 U.S.C. § 2412(d)(1)(A), because the Board and the Board's General Counsel were substantially justified in their positions during the extensive litigation concerning the validity of the parties' rules on containers included in agreements between the shipping industry and the International Longshoremen's Association. The court noted that the issues involved were complex and of a harder nature than previous cases dealing with work-preservation rules. The court also noted that the General Counsel's position in challenging the rules was reasonable given "the absence of clear authority to the contrary." In this regard, the court found that the holdings in *National Woodwork Mfgrs. Assn. v. NLRB*, 386 U.S. 612 (1967), and *NLRB v. Longshoremen ILA*, 447 U.S. 490 (1980), did not predetermine the result in the subsequent litigation on the rules. The court stated that the result was not clearly dictated by prior law, but was "the crystalization of the cogent briefing, elucidating oral argument, the development of a full factual record, and the extensive litigation process before the Board, the Federal courts, and the Supreme Court."

F. Miscellaneous

In *Centra, Inc. v. NLRB*,[23] the district court granted the Board's request for attorneys' fees pursuant to Rule 11 of the Federal Rules of Civil Procedure. The request for Rule 11 sanctions was made against a company, respondent in an unfair labor practice proceeding, which had filed a mandamus action in Federal district court (1) to compel the Board's Regional Office to postpone the date of the unfair labor practice hearing, and (2) to bar the Region from seeking interim relief pursuant to Section 10(j) of the Act. After dismissing the mandamus action,[24] the court concluded that the Rule 11 sanction should be imposed because it was clear from the case law that the court lacked jurisdiction over the complaint. The court noted that an action in mandamus lies only where the defendant owes a clear, ministerial, and nondiscretionary duty, whereas "the act of setting a hearing date is in its very nature discretionary." The court rejected the company's contention that mandamus could be granted prior

[21] H R Rep No 1418 at 15 (1980)
[22] Docket No 831185, etc
[23] 630 F Supp 42 (E D Pa)
[24] 606 F Supp 530 (E D Pa 1985)

to exhaustion of administrative remedies on the allegation of a procedural due-process violation. The court explained that exhaustion of administrative remedies could be excused only when it is shown to be futile, and that this was clearly not such a case. Here, the court ruled, the company knew or should have known that its constitutional claim was not ripe for judicial consideration. Finally, the court stated that any argument concerning the misuse by the Board of its authority under Section 10(j) of the Act should have been made to the District Court of New Jersey where that case was pending.

In *Longshoremen ILA Local 32 v. Pacific Maritime Assn.*,[25] Local 32 filed suit to enforce an arbitration award which was in conflict with a prior determination of a work assignment dispute by the Board. The arbitrator found that certain work on a dock owned by Weyerhaeuser—the handling of cargo from warehouse to shipside and tying and untying of lines of vessels—should have been assigned to members of Local 32. The arbitrator also ruled that "time in lieu" payments were owed by stevedore companies that were party to the ILWU area agreement for such work which should have been but was not assigned to Local 32 members. Prior to issuance of that arbitration decision, Weyerhaeuser had filed a charge with the Board alleging that Local 32 violated the Act by seeking to force Weyerhaeuser to assign to members of Local 32 that very disputed work. Traditionally the work was assigned to Weyerhaeuser employees represented by the Association of Western Pulp and Paper Workers. On Weyerhaeuser's charge, the Board conducted a hearing and, pursuant to Section 10(k) of the Act, issued a Decision and Determination of Dispute awarding the work to the Weyerhaeuser employees. Notwithstanding the Board's award, Local 32 brought the suit to enforce the arbitration award for time-in-lieu payments. The district court granted the Board's motion to dismiss the complaint. The court concluded that there was a conflict between the Board's award of the disputed work to employees of Weyerhaeuser represented by AWPPW and the arbitrator's award of the time in lieu payments to Local 32 members. "As between the two," the district court ruled, "the 10(k) determination of the NLRB [was] controlling." On appeal the Ninth Circuit noted the settled principle that once the Board exercises its authority under Section 10(k) to resolve a work assignment dispute between two competing labor organizations, its determination takes precedence over and precludes enforcement of a contrary arbitration award.[26] Local 32 contended, however, that in this case there was no conflict with the Board's determination because the arbitration award merely required an employer, who was not party to the Board's proceeding, to make payments pursuant to its col-

[25] 773 F 2d 1012 (9th Cir), cert denied 106 S Ct 2277
[26] 773 F 2d at 1016

lective-bargaining agreement with Local 32. The Ninth Circuit agreed with the Board that the conflict between the Board's determination and the arbitrator's award is inescapable. Here, the court of appeals reasoned, the stevadore company could not lawfully compel Weyerhaeuser to assign longshoring activities to Local 32 members. It was Weyerhaeuser who held the power to hire and fire persons to perform the disputed work and Weyerhaeuser had no contractual obligation to Local 32. The court also pointed out that the Board's 10(k) order was unconditional. It declared that employees of Weyerhaeuser represented by the AWPPW "are entitled to perform the [disputed] work." The court concluded that such an unqualified ruling by the Board would conflict with any attempt by any of the parties involved to assign such work to or recover damages for members of Local 32. Accordingly, the Ninth Circuit ruled that Local 32's attempt to enforce the arbitration award here conflicted with the Board's 10(k) assignment of work to AWPPW and was properly dismissed by the district court consistent with settled law.

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

Advisory Opinion Cases

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

Agreement of Parties

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

Amendment of Certification Cases

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

Backpay

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

Backpay Hearing

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

Backpay Specification

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

Case

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

Certification

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

Challenges

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

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

Charge

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

Complaint

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

Election, Runoff

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

Election, Stipulated

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

Eligible Voters

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

Fees, Dues, and Fines

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

Fines

See "Fees, Dues, and Fines "

Formal Action

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

Formal Agreement (in unfair labor practice cases)

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

Compliance

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

Dismissed Cases

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

Dues

See "Fees, Dues, and Fines "

Election, Consent

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

Election, Directed

Board-Directed

An election conducted by the regional director pursuant to a decision and direction of election by the Board Postelection rulings are made by the regional director or by the Board

Regional Director-Directed

An election conducted by the regional director pursuant to a decision and direction of election issued by the regional director after a hearing Postelection rulings are made by the regional director or by the Board

Election, Expedited

An election conducted by the regional director pursuant to a petition filed within 30 days of the commencement of picketing in a situation in which a meritorious 8(b)(7)(C) charge has been filed. The election is conducted under priority conditions and without a hearing unless the regional director believes the proceeding raises questions which cannot be decided without a hearing.

Postelection rulings on objections and/or challenges are made by the regional director and are final and binding unless the Board grants an appeal on application by one of the parties

Election, Rerun

An election held after an initial election has been set aside either by the regional director or by the Board

Informal Agreement (in unfair labor practice cases)

A written agreement entered into between the party charged with committing an unfair labor practice, the regional director, and (in most cases) the charging party requiring the charged party to take certain specific remedial action as a basis for the closing of the case Cases closed in this manner are included in "adjusted" cases.

Injunction Petitions

Petitions filed by the Board with respective U S district courts for injunctive relief under section 10(j) or section 10(e) of the Act pending hearing and adjudication of unfair labor practice charges before the Board. Also, petitions filed with the U S court of appeals under section 10(e) of the Act

Jurisdictional Disputes

Controversies between unions or groupings of employees as to which employees will perform specific work. Cases involving jurisdictional disputes are received by the Board through the filing of charges alleging a violation of section 8(b)(4)(D) They are initially processed under section 10(k) of the Act which is concerned with the determination of the jurisdictional dispute itself rather than with a finding as to whether an unfair labor practice has been committed. Therefore, the failure of a party to comply with the Board's determination of dispute is the basis for the issuance of an unfair labor practice complaint and the processing of the case through usual unfair labor practice procedures.

Objections

Any party to an election may file objections alleging that either the conduct of the election or the conduct of a party to the election failed to meet the Board's standards. An election will be set aside if eligible employee-voters have not been given an adequate opportunity to cast their ballots, in secrecy and without hindrance from fear or other interference with the expression of their free choice

Petition

See "Representation Cases" Also see "Other Cases—AC, UC, and UD" under "Types of Cases"

Proceeding

One or more cases included in a single litigated action. A "proceeding" may be a combination of C and R cases consolidated for the purpose of hearing

Representation Cases

This term applies to cases bearing the alphabetical designations RC, RM, or RD (See "R Cases" under "Types of Cases," this glossary, for specific definitions of these terms) All three types of cases are included in the term "representation" which deals generally with the problem of which union, if any, shall represent employees in negotiations with their employer The cases are intitated by the filing of a petition by a union, an employer, or a group of employees

Representation Election

An election by secret ballot conducted by the Board among the employees in an appropriate collective-bargaining unit to determine whether the employees wish to be represented by a particular labor organization for purposes of collective bargaining The tables herein reflect only final elections which result in the issuance of a certification of representative if a union is chosen, or a certification of results if the majority has voted for "no union"

Situation

One or more unfair labor practice cases involving the same factual situation These cases are processed as a single unit of work A situation may include one or more CA cases, a combination of CA and CB cases, or combination of other types of C cases It does not include representation cases

Types of Cases

General· Letter designations are given to all cases depending upon the subsection of the Act allegedly violated or otherwise describing the general nature of each case Each of the letter designations appearing below is descriptive of the case it is associated with

C Cases (unfair labor practice cases)

A case number which contains the first letter designation C, in combination with another letter, i e, CA, CB, etc, indicates that it involves a charge that an unfair labor practice has been committed in violation of one or more subsections of section 8

CA A charge that an employer has committed unfair labor practices in violation of section 8(a)(1), (2), (3), (4), or (5), or any combination thereof

CB A charge that a labor organization has committed unfair labor practices in violation of section 8(b)(1), (2), (3), (5), or (6), or any combination thereof.

CC· A charge that a labor organization has committed unfair labor practices in violation of section 8(b)(4)(i) and/or (A), (B), or (C), or any combination thereof

CD A charge that a labor organization has committed an unfair labor practice in violation of section 8(b)(4)(i) or (ii)(D) Preliminary actions under section 10(k) for the determination of jurisdictional disputes are processed as CD cases (See "Jurisdictional Disputes" in this glossary)

CE A charge that either a labor organization or an employer, or both jointly, have committed an unfair labor practice in violation of section 8(e)

CG A charge that a labor organization has committed unfair labor practices in violation of section 8(g)

CP A charge that a labor organization has committed unfair labor practices in violation of section 8(b)(7)(A), (B), or (C), or any combination thereof

R Cases (representation cases)

A case number which contains the first letter designation R, in combination with another letter, i e , RC, RD, RM, indicates that it is a petition for investigation and determination of a question concerning representation of employees, filed under section 9(c) of the act

RC A petition filed by a labor organization or an employee alleging that a question concerning representation has arisen and seeking an election for determination of a collective-bargaining representative

RD A petition filed by employees alleging that the union previously certified or currently recognized by the employer as their collective-bargaining representative no longer represents a majority of the employees in the appropriate unit and seeking an election to determine this

RM A petition filed by an employer alleging that a question concerning representation has arisen and seeking an election for the determination of a collective-bargaining representative

Other Cases

AC (Amendment of Certification cases) A petition filed by a labor organization or an employer for amendment of an existing certification to reflect changed circumstances, such as changes in the name or affiliation of the labor organization involved or in the name or location of the employer involved

AO (Advisory Opinion cases) As distinguished from the other types of cases described above, which are filed in and processed by regional offices of the Board, AO or "advisory opinion" cases are filed directly with the Board in Washington and seek a determination as to whether the Board would or would not assert jurisdiction, in any given situation on the basis of its current standards over the party or parties to a proceeding pending before a state or territorial agency or a court (See subpart H of the Board's Rules and Regulations, Series 8, as amended)

UC (Unit Clarification cases) A petition filed by a labor organization or an employer seeking a determination as to whether certain classification of 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 or the charge of 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 1986[1]

	Total	Identification of filing party					
		AFL–CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
All cases							
Pending October 1, 1985	*19,271	7,497	2,055	549	1,111	6,143	1,916
Received fiscal 1986	42,322	14,348	4,363	1,049	1,743	17,206	3,613
On docket fiscal 1986	61,593	21,845	6,418	1,598	2,854	23,349	5,529
Closed fiscal 1986	41,604	13,709	4,481	855	1,708	17,015	3,836
Pending September 30, 1986	19,989	8,136	1,937	743	1,146	6,334	1,693
Unfair labor practice cases[2]							
Pending October 1, 1985	*16,395	6,274	1,536	470	902	5,606	1,607
Received fiscal 1986	34,435	11,181	2,837	860	1,247	15,376	2,934
On docket fiscal 1986	50,830	17,455	4,373	1,330	2,149	20,982	4,541
Closed fiscal 1986	33,450	10,517	2,876	656	1,208	15,129	3,064
Pending September 30, 1986	17,380	6,938	1,497	674	941	5,853	1,477
Representation cases[3]							
Pending October 1, 1985	*2,640	1,187	509	77	194	460	213
Received fiscal 1986	7,296	3,027	1,482	180	467	1,615	525
On docket fiscal 1986	9,936	4,214	1,991	257	661	2,075	738
Closed fiscal 1986	7,532	3,054	1,570	190	473	1,652	593
Pending September 30, 1986	2,404	1,160	421	67	188	423	145
Union-shop deauthorization cases							
Pending October 1, 1985	*77	—	—	—	—	77	—
Received fiscal 1986	209	—	—	—	—	209	—
On docket fiscal 1986	286	—	—	—	—	286	—
Closed fiscal 1986	228	—	—	—	—	228	—
Pending September 30, 1986	58	—	—	—	—	58	—
Amendment of certification cases							
Pending October 1, 1985	*12	5	1	1	5	0	0
Received fiscal 1986	27	13	12	1	1	0	0
On docket fiscal 1986	39	18	13	2	6	0	0
Closed fiscal 1986	24	13	7	2	2	0	0
Pending September 30, 1986	15	5	6	0	4	0	0
Unit clarification cases							
Pending October 1, 1985	*147	31	9	1	10	0	96
Received fiscal 1986	355	127	32	8	28	6	154
On docket fiscal 1986	502	158	41	9	38	6	250
Closed fiscal 1986	370	125	28	7	25	6	179
Pending September 30, 1986	132	33	13	2	13	0	71

[1] See Glossary of terms for definitions Advisory Opinion (AO) cases not included See Table 22
[2] See Table 1A for totals by types of cases
[3] See Table 1B for totals by types of cases
* Revised, reflects lower figures than reported pending Sept 30, 1985, 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 1986[1]

	Total	Identification of filing party					
		AFL–CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
CA cases							
Pending October 1, 1985	*12,616	6,219	1,520	460	843	3,570	4
Received fiscal 1986	24,084	10,977	2,823	835	1,190	8,259	0
On docket fiscal 1986	36,700	17,196	4,343	1,295	2,033	11,829	4
Closed fiscal 1986	23,180	10,430	2,858	632	1,141	8,117	2
Pending September 30, 1986	13,520	6,766	1,485	663	892	3,712	2
CB cases							
Pending October 1, 1985	*2,823	37	14	9	26	2,031	706
Received fiscal 1986	8,496	184	13	7	29	7,117	1,146
On docket fiscal 1986	11,319	221	27	16	55	9,148	1,852
Closed fiscal 1986	8,266	57	16	7	30	7,012	1,144
Pending September 30, 1986	3,053	164	11	9	25	2,136	708
CC cases							
Pending October 1, 1985	*641	9	0	1	17	1	613
Received fiscal 1986	1,206	8	0	10	13	0	1,175
On docket fiscal 1986	1,847	17	0	11	30	1	1,788
Closed fiscal 1986	1,320	14	0	11	17	0	1,278
Pending September 30, 1986	527	3	0	0	13	1	510
CD cases							
Pending October 1, 1985	*124	8	2	0	6	0	108
Received fiscal 1986	298	9	1	0	5	0	283
On docket fiscal 1986	422	17	3	0	11	0	391
Closed fiscal 1986	323	14	2	0	8	0	299
Pending September 30, 1986	99	3	1	0	3	0	92
CE cases							
Pending October 1, 1985	*55	0	0	0	10	2	43
Received fiscal 1986	67	2	0	2	3	0	60
On docket fiscal 1986	122	2	0	2	13	2	103
Closed fiscal 1986	75	2	0	1	6	0	66
Pending September 30, 1986	47	0	0	1	7	2	37
CG cases							
Pending October 1, 1985	*6	0	0	0	0	0	6
Received fiscal 1986	25	0	0	0	1	0	24
On docket fiscal 1986	31	0	0	0	1	0	30
Closed fiscal 1986	20	0	0	0	1	0	19
Pending September 30, 1986	11	0	0	0	0	0	11
CP cases							
Pending October 1, 1985	*130	1	0	0	0	2	127
Received fiscal 1986	259	1	0	6	6	0	246
On docket fiscal 1986	389	2	0	6	6	2	373
Closed fiscal 1986	266	0	0	5	5	0	256
Pending September 30, 1986	123	2	0	1	1	2	117

[1] See Glossary of terms for definitions

* Revised, reflects lower figures than reported pending Sept 30, 1985, 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 1986[1]

	Total	Identification of filing party					
		AFL–CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
				RC cases			
Pending October 1, 1985	*1,960	1,184	509	77	186	4	—
Received fiscal 1986	5,131	3,013	1,472	177	458	11	—
On docket fiscal 1986	7,091	4,197	1,981	254	644	15	—
Closed fiscal 1986	5,262	3,043	1,562	188	461	8	—
Pending September 30, 1986	1,829	1,154	419	66	183	7	—
				RM cases			
Pending October 1, 1985	*213	—	—	—	—	—	213
Received fiscal 1986	525	—	—	—	—	—	525
On docket fiscal 1986	738	—	—	—	—	—	738
Closed fiscal 1986	593	—	—	—	—	—	593
Pending September 30, 1986	145	—	—	—	—	—	145
				RD cases			
Pending October 1, 1985	*467	3	0	0	8	456	—
Received fiscal 1986	1,640	14	10	3	9	1,604	—
On docket fiscal 1986	2,107	17	10	3	17	2,060	—
Closed fiscal 1986	1,677	11	8	2	12	1,644	—
Pending September 30, 1986	430	6	2	1	5	416	—

