FIFTY-SECOND

ANNUAL REPORT

OF THE

NATIONAL LABOR RELATIONS BOARD

FOR THE FISCAL YEAR

ENDED SEPTEMBER 30

1987

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PROPERTY OF THE UNITED STATES GOVERNMENT
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LETTER OF TRANSMITTAL

NATIONAL LABOR RELATIONS BOARD,
Washington, D.C., February 1, 1989.

SIR: As provided in Section 3(c) of the Labor Management Relations Act, 1947, I submit the Fifty-Second Annual Report of the National Labor Relations Board for the fiscal year ended September 30, 1987.

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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Operations in Fiscal Year 1987

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 1987, 39,639 cases were received by the Board.

The public filed 32,043 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 7,180 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 416 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 1987, 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 1987 include:

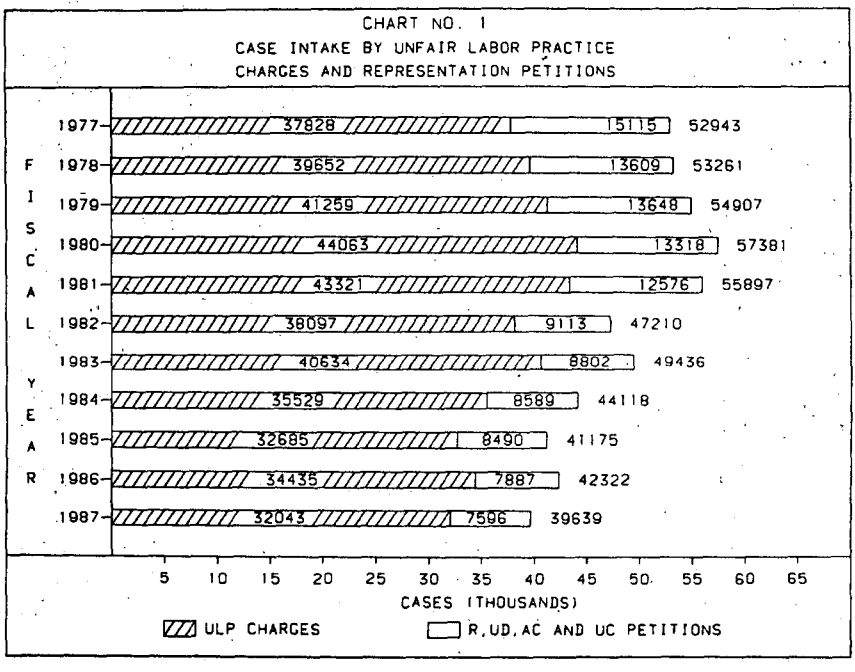
- The NLRB conducted 4,069 conclusive representation elections among some 212,479 employee voters, with workers choosing labor unions as their bargaining agents in 43.9 percent of the elections.
- Although the Agency closed 39,687 cases, 19,939 cases were pending in all stages of processing at the end of the fiscal year. The closings included 32,113 cases involving unfair labor practice charges and 6,965 cases affecting employee representation and 609 related cases.

• Settlements, avoiding formal litigation while achieving the goal of equitable remedies in unfair labor practice situations, numbered 9,368.

• The amount of $40,635,903 in reimbursement to employees illegally discharged or otherwise discriminated against in violation of their organizational rights was obtained by the NLRB from employers and unions. This total was for lost earnings, fees, dues, and fines. The NLRB obtained 4,307 offers of job reinstatements, with 3,286 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 3,252 complaints, setting the cases for hearing.

• NLRB's corps of administrative law judges issued 623 decisions.



NLRB Administration

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

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

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

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

The NLRB does not act on its own motion in either function. It processes only those charges of unfair labor practices and petitions for employee elections which are filed in the NLRB's Regional, Subregional, and Resident Offices, which numbered 52 during fiscal year 1987.

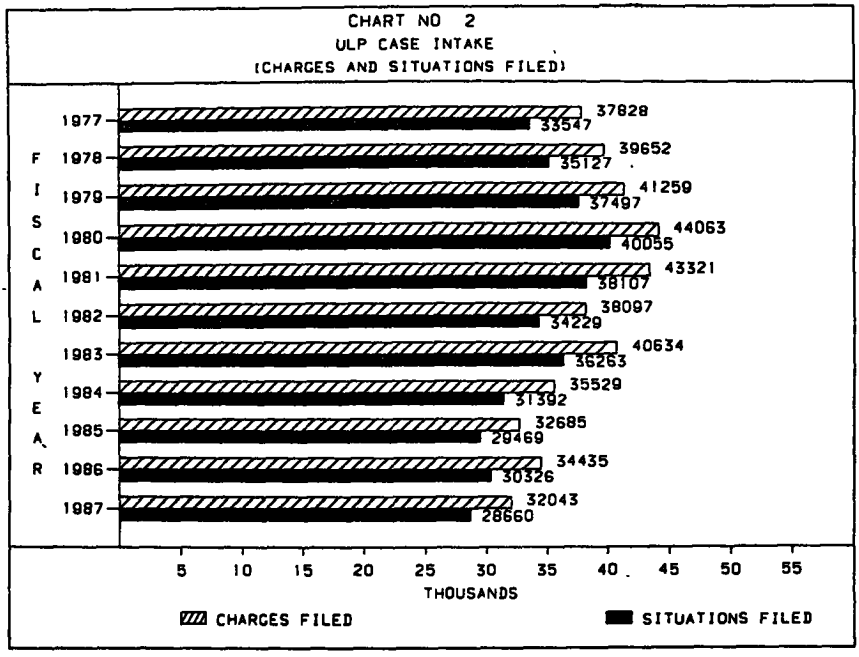
The Act's unfair labor practice provisions place certain restrictions on actions of employers and labor organizations in their relations with employees, as well as with each other. Its election provisions provide mechanics for conducting and certifying results of representation elections to determine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

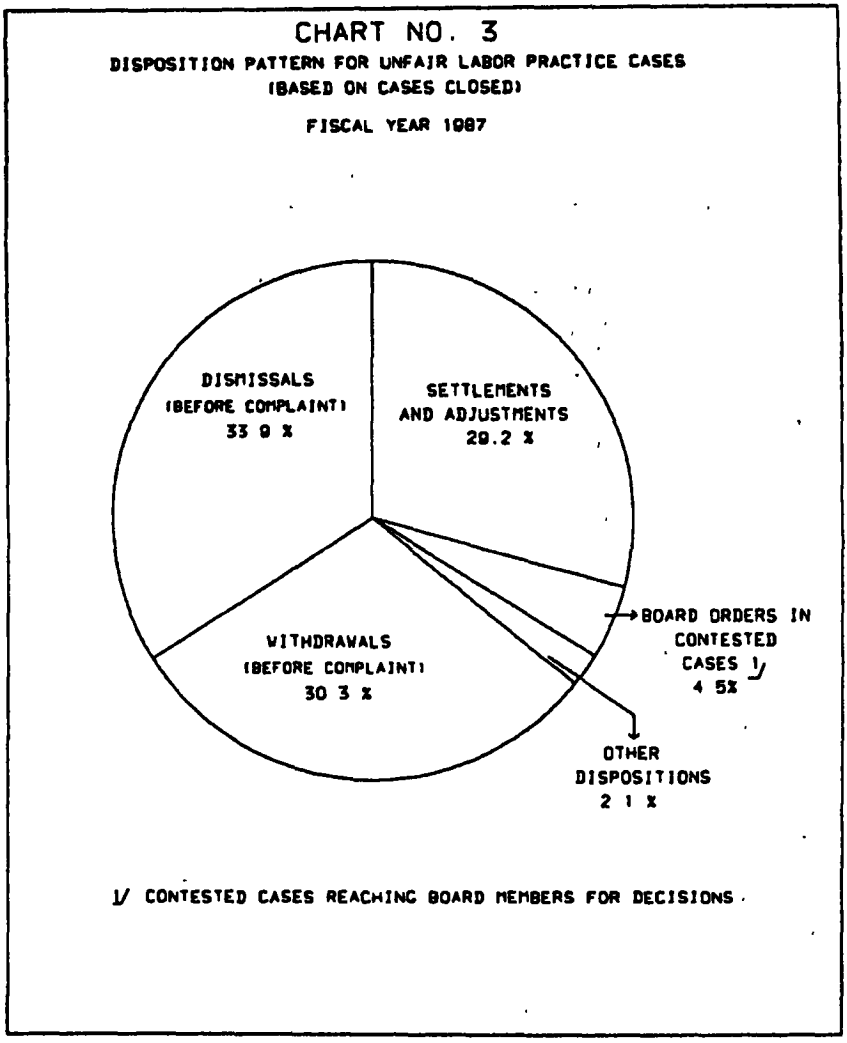
All cases coming to the NLRB begin their processing in the Regional Offices. Regional Directors, in addition to processing unfair labor practice cases in the initial stages, also have the authority to investigate representation petitions, to determine units of employees appropriate for collective-bargaining 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 1987, 32,043 unfair labor practice charges were filed with the NLRB, a decrease of 7 percent from the 34,435 filed in fiscal 1986. In situations in which related charges are counted as a single unit, there was a 6-percent decrease from the preceding fiscal year. (Chart 2.)

Alleged violations of the Act by employers were filed in 22,475 cases, about 7 percent less than the 24,084 of 1986. Charges against unions decreased 7 percent to 9,523 from 10,284 in 1986.

There were 45 charges of violation of Section 8(e) of the Act, which bans hot-cargo agreements. (Tables 1A and 2.)

The majority of all charges against employers alleged illegal discharge or other discrimination against employees. There were 11,548 such charges in 51 percent of the total charges that employers committed violations.

Refusal to bargain was the second largest category of allegations against employers, comprising 9,760 charges, in about 43 percent of the total charges. (Table 2.)

Of charges against unions, the majority (7,354) alleged illegal restraint and coercion of employees, about 78 percent, about the same percentage as last year. There were 1,430 charges against unions for illegal secondary boycotts and jurisdictional disputes, a decrease of 5 percent from the 1,504 of 1986.

There were 1,298 charges (about 14 percent) of illegal union discrimination against employees, a decrease of 2 percent from the 1,324 of 1986. There were 274 charges that unions picketed illegally for recognition or for organizational purposes, compared with 259 charges in 1986. (Table 2.)

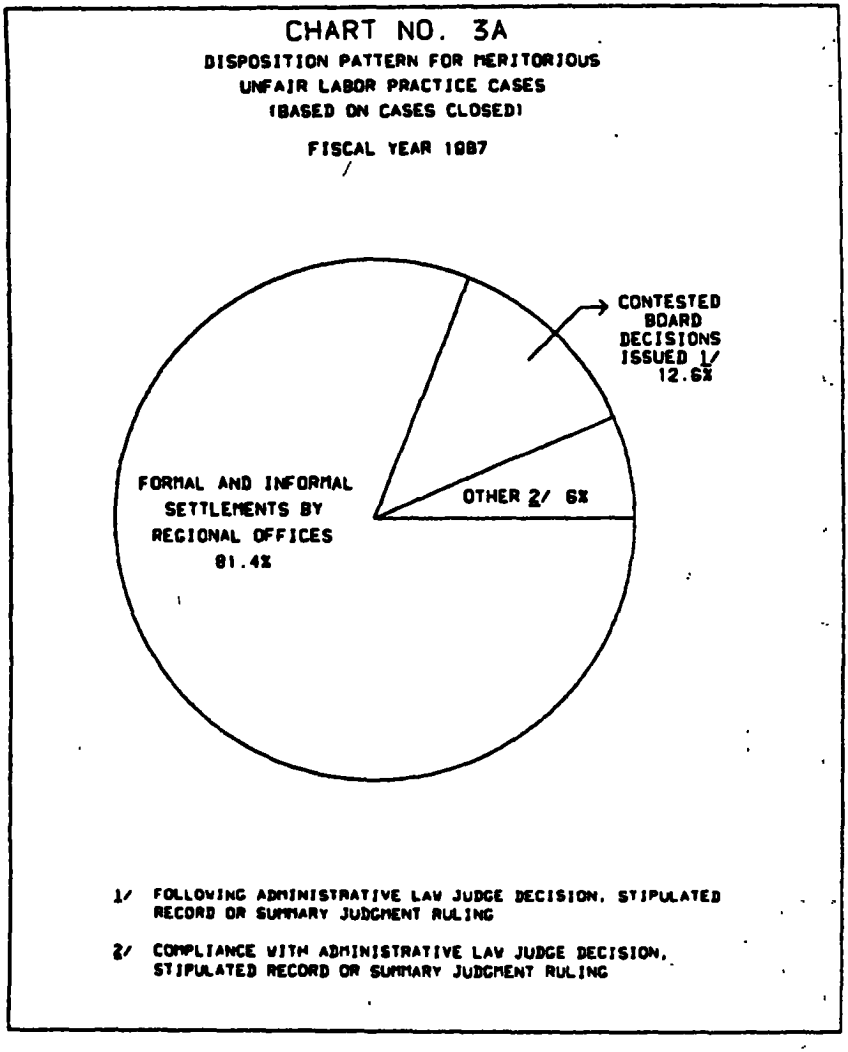
In charges filed against employers, unions led with 67 percent of the total. Unions filed 15,095 charges and individuals filed 7,380.

Concerning charges against unions, 6,530 were filed by individuals, or 69 percent of the total of 9,523. Employers filed 2,801 and other unions filed the 192 remaining charges.

In fiscal 1987, 32,113 unfair labor practice cases were closed. Some 93 percent were closed by NLRB Regional Offices, virtually the same as in 1986. During the fiscal year, 29.2 percent of the cases were settled or adjusted before issuance of administrative law judges' decisions, 30.3 percent were withdrawn before complaint, and 33.9 percent were administratively dismissed.

In evaluation of the Regional workload, the number of unfair labor practice charges found to have merit is important—the higher the merit factor the more litigation required. In fiscal year 1987, 34 percent of the unfair labor practice cases were found to have merit, as compared to 35 percent in 1986.

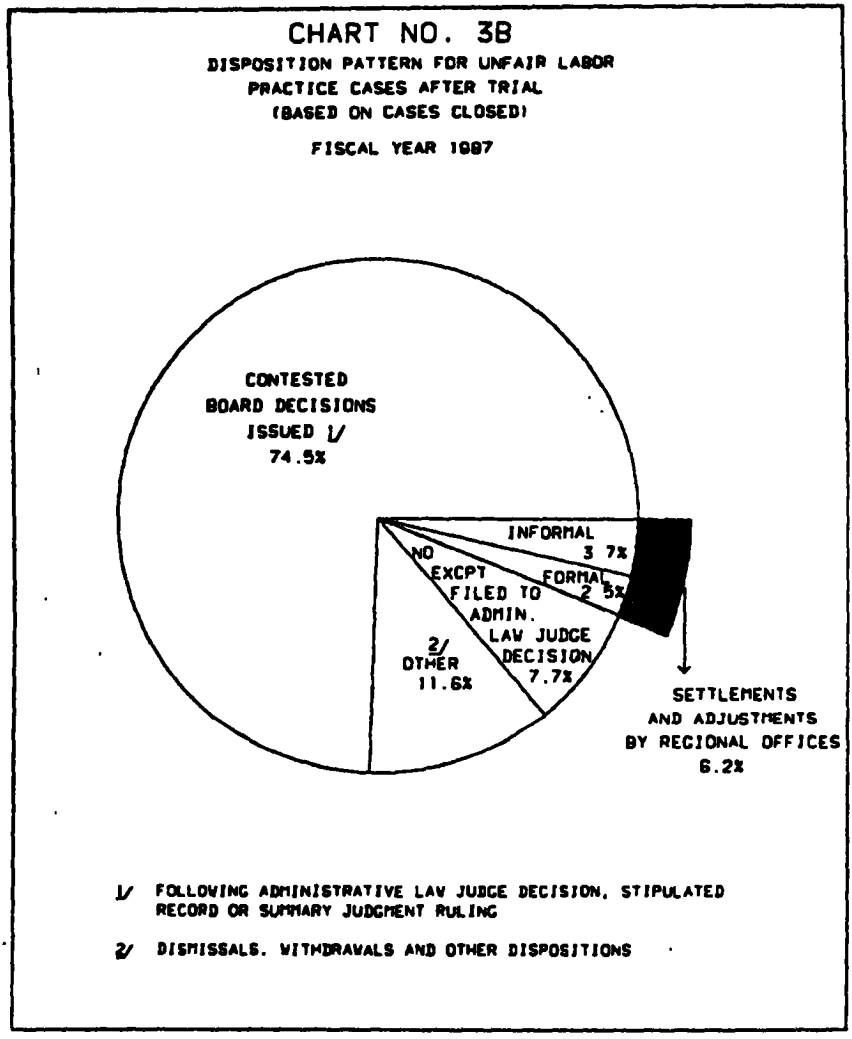
When the Regional Offices determine that charges alleging unfair labor practices have merit, attempts at voluntary resolution are stressed—to improve labor-management relations and to reduce NLRB litigation and related casehandling. Settlement ef-



forts have been successful to a substantial degree. In fiscal 1987, precomplaint settlements and adjustments were achieved in 6,531 cases, or 20.7 percent of the charges. In 1986 the percentage was the same. (Chart 5.)

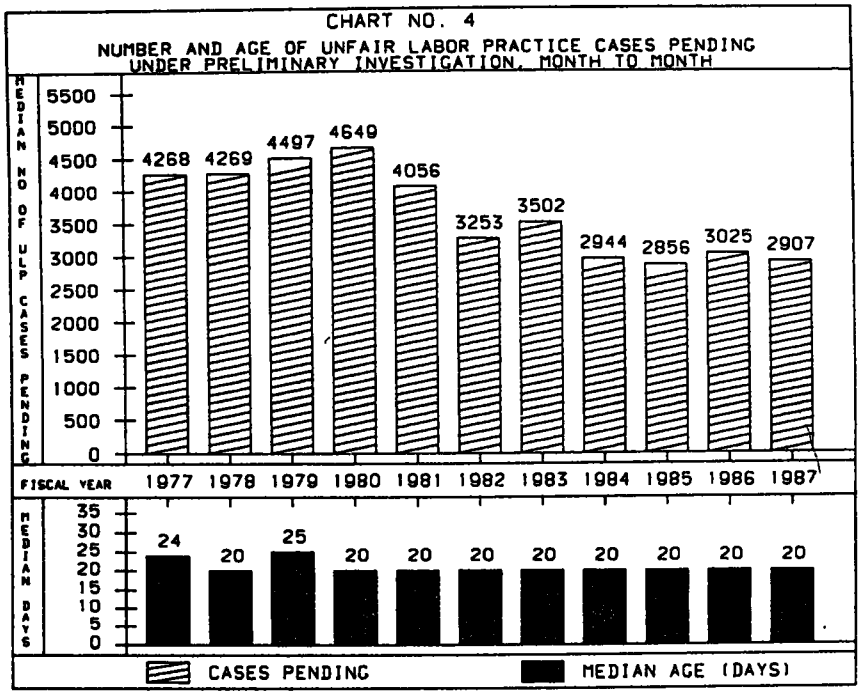
Cases of merit not settled by the Regional Offices produce formal complaints, issued on behalf of the General Counsel. This action schedules hearings before administrative law judges. During 1987, 3,252 complaints were issued, compared with 3,714 in the preceding fiscal year. (Chart 6.)

Of complaints issued, 81.6 percent were against employers, 16.9 percent against unions, and 1.5 percent against both employers and unions.



NLRB Regional Offices processed cases from filing of charges to issuance of complaints in a median of 46 days. The 46 days included 15 days in which parties had the opportunity to adjust charges and remedy violations without resort to formal NLRB processes. (Chart 6.)

Additional settlements occur before, during, and after hearings before administrative law judges. The judges issued 623 decisions in 668 cases during 1987. They conducted 613 initial hearings, and 29 additional hearings in supplemental matters. (Chart 8 and Table 3A.)

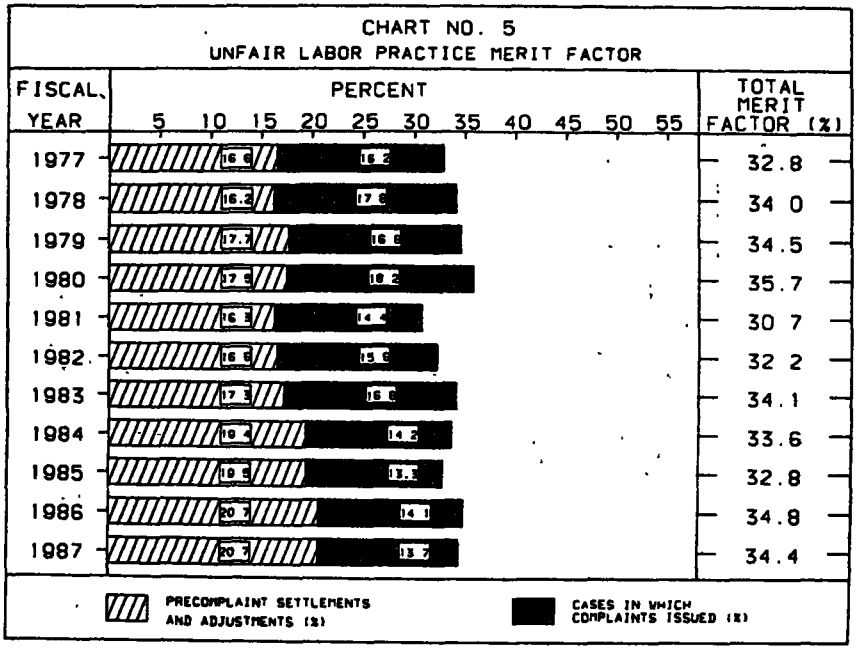


By filing exceptions to judges' findings and recommended rulings, parties may bring unfair labor practice cases to the five-member Board for final NLRB decision.

In fiscal 1987, the Board issued 767 decisions in unfair labor practice cases contested as to the law or the facts—716 initial decisions, 22 backpay decisions, 18 determinations in jurisdictional work dispute cases, and 11 decisions on supplemental matters. Of the 716 initial decision cases 567 involved charges filed against employers and 149 had union respondents.

For the year, the NLRB awarded backpay of $39.5 million. (Chart 9.) Reimbursement 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 4,307 employees were offered reinstatement, and 76 percent accepted.

At the end of fiscal 1987, there were 17,309 unfair labor practice cases being processed at all stages by the NLRB, compared with 17,380 cases pending at the beginning of the year.



2. Representation Cases

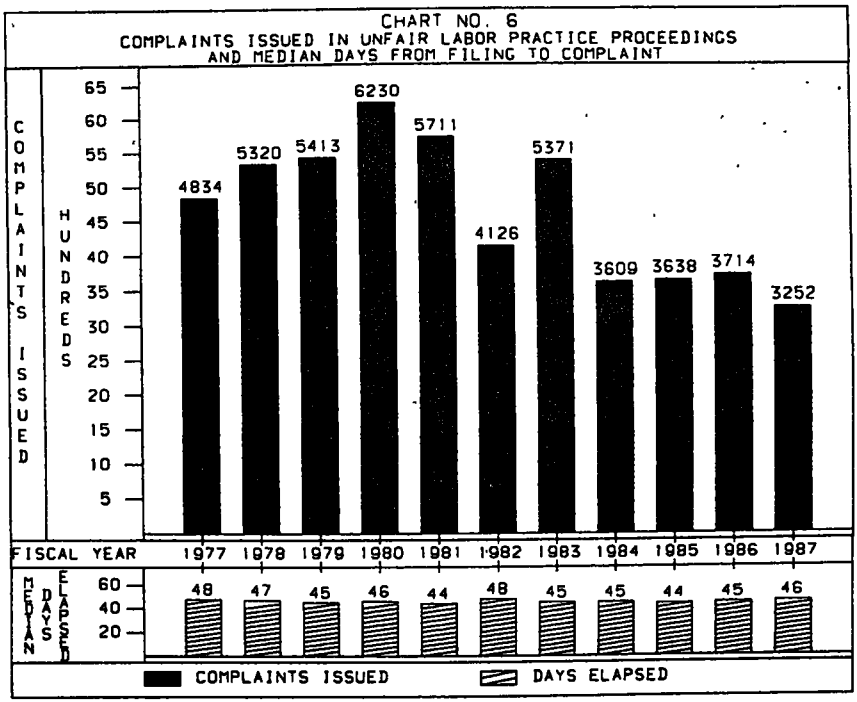
The NLRB received 7,596 representation and related case petitions in fiscal 1987, compared with 7,887 such petitions a year earlier.

The 1987 total consisted of 5,578 petitions that the NLRB conduct secret-ballot elections where workers select or reject unions to represent them in collective bargaining; 1,416 petitions to decertify existing bargaining agents; 186 deauthorization petitions for referendums on rescinding a union's authority to enter into union-shop contracts; and 372 petitions for unit clarification to determine whether certain classifications of employees should be included in or excluded from existing bargaining units.

Additionally, 43 amendment of certification petitions were filed.

During the year, 7,574 representation and related cases were closed, compared with 8,154 in fiscal 1986. Cases closed included 5,566 collective-bargaining election petitions; 1,399 decertification election petitions; 196 requests for deauthorization polls; and 413 petitions for unit clarification and amendment of certification. (Chart 14 and Tables 1 and 1B.)

The overwhelming majority of elections conducted by the NLRB resulted from some form of agreement by the parties on when, where, and among whom the voting should occur. Such



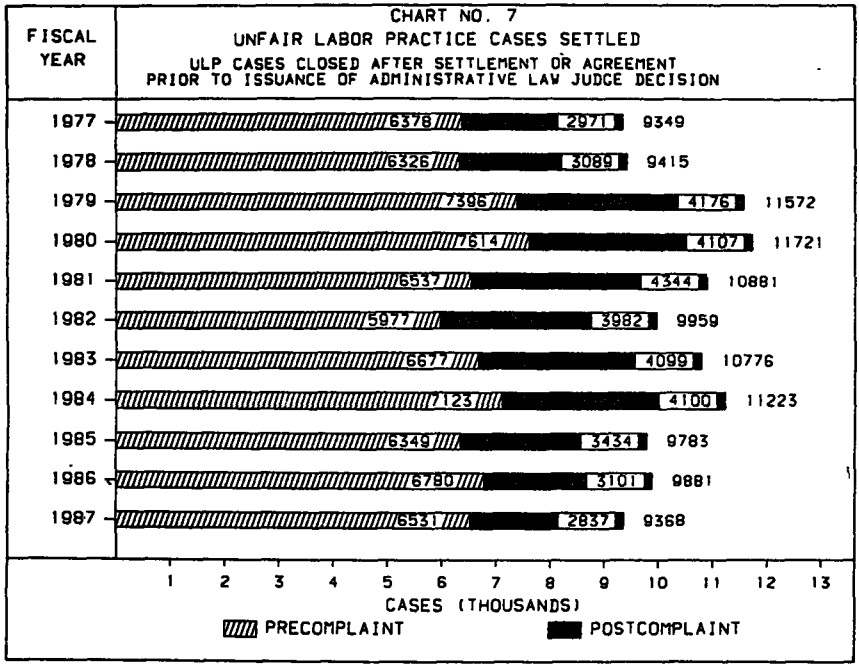
agreements are encouraged by the Agency. In 16.2 percent of representation cases closed by elections, balloting was ordered by NLRB Regional Directors following hearing on points in issue. In one case, the Board directed an election after a transfer of the case from the Regional Office. (Table 10.) There were no cases that resulted in expedited elections pursuant to the Act's 8(b)(7)(C) provisions pertaining to picketing.

3. Elections

The NLRB conducted 4,069 conclusive representation elections in cases closed in fiscal 1987, compared with the 4,520 such elections a year earlier. Of 241,825 employees eligible to vote, 212,479 cast ballots, virtually 9 of every 10 eligible.

Unions won 1,788 representation elections, or 43.9 percent. In winning majority designation, labor organizations earned bargaining rights or continued as employee representatives for 96,384 workers. The employee vote over the course of the year was 102,404 for union representation and 110,075 against.

The representation elections were in two categories—the 3,314 collective-bargaining elections in which workers chose or voted down labor organizations as their bargaining agents, plus the 755

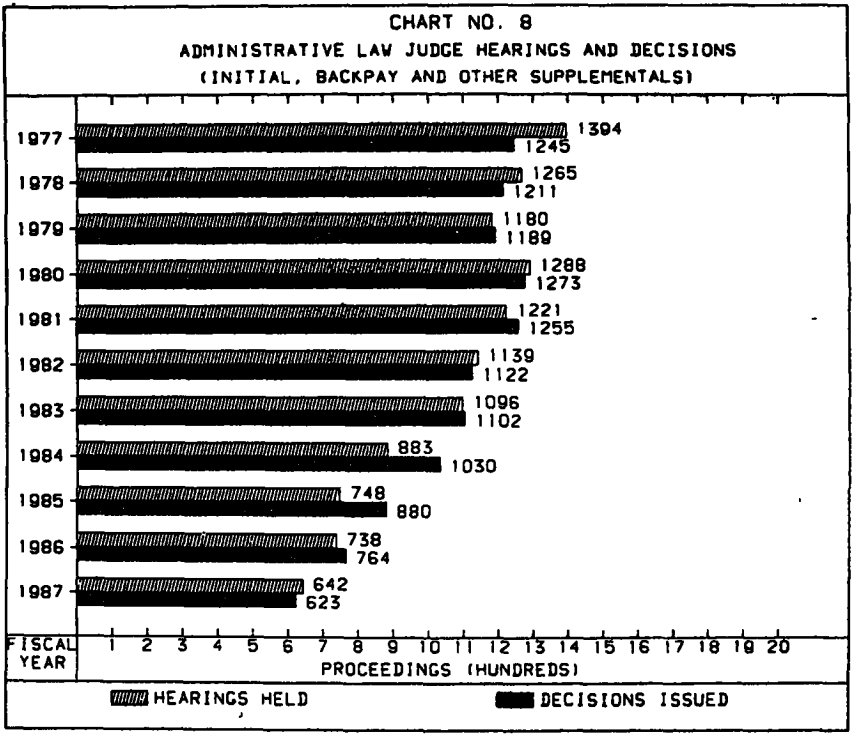


decertification elections determining whether incumbent unions would continue to represent employees.

There were 3,841 select-or-reject-bargaining-rights (one union on ballot) elections, of which unions won 1,605, or 41.8 percent. In these elections, 83,691 workers voted to have unions as their agents, while 104,287 employees voted for no representation. In appropriate bargaining units of employees, the election results provided union agents for 75,195 workers. In NLRB elections the majority decides the representational status for the entire unit.

There were 228 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 183 elections, or 80.3 percent.

As in previous years, labor organizations lost decertification elections by a substantial margin—about three out of four. The decertification results brought continued representation by unions in 180 elections, or 23.8 percent, covering 14,978 employees. Unions lost representation rights for 22,612 employees in 575 elections, or 76.2 percent. Unions won in bargaining units aver-



aging 83 employees, and lost in units averaging 39 employees. (Table 13.)

Besides the conclusive elections, there were 128 inconclusive representation elections during fiscal 1987 which resulted in withdrawal or dismissal of petitions before certification, or required a rerun or runoff election.

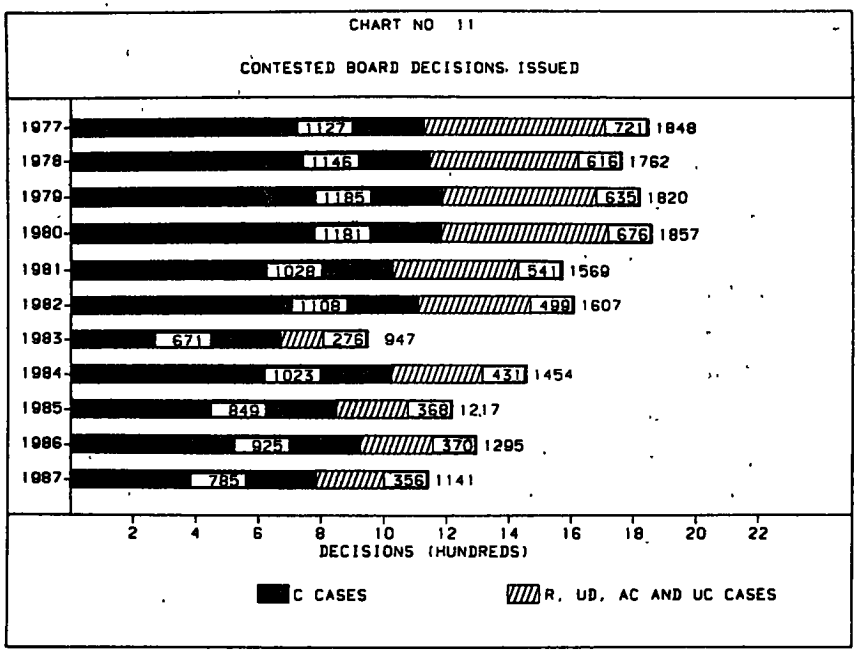
In deauthorization polls, labor organizations lost the right to make union-shop agreements in 45 referendums, or 46 percent, while they maintained the right in the other 54 polls which covered 4,222 employees. (Table 12.)

For all types of elections in 1987, the average number of employees voting, per establishment, was 52 compared with 51 in 1986. About 71 percent of the collective-bargaining and decertification elections involved 59 or fewer employees. (Tables 11 and 17.)

4. Decisions Issued

a. The Board

Dealing effectively with the remaining cases reaching it from nationwide filings after dismissals, settlements, and adjustments in earlier processing stages, the Board handed down 1,824 decisions concerning allegations of unfair labor practices and questions re-



lating to employee representation. This total compared with the 2,032 decisions rendered during fiscal 1986.

A breakdown of Board decisions follows:

Total Board decisions		1,824
Contested decisions		1,145
Unfair labor practice decisions		785
Initial (includes those based on stipulated record)	734	
Supplemental	11	
Backpay	22	
Determinations in jurisdictional disputes	18	
Representation decisions		356
After transfer by Regional Directors for initial decision	22	
After review of Regional Director decisions	69	
On objections and/or challenges	265	

Other decisions		4
Clarification of bargaining unit	4	
Amendment to certification	0	
Union-deauthorization	0	
Noncontested decisions		679
Unfair labor practice	240	
Representation	435	
Other	4	

The majority (63 percent) of Board decisions resulted from cases contested by the parties as to the facts and/or application of the law. (Tables 3A, 3B, and 3C.)

In fiscal 1987, about 13 percent of all meritorious charges and 75 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 1,296 decisions in fiscal 1987, compared with 1,359 in 1986. (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 623 decisions and conducted 642 hearings. (Chart 8 and Table 3A.)

5. Court Litigation

a. Appellate Courts

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

In fiscal 1987, 199 cases involving the NLRB were decided by the United States courts of appeals compared with 197 in fiscal 1986. Of these, 87.4 percent were won by NLRB in whole or in part compared to 83.8 percent in fiscal 1986; 7.1 percent were remanded entirely compared with 8.1 percent in fiscal 1986; and 5.5 percent were entire losses compared to 8.1 percent in fiscal 1986.

b. The Supreme Court

In fiscal 1987, the Supreme Court decided two Board cases; the Board won one in full and lost one. The Board participated

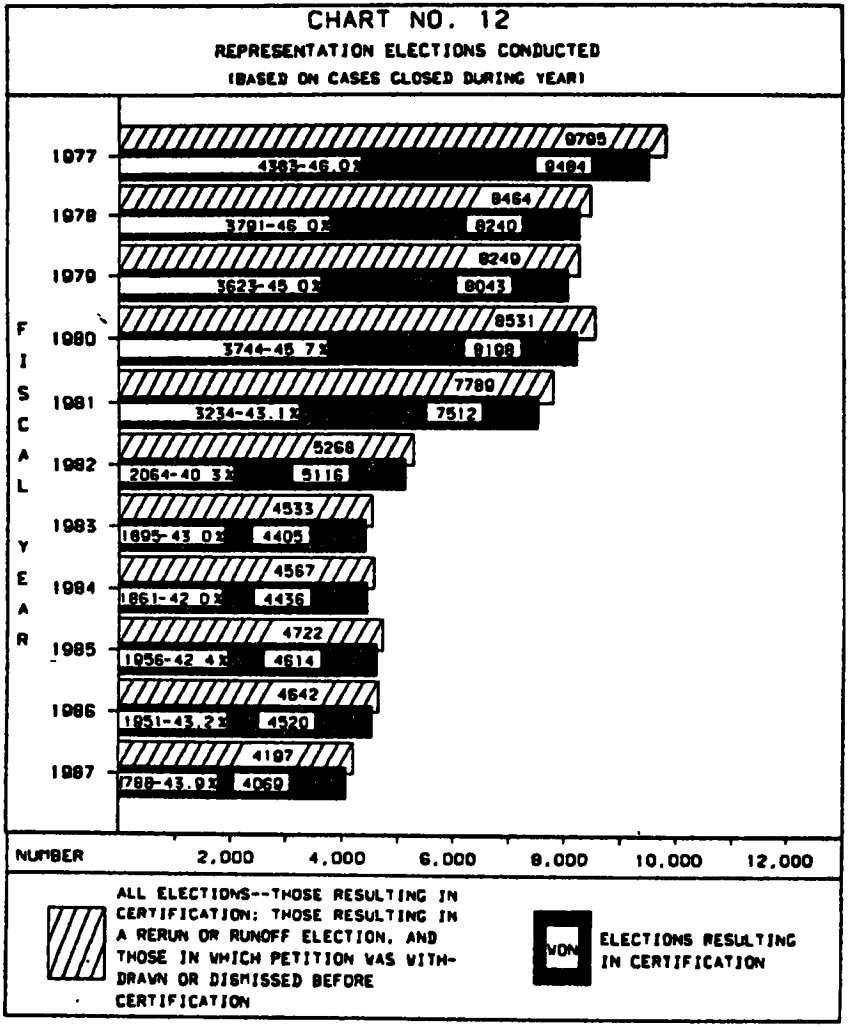
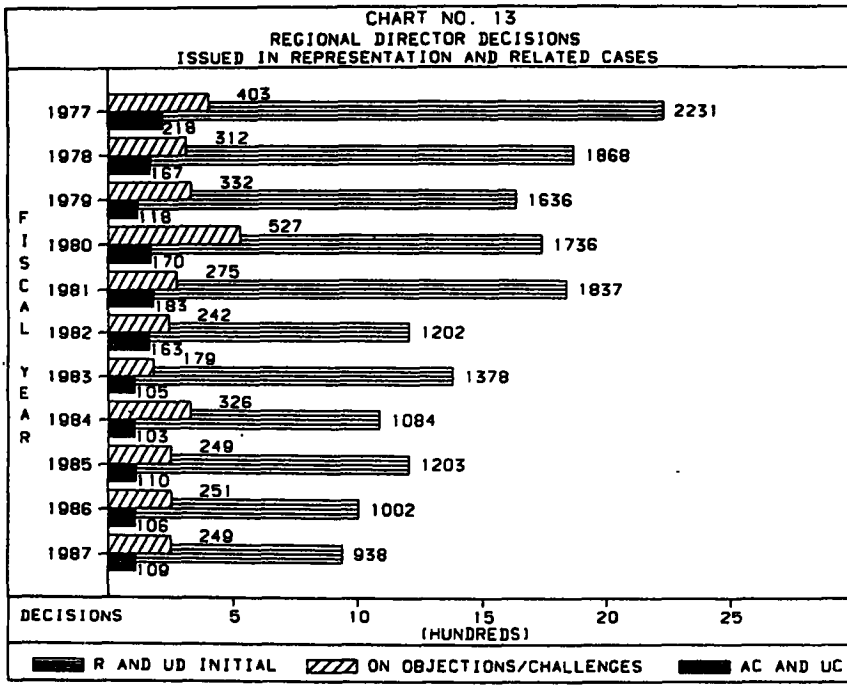


CHART NO. 12
REPRESENTATION ELECTIONS CONDUCTED
(BASED ON CASES CLOSED DURING YEAR)
FISCAL YEAR
1977
9799
4383-46.0%
8484
1978
8464
3791-46.0%
8240
1979
8249
3623-45.0%
8043
1980
8531
3744-45.7%
8198
1981
7789
3234-43.1%
7512
1982
5268
2064-40.3%
5116
1983
4533
1895-43.0%
4405
1984
4567
1861-42.0%
4436
1985
4722
1956-42.4%
4614
1986
4642
1951-43.2%
4520
1987
4197
788-43.9%
4069
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



as amicus in two cases and the Board's position prevailed in both cases.

c. Contempt Actions

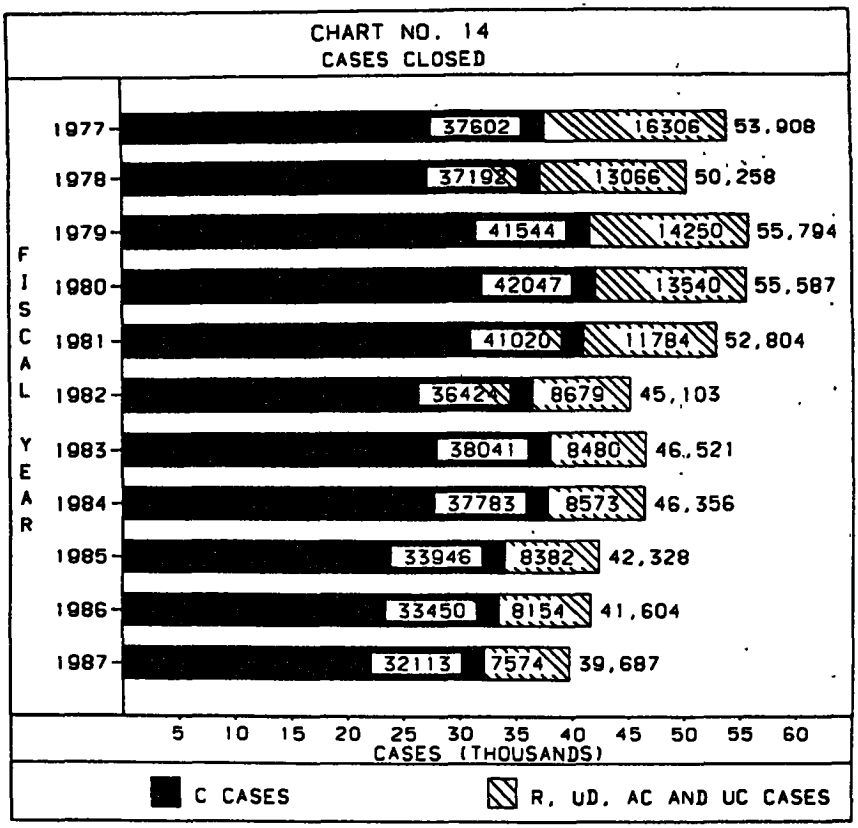
In fiscal 1987, 117 cases were referred to the contempt section for consideration of contempt action. There were 20 contempt proceedings instituted. There were 23 contempt adjudications awarded in favor of the Board; 2 cases in which the court directed compliance without adjudication; 1 case in which the petition was withdrawn; and 1 case in which the Board's petition was denied on the merits.

d. Miscellaneous Litigation

There were 35 additional cases involving miscellaneous litigation decided by appellate, district, and bankruputcy courts. The NLRB's position was upheld in 31 cases. (Table 21.)

e. Injunction Activity

The NLRB sought injunctions pursuant to Sections 10(j) and 10(l) in 83 petitions filed with the U.S. district courts, compared with 65 in fiscal 1986. (Table 20.) Injunctions were granted in 30, or 75 percent, of the 40 cases litigated to final order.



NLRB injunction activity in district courts in 1987:

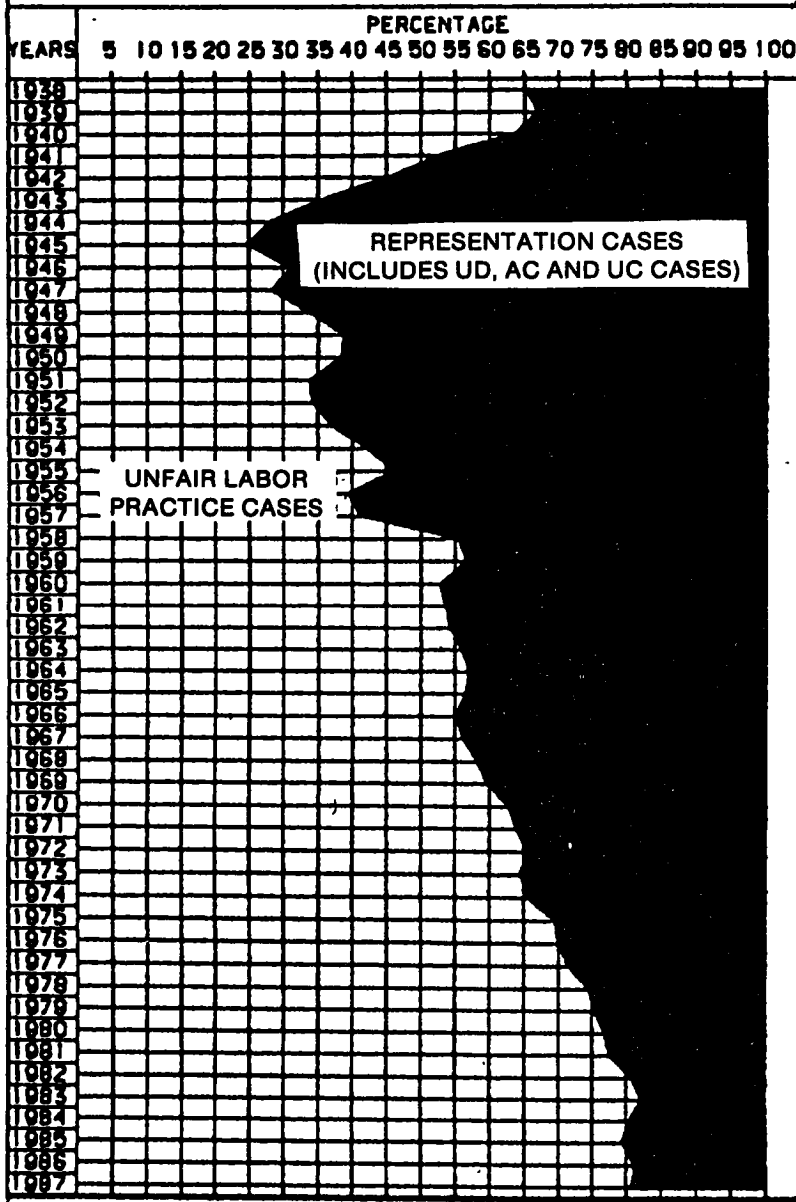
Granted	30
Denied	10
Withdrawn	4
Dismissed	2
Settled or placed on court's inactive lists	30
Awaiting action at end of fiscal year	23

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

CHART NO. 15

COMPARISON OF FILINGS OF UNFAIR LABOR PRACTICE CASES AND REPRESENTATION CASES



THIS GRAPH SHOWS THE PERCENTAGE DIVISION OF NLRB CASELOAD BETWEEN UNFAIR LABOR PRACTICE CASES AND REPRESENTATION CASES DURING FISCAL YEARS 1938-1987.

the Board's accommodation of established principles to those developments. Chapter II on "NLRB Jurisdiction," chapter III on "NLRB Procedure," chapter IV on "Representation Proceedings," and chapter V on "Unfair Labor Practices" discuss some of the more significant decisions of the Board during the report period. The following summarizes briefly some of the decisions establishing or reexamining basic principles in significant areas.

1. Repudiation of Collective-Bargaining Agreements Under Section 8(f)

In *John Deklewa & Sons*,[1] the Board considered the issue of whether a construction industry employer violated Section 8(a)(5) and (1) of the Act by repudiating its collective-bargaining agreement entered into with the uinon under Section 8(f). The Board reexamined and rejected the "conversion doctrine," whereby an 8(f) relationship/agreement can convert into a 9(a) relationship by means other than a Board election or voluntary recognition, overruled *R. J. Smith*,[2] and modified relevant unit scope rules in 8(f) cases. The Board set out new principles designed to strike a balance between the dual congressional objectives of promoting and maintaining employee free choice and fostering labor stability in the construction industry. In so doing, the Board concluded that parties who enter into an 8(f) agreement will be required to comply with that agreement unless the employees vote in a Board-conducted election to reject or change their bargaining representative.