[1] See Glossary of terms for definitions

* Revised, reflects lower figures than reported pending Sept 30, 1985, 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 1986

	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	24,084	100 0
8(a)(1)	3,536	14 7
8(a)(1)(2)	224	0 9
8(a)(1)(3)	9,101	37 7
8(a)(1)(4)	185	0 8
8(a)(1)(5)	7,287	30 1
8(a)(1)(2)(3)	256	1 1
8(a)(1)(2)(4)	7	0 0
8(a)(1)(2)(5)	111	0 5
8(a)(1)(3)(4)	622	2 6
8(a)(1)(3)(5)	2,477	10 3
8(a)(1)(4)(5)	16	0 1
8(a)(1)(2)(3)(4)	22	0 1
8(a)(1)(2)(3)(5)	118	0 5
8(a)(1)(2)(4)(5)	4	0 0
8(a)(1)(3)(4)(5)	102	0 4
8(a)(1)(2)(3)(4)(5)	16	0 1
Recapitulation[1]		
8(a)(1)[2]	24,084	100 0
8(a)(2)	758	3 1
8(a)(3)	12,714	52 8
8(a)(4)	974	4 0
8(a)(5)	10,131	42 1
B Charges filed against unions under sec 8(b)		
Subsections of Sec 8(b) Total cases	10,259	100 0
8(b)(1)	6,472	63 1
8(b)(2)	90	0 9
8(b)(3)	345	3 4
8(b)(4)	1,504	14 7
8(b)(5)	3	0 0
8(b)(6)	8	0 1
8(b)(7)	259	2 5
8(b)(1)(2)	1,169	11 4
8(b)(1)(3)	321	3 1
8(b)(1)(5)	8	0 1
8(b)(1)(6)	6	0 1
8(b)(2)(3)	8	0 1
8(b)(3)(5)	1	0 0
8(b)(3)(6)	4	0 0
8(b)(1)(2)(3)	48	0 5
8(b)(1)(2)(5)	4	0 0
8(b)(1)(2)(6)	1	0 0
8(b)(1)(3)(5)	2	0 0
8(b)(1)(3)(6)	2	0 0
8(b)(1)(2)(3)(6)	3	0 0
8(b)(1)(2)(3)(5)(6)	1	0 0
Recapitulation[1]		
8(b)(1)	8,037	78 3
8(b)(2)	1,324	12 9
8(b)(3)	735	7 2
8(b)(4)	1,504	14 7
8(b)(5)	19	0 2
8(b)(6)	25	0 2
8(b)(7)	259	2 5

Table 2.—Types of Unfair Labor Practices Alleged, Fiscal Year 1986—Continued

	Number of cases showing specific allegations	Percent of total cases
B1 Analysis of 8(b)(4)		
Total cases 8(b)(4)	1,504	100 0
8(b)(4)(A)	109	7 2
8(b)(4)(B)	1,005	66 8
8(b)(4)(C)	23	1 5
8(b)(4)(D)	298	19 8
8(b)(4)(A)(B)	61	4 1
8(b)(4)(A)(C)	1	0 1
8(b)(4)(B)(C)	2	0 1
8(b)(4)(A)(B)(C)	5	0 4
Recapitulation[1]		
8(b)(4)(A)	176	11 7
8(b)(4)(B)	1,073	71 3
8(b)(4)(C)	31	2 1
8(b)(4)(D)	298	19 8
B2 Analysis of 8(b)(7)		
Total cases 8(b)(7)	259	100 0
8(b)(7)(A)	77	29 7
8(b)(7)(B)	20	7 7
8(b)(7)(C)	160	61 8
8(b)(7)(B)(C)	2	0 8
Recapitulation[1]		
8(b)(7)(A)	77	29 7
8(b)(7)(B)	22	8 5
8(b)(7)(C)	162	62 5
C Charges filed under sec 8(c)		
Total cases 8(c)	67	100 0
Against unions alone	63	94 0
Against employers alone	4	6 0
Against unions and employers	0	—
D Charges filed under sec 8(g)		
Total cases 8(g)	25	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 1986[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	71	69	—	—	—	69	—	—	—	—	—	—	—
Complaints issued	4 630	3 714	2 984	408	125	—	5	5	2	26	40	38	81
Backpay specifications issued	74	59	47	11	0	—	0	0	0	0	1	0	0
Hearings completed total	821	755	597	102	10	17	0	0	0	6	3	11	9
Initial ULP hearings	750	704	552	96	10	17	0	0	0	6	3	11	9
Backpay hearings	49	38	33	5	0	—	0	0	0	0	0	0	0
Other hearings	22	13	12	1	0	—	0	0	0	0	0	0	0
Decisions by administrative law judges total	796	764	632	110	17	—	1	0	0	4	3	8	7
Initial ULP decisions	732	704	580	104	15	—	1	0	0	4	2	8	7
Backpay decisions	35	39	33	5	1	—	0	0	0	0	1	0	0
Supplemental decisions	29	21	19	1	1	—	0	0	0	0	0	0	0
Decisions and orders by the Board total	1 456	1 217	923	114	43	20	5	7	2	12	25	30	36
Upon consent of parties													
Initial decisions	93	69	49	7	11	—	0	1	0	0	0	0	1
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	257	222	174	27	5	—	0	1	0	3	2	9	1
Backpay decisions	1	1	1	0	0	—	0	0	0	0	0	0	0
Contested													
Initial ULP decisions	1 013	857	647	73	26	20	5	4	2	8	22	20	30
Decisions based on stipulated record	34	21	12	2	1	—	0	1	0	1	0	0	4
Supplemental ULP decisions	20	16	13	3	0	—	0	0	0	0	0	0	0
Backpay decisions	38	31	27	2	0	—	0	0	0	0	1	1	0

[1] See Glossary of terms for definitions

Table 3B.—Formal Actions Taken in Representation and Union Deauthorization Cases, Fiscal Year 1986[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	1 328	1,282	1 019	73	190	7
Initial hearings	1 121	1 084	846	65	173	7
Hearings on objections and/or challenges	207	198	173	8	17	0
Decisions issued, total	1,107	1 061	845	73	168	15
By Regional Directors	1 016	987	754	71	162	15
Elections directed	848	828	641	48	139	14
Dismissals on record	168	159	113	23	23	1
By Board	91	74	66	2	6	0
Transferred by Regional Directors for initial decision	28	18	16	1	1	0
Elections directed	17	12	10	1	1	0
Dismissals on record	11	6	6	0	0	0
Review of Regional Directors decisions						
Requests for review received	660	632	563	19	51	0
Withdrawn before request ruled upon	5	5	4	0	1	0
Board action on request ruled upon total	450	418	362	14	42	0
Granted	70	66	59	1	6	0
Denied	377	349	300	13	36	0
Remanded	3	3	3	0	0	0
Withdrawn after request granted, before Board review	4	4	3	0	1	0
Board decision after review, total	63	56	50	1	5	0
Regional Directors decisions						
Affirmed	33	30	25	1	4	0
Modified	19	15	15	0	0	0
Reversed	11	11	10	0	1	0
Outcome						
Election directed	39	34	25	2	6	0
Dismissals on record	24	22	16	0	6	0

Table 3B.—Formal Actions Taken in Representation and Union Deauthorization Cases, Fiscal Year 1986[1]—Continued

Types of formal actions taken	Cases in which formal actions taken	Formal actions taken by type of case				
		Total formal actions taken	RC	RM	RD	UD
Decisions on objections and/or challenges, total	1,040	969	710	69	190	14
By Regional Directors	261	243	182	16	45	8
By Board	779	726	528	53	145	6
In stipulated elections	728	681	494	48	139	6
No exceptions to Regional Directors reports	458	430	322	28	80	4
Exceptions to Regional Directors reports	270	251	172	20	59	2
In directed elections (after transfer by Regional Director)	50	44	33	5	6	0
Review of Regional Directors supplemental decisions						
Request for review received	184	170	127	10	33	0
Withdrawn before request ruled upon	0	0	0	0	0	0
Board action on request ruled upon, total	171	159	118	11	30	0
Granted	22	22	15	1	5	0
Denied	148	136	102	9	25	0
Remanded	1	1	0	1	0	0
Withdrawn after request granted, before Board review	0	0	0	0	0	0
Board decision after review, total	1	1	1	0	0	0
Regional Directors' decisions						
Affirmed	1	1	1	0	0	0
Modified	0	0	0	0	0	0
Reversed	0	0	0	0	0	0

[1] See Glossary of terms for definitions

Table 3C.—Formal Actions Taken in Amendment of Certification and Unit Clarification Cases, Fiscal Year 1986[1]

Types of formal actions taken	Cases in which formal actions taken	Formal actions taken by type of case	
		AC	UC
Hearings completed	110	6	99
Decisions issued after hearing	119	7	108
By Regional Directors	110	6	100
By Board	9	1	8
Transferred by Regional Directors for initial decision	1	0	0
Review of Regional Directors' decisions			
Requests for review received	1	1	23
Withdrawn before request ruled upon	0	0	0
Board action on requests ruled upon total	28	0	28
Granted	18	0	18
Denied	10	0	10
Remanded	0	0	0
Withdrawn after request granted, before Board review	0	0	0
Board decision after review, total	9	1	8
Regional Directors' decisions			
Affirmed	2	1	1
Modified	6	0	6
Reversed	1	0	1

[1] See Glossary of terms for definitions

Table 4.—Remedial Actions Taken in Unfair Labor Practice Cases Closed, Fiscal Year 1986[1]

Action taken	Total all	Remedial action taken by—											
		Employer						Union					
		Total	Pursuant to—					Total	Pursuant to—				
			Agreement of parties		Recommendation of administrative law judge	Order of—			Agreement of parties		Recommendation of administrative law judge	Order of—	
			Informal settlement	Formal settlement		Board	Court		Informal settlement	Formal settlement		Board	Court
A By number of cases involved	[2]10,793	—	—	—	—	—	—	—	—	—	—	—	—
Notice posted	1,418	1,259	873	76	6	187	117	159	102	12	0	35	10
Recognition or other assistance withdrawn	47	47	35	7	0	3	2	—	—	—	—	—	—
Employer-dominated union disestablished	18	18	17	1	0	0	0	—	—	—	—	—	—
Employees offered reinstatement	1 253	1 253	1 049	15	0	111	78	—	—	—	—	—	—
Employees placed on preferential hiring list	430	430	402	5	0	18	5	—	—	—	—	—	—
Hiring hall rights restored	93	—	—	—	—	—	—	93	76	1	0	13	3
Objections to employment withdrawn	87	—	—	—	—	—	—	87	72	1	0	12	2
Picketing ended	279	—	—	—	—	—	—	279	220	5	3	46	5
Work stoppage ended	64	—	—	—	—	—	—	64	54	3	3	2	2
Collective bargaining begun	3 043	2 883	2,648	19	7	107	82	160	153	1	0	6	0
Backpay distributed	2 490	2 305	2 023	36	6	154	86	185	149	5	0	24	7
Reimbursement of fees dues, and fines	597	457	432	2	0	17	6	140	125	0	0	14	1
Other conditions of employment improved	3 162	2 182	2 107	9	3	50	13	980	966	1	0	9	4
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	3 196	3 196	2 319	51	13	449	364	—	—	—	—	—	—
Accepted	2 514	2,514	1,918	39	8	370	179	—	—	—	—	—	—
Declined	682	682	401	12	5	79	185	—	—	—	—	—	—
Employees placed on preferential hiring list	812	812	561	15	0	207	29	0	0	0	0	0	0
Hiring hall rights restored	336	—	—	—	—	—	—	336	293	1	0	37	5
Objections to employment withdrawn	18	—	—	—	—	—	—	18	12	1	0	1	4

Table 4.—Remedial Actions Taken in Unfair Labor Practice Cases Closed, Fiscal Year 1986[1]—Continued

Action taken	Total all	Remedial action taken by—											
		Employer						Union					
		Total	Pursuant to—					Total	Pursuant to—				
			Agreement of parties		Recommendation of administrative law judge	Order of—			Agreement of parties		Recommendation of administrative law judge	Order of—	
			Informal settlement	Formal settlement		Board	Court		Informal settlement	Formal settlement		Board	Court
Employees receiving backpay													
From either employer or union	18 090	17,588	13 865	387	55	1 974	1 307	502	119	6	0	270	107
From both employer and union	54	47	21	0	0	1	25	7	6	0	0	1	0
Employees reimbursed for fees dues, and fines													
From either employer or union	2 705	2 092	1 999	22	0	71	0	613	598	0	0	14	1
From both employer and union	2	1	1	0	0	0	0	1	1	0	0	0	0
C By amounts of monetary recovery total	$36.289 852	$35 306,519	$23,338,751	$719 018	$134 707	$4 576,837	$6 537 206	$983,333	$178 543	$61 623	0	$82 216	$660 951
Backpay (includes all monetary payments except fees dues, and fines)	35,086 439	34,158,657	22 217 486	714 812	128 979	4 560 174	6 537 206	927,782	132 535	61 623	0	81 173	652 451
Reimbursement of fees dues and fines	1 203 413	1 147 862	1 121 265	4,206	5 728	16,663	0	55,551	46 008	0	0	1,043	8,500

[1] See Glossary of terms for definitions Data in this table are based on unfair labor practice cases that were closed during fiscal year 1986 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 1986[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	1 584	1,270	901	347	16	1	0	0	5	287	199	20	68	8	4	15
Tobacco manufacturers	10	8	5	3	0	0	0	0	0	2	2	0	0	0	0	0
Textile mill products	249	206	170	32	2	0	0	0	2	40	23	3	14	1	0	2
Apparel and other finished products made from fabric and similar materials	303	257	191	64	1	0	0	0	1	44	27	2	15	2	0	0
Lumber and wood products (except furniture)	519	398	307	87	3	0	0	0	1	114	83	9	22	4	1	2
Furniture and fixtures	514	422	341	77	4	0	0	0	0	86	67	2	17	4	0	2
Paper and allied products	588	506	392	106	5	3	0	0	0	74	51	4	19	1	0	7
Printing, publishing, and allied products	794	596	462	120	10	3	1	0	0	165	108	15	42	5	2	26
Chemicals and allied products	641	499	413	83	3	0	0	0	0	130	82	7	41	4	2	6
Petroleum refining and related industries	186	151	111	38	0	1	0	0	1	34	17	0	17	1	0	0
Rubber and miscellaneous plastic products	598	478	377	97	3	0	0	0	1	114	85	3	26	3	0	3
Leather and leather products	95	81	55	25	1	0	0	0	0	14	9	2	3	0	0	0
Stone, clay, glass, and concrete products	756	602	455	134	11	2	0	0	0	139	89	9	41	6	0	9
Primary metal industries	1,178	1,009	692	293	12	11	0	0	1	155	124	6	25	8	1	5
Fabricated metal products (except machinery and transportation equipment)	1,490	1,208	932	239	29	6	1	0	1	272	197	15	60	3	1	6
Machinery (except electrical)	1 378	1,128	812	260	23	26	2	0	5	240	164	14	62	3	1	6
Electrical and electronic machinery equipment, and supplies	926	790	520	261	8	0	0	0	1	126	90	4	32	6	1	3
Aircraft and parts	359	343	191	151	1	0	0	0	0	15	12	0	3	0	1	0
Ship and boat building and repairing	249	222	135	79	3	3	1	0	1	23	19	1	3	1	0	3
Automotive and other transportation equipment	1,261	1,105	663	430	8	3	1	0	0	148	115	7	26	4	0	4
Measuring, analyzing, and controlling instruments, photographic, medical, and optical goods, watches and clocks	278	224	163	57	2	1	0	0	1	48	29	3	16	4	0	2
Miscellaneous manufacturing industries	1,442	1,107	669	374	42	12	4	0	6	317	250	20	47	8	0	10
Manufacturing	15,398	12 610	8 957	3,357	187	72	10	0	27	2 587	1 842	146	599	76	14	111

Table 5.—Industrial Distribution of Cases Received, Fiscal Year 1986[1]—Continued

Industrial group[2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Metal mining	58	43	25	17	0	1	0	0	0	11	8	0	3	1	0	3
Coal mining	733	705	571	87	33	1	0	0	13	27	17	7	3	0	0	1
Oil and gas extraction	61	49	36	10	3	0	0	0	0	11	2	0	9	0	0	1
Mining and quarrying of nonmetallic minerals (except fuels)	49	37	27	9	1	0	0	0	0	11	6	0	5	0	0	1
Mining	901	834	659	123	37	2	0	0	13	60	33	7	20	1	0	6
Construction	4,469	3,968	2,084	972	613	159	37	0	103	482	337	87	58	4	1	14
Wholesale trade	2,217	1,631	1,210	365	36	10	5	0	5	557	355	38	164	15	0	14
Retail trade	4,120	3,162	2,401	635	57	3	2	0	64	880	489	114	277	41	6	31
Finance, insurance, and real estate	514	375	302	56	15	0	1	0	1	130	105	6	19	2	0	7
U S Postal Service	1,666	1,663	1,276	387	0	0	0	0	0	3	3	0	0	0	0	0
Local and suburban transit and interurban highway passenger transportation	508	377	293	83	0	0	0	0	1	125	107	3	15	3	0	3
Motor freight transportation and warehousing	2,339	1,843	1,398	381	45	10	4	0	5	452	300	48	104	8	0	36
Water transportation	448	408	217	158	27	2	3	0	1	35	27	3	5	2	0	3
Other transportation	278	228	147	68	8	2	2	0	1	49	43	1	5	1	0	0
Communication	1,050	867	555	286	22	4	0	0	0	165	107	5	53	3	0	15
Electric, gas, and sanitary services	679	547	356	157	13	10	0	0	11	121	87	7	27	1	0	10
Transportation, communication, and other utilities	5,302	4,270	2,966	1,133	115	28	9	0	19	947	671	67	209	18	0	67
Hotels, rooming houses, camps, and other lodging places	819	690	490	163	30	3	0	0	4	120	92	6	22	8	0	1
Personal services	334	235	191	36	6	0	0	0	2	92	69	3	20	3	0	4
Automotive repair, services, and garages	333	213	164	45	1	1	0	0	2	110	74	6	30	7	0	3
Motion pictures	223	200	131	66	1	0	0	0	2	22	19	0	3	0	0	1
Amusement and recreation services (except motion pictures)	294	236	143	77	8	3	0	0	5	50	37	1	12	5	0	3
Health services	2,247	1,631	1,293	294	13	4	0	25	2	551	446	13	92	12	4	49
Educational services	253	190	145	40	3	1	0	0	1	57	47	2	8	2	0	4
Membership organizations	590	523	266	234	12	8	2	0	1	51	43	1	7	1	0	15
Business services	1,672	1,314	908	348	49	1	0	0	8	338	275	16	47	8	0	12
Miscellaneous repair services	136	96	75	17	3	0	1	0	0	37	25	5	7	2	1	0
Legal services	49	33	25	7	1	0	0	0	0	13	10	0	3	0	1	2
Museums, art galleries, and botanical and zoological gardens	6	6	5	1	0	0	0	0	0	0	0	0	0	0	0	0