2. Suspension of Disability and Health Insurance Benefits During Economic Strike

In *Texaco, Inc.*,[3] the Board overruled its *Emerson Electric*[4] coercive effects theory of violation when it reconsidered, in light of its subsequent decision in and judicial review of *Conoco, Inc.*,[5] its earlier decision[6] on the issue of whether an employer violated Section 8(a)(3) and (1) of the Act by suspending disability and health insurance benefits during an economic strike. The Board rejected its underlying theory in *Emerson*, which was based on Section 8(a)(1) and the probable coercive effect of an employer's withholding benefits at the commencement of a strike on the exercise of employee Section 7 rights. It applied the *Great Dane* test[7] used by the reviewing courts in *Emerson* and *Conoco*. Under this test, the Board said the initial burden to prove a violation is on the General Counsel to show at least some adverse effect on employee rights of the benefit denial. This burden can be met by showing that the benefit had accrued and that it was

[1] 282 NLRB No. 184.
[2] *R. J. Smith Construction Co.*, 191 NLRB 693 (1971)
[3] 285 NLRB No. 45.
[4] *Emerson Electric Co.*, 246 NLRB 1143 (1979).
[5] 265 NLRB 819 (1982), enfd. 740 F 2d 811 (10th Cir. 1984).
[6] *Texaco, Inc.*, 260 NLRB 1192 (1982).
[7] *NLRB v. Great Dane Trailers*, 388 U S 26 (1967).

withheld on the apparent basis of a strike. Once the General Counsel makes the necessary prima facie showing, the burden shifts to the employer to prove a legitimate and substantial business justification for the cessation of benefits, either by proof that the collective-bargaining representative has clearly and unmistakably waived the employees' statutory right to be free of such discrimination or coercion or by demonstrating the employer's reasonably and arguably correct reliance on a nondiscriminatory contract interpretation. Further, the Board held that under *Great Dane*, even if the employer proves a business justification, the Board may nevertheless find an unfair labor practice if the employer's conduct is either inherently destructive of important employee rights or motivated by antiunion intent.

3. Presumption that Striker Replacements Support Union in Same Ratio as Strikers

In *Station KKHI*,[8] the Board addressed the respondent's contention that it had a good-faith doubt of the union's continuing majority status based on its hiring of permanent replacements for its striking employees, strengthened by the fact that two of the strikers resigned. The administrative law judge had rejected this argument, relying on the presumption that striker replacements support the union in the same ratio as the strikers. The Board, however, found that there is no warrant for a presumption of striker replacement support for an incumbent union and therefore declined to maintain or create any presumptions regarding their union sentiments. Rather, the Board indicated that in resolving this issue it would review the facts of each case, and would require some further evidence of union nonsupport before concluding that an employer's claim of good-faith doubt of the union's majority status is sufficient to rebut the overall presumption of continuing majority status.

4. Computing Interest on Backpay

In *New Horizons for the Retarded*,[9] the Board agreed with the General Counsel that the method of computing interest on backpay, established in *Florida Steel Corp.*,[10] was no longer appropriate. The Board adopted the method currently used by the IRS to compute interest charged on the underpayment of Federal taxes. Under the Tax Reform Act of 1986, the IRS no longer calculates interest on tax underpayments based on the adjusted prime rate, but rather uses the short-term Federal rate. The Board noted that the short-term Federal rate is subject to periodic adjustment and is relatively easy to administer. Further, this rate is determined quarterly, with the rate for any calendar quarter being the rate

[8] 284 NLRB No. 113.
[9] 283 NLRB No. 181
[10] 231 NLRB 651 (1977).

determined by the Secretary of the Treasury for the first month of the previous calendar quarter.

5. Union Agents

In *Davlan Engineering*,[11] the Board addressed the employer's contention that employees who had solicited union authorization cards were union agents such that their remarks concerning the union's initiation fee policy were imputed to the union and were objectionable conduct under *NLRB v. Savair Mfg. Co.*[12] Setting forth principles intended to encourage unions to clearly explain their fee policies so that most *Savair* objections would be obviated, the Board concluded that, absent extraordinary circumstances, employees who solicit authorization cards should be considered special agents of the union for the limited purpose of assessing the impact of statements about union fee waivers or other purported union policies that they make in the course of their soliciting. The Board found that a union may avoid responsibility for improper statements by publicizing a lawful fee waiver policy in a manner calculated to reach employees before they sign cards.

D. Financial Statement

The obligations and expenditures of the National Labor Relations Board for the fiscal year ended September 30, 1987, are as follows:

Personnel compensation[13]	$ 89,335,713
Personnel benefits	12,072,119
Benefits for former personnel	12,316
Travel and transportation of persons	3,335,855
Transportation of things	280,994
Rent, communications, and utilities	17,760,428
Printing and reproduction	566,138
Other services	4,137,405
Supplies and materials	1,533,407
Equipment	1,817,625
Insurance claims and indemnities	165,806
Total obligations and expenditures	$131,017,806

[11] 283 NLRB No. 124.

[12] 414 U.S. 270 (1973).

[13] Includes $187,000 for reimbursements.

II

NLRB Jurisdiction

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

A. Direct Inflow Standard

In *Arrow Rock Materials*,[6] the Board reaffirmed "that in determining whether an employer meets the Board's jurisdictional

[1] See Secs. 9(c) and 10(a) of the Act and also the 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[s]" are now included in the definition of "health care institution" under the new Sec. 2(14) of the Act. "Agricultural laborers" and others excluded from the term "employee" as defined by Sec. 2(3) of the Act are discussed, inter alia, at 29 NLRB Ann. Rep. 52-55 (1964), and 31 NLRB Ann. Rep. 36 (1966).

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

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

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

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

[6] 284 NLRB No. 1 (Members Johansen, Babson, Stephens, and Cracraft; Chairman Dotson dissenting).

standards, '[t]he Board's practice . . . is to include nonrecurring capital expenses if such expenses are not the *only* items of inflow,'" citing *East Side Sanitation Service.*[7]

The employer operated a sand and gravel quarry in Palmdale, California, which made sales only to in-state customers. During the relevant time period, the employer sold materials valued in excess of $50,000 to Jaqua Block, Inc. (Jaqua), a local customer. Jaqua, during the same time period, purchased a block machine valued in excess of $50,000 directly from a supplier located outside the State. The parties stipulated that Jaqua's purchase was a nonrecurring capital expense. Jaqua also purchased spare parts—noncapital expenditures—valued at approximately $10,000 from sources located outside the State.

The Board majority found that it was proper to assert jurisdiction over Jaqua on a direct inflow basis by combining its out-of-state noncapital expenses and its nonrecurring capital expenditures. The Board stated that because the employer's sales to Jaqua exceeded $50,000, and Jaqua met one of the Board's direct jurisdictional standards, the Regional Director properly asserted jurisdiction over the employer on the basis of the indirect outflow standard set forth in *Siemons Mailing Service.*[8]

Chairman Dotson dissented, stating that he would overrule *East Side* and *Snowshoe,* as he thought it improper to include nonrecurring capital expenses in the jurisdictional analysis, even assuming other items of inflow. "A one-time capital expenditure does not furnish a reliable indicator of an enterprise's effect on interstate commerce," stated the Chairman. He also asserted that the Board's use of nonrecurring capital expenditures in determining jurisdiction was "an extension of the Board's jurisdiction beyond previously recognized limits."

The Board majority responded that their decision was not "an expansion of the Board's jurisdiction," but was merely the result of the "straightforward application of Board precedent which has been in existence for almost 23 years and which has withstood court challenge."

B. Standard for Social Service Organizations

In *Hispanic Federation for Development,*[9] the Board set a discretionary jurisdictional standard of $250,000 gross annual revenue for all social service organizations other than those covered by a specific standard, such as community health clinics or day care centers. The Board, therefore, declined to assert jurisdiction over the employer, a Philadelphia agency that counsels and refers families with problems and provides technical and consultative

[7] 230 NLRB 632 (1977) (emphasis in original). See also *Snowshoe Co.,* 212 NLRB 535 (1974).
[8] 122 NLRB 81, 85 (1958).
[9] 284 NLRB No. 50 (Members Johansen, Babson, Stephens, and Cracraft; Chairman Dotson concurring).

services related to housing, as the employer received gross annual revenue of $222,463, less than the $250,000 threshold. The Board reversed the Regional Director's ruling that the employer was covered by the $100,000 annual revenue standard that applies to nursing homes, visiting nurses associations, and related facilities.

In setting the new standard, the Board relied on Census Bureau data indicating that the $250,000 standard would bring within the Board's jurisdiction about 38 percent of all social service organizations other than day care centers and about 88 percent of all employees employed by such organizations. The Board also took into account the discretionary jurisdictional standards it had set for employers in somewhat analogous fields, such as the $250,000 standard for health care institutions other than nursing homes, visiting nurses associations, and related facilities and the $250,000 standard for day care centers and residential educational and treatment facilities for children.

While concurring in the Board's decision to decline jurisdiction over the employer, Chairman Dotson found the $250,000 jurisdictional standard set by the Board to be inappropriate. He stated that he would "decline to exercise jurisdiction over nonprofit, charitable institutions except where a particular class of these institutions has a substantial, demonstrated impact on interstate commerce." He argued that there was no showing that, even if it had revenue over $250,000, a social service organization such as the employer would have a substantial impact on commerce or would represent a field of substantial labor tension.

C. "Church-Operated" Schools

Several cases were decided during this report year in which the Board applied the Supreme Court's decision in *Catholic Bishop of Chicago*,[10] and declined to assert jurisdiction over certain educational institutions. In *Jewish Day School of Greater Washington*,[11] the Board held that the constitutional concerns expressed by the Court regarding the exercise of jurisdiction over church-operated schools apply equally to all schools whose purpose and function in substantial part are to propagate a religious faith.

The employer in *Jewish Day School* was a private, nonprofit corporation created for the purpose of establishing and operating a synagogue and an institution of learning in both secular and religious subjects. Religious instruction was mandatory at all grade levels, from kindergarten through grade 12, and religious subjects were taught in accordance with the principles of the Jewish faith. The employer's Judaic studies program, which comprised

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

[11] 283 NLRB No. 106 (Chairman Dotson and Members Babson and Stephens; Member Johansen dissenting).

the religious curriculum and accounted for 40 percent of each student's school day, provided exposure to the conservative, orthodox, reform, and reconstruction branches of Judaism without attempting to impose any one particular philosophy over the other. At the elementary level, the religious instruction included basic Hebrew language and literature, elementary Bible instruction, elementary instruction in basic elements of Jewish history, and elementary instruction in the basic skills of Jewish life and law. In the upper grades, the teachers specialized in the Bible, Rabbinic literature, Hebrew language, or Jewish history.

The employer also indicated that it sought to integrate the religious with the secular curriculum, and that it had a policy of requiring students to attend prayer services in Hebrew each morning, and to observe Jewish dietary and dress restrictions. The employer's operations were controlled by a 25-member board of governors and a 33-member board of directors, each established by the corporation's bylaws. There was no requirement that any of these individuals hold religious office, except that two nonvoting directors were to hold specified positions with the United Jewish Appeal Foundation. The bylaws further established an education committee of up to 35 members which "generally shall include religious and secular educators who are professionally trained, and other individuals experienced in education."

The Board first reviewed the Supreme Court's decision in *Catholic Bishop of Chicago*, which held that, because the Board's assertion of jurisdiction over church-operated schools raised serious constitutional questions, it was necessary to determine whether the legislative history of the Act manifested a clearly expressed affirmative intention, on the part of the Congress, that the Board assert jurisdiction in such cases. Finding that no such clear expression of legislative intention existed, the Court declined to construe the Act in a manner which would, in turn, necessitate resolution of the serious constitutional questions which an assertion of jurisdiction would otherwise raise.

The Board next considered whether the Court's reference to church-operated schools in *Catholic Bishop* should be construed strictly, and in rejecting that construction ruled that the Court's analysis focused on the school's religious purpose rather than its affiliation, the role of the teacher in effectuating that purpose, and the potential effects of the Board's exercise of jurisdiction. Accordingly, the Board construed church-operated schools to be a shorthand description of schools whose purpose and function in substantial part are to propagate a religious faith and overruled *Bishop Ford Central Catholic High School.*[12] The Board found that the employer met this expanded criterion in view of the facts set forth above establishing that there was a substantial suffusion of religion into the school's curriculum.

[12] 243 NLRB 49 (1979), enf. denied 623 F.2d 818 (2d Cir. 1980), cert. denied 450 U.S. 996 (1981).

In dissent, Member Johansen expressed the view that the Court in *Catholic Bishop* exhibited its extreme sensitivity to the constitutional concerns there due to the essential fact that the schools involved were operated by the church itself, and that these concerns are not controlling absent a school's operation by a religious institution. He found no basis for declining to exercise jurisdiction.

In *St. Joseph's College*,[13] the Board declined to assert jurisdiction over a Roman Catholic college, finding that the school was church-operated within the meaning of *NLRB v. Catholic Bishop of Chicago*[14] and that assertion of jurisdiction presented a significant risk of infringement on the school's first amendment rights. In so holding, the Board overruled *Barber-Scotia College*[15] and similar cases to the extent that they held that *Catholic Bishop* did not apply to institutions of higher learning.

St. Joseph's College was founded by the Sisters of Mercy of Maine (the Order) and received significant financial and administrative support from the Order. The petitioner sought to represent a unit of full-time faculty at the college, excluding members of the religious Order. The Acting Regional Director, relying on the Board's decision in *Barber-Scotia*, found that the Board was not precluded from asserting jurisdiction because *Catholic Bishop* did not apply to colleges. He further found that assertion of jurisdiction would be proper because the college was not church-operated within the meaning of the Supreme Court's decision and therefore no risk of entanglement between church and state was presented.

The Board decided to reverse the Acting Regional Director and to overrule its earlier cases limiting the application of *Catholic Bishop* to parochial elementary and secondary schools. Rather, the Board determined that *Catholic Bishop* "applies to all schools regardless of the level of education provided." With respect to St. Joseph's College, the Board found that it exhibited several characteristics of a school which is church-operated within the meaning of *Catholic Bishop*. In particular, the Board noted the college's financial dependence on the Order, the Order's considerable administrative control over the college, and the significant degree of control that the Bishop of Portland had over the college, by virtue of both the presence of his representative on the board of governors and his power to remove a faculty member whose conduct was not in harmony with Catholic beliefs.

In addition, the Board noted that new faculty members were required to sign a letter in which they agreed that they would "promote the objectives and goals" of the Order, and that all faculty members were prohibited from knowingly inculcating

[13] 282 NLRB No. 9 (Chairman Dotson and Members Johansen and Babson).
[14] 440 U.S. 490 (1979).
[15] 245 NLRB 406 (1979).

ideas contrary to the position of the Catholic Church on matters of faith and morals.

Based on these facts, the Board found a significant risk of infringement on first amendment rights was presented. The Board placed particular significance on the college's requirement that faculty members agree to promote the objectives of the Order because this would necessarily involve the Board in an unacceptable examination of the clergy-administrators' good faith concerning disciplinary actions alleged as unfair labor practices. Thus, the Board concluded that the "very process of inquiry" would present the likelihood that first amendment rights would be impinged and, accordingly, declined to assert jurisdiction.

In *Nazareth Regional High School*,[16] the Board declined to assert jurisdiction over a Catholic high school which was operated by a predominantly lay board of trustees.

The Board's decision reversed the administrative law judge, who had recommended asserting jurisdiction based on *Bishop Ford Central Catholic High School*,[17] which found that a school which was operated by an independent lay board of trustees was not church-operated within the meaning of *NLRB v. Catholic Bishop of Chicago*.[18]

Applying its decision in *Jewish Day School*,[19] the Board concluded that it could not assert jurisdiction because the school's "purpose and function in substantial part are to propagate a religious faith." The Board noted that the school defined itself in its faculty handbook by its "attempt to transmit the teachings of Jesus Christ and His Church," and in its student handbook stated that students were "expected to be a sign of the values which Jesus taught." The school's principal asked applicants for teaching positions if they were willing to teach Catholic doctrine. Teachers of both religion and nonreligion courses were expected to impart the values of the Catholic Church to students. Furthermore, religion classes were mandatory at all grade levels, mass was celebrated daily in the school's chapel, each day a religion class was assigned to participate in that mass, and each morning a prayer was read over the public address system. Moreover, the physical plant of the school was subject to a right of reverter to the diocese, conditioned on the school's continued operation as a Catholic school.

D. Nonprofit Charity

In *Hanna Boys Center*,[20] the Board asserted jurisdiction over a nonprofit charitable institution founded by two Catholic priests.

[16] 283 NLRB No. 116 (Chairman Dotson and Members Babson and Stephens).
[17] 243 NLRB 49 (1979), enf. denied 623 F.2d 818 (2d Cir. 1980), cert. denied 450 U.S. 996 (1981).
[18] 440 U.S. 490 (1979).
[19] 283 NLRB No. 106.
[20] 284 NLRB No. 121 (Members Johansen and Stephens; Chairman Dotson dissenting).

The center provided a therapeutic and residential facility for boys from troubled homes.

Citing *Jewish Day School*,[21] the majority found *Catholic Bishop* was not controlling under the facts of *Hanna*. The Board determined that in *Catholic Bishop* a threshold issue concerning the Supreme Court was the first amendment issue of freedom of religion and the potential impact of the Board's processes on the relationship between school and teacher. As noted in *Catholic Bishop*, teachers have a "critical and unique role" in fulfilling the mission of a church-operated school and that unique role must be examined to determine whether to assert jurisdiction. The majority in *Hanna* found that there were no teachers in the unit sought, which included child care workers, and it rejected the argument that child care workers are analogous to teachers. The Board also determined that there was no indication that child care workers were involved in the religious or secular training of the entrants.

In *Hanna*, the Board thus determined that the sensitive first amendment issues raised in *Catholic Bishop* were not involved in the assertion of jurisdiction over the center. In view of its findings, the Board found it unnecessary to determine whether Hanna Boys Center was a school and whether its purpose and function in substantial part were to propagate a religious faith.

Chairman Dotson, dissenting, stated he would decline to exercise jurisdiction over nonprofit, charitable institutions unless it was demonstrated that the institution had a substantial impact on interstate commerce, citing *Ming Quong Children's Center*.[22] As he found no such showing made in *Hanna* he would not assert jurisdiction. He did not pass on the applicability of *Catholic Bishop* to the case at hand.

E. Government Contractor

In *Dynaelectron Corp.*,[23] a Board panel asserted jurisdiction over an employer who was a government contractor subject to the terms of the Service Contract Act of 1965.[24] The Board, applying the test set forth in *Res-Care, Inc.*[25] and *Long Stretch Youth Home*,[26] concluded that the employer retained sufficient control over "terms and conditions of employment to engage in meaningful collective bargaining, and that neither the Navy nor the [Department of Labor] exercise[d] any controls that significantly affect[ed] the employer's ultimate discretion over wage and benefit levels."

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[21] 283 NLRB No. 106.
[22] 210 NLRB 899 (1974).
[23] 286 NLRB No. 28 (Chairman Dotson and Members Johansen and Stephens).
[24] 41 U.S.C. § 351.
[25] 280 NLRB No. 78 (June 24, 1986).
[26] 280 NLRB No. 79 (June 24, 1986).

The employer provided maintenance services on aircraft for the U.S. Navy at Meridian, Mississippi. The petitioner sought to represent production and maintenance employees at Meridian, and the Regional Director dismissed the petition for lack of jurisdiction.

The employer argued that the terms of the Service Contract Act prevented meaningful bargaining over employee wages and benefits. That statute provides that contractors furnishing services to the Government must abide by minimum wage rates established by the Department of Labor, known as wage determinations. In addition, under the statute, collectively bargained compensation levels are substituted for the wage determinations.

The Board panel reasoned that the employer's ability to bargain was not limited in that the employer was not subject to any restrictions on maximum wages and benefits and the employer determined the levels of compensation for its employees, guided only by the minimum standards.

Accordingly, the Board panel concluded that it would effectuate the purposes and policies of the Act to assert jurisdiction. Thus, the panel reversed the Regional Director, reinstated the petition, and remanded the proceeding.

III

NLRB Procedure

The filing of a charge activates the Board's processes. The charge enables the General Counsel, after due investigation, to issue a complaint. Section 10(b) of the Act provides, however, "[t]hat no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge."

A. 10(b) Period for Filing Charge

In *Castaways Management*,[1] a Board panel refused to affirm violations found by the administrative law judge which were based on two dismissed charges that had been reinstated by the Regional Director outside the 6-month limitations period of Section 10(b) of the Act. The Board also found that an amendment to a third charge did not relate back to the original charge. Thus, the amendment was considered to be time-barred by Section 10(b).

A consolidated complaint which issued on November 28, 1980, was based on charges filed in three cases. The charges in two of the three cases had been dismissed by the Regional Director and appeals from the dismissals denied by the General Counsel. Subsequently, some 10 months following the occurrence of the misconduct alleged in the later filed charge, the General Counsel issued a complaint based in part on the two previously dismissed charges. The judge did not find any of the charges included in the complaint to be time-barred by Section 10(b) of the Act.

The Board, citing *Ducane Heating Corp.*,[2] found the two previously dismissed charges to be time-barred. *Ducane Heating* held that a dismissed charge may not be reinstated outside the 6-month limitations period of Section 10(b) absent special circumstances in which a respondent fraudulently conceals the operative facts underlying the violation alleged. The Board noted that counsel for the General Counsel had made general assertions in oral arguments before the judge that evidence of illegal assistance to one union had been fraudulently concealed by the respondent, but found that counsel's bare assertions of fraudulent

[1] 285 NLRB No. 121 (Chairman Dotson and Members Johansen and Babson).
[2] 273 NLRB 1389 (1985).

concealment made in arguments at the hearing without supporting facts or evidence did not warrant an extension of the limitations period under *Ducane.*

The Board also found that an amendment to the third charge did not support findings of some violations occurring more than 6 months prior to the filing of the amended charge because they were unrelated to the subject matter of the original charge and were not independent violations of Section 8(a)(1). The original charge was filed on May 21, 1980, and alleged that the respondent violated Section 8(a)(1) of the Act by threatening to reduce wages and benefits if employees selected one particular union as their collective-bargaining representative. The charge form also contained the printed allegation that the charged party had interfered with, restrained, and coerced employees in the exercise of Section 7 rights by "other acts" in addition to those set forth elsewhere in the charge. On June 23, 1980, the May 21 charge was amended to allege further specific violations of Section 8(a)(1), (2), (3), (4), and (5) of the Act through, inter alia, unlawful assistance to a different union, unlawful threats, discriminatory discharges, and an unlawful discharge for giving an affidavit to the Board.

The judge had concluded that the amendment to the original charge was sufficiently related to the original charge to support violations occurring back to December 1, 1979. Disagreeing, the Board held that only misconduct in violation of Section 8(a)(1) was sufficiently related to the original charge to be encompassed by that charge, and that all conduct in violation of other sections of the Act which occurred prior to December 23, 1979, the date 6 months prior to the filing of the amended charge, was barred by Section 10(b) of the Act.

The Board explained that the amended charge itself served as a basis for complaint allegations occurring on or after December 23, 1979, and that the original charge served as a proper basis for complaint allegations occurring on or after November 21, 1979, the date 6 months prior to its filing. It found, however, that the original charge, which alleged specific and general violations of Section 8(a)(1) of the Act, supported only 8(a)(1) allegations which were included in the amended charge and did not support violations of other sections of the Act which were not sufficiently related to, or encompassed by, the subject matter covered in the original charge. Thus, the original charge did not provide a basis for finding violations of other sections of the Act unrelated to the subject of wages and benefits back to November 21, 1979, including alleged unfair discharges which occurred between that date and December 23, 1979. Accordingly, the Board concluded that certain violations found by the judge which occurred during that time period were barred by Section 10(b) of the Act.

In *Arvin Industries*,[3] a Board panel held that Section 10(b) did not bar allegations that an employer and a union violated Section 8(a)(3) and (1) and Section 8(b)(1)(A) and (2), respectively, by maintaining and enforcing provisions in their collective-bargaining agreement according superseniority to union officials whose responsibilities were not directly related to on-the-job grievance processing and administration of the collective-bargaining agreement.