Table 5.—Industrial Distribution of Cases Received, Fiscal Year 1986[1]—Continued

Industrial group[2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Social services	244	142	115	25	2	0	0	0	0	95	82	2	11	1	0	6
Miscellaneous services	192	151	108	34	9	0	0	0	0	38	24	2	12	1	0	2
Services	7,392	5,660	4,059	1,387	138	21	3	25	27	1,574	1,243	57	274	50	6	102
Public administration	343	262	170	81	8	3	0	0	0	76	53	3	20	2	0	3
Total, all industrial groups	42,322	34,435	24,084	8,496	1,206	298	67	25	259	7,296	5,131	525	1,640	209	27	355

[1] See Glossary of terms for definitions
[2] Source Standard Industrial Classification, Statistical Policy Division, Office of Management and Budget, Washington, D C , 1972

Table 6A.—Geographic Distribution of Cases Received, Fiscal Year 1986[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	130	110	88	18	4	0	0	0	0	15	11	1	3	1	0	4
New Hampshire	77	61	50	8	3	0	0	0	0	11	7	0	4	2	0	3
Vermont	55	50	41	8	1	0	0	0	0	5	4	0	1	0	0	0
Massachusetts	1,278	1,088	843	184	30	23	2	2	4	175	133	7	35	2	0	13
Rhode Island	152	119	81	27	4	3	0	3	1	31	22	1	8	1	0	1
Connecticut	708	615	453	148	7	4	0	1	2	83	65	7	11	5	0	5
New England	2,400	2,043	1 556	393	49	30	2	6	7	320	242	16	62	11	0	26
New York	3 767	3,025	1,844	1,044	84	16	12	1	24	693	582	26	85	14	0	35
New Jersey	1,461	1,119	790	217	62	34	4	2	10	308	247	11	50	23	1	10
Pennsylvania	2,798	2,307	1,717	441	87	36	2	2	22	460	359	13	88	11	3	17
Middle Atlantic	8,026	6,451	4 351	1 702	233	86	18	5	56	1 461	1,188	50	223	48	4	62
Ohio	2,750	2,287	1,599	566	106	6	0	1	9	435	334	15	86	18	2	8
Indiana	1,655	1,450	1,012	387	21	21	2	0	7	185	141	9	35	7	2	11
Illinois	2,692	2,144	1,396	535	127	52	4	0	30	485	304	60	121	16	1	46
Michigan	2,342	1,800	1,328	403	50	12	1	1	5	517	379	24	114	11	1	13
Wisconsin	739	559	404	144	7	0	2	0	2	162	107	6	49	2	0	16
East North Central	10,178	8 240	5 739	2,035	311	91	9	2	53	1 784	1,265	114	405	54	o	94
Iowa	326	247	180	54	9	4	0	0	0	79	48	9	22	0	0	0
Minnesota	564	370	260	61	34	1	1	0	13	183	104	19	60	6	0	5
Missouri	1,099	874	601	193	52	13	1	1	13	214	141	13	60	6	0	5
North Dakota	31	22	16	6	0	0	0	0	0	9	5	1	3	0	0	0
South Dakota	36	27	19	5	3	0	0	0	0	9	7	0	2	0	0	0
Nebraska	107	84	65	14	5	0	0	0	0	22	17	3	2	0	0	1
Kansas	231	177	119	52	2	0	1	0	3	49	37	2	10	1	0	4
West North Central	2,394	1,801	1,260	385	105	18	3	1	29	565	359	47	159	13	0	15
Delaware	87	66	36	10	18	2	0	0	0	19	13	0	6	2	0	0
Maryland	843	711	429	267	9	3	1	0	2	125	105	3	17	5	0	2

Table 6A.—Geographic Distribution of Cases Received, Fiscal Year 1986[1]—Continued

Division and State[2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
District of Columbia	206	157	111	41	3	0	0	1	1	44	40	1	3	0	0	5
Virginia	462	386	305	76	3	1	0	0	1	70	56	4	10	0	0	6
West Virginia	734	683	530	105	30	3	0	0	15	50	33	7	10	0	1	0
North Carolina	395	339	265	73	1	0	0	0	0	55	43	0	12	0	0	1
South Carolina	156	137	104	31	2	0	0	0	0	19	12	0	7	0	0	0
Georgia	644	550	395	143	3	8	1	0	0	93	75	1	17	0	0	1
Florida	952	807	643	138	19	3	1	0	3	143	121	1	21	0	1	1
South Atlantic	4,479	3,836	2,818	884	88	20	3	1	22	618	498	17	103	7	2	16
Kentucky	671	580	470	82	23	0	0	0	5	83	62	3	18	1	1	6
Tennessee	873	741	599	128	6	0	5	0	3	127	83	5	39	0	0	5
Alabama	368	289	219	67	3	0	0	0	0	78	63	1	14	0	0	1
Mississippi	201	164	122	42	0	0	0	0	0	37	33	0	4	0	0	0
East South Central	2,113	1,774	1,410	319	32	0	5	0	8	325	241	9	75	1	1	12
Arkansas	234	183	151	32	0	0	0	0	0	49	37	2	10	0	0	2
Louisiana	393	337	215	103	11	3	3	1	1	55	41	1	13	0	0	1
Oklahoma	259	218	180	37	1	0	0	0	0	40	25	3	12	0	0	1
Texas	1,179	1031	704	298	18	7	2	1	1	142	100	12	30	0	0	6
West South Central	2,065	1,769	1,250	470	30	10	5	2	2	286	203	18	65	0	0	10
Montana	206	144	122	15	6	0	0	0	1	48	23	3	22	12	0	2
Idaho	123	92	40	34	2	16	0	0	0	26	15	3	8	1	0	4
Wyoming	52	45	35	10	0	0	0	0	0	7	4	1	2	0	0	0
Colorado	726	619	494	122	1	0	0	0	2	95	53	12	30	0	0	12
New Mexico	165	142	96	46	0	0	0	0	0	23	13	0	10	0	0	0
Arizona	441	392	278	103	8	0	1	0	2	45	27	8	10	0	0	4
Utah	117	85	65	20	0	0	0	0	0	31	29	0	2	0	0	1
Nevada	376	311	205	77	18	1	1	0	9	61	37	4	20	0	0	4
Mountain	2,206	1,830	1,335	427	35	17	2	0	14	336	201	31	104	13	0	27

Table 6A.—Geographic Distribution of Cases Received, Fiscal Year 1986[1]—Continued

Division and State[2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Washington	1,128	843	555	251	22	6	3	1	5	255	124	29	102	17	0	13
Oregon	602	422	332	75	13	0	0	0	2	159	86	20	53	6	4	11
California	5,867	4,777	3,061	1,352	270	19	17	1	57	995	585	165	245	36	2	57
Alaska	259	206	133	65	6	1	0	0	1	46	35	4	7	0	0	7
Hawaii	167	111	69	36	6	0	0	0	0	45	26	3	16	2	8	1
Guam	10	2	2	0	0	0	0	0	0	8	8	0	0	0	0	0
Pacific	8,033	6,361	4,152	1,779	317	26	20	2	65	1,508	864	221	423	61	14	89
Puerto Rico	409	320	204	101	6	0	0	6	3	84	62	2	20	1	0	4
Virgin Islands	19	10	9	1	0	0	0	0	0	9	8	0	1	0	0	0
Outlying areas	428	330	213	102	6	0	0	6	3	93	70	2	21	1	0	4
Total, all States and areas	42,322	34,435	24,084	8,496	1,206	298	67	25	259	7,296	5,131	525	1,640	209	27	355

[1] See Glossary of terms for definitions
[2] The States are grouped according to the method used by the Bureau of the Census, U S Department of Commerce

Table 6B.—Standard Federal Administrative Regional Distribution of Cases Received, Fiscal Year 1986[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	708	615	453	148	7	4	0	1	2	83	65	7	11	5	0	5
Maine	130	110	88	18	4	0	0	0	0	15	11	1	3	1	0	4
Massachusetts	1,278	1,088	843	184	30	23	2	2	4	175	133	7	35	2	0	13
New Hampshire	77	61	50	8	3	0	0	0	0	11	7	0	4	2	0	3
Rhode Island	152	119	81	27	4	3	0	3	1	31	22	1	8	1	0	1
Vermont	55	50	41	8	1	0	0	0	0	5	4	0	1	0	0	0
Region I	2,400	2,043	1,556	393	49	30	2	6	7	320	242	16	62	11	0	26
Delaware	87	66	36	10	18	2	0	0	0	19	13	0	6	2	0	0
New Jersey	1,461	1,119	790	217	62	34	4	2	10	308	247	11	50	23	1	10
New York	3,767	3,025	1,844	1,044	84	16	12	1	24	693	582	26	85	14	0	35
Puerto Rico	409	320	204	101	6	0	0	6	3	84	62	2	20	1	0	4
Virgin Islands	19	10	9	1	0	0	0	0	0	9	8	0	1	0	0	0
Region II	5,743	4,540	2,883	1,373	170	52	16	9	37	1,113	912	39	162	40	1	49
District of Columbia	206	157	111	41	3	0	0	1	1	44	40	1	3	0	0	5
Maryland	843	711	429	267	9	3	1	0	2	125	105	3	17	5	0	2
Pennsylvania	2,798	2,307	1,717	441	87	36	2	2	22	460	359	13	88	11	3	17
Virginia	462	386	305	76	3	1	0	0	1	70	56	4	10	0	0	6
West Virginia	734	683	530	105	30	3	0	0	15	50	33	7	10	0	1	0
Region III	5,043	4,244	3,092	930	132	43	3	3	41	749	593	28	128	16	4	30
Alabama	368	289	219	67	3	0	0	0	0	78	63	1	14	0	0	1
Florida	952	807	643	138	19	3	1	0	3	143	121	1	21	0	1	1
Georgia	644	550	395	143	3	8	1	0	0	93	75	1	17	0	0	1
Kentucky	671	580	470	82	23	0	0	0	5	83	62	3	18	1	1	6
Mississippi	201	164	122	42	0	0	0	0	0	37	33	0	4	0	0	0
North Carolina	395	339	265	73	1	0	0	0	0	55	43	0	12	0	0	1

Table 6B.—Standard Federal Administrative Regional Distribution of Cases Received, Fiscal Year 1986[1]—Continued

Standard Federal Regions[2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
South Carolina	156	137	104	31	2	0	0	0	0	19	12	0	7	0	0	0
Tennessee	873	741	599	128	6	0	5	0	3	127	83	5	39	0	0	5
Region IV	4,260	3,607	2,817	704	57	11	7	0	11	635	492	11	132	1	2	15
Illinois	2,692	2,144	1,396	535	127	52	4	0	30	485	304	60	121	16	1	46
Indiana	1,655	1,450	1,012	387	21	21	2	0	7	185	141	9	35	7	2	11
Michigan	2,342	1,800	1,328	403	50	12	1	1	5	517	379	24	114	11	1	13
Minnesota	564	370	260	61	34	1	1	0	13	183	104	19	60	6	0	5
Ohio	2,750	2,287	1,599	566	106	6	0	1	9	435	334	15	86	18	2	8
Wisconsin	739	559	404	144	7	0	2	0	2	162	107	6	49	2	0	16
Region V	10,742	8,610	5,999	2,096	345	92	10	2	66	1 967	1 369	133	465	60	6	99
Arkansas	234	183	151	32	0	0	0	0	0	49	37	2	10	0	0	2
Louisiana	393	337	215	103	11	3	3	1	1	55	41	1	13	0	0	1
New Mexico	165	142	96	46	0	0	0	0	0	23	13	0	10	0	0	0
Oklahoma	259	218	180	37	1	0	0	0	0	40	25	3	12	0	0	1
Texas	1,179	1 031	704	298	18	7	2	1	1	142	100	12	30	0	0	6
Region VI	2,230	1,911	1,346	516	30	10	5	2	2	309	216	18	75	0	0	10
Iowa	326	247	180	54	9	4	0	0	0	79	48	9	22	0	0	0
Kansas	231	177	119	52	2	0	1	0	3	49	37	2	10	1	0	4
Missouri	1,099	874	601	193	52	13	1	1	13	214	141	13	60	6	0	5
Nebraska	107	84	65	14	5	0	0	0	0	22	17	3	2	0	0	1
Region VII	1,763	1,382	965	313	68	17	2	1	16	364	243	27	94	7	0	10
Colorado	726	619	494	122	1	0	0	0	2	95	53	12	30	0	0	12
Montana	206	144	122	15	6	0	0	0	1	48	23	3	22	12	0	2
North Dakota	31	22	16	6	0	0	0	0	0	9	5	1	3	0	0	0
South Dakota	36	27	19	5	3	0	0	0	0	9	7	0	2	0	0	0
Utah	117	85	65	20	0	0	0	0	0	31	29	0	2	0	0	1
Wyoming	52	45	35	10	0	0	0	0	0	7	4	1	2	0	0	0

Table 6B.—Standard Federal Administrative Regional Distribution of Cases Received, Fiscal Year 1986[1]—Continued

Standard Federal Regions[2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Region VIII	1,168	942	751	178	10	0	0	0	3	199	121	17	61	12	0	15
Arizona	441	392	278	103	8	0	1	0	2	45	27	8	10	0	0	4
California	5,867	4,777	3,061	1,352	270	19	17	1	57	995	585	165	245	36	2	57
Hawaii	167	111	69	36	6	0	0	0	0	45	26	3	16	2	8	1
Guam	10	2	2	0	0	0	0	0	0	8	8	0	0	0	0	0
Nevada	376	311	205	77	18	1	1	0	9	61	37	4	20	0	0	4
Region IX	6,861	5,593	3,615	1,568	302	20	19	1	68	1,154	683	180	291	38	10	66
Alaska	259	206	133	65	6	1	0	0	1	46	35	4	7	0	0	7
Idaho	123	92	40	34	2	16	0	0	0	26	15	3	8	1	0	4
Oregon	602	422	332	75	13	0	0	0	2	159	86	20	53	6	4	11
Washington	1,128	843	555	251	22	6	3	1	5	255	124	29	102	17	0	13
Region X	2,112	1,563	1,060	425	43	23	3	1	8	486	260	56	170	24	4	35
Total, all States and areas	42,322	34,435	24,084	8,496	1,206	298	67	25	259	7,296	5,131	525	1,640	209	27	355

[1] See Glossary of terms for definitions
[2] The States are grouped according to the 10 Standard Federal Administrative Regions

Table 7.—Analysis of Methods of Disposition of Unfair Labor Practice Cases Closed, Fiscal Year 1986[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	33,450	100 0	——	23,180	100 0	8,266	100 0	1,320	100 0	323	100 0	75	100 0	20	100 0	266	100 0
Agreement of the parties	9,735	29 1	100 0	7,552	32 5	1,407	17 0	655	49 6	6	1 8	17	22 6	10	50 0	88	33 0
Informal settlement	9,483	28 3	97 4	7 375	31 8	1,356	16 4	639	48 4	4	1 2	14	18 6	10	50 0	85	31 9
Before issuance of complaint	6,634	19 8	68 1	5,108	22 0	986	11 9	470	35 6	[2]	——	8	10 6	10	50 0	52	19 5
After issuance of complaint, before opening of hearing	2,778	8 3	28 5	2,203	9 5	364	4 4	169	12 8	3	0 9	6	8 0	0	0 0	33	12 4
After hearing opened before issuance of administrative law judge s decision	71	0 2	0 7	64	0 2	6	0 0	0	0 0	1	0 3	0	0 0	0	0 0	0	0 0
Formal settlement	252	0 8	2 6	177	0 8	51	0 6	16	1 2	2	0 6	3	4 0	0	0 0	3	1 1
After issuance of complaint, before opening of hearing	154	0 5	1 6	104	0 4	27	0 3	15	1 1	2	0 6	3	4 0	0	0 0	3	1 1
Stipulated decision	34	0 1	0 3	21	0 0	8	0 0	3	0 2	0	0 0	2	2 6	0	0 0	0	0 0
Consent decree	120	0 4	1 2	83	0 3	19	0 2	12	0 9	2	0 6	1	1 3	0	0 0	3	1 1
After hearing opened	98	0 3	1 0	73	0 3	24	0 3	1	0 1	0	0 0	0	0 0	0	0 0	0	0 0
Stipulated decision	14	0 0	0 1	10	0 0	3	0 0	1	0 1	0	0 0	0	0 0	0	0 0	0	0 0
Consent decree	84	0 3	0 9	63	0 3	21	0 3	0	0 0	0	0 0	0	0 0	0	0 0	0	0 0
Compliance with	912	2 7	100 0	694	2 9	167	2 0	37	2 8	0	0 0	8	10 6	1	5 0	5	1 8
Administrative law judge's decision	20	0 1	2 2	17	0 0	3	0 0	0	0 0	0	0 0	0	0 0	0	0 0	0	0 0
Board decision	626	1 9	68 6	461	1 9	134	1 6	21	1 5	0	0 0	7	9 3	1	5 0	2	0 7
Adopting administrative law judge's decision (no exceptions filed)	213	0 6	23 4	161	0 6	37	0 4	12	0 9	0	0 0	1	1 3	1	5 0	1	0 3
Contested	413	1 2	45 3	300	1 2	97	1 1	9	0 6	0	0 0	6	8 0	0	0 0	1	0 3
Circuit court of appeals decree	257	0 8	28 2	210	0 9	29	0 3	15	1 1	0	0 0	0	0 0	0	0 0	3	1 1

Table 7.—Analysis of Methods of Disposition of Unfair Labor Practice Cases Closed, Fiscal Year 1986[1]—Continued

Method and stage of disposition	All C cases			CA cases		CB cases		CC cases		CD cases		CE cases		CG cases		CP cases	
	Number	Percent of total closed	Percent of total method	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed
Supreme Court action	9	0 0	1 0	6	0 0	1	0 0	1	0 0	0	0 0	1	1 3	0	0 0	0	0 0
Withdrawal	10,416	31 1	100 0	7,359	31 7	2,488	30 0	427	32 3	0	0 0	27	36 0	6	30 0	109	40 9
Before issuance of complaint	10 174	30 4	97 7	7,160	30 8	2,457	29 7	418	31 6	[2]	——	25	33 3	6	30 0	108	40 6
After issuance of complaint before opening of hearing	220	0 7	2 1	182	0 7	27	0 3	8	0 6	0	0 0	2	2 6	0	0 0	1	0 3
After hearing opened, before administrative law judge's decision	21	0 1	0 2	16	0 0	4	0 0	1	0 0	0	0 0	0	0 0	0	0 0	0	0 0
After administrative law judge's decision before Board decision	1	0 0	0 0	1	0 0	0	0 0	0	0 0	0	0 0	0	0 0	0	0 0	0	0 0
After Board or court decision	0	0 0	0 0	0	0 0	0	0 0	0	0 0	0	0 0	0	0 0	0	0 0	0	0 0
Dismissal	11,977	35 8	100 0	7,487	32 2	4,198	50 7	201	15 2	1	0 3	23	30 6	3	15 0	64	24 0
Before issuance of complaint	11,054	33 0	92 3	6,838	29 4	3,956	47 8	181	13 7	[2]	——	19	25 3	2	10 0	58	21 8
After issuance of complaint, before opening of hearing	65	0 2	0 5	57	0 2	5	0 0	2	0 1	1	0 3	0	0 0	0	0 0	0	0 0
After hearing opened before administrative law judge's decision	6	0 0	0 1	6	0 0	0	0 0	0	0 0	0	0 0	0	0 0	0	0 0	0	0 0
By administrative law judge's decision	16	0 0	0 1	14	0 0	2	0 0	0	0 0	0	0 0	0	0 0	0	0 0	0	0 0
By Board decision	817	2 4	6 8	556	2 3	232	2 8	18	1 3	0	0 0	4	5 3	1	5 0	6	2 2
Adopting administrative law judge's decision (no exceptions filed)	35	0 1	0 3	29	0 1	6	0 0	0	0 0	0	0 0	0	0 0	0	0 0	0	0 0
Contested	782	2 3	6 5	527	2 2	226	2 7	18	1 3	0	0 0	4	5 3	1	5 0	6	2 2
By circuit court of appeals decree	19	0 1	0 2	16	0 0	3	0 0	0	0 0	0	0 0	0	0 0	0	0 0	0	0 0
By Supreme Court action	0	0 0	0 0	0	0 0	0	0 0	0	0 0	0	0 0	0	0 0	0	0 0	0	0 0
10(k) actions (see Table 7A for details of dispositions)	315	0 9	0 0	0	0 0	0	0 0	0	0 0	315	97 5	0	0 0	0	0 0	0	0 0
Otherwise (compliance with order of administrative law judge or Board not achieved—firm went out of business)	95	0 3	0 0	88	0 3	6	0 0	0	0 0	1	0 3	0	0 0	0	0 0	0	0 0

[1] See Table 8 for summary of disposition by stage See Glossary of terms for definitions
[2] CD cases closed in this stage are processed as jurisdictional disputes under Sec 10(k) of the Act See Table 7A

Table 7A.—Analysis of Methods of Disposition of Jurisdictional Dispute Cases Closed Prior to Unfair Labor Practice Proceedings, Fiscal Year 1986[1]

Method and stage of disposition	Number of cases	Percent of total closed
Total number of cases closed before issuance of complaint	315	100 0
Agreement of the parties—informal settlement	144	45 7
Before 10(k) notice	100	31 7
After 10(k) notice, before opening of 10(k) hearing	36	11 4
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	8	2 5
Compliance with Board decision and determination of dispute	2	0 6
Withdrawal	107	34 0
Before 10(k) notice	89	28 3
After 10(k) notice, before opening of 10(k) hearing	10	3 2
After opening of 10(k) hearing before issuance of Board decision and determination of dispute	8	2 5
After Board decision and determination of dispute	0	0 0
Dismissal	62	19 7
Before 10(k) notice	50	15 9
After 10(k) notice, before opening of 10(k) hearing	8	2 5
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	0	0 0
By Board decision and determination of dispute	4	1 3

[1] See Glossary of terms for definitions

Table 8.—Disposition by Stage of Unfair Labor Practice Cases Closed, Fiscal Year 1986[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	33,450	100 0	23,180	100 0	8,266	100 0	1,320	100 0	323	100 0	75	100 0	20	100 0	266	100 0
Before issuance of complaint	28,177	84 2	19,106	82 4	7,399	89 5	1,069	81 0	315	97 5	52	69 3	18	90 0	218	82 0
After issuance of complaint, before opening of hearing	3,217	9 6	2,546	11 0	423	5 1	194	14 7	6	1 9	11	14 7	0	0 0	37	13 9
After hearing opened, before issuance of administrative law judge's decision	196	0 6	159	0 7	34	0 4	2	0 2	1	0 3	0	0 0	0	0 0	0	0 0
After administrative law judge's decision, before issuance of Board decision	37	0 1	32	0 1	5	0 1	0	0 0	0	0 0	0	0 0	0	0 0	0	0 0
After Board order adopting administrative law judge's decision in absence of exceptions	248	0 7	190	0 8	43	0 5	12	0 9	0	0 0	1	1 3	1	5 0	1	0 4
After Board decision, before circuit court decree	1,271	3 8	897	3 9	328	4 0	27	2 0	1	0 3	10	13 3	1	5 0	7	2 6
After circuit court decree, before Supreme Court action	295	0 9	244	1 1	33	0 4	15	1 1	0	0 0	0	0 0	0	0 0	3	1 1
After Supreme Court action	9	0 0	6	0 0	1	0 0	1	0 1	0	0 0	1	1 3	0	0 0	0	0 0

[1] See Glossary of terms for definitions

Table 9.—Disposition by Stage of Representation and Union Deauthorization Cases Closed, Fiscal Year 1986[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	7,532	100 0	5,262	100 0	593	100 0	1,677	100 0	228	100 0
Before issuance of notice of hearing	2,374	31 5	1,260	23 9	283	47 7	831	49 6	176	77 2
After issuance of notice, before close of hearing	3,783	50 2	2,994	56 9	175	29 6	614	36 5	20	8 8
After hearing closed, before issuance of decision	105	1 4	87	1 7	5	0 8	13	0 8	1	0 4
After issuance of Regional Director's decision	1,081	14 4	840	16 0	70	11 8	171	10 2	31	13 6
After issuance of Board decision	189	2 5	81	1 5	60	10 1	48	2 9	0	0 0

[1] See Glossary of terms for definitions

Table 10.—Analysis of Methods of Disposition of Representation and Union Deauthorization Cases Closed, Fiscal Year 1986[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	7,532	100 0	5,262	100 0	593	100 0	1,677	100 0	228	100 0
Certification issued, total	4,692	62 3	3,586	68 1	211	35 6	895	53 4	124	54 4
After										
Consent election	120	1 6	70	1 3	3	0 5	47	2 8	11	4 8
Before notice of hearing	57	0 8	29	0 6	2	0 3	26	1 6	11	4 8
After notice of hearing, before hearing closed	61	0 8	39	0 7	1	0 2	21	1 3	0	0 0
After hearing closed, before decision	2	0 0	2	0 0	0	0 0	0	0 0	0	0 0
Stipulated election	3,759	49 9	2,883	54 8	162	27 3	714	42 6	85	37 3
Before notice of hearing	1,132	15 0	758	14 4	60	10 1	314	18 7	70	30 7
After notice of hearing, before hearing closed	2,597	34 5	2,099	39 9	102	17 2	396	23 6	15	6 6
After hearing closed, before decision	30	0 4	26	0 5	0	0 0	4	0 2	0	0 0
Expedited election	7	0 1	1	0 0	5	0 8	1	0 1	0	0 0
Regional Director-directed election	786	10 4	617	11 7	41	6 9	128	7 6	28	12 3
Board-directed election	20	0 3	15	0 3	0	0 0	5	0 3	0	0 0
By withdrawal, total	2,156	28 6	1,410	26 8	233	39 3	513	30 6	77	33 8
Before notice of hearing	912	12 1	426	8 1	159	26 8	327	19 5	71	31 1
After notice of hearing, before hearing closed	1,048	13 9	824	15 7	63	10 6	161	9 6	5	2 2
After hearing closed, before decision	64	0 8	54	1 0	3	0 5	7	0 4	1	0 4
After Regional Director's decision and direction of election	131	1 7	106	2 0	7	1 2	18	1 1	0	0 0
After Board decision and direction of election	1	0 0	0	0 0	1	0 2	0	0 0	0	0 0
By dismissal, total	684	9 1	266	5 1	149	25 1	269	16 0	27	11 8
Before notice of hearing	266	3 5	46	0 9	57	9 6	163	9 7	24	10 5
After notice of hearing, before hearing closed	77	1 0	32	0 6	9	1 5	36	2 1	0	0 0
After hearing closed, before decision	9	0 1	5	0 1	2	0 3	2	0 1	0	0 0
By Regional Director's decision	164	2 2	117	2 2	22	3 7	25	1 5	3	1 3
By Board decision	168	2 2	66	1 3	59	9 9	43	2 6	0	0 0

[1] See Glossary of terms for definitions

Table 10A.—Analysis of Methods of Disposition of Amendment of Certification and Unit Clarification Cases Closed, Fiscal Year 1986

	AC	UC
Total, all	24	370
Certification amended or unit clarified	11	48
Before hearing	0	0
By Regional Director's decision	0	0
By Board decision	0	0
After hearing	11	48
By Regional Director's decision	11	48
By Board decision	0	0
Dismissed	11	131
Before hearing	5	16
By Regional Director's decision	5	16
By Board decision	0	0
After hearing	6	115
By Regional Director's decision	4	107
By Board decision	2	8
Withdrawn	2	191
Before hearing	2	191
After hearing	0	0

Table 11.—Types of Elections Resulting in Certification in Cases Closed, Fiscal Year 1986[1]

Type of case	Type of election					
	Total	Consent	Stipulated	Board-directed	Regional Director-directed	Expedited elections under 8(b)(7)(C)
All types, total						
Elections	4,644	130	3,704	20	784	6
Eligible voters	265,836	3,178	206,178	3,324	52,872	284
Valid votes	234,939	2,835	183,986	2,859	45,008	251
RC cases						
Elections	3,495	71	2,812	15	596	1
Eligible voters	217,110	1,716	174,220	2,748	38,323	103
Valid votes	193,323	1,522	156,097	2,356	33,254	94
RM cases						
Elections	168	2	129	0	33	4
Eligible voters	5,908	12	3,148	0	2,574	174
Valid votes	5,222	10	2,773	0	2,288	151
RD cases						
Elections	857	46	684	5	121	1
Eligible voters	36,221	787	25,167	576	9,684	7
Valid votes	31,028	707	22,266	503	7,546	6
UD cases						
Elections	124	11	79	0	34	—
Eligible voters	6,597	663	3,643	0	2,291	—
Valid votes	5,366	596	2,850	0	1,920	—

[1] See Glossary of terms for definitions

Table 11A.—Analysis of Elections Conducted in Representation Cases Closed, Fiscal Year 1986

Type of election	All R elections				RC elections				RM elections				RD elections			
	Elections conducted				Elections conducted				Elections conducted				Elections conducted			
	Total elections	Withdrawn or dismissed before certification	Resulting in a rerun or runoff	Resulting in certification[1]	Total elections	Withdrawn or dismissed before certification	Resulting in a rerun or runoff	Resulting in certification	Total elections	Withdrawn or dismissed before certification	Resulting in a rerun or runoff	Resulting in certification	Total elections	Withdrawn or dismissed before certification	Resulting in a rerun or runoff	Resulting in certification
All types	4,642	33	89	4,520	3,600	30	75	3,495	171	2	1	168	871	1	13	857
Rerun required	—	—	67	—	—	—	57	—	—	—	0	—	—	—	10	—
Runoff required	—	—	22	—	—	—	18	—	—	—	1	—	—	—	3	—
Consent elections	123	2	2	119	74	1	2	71	3	1	0	2	46	0	0	46
Rerun required	—	—	2	—	—	—	2	—	—	—	0	—	—	—	0	—
Rerun required	—	—	0	—	—	—	0	—	—	—	0	—	—	—	0	—
Stipulated elections	3,707	21	61	3,625	2,885	20	53	2,812	129	0	0	129	693	1	8	684
Rerun required	—	—	47	—	—	—	41	—	—	—	0	—	—	—	6	—
Runoff required	—	—	14	—	—	—	12	—	—	—	0	—	—	—	2	—
Regional Director-directed	780	9	21	750	621	8	17	596	35	1	1	33	124	0	3	121
Rerun required	—	—	15	—	—	—	12	—	—	—	0	—	—	—	3	—
Runoff required	—	—	6	—	—	—	5	—	—	—	1	—	—	—	0	—
Board-directed	25	1	4	20	19	1	3	15	0	0	0	0	6	0	1	5
Rerun required	—	—	3	—	—	—	2	—	—	—	0	—	—	—	1	—
Runoff required	—	—	1	—	—	—	1	—	—	—	0	—	—	—	0	—
Expedited—Sec 8(b)(7)(C)	7	0	1	6	1	0	0	1	4	0	0	4	2	0	1	1
Rerun required	—	—	0	—	—	—	0	—	—	—	0	—	—	—	0	—
Runoff required	—	—	1	—	—	—	0	—	—	—	0	—	—	—	1	—

[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 1986

	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	4,642	433	9 3	173	3 7	111	2 4	544	11 7	284	6 1
By type of case											
In RC cases	3,600	372	10 3	138	3 8	92	2 6	464	12 9	230	6 4
In RM cases	171	12	7 0	8	4 7	8	4 7	20	11 7	16	9 4
In RD cases	871	49	5 6	27	3 1	11	1 3	60	6 9	38	4 4
By type of election											
Consent elections	123	11	8 9	13	10 6	2	1 6	13	10 6	15	12 2
Stipulated elections	3,707	303	8 2	125	3 4	92	2 5	395	10 7	217	5 9
Expedited elections	7	0	0 0	0	0 0	0	0 0	0	0 0	0	0 0
Regional Director-directed elections	780	118	15 1	34	4 4	13	1 7	131	16 8	47	6 0
Board-directed elections	25	1	4 0	1	4 0	4	16 0	5	20 0	5	20 0

[1] Number of elections in which objections were ruled on, regardless of number of allegations in each election
[2] Number of elections in which challenges were ruled on, regardless of individual ballots challenged in each election

Table 11C.—Objections Filed in Representation Cases Closed, by Party Filing, Fiscal Year 1986[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	591	100 0	139	23 5	416	70 4	36	6 1
By type of case								
RC cases	502	100 0	117	23 3	354	70 5	31	6 2
RM cases	20	100 0	6	30 0	13	65 0	1	5 0
RD cases	69	100 0	16	23 2	49	71 0	4	5 8
By type of election								
Consent elections	14	100 0	2	14 3	11	78 6	1	7 1
Stipulated elections	430	100 0	103	24 0	300	69 7	27	6 3
Expedited elections	0	—	0	—	0	—	0	—
Regional Director-directed elections	142	100 0	32	22 6	102	71 8	8	5 6
Board-directed elections	5	100 0	2	40 0	3	60 0	0	0 0

[1] See Glossary of terms for definitions
[2] Objections filed by more than one party in the same cases are counted as one

Table 11D.—Disposition of Objections in Representation Cases Closed, Fiscal Year 1986[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	591	47	544	408	75 0	136	25 0
By type of case							
RC cases	502	38	464	346	74 6	118	25 4
RM cases	20	0	20	16	80 0	4	20 0
RD cases	69	9	60	46	76 7	14	23 3
By type of election							
Consent elections	14	1	13	9	69 2	4	30 8
Stipulated elections	430	35	395	296	74 9	99	25 1
Expedited elections	0	0	0	0	—	0	—
Regional Director-directed elections	142	11	131	99	75 6	32	24 4
Board-directed elections	5	0	5	4	80 0	1	20 0

[1] See Glossary of terms for definitions
[2] See Table 11E for rerun elections held after objections were sustained In 47 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 1986[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	63	100 0	17	27 0	46	73 0	29	40 8
By type of case								
RC cases	45	100 0	13	28 9	32	71 1	23	51 1
RM cases	4	100 0	1	25 0	3	75 0	1	25 0
RD cases	14	100 0	3	21 4	11	78 6	5	35 7
By type of election								
Consent elections	2	100 0	0	0 0	2	100 0	0	—
Stipulated elections	36	100 0	11	30 6	25	69 4	18	40 9
Expedited elections	0	—	0	—	0	—	0	—
Regional Director-directed elections	20	100 0	5	25 0	15	75 0	10	50 0
Board-directed elections	5	100 0	1	20 0	4	80 0	1	20 0

[1] See Glossary of terms for definitions
[2] More than 1 rerun election was conducted in 4 cases, however, only the final election is included in this table

Table 12.—Results of Union-Shop Deauthorization Polls in Cases Closed, Fiscal Year 1986