In March 1981 the parties executed an agreement, effective March 2, 1981, through March 1, 1984, providing that seniority shall be the determinative factor in cases of layoff and recall and, where practicable, shift preference would be guided by seniority. The agreement provided that certain designated union officeholders shall be considered at the top of the seniority list for layoff purposes. That same month, the parties executed a letter of understanding that established day-shift preference for designated union officeholders. Thereafter, on September 4, 1983, a senior employee was transferred to another shift because of the exercise of superseniority by a union officeholder. On September 19, 1983, the aggrieved employee filed a charge alleging the unlawful maintenance and enforcement of contractual superseniority provisions.

The majority held that, as to the enforcement allegation, the 10(b) period commenced in September 1983 when the union officeholder exercised his superseniority to "bump" the aggrieved employee to another shift. Thus, the charge was timely filed in this respect. As to the maintenance allegation, the majority held that Section 10(b) did not bar an allegation concerning maintenance of the provision within the 6-month period preceding the filing of the charge. The majority found that it was not compelled to dismiss the complaint because of certain precedent of the United States Court of Appeals for the Eleventh Circuit where this proceeding "arose."

As to the application of Section 10(b) to the maintenance allegation, the majority noted that other courts of appeals had concluded that an intervening Board decision pertaining to superseniority had clarified the theory of the violation in such a way as to obviate any conflict with the adverse precedent of the Eleventh Circuit. Thus, those other cases would provide a basis for requesting the court to reexamine its own precedent. The majority noted further that the venue provisions of the Act are such that the Board's Order in this proceeding was potentially subject to review in circuits other than the Eleventh Circuit. They emphasized that the Board operates under a statute that does not contemplate that the law of a single circuit would exclusively apply in any given case.

[3] 285 NLRB No. 102 (Members Johansen and Stephens; Chairman Dotson dissenting).

Chairman Dotson, dissenting, stated that dismissal of the complaint was compelled by the adverse precedent of the Eleventh Circuit. Although convinced of the soundness of the Board's prevailing precedent with regard to the application of Section 10(b), Chairman Dotson would have abandoned the policy of nonacquiescence in adverse precedent in the circuit court where enforcement or review of the Board's decision will be sought.

In *Norris Concrete Materials*,[4] the Board concluded that a Regional Director acted properly in reinstating a withdrawn charge and complaint outside the 10(b) period.

The consolidated complaint in the case included allegations encompassed by two unfair labor practice charges. The original charge, filed in 1981, alleged that the respondent violated Section 8(a)(4) and (1) of the Act by laying off an employee in 1980 because his son had filed charges with the Board. Following the issuance of a complaint, the parties in 1982 entered into a non-Board settlement agreement under which the employee was reinstated with partial backpay in exchange for the withdrawal of the pending charge. The Regional Director subsequently approved the employee's withdrawal request and withdrew the complaint. One week later, the employee filed a new charge alleging he was constructively discharged shortly after his reinstatement because he had filed the 1981 charge. Because the Regional Director found that the terms of the non-Board settlement had been violated, he revoked his earlier order and reinstated the complaint in the earlier case. The consolidated complaint followed. The respondent argued in its answer that the 1981 charge was "fully compromised and settled" by the 1982 settlement agreement.

The administrative law judge found that he was precluded from making any unfair labor practice findings with respect to the allegations encompassed by the 1981 charge based on his interpretation of *Winer Motors*, 265 NLRB 1457 (1982). *Winer* held that a withdrawn charge may not be reinstated beyond the normal 6-month period prescribed in Section 10(b) of the Act. The judge determined that the Board did not allow for any exceptions in *Winer* to cover situations where a charge is withdrawn as part of a non-Board settlement. However, on the facts, the judge determined that the respondent did not enter into its agreement with the employee in good faith. Rather, with an intent to frustrate the settlement agreement, the respondent created a new employee classification system and discipline policy which resulted in conditions so intolerable that they led to the constructive discharge of the employee.

The Board found that the rule announced in *Winer* did not address cases involving noncompliance with settlement agreements. The Board noted that, in this case, the respondent not only failed

[4] 282 NLRB No. 45 (Chairman Dotson and Members Babson and Stephens).

to comply with the terms of its settlement agreement, but also perpetrated a fraud against the employee and the Board by entering into a settlement agreement with which it had no intent to comply. Thus, in addition to creating the new classification and discipline systems, the respondent issued groundless warnings to, and temporarily laid off, the employee. The Board concluded that the respondent's postsettlement unfair labor practices effectively nullified the settlement by negating its terms and purpose. The Board held, therefore, that because the Respondent used a non-Board settlement in a postcomplaint situation as a subterfuge to avoid its liability under the Act, the reinstatement of the withdrawn charge was appropriate despite the expiration of the 10(b) period. The Board, noting the indispensable role that settlements play in implementing national labor policy, commented that respondents who fraudulently enter into such agreements must not benefit from their misconduct.

Addressing the merits of the 1981 charge, the Board found that the respondent violated Section 8(a)(4) and (1) of the Act by discharging the employee in 1980, and violated Section 8(a)(1) by threatening an employee with an unfavorable job reference in retaliation for filing charges with the Board.

B. Effect of Settlement Agreement

In *United States Gypsum*,[5] a Board panel, reversing an administrative law judge, found that the General Counsel erred in issuing a complaint which included an unfair labor practice allegation that was encompassed by the parties' prior settlement agreement.

The amended consolidated complaint alleged that the employer violated Section 8(a)(5) and (1) of the Act by unilaterally changing the lunch and break periods of its unit employees. The judge concluded that the employer had fulfilled its bargaining obligation on this issue and was therefore entitled to act as it did by instituting the lunch and break period changes. Contrary to the judge, the Board concluded that this issue was squarely governed by *Hollywood Roosevelt Hotel Co.*,[6] and that the General Counsel should never have permitted this charge to survive.

In *Hollywood Roosevelt Hotel*, the Board held that a settlement agreement disposes of all issues involving presettlement conduct unless prior violations of the Act were unknown to the General Counsel, not readily discoverable by investigation, or specifically reserved from the settlement by the mutual understanding of the parties. The Board further held in that case that the mere fact that a charge is filed after a settlement agreement has been negotiated does not ipso facto establish that the General Counsel was unaware of the alleged misconduct.

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[5] 284 NLRB No. 2 (Chairman Dotson and Members Babson and Stephens).

[6] 235 NLRB 1397 (1978).

In the instant case, the charge, which alleged that the employer unilaterally changed lunch and break periods, was filed on October 23, 1981. The settlement agreement was executed on November 27, 1981. Thus, the Board noted that although the charge was not specifically addressed in the settlement agreement, it is clear that both the General Counsel and the charging party had knowledge of these allegations at the time the agreement was executed. In addition, the Board noted that there was no evidence that the charge came within any of the exceptions to the general rule that a settlement agreement with which the parties had complied bars subsequent litigation of presettlement conduct alleged to constitute an unfair labor practice. In these circumstances, the Board concluded that the charge was encompassed by the settlement and should never have been permitted to survive.

C. Right of Nonparty to File Exceptions

In *J. A. Jones Construction Co.*,[7] the Board rejected an attempt by a nonparty, aggrieved individual to file exceptions when neither of the parties filed exceptions. The Board adopted the administrative law judge's conclusions that the respondent violated Section 8(a)(1) and (2) of the Act by interfering with the administration of the union by permitting its supervisor Robert Tidwell to serve as a union representative on the joint apprenticeship committee, as a trustee on a board that oversees health, welfare, and retirement funds, and as a delegate to the union's national convention.

Tidwell was one of 10 general foremen who reported to the respondent's two superintendents. He was the general foreman over 8 to 10 foremen and exercised supervisory authority over about 70 plumbers and steamfitters. Tidwell served as a representative for the union in three different capacities, as mentioned above. He also had voting authority in each of these areas affecting the union's constitution, the local's apprenticeship program, and the local's health, welfare, and retirement fund.

The judge found that Tidwell was a supervisor and that the respondent violated the Act by interfering with the administration of the union. As part of the recommended remedy, the respondent was required to direct Tidwell to resign from his union positions.

The Board cited *Lincoln Technical Institute*,[8] stating that a "nonparty discriminatee has no right to file exceptions to a decision of an administrative law judge that is not excepted to by any party." 256 NLRB at 177. The Board stated that if Tidwell had moved to intervene to become a party, "he would have been entitled to notice of the hearing on the complaint, to an opportunity to be heard, to notice of the decision, and to the opportunity

[7] 284 NLRB No. 141 (Chairman Dotson and Members Johansen and Babson).
[8] 256 NLRB 176 (1981), enfd. sub nom. *Giacalone v. NLRB*, 682 F.2d 427 (3d Cir. 1982).

to file exceptions." In a footnote, the Board stated that even assuming Tidwell had the status of "a 'person aggrieved' by a final Board order within the meaning of Sec. 10(f) and [who was] therefore entitled to seek review in a United States court of appeals, this status does not establish his antecedent right to file exceptions. *Giacalone v. NLRB*, supra."

In Member Johansen's view, a nonparty has no right to file exceptions to an administrative law judge's decision.

D. "Settlement Bar" Rule

In *Park-Ohio Industries*,[9] the Board held that its "settlement bar" rule, under which a settlement agreement normally disposes of all pending issues involving presettlement conduct, does not extend to compliance litigation.

In 1981, the Board found that Tocco Division of Park-Ohio had unlawfully transferred unit work from a plant in Ohio to a plant in Alabama without bargaining with the union, and ordered it to reinstitute the transferred work at the Ohio plant and to reinstate with backpay the employees who had lost their jobs because of the unlawful transfer.[10] The Board's decision was enforced, and a backpay specification was issued. Subsequently, the union filed three additional charges—one against Tocco Division and another of Park-Ohio's divisions, Ohio Crankshaft, and the other two against Ohio Crankshaft. One of those charges, involving only Ohio Crankshaft, was settled through an informal agreement approved by the Regional Director. A consolidated complaint was issued concerning matters raised by the other two charges, and was pending at the time the other charge was settled.

Park-Ohio moved for summary judgment concerning both the unfair labor practice proceeding and the backpay proceeding, contending that under the Board's settlement bar rule, those matters could not be litigated because they were pending when the settlement agreement was approved. According to Park-Ohio, those cases did not involve conduct that was unknown to the General Counsel or that had been specifically reserved from the settlement by the mutual understanding of the parties and thus, under *Hollywood Roosevelt Hotel Co.*,[11] should be dismissed.

Concerning the backpay proceeding, the Board held that the settlement bar rule was not intended to encompass such actions. It explained that the rule was designed to bar litigation of presettlement conduct alleged to be unlawful, not to preclude compliance litigation where unfair labor practices already have been found. It thus dismissed with prejudice the portion of the motion addressed to the backpay proceeding.

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[9] 283 NLRB No. 82 (Chairman Dotson and Members Stephens and Cracraft).
[10] *Park-Ohio Industries*, 257 NLRB 413 (1981), enfd. 702 F.2d 624 (6th Cir. 1983).
[11] 235 NLRB 1397 (1978).

However, the Board found that ambiguities arising from both the language and circumstances of the settlement agreement made it impossible to determine whether the parties had mutually intended to reserve from that agreement the issues in the other pending cases. Accordingly, the Board denied the portion of the motion addressed to the pending unfair labor practice cases, without prejudice to the introduction at the hearing of evidence bearing on the intent of the parties in arriving at the settlement agreement.

E. Extension of Time to File

In *P & M Cedar Products*,[12] the Board ruled that any extension of time granted to file an answering brief in a proceeding applies to all the parties, but that subsequent to its decision such an extension will not enlarge the time to file cross-exceptions to an administrative law judge's decision.

After the respondent filed exceptions in that case, the Board granted the charging party's request for an extension of time to file an answering brief. Before the extended period of time had expired, the Board received an answering brief from the union. On the same date, the General Counsel, who neither requested nor was granted an extension of time, filed cross-exceptions and an answering brief. The respondent moved to strike both the General Counsel's submissions on the ground that they were untimely.

In denying the respondent's motion, the Board noted that in its Rules and Regulations the only limitation on the right to file cross-exceptions is that the party who wishes to file cross-exceptions may not already have filed exceptions. The Board further noted, with respect to extensions of time, that its longstanding policy and practice is that a request for an extension of time filed by one party is applicable to all parties, provided, of course, that the party is otherwise eligible to file the document for which the extension is sought. Thus, if one party filed a request for an extension of time to file an answering brief to another party's exceptions, the Board found that any extension of time granted applies to all parties without regard to whether the request for an extension was a joint request.

Additionally, because the filing of cross-exceptions usually, but not invariably, is accompanied by the filing of an answering brief, the Board emphasized that a request for an extension of time to file cross-exceptions has been construed to enlarge the time to file an answering brief even if the extension-of-time request does not specifically allude to an answering brief.

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[12] 282 NLRB No. 108 (Member Johansen concurred in denying the respondent's motion to strike the General Counsel's answering brief, but would have granted the motion to strike the General Counsel's cross-exceptions).

The Board found that the reverse is not true, i.e., a request for an extension of time to file an answering brief does not enlarge the time to file cross-exceptions. However, as it is the case with respect to whether a request for an extension of time is applicable to all the parties, the Board noted that its Rules are silent with respect to whether an extension of time to file an answering brief also enlarges the time to file cross-exceptions. Although noting that the General Counsel would have been better advised to have filed a specific request to enlarge the time to file cross-exceptions, under the circumstances, and given the ambiguity in the Rules, the Board accepted the General Counsel's cross-exceptions. In so concluding, the Board stressed that in the future it would not accept a party's cross-exceptions in that situation.

Member Johansen concurred in the denial of the respondent's motion to strike the General Counsel's answering brief, but would have granted the motion to strike the General Counsel's cross-exceptions.

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

A. Unit Issues

1. Status of "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 ser-

vants, or anyone employed by his or her 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 *Anamag*,[1] the Board found that the employer's "team leaders" were not supervisors as defined in Section 2(11) of the Act, notwithstanding "the novel and rather complex conceptual framework within which team leaders perform their functions, a framework which surely was not contemplated by the drafters of the Act over 50 years ago."

The employer operated its facility under a Japanese managerial philosophy referred to as the "team concept." Pursuant to this philosophy, employees were encouraged to participate in decision-making with management regarding the everyday operation of the facility. The employer's implementation of this philosophy resulted in the organization of its production employees into six "teams" consisting of "team members" and a "team leader," a rank-and-file employee elected by a majority vote of the team members to serve for an indefinite period of time. There were no eligibility requirements or other limitations on whom the team members could select or remove as team leader, and the employer had never interfered with a team's selection of its team leader.

The Board found that the record supported the Regional Director's findings that the team leaders "do not . . . possess or exercise supervisory authority on an independent basis in furtherance of management's interest," and that "[a]ny nominal authority which [they] may possess by virtue of their elected positions is derived from the team's tacit support, which can be withdrawn at any time."

The Board noted that disciplinary decisions unrelated to attendance were typically made by team consensus, and that attendance-related discipline was controlled by a highly structured system which virtually eliminated the exercise of discretion by a team leader. Team leaders' assignment and direction of work was, as found by the Regional Director, "generally routine and based to a large extent on the team's production requirements." Moreover, the Board found that work assignments usually were determined by the team as a group. Similarly, the team participated in decisions regarding team members' performance evaluations and in the decision-making process regarding overtime assignments.

The Board therefore concluded that "team leaders' authority sufficient to warrant a finding of supervisory status is largely preempted by the decision-making power of the team members

[1] 284 NLRB No. 72 (Chairman Dotson and Members Johansen, Babson, Stephens, and Cracraft).

and/or the presence of guidelines issued by the Employer with respect to several personnel functions."

2. Health Care Employees

In *St. Vincent Hospital*,[2] the Board announced that, during the pendency of its rulemaking proceeding on the subject of appropriate bargaining units in the health care industry,[3] it would continue to apply the "disparity-of-interests" test for making unit determinations in that industry.[4]

The Board acknowledged that its decision to continue to apply the disparity-of-interests test might place it in conflict to some extent with *Electrical Workers IBEW Local 474 v. NLRB*,[5] in which the D.C. Circuit denied enforcement of the Board's decision in *St. Francis II*. In that case, the court of appeals found that the Board erred by interpreting the 1974 amendments to the Act[6] as mandating the use of the disparity-of-interests standard, and that the standard entailed the implicit presumption that only two health care units—all professionals and all nonprofessionals—are appropriate. The court also indicated that the Board should not have relied on the legislative history of the 1974 amendments, which contained several expressions of Congress' concern that the Board avoid proliferation of health care bargaining units, because Section 9(b) of the Act was not amended in 1974, and therefore the Board's unit certification standards were not changed by the amendments.

The Board explained, however, that it did not view the disparity-of-interests standard as mandated by the 1974 amendments, or as entailing an implicit presumption that only two units are appropriate in the health care industry.[7] Instead, the Board explained, the disparity-of-interests test was adopted in the exercise of the Board's discretion, which had properly been informed by Congress' inclusion of several provisions in the 1974 amendments designed to forestall work stoppages in the health care industry, as well as by the congressional admonition against unit proliferation in that industry. The Board also stressed that under the disparity-of-interests test it analyzed the same "community-of-interests" factors that are used in making unit determinations in other industries, but that it required more in the way of differences between the employees in the unit requested and those in an overall unit to grant a separate unit in the health care industry than it

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[2] 285 NLRB No. 64 (Chairman Dotson and Members Johansen, Babson, Stephens, and Cracraft).

[3] See the Board's Notice of Proposed Rulemaking, 52 Fed. Reg. 25142 (July 2, 1987). Chairman Dotson and Member Johansen, although concurring with the majority in *St. Vincent Hospital*, did not consider rulemaking to be an appropriate or effective exercise of the Board's authority in this class of decisions.

[4] The disparity-of-interests test was set forth in *St. Francis Hospital*, 271 NLRB 948 (1984) (*St. Francis II*).

[5] 814 F.2d 697 (D.C. Cir. 1987).

[6] Pub. L. 93-360, 88 Stat. 395 (July 26, 1974).

[7] See, e.g., *Southern Maryland Hospital*, 274 NLRB 1470 (1985) (separate unit of technical employees found appropriate).

would require elsewhere. The Board thus explained that it had not abandoned the traditional community-of-interests standard in formulating the disparity-of-interests test, but had merely modified the former standard, in the exercise of its discretion, to give effect to the congressional admonition against health care unit proliferation.

Applying the disparity-of-interests standard to the facts of the case, the Board found that there did not exist "sharper than usual differences" between registered nurses and other professional employees of the hospital. Accordingly, the Board held that a separate unit of registered nurses did not constitute an appropriate unit, and that the smallest appropriate unit was one consisting of all of the hospital's professional employees.[8]

In *Manor Healthcare Corp.*,[9] the Board reaffirmed its traditional view that, despite congressional admonitions to prevent proliferation of bargaining units in the health care industry, there is a rebuttable presumption that single-facility units are appropriate in this industry. Here, the union sought a unit encompassing essentially all nonprofessional employees at one of the employer's three Baltimore-area convalescent homes. The employer contended that the smallest appropriate unit included employees employed at all three of its Baltimore-area convalescent homes, even though the other two were 10 and 13 miles distant, respectively, from the single facility sought.

The U.S. Courts of Appeals for the Second and Tenth Circuits had previously rejected the Board's application of the single-facility presumption in this industry.[10] The courts had held that the Board erred in concluding that the congressional intent regarding undue proliferation had no bearing on questions of a health care unit's geographical scope. In reaffirming the validity of its traditional rebuttable presumption, the Board acknowledged the overbreadth of its previous pronouncement, and decided that considerations of antiproliferation were properly to be considered along with other factors in a party's rebuttal of the presumption of single-facility appropriateness. The Board reasoned, however, that the congressional concern over proliferation was directed primarily at the question of multiple bargaining units within a single facility and did not generally outweigh the Board's long-held and court-approved principle of single-facility appropriateness as applied in a number of other industries. In its view, nothing about the health care industry made it unique with respect to the likelihood of the spread of work stoppages or other disruptions because of single-facility units. Rather, the Board foresaw, if anything, a greater risk of an areawide disrup-

[8] See, e.g., *North Arundel Hospital Assn.*, 279 NLRB 311 (1986).

[9] 285 NLRB No. 31 (Chairman Dotson and Members Johansen, Babson, Stephens, and Cracraft).

[10] *Long Island Jewish-Hillside Medical Center v. NLRB*, 685 F.2d 29 (2d Cir. 1982); *Prebyterian/St. Luke's Medical Center v. NLRB*, 653 F.2d 450 (10th Cir. 1981).

tion of the delivery of health care services if the bargaining unit were broader.

Based on the facts presented in this case, including the geographical separation of the facilities, the minimal interchange of employees and patients between facilities, the lack of functional integration, and the autonomous day-to-day administration of labor matters at each facility, the Board found that the presumption of single-facility appropriateness had not been rebutted.

3. Hotel Engineering Unit

In *Omni International Hotel*,[11] the Board held that the petitioned-for unit of the hotel's engineering department employees was an appropriate unit for bargaining.

The majority of Members Babson, Stephens, and Cracraft found that the record contained "no compelling facts which would mandate a finding that the smallest appropriate unit must include all employees of the hotel." Noting that it was "beyond peradventure that the Act allows a union to petition for an appropriate unit," the majority concluded that the unit sought was appropriate, relying on the engineering department employees' separate supervision and unique skills; the absence of permanent or temporary interchange between engineering department employees and other hotel employees; the prevailing areawide pattern of bargaining, which revealed separate engineering department units at "virtually all" major Detroit metropolitan area hotels; and the fact that engineering department employees earned the highest hourly wage among the hotel's nonsupervisory employees.

Chairman Dotson and Member Johansen, dissenting, believed that the petitioned-for unit did not constitute a separate appropriate bargaining unit. They noted that the engineering department employees did not constitute a craft unit, had frequent day-to-day contact with other hotel employees, and, although having separate immediate supervision, were jointly supervised at a higher level with employees in six other job classifications. The dissent further noted that all hotel employees were paid on an hourly basis, enjoyed the same fringe benefits, and were subject to the same work rules and personnel policies.

4. Auto Service Technicians

In *Dodge City of Wauwatosa*,[12] the Board considered the appropriateness of a unit limited to the employer's service technicians (mechanics) at its automobile dealership. In so doing, the Board found that the petitioned-for employees constituted a craft

[11] 283 NLRB No. 73 (Members Babson, Stephens, and Cracraft; Chairman Dotson and Member Johansen dissenting).

[12] 282 NLRB No. 71 (Chairman Dotson and Members Babson and Stephens; Member Johansen concurring).

unit which could be represented in a separate collective-bargaining unit.

The Board found that the employer's mechanics were "a distinct and homogeneous group of highly trained and skilled craftsmen who are primarily engaged in the performance of tasks that are not only different from the work performed by the other service department employees [body shop and parts department], but that require the use of substantial specific craft skills, as well as specialized tools and equipment"; and that such training and skills set the mechanics apart from the rest of the service department employees.[13]

The Board distinguished *Austin Ford*,[14] in which all the employees in the service department possessed and exercised the skills of automobile mechanics and the functions they performed were related to automobile repair, and noted that in the instant case, unlike the situation in *Austin Ford*, the lines of demarcation between employee classifications were clear. Further, the Board noted that it had not determined per se that the only appropriate unit in this industry must include all of the employees of an employer's service department, but that it had consistently found that mechanics possessing skills and training unique among other employees constitute a group of craft employees within an automotive or motor service department which, if requested, may be represented in a separate unit.[15]

Member Johansen, concurring, agreed that the unit of auto shop employees was an appropriate unit based on general community-of-interests principles, but he did not rely on a specific finding that the auto shop constituted a "craft unit." He found that these employees possessed a distinct community of interests as they learned and exercised specialized mechanical skills, they worked in a separate location, and they enjoyed limited work contact with employees of other departments.

B. Merger of Units

In *Wisconsin Bell*,[16] the Board held that when an employer and a union have agreed to merge separately certified or recognized units, the larger, merged unit is the only unit appropriate for purposes of a representation election.