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	124	67	54 0	57	46 0	6,597	2 075	31 5	4,522	68 5	5,366	81 3	2,666	40 4
AFL-CIO unions	86	45	52 3	41	47 7	5,021	1,550	30 9	3,471	69 1	4,048	80 6	2,065	41 1
Teamsters	30	19	63 3	11	36 7	1,158	448	38 7	710	61 3	1,002	86 5	504	43 5
Other national unions	3	2	66 7	1	33 3	36	23	63 9	13	36 1	33	91 7	21	58 3
Other local unions	5	1	20 0	4	80 0	382	54	14 1	328	85 9	283	74 1	76	19 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 1986[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	2,649	42 6	1,129	1,129	—	—	—	1,520	175,230	57,380	57,380	—	—	—	117,850
Teamsters	1,322	37 2	492	—	492	—	—	830	42,462	12,843	—	12,843	—	—	29,619
Other national unions	122	45 9	56	—	—	56	—	66	7,919	2,250	—	—	2,250	—	5,669
Other local unions	237	51 5	122	—	—	—	122	115	12,472	4,733	—	—	—	4,733	7,739
1-union elections	4,330	41 6	1,799	1,129	492	56	122	2,531	238,083	77,206	57,380	12 843	2 250	4,733	160,877
AFL-CIO v AFL-CIO	30	56 7	17	17	—	—	—	13	5,858	3,050	3,050	—	—	—	2,808
AFL-CIO v Teamsters	50	82 0	41	19	22	—	—	9	3,045	2,062	717	1,345	—	—	983
AFL-CIO v National	15	46 7	7	4	—	3	—	8	1,922	197	77	—	120	—	1,725
AFL-CIO v Local	60	96 7	58	35	—	—	23	2	7,144	6,912	4,583	—	—	2,329	232
Teamsters v National	2	50 0	1	—	1	0	—	1	506	16	—	16	0	—	490
Teamsters v Local	9	100 0	9	—	6	—	3	0	347	347	—	138	—	209	0
Teamsters v Teamsters	2	0 0	0	—	0	—	—	2	74	0	—	0	—	—	74
National v Local	5	80 0	4	—	—	1	3	1	152	134	—	—	9	125	18
Local v Local	13	84 6	11	—	—	—	11	2	1,074	1,041	—	—	—	1,041	33
2-union elections	186	79 6	148	75	29	4	40	38	20,122	13,759	8,427	1,499	129	3,704	6,363
AFL-CIO v AFL-CIO v Teamsters	2	100 0	2	0	2	—	—	0	257	257	0	257	—	—	0
AFL-CIO v AFL-CIO v National	1	100 0	1	0	—	1	—	0	710	710	0	—	710	—	0
AFL-CIO v Teamsters v Teamsters	1	100 0	1	0	1	—	—	0	67	67	0	67	—	—	0
3 (or more)-union elections	4	100 0	4	0	3	1	0	0	1,034	1,034	0	324	710	0	0
Total representation elections	4,520	43 2	1,951	1,204	524	61	162	2,569	259,239	91,999	65,807	14,666	3,089	8,437	167,240

Table 13.—Final Outcome of Representation Elections in Cases Closed, Fiscal Year 1986[1]—Continued

Participating unions	Total elections[2]	Elections won by unions						Elections in which no representative chosen	Employees eligible to vote						In elections where no representative chosen
		Percent won	Total won	AFL-CIO unions	Teamsters	Other national unions	Other local unions		Total	In elections won	In units won by				
											AFL-CIO unions	Teamsters	Other national unions	Other local unions	
B Elections in RC cases															
AFL-CIO	2,051	47 9	982	982	—	—	—	1,069	146,789	45,613	45,613	—	—	—	101,176
Teamsters	967	44 1	426	—	426	—	—	541	35,238	10,593	—	10,593	—	—	24,645
Other national unions	110	49 1	54	—	—	54	—	56	7,501	2,163	—	—	2,163	—	5,338
Other local unions	194	54 1	105	—	—	—	105	89	10,688	4,012	—	—	—	4,012	6,676
1-union elections	3,322	47 2	1,567	982	426	54	105	1,755	200,216	62,381	45,613	10,593	2,163	4,012	137,835
AFL-CIO v AFL-CIO	27	51 9	14	14	—	—	—	13	4,258	1,450	1,450	—	—	—	2,808
AFL-CIO v Teamsters	45	80 0	36	17	19	—	—	9	2,852	1,869	679	1,190	—	—	983
AFL-CIO v National	14	50 0	7	4	—	3	—	7	1,831	197	77	—	120	—	1,634
AFL-CIO v Local	57	96 5	55	33	—	—	22	2	5,525	5,293	2,988	—	—	2,305	232
Teamsters v National	1	100 0	1	—	1	0	—	0	16	16	—	16	0	—	0
Teamsters v Local	9	100 0	9	—	6	—	3	0	347	347	—	138	—	209	0
Teamsters v Teamsters	2	0 0	0	—	0	—	—	2	74	0	—	0	—	—	74
National v Local	5	80 0	4	—	—	1	3	1	152	134	—	—	9	125	18
Local v Local	9	88 9	8	—	—	—	8	1	805	795	—	—	—	795	10
2-union elections	169	79 3	134	68	26	4	36	35	15,860	10,101	5 194	1,344	129	3,434	5,759
AFL-CIO v AFL-CIO v Teamsters	2	100 0	2	0	2	—	—	0	257	257	0	257	—	—	0
AFL-CIO v AFL-CIO v National	1	100 0	1	0	—	1	—	0	710	710	0	—	710	—	0
AFL-CIO v Teamsters v Teamsters	1	100 0	1	0	1	—	—	0	67	67	0	67	—	—	0
3 (or more)-union elections	4	100 0	4	0	3	1	0	0	1,034	1,034	0	324	710	0	0
Total RC elections	3,495	48 8	1,705	1,050	455	59	141	1,790	217,110	73,516	50,807	12,261	3,002	7,446	143 594

Table 13.—Final Outcome of Representation Elections in Cases Closed, Fiscal Year 1986[1]—Continued

Participating unions	Total elections[2]	Elections won by unions: Percent won	Total won	AFL-CIO unions	Teamsters	Other national unions	Other local unions	Elections in which no representative chosen	Employees eligible to vote: Total	In elections won	In units won by: AFL-CIO unions	Teamsters	Other national unions	Other local unions	In elections where no representative chosen
C Elections in RM cases															
AFL-CIO	103	19 4	20	20	—	—	—	83	2,862	686	686	—	—	—	2,176
Teamsters	54	18 5	10	—	10	—	—	44	1,223	309	—	309	—	—	914
Other national unions	2	0 0	0	—	—	0	—	2	12	0	—	—	0	—	12
Other local unions	5	40 0	2	—	—	—	2	3	182	155	—	—	—	155	27
1-union elections	164	19 5	32	20	10	0	2	132	4,279	1,150	686	309	0	155	3,129
AFL-CIO v AFL-CIO	2	100 0	2	2	—	—	—	0	1,590	1,590	1,590	—	—	—	0
AFL-CIO v Teamsters	1	100 0	1	1	0	—	—	0	16	16	16	0	—	—	0
Local v Local	1	0 0	0	—	—	—	0	1	23	0	—	—	—	0	23
2-union elections	4	75 0	3	3	0	0	0	1	1,629	1,606	1,606	0	0	0	23
Total RM elections	168	20 8	35	23	10	0	2	133	5,908	2,756	2,292	309	0	155	3,152
D Elections in RD cases															
AFL-CIO	495	25 7	127	127	—	—	—	368	25,579	11,081	11,081	—	—	—	14,498
Teamsters	301	18 6	56	—	56	—	—	245	6,001	1,941	—	1,941	—	—	4,060
Other national unions	10	20 0	2	—	—	2	—	8	406	87	—	—	87	—	319
Other local unions	38	39 5	15	—	—	—	15	23	1,602	566	—	—	—	566	1,036
1-union elections	844	23 7	200	127	56	2	15	644	33,588	13,675	11,081	1,941	87	566	19,913
AFL-CIO v AFL-CIO	1	100 0	1	1	—	—	—	0	10	10	10	—	—	—	0
AFL-CIO v Teamsters	4	100 0	4	1	3	—	—	0	177	177	22	155	—	—	0
AFL-CIO v National	1	0 0	0	0	—	0	—	1	91	0	0	—	0	—	91
AFL-CIO v Local	3	100 0	3	2	—	—	1	0	1,619	1,619	1,595	—	—	24	0
Teamsters v National	1	0 0	0	—	0	0	—	1	490	0	—	0	0	—	490
Local v Local	3	100 0	3	—	—	—	3	0	246	246	—	—	—	246	0
2-union elections	13	84 6	11	4	3	0	4	2	2,633	2,052	1,627	155	0	270	581

Table 13.—Final Outcome of Representation Elections in Cases Closed, Fiscal Year 1986[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	
Total RD elections	857	24 6	211	131	59	2	19	646	36,221	15,727	12,708	2,096	87	836	20,494

[1] See Glossary of terms for definitions

[2] Includes each unit in which a choice regarding collective-bargaining agent was made, for example, there may have been more than one election in a single case, or several cases may have been involved in one election unit

Table 14.—Valid Votes Cast in Representation Elections, by Final Results of Election, in Cases Closed, Fiscal Year 1986[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	155,522	32,918	32,918	—	—	—	16,815	35,438	35,438	—	—	—	70,351
Teamsters	37,974	7,804	—	7,804	—	—	3,433	7,913	—	7,913	—	—	18,824
Other national unions	6,808	1,370	—	—	1,370	—	581	1,737	—	—	1,737	—	3,120
Other local unions	10,875	3,010	—	—	—	3,010	1,054	2,244	—	—	—	2,244	4,567
1-union elections	211,179	45,102	32,918	7,804	1,370	3,010	21,883	47,332	35,438	7,913	1,737	2,244	96,862
AFL-CIO v AFL-CIO	5,124	2,538	2,538	—	—	—	105	859	859	—	—	—	1,622
AFL-CIO v Teamsters	2,808	1,565	592	973	—	—	297	354	116	238	—	—	592
AFL-CIO v National	1,722	133	51	—	82	—	22	547	348	—	199	—	1,020
AFL-CIO v Local	6,097	5,648	3,157	—	—	2,491	251	79	42	—	—	37	119
Teamsters v National	308	13	—	13	0	—	3	123	—	8	115	—	169
Teamsters v Local	303	292	—	140	—	152	11	0	—	0	—	0	0
Teamsters v Teamsters	58	0	—	0	—	—	0	25	—	25	—	—	33
National v Local	130	91	—	—	10	81	22	2	—	—	1	1	15
Local v Local	859	781	—	—	—	781	46	17	—	—	—	17	15
2-union elections	17,409	11,061	6,338	1,126	92	3,505	757	2,006	1,365	271	315	55	3,585
AFL-CIO v AFL-CIO v Teamsters	249	247	25	222	—	—	2	0	0	0	—	—	0
AFL-CIO v AFL-CIO v National	671	667	204	—	463	—	4	0	0	—	0	—	0
AFL-CIO v Teamsters v Teamsters	65	46	3	43	—	—	19	0	0	0	—	—	0
3 (or more)-union elections	985	960	232	265	463	0	25	0	0	0	0	0	0
Total representation elections	229,573	57,123	39,488	9,195	1,925	6,515	22,665	49,338	36,803	8,184	2,052	2,299	100,447

Table 14.—Valid Votes Cast in Representation Elections, by Final Results of Election, in Cases Closed, Fiscal Year 1986[1]—Continued

Participating unions	Total valid votes cast	Valid votes cast in elections won						Valid votes cast in elections lost					
		Votes for unions					Total votes for no union	Votes for unions					Total votes for no union
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions	
		B Elections in RC cases											
AFL-CIO	131,107	26,665	26,665	—	—	—	13,034	30,980	30,980	—	—	—	60,428
Teamsters	31,636	6,565	—	6,565	—	—	2,733	6,851	—	6,851	—	—	15,487
Other national unions	6,443	1,326	—	—	1,326	—	552	1,662	—	—	1,662	—	2,903
Other local unions	9,297	2,562	—	—	—	2,562	870	1,894	—	—	—	1,894	3,971
1-union elections	178,483	37,118	26,665	6,565	1,326	2,562	17,189	41,387	30,980	6,851	1,662	1,894	82,789
AFL-CIO v AFL-CIO	3,698	1,112	1,112	—	—	—	105	859	859	—	—	—	1,622
AFL-CIO v Teamsters	2,628	1,417	556	861	—	—	265	354	116	238	—	—	592
AFL-CIO v National	1,634	133	51	—	82	—	22	510	311	—	199	—	969
AFL-CIO v Local	4,765	4,351	2,407	—	—	1,944	216	79	42	—	—	37	119
Teamsters v National	16	13	—	13	0	—	3	0	—	0	0	—	0
Teamsters v Local	303	292	—	140	—	152	11	0	—	0	—	0	0
Teamsters v Teamsters	58	0	—	0	—	—	0	25	—	25	—	—	33
National v Local	130	91	—	—	10	81	22	2	—	—	1	1	15
Local v Local	623	589	0	0	0	589	24	10	0	0	0	10	0
2-union elections	13,855	7,998	4,126	1,014	92	2,766	668	1,839	1,328	263	200	48	3,350
AFL-CIO v AFL-CIO v Teamsters	249	247	25	222	—	—	2	0	0	0	—	—	0
AFL-CIO v AFL-CIO v National	671	667	204	—	463	—	4	0	0	—	0	—	0
AFL-CIO v Teamsters v Teamsters	65	46	3	43	—	—	19	0	0	0	—	—	0
3 (or more)-union elections	985	960	232	265	463	0	25	0	0	0	0	0	0
Total RC elections	193,323	46,076	31,023	7,844	1,881	5,328	17,882	43,226	32,308	7,114	1,862	1,942	86,139

Table 14.—Valid Votes Cast in Representation Elections, by Final Results of Election, in Cases Closed, Fiscal Year 1986[1]—Continued

Participating unions	Total valid votes cast	Valid votes cast in elections won						Valid votes cast in elections lost					
		Votes for unions					Total votes for no union	Votes for unions					Total votes for no union
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions	
C Elections in RM cases													
AFL-CIO	2,546	439	439	—	—	—	177	449	449	—	—	—	1,481
Teamsters	1,062	200	—	200	—	—	76	189	—	189	—	—	597
Other national unions	11	0	—	—	0	—	0	2	—	—	2	—	9
Other local unions	149	106	—	—	—	106	17	10	—	—	—	10	16
1-union elections	3,768	745	439	200	0	106	270	650	449	189	2	10	2,103
AFL-CIO v AFL-CIO	1,416	1,416	1,416	—	—	—	0	0	0	—	—	—	0
AFL-CIO v Teamsters	16	15	9	6	—	—	1	0	0	0	—	—	0
Local v Local	22	0	—	—	—	0	0	7	—	—	—	7	15
2-union elections	1,454	1,431	1,425	6	0	0	1	7	0	0	0	7	15
Total RM elections	5,222	2,176	1,864	206	0	106	271	657	449	189	2	17	2,118
D Elections in RD cases													
AFL-CIO	21,869	5,814	5,814	—	—	—	3,604	4,009	4,009	—	—	—	8,442
Teamsters	5,276	1,039	—	1,039	—	—	624	873	—	873	—	—	2,740
Other national unions	354	44	—	—	44	—	29	73	—	—	73	—	208
Other local unions	1,429	342	—	—	—	342	167	340	—	—	—	340	580
1-union elections	28,928	7,239	5,814	1,039	44	342	4,424	5,295	4,009	873	73	340	11,970
AFL-CIO v AFL-CIO	10	10	10	—	—	—	0	0	0	—	—	—	0
AFL-CIO v Teamsters	164	133	27	106	—	—	31	0	0	0	—	—	0
AFL-CIO v National	88	0	0	—	0	—	0	37	37	—	0	—	51
AFL-CIO v Local	1,332	1,297	750	—	—	547	35	0	0	—	—	0	0
Teamsters v National	292	0	—	0	0	—	0	123	—	8	115	—	169
Local v Local	214	192	—	—	—	192	22	0	—	—	—	0	0
2-union elections	2,100	1,632	787	106	0	739	88	160	37	8	115	0	220

Table 14.—Valid Votes Cast in Representation Elections, by Final Results of Election, in Cases Closed, Fiscal Year 1986[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	
Total RD elections	31,028	8,871	6,601	1,145	44	1,081	4,512	5,455	4,046	881	188	340	12,190

[1] See Glossary of terms for definitions

Table 15A.—Geographic Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1986

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	7	2	2	0	0	0	5	738	667	255	255	0	0	0	412	80
New Hampshire	9	3	2	1	0	0	6	209	192	105	10	95	0	0	87	82
Vermont	4	3	2	1	0	0	1	89	84	49	43	6	0	0	35	77
Massachusetts	114	68	53	11	2	2	46	4,798	4,161	2,217	1,504	255	372	86	1,944	2,013
Rhode Island	15	7	4	0	3	0	8	1,677	1,583	1,054	432	2	620	0	529	852
Connecticut	68	34	9	12	3	10	34	6,090	4,831	2,402	1,650	229	132	391	2,429	3,708
New England	217	117	72	25	8	12	100	13,601	11,518	6,082	3,894	587	1,124	477	5,436	6,812
New York	362	169	117	24	1	27	193	19,832	16,856	8,167	5,948	779	412	1,028	8,689	7,397
New Jersey	171	73	42	19	3	9	98	10,135	8,495	4,273	2,627	607	290	749	4,222	3,805
Pennsylvania	311	128	82	30	5	11	183	17 973	16,074	7,070	4,883	1,178	112	897	9,004	5,388
Middle Atlantic	844	370	241	73	9	47	474	47,940	41,425	19,510	13,458	2,564	814	2,674	21,915	16,590
Ohio	292	108	73	27	6	2	184	15,430	14,132	5,967	4,519	1,023	339	86	8,165	4,339
Indiana	145	60	27	28	0	5	85	7,748	7,381	3,265	2,186	875	15	189	4,116	2,653
Illinois	263	110	58	28	12	12	153	9,055	8,009	3,811	2,368	552	260	631	4,198	3,799
Michigan	363	163	107	46	3	7	200	19,416	16,806	8,194	6,473	968	170	583	8,612	7,555
Wisconsin	121	40	25	11	0	4	81	5,785	5,217	2,537	1,674	443	2	418	2,680	1,681
East North Central	1,184	481	290	140	21	30	703	57,434	51,545	23,774	17,220	3,861	786	1,907	27,771	20,027
Iowa	58	24	12	11	0	1	34	1,726	1,505	695	429	240	0	26	810	707
Minnesota	105	47	32	11	0	4	58	4,195	3,718	1,752	1,156	355	1	240	1,966	1,756
Missouri	150	64	40	19	5	0	86	6,261	5,457	2,452	1,571	677	204	0	3,005	2,354
North Dakota	4	2	2	0	0	0	2	135	120	46	46	0	0	0	74	22
South Dakota	7	3	3	0	0	0	4	424	385	181	151	30	0	0	204	109
Nebraska	14	9	7	2	0	0	5	360	317	203	147	56	0	0	114	307
Kansas	37	15	8	6	0	1	22	1,622	1,480	595	363	204	0	28	885	517
West North Central	375	164	104	49	5	6	211	14,723	12,982	5,924	3,863	1,562	205	294	7,058	5,772