The employer and the union had been parties to a series of collective-bargaining contracts since 1974. In September 1984, the union was certified as the collective-bargaining representative for a unit of eight of the employer's commercial employees. By prior agreement between the employer and the union, the parties' 1983

[13] See *Taylor Bros.*, 230 NLRB 861 (1977); *International Harvester Co.*, 119 NLRB 1709 (1958). See also *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966); *E. I. du Pont & Co.*, 162 NLRB 413 (1966).

[14] 136 NLRB 1398 (1962).

[15] 282 NLRB No. 71, slip op. at 5 fn. 6.

[16] 283 NLRB No. 179 (Members Johansen and Babson; Chairman Dotson dissenting).

contract was then amended by letter to include these employees in the overall commercial workers unit.

On May 22, 1986, a representation petition was filed, requesting a decertification election in a unit limited to the eight-employee unit organized in September 1984. The Regional Director dismissed the petition on the grounds that the merger of the two units rendered the petitioned-for unit inappropriate for purposes of a decertification election. The Board majority affirmed this decision, citing *Gibbs & Cox*,[17] which had recently affirmed the Board's merger doctrine. The merger doctrine provides that an employer and a union can agree to merge separately certified or recognized units into one overall unit. Because such an agreement had been made here, the Board stated, "the petitioned-for unit is not coextensive with the currently recognized and established bargaining unit, [and] the petition shall be dismissed."

Chairman Dotson, dissenting, believed that the majority's adherence to the merger doctrine "callously ignores the specific right of employees to reject or change their bargaining representative." The situation in *Wisconsin Bell*, the Chairman stated, "clearly illustrates the inherent unfairness of placing the employees' collective-bargaining fate in the hands of the Employer and the Union." Rather, the Chairman asserted, citing his and Member Dennis' dissent in *Gibbs & Cox*, the only proper course of action was to require that any unit approved for purposes of selecting a bargaining representative remain appropriate when the time came to reject or change that bargaining representative. Accordingly, the Chairman would have reversed the Regional Director's dismissal of the petition and ordered an election to be held in the petitioned-for unit.

In *Special Machine & Engineering*,[18] a Board majority held that a smaller unrepresented group was accreted to a larger represented group when the two groups were merged.

The employer consolidated its operations such that approximately 20 unrepresented employees were merged into a single productive entity with a represented group of approximately 50 employees. The Board majority found, citing *Central Soya Co.*,[19] that accretion had occurred because the represented group constituted a majority of the work force, and the employees used the same skills and worked on the same projects under the same supervision and the same terms and conditions of employment.

Accordingly, the majority, finding no question concerning representation, denied the employer's request for review of the Regional Director's dismissal of the RM petition.

Chairman Dotson, in dissent, believed that the represented group was not sufficiently predominant to remove a question concerning representation. The Chairman would have applied

[17] 280 NLRB 953 (1986).
[18] 282 NLRB No. 172 (Members Johansen and Stephens; Chairman Dotson dissenting).
[19] 281 NLRB No. 173 (Oct. 21, 1986).

the same standard as the Board requires when two groups of represented employers are merged, citing *Martin Marietta Chemicals.*[20] Chairman Dotson would have, therefore, ordered an election.

C. Unit Clarification

In *Batesville Casket Co.*,[21] the Board considered the question of whether the existing single unit of employees of Batesville Casket Company, Inc. and Hill-Rom Company, Inc. should be clarified to constitute two separate units. In so doing, the Board found that the Regional Director had properly applied the principles set forth in *Rock-Tenn Co.*[22] to the facts of the instant case, and it affirmed the Regional Director's dismissal of the petition.

In *Rock-Tenn*, the Board clarified the existing multiplant unit to constitute two separate single-plant units when recent, substantial changes in the organizational structure and operations of the two plants had occurred which negated any community of interests that may have existed previously among employees of the two plants. Thus, in that case the Board found that "compelling circumstances" existed for disregarding the bargaining history on a two-plant basis, and that the historical unit no longer conformed reasonably well to the normal standards of appropriateness.[23] In the instant case, the Board found that the only significant operational changes involving the existing unit occurred nearly 30 years ago, and that the creation of separate personnel or human resources departments occurred over 10 years ago. Further, the Board found that the same employees continued to perform the same functions in the same locations under the same immediate supervision, and that the changes have had no practical effect at all on several significant areas of personnel policy or labor relations because the parent company (Hillenbrand Industries) remained directly involved with hiring, grievances and arbitration, and the actual negotiation and execution of all collective-bargaining agreements.

The Board concluded that although the two companies functioned separately and autonomously in many respects, there continued to exist a high degree of commonality due to the relationship of the parent company to its subsidiaries and the long history of bargaining as a combined unit; and, unlike *Rock-Tenn*, there had been no recent, significant changes in the companies' operations. The Board also noted that at no time before the instant

[20] 270 NLRB 821 (1984).

[21] 283 NLRB No. 118 (Members Johansen, Babson, Stephens, and Cracraft; Chairman Dotson dissenting).

[22] 274 NLRB 772 (1985).

[23] Id. at 773.

petition was filed did either party seek to modify the existing unit or split it into two units.

Chairman Dotson, dissenting, would have clarified the two-plant unit to constitute two separate units, as he found it clear that the historical (combined) unit was no longer appropriate when measured against the Board's usual standards. Moreover, he found it immaterial that the changes which occurred in this case were not recent, as these changes did take place and they had negated the community of interests which once existed between the employees of the company, and had rendered a combined unit inappropriate for the purposes of meaningful and effective collective bargaining.

In *Super Valu Stores*,[24] a Board panel granted an employer's petition to clarify the existing unit of warehouse employees at its Brighton Boulevard facility to exclude warehouse employees at its newly opened Aurora warehouse. In making this determination, the Board rejected the union's arguments that the Aurora employees constituted an accretion to the existing Brighton unit and that the Board should defer to an arbitrator's award applying the collective-bargaining agreement to the Aurora employees.

The Colorado division of the employer, a wholesale distributor of grocery and household products to retail stores in that State, operated a wholesale grocery warehouse on Brighton Boulevard in Denver and a general merchandise warehouse in Aurora. Grocery and general merchandise items had historically been stocked at the Brighton warehouse, but the general merchandise operation had been virtually eliminated when the employer purchased this warehouse in 1982. The union had represented the employees at this latter warehouse since 1940, and after the purchase the employer and the union became parties to successive collective-bargaining agreements covering employees working there. Subsequently, the employer was required to establish a general merchandise operation in order to acquire a major customer. Although it initially supplied general merchandise orders from its Omaha, Nebraska facility, the employer later decided to establish a general merchandise operation within the Colorado division because of inconsistent and late deliveries from the Nebraska facility. It then opened the Aurora warehouse, which was located approximately 10 miles from the Brighton warehouse, but it did not hire any Brighton unit employees to staff the facility. The employer also refused to apply the existing collective-bargaining agreement to the employees at the new facility. After the union filed a grievance, the arbitrator sustained the union's position and ordered the employer to apply the collective-bargaining agreement to the Aurora warehouse. Although the employer initially complied with the arbitrator's award and transferred several Brighton unit employees to the Aurora warehouse, it then decid-

[24] 283 NLRB No. 24 (Chairman Dotson and Members Babson and Stephens).

ed to contest the award by returning the transferred employees to the Brighton facility and filing the unit clarification petition.

The Board, inter alia, rejected the union's contention that it should defer to the arbitrator's award applying the collective-bargaining agreement to the Aurora facility and therefore find that unit clarification was inappropriate. Citing *Marion Power Shovel Co.*[25] for the proposition that the Board alone must resolve questions involving clarification of a bargaining unit, the Board concluded that deferral was not appropriate as the employer's petition had presented a question of whether to clarify an existing unit. Consequently, the Board decided that the arbitrator's decision did not preclude its determination of whether to clarify the unit.

The Board also rejected the union's argument that the employees at the Aurora warehouse constituted an accretion to the existing Brighton unit. Pursuant to *Safeway Stores,*[26] the Board finds a valid accretion "only when the additional employees have little or no separate group identity . . . and when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted." The union had argued that the Aurora employees shared such a requisite community of interests with the Brighton employees by pointing to the following factors: the integrated operation of the two warehouses to fill customer orders; the similarity in working skills and functions of the employees at both warehouses; the contact between the Brighton unit driver and the Aurora warehouse employees; the bargaining history whereby the bargaining unit employees had historically handled general merchandise; and the close proximity of the two facilities. Although acknowledging that these factors arguably weighed in favor of an accretion, the Board found that other factors were neutral or weighed in the other direction. Following its earlier decision in *Towne Ford Sales,*[27] the Board concluded that two other factors—degree of employee interchange and common supervision—strongly militated against a finding of accretion. The Board found that the record revealed a total lack of interchange of employees between the two facilities, except for the 2-week period in which the employer had complied with the arbitration award, and the absence of common day-to-day supervision between the two facilities. Accordingly, it concluded that the Aurora employees did not constitute an accretion to the existing Brighton unit. In light of this conclusion and its finding that the parties had not agreed to include the Aurora employees in the Brighton unit under the terms of the collective-bargaining agreement, the Board granted the petition to clarify the unit.

[25] 230 NLRB 576 (1977).
[26] 256 NLRB 918 (1981).
[27] 270 NLRB 311 (1984).

D. Amendment of Certification

In *Hammond Publishers,*[28] a Board panel affirmed the Regional Director's amendment of certification substituting the name "Hammond Unit of the Chicago Newspaper Guild" for "The Organization of Newspaper Employees" (ONE) as the certified collective-bargaining representative of a unit of the employer's employees.

ONE was a small independent union representing approximately 90 of the employer's employees. Following a decision of ONE's executive board to seek affiliation with the petitioner, the Chicago Newspaper Guild, an affiliation election was scheduled. Approximately 2-1/2 weeks before the election, election notices were mailed to the home addresses of nearly all unit employees and posted on union bulletin boards on the employer's premises. Meetings between union officials and unit members were also held prior to the election. No proxy voting was to be allowed. The election took place as scheduled. Attendance was taken at a check-in table staffed by three employees from three different represented departments in the unit. These employees generally were able to identify all voters on sight and requested the telephone numbers of those whom they did not know.

Prior to the election, ONE's president stated the purpose of the election, informed employees that two different colored ballots would be used in anticipation of the employer's challenge to the eligibility of one of the two employee groups voting, explained the election procedures, and offered the employees an opportunity to ask questions or make comments. When no one did so, the balloting began. In accordance with instructions, each employee approached the table at which tally clerks were seated and gave his or her name to a tally clerk, who then checked the employee's name off the master voting list. An open table located within several feet of the tally clerks' table was provided for voting. Although a majority of the employees voted there, several voted away from the table in other parts of the room. Ballots were counted immediately after the polls closed. The election results showed a majority in favor of affiliation.

The Board rejected the employer's contentions that the affiliation was invalid. Rather, it found that the affiliation satisfied the two conditions generally required of a valid affiliation, i.e., that the vote for affiliation take place under circumstances which meet minimum standards of due process and that there be substantial continuity between the pre- and post-affiliation representative.

With respect to due process, the Board found that ONE's mailing and posting of election notices approximately 2-1/2 weeks before the election, together with the opportunity for dis-

[28] 286 NLRB No. 6 (Members Babson and Stephens; Member Johansen concurring).

cussion presented by the preelection meetings, clearly satisfied the Board's requirement that eligible voters be notified of the election and be given an opportunity to discuss the election and its effect. The Board also found that failure to provide proxy voting did not affect the validity of the election results, as argued by the employer, when there was no showing that denial of proxy voting was a departure from ONE's usual procedures or that eligible voters were disenfranchised as a result. The Board also found that visual identification of eligible voters by coworkers who served as tally clerks, the use of color-coded ballots for a legitimate purpose, i.e., in anticipation of the employer's challenge, and which did not identify the individual voter or how he or she voted, and voting at an open table in the absence of evidence that an employee saw how another voted did not defeat due process. Overall, the Board found that the procedures used were not "so irregular or unmindful of due process to invalidate the election."

The Board rejected the employer's contention that the affiliation of a small independent union with a large international union either in itself or through the former's loss of its autonomy created a substantially different entity. It found that despite the disparity of size, continuity of representative was maintained in these circumstances where the authority to approve collective-bargaining agreements, call strikes, and control local expenditures continued to rest with the unit membership either directly or indirectly through their own elected officials and where former officials of ONE responsible for collective bargaining and grievance processing were retained in these capacities by the postaffiliation representative.

In light of these findings, the Board accordingly affirmed the Regional Director's amendment of certification, as it concluded that the affiliation took place as a result of an election that met minimal due process standards, showed continuity of representative, and did not raise a question concerning representation.

E. Conduct of Election

Section 9(c)(1) of the Act provides that when a question concerning representation is found to exist pursuant to the filing of a petition, the Board shall resolve it through a secret-ballot election. The election details are left to the Board. Such matters as voting eligibility, the timing of elections, and standards of election conduct are subject to rules laid down by the Board in its Rules and Regulations and in its decisions. Elections are conducted in accordance with strict standards designed to ensure that the participating employees have an opportunity to register a free and untrammeled choice in the selection of a bargaining representative. Any party to an election who believes that the standards have not been met may file timely objections to the election

with the Regional Director under whose supervision it was held. The Regional Director may either make an administrative investigation of the objections or hold a formal hearing to develop a record as the basis for a decision, as the situation warrants. If the election was held pursuant to a consent-election agreement authorizing a determination by the Regional Director, the Regional Director will then issue a final decision.[29] If the election was held pursuant to a consent-election agreement authorizing a determination by the Board, the Regional Director will issue a report on objections which is subject to exceptions by the parties and to a decision by the Board.[30] However, if the election was originally directed by the Board,[31] the Regional Director may either (1) make a report on the objections, subject to exceptions, with the decision to be made by the Board, or (2) issue a decision, which is then subject to limited review by the Board.[32]

1. Eligibility to Vote

In *Jeld-Wen of Everett, Inc.*,[33] the Board held that replaced economic strikers, eligible to vote in an initial election held within 12 months of the inception of an economic strike, were eligible to vote in a rerun election held outside the 12-month period of Section 9(c) of the Act where the rerun election was necessitated by employer misconduct.

Pursuant to the Regional Director's Decision and Direction of Election, an election was conducted within 12 months of the commencement of an economic strike, which began when negotiations between the employer and the union broke down. Both the striking employees and their replacements voted in this election. The election resulted in challenged ballots sufficient in number to affect the results of the election. In addition, the union filed timely objections to the election, as well as an unfair labor practice charge. The representation case and unfair labor practice case were consolidated for hearing. During the hearing, the parties voluntarily resolved most of the challenges and the administrative law judge ordered a recount of the ballots. The union lost the election. The judge sustained the union's election objections, however, because there was considerable employer misconduct, ordered the election set aside, and directed a second election. The Board affirmed.[34]

The second election was conducted more than 12 months after the commencement of the economic strike. The tally of ballots showed that there were 509 challenged ballots, a number sufficient to affect the results of the election. No objections to the

[29] Rules and Regulations, Sec. 102.62(a).
[30] Rules and Regulations, Secs. 102.62(b) and 102.69(c).
[31] Rules and Regulations, Secs. 102.62 and 102.67.
[32] Rules and Regulations, Sec. 102.69(c).
[33] 285 NLRB No. 19 (Chairman Dotson and Members Johansen, Babson, Stephens, and Cracraft).
[34] *E. A. Nord Co.*, 276 NLRB 1418 (1985).

election were filed. The Regional Director investigated the challenges and found that, of the 509 challenged ballots, 464 belonged to economic strikers who had been engaged in an economic strike for more than 12 months. As a result, the Regional Director concluded that the economic strikers were ineligible to vote in the rerun election, and he sustained the challenges to their ballots.[35] The remaining challenges were not determinative. Accordingly, the Regional Director certified the results of the election, concluding that a majority of the valid votes plus challenged ballots had not been cast for the union.

The union filed a timely request for review of the Regional Director's decision. The Board granted the union's request because this case raised the novel question of whether replaced strikers, eligible to vote in an initial election held within 12 months of the inception of an economic strike, should be allowed to vote in a rerun election held outside the 12-month limitation period of Section 9(c) when the rerun election was necessitated by employer misconduct.

After careful consideration of the legislative history of Section 9(c), which governs the eligibility of replaced economic strikers to vote in a Board-conducted election, the Board concluded that, given the concerns which prompted the 12-month eligibility period, Section 9(c)(3) should be read as requiring that replaced economic strikers be empowered to affect the results of an election for at least 12 months after the commencement of a strike. Noting that a rerun election is a repeat election, standing in the place of another election which has been tarnished because the conditions denied voters a free choice, the Board found that the vote of replaced economic strikers, otherwise enfranchised by Section 9(c)(3), would be nullified and their intended power to affect the election outcome rendered a fiction unless they were found eligible to vote in rerun elections held outside the 12-month period of Section 9(c)(3).

In addition, the Board found that allowing the economic strikers to vote in the rerun election in this case was "consistent with the purpose and provisions of the Act," inasmuch as withholding "from the replaced strikers the right of every employee to participate in an election which reflects a free and untrammeled choice because more than 12 months have passed since the strike began would give undue significance to the 12-month period of Section 9(c)(3) while ignoring the strikers' more fundamental statutory right to exercise a free choice."

Finally, the Board concluded that the equities of this case rested with the replaced strikers and that holding the strikers ineligible to vote in the rerun election would be evading the Board's statutory duty to assure that elections are properly con-

[35] See *Gulf States Paper Corp.*, 219 NLRB 806 (1975); *Wahl Clipper Corp.*, 195 NLRB 634 (1972); *Pacific Tile Co.*, 137 NLRB 1358 (1962).

ducted. It noted that neither the replaced strikers nor any other unit employee in this case had had the benefit of an environment free from interference, restraint, and coercion in which to decide whether they wanted to be represented by the union. Accordingly, the Board reversed the Regional Director and remanded the case to him with directions to open and count the ballots of the economic strikers.

2. Voter Turnout

In *Lemco Construction*,[36] the Board overruled a line of cases requiring that one-vote elections be set aside,[37] and held that "election results should be certified where all eligible voters have [had] an adequate opportunity to participate in the election, notwithstanding low voter participation."

An election was scheduled to take place at the employer's facility between 7 and 7:30 a.m. on October 24, 1984. Of the approximately eight eligible voters, only one, the employer's election observer, cast a ballot. Five employees arrived to vote just after the polls closed, having relied on a timepiece that differed from the Board agent's by several minutes. The petitioner filed objections to the election, claiming that the vote was not representative of the unit and that the election should be rerun. A hearing was held and the hearing officer concluded that because a substantial and representative number of employees had not voted, the election should be set aside.

In disagreeing with the hearing officer, the Board abandoned "any analysis dependent on a numerical test to determine the validity of a representation election." Rather, the Board determined that it would "issue certifications where there is adequate notice and opportunity to vote and employees are not prevented from voting by the conduct of a party or by unfairness in the scheduling or mechanics of the election."

In the instant case, the Board concluded that the employees who arrived at the polls late had not been denied an opportunity to vote, but rather failed to vote because they chose to wait until the final minutes before the polls closed to vote together as a group, and then found they were too late. In the absence of unusual circumstances, the Board stated, the reasons an employee fails to vote will be immaterial to the certification of the election.[38] As no such unusual circumstances were present here, the results of the election were certified.

In *Community Care Systems*,[39] the Board rejected the employer's exceptions regarding the election date because the employer

[36] 283 NLRB No. 68 (Chairman Dotson and Members Johansen, Babson, and Stephens).

[37] See *Kit Mfg. Co.*, 198 NLRB 1 (1971); *Gold & Baker*, 54 NLRB 869 (1944).

[38] In so holding, the Board distinguished *V.I.P. Limousine*, 274 NLRB 641 (1985), relied on by the hearing officer, because in that case a 20-inch snowstorm occurred during the polling period and a substantial number of employees did not vote. The snowstorm, the Board concluded, did constitute the type of "unusual circumstance" which would require a rerun election.

[39] 284 NLRB No. 116 (Members Johansen, Babson, and Stephens; Chairman Dotson dissenting).

signed a stipulation specifying that the election would be held on the date in question. The Board also rejected the employer's assertion that the low voter turnout warranted setting aside the election.

The employer provided services to senior citizens in their homes. Its employees reported for work at a central location only for training sessions scheduled approximately every 3 months. The employer initially requested the Regional Director to schedule the rerun election to coincide with one of the regular training sessions, but subsequently signed a stipulation specifying a different date. The tally of ballots for the rerun election showed that, of approximately 417 eligible voters, 47 cast ballots for, and 36 against, the petitioner. There where six challenged ballots.

The Board majority found that, although the employer contended the election date made it inconvenient and difficult for employees to vote, it alleged no facts that the election date prevented employees from voting. Although the majority observed that ensuring maximum voter participation is desirable, it held:

> But where the election has gone ahead pursuant to the parties' stipulation, however reluctant, and it does not appear that the election arrangements were such that employees were prevented from voting, we see no basis for permitting the unsuccessful party to attack the election on the basis of a condition to which it stipulated.

The majority found that entertaining postelection proceedings on whether stipulated election conditions would ensure maximum voter participation would not serve the interests of "some degree of finality to the results of an election," quoting from *Versail Mfg.*[40] The majority concluded that the Regional Director properly relied on the parties' stipulation to find that the election schedule "provided voters with notice and an opportunity to vote."

The majority also held that the low voter participation in the election did not invalidate the election results. The majority quoted *Lemco Construction*[41] for the proposition that the Board "abandon[ed] any analysis dependent on a numerical test to determine the validity of a representation election."

Chairman Dotson, dissenting, would have found that the Regional Director's refusal to schedule the election on the same day as a mandatory training session unreasonably denied employees "their single best opportunity to vote." He stated that the special circumstance of employees coming together only at the training sessions clearly warranted special provisions in scheduling the election to ensure maximum voter participation. The Chairman also would have found that the employer's reluctant acquies-

[40] 212 NLRB 592, 593 (1974).
[41] 283 NLRB No. 68.

cence in the election date did not rectify "the fundamental wrong done to the unit employees here." Accordingly, he would have set aside the election and directed that another election be conducted.

F. 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 the actual effect of the conduct on the employees. Instead, the Board determines 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 a 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 so as to deprive them of their freedom of choice.

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

The Board evaluates the permissibility of electioneering tactics, including threats, in terms of whether the conduct tended to prevent free employee expression.

In *Cal-Western Transport*,[42] the Board decided on its own motion to reconsider its earlier decision in this proceeding (279 NLRB No. 115 (May 9, 1986) (not reported in Board volumes)), and abandoned the previously drawn distinction between "major" and "minor" supervisors with respect to evaluating the coercive impact of preelection, prounion supervisory conduct.

Cal-Western Transport involved an individual named Kuyper, who was working as a dispatcher for the employer. Kuyper was involved with the union's initial organizing drive and solicited employees to sign authorization cards. An election was held on

[42] 283 NLRB No. 66 (Chairman Dotson and Members Babson and Stephens).

August 5, 1983, which resulted in 12 votes cast for, and 6 votes cast against, the union, with 8 challenged ballots. The company filed objections to the election, alleging, inter alia, that "supervisory taint" was present during the organizing drive through Kuyper's participation. The hearing officer overruled this objection, finding that Kuyper was a minor supervisor and therefore his involvement with the campaign was not coercive.

The Board agreed with the hearing officer's determination that Kuyper's conduct was not coercive. In doing so, however, the Board indicated that it would no longer rely on the characterization of a supervisor as major or minor, but would instead evaluate the supervisor's ability both to reward and to retaliate against employees when determining the effect of his or her prounion conduct.

Upon a close scrutiny of Kuyper's duties, the Board concluded that he had neither the power to reward employees nor the power to retaliate against them. In addition, the Board noted that, although Kuyper may have been influential in starting the union drive, there was no evidence that he had engaged in any significant prounion conduct after the petition was filed. Moreover, the Board noted that there were no allegations that Kuyper had threatened employees in any way or had promised any rewards to enlist support for the union. Based on these factors, the Board concluded that the employer's objection had been properly overruled, and that the issuance of the Certification of Representative was appropriate.

In *Duralam, Inc.*,[43] a panel majority overruled the employer's objection involving threats of violence made by union supporters that were directed mostly at specific individuals, were not repeated by the union supporters who initially uttered them, were disseminated within the unit but were not repeated at or near the time of the election, were partially neutralized, and were not accompanied by acts of violence.

Specifically, the Board considered preelection remarks made by three prounion employees. The Board found that Kartes' statement to Mischler that the latter would get his "nose nipped" if he did not vote for the union was withdrawn. The Board further found that Burr's statement advocating violence, made at a union meeting, was neutralized by the admonition of the union organizer. Additionally, regarding Burr's statement to Heenan that Heenan would be "dead meat" if he did not vote for the union, the Board found that Heenan himself used the phrase "dead meat," which was representative of the rough banter that went on at the plant. Regarding Mohnen's remarks to Sherwood that if the latter crossed a picket line he would have his knees broken and Mohnen would bring in his rifle and hire employee Zuiches' motorcycle gang to break some bones, the Board found

[43] 284 NLRB No. 125 (Members Babson and Stephens; Chairman Dotson dissenting).

that the conversation was part of an ongoing "debative" relationship between Mohnen and Sherwood. The Board further found that, although disseminated, the remarks were neutralized by the dissemination of a statement that there was no basis for the motorcycle reference. Finally, the Board found that Mohnen's comment to Kwiatkowski that "we will take care of you" or "we will remember you" was ambiguous, and was not linked to any reference to violence. Recognizing that the tally was close, the Board, citing *John M. Horn Lumber Co.*,[44] nevertheless found that, whether viewed individually or cumulatively, the threats did not create a general atmosphere of fear and reprisal rendering a free choice in the election impossible.

In his dissent, Chairman Dotson, citing *RJR Archer, Inc.*,[45] stated that the threats of violence were intensified because the unit of some 45 employees was small and the tally was close, the union winning the election by a vote of 24 to 21. Although recognizing that one threat was withdrawn and one reference to violence was countered by a union agent, he found that in all other cases the threats were unchecked and were disseminated among the unit employees. Referring to the general atmosphere of threats of physical harm that surrounded the campaign, Chairman Dotson concluded, "To permit this election to stand is to abdicate the Board's statutory duty to establish normative standards which discourage violence in the labor relations context."

G. Agency Status of Card Solicitors

In *Davlan Engineering*,[46] the Board held that "in the absence of extraordinary circumstances, employees who solicit authorization cards should be deemed special agents of the union for the limited purpose of assessing the impact of statements about union fee waivers or other purported union policies that they make in the course of soliciting."

This was a supplemental decision in which the Board vacated an earlier Decision and Order[47] and a Certification of Representative.[48] The Board took this action because it determined that the agency status of authorization card solicitors was a "troubling and recurring" question which had "all too frequently been presented to the Board."

Applying its new standard, the Board determined that four employees who solicited authorization cards were special agents of the union. As all four had made improper fee-waiver statements, their statements were imputable to the union. The statements therefore tainted the outcome of the election, requiring a second election.

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[44] 280 NLRB 593 (1986).
[45] 274 NLRB 335 (1985).
[46] 283 NLRB No. 124 (Chairman Dotson and Members Johansen, Babson, and Stephens).
[47] 265 NLRB No. 66 (Dec. 6, 1982) (not reported in Board volumes).
[48] 262 NLRB 850 (1982).

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 Section 8) affecting commerce. In general, Section 8 prohibits an employer or a union or their agents from engaging in certain specified types of activity which Congress has designated as unfair labor practices. The Board, however, may not act to prevent or remedy such activities until an unfair labor practice charge has been filed with it. Such charges may be filed by an employer, an employee, a labor organization, or 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 1987 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 byproduct of any of the types of conduct specifically identified in paragraphs (2) through (5) of Section 8(a),[1] or may consist of any other employer conduct which independently tends to interfere with, restrain, or coerce employees in exercising their statutory rights. This section treats only decisions involving activities which constitute such independent violations of Section 8(a)(1).

1. 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.

a. Concerted Nature of Activity

In *Salisbury Hotel*,[2] a Board panel adopted, under a somewhat different rationale, the administrative law judge's finding that the employer violated Section 8(a)(3) and (1) by unlawfully discharging Cheryl Resnick. The judge found that Resnick's employment was terminated because she concertedly complained to fellow employees about a change in the employer's lunch policy, because she contacted the Department of Labor regarding the legality of that change, which was a continuation of the employees' concerted complaint, and because the employer mistakenly believed she had engaged in union activity.

The Board concluded that Resnick's activities were concerted under *Meyers II*,[3] which defines concerted activities as being "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[4] Specifically, the Board noted that the employees complained about the new lunch hour policy among themselves and that Resnick brought the complaint directly to management. A majority also found that Resnick's call to the Department of Labor constituted concerted activity as the call "logically grew out of the employees' concerted efforts and [was] therefore a 'continuation' of that concerted activity."[5]

Chairman Dotson, concurring, disagreed with the majority's finding that Resnick's call to the Labor Department constituted concerted activity. He believed that the record failed to establish that Resnick's call was engaged in with or on the authority of other employees. The Chairman warned that the majority's finding of concerted activity based on a logical continuation of earlier concerted activity effectively resurrected the *Alleluia*[6] presumption that individual actions regarding group concerns are concerted.

In *Every Woman's Place*,[7] a Board panel adopted the administrative law judge's finding that an employee was engaged in protected concerted activity when she telephoned the Department of Labor and the employer violated Section 8(a)(1) by laying her off for her actions.

Every Woman's Place (EWP) had recently merged with another organization causing a shift in management hierarchy and the imposition of EWP's policies and procedures on all employees. Several employees indicated concern over EWP's policy regarding holiday and compensatory time and tried on several occasions to obtain information about this policy. The program di-

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[2] 283 NLRB No. 101 (Members Johansen and Stephens; Chairman Dotson concurring).

[3] *Meyers Industries*, 281 NLRB No. 118 (Sept. 30, 1986).

[4] *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985).

[5] 283 NLRB No. 101, slip op. at 7.

[6] *Alleluia Cushion Co.*, 221 NLRB 999 (1975).

[7] 282 NLRB No. 48 (Members Johansen and Stephens; Chairman Dotson dissenting).

rector made several inquiries but was unable to get them a definite answer. Finally, one employee telephoned the Wage and Hour Division of the U.S. Department of Labor to ask what pay employees were legally entitled to receive if they worked on holidays. She relayed this information to EWP's chief management official, who laid her off a few months later.

The majority found that because the fired employee and two fellow employees had brought the matter of overtime compensation for holidays to the program director on at least four or five occasions, the phone call to the Department of Labor was a "logical outgrowth" of the original protest by all three employees. Thus, it was sufficiently linked to group activity to constitute concerted activity within the meaning of Section 7 of the Act.

The majority found the case distinguishable from *Meyers* and emphasized they were not repudiating its rationale. Here, the fired employee was seeking information because she and fellow employees had received no response to their common complaint and her phone call was thus a continuance of protected Section 7 activity. The employee in *Meyers*, however, was found to be simply registering complaints about his own truck and never made any common cause with any fellow employee with a similar complaint.

The majority also emphasized that they were not returning to the *Alleluia Cushion* presumption that any complaint to a Government agency that could benefit others automatically qualified as an expression of common concern. Here, the majority held that the employees had spoken for themselves and the fired employee was advancing those expressed interests with her phone call.

Chairman Dotson, in dissent, would not find the activity in question to be concerted on several grounds. First, he found nothing in the record to support the presumption that the employees' initial questioning was concerted. He concluded that from the record evidence it was equally plausible that the employees questioned the program director individually on separate occasions, which would not be concerted under *Meyers*. Even assuming that the prior questioning was concerted, he would not have found the phone call protected. He noted that there was no evidence that when the employee made the call she was acting on the authority of any of the other employees. In addition, there was no evidence that the Respondent knew of the alleged concerted nature of the employee's call. He concluded that the majority found concertedness by applying the *Alleluia* presumption and departed from the *Meyers* analysis without explanation, and thus had left the Board open to correction by a reviewing court.

In *Stor-Rite Metal Products*,[8] a Board panel held that an employer violated Section 8(a)(3) and (1) by reducing its powder-

[8] 283 NLRB No. 123 (Members Johansen and Cracraft; Member Stephens dissenting in part).

line employees' hours after employee Paul Martin called the Indiana Human Rights Department and filed charges with the National Labor Relations Board. Martin had contended that the employer unlawfully denied powder-line employees contractual wages and benefits.

Relying on the *Interboro doctrine*,[9] the Board found that Martin had engaged in concerted activity when he contacted the state agency and filed the charges. That doctrine provides that "an employee who honestly and reasonably asserts a right grounded in a collective-bargaining agreement acts concertedly within the meaning of Section 7, even if the employee acts alone."[10] Accordingly, Martin's contentions were reasonably based on the parties' collective-bargaining agreement, which provided full-time employees with contractual benefits. Martin had argued that powder-line employees often worked more than 40 hours per week and were entitled to full-time status. The Board also distinguished its holding in *Meyers*, in which there was no applicable collective-bargaining agreement.

Member Stephens, dissenting in part, agreed that Martin's activities aimed at securing contractual benefits for the powder-line employees were protected concerted activities. Stephens, however, concluded that the employer would have reduced the powder-line employees' hours even in the absence of Martin's activities.

b. Protected Protest

In *Jasper Seating Co.*,[11] a Board panel adopted the administrative law judge's finding that the employer violated Section 8(a)(1) by discharging two employees for walking off the job together in protest over what they perceived to be uncomfortably cool and breezy conditions in their workplace.

The temperature in the employer's woodworking shop was the topic of continuing conversation during the spring. The practice was to open the shop's large exterior overhead door at the start of each day in order to let cool air in. Employees Thompson and Goodpasture, who worked 40 feet from the door, felt too cold and exposed to drafts when the door was open. Other employees were comfortable though. However, if the door was closed, Thompson and Goodpasture were satisfied, but their coworkers were warm. Throughout May, Thompson and Goodpasture complained about the door being open. After the problem was discussed at an employee group meeting, the employer stated that when the temperature was above 68 degrees the door would stay open. The next week, Thompson and Goodpasture were bothered by the open door. Although the temperature was 72 to 74 degrees, Thompson asked that the door be closed. The request

[9] *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967).
[10] 283 NLRB No. 123, slip op. at 6.
[11] 285 NLRB No. 67 (Members Johansen and Babson; Chairman Dotson dissenting).

was refused and Thompson and Goodpasture went home. They told the employer that they were leaving because it was too cold and drafty to work. The employer discharged both employees for their walkout.

The majority agreed with the administrative law judge, who relied on *NLRB v. Washington Aluminum Co.*,[12] that the walkout was protected concerted activity. The majority, disagreeing with their dissenting colleague, stated that the Section 7 right to strike over employment conditions is a basic employee right and cannot be characterized as "thin." The fact that the protesting employees represented an isolated minority did not justify the discharging action. The majority noted that the term "labor dispute" as defined by Section 2(9) of the Act includes any controversy concerning terms, tenure, or conditions of employment. The majority further found that the fact that the employer had made a good-faith effort to accommodate divergent employee interests did not justify the employer's discharging the two employees for walking out. Accordingly, the majority concluded that the employees brief refusal to work for 1 day in protest of adverse working conditions was protected concerted activity and their discharge because of such activity violated Section 8(a)(1).

Chairman Dotson, dissenting, did not believe that the Act was intended to protect the conduct of employees who walked off their jobs in a fit of personal pique over their subjective discomfort from working in the draft and chill of a 72- to 74-degree temperature. He noted that Thompson's and Goodpasture's disagreement was with their fellow employees and not the employer. Chairman Dotson further found that the employees' Section 7 rights were extremely thin and had to be balanced against the respondent's substantial interests in maintaining production and in assuring labor relations stability through a working environment acceptable to all employees.

In *Brunswick Food & Drug*,[13] the Board considered whether an employer's suspension and discharge of an employee for engaging in a verbal outburst in front of the employer's customers violated Section 8(a)(3) and (1).

Shortly after a heated organizing campaign which resulted in the union's receiving a majority vote in a Board-conducted election, two union representatives visited the employer's premises. The representatives entered the employer's store, purchased food, and then sat down to eat in the employer's deli restaurant. There, they were joined by employees who were on break, as had frequently happened during the election campaign. The representatives were asked to leave, however, by the employer's comanager. After they refused to do so, the employer called the

[12] 370 U.S. 9 (1962).

[13] 284 NLRB No. 78 (Members Johansen and Stephens; Chairman Dotson dissenting).

police and had them evicted from the store.[14] Bonnie Manning, one of the employees present during this incident, jumped up, and in a very excited manner stated, in the presence of the restaurant customers, that she would "like to apologize for the ignorance of management." The employer first suspended, and then discharged, Manning because of her outburst.

The judge found that the suspension and discharge of Manning did not violate the Act. Initially, the judge reasoned that the employer's unlawful conduct in having the union representatives removed from the premises was directed only at those individuals and not at Manning and her fellow employees. Secondly, the judge reasoned that Manning's spontaneous protest of that unlawful conduct was "so excessive and extreme that it lost any protected nature it might otherwise have."

In reversing the judge, the Board began with the premise that employees have a right to meet with their collective-bargaining representative on their own time. The employer interfered with that right by evicting the union representatives. As the rights guaranteed by the Act are rights which are given to employees, not union representatives, the Board concluded that the employer's conduct was directed at the employees as well as the union representatives. This unlawful action, the Board reasoned, could "be expected to create a sense of indignation, as well as to prompt a verbal reaction, by a directly affected employee such as Manning."

The Board then went on to consider whether Manning's conduct was so extreme as to exceed the bounds of conduct protected by the Act. In finding Manning's conduct was not outside the protection of the Act, the Board noted that, when an employee's impulsive behavior is induced by an employer's unlawful conduct, the seriousness of the employer's unlawful conduct will be compared with the extent of the employee's reaction to it. Here, while Manning's comments were directed at customers, it was the employer who selected the setting for the confrontation with the union representatives which precipitated Manning's outburst. Furthermore, in comparison with the provocation, Manning's outburst was neither prolonged nor extreme conduct. Therefore, the Board concluded that "the Respondent's unlawful interference with the rights of its employees, including Manning, to meet with their union representatives provoked a protest from Manning that, under the circumstances, was not rendered unprotected by virtue of the manner in which it was expressed."

Chairman Dotson, dissenting, concluded that the suspension and discharge of Manning did not violate the Act because the employer's unlawful removal of two union representatives from its deli restaurant was not so serious and compelling a provoca-

[14] The administrative law judge found, and the Board affirmed, that the employer's conduct in having the union representatives evicted violated Sec. 8(a)(1).

tion against employee Manning that it relieved her from being held accountable for her loud and disruptive behavior in front of the employer's customers.

2. Employer Restraint and Coercion

a. Coercive Interrogation

In *Bill Scott Oldsmobile*,[15] a Board panel adopted the administrative law judge's finding that the employer violated Section 8(a)(1) by its attorney's questioning eight employees in preparation for the unfair labor practice proceeding without first administering all three warnings to each employee interviewed as required by *Johnnie's Poultry Co.*[16]

The employer's attorney individually interviewed eight employees in the office of the employer's owner in preparation for the unfair labor practice hearing. The attorney told the employees that there would be no reprisals for their answers, one of the three warnings required by *Johnnie's Poultry.* However, the attorney in each instance did not provide the two other warnings required by *Johnnie's Poultry*, i.e., state the purpose of the interview and that participation was voluntary.

The Board majority adopted the judge's finding that by failing to administer all three *Johnnie's Poultry* warnings in each interview, the employer violated Section 8(a)(1). In making this finding, the Board majority relied, as did the judge, on *Standard Coosa-Thatcher, Inc.*,[17] in which the employer was found to have violated Section 8(a)(1) because its counsel failed to give 1 employee out of the 70 employees interviewed (all the rest of whom were properly warned) 2 of the 3 warnings. The majority further explained that "[i]n the 21 years since that decision's issuance, the *Johnnie's Poultry* requirements have proved effective as a prophylactic measure to temper the coerciveness of such interviews while permitting employers considerable latitude to question employees in preparation for trial." The Board majority assessed these safeguards as "not unduly onerous or hampering." Further, in the majority's view, the "clear guidance" the guidelines provide to allow the employer to avoid unfair labor practice liability while pursuing the legitimate interest of preparing a defense outweighs any inconvenience to the employer, "especially in view of the significant Section 7 rights the Board is seeking to protect.

Chairman Dotson, dissenting, disagreed with what he termed the majority's "per se approach to employer interviews." Instead, in an approach similar to that of the Sixth Circuit,[18] he stated he

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[15] 282 NLRB No. 140 (Members Johansen and Babson; Chairman Dotson dissenting).

[16] 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965).

[17] 257 NLRB 304 (1981), enfd. 691 F.2d 1113, 1140–1141 (4th Cir. 1982).

[18] *Anserphone, Inc. v. NLRB*, 632 F.2d 4 (6th Cir. 1980), denying enf. of 236 NLRB 931 (1978); *Dayton Typographical Service v. NLRB*, 778 F.2d 1188 (6th Cir. 1985), denying enf. of 273 NLRB 1205 (1984). In each of these cases the employer's failure to provide all three warnings was found not in violation of Sec. 8(a)(1) based essentially on the absence of evidence of coercion and the presence of affirmative evidence that coercion did not occur.

would find a violation in such a context "only where the totality of the evidence indicates that the interviews amounted to coercive conduct." Thus, he noted that the Board has recently,[19] signaled disapproval of a per se approach to allegations of unlawful interrogation and returned 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."[20] Chairman Dotson found that interviews in preparation for trial, in which the Board has long recognized that the employer has a legitimate interest, are also appropriate for this type of analysis. He disagreed with the majority that *Johnnie's Poultry* recognized a necessary difference in the nature and circumstances of interrogations in preparation for litigation from those of other interrogations, which in the majority's view justify a "more formal standard" in considering the former.

Applying this totality-of-circumstances test, Chairman Dotson found the overall effect of each interview was not coercive. Accordingly, he declined to join his colleagues in finding the interviews unlawful.

In *Southwire Co.*,[21] the Board found that the respondent violated Section 8(a)(1) of the Act by interrogating its employees about their union activities. The questioning took place during the preliminary phase of a polygraph test administered in the course of a drug investigation at the company.

The Board rejected the administrative law judge's finding that the questioning was noncoercive because it was done during the preliminary part of the test by the respondent's limited agents conducting a drug test and not by supervisors. Asking employees about the extent of their union activities and sympathies reaches the core of employees' protected rights under the Act, and the coercive nature of such questions cannot be dissipated because "special agents" and not supervisors do the interrogating, the Board said.

The Board reiterated the basic test for evaluating interrogations: whether under all the circumstances the interrogation reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act. Here, the totality of circumstances dictated a finding that the questioning was coercive and a violation of the Act. Management requested that two employees submit to polygraph examinations after they gave sworn statements denying involvement with drugs on company premises. On the examination days they were escorted to management offices where the testing lasted about 2 hours. It was in this apprehensive and formal setting that the employees were questioned. The fact that the em-

[19] *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985); *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

[20] *Sunnyvale Medical Clinic*, supra.

[21] 282 NLRB No. 117 (Members Johansen, Babson, and Stephens).

ployees were not questioned about the union while connected to the polygraph machine did not preclude finding of a violation.

b. Threat of Subpoena

In *Adco Metals,*[22] a Board panel held that the respondent violated Section 8(a)(1) by distributing a written statement indicating that employees who signed union authorization cards could expect to be subpoenaed as witnesses in a Federal proceeding.

The charging party, Shopmen's Local Union No. 502, engaged in a campaign to organize the respondent's unrepresented shop employees and distributed authorization cards. When the respondent became aware of the distribution of authorization cards, it distributed to its employees the following statement signed by the respondent's president:

> Before you consider signing a union authorization card, keep in mind, by signing the card, it is not a free ride. Anybody that signs the union card can expect to be subpoenaed as a witness in a federal proceeding.

The Board found that the respondent's statement unlawfully threatened employees with retaliation if they signed authorization cards. The Board, recognizing the "chilling" effect on the right of employees to signify their union support if their anonymity is not maintained, reiterated that the Board's customary rule is to hold authorization cards in confidence during representation cases.

In determining the potential impact of the respondent's statement on its employees, the Board noted the following: the statement was signed by the respondent's president and distributed to employees just after they had received union authorization cards; the words "it is not a free ride" suggested some cost to the employee cardsigners as a consequence of the disclosure of their identities; the statement overstated in absolute terms the inevitability of subpoenaed testimony; and there was no evidence that the respondent reasonably contemplated litigation of issues related to the cardsignings.

The Board stated that evidence of union animus was not a prerequisite to finding a violation. Nor did the violation depend on the truth or falsity of the respondent's statement. Rather, the finding of a violation in this case stemmed from what the Board judged to be the "plain coerciveness of an employer's statement that cardsigners not only will be *identified* but will be forced to testify in a Federal proceeding whether they may wish to or not—and all of this in the absence of any issues [sic] which is or is likely to be litigated concerning the signing of union authorization cards."

[22] 281 NLRB No. 172 (Members Johansen and Babson; Chairman Dotson concurring).

Chairman Dotson concurred in the result "only on the basis that, in the context of the stipulated facts, the statement that employees 'can expect to be subpoenaed as a witness in a federal proceeding' can reasonably be construed as a statement of an intention on the part of the Employer to involve employees in the inconvenience of 'a federal proceeding' without lawful and proper cause as retaliation for signing a card." He added that this was particularly true in view of the fact that the identity of cardsigners is not revealed as a result of legal processes in the usual course of representation proceedings, but that "[a]s a practical matter employees cannot sign cards with the assurance that their identities will not be disclosed."

3. Employee Access

In *Fairmont Hotel*,[23] the Board addressed conflicts between employees' Section 7 rights and their employer's property rights. The Board first reviewed the Supreme Court's decisions in *NLRB v. Babcock & Wilcox Co.*,[24] *Hudgens v. NLRB*,[25] and *Sears, Roebuck & Co. v. San Diego County Council of Carpenters*[26] and its own decision in *Giant Food Markets*.[27] The Board then found that in cases posing a conflict between Section 7 rights and property rights, the Board's first task is "to weigh the relative strength of each party's claim." The Board further stated that after conducting such a weighing:

> If the property owner's claim is a strong one, while the Section 7 right at issue is clearly a less compelling one, the property right will prevail. If the property claim is a tenuous one, and the Section 7 right is clearly more compelling, then the Section 7 right will prevail. Only in those cases where the respective claims are relatively equal in strength will effective alternative means of communication become determinative.

The Board further enumerated factors that might affect the relative strength or weakness of an asserted property right or an asserted Section 7 right. It noted that the owner of "a single store surrounded by its own parking lot provided exclusively for the convenience of customers will have a significantly more compelling property right claim" than will "the owner of a large shopping mall who allows the general public to utilize his property without substantial limitation."

As to Section 7 rights, the Board observed that "organizational rights and the right to engage in primary economic activity at the situs of a dispute may be viewed as more compelling than

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[23] 282 NLRB No. 27 (Chairman Dotson and Members Johansen and Babson; Member Stephens concurring).

[24] 351 U.S. 105 (1956).

[25] 424 U.S. 507 (1976).

[26] 436 U.S. 180 (1978).

[27] 241 NLRB 727 (1979).

handbilling and other informational activity at locations other than the primary situs."

Applying this analysis to the facts of the case, the Board concluded that Fairmont did not violate Section 8(a)(1) by ordering off its property three nonemployee union officers who had been distributing handbills to guests of the hotel on the hotel's front steps. The handbills explained that the union had an area-standards dispute with Bakers of Paris and asked the public not to patronize the hotel until the hotel stopped doing business with employers who failed to meet area standards. Bakers of Paris supplied some of the baked products served at the hotel.

The Board found that the property rights asserted by Fairmont were more compelling than were the Section 7 rights asserted by the union. The Board noted that Fairmont was a large luxury hotel, and the steps on which the union officers distributed handbills led to the main hotel entrance and were used only by patrons of the hotel; employees and suppliers were required to use other entrances. Further, Fairmont had a valid interest in minimizing congestion, litter, and the possibility of theft of patrons' luggage from the area in front of the hotel's main entrance, as well as an interest in maintaining the hotel's decorum. Additionally, innkeepers are frequently held to a higher standard of care for their guests than are many other employers offering public accommodations. Based on these factors, the Board found that in excluding the handbillers from its front steps, Fairmont was asserting a substantial private property interest.