Table 15A.—Geographic Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1986—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	8	3	1	1	0	1	5	510	468	140	125	11	0	4	328	54
Maryland	80	35	25	7	1	2	45	5,356	4,629	2,313	1,639	380	6	288	2,316	2,354
District of Columbia	31	23	21	1	1	0	8	1,016	901	590	453	28	103	6	311	870
Virginia	54	30	19	5	1	5	24	3,111	2,785	1,348	993	214	10	131	1,437	1,600
West Virginia	28	15	10	3	2	0	13	1,216	1,091	531	456	37	38	0	560	614
North Carolina	43	19	15	4	0	0	24	17,116	15,872	6,317	6,111	206	0	0	9,555	2,117
South Carolina	17	4	4	0	0	0	13	1,519	1,378	610	560	50	0	0	768	421
Georgia	72	36	26	10	0	0	36	9,064	8,264	3,791	3,015	591	30	155	4,473	3,160
Florida	80	30	19	10	0	1	50	6,234	6,083	2,412	1,856	534	10	12	3,671	1,470
South Atlantic	413	195	140	41	5	9	218	45,142	41,471	18,052	15,208	2,051	197	596	23,419	12,660
Kentucky	60	28	15	11	1	1	32	4,204	3,822	1,611	1,250	262	85	14	2,211	942
Tennessee	73	34	17	16	0	1	39	9,603	8,684	4,098	3,301	408	0	389	4,586	3,253
Alabama	61	30	26	4	0	0	31	3,884	3,607	1,769	1,615	121	14	19	1,838	1,799
Mississippi	22	5	4	0	1	0	17	1,730	1,619	588	516	19	14	39	1,031	368
East South Central	216	97	62	31	2	2	119	19,421	17,732	8,066	6,682	810	113	461	9,666	6,362
Arkansas	37	16	15	1	0	0	21	4,161	3,659	1,801	1,713	88	0	0	1,858	2,048
Louisiana	43	21	14	6	0	1	22	1,799	1,639	836	635	154	5	42	803	954
Oklahoma	25	8	5	1	0	2	17	891	815	321	247	34	0	40	494	269
Texas	95	43	26	14	0	3	52	5,479	4,980	2,473	1,594	829	0	50	2,507	2,559
West South Central	200	88	60	22	0	6	112	12,330	11,093	5,431	4,189	1,105	5	132	5,662	5,830
Montana	31	15	13	1	1	0	16	853	735	309	175	30	104	0	426	231
Idaho	15	6	5	1	0	0	9	1,096	1,001	281	263	14	0	4	720	271
Wyoming	5	4	2	1	0	1	1	164	154	104	35	8	1	60	50	141
Colorado	55	24	19	1	0	4	31	1,823	1,607	790	569	70	0	151	817	795
New Mexico	16	8	4	2	0	2	8	726	681	346	164	77	0	105	335	520
Arizona	26	9	7	2	0	0	17	2,203	2,022	914	767	147	0	0	1,108	628
Utah	17	8	4	4	0	0	9	989	875	307	163	108	36	0	568	170

Table 15A.—Geographic Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1986—Continued

Division and State[1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		
Nevada	21	7	1	2	0	4	14	887	690	330	118	43	0	169	360	482
Mountain	186	81	55	14	1	11	105	8,741	7,765	3,381	2,254	497	141	489	4,384	3,238
Washington	147	56	25	24	0	7	91	4,593	3,466	1,625	897	616	2	110	1,841	1,699
Oregon	87	33	15	12	1	5	54	4,320	3,764	1,693	1,338	187	32	136	2,071	1,223
California	548	229	125	85	5	14	319	22,923	19,583	9,919	6,428	2,520	374	597	9,664	10,232
Alaska	24	6	6	0	0	0	18	724	632	201	156	1	44	0	431	96
Hawaii	23	13	7	2	4	0	10	921	748	425	228	26	140	31	323	414
Guam	3	1	0	0	0	1	2	2,077	1,855	649	0	647	0	2	1,206	3
Pacific	832	338	178	123	10	27	494	35,558	30,048	14,512	9,047	3,997	592	876	15,536	13,667
Puerto Rico	51	19	2	6	0	11	32	4,295	3,940	1,688	466	345	0	877	2,252	1,010
Virgin Islands	2	1	0	0	0	1	1	54	54	41	10	0	0	31	13	31
Outlying Areas	53	20	2	6	0	12	33	4,349	3,994	1,729	476	345	0	908	2,265	1,041
Total, all States and areas	4,520	1,951	1,204	524	61	162	2,569	259,239	229,573	106,461	76,291	17,379	3,977	8,814	123,112	91,999

[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 1986

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	7	2	2	0	0	0	5	738	667	255	255	0	0	0	412	80
New Hampshire	6	3	2	1	0	0	3	154	140	94	10	84	0	0	46	82
Vermont	3	2	1	1	0	0	1	64	59	32	26	6	0	0	27	52
Massachusetts	106	66	51	11	2	2	40	4,655	4,046	2,167	1,463	249	372	83	1,879	1,972
Rhode Island	12	6	3	0	3	0	6	1,646	1,554	1,044	422	2	620	0	510	842
Connecticut	60	31	6	12	3	10	29	3,729	3,368	1,594	846	225	132	391	1,774	1,422
New England	194	110	65	25	8	12	84	10,986	9,834	5,186	3,022	566	1,124	474	4,648	4,450
New York	320	159	109	23	1	26	161	18,294	15,542	7,520	5,370	731	412	1,007	8,022	6,661
New Jersey	147	65	40	17	3	5	82	8,799	7,490	3,825	2,446	570	175	634	3,665	3,485
Pennsylvania	261	114	71	27	5	11	147	16,050	14,436	6,371	4,295	1,089	107	880	8,065	4,738
Middle Atlantic	728	338	220	67	9	42	390	43,143	37,468	17,716	12,111	2,390	694	2,521	19,752	14,884
Ohio	247	97	65	25	6	1	150	13,835	12,744	5,362	4,025	927	339	71	7,382	3,678
Indiana	122	55	23	28	0	4	67	6,715	6,413	2,805	1,791	840	15	159	3,608	2,287
Illinois	203	96	50	25	12	9	107	6,955	6,129	2,930	1,719	493	251	467	3,199	2,626
Michigan	307	153	99	44	3	7	154	17,048	14,815	7,435	5,809	885	162	579	7,380	6,675
Wisconsin	86	37	22	11	0	4	49	4,758	4,289	2,187	1,415	366	2	404	2,102	1,590
East North Central	965	438	259	133	21	25	527	49,311	44,390	20,719	14,759	3,511	769	1,680	23,671	16,856
Iowa	44	19	11	7	0	1	25	1,408	1,211	559	372	161	0	26	652	500
Minnesota	73	38	24	10	0	4	35	3,093	2,775	1,352	820	292	0	240	1,423	1,270
Missouri	117	57	34	18	5	0	60	5,009	4,380	2,013	1,165	644	204	0	2,367	1,754
North Dakota	2	2	2	0	0	0	0	22	18	17	17	0	0	0	1	22
South Dakota	4	3	3	0	0	0	1	231	209	100	70	30	0	0	109	109
Nebraska	14	9	7	2	0	0	5	360	317	203	147	56	0	0	114	307
Kansas	30	14	8	5	0	1	16	1,451	1,326	501	327	146	0	28	825	439
West North Central	284	142	89	42	5	6	142	11,574	10,236	4,745	2,918	1,329	204	294	5,491	4,401

Table 15B.—Geographic Distribution of Collective-Bargaining Elections Held in Cases Closed, Fiscal Year 1986—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	7	3	1	1	0	1	4	480	440	134	125	5	0	4	306	54
Maryland	74	34	25	7	1	1	40	4 760	4 118	2,076	1,619	380	6	71	2,042	2,348
District of Columbia	30	22	20	1	1	0	8	1,006	891	580	443	28	103	6	311	860
Virginia	47	29	18	5	1	5	18	2,905	2,594	1,265	924	200	10	131	1,329	1,514
West Virginia	22	11	7	2	2	0	11	1,036	923	443	376	29	38	0	480	446
North Carolina	35	15	12	3	0	0	20	16,642	15,426	6,106	5,941	165	0	0	9,320	1,848
South Carolina	13	3	3	0	0	0	10	1,189	1,102	489	439	50	0	0	613	341
Georgia	62	33	24	9	0	0	29	8,061	7,360	3,245	2,668	547	30	0	4,115	2,755
Florida	67	26	16	9	0	1	41	5,153	5,026	1,877	1,350	505	10	12	3,149	810
South Atlantic	357	176	126	37	5	8	181	41,232	37,880	16 215	13,885	1,909	197	224	21,665	10,976
Kentucky	48	23	13	9	1	0	25	3,645	3,319	1,400	1,123	192	85	0	1,919	793
Tennessee	55	28	13	14	0	1	27	7,443	6,871	2,769	2,448	312	0	9	4,102	1,586
Alabama	50	28	24	4	0	0	22	3,283	3,045	1,521	1,404	102	14	1	1,524	1,550
Mississippi	19	4	3	0	1	0	15	1,671	1,566	579	510	16	14	39	987	360
East South Central	172	83	53	27	2	1	89	16,042	14,801	6,269	5 485	622	113	49	8,532	4,289
Arkansas	33	15	15	0	0	0	18	3,705	3,247	1,599	1,579	20	0	0	1,648	1,957
Louisiana	35	18	12	5	0	1	17	1,385	1,242	639	481	131	5	22	603	776
Oklahoma	19	7	5	1	0	1	12	772	700	273	242	25	0	6	427	207
Texas	72	34	21	12	0	1	38	4,616	4,186	2,169	1,363	802	0	4	2,017	2,295
West South Central	159	74	53	18	0	3	85	10,478	9,375	4,680	3,665	978	5	32	4,695	5,235
Montana	19	10	8	1	1	0	9	587	512	206	79	23	104	0	306	113
Idaho	11	5	5	0	0	0	6	1,008	924	253	249	0	0	4	671	244
Wyoming	4	4	2	1	0	1	0	141	131	96	27	8	1	60	35	141
Colorado	43	23	19	0	0	4	20	1,569	1,380	702	541	10	0	151	678	712
New Mexico	9	6	2	2	0	2	3	450	419	244	62	77	0	105	175	374
Arizona	19	8	7	1	0	0	11	1,110	1,011	436	402	34	0	0	575	428
Utah	17	8	4	4	0	0	9	989	875	307	163	108	36	0	568	170

Table 15B.—Geographic Distribution of Collective-Bargaining Elections Held in Cases Closed, Fiscal Year 1986—Continued

Division and State[1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		
Nevada	11	6	1	1	0	4	5	619	440	254	69	16	0	169	186	458
Mountain	133	70	48	10	1	11	63	6,473	5,692	2,498	1,592	276	141	489	3,194	2,640
Washington	96	46	21	19	0	6	50	3,489	2,557	1,239	655	493	2	89	1,318	1,372
Oregon	56	25	13	8	0	4	31	3,233	2,795	1,222	1,011	86	0	125	1,573	730
California	430	200	111	72	5	12	230	19,488	16,746	8,807	5,730	2,226	374	477	7,939	8,943
Alaska	20	6	6	0	0	0	14	674	592	192	147	1	44	0	400	96
Hawaii	17	11	7	1	3	0	6	684	535	339	228	2	78	31	196	356
Guam	3	1	0	0	0	1	2	2,077	1,855	649	0	647	0	2	1,206	3
Pacific	622	289	158	100	8	23	333	29,645	25,080	12,448	7,771	3,455	498	724	12,632	11,500
Puerto Rico	47	19	2	6	0	11	28	4,080	3 735	1,618	426	317	0	875	2,117	1,010
Virgin Islands	2	1	0	0	0	1	1	54	54	41	10	0	0	31	13	31
Outlying Areas	49	20	2	6	0	12	29	4,134	3 789	1,659	436	317	0	906	2,130	1,041
Total, all States and areas	3,663	1,740	1,073	465	59	143	1 923	223,018	198,545	92,135	65,644	15,353	3,745	7,393	106,410	76,272

[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 1986

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	55	52	11	0	11	0	0	41	0
Vermont	1	1	1	0	0	0	0	25	25	17	17	0	0	0	8	25
Massachusetts	8	2	2	0	0	0	6	143	115	50	41	6	0	3	65	41
Rhode Island	3	1	1	0	0	0	2	31	29	10	10	0	0	0	19	10
Connecticut	8	3	3	0	0	0	5	2,361	1,463	808	804	4	0	0	655	2,286
New England	23	7	7	0	0	0	16	2,615	1,684	896	872	21	0	3	788	2,362
New York	42	10	8	1	0	1	32	1,538	1,314	647	578	48	0	21	667	736
New Jersey	24	8	2	2	0	4	16	1,336	1,005	448	181	37	115	115	557	320
Pennsylvania	50	14	11	3	0	0	36	1,923	1,638	699	588	89	5	17	939	650
Middle Atlantic	116	32	21	6	0	5	84	4,797	3,957	1,794	1,347	174	120	153	2,163	1,706
Ohio	45	11	8	2	0	1	34	1,595	1,388	605	494	96	0	15	783	661
Indiana	23	5	4	0	0	1	18	1,033	968	460	395	35	0	30	508	366
Illinois	60	14	8	3	0	3	46	2,100	1,880	881	649	59	9	164	999	1,173
Michigan	56	10	8	2	0	0	46	2,368	1,991	759	664	83	8	4	1,232	880
Wisconsin	35	3	3	0	0	0	32	1,027	928	350	259	77	0	14	578	91
East North Central	219	43	31	7	0	5	176	8,123	7,155	3,055	2,461	350	17	227	4,100	3,171
Iowa	14	5	1	4	0	0	9	318	294	136	57	79	0	0	158	207
Minnesota	32	9	8	1	0	0	23	1,102	943	400	336	63	1	0	543	486
Missouri	33	7	6	1	0	0	26	1,252	1,077	439	406	33	0	0	638	600
North Dakota	2	0	0	0	0	0	2	113	102	29	29	0	0	0	73	0
South Dakota	3	0	0	0	0	0	3	193	176	81	81	0	0	0	95	0
Nebraska	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Kansas	7	1	0	1	0	0	6	171	154	94	36	58	0	0	60	78
West North Central	91	22	15	7	0	0	69	3,149	2,746	1,179	945	233	1	0	1,567	1,371

Table 15C.—Geographic Distribution of Decertification Elections Held in Cases Closed, Fiscal Year 1986—Continued

Division and State[1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL–CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL–CIO unions	Teamsters	Other national unions	Other local unions		
Delaware	1	0	0	0	0	0	1	30	28	6	0	6	0	0	22	0
Maryland	6	1	0	0	0	1	5	596	511	237	20	0	0	217	274	6
District of Columbia	1	1	1	0	0	0	0	10	10	10	10	0	0	0	0	10
Virginia	7	1	1	0	0	0	6	206	191	83	69	14	0	0	108	86
West Virginia	6	4	3	1	0	0	2	180	168	88	80	8	0	0	80	168
North Carolina	8	4	3	1	0	0	4	474	446	211	170	41	0	0	235	269
South Carolina	4	1	1	0	0	0	3	330	276	121	121	0	0	0	155	80
Georgia	10	3	2	1	0	0	7	1,003	904	546	347	44	0	155	358	405
Florida	13	4	3	1	0	0	9	1,081	1,057	535	506	29	0	0	522	660
South Atlantic	56	19	14	4	0	1	37	3,910	3,591	1,837	1,323	142	0	372	1,754	1,684
Kentucky	12	5	2	2	0	1	7	559	503	211	127	70	0	14	292	149
Tennessee	18	6	4	2	0	0	12	2,160	1,813	1,329	853	96	0	380	484	1,667
Alabama	11	2	2	0	0	0	9	601	562	248	211	19	0	18	314	249
Mississippi	3	1	1	0	0	0	2	59	53	9	6	3	0	0	44	8
East South Central	44	14	9	4	0	1	30	3,379	2,931	1,797	1,197	188	0	412	1,134	2,073
Arkansas	4	1	0	1	0	0	3	456	412	202	134	68	0	0	210	91
Louisiana	8	3	2	1	0	0	5	414	397	197	154	23	0	20	200	178
Oklahoma	6	1	0	0	0	1	5	119	115	48	5	9	0	34	67	62
Texas	23	9	5	2	0	2	14	863	794	304	231	27	0	46	490	264
West South Central	41	14	7	4	0	3	27	1,852	1,718	751	524	127	0	100	967	595
Montana	12	5	5	0	0	0	7	266	223	103	96	7	0	0	120	118
Idaho	4	1	0	1	0	0	3	88	77	28	14	14	0	0	49	27
Wyoming	1	0	0	0	0	0	1	23	23	8	8	0	0	0	15	0
Colorado	12	1	0	1	0	0	11	254	227	88	28	60	0	0	139	83
New Mexico	7	2	2	0	0	0	5	276	262	102	102	0	0	0	160	146
Arizona	7	1	0	1	0	0	6	1,093	1,011	478	365	113	0	0	533	200
Utah	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Table 15C.—Geographic Distribution of Decertification Elections Held in Cases Closed, Fiscal Year 1986—Continued