The Board found that the Section 7 right asserted by the union was of more limited significance. It noted that, while protected, area-standards activity lacks a vital link to the employees located on the targeted employer's property and that this was particularly true in this case, as the handbilling was not carried out at the property of the employer with which the union had the area-standards dispute, Bakers of Paris, but, rather, at the property of Fairmont, which simply received supplies from Bakers of Paris. Thus, the Board observed:

> [T]he Union's activity here was carried out at the property of an employer with which the Union had no primary dispute, not even an area-standards one, and the employees of which stood to reap no benefit, not even an incidental one, if the Union achieved its ultimate objective of improved wages for the employees of Bakers of Paris.

The Board concluded that, as the property rights asserted by Fairmont far outweighed the Section 7 rights asserted by the union, Fairmont did not violate the Act by excluding the handbillers from its property. Because the rights asserted by Fairmont and the union were not relatively equal, the Board found it unnecessary to consider the availability of reasonable alternative

means by which the union could have communicated its message to its intended audience.

In his concurring opinion, Member Stephens stated that he would not adopt an access rights test that would bar inquiry into the availability of reasonable alternative means of communication with a target audience unless the property and Section 7 rights at issue were of relatively equal strength. In agreeing with the dismissal of the complaint, Member Stephens noted that the record did not show that Fairmont was the only establishment carrying the products of the primary employer, Bakers of Paris, or even that Fairmont was a principal customer of this bakery. As it was not shown that the union would not be able substantially to carry out its area-standards protest through handbilling on public property near the premises of other customers of Bakers of Paris, Member Stephens concluded that he would not find the union's Section 7 rights to outweigh Fairmont's property rights.

In *Orange Memorial Hospital*,[28] a Board panel held that the hospital violated Section 8(a)(1) and (3) by maintaining a rule denying off-duty employees entry to the hospital facility and by issuing written warnings and suspending employees pursuant to the rule for distributing union literature in outside nonwork areas when the disciplined employees were not scheduled to work.

The hospital maintained a rule prohibiting employees from entering or remaining on hospital premises during off-duty hours and requiring them to report for and leave duty within 5 minutes of their scheduled worktime. Several employees who were not scheduled to work or who arrived 20 minutes before starting time distributed union literature in nonwork areas outside the facility. The respondent ordered them to leave and also issued them written warnings that they had violated the rule and their jobs were in jeopardy.

A few days later, two employees again distributed union literature in outside nonwork areas when they were not scheduled to work. The respondent suspended them for 3 days for violating the rule.

An employer may not deny off-duty employees entry to outside nonwork areas of its premises, unless the employer provides an adequate business justification. Therefore, the respondent's rule was invalid, unless it could show legitimate business considerations. The Board majority noted that the respondent claimed its rule ensured patient security but had failed to provide an adequate factual basis for the assertion, e.g., the parties' stipulation did not show that patients frequented the outside nonwork areas. Therefore, the Board majority concluded that the respondent violated Section 8(a)(1) by maintaining the rule and by issuing written warnings for distributing union literature in outside nonwork areas when the distributors were not scheduled to work.

[28] 285 NLRB No. 136 (Members Johansen and Stephens; Chairman Dostson dissenting).

The majority also concluded that the respondent violated Section 8(a)(3) by suspending employees for distributing union literature in outside nonwork areas when they were not scheduled to work.

Chairman Dotson dissented. He reasoned that an off-duty employee is not on the same footing as an employee who is lawfully on the premises while working. He stated that the right of the off-duty employee to reenter the premises must be weighed against the employer's right to control access to its property. He considered a no-access rule presumptively valid absent a showing that no adequate alternative means of communication existed, which the General Counsel failed to show.

4. Discharge of Supervisor

In *Pontiac Osteopathic Hospital*,[29] the Board found that an employer did not violate Section 8(a)(1) by discharging a supervisor for her failure to support management action amounting to an unfair labor practice.

The employer discharged an employee for writing a "fake newsletter" commenting on, among other things, the employer's relationship with its employees. When the director of nursing was considering how to discipline the employee, the employee's supervisor informed the director of nursing that she did not support the decision to discharge the employee and that she felt it was wrong to discharge an employee for expressing her feelings about management. The supervisor, however, was not asked to carry out the discharge or in any way to participate in the discipline. Shortly after the employee appealed her discharge and was reinstated to her position, the supervisor was demoted because she had not supported management in its decision to discharge the employee. Approximately 2 weeks later the supervisor was discharged.

The administrative law judge found that the discharge of both the employee and the supervisor violated Section 8(a)(1). While the Board adopted the judge's finding that the employee's discharge violated the Act, the Board concluded that the discharge of the supervisor did not violate the Act.

In finding no violation, the Board distinguished between a supervisor's failure to support management action amounting to an unfair labor practice and a supervisor's refusal to commit an unfair labor practice, reasoning that:

> When an employer asks a supervisor to commit an unfair labor practice, the supervisor is forced to choose between violating the law or disobeying the employer's request—a choice which could lead to discipline or discharge. Consequently, in such situations an employer is able to pressure a supervisor into violating the law on its behalf. On the other hand, when a supervi-

[29] 284 NLRB No. 51 (Chairman Dotson and Members Johansen and Stephens).

sor, acting on his or her own initiative, chooses to express disapproval of a management policy, the supervisor is not coerced at all, i.e., he or she has not been forced to choose between violating the law or risking the consequences of the employer's wrath.

The Board, relying on its decision in *Parker-Robb Chevrolet*, 262 NLRB 402 (1982), found that "it is the need to ensure that statutorily excluded employees are not coerced into violating the law or discouraged from participating in Board or grievance proceedings that compels protection for supervisors." As the supervisor here was in no way coerced into violating the law or discouraged from participating in Board or grievance procedures, the Board found that her discharge did not violate the Act.

In *Barmet of Indiana*,[30] the Board held that the discharge of a supervisor for refusing to assign employees to work with unsafe equipment did not violate Section 8(a)(3) and (1).

A supervisor at the employer's plant became aware that one of the employer's cats[31] was leaking hydraulic fluid and informed the garage superintendent. The latter responded that the cat had been repaired and instructed the supervisor to direct his men to operate the cat. The supervisor refused, stating that the cat was defective and that on four previous occasions it had caught on fire. The supervisor was fired for his refusal.

The Board, in finding the discharge lawful, relied on *Parker-Robb*, supra, in which the Board stated that the protection of the Act does not extend to supervisors who are disciplined or discharged as a result of their union or concerted activities. In *Parker-Robb*, "the Board recognized that the discharge of [a] supervisor for engaging in union or concerted activity almost invariably has secondary effects on rank-and-file employees, but this coincidental effect is insufficient to warrant an exception to the general statutory provision excluding supervisors from the Act's protection." The Board noted that although *Parker-Robb* set forth limited exceptions under which the discharge of a supervisor may violate the Act, the facts in this case did not fall within the scope of any of the recognized exceptions.

5. Exclusion of Represented Employees from ESOP

In *Handleman Co.*,[32] a Board panel on a stipulated record dismissed a complaint that Handleman's employee stock ownership plan (ESOP) violated Section 8(a)(1) because it allegedly excluded from coverage employees who became represented by a labor organization and were covered by a collective-bargaining agreement.

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[30] 284 NLRB No. 106 (Chairman Dotson and Member Babson; Member Johansen concurring and dissenting in part).

[31] A cat is a front-end loading machine operated by a set of forks or with a bucket.

[32] 283 NLRB No. 65 (Members Johansen, Babson, and Stephens).

The employee stock ownership plan defined a covered employee as one who: "Is not covered by a collective bargaining agreement entered into by the Company unless such agreement, by specific reference to the Plan, provides for coverage under the Plan." The panel found, contrary to the General Counsel's assertion, that the exclusionary language indicated that coverage of represented employees was not automatically terminated, but was subject to negotiations, a critical distinction. The panel stated:

> The Respondent's plan does not cut off the benefit prior to negotiations, but contemplates the continuation of the benefits during the negotiations. Rather than automatically withdrawing or completely foreclosing coverage for represented employees, the Respondent's plan leaves continued coverage to collective bargaining, allowing the parties to agree to continued coverage or not.

The panel found the plan distinguishable from plans automatically excluding employees who joined a union,[33] chose union representation,[34] were members of a bargaining unit,[35] or were covered by a bargaining agreement.[36] The panel further found that the plan's exclusionary provision was similar to those found lawful in *Sarah Neuman Nursing Home*, 270 NLRB 663, 680 (1984) (excluding "any person who is covered under a collective bargaining agreement . . . unless the collective bargaining agreement provides for the inclusion of such person under the plan"), and *Rangaire Corp.*, 157 NLRB 682, 683–684 (1966) (excluding "any person covered by a collective bargaining agreement entered into with the employer, which agreement does not provide for coverage of such person by this plan").

B. 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 as to employer motivation. Other cases, however, present substantial questions of policy and statutory construction.

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[33] *Toffenetti Restaurant Co.*, 136 NLRB 1156 (1962), enfd. 311 F.2d 219 (2d Cir. 1962), cert. denied 372 U.S. 977 (1963).

[34] *Channel Master Corp.*, 148 NLRB 1343 (1964).

[35] *Dura Corp.*, 156 NLRB 285 (1965), enfd. 380 F.2d 970 (6th Cir. 1967).

[36] *Niagara Wires*, 240 NLRB 1326 (1979).

1. Strike-Lockout Issues

a. Rights of Strikers to Reinstatement

In *Gem Urethane Corp.*,[37] a Board panel adopted the administrative law judge's finding that the employer violated Section 8(a)(3) and (1) by delaying the reinstatement of 14 striking employees following their unconditional offer to return to work after the cessation of an unfair labor practice strike[38] and by failing to reinstate them immediately. Applying a different burden of proof allocation and the *Clear Pine Mouldings*[39] standard, however, the panel found that the employer was justified in refusing to reinstate eight employees but that one employee's alleged misconduct did not disqualify him from reinstatement.

The union's unconditional offer to return to work brought the unfair labor practice strike to an end. The employer accepted the union's offer but refused to reinstate 12 named strikers because of their alleged strike misconduct. The alleged strike misconduct on which the employer relied had been the basis for an 8(b)(1)(A) charge which it had filed in a CB case. The CB case was consolidated with the union's CA case but was subsequently withdrawn and severed from the CA case after the Regional Director approved the union's settlement with the General Counsel.

The judge found that the employer relied both on the complaint in the CB case and on its own investigation in determining whether an employee had engaged in strike misconduct. The judge reasoned that because the CB case had been settled, the General Counsel did not assume the burden of showing strike misconduct and found that the burden was on the employer to show the basis on which the 12 employees had been refused reinstatement.

Applying this standard to the facts surrounding the alleged misconduct, the judge found that the employer was justified in refusing to reinstate three employees but that it violated Section 8(a)(3) by refusing to reinstate the remaining nine. The panel found it to be well settled that strikers who have committed serious acts of misconduct are not entitled to be reinstated. If the employer establishes such a showing, the General Counsel then must come forward with evidence that either the employee did not engage in the alleged misconduct or that the conduct was not sufficiently serious to preclude reinstatement. In this regard, the panel noted: "At all times, the burden of proving discrimination is that of the General Counsel."[40] The panel found that the employer acted in good faith and that the judge improperly allocated the burden of proof by requiring the employer to prove

[37] 284 NLRB No. 122 (Members Johansen and Babson; Chairman Dotson dissenting in part).

[38] Chairman Dotson, dissenting, found that the strike was not an unfair labor practice strike on the grounds that there was no evidence that the strike resulted from the employer's illegal wage increase.

[39] 268 NLRB 1044 (1984), enfd. 765 F.2d 148 (9th Cir. 1985).

[40] *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964).

the alleged misconduct on which it based its refusal to reinstate the 12 strikers.

The panel said the judge particularly erred as to three strikers who he concluded should have been reinstated because there was no record evidence of strike misconduct by these employees. It further found that in requiring the employer to prove the basis for its refusal to reinstate the strikers, rather than requiring it to establish an honest belief that the strikers had engaged in serious misconduct, the judge failed to consider the complaint issued in the CB case.

While the settlement of that case precluded its use as evidence of actual misconduct, there was no similar preclusion in using it to provide the basis for an honest belief that misconduct occurred. These three strikers were named in the CB complaint, which set forth the specific acts of alleged misconduct, the dates, and the places of occurrence.

Because the Acting Regional Director would not have issued the CB complaint without a prior administrative determination that the alleged unfair labor practices stated in the complaint had been committed,[41] the panel found that the CB complaint provided a valid basis for an honest belief that the strikers were responsible for strike misconduct serious enough to permit the employer to deny them reinstatement. It also found that the General Counsel failed to provide evidence that the strikers' alleged misconduct did not occur or, if it did, that the misconduct was not serious enough to deny them the protection of the Act. It concluded that the employer did not violate Section 8(a)(3) by refusing to reinstate these three strikers.

As to the remaining six strikers, who the judge found were entitled to reinstatement, the panel disagreed with his analysis of the evidence regarding the strikers' conduct. The judge applied the standard set out in *Coronet Casuals*,[42] i.e., "absent violence . . . a picket is not disqualified from reinstatement despite . . . making abusive threats against nonstrikers," and found that the strikers' strike misconduct was not sufficiently serious to preclude their reinstatement.

The panel applied the *Clear Pine Mouldings*[43] standard, i.e., "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." The panel found that the strike misconduct of five of these strikers exceeded the bounds of protected strike activity and was sufficient to refuse them reinstatement, but that the misconduct of the sixth (i.e., a threat "to kick [the nonstriker's] ass") was a well-known

[41] Sec. 102.50, National Labor Relations Board Casehandling Manual (Part One), Unfair Labor Practice Proceedings.

[42] 207 NLRB 304, 305 (1973).

[43] 268 NLRB 1044 (1984), enfd. 765 F.2d 148 (9th Cir. 1985).

figure of speech used on a single occasion which had no necessarily violent connotation and was common banter.[44]

In *Axelson, Inc.*,[45] the issues before a four-member Board panel involved the administrative law judge's finding that the respondent had violated Section 8(a)(3) by its termination of the reinstatement rights of three former strikers awaiting recall; the respondent's action was based on the alleged strike misconduct of the three.

The Board reversed the judge's finding concerning one of the employees, concluding that the respondent had satisfied the required evidentiary burden regarding discharge for strike misconduct and that the General Counsel had failed to carry the ultimate burden of proving unlawful discrimination. With respect to the other two employees, the Board agreed with the judge that the respondent had not met the required burden and thus violated the Act. However, because the two had in fact engaged in particular strike misconduct justifying discharge, the Board concluded that a reinstatement remedy was inappropriate and that its remedial order should permit only limited backpay rights.

Regarding the first employee, Williams, the Board, reaffirming the rule of shifting evidentiary burdens in *Rubin Bros. Footwear*[46] concerning termination for alleged strike misconduct, found that the judge had placed a heavier burden on the respondent than the required "honest belief" that the employee had engaged in particular misconduct. The judge implicitly required that the respondent prove that Williams in fact had engaged in the alleged misconduct by finding inadequate the identification of Williams in connection with the incident of misconduct. The Board concluded that the identification was sufficient to link Williams to the incident with the degree of specificity required for an "honest belief,"[47] thus shifting the burden to the General Counsel to prove that Williams had not engaged in the misconduct. Because the General Counsel failed to respond, and consequently failed to prove unlawful discrimination, the Board found that the respondent's termination of Williams' reinstatement rights was lawful under the strike misconduct standard of *Clear Pine Mouldings*, supra, and it dismissed the 8(a)(3) allegation against the respondent.

Concerning the other two employees, McGrede and Curtis, the Board affirmed the judge's finding that the respondent did not meet its "honest belief" burden because it did not demonstrate that it relied on two particular incidents of strike miscon-

[44] Chairman Dotson dissented and found that this striker's threat, made while he was drunk and moving toward the nonstriker, would tend to coerce or intimidate the nonstriker and was justifiable grounds for not reinstating him.

[45] 285 NLRB No. 118 (Members Johansen, Babson, and Stephens; Chairman Dotson dissenting in part).

[46] 99 NLRB 610 (1952).

[47] See *General Telephone Co.*, 251 NLRB 737 (1980), cited in the decision.

duct involving the two employees at the time it terminated their reinstatement rights.

The Board also agreed with the judge that the respondent did not become aware of the two incidents until they were introduced in testimony at the hearing. However, in affirming the 8(a)(3) violation, the Board noted that McGrede and Curtis clearly had engaged in the incidents, that the nature of the misconduct was sufficient for a lawful discharge under *Clear Pine*, above, and that there was no evidence that the respondent would have tolerated the misconduct had it known about it. Accordingly, the Board declined to order the respondent to reinstate McGrede and Curtis.

Further, a Board majority ordered limited backpay rights for the two employees, cutting off such rights at the time the respondent found out about the misconduct, and thus balancing the Board's responsibility to remedy unfair labor practices and its policy of deterring strike misconduct. In taking this approach, the majority overruled *Western-Pacific Construction*,[48] a case which held that all backpay rights should be denied where discriminatees have participated in strike misconduct, without regard to the employer's unawareness of the misconduct at the time of its unlawful action.

Chairman Dotson, dissenting in part, disagreed with the majority's order for limited backpay rights and the overruling of *Western Pacific*, pointing out that even a limited backpay award to a wrongdoer constituted an unjustifiable windfall, and that a cease-and-desist order was a sufficient remedy for the respondent's unfair labor practice.

In *Emarco, Inc.*,[49] a Board panel found that the remarks of two employees who were not recalled after the conclusion of a strike were protected by Section 7. It thus concluded that, by making these remarks, the employees did not forfeit their rights to reinstatement, and the employer violated Section 8(a)(1) by its refusal to reinstate them.

The employer and the union were parties to a collective-bargaining agreement which contained a no-strike clause and a provision obligating the employer to make payments on behalf of its employees to the union's welfare and pension plan. From 1976 to 1980, the employer was consistently in arrears in its payments to the plan. In April of 1979, the employer was 5 months late in its payments, and the employees were informed that their medical bills and death benefits would no longer be honored. The employees wrote the employer a letter concerning its delinquency, stating that, if the employer was not current in its payments by a certain date, the employees would not report to work. When payment was not received as of that date, the employees struck.

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[48] 272 NLRB 1393 (1984), enfd. sub nom. *Teamsters Local 162 v. NLRB*, 782 F.2d 839 (9th Cir. 1986).

[49] 284 NLRB No. 91 (Members Johansen and Babson; Chairman Dotson dissenting).

The strike lasted until the employer made the required fund payments.

At the end of the strike, the employer recalled two employees. It informed the union vice president that it was having some problems getting back to work and its other two employees would be called back the following morning. The employees were not recalled the next morning. Two days later these unrecalled employees visited a jobsite where the employer was a subcontractor. At that time, they had a conversation with the general contractor in which they explained that the strike was over but that they had not been recalled. In response to a question about the cause of the strike, they discussed the employer's delinquence in making the health and welfare fund payments. When asked why the employer fell behind in its payments, the employees made several remarks to the effect that the employer did not have the money. When the employer's president was informed of this conversation, he decided he would not recall the two employees because of their remarks to the general contractor.

The Board majority concluded that, whether or not the employer's delinquency constituted a serious or flagrant unfair labor practice, the employer "condoned" the resulting strike activity. Such condonation rendered the strike, in effect, protected activity, regardless of whether it was initially protected or unprotected. Thus, the Board held that at the time the employees' remarks were made, they had reinstatement rights identical to those of other employees who engage in protected strikes.

The Board majority went on to conclude that, even though the employees' remarks were subsequent to the employer's condonation of the strike activity and, hence, could not be considered to have been condoned, the remarks themselves were protected under the principles of the Supreme Court's decision in *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard)*.[50] In this regard, the majority viewed the remarks as an extension of a legitimate and ongoing labor dispute over the employer's chronic delinquency in making fund payments which predated the strike and of which the strike proper was only one manifestation. The Board majority noted further that the remarks were made in the context of and were expressly linked to the labor dispute.

Finally, the majority found the remarks were not such as to forfeit any Section 7 protection to which the employees might otherwise have been entitled. They based this conclusion on the administrative law judge's finding that, name calling aside, the remarks were not malicious falsehoods, but reflected to some extent the employer's actual inability to meet its financial obligations, which concern was at the heart of the labor dispute.

[50] 346 U.S. 464 (1953).

Chairman Dotson, although agreeing with the majority that the employer effectively condoned the strike, would have found, contrary to the majority, that the employees had engaged in sufficiently serious acts of poststrike misconduct so as to forfeit any protection under Section 7 to which they might otherwise have been entitled. He disagreed with the majority as to the existence of an ongoing labor dispute between the employer and the employees, finding that the labor dispute in question had already been resolved and the strike had ended when the employees made their remarks. He further characterized the employees' remarks as a "broadside, reckless, and malicious attack on the general financial and operational integrity of the [employer] . . . not based on any factual information, and far beyond the scope of the protection of Section 7 of the Act." He thus concluded there was ample just cause for the employer to deny the employees reinstatement under *Jefferson Standard*.

b. Strike Misconduct

In *GSM, Inc.*,[51] the Board reversed the administrative law judge's findings that the employer unlawfully discharged four strikers for strike misconduct. The Board found that one of the four strikers had kicked a replacement's car as it was leaving the plant; that another had slapped the hood of a car as it was leaving the plant; that a third striker had thrown a beer can at the side of a delivery truck as it was leaving the plant; and that the fourth striker had intentionally parked his van in areas where strikers could hide behind it and throw rocks, and had driven the van on an occasion when his passenger jumped out at a stoplight and threw a cinder block at a company truck they had been following.

The Board rejected the judge's reasoning that such conduct was nondisqualifying under the *Clear Pine Mouldings* standard because it was "relatively innocuous" and, with respect to the fourth striker, because the striker had not himself directly engaged in coercive or intimidating conduct. The Board held that while conduct such as kicking, slapping, and throwing beer cans at moving vehicles might be "relatively innocuous" when measured against other more violent behavior, it nevertheless was violent behavior which might reasonably tend to coerce or intimidate employees in the exercise of their Section 7 rights. As for the fourth striker, the Board found that his "active cooperation" with other strikers who engaged in such conduct justified his discharge.

c. Replacements During Lockout

In *Marquette Co.*,[52] a Board panel reversed an administrative law judge and dismissed a complaint alleging that Marquette vio-

[51] 284 NLRB No. 22 (Chairman Dotson and Members Johansen and Babson).
[52] 285 NLRB No. 103 (Chairman Dotson and Members Johansen and Babson).

lated Section 8(a)(3) and (1) of the Act by utilizing temporary replacements during a lockout of its clerical employees.

Following an impasse in negotiations for a contract covering the clerical unit, Marquette locked out its clerical employees. Although the employer had planned to use nonunit personnel to perform the clerical duties, due to unforeseen circumstances the nonunit employees were unable to handle the workload. As a result, the employer hired temporary replacements for the duration of the lockout.

The Board relied on *Harter Equipment*,[53] in which it held that, absent specific proof of antiunion motivation, an employer does not violate Section 8(a)(3) and (1) by hiring temporary replacements in order to engage in business operations during an otherwise lawful lockout. The Board found that Marquette's lockout of the clerical employees in pursuit of its bargaining objective to maintain separate agreements for its clerical unit and production and maintenance unit was lawful. The Board further found that the use of temporary replacements was a measure reasonably adapted to the achievement of a legitimate employer interest. The Board found no evidence of antiunion motivation.

d. Discontinuance of Benefits During Strike or Lockout

In *Texaco, Inc.*,[54] a Board panel set forth governing principles for determining when an employer's suspension of benefits for disabled employees on commencement of a strike violates the Act. After examination of relevant precedent, the Board expressly overruled the *Emerson Electric* theory[55] of violation and held "that the question of whether an employer violates Section 8(a)(3) or (1) by refusing to continue benefit payments to a disabled employee on commencement of a strike will be resolved by application of the *Great Dane* test[56] for alleged unlawful conduct." Applying this test, the Board found that the struck employer failed to establish a legitimate and substantial business justification for discontinuing the accident and sickness (A&S) benefits and pension credit it had been paying, but dismissed an allegation that the employer unlawfully canceled its employees' health insurance.