Division and State[1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		
Nevada	10	1	0	1	0	0	9	268	250	76	49	27	0	0	174	24
Mountain	53	11	7	4	0	0	42	2,268	2,073	883	662	221	0	0	1,190	598
Washington	51	10	4	5	0	1	41	1,104	909	386	242	123	0	21	523	327
Oregon	31	8	2	4	1	1	23	1,087	969	471	327	101	32	11	498	493
California	118	29	14	13	0	2	89	3,435	2,837	1,112	698	294	0	120	1,725	1,289
Alaska	4	0	0	0	0	0	4	50	40	9	9	0	0	0	31	0
Hawaii	6	2	0	1	1	0	4	237	213	86	0	24	62	0	127	58
Guam	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Pacific	210	49	20	23	2	4	161	5,913	4,968	2,064	1,276	542	94	152	2,904	2 167
Puerto Rico	4	0	0	0	0	0	4	215	205	70	40	28	0	2	135	0
Virgin Islands	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Outlying Areas	4	0	0	0	0	0	4	215	205	70	40	28	0	2	135	0
Total, all States and areas	857	211	131	59	2	19	646	36,221	31,028	14,326	10,647	2,026	232	1,421	16,702	15,727

[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 1986

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	184	69	35	31	0	3	115	15,686	14,225	6,135	3,658	2,064	38	375	8,090	3,943
Tobacco manufacturers	1	1	1	0	0	0	0	9	9	8	8	0	0	0	1	9
Textile mill products	24	8	4	4	0	0	16	3,270	2,885	1,758	1,112	185	5	456	1,127	1,651
Apparel and other finished products made from fabric and similar materials	27	10	8	1	0	1	17	13,239	12,102	4,686	4,485	27	126	48	7,416	1 219
Lumber and wood products (except furniture)	91	40	28	9	0	3	51	6,218	5,133	2,143	1,716	245	0	182	2,990	1,698
Furniture and fixtures	64	24	15	6	2	1	40	5,892	5,336	2,625	2,190	358	51	26	2,711	2,460
Paper and allied products	60	27	18	9	0	0	33	2,856	2,610	1,212	846	314	0	52	1,398	1,106
Printing, publishing, and allied products	105	39	24	6	2	7	66	4,999	4,608	2,263	1,345	538	148	232	2,345	2,052
Chemicals and allied products	92	41	29	11	0	1	51	4,408	4,134	1,939	1,673	206	0	60	2,195	2,149
Petroleum refining and related industries	19	5	2	2	0	1	14	1,207	1,122	507	137	216	0	154	615	338
Rubber and miscellaneous plastic products	103	38	30	6	2	0	65	10,272	9,401	3,824	3,035	631	96	62	5,577	2,511
Leather and leather products	14	7	4	0	0	3	7	1,495	1,338	574	443	0	2	129	764	533
Stone, clay, glass, and concrete products	98	36	22	13	0	1	62	5,039	4,680	2,035	1,513	367	0	155	2,645	1,953
Primary metal industries	108	59	45	7	1	6	49	7,050	6,552	3,409	2,752	219	15	423	3,143	2,972
Fabricated metal products (except machinery and transportation equipment)	188	80	61	12	3	4	108	11,812	10,789	5,047	4,327	470	88	162	5,742	3,862
Machinery (except electrical)	160	68	50	11	1	6	92	12,927	11,884	4,781	3,851	533	21	376	7,103	2,661
Electrical and electronic machinery, equipment, and supplies	100	36	27	6	1	2	64	12,197	11,150	5 558	4,877	506	94	81	5,592	4,198
Aircraft and parts	95	44	29	12	0	3	51	8,254	7,461	3,678	2,946	570	37	125	3,783	4,119
Ship and boat building and repairing	10	3	3	0	0	0	7	3,457	2,537	1,140	1,119	0	0	21	1,397	2,267
Automotive and other transportation equipment	16	7	6	1	0	0	9	779	712	334	248	86	0	0	378	202
Measuring, analyzing, and controlling instruments, photographic, medical, and optical goods watches and clocks	35	10	7	1	0	2	25	2,680	2,516	1,219	821	57	15	326	1,297	739
Miscellaneous manufacturing industries	164	64	31	19	5	9	100	7,235	6,509	2,788	1,682	713	82	311	3,721	2,243
Manufacturing	1,758	716	479	167	17	53	1 042	140,981	127,693	57,663	44,784	8,305	818	3,756	70,030	44,885
Metal mining	8	2	2	0	0	0	6	1,311	1,202	540	450	0	90	0	662	105
Coal mining	14	5	1	0	3	1	9	1,185	1,091	362	183	0	119	60	729	162
Oil and gas extraction	7	2	1	1	0	0	5	303	285	101	94	7	0	0	184	91

Table 16.—Industrial Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1986—Continued

Industrial group[1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL-CIO unions	Teamsters	Other national unions	Other local unions		
Mining and quarrying of nonmetallic minerals (except fuels)	7	3	2	1	0	0	4	287	251	98	96	2	0	0	153	8
Mining	36	12	6	2	3	1	24	3,086	2,829	1,101	823	9	209	60	1,728	366
Construction	199	89	72	9	3	5	110	4,346	3,766	1,905	1,632	113	38	122	1,861	2,321
Wholesale trade	386	141	53	84	2	2	245	13,033	11,509	5,044	2,512	1,852	273	407	6,465	4,583
Retail trade	501	176	100	62	3	11	325	17,895	15,360	6,377	4,290	1,568	61	458	8,983	5,747
Finance, insurance, and real estate	83	55	42	7	1	5	28	2,962	2,506	1,364	1,084	128	13	139	1,142	2,003
U S Postal Service	1	1	0	0	1	0	0	3	3	3	0	0	3	0	0	3
Local and suburban transit and interurban highway passenger transportation	53	34	15	16	1	2	19	2,618	2,043	1,197	529	511	17	140	846	1,841
Motor freight transportation and warehousing	273	103	12	82	5	4	170	6,739	5,919	2,884	514	1,894	217	259	3,035	2,888
Water transportation	16	5	4	0	1	0	11	572	449	187	141	20	26	0	262	152
Other transportation	29	12	2	9	1	0	17	1,485	1,411	605	458	127	20	0	806	164
Communication	96	39	36	1	0	2	57	1,880	1,746	792	747	24	9	12	954	738
Electric, gas, and sanitary services	89	35	24	8	2	1	54	3,434	3,237	1,728	982	221	502	23	1,509	1,388
Transportation, communication, and other utilities	556	228	93	116	10	9	328	16,728	14,805	7,393	3,371	2,797	791	434	7,412	7,171
Hotels, rooming houses, camps, and other lodging places	73	32	24	3	0	5	41	4,690	3,793	1,782	1,394	178	59	151	2,011	1,661
Personal services	58	24	13	8	0	3	34	2,025	1,807	949	532	351	0	66	858	954
Automotive repair, services, and garages	73	41	18	21	0	2	32	1,215	1,096	574	213	346	0	15	522	631
Motion pictures	10	5	4	0	0	1	5	364	293	158	156	0	0	2	135	105
Amusement and recreation services (except motion pictures)	34	12	11	0	1	0	22	1,582	1,367	528	381	1	125	21	839	726
Health services	373	190	143	15	5	27	183	36,178	30,837	14,927	10,648	1,001	1,111	2,167	15,910	13,311
Educational services	39	20	13	1	2	4	19	2,192	1,912	961	671	21	85	184	951	727
Membership organizations	23	15	7	1	0	7	8	410	367	248	143	13	0	92	119	277
Business services	207	123	78	20	6	19	84	7,722	6,363	3,802	2,410	589	274	529	2,561	4,609
Miscellaneous repair services	17	6	3	3	0	0	11	383	330	105	70	35	0	0	225	75

Table 16.—Industrial Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1986—Continued

Industrial group[1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL–CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL–CIO unions	Teamsters	Other national unions	Other local unions		
Museums, art galleries, botanical and zoological gardens	1	1	1	0	0	0	0	29	29	27	26	0	0	1	2	29
Legal services	6	6	4	0	0	2	0	251	216	151	114	0	0	37	65	251
Social services	64	47	34	5	3	5	17	2,652	2,267	1,182	916	72	43	151	1,085	1,309
Miscellaneous services	13	5	2	0	2	1	8	378	312	131	74	0	35	22	181	150
Services	991	527	355	77	19	76	464	60,071	50,989	25,525	17,748	2,607	1,732	3,438	25,464	24,815
Public administration	9	6	4	0	2	0	3	134	113	86	47	0	39	0	27	105
Total, all industrial groups	4,520	1,951	1,204	524	61	162	2 569	259,239	229,573	106,461	76,291	17,379	3,977	8,814	123,112	91,999

[1] Source Standard Industrial Classification, Statistical Policy Division, Office of Management and Budget, Washington, D C , 1972

Table 17.—Size of Units in Representation Elections in Cases Closed, Fiscal Year 1986[1]

Size of unit (number of employees)	Number eligible to vote	Total elections	Percent of total	Cumulative percent of total	Elections in which representation rights were won by								Elections in which no representative was chosen	
					AFL–CIO unions		Teamsters		Other national unions		Other local unions			
					Number	Percent by size class	Number	Percent by size class	Number	Percent by size class	Number	Percent of size class	Number	Percent by size class
					A Certification elections (RC and RM)									
Total RC and RM elections	223,018	3,663	100 0	——	1,073	100 0	465	100 0	59	100 0	143	100 0	1,923	100 0
Under 10	14,886	831	22 7	22 7	268	25 0	156	33 6	12	20 3	27	18 8	368	19 1
10 to 19	10,620	749	20 4	43 1	234	21 7	131	28 2	11	18 6	33	23 1	340	17 7
20 to 29	10 402	430	11 7	54 8	112	10 3	53	11 4	8	13 6	16	11 2	241	12 5
30 to 39	10,306	300	8 2	63 0	92	8 6	34	7 3	10	16 9	12	8 4	152	7 9
40 to 49	9,291	212	5 8	68 8	67	6 2	22	4 7	5	8 5	3	2 1	115	6 0
50 to 59	9,815	181	4 9	73 7	51	4 8	20	4 3	1	1 7	12	8 4	97	5 0
60 to 69	8,890	138	3 8	77 5	37	3 3	10	2 2	1	1 7	4	2 8	86	4 5
70 to 79	9,394	127	3 5	81 0	43	4 0	13	2 8	4	6 8	7	4 9	60	3 1
80 to 89	7,330	87	2 4	83 4	21	2 0	5	1 1	0	0 0	4	2 8	57	3 0
90 to 99	6,411	68	1 9	85 3	15	1 4	3	0 6	1	1 7	6	4 2	43	2 2
100 to 109	5,714	55	1 5	86 8	21	2 0	4	0 9	0	0 0	2	1 4	28	1 5
110 to 119	7 137	62	1 7	88 5	18	1 7	3	0 6	1	1 7	2	1 4	38	2 0
120 to 129	6,099	49	1 3	89 8	14	1 3	1	0 2	0	0 0	3	2 1	31	1 6
130 to 139	4,291	32	0 9	90 7	2	0 2	4	0 9	0	0 0	2	1 4	24	1 2
140 to 149	3,772	26	0 7	91 4	3	0 3	0	0 0	0	0 0	1	0 7	22	1 1
150 to 159	4,468	29	0 8	92 2	7	0 7	0	0 0	1	1 7	3	2 1	18	0 9
160 to 169	5,083	31	0 8	93 0	11	1 0	1	0 2	2	3 4	0	0 0	17	0 9
170 to 179	2,443	14	0 4	93 4	6	0 6	1	0 2	0	0 0	0	0 0	7	0 4
180 to 189	1,837	10	0 3	93 7	3	0 3	0	0 0	0	0 0	1	0 7	6	0 3
190 to 199	4,085	21	0 6	94 3	6	0 6	0	0 0	0	0 0	1	0 7	14	0 7
200 to 299	27,089	114	3 0	97 3	21	2 0	3	0 6	1	1 7	0	0 0	89	4 6
300 to 399	12,469	37	1 0	98 3	8	0 7	0	0 0	0	0 0	2	1 4	27	1 4
400 to 499	11,189	25	0 7	99 0	5	0 5	0	0 0	0	0 0	1	0 7	19	1 0
500 to 599	5,545	10	0 3	99 3	4	0 4	1	0 2	0	0 0	1	0 7	4	0 2
600 to 799	8,818	13	0 4	99 7	3	0 3	0	0 0	1	1 7	0	0 0	9	0 5
800 to 999	6,096	7	0 2	99 9	0	0 0	0	0 0	0	0 0	0	0 0	7	0 4
1,000 to 1,999	4,443	3	0 1	100 0	1	0 1	0	0 0	0	0 0	0	0 0	2	0 1
2,000 to 2,999	2,058	1	0 0	100 0	0	0 0	0	0 0	0	0 0	0	0 0	1	0 1
3,000 to 9,999	3,037	1	0 0	100 0	0	0 0	0	0 0	0	0 0	0	0 0	1	0 1

Table 17.—Size of Units in Representation Elections in Cases Closed, Fiscal Year 1986[1]—Continued

Size of unit (number of employees)	Number eligible to vote	Total elections	Percent of total	Cumulative percent of total	Elections in which representation rights were won by								Elections in which no representative was chosen	
					AFL-CIO unions		Teamsters		Other national unions		Other local unions			
					Number	Percent by size class	Number	Percent by size class	Number	Percent by size class	Number	Percent of size class	Number	Percent by size class
					B Decertification elections (RD)									
Total RD elections	36,221	857	100 0	——	131	100 0	59	100 0	2	100 0	19	100 0	646	100 0
Under 10	1,456	269	31 4	31 4	18	13 7	12	20 3	0	0 0	4	21 1	235	36 4
10 to 19	2,657	197	23 0	54 4	17	13 0	16	27 1	1	50 0	2	10 5	161	24 9
20 to 29	2,327	97	11 3	65 7	17	13 0	10	16 9	0	0 0	6	31 5	64	9 9
30 to 39	2,119	63	7 4	73 1	11	8 4	4	6 8	0	0 0	1	5 3	47	7 3
40 to 49	1 728	39	4 6	77 7	5	3 8	1	1 7	0	0 0	2	10 5	31	4 8
50 to 59	1,869	35	4 1	81 8	9	6 9	2	3 4	0	0 0	0	0 0	24	3 7
60 to 69	2,113	33	3 9	85 7	7	5 3	5	8 5	0	0 0	2	10 5	19	2 9
70 to 79	1 585	21	2 5	88 2	5	3 8	1	1 7	1	50 0	0	0 0	14	2 2
80 to 89	1,932	23	2 7	90 9	11	8 4	3	5 1	0	0 0	0	0 0	9	1 4
90 to 99	1 011	11	1 3	92 2	2	1 5	2	3 4	0	0 0	0	0 0	7	1 1
100 to 109	1,034	10	1 2	93 4	3	2 3	1	1 7	0	0 0	0	0 0	6	0 9
110 to 119	560	5	0 5	93 9	2	1 5	0	0 0	0	0 0	0	0 0	3	0 5
120 to 129	491	4	0 4	94 3	3	2 3	0	0 0	0	0 0	0	0 0	1	0 2
130 to 139	664	5	0 5	94 8	4	3 1	1	1 7	0	0 0	0	0 0	0	0 0
140 to 149	717	5	0 5	95 3	2	1 5	0	0 0	0	0 0	0	0 0	3	0 5
150 to 159	1,078	7	0 8	96 1	2	1 5	0	0 0	0	0 0	1	5 3	4	0 6
160 to 169	332	2	0 2	96 3	0	0 0	0	0 0	0	0 0	0	0 0	2	0 3
170 to 199	1,277	7	0 8	97 1	3	2 3	0	0 0	0	0 0	0	0 0	4	0 6
200 to 299	2,373	10	1 2	98 3	4	3 1	1	1 7	0	0 0	1	5 3	4	0 6
300 to 499	3,614	9	1 1	99 4	3	2 3	0	0 0	0	0 0	0	0 0	6	0 9
500 to 799	1 798	3	0 4	99 8	1	0 8	0	0 0	0	0 0	0	0 0	2	0 3
800 and over	3,486	2	0 2	100 0	2	1 5	0	0 0	0	0 0	0	0 0	0	0 0

[1] See Glossary of terms for definitions

Table 18.—Distribution of Unfair Labor Practice Situations Received, by Number of Employees in Establishments, Fiscal Year 1986[1]

Size of establishment (number of employees)	Total number of situations	Total		Type of situations																	
				CA		CB		CC		CD		CE		CG		CP		CA–CB combinations		Other C combinations	
		Percent of all situations	Cumulative percent of all situations	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class
Total	[2]30,326	100 0	——	20,843	100 0	6,543	100 0	985	100 0	231	100 0	58	100 0	21	100 0	194	100 0	1,311	100 0	140	100 0
Under 10	8,407	27 7	27 7	5,415	26 0	2,019	30 9	414	42 2	93	40 4	29	50 0	2	9 5	68	35 1	317	24 1	50	35 7
10–19	2,633	8 7	36 4	2,048	9 8	339	5 2	93	9 4	24	10 5	4	6 9	0	0 0	32	16 5	76	5 8	17	12 1
20–29	2,031	6 7	43 1	1,548	7 4	280	4 3	71	7 2	21	9 1	5	8 6	0	0 0	26	13 4	59	4 5	21	15 0
30–39	1,409	4 6	47 7	1,020	4 9	232	3 5	69	7 0	13	5 6	5	8 6	1	4 8	7	3 6	52	4 0	10	7 1
40–49	1,027	3 4	51 1	790	3 8	158	2 4	30	3 0	10	4 3	1	1 8	0	0 0	8	4 1	25	1 9	5	3 6
50–59	1,294	4 3	55 4	923	4 4	256	3 9	35	3 6	6	2 6	2	3 4	1	4 8	7	3 6	61	4 7	3	2 2
60–69	787	2 6	58 0	602	2 9	131	2 0	15	1 5	2	0 9	2	3 4	1	4 8	5	2 6	28	2 1	1	0 7
70–79	717	2 4	60 4	544	2 6	128	2 0	11	1 1	4	1 7	0	0 0	1	4 8	1	0 5	27	2 1	1	0 7
80–89	552	1 8	62 2	423	2 0	83	1 3	15	1 5	1	0 4	0	0 0	1	4 8	1	0 5	26	2 0	2	1 4
90–99	314	1 0	63 2	230	1 1	59	0 9	4	0 4	0	0 0	0	0 0	0	0 0	8	4 1	10	0 8	3	2 2
100–109	1,375	4 5	67 7	860	4 1	362	5 5	53	5 5	19	8 2	6	10 3	1	4 8	5	2 6	67	5 1	2	1 4
110–119	231	0 8	68 5	193	0 9	26	0 4	2	0 2	0	0 0	0	0 0	0	0 0	1	0 5	6	0 5	3	2 2
120–129	452	1 5	70 0	334	1 6	83	1 3	11	1 1	1	0 4	1	1 8	1	4 8	2	1 0	18	1 4	1	0 7
130–139	187	0 6	70 6	152	0 7	21	0 3	3	0 3	0	0 0	0	0 0	0	0 0	3	1 5	7	0 5	1	0 7
140–149	125	0 4	71 0	104	0 5	14	0 2	0	0 0	0	0 0	0	0 0	0	0 0	0	0 0	6	0 5	1	0 7
150–159	606	2 0	73 0	428	2 1	140	2 1	4	0 4	3	1 3	0	0 0	1	4 8	0	0 0	27	2 1	3	2 2
160–169	117	0 4	73 4	89	0 4	20	0 3	2	0 2	0	0 0	0	0 0	0	0 0	0	0 0	5	0 4	1	0 7
170–179	158	0 5	73 9	117	0 6	30	0 5	3	0 3	3	1 3	0	0 0	0	0 0	0	0 0	5	0 4	0	0 0
180–189	121	0 4	74 3	97	0 5	15	0 2	1	0 1	0	0 0	0	0 0	0	0 0	1	0 5	7	0 5	0	0 0
190–199	45	0 1	74 4	26	0 1	16	0 2	3	0 3	0	0 0	0	0 0	0	0 0	0	0 0	0	0 0	0	0 0
200–299	1,832	6 0	80 4	1,285	6 2	398	6 1	38	3 9	7	3 0	2	3 4	1	4 8	10	5 2	87	6 5	4	2 9
300–399	1,100	3 6	84 0	703	3 4	295	4 5	25	2 5	3	1 3	0	0 0	0	0 0	2	1 0	71	5 4	1	0 7
400–499	586	1 9	85 9	406	1 9	139	2 1	9	0 9	1	0 4	0	0 0	1	4 8	1	0 5	29	2 2	0	0 0
500–599	632	2 1	88 0	379	1 8	196	3 0	8	0 8	2	0 9	0	0 0	0	0 0	1	0 5	44	3 4	2	1 4
600–699	313	1 0	89 0	207	1 0	78	1 2	2	0 2	0	0 0	0	0 0	0	0 0	0	0 0	25	1 9	1	0 7
700–799	237	0 8	89 8	157	0 8	64	1 0	1	0 1	0	0 0	0	0 0	6	28 1	1	0 5	8	0 6	0	0 0
800–899	265	0 9	90 7	166	0 8	61	0 9	7	0 7	4	1 7	0	0 0	0	0 0	4	2 1	23	1 8	0	0 0
900–999	111	0 4	91 1	76	0 4	24	0 4	5	0 5	0	0 0	1	1 8	0	0 0	0	0 0	5	0 4	0	0 0
1,000–1,999	1 072	3 5	94 6	652	3 1	344	5 3	13	1 3	1	0 4	0	0 0	1	4 8	0	0 0	58	4 4	3	2 2
2 000–2,999	511	1 7	96 3	290	1 4	174	2 7	3	0 3	0	0 0	0	0 0	0	0 0	0	0 0	42	3 2	2	1 4
3 000–3,999	271	0 9	97 2	124	0 6	101	1 5	12	1 2	10	4 3	0	0 0	1	4 8	0	0 0	22	1 7	1	0 7

Table 18.—Distribution of Unfair Labor Practice Situations Received, by Number of Employees in Establishments, Fiscal Year 1986[1]—Continued

Size of establishment (number of employees)	Total number of situations	Total		Type of situations																	
				CA		CB		CC		CD		CE		CG		CP		CA–CB combinations		Other C combinations	
		Percent of all situations	Cumulative percent of all situations	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class
4,000–4,999	172	0 7	97 9	92	0 4	54	0 8	10	1 0	0	0 0	0	0 0	0	0 0	0	0 0	16	1 2	0	0 0
5,000–9,999	329	1 1	99 0	179	0 9	115	1 8	4	0 4	1	0 4	0	0 0	1	4 8	0	0 0	28	2 1	1	0 7
Over 9,999	307	1 0	100 0	184	0 9	88	1 3	9	0 9	2	0 9	0	0 0	0	0 0	0	0 0	24	1 8	0	0 0

[1] See Glossary of terms for definitions
[2] Based on revised situation count which absorbs companion cases, cross-filing, and multiple filings

Table 19.—Litigation for Enforcement and/or Review of Board Orders, Fiscal Year 1986 and Cumulative Totals, Fiscal Years 1936–1986

	Fiscal year 1986									July 5, 1937–Sept 30 1986	
	Number of proceedings[1]					Percentages					
	Total	Vs employers only	Vs unions only	Vs both employers and unions	Board dismissal[2]	Vs employers only	Vs unions only	Vs both employers and unions	Board dismissal	Number	Percent
Proceedings decided by U S courts of appeals	214	140	60	0	14	—	—	—	—	—	—
On petitions for review and/or enforcement	197	129	54	0	14	100 0	100 0	—	100 0	9,293	100 0
Board orders affirmed in full	146	105	35	0	6	81 4	64 8	—	42 9	5,990	64 5
Board orders affirmed with modification	12	7	3	0	2	5 4	5 6	—	14 2	1,355	14 6
Remanded to Board	16	8	8	0	0	6 2	14 8	—	0 0	454	4 9
Board orders partially affirmed and partially remanded	7	3	4	0	0	2 3	7 4	—	0 0	172	1 8
Board orders set aside	16	6	4	0	6	4 7	7 4	—	42 9	1,322	14 2
On petitions for contempt	17	11	6	0	0	100 0	100 0	—	—	—	—
Compliance after filing of petition, before court order	0	0	0	0	0	0 0	0 0	—	—	—	—
Court orders holding respondent in contempt	14	9	5	0	0	81 8	83 3	—	—	—	—
Court orders denying petition	0	0	0	0	0	0 0	0 0	—	—	—	—
Court orders directing compliance without contempt adjudication	3	2	1	0	0	18 2	16 7	—	—	—	—
Contempt petitions withdrawn without compliance	0	0	0	0	0	0 0	0 0	—	—	—	—
Proceedings decided by U S Supreme Court[3]	1	0	0	0	1	—	—	—	100 0	243	100 0
Board orders affirmed in full	0	0	0	0	0	—	—	—	0 0	146	60 1
Board orders affirmed with modification	0	0	0	0	0	—	—	—	—	18	7 4
Board orders set aside	1	0	0	0	1	—	—	—	100 0	41	16 9
Remanded to Board	0	0	0	0	0	—	—	—	—	19	7 8
Remanded to court of appeals	0	0	0	0	0	—	—	—	—	16	6 6
Board's request for remand or modification of enforcement order denied	0	0	0	0	0	—	—	—	—	1	0 4
Contempt cases remanded to court of appeals	0	0	0	0	0	—	—	—	—	1	0 4
Contempt cases enforced	0	0	0	0	0	—	—	—	—	1	0 4

[1] "Proceedings" are comparable to "cases" reported in annual reports prior to fiscal 1964 This term more accurately describes the data inasmuch as a single "proceeding" often includes more than one "case" See Glossary of terms for definitions

[2] A proceeding in which the Board had entered an order dismissing the complaint and the charging party appealed such dismissal in the courts of appeals

[3] The Board appeared as "amicus curiae" in 3 cases

Table 19A.—Proceedings Decided by Circuit Courts of Appeals on Petitions for Enforcement and/or Review of Board Orders, Fiscal Year 1986, Compared With 5-Year Cumulative Totals, Fiscal Years 1981 Through 1985[1]

Circuit courts of appeals (headquarters)	Total fiscal year 1986	Total fiscal years 1981–1985	Affirmed in full				Modified				Remanded in full				Affirmed in part and remanded in part				Set aside			
			Fiscal year 1986		Cumulative fiscal years 1981–1985		Fiscal year 1986		Cumulative fiscal years 1981–1985		Fiscal year 1986		Cumulative fiscal years 1981–1985		Fiscal year 1986		Cumulative fiscal years 1981–1985		Fiscal year 1986		Cumulative fiscal years 1981–1985	
			Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total all circuits	197	1,879	146	74 1	1,265	67 3	12	6 1	196	10 4	16	8 1	122	6 5	7	3 6	48	2 6	16	8 1	248	13 2
1 Boston, MA	10	72	7	70 0	47	65 3	0	0 0	12	16 7	0	0 0	3	4 2	0	0 0	2	2 7	3	30 0	8	11 1
2 New York, NY	23	131	18	78 2	92	70 2	0	0 0	14	10 7	1	4 4	5	3 8	1	4 4	3	2 3	3	13 0	17	13 0
3 Phila , PA	20	190	19	95 0	132	69 5	0	0 0	15	7 9	1	5 0	15	7 9	0	0 0	7	3 7	0	0 0	21	11 0
4 Richmond, VA	14	146	12	85 8	84	57 5	1	7 1	23	15 8	0	0 0	6	4 1	0	0 0	3	2 1	1	7 1	30	20 5
5 New Orleans, LA	10	174	9	90 0	121	69 5	0	0 0	16	9 2	1	10 0	8	4 6	0	0 0	5	2 9	0	0 0	24	13 8
6 Cincinnati, OH	29	299	22	75 9	194	64 9	2	6 9	37	12 4	0	0 0	17	5 7	1	3 4	3	1 0	4	13 8	48	16 0
7 Chicago, IL	15	178	10	66 7	98	55 1	2	13 3	28	15 7	3	20 0	9	5 1	0	0 0	2	1 1	0	0 0	41	23 0
8 St Louis, MO	11	123	9	81 8	89	72 4	1	9 1	15	12 2	0	0 0	9	7 3	1	9 1	2	1 6	0	0 0	8	6 5
9 San Francisco, CA	39	367	28	71 8	265	72 2	3	7 7	25	6 8	4	10 3	29	7 9	2	5 1	15	4 1	2	5 1	33	9 0
10 Denver, CO	2	59	1	50 0	45	76 3	0	0 0	3	5 1	0	0 0	5	8 5	0	0 0	1	1 7	1	50 0	5	8 4
11 Atlanta, GA[2]	7	49	4	57 1	37	75 5	1	14 3	4	8 2	1	14 3	1	2 0	0	0 0	0	0 0	1	14 3	7	14 3
Washington, DC	17	91	7	41 2	61	67 0	2	11 8	4	4 4	5	29 4	15	16 5	2	11 7	5	5 5	1	5 9	6	6 6

[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 1986

	Total proceedings	Injunction proceedings		Total dispositions	Disposition of injunctions						Pending in district court Sept 30, 1986
		Pending in district court Oct 1, 1985	Filed in district court fiscal year 1986		Granted	Denied	Settled	Withdrawn	Dismissed	Inactive	
Under Sec 10(e) total	[1]2	0	2	2	2	0	0	0	0	0	0
Under Sec 10(j) total	27	2	25	22	12	1	6	1	0	2	5
8(a)(1)(3)	6	0	6	4	0	0	2	1	0	1	2
8(a)(1)(3)(4)	1	0	1	1	0	0	1	0	0	0	0
8(a)(1)(3)(4)(5)	1	0	1	1	1	0	0	0	0	0	0
8(a)(1)(3)(5)	12	0	12	12	7	1	3	0	0	1	0
8(a)(1)(5)	2	0	2	1	1	0	0	0	0	0	1
8(b)(1)	3	2	1	1	1	0	0	0	0	0	2
8(b)(1),8(a)(1)(3)(5)	1	0	1	1	1	0	0	0	0	0	0
8(g)	1	0	1	1	1	0	0	0	0	0	0
Under Sec 10(l) total	48	8	40	37	17	2	15	2	0	1	11
8(b)(4)(A)	1	1	0	1	0	0	1	0	0	0	0
8(b)(4)(A)(B)	1	0	1	1	0	0	1	0	0	0	0
8(b)(4)(A)(B),8(e)	0	0	0	0	0	0	0	0	0	0	0
8(b)(4)(B)	30	2	28	23	12	1	7	2	0	1	7
8(b)(4)(B)(D)	1	0	1	1	1	0	0	0	0	0	0
8(b)(4)(B),7(C)	0	0	0	0	0	0	0	0	0	0	0
8(b)(4)(B),8(e)	1	0	1	0	0	0	0	0	0	0	1
8(b)(4)(D)	4	2	2	4	2	0	2	0	0	0	0
8(b)(4)(D),7(C)	1	1	0	0	0	0	0	0	0	0	1
8(b)(7)(A)	2	0	2	2	0	0	2	0	0	0	0
8(b)(7)(B)	1	0	1	0	0	0	0	0	0	0	1
8(b)(7)(C)	5	1	4	4	2	0	2	0	0	0	1
8(e)	1	1	0	1	0	1	0	0	0	0	0

[1] In courts of appeals

Table 21.—Special Litigation Involving NLRB; Outcome of Proceedings in Which Court Decisions Issued in Fiscal Year 1986

Type of litigation	Number of proceedings											
	Total—all courts			In courts of appeals			In district courts			In bankruptcy courts		
	Number decided	Court determination		Number decided	Court determination		Number decided	Court determination		Number decided	Court determination	
		Upholding Board position	Contrary to Board position		Upholding Board position	Contrary to Board position		Upholding Board position	Contrary to Board position		Upholding Board position	Contrary to Board position
Totals—all types	46	38	8	26	19	7	15	14	1	5	5	0
NLRB-initiated actions or interventions	4	3	1	3	2	1	1	1	0	0	0	0
To enforce subpoena	0	0	0	0	0	0	0	0	0	0	0	0
To defend Board's jurisdiction	1	1	0	1	1	0	0	0	0	0	0	0
To prevent conflict between NLRA and a section 301 suite	3	2	1	2	1	1	1	1	0	0	0	0
Action by other parties	42	35	7	23	17	6	14	13	1	5	5	0
To review settlement agreements	3	2	1	3	2	1	0	0	0	0	0	0
To review non-final orders	3	3	0	2	2	0	1	1	0	0	0	0
To restrain NLRB from	9	7	2	2	1	1	4	3	1	3	3	0
Proceeding with section 10(e) application	1	1	0	1	1	0	0	0	0	0	0	0
Proceeding in R case	3	3	0	0	0	0	3	3	0	0	0	0
Proceeding in unfair labor practice case	5	3	2	1	0	1	1	0	1	3	3	0
Enforcing subpoena	0	0	0	0	0	0	0	0	0	0	0	0
Other	0	0	0	0	0	0	0	0	0	0	0	0
To compel NLRB to	25	21	4	16	12	4	9	9	1	0	0	0
Take action in C Case	1	1	0	0	0	0	1	1	0	0	0	0
Issue complaint	10	10	0	6	6	0	4	4	0	0	0	0
Take action in R case	3	3	0	0	0	0	3	3	0	0	0	0
Comply with Freedom of Information Act[1]	2	2	0	1	1	0	1	1	0	0	0	0
Pay fees under Equal Access to Justice Act	9	5	4	9	5	4	0	0	0	0	0	0
Other	2	2	0	0	0	0	0	0	0	2	2	0
Objection to Board's proof of claim	2	2	0	0	0	0	0	0	0	2	2	0

[1] FOIA cases are categorized regarding court determination depending on whether NLRB substantially prevailed

Table 22.—Advisory Opinion Cases Received, Closed, and Pending, Fiscal Year 1986[1]

	Total	Number of cases			
		Identification of petitioner			
		Employer	Union	Courts	State boards
Pending October 1, 1985	1	1	0	0	0
Received fiscal 1986	2	2	0	0	0
On docket fiscal 1986	3	3	0	0	0
Closed fiscal 1986	3	3	0	0	0
Pending September 30, 1986	0	0	0	0	0

[1] See Glossary of terms for definitions

Table 22A.—Disposition of Advisory Opinion Cases, Fiscal Year 1986[1]

Action taken	Total cases closed
	3
Board would assert jurisdiction	1
Board would not assert jurisdiction	0
Unresolved because of insufficient evidence submitted	0
Dismissed	2
Withdrawn	0

[1] See Glossary of terms for definitions

Table 23.—Time Elapsed for Major Case Processing Stages Completed, Fiscal Year 1986; and Age of Cases Pending Decision, September 30, 1986

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	98
3 Close of hearing to issuance of administrative law judge's decision	125
4 Administrative law judge's decision to issuance of Board decision	293
5 Filing of charge to issuance of Board decision	769
B Age[1] of cases pending administrative law judge's decision, September 30, 1986	381
C Age[1] of cases pending Board decision, September 30, 1986	796
II Representation cases	
A Major stages completed—	
1 Filing of petition of notice of hearing issued	8
2 Notice of hearing to close of hearing	14
3 Close of hearing to—	
Board decision issued	256
Regional Director's decision issued	22
4 Filing of petition to—	
Board decision issued	302
Regional Director's decision issued	44
B Age[2] of cases pending Board decision, September 30, 1986	210
C Age[2] of cases pending Regional Director's decision, September 30, 1986	33

[1] From filing of charge
[2] From filing of petition

Table 24.—NLRB Activity Under the Equal Access to Justice Act, Fiscal Year 1986

I Applications for fees and expenses before the NLRB	
A Filed with Board	15
B Hearings held	0
C Awards ruled on	
1 By administrative law judges	
Granting	6
Denying	13
2 By Board	
Granting	6
Denying	25
D Amount of fees and expenses in cases ruled on by Board	
Claimed	$369,097
Recovered	$126,620
II Applications for fees and expenses before the circuit courts of appeals	
A Awards ruled on	
Granting	3
Denying	6
B Amounts of fees and expenses recovered pursuant to court award	$43,652

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