The union struck during bargaining for a successor agreement. The employer suspended A&S benefits then being paid to three employees. One of these employees, who qualified for a monthly pension credit under the A&S plan, had the credit suspended. The employer also required that these employees, like all strikers, pay the entire health insurance premium. None of the three disabled employees participated in the strike.

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[53] 280 NLRB 597 (1986).

[54] 285 NLRB No. 45 (Chairman Dotson and Members Johansen and Babson).

[55] *Emerson Electric Co*, 246 NLRB 1143 (1979), enfd. 650 F.2d 463 (3d Cir. 1981), cert. denied 455 U.S. 939 (1982).

[56] *NLRB v. Great Dane Trailers*, 388 US. 26, 34 (1967).

The Board emphasized that, to establish a prima facie case of unlawful discrimination, the General Counsel must establish that the benefit was accrued[57] and was withheld on the apparent basis of a strike. The burden under *Great Dane* then shifts to the employer to establish a legitimate and substantial business justification by demonstrating reliance on a nondiscriminatory contract interpretation that is reasonable and arguably correct, or by proving that the union clearly and unmistakably waived the employees' statutory right to be free of such discrimination or coercion.

The General Counsel established a prima facie case concerning the discontinuance of A&S benefits and the pension credit. Both benefits were accrued because they were due and payable on the date denied, and they were withheld on commencement of the strike. The employer claimed no waiver, and failed to demonstrate reliance on its contractual interpretation, which in any event was unreasonable and not arguably correct. Therefore, it was unnecessary to decide whether the employer's conduct was "inherently destructive" of employee rights.

The Board found no violation, however, with respect to health insurance coverage. The General Counsel failed to establish that health insurance was an accrued benefit. Even assuming that this benefit had accrued, disabled employees had suffered no actual deprivation of this benefit. Pursuant to an employer-union agreement, coverage and employee premium contribution rates remained intact, and the employer's contributions were paid from a surplus account.

In *Amoco Oil Co.*,[58] the Board held that the employer did not violate Section 8(a)(3) and (1) when it suspended sickness and disability benefits and occupational illness and injury benefits during a strike at its Wood River, Illinois refinery.

After the unions struck, the employer did not permit any union-represented employees to work during the strike pursuant to its "closed gate policy." It thus sent letters to union-represented employees who were receiving the benefits described above when the strike began, informing them that their benefits were suspended until such time as the strike ended or work was made available to bargaining unit employees. No payments were made during the strike and lockout. The employer argued in support of its conduct that the affected employees did not, during the lockout, meet its benefit plan's dual eligibility requirements of being both disabled and otherwise scheduled to work.

The Board applied the principles articulated in *Texaco, Inc.*[59] to find the suspension of benefits to disabled employees during

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[57] In this regard, the Board stated: "Proof of accrual on a case-by-case basis will most often turn on interpretation of the relevant collective-bargaining agreement, benefit plan, or past practice." 285 NLRB No. 45, slip op. at 15.

[58] 285 NLRB No. 117 (Chairman Dotson and Members Johansen, Babson, and Stephens).

[59] 285 NLRB No. 45.

the strike was not unlawful. It found that the General Counsel had proven a prima facie 8(a)(3) and (1) case based on the facts that the disabled employees were entitled to and were receiving benefits when the strike began and the employer undisputedly suspended benefits on commencement of the strike. The Board went on to conclude, however, that the employer had met its burden of proving its reliance on a reasonable and arguably correct nondiscriminatory interpretation of its benefit plan, incorporated by reference in the parties' collective-bargaining agreement, sufficient to constitute a legitimate and substantial business justification for its conduct. The Board further found that the employer's conduct was not "inherently destructive" of important employee rights. In light of the above, and in the absence of any evidence in the record to support a finding of antiunion motivation, the Board dismissed the complaint under the test for unlawful conduct set forth in *NLRB v. Great Dane Trailers*, supra, relied on in *Texaco, Inc.*, supra.

In *Studio 44, Inc.*,[60] a Board panel held that the respondent violated Section 8(a)(3) and (1) of the Act by reassigning Union Steward Chi Yao Chang to more onerous work 2 days after he was elected shop steward and by subsequently issuing warnings to Chang for low productivity.

The Board further found that the respondent violated Section 8(a)(5) and (1) by its refusal to discuss a possible grievance and violated Section 8(a)(3) and (1) of the Act by the retaliatory layoff of Chang and eight grievants out of seniority and in the middle of the workweek.

The Board adopted the administrative law judge's finding that a technicians' strike the day after the layoffs was caused by the respondent's unfair labor practices and was not subject to sanction pursuant to the contract's no-strike provision. The majority, however, contrary to the judge's conclusion, found that the strike lost its protected status when the strikers refused the respondent's offer of reinstatement with backpay. The offer was accompanied by the respondent's promise to abide by the contract's seniority provision in effectuating any future layoffs, and to discuss any employee grievance in accordance with the contractual grievance procedure.

In *Mastro Plastics Corp. v. NLRB*,[61] the Supreme Court held that a general no-strike, no-lockout provision did not waive the employees' right to strike in response to the employer's unfair labor practices. The Board, in *Arlan's Department Store*,[62] rejected a broad interpretation of *Mastro Plastics*, holding that "only strikes in protest against serious unfair labor practices should be held immune from general no-strike clauses." In *Arlan's*, the

[60] 284 NLRB No. 67 (Chairman Dotson and Member Stephens; Member Johansen dissenting in part).
[61] 350 U.S. 270 (1956).
[62] 133 NLRB 802, 807 (1961).

Board described an unfair labor practice as serious if it is "destructive of the foundation on which collective bargaining must rest."[63] Such a determination requires a case-by-case approach.

The majority in the instant case found that the respondent's offer brought the parties' relationship back within the ambit of *Arlan's*, i.e. the continuing effect of the violations was not so serious as to immunize a choice to violate the no-strike clause rather than submit the dispute to the contractual grievance-arbitration procedure. The majority found the technicians' stated reasons for refusing the respondent's offer were lacking in merit. The technicians' demand, for example, that the respondent surrender its right to lay off or terminate employees was inappropriate. The respondent's offer was sufficient to render the technicians' continued walkout unprotected, and the respondent thereafter was not obliged to reinstate the strikers.

Member Johansen, dissenting in part, found that the respondent failed to cure its unfair labor practices because it gave the employees no assurances it would not again discriminatorily lay off its technicians. He found the strike remained an unfair labor practice strike.

In *Challenge-Cook Bros.*,[64] a Board panel adopted an administrative law judge's finding that the employer lawfully locked out its employees after reaching an impasse in contract negotiations in order to further its bargaining position. However, the Board panel found, contrary to the judge, that the employer did not violate Section 8(a)(1), (3), and (5) when it denied pension withdrawal benefits to employees during a 2-week period of the lockout.

Prior to the lockout, the employer had scheduled to lay off its employees for 2 weeks. Under the employees' pension plan, employee participants of the plan who were "laid off temporarily for lack of work" were allowed to withdraw funds from the pension account "during said layoff." When employees during the lockout applied for benefits under the pension plan, the employer denied the applications on the grounds that the plan precluded payment during a lockout. The judge found that the employer's denial of benefits was unlawful because the respondent had deliberately scheduled the lockout to overlap with the layoff so as to deprive employees of the benefits they would have received during the 2-week period.

The Board panel disagreed, finding that the employer initiated the lockout on the first working day after the union rejected its latest contract proposal and that it viewed the lockout from its inception as being of indefinite duration. The panel noted that the timing of the lockout was, as found by the judge in another context, designed to put economic pressure on the union to

[63] Id. at 808.

[64] 282 NLRB No. 2 (Chairman Dotson and Members Johansen and Babson).

accept the employer's bargaining position and not to overlap with a prescheduled layoff.

The majority concluded that, in the absence of any evidence showing that the employer deliberately planned the lockout to overlap with the scheduled layoff, no violation of the Act could be found in the employer's denial of pension benefits to locked out employees.

Member Babson agreed with the majority that the denial of pension benefits did not violate the Act. In this regard, he distinguished *Sargent-Welch Scientific Co.*, 208 NLRB 811 (1974), cited by the judge, from the present case. In a footnote, he observed that, while in *Sargent-Welch* the contract provision did not authorize the employer to withhold vacation pay from employees who had been scheduled to begin vacations shortly after the start of the lockout, the provision in question here permitted laid-off employees to withdraw funds from the pension account but made no mention of employees who were locked out. Accordingly, he found that the employer was abiding by the precise language of the applicable provision when it denied certain funds to locked-out employees.

e. No Implied No-Strike Clause

In *Atlas Plastering*,[65] a Board panel held that a contract did not contain an implied no-strike clause and therefore the respondent violated Section 8(a)(1) by threatening to discharge employees if they engaged in a strike and Section 8(a)(3) by discharging employees because they engaged in a strike.

In April 1982, the union business agent discovered during an inspection of the jobsite some employees working without referrals as the contract required. He informed the respondent and stated that he would send a qualified worker as steward to police violations; the contract permitted the union to appoint stewards. The union sent a qualified individual to the jobsite as steward, but the respondent refused to accept him. When the union met with the Respondent, the respondent repeated that it would not accept the individual as steward. The union said if the respondent would not accept him, it would close down the job. The respondent replied that it would terminate anyone who left the job. Pursuant to instructions from the union, employees walked off the job because the respondent refused to take the steward and because there were employees on the site whom the union had not referred.

The judge found that the parties' contract provided for a mandatory dispute resolving mechanism (the adjustment board/joint committee) that implied a no-strike clause regarding disputes arising under the contract, and that the disputes in question were

[65] 285 NLRB No. 26 (Chairman Dotson and Members Stephens and Cracraft).

cognizable under the contract. He recommended dismissing the complaint.

The Board observed that the contract did not contain an express no-strike clause; that an agreement to resolve disputes by an exclusive, final, and binding means does not arise solely by operation of law; and that where the parties have not so agreed there is nothing from which to imply an obligation not to strike.

The Board's review of the contract showed an absence of language stating that the contract's adjustment board/joint committee determination was exclusive, final, and binding. The Board also noted that the contract provided for final and binding arbitration of dispatching problems, which evidenced that the parties knew how to draft contract language regarding final and binding mechanisms, and from which the Board inferred that the parties did not contract for final and binding resolution of all disputes.

Finally, the Board observed that the contract appeared to authorize strikes, from which the Board inferred it would be inconsistent to imply a no-strike clause.

The Board therefore held that the union did not waive the right to strike. Therefore, the respondent violated Section 8(a)(1) and (3) by threatening to discharge and by discharging employees because they engaged in a walkout to protest contract violations.

f. Employer Poststrike Party

In *Desert Inn Country Club*,[66] the Board held, contrary to the administrative law judge, that the employer violated Section 8(a)(3) and independently violated Section 8(a)(1) by holding a poststrike party for those employees who either did not strike or returned to work before the strike ended.

After an approximately 2-month strike, involving "violence and ill-will," the unions and the employer entered into a 5-year collective-bargaining agreement. The poststrike atmosphere was "tense and adversarial." About 2-1/2 months after the strike had ended, the employer's president invited exclusively those employees who had worked during the strike, along with a guest, to an "appreciation" party to be held at the employer's facility. At least three employees had their schedules adjusted so they could attend the party, and some of the employees who had participated in the strike worked at the party for the employer. The employer provided food, liquor, and entertainment, spending approximately $4000 on the event.

The Board majority, in finding an 8(a)(3) violation, held that the party constituted a term and condition of employment and that it was provided to employees in a disparate manner based on the employees' union activities. The majority found there to be no legitimate business justification for the party. Relying on *Aero-*

[66] 282 NLRB No. 94 (Members Johansen, Babson, and Stephens; Chairman Dotson dissenting).

Motive Mfg. Co., 195 NLRB 790 (1972), enfd. 475 F.2d 27 (6th Cir. 1973), it rejected the employer's stated reason that the purpose was to show appreciation to those employees who had worked during the strike. The majority also failed to see how the employer could accomplish its additionally stated goal of easing poststrike tension by an "employer-sponsored function at which various former strikers worked, catering and cleaning up after their coworkers who had not struck."

Relying on *Rubatex Corp.*, 235 NLRB 833 (1978), enfd. 601 F.2d 147 (4th Cir. 1979), the majority also found that the holding of the party constituted an independent violation of Section 8(a)(1) because it "had a tendency to interfere with the exercise of the right to strike, which is protected by Section 7." The majority further found, for the reasons stated above, that the employer had "insufficient business justification for holding the party and, accordingly, that the coercive effects of the party were not outweighed by business considerations."

Chairman Dotson, dissenting, would have dismissed the complaint, as the judge had. Pointing to the poststrike animosity between the strikers and those who worked during the strike, Chairman Dotson reasoned that the employer had a legitimate business reason for organizing the party. Moreover, Chairman Dotson contended that the majority pointed to no evidence showing actual antiunion motivation which would rebut the employer's asserted business justification.

Finally, Chairman Dotson found that "the events surrounding the party do not support the inference that its purpose and effect was to tamper, by economic inducement, with employees' Section 7 freedom to honor or not to honor a picket line." The Chairman reasoned that "the past strike could not have been affected by the party and 'any tendency to deter participation in future strikes is minor.'"

g. Unprotected Strike

In *Betances Health Unit*,[67] the Board adopted, under a somewhat different rationale, the administrative law judge's finding that the employer did not violate Section 8(a)(3) when it discharged an employee for engaging in a strike.

Following the transfer of several employees and the discharges of several others, an employee association representing employees of a medical clinic decided to go on strike, in which the employee in question participated. The employee association, which was found by the judge to be a labor organization, however, failed to notify the employer of its intent to strike in accordance with Section 8(g).[68]

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[67] 283 NLRB No. 59 (Members Babson and Stephens; Chairman Dotson dissenting).

[68] Sec. 8(g) requires that a labor organization which represents employees at a health care institution provide the employer with notice of its intent to strike at least 10 days prior to taking such action.

The Board majority agreed with the judge that the failure to give notice under Section 8(g) rendered the strike unprotected. It also agreed with the judge's conclusion that the unfair labor practices found did not render the strike an unfair labor practice strike. In adopting this finding, however, the majority found, contrary to the judge—who had found that one of the discharges preceding the strike was a proximate cause of the strike and, although unlawful, was not so serious as to excuse the failure to give the requisite notice—that there was no evidence establishing a causal relationship between the unfair labor practices found and the strike. Accordingly, it found that the strike was an economic strike and that the employer did not violate Section 8(a)(3) when it discharged the employee for participating in the strike.

Chairman Dotson declined to rule on the merits of this and other issues in the case. Unlike his colleagues, who found it unnecessary in the absence of exceptions to disturb the judge's assertion of jurisdiction over the employer, which in major part received Government funding, the Chairman would have remanded this proceeding for consideration of whether the Board had jurisdiction over the employer under *Res-Care, Inc.*[69] and *Long Stretch Youth Home.*[70]

2. Right to Serve as Steward

In *Aces Mechanical Corp.*,[71] the Board reversed the administrative law judge and concluded that the employer violated Section 8(a)(3) by conditioning the continued employment of an employee on his relinquishing his right to act as a union steward.

The employee initially had been employed as a journeyman plumber at one of the employer's construction projects. He also functioned as a very active and diligent union steward at the project. The employee's active pursuit of his steward duties prompted the employer's general superintendent to complain to the union. Thereafter, the employer terminated the employee in September 1982 after he purportedly had returned to work late after lunch. The employee filed a grievance over his discharge and it ultimately proceeded to arbitration. In the meantime, the employer's president reached an agreement with the union's president to reemploy the employee pending the outcome of the arbitration, provided that the employee would not act as a steward.

Under the parties' collective-bargaining agreement, the union's business agent had the right to appoint the steward. When the employee returned to work and was advised that he could not be the steward, he contacted the union and he and the business agent informed the employer that he would be the steward. When the employer adhered to its position based on its agree-

[69] 280 NLRB 670 (1986).

[70] 280 NLRB 678 (1986)

[71] 282 NLRB No. 137 (Members Johansen and Babson; Chairman Dotson dissenting).

ment with the union president, the employee and the business agent left the job.

The Board majority disagreed with the judge's conclusion that the union had properly waived the employee's right to be steward and that the employer therefore had not violated the Act by insisting that the employee's reinstatement be conditioned on his relinquishing his steward duties. The majority noted that, to be effective, a waiver of employee statutory rights must be clear and unmistakable. The majority concluded that "[a]ssuming, without deciding, that union officials can waive employees' rights to serve as stewards, we do not find that a clear and unmistakable waiver has been established here."

The majority noted that the business agent had the authority under the collective-bargaining agreement to appoint the steward and that the business agent had adamantly insisted to the employer that the employee would be the steward.

Chairman Dotson, dissenting, agreed with the judge and would have found that the union president had effectively waived the employee's right to serve as steward. The Chairman contended that the authority granted the business agent in the collective-bargaining agreement did not establish that the business agent rather than the president had superior or exclusive authority over employees' rights to be steward.

C. Employer Bargaining Obligation

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

1. Mandatory Subject of Bargaining

The Act requires both an employer and its employees' statutory bargaining representative to bargain collectively with respect to "wages, hours, and other terms and conditions of employment."[72] Either party may insist on the other's agreement to its proposals concerning these areas. In addition to these mandatory bargaining subjects, the parties may bargain about other matters. But neither party may insist that the other agree on such nonmandatory or permissive subjects. Nor may a party condition performance of its statutory bargaining obligation regarding mandatory bargaining subjects on the other party's agreement to nonmandatory bargaining proposals. The Board is frequently re-

[72] Sec. 8(d) of the Act.

quired to determine whether a particular subject or specific proposal is a mandatory subject of bargaining.

In *Owens-Corning Fiberglas Corp.*,[73] the Board ruled that an employee purchase plan, under which employees were allowed to buy certain of the employer's products at a discount, was a mandatory subject of bargaining, even though it was not contained in the collective-bargaining contract. Accordingly, the Board affirmed the administrative law judge's finding that the employer unlawfully modified the plan without bargaining with the union.

In dissent, Chairman Dotson disagreed with the majority's finding that the employee purchase plan was a mandatory subject of bargaining. He noted that, although the plan had been in existence for more than 20 years, the employer had exercised exclusive control over its operation, and had previously altered the terms of the program without bargaining with the union. Chairman Dotson found that the union's silence over such a long period of time indicated an acknowledgment on its part that the plan was not a bargainable matter. Noting also that the program was available to all employees, regardless of performance, seniority, or any employment-related factor, Chairman Dotson found that the plan was more analogous to an employer's grant of gifts to employees, which the Board has found not to be a mandatory subject of bargaining.[74]

In response to Chairman Dotson, the majority observed that the employee purchase plan was a benefit that had accrued to employees out of their employment relationship with the employer, and thus was a mandatory subject of bargaining. Moreover, the plan had been in effect for more than 20 years and apparently was of significant economic benefit to employees.[75] The majority also emphasized that the union's failure to request bargaining over previous changes in the plan did not operate as a waiver of its right to bargain over such changes for all time,[76] especially in view of the fact that the terms of the plan never were discussed during contract negotiations.

Another decision during the report year involved a loyalty clause proposed by the employer requiring employees and their representatives to use their best efforts to promote the employer's interests. In *Meda-Care Ambulance*,[77] the respondent employer proposed including this clause in its contract with the union. The respondent indicated to the union that its wage proposals would not be forthcoming until the union agreed to the

[73] 282 NLRB No. 85 (Members Johansen and Stephens; Chairman Dotson dissenting).

[74] *Benchmark Industries*, 270 NLRB 22 (1984).

[75] The majority thus distinguished *Benchmark Industries*, supra, in which the gifts to employees consisted only of holiday lunches or dinners and 5-pound hams, the latter having been given to employees for only 3 years.

[76] *Ciba-Geigy Pharmaceuticals*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983).

[77] 285 NLRB No. 50 (Chairman Dotson and Members Johansen and Babson).

inclusion of the respondent's proposed loyalty clause[78] and, if the union failed to agree to the clause, the respondent's wage proposals would be limited to the Federally suggested minimum.

The administrative law judge found no evidence that the respondent impeded bargaining by unlawfully conditioning further negotiations on the union's acceptance of the loyalty clause. The judge found the respondent did not indulge in the degree of "insistence" contemplated by *NLRB v. Borg-Warner Corp.*,[79] which condemned a party's insistence to impasse on a nonmandatory subject of bargaining. Thus, the judge found no 8(a)(5) violation.

The Board, reversing the judge in part, found that the loyalty clause proposed by the respondent was not a mandatory subject of bargaining, citing *Salvation Army of Massachusetts*[80] and *Hall Tank Co.*[81] The Board found that the respondent made it clear that the union's agreement to the loyalty policy was a condition precedent to further bargaining. The Board determined that it was a violation of the duty to bargain in good faith to hold negotiations hostage to a demand for a nonmandatory subject, citing *Operating Engineers Local 542 (York County)*[82] and *Operating Engineers Local 12 (AGC).*[83] The Board thus found a violation of Section 8(a)(5).

2. Unilateral Change in Employment Terms

In cases decided during the report year, the Board was presented with alleged violations of Section 8(a)(5) involving employers' unilateral changes in employees' terms and conditions of employment. The obligation to recognize and bargain with a labor organization representing its employees precludes an employer from taking unilateral action changing the terms and conditions of employment of those employees.

The Board faced, in *Schmidt-Tiago Construction Co.*,[84] an unusual question concerning an employer's unilateral changes instituted during a strike. The Board majority held that the employer violated Section 8(a)(5) by substituting benefit plans, by discontinuing payments to a pension fund, and by paying returning strikers additional wages in lieu of contributing to the contractual vacation fund.

Shortly after an economic strike began, the employer informed the union that it was discontinuing contributions to existing con-

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[78] The clause stated:
Employees will individually and collectively perform their work and fulfill their duties in a safe, prompt and efficient manner and they and their representatives will use their influence and best efforts at all times to protect the property and reputation of the Company and consistent with the Federal and State laws to protect and promote the Company's best interest.

[79] 356 U.S. 342 (1958).

[80] 271 NLRB 195, 198–199 (1984).

[81] 214 NLRB 995 (1974).

[82] 216 NLRB 408, 410 (1975), enfd. 532 F.2d 902 (3d Cir. 1976).

[83] 187 NLRB 430, 432 (1970).

[84] 286 NLRB No. 31 (Members Johansen, Babson, and Stephens; Chairman Dotson and Member Cracraft dissenting in part).

tractual benefit plans until the parties reached new "labor agreements." As soon as some strikers abandoned the strike and returned to work, the employer began to contribute to a different health and welfare fund, paid them additional wages in lieu of making vacation fund contributions on their behalf, and simply discontinued pension fund contributions with no substitution. Contract negotiations resumed during the strike. The employer proposed essentially those benefit plan changes that had already been effectuated. When the parties met for the last time, they had not yet bargained over this proposal, and the union protested that the changes had been implemented before the parties reached impasse on them. The employer responded that it had no further bargaining obligation and that the union could either accept its proposals or file charges with the Board.

The Board majority found that the employer had created a confusing situation in which the union was faced with what at first may have appeared to be temporary, strike-related changes, but, when relabeled as proposals to be incorporated into a new collective-bargaining agreement and acknowledged to have been implemented, became, in effect, permanent changes. These permanent, unilateral changes violated Section 8(a)(5). Moreover, the majority found that ceasing contributions to the benefit plans of the expired contract was inseparable, on the facts presented, from the substitution of low wages and benefits, and also violated Section 8(a)(5).

Chairman Dotson and Member Cracraft, in dissent, took the position that those changes affecting employees who returned to work during the strike were lawful because, in their view, the interests of returning strikers are more closely aligned with those of striker replacements than with those of strikers. As there was no obligation to bargain over the terms and conditions of employment of striker replacements, the dissenters found no obligation to bargain regarding the terms of the returning strikers' employment. The majority expressed no position on the broad issue of the suspension of an employer's duty to bargain during a strike. Rather, the majority took the view that that issue was beyond the scope of the case as presented.

In *Peerless Publications*,[85] the Board readdressed the question of an employer's unilateral imposition of work rules and a code of ethics, and whether those rules/ethics code were severable, for bargaining purposes, from the constituent penalties designed to enforce them. The case was before the Board on remand from the U.S. Court of Appeals for the D.C. Circuit, which had denied enforcement of the Board's initial decision[86] in the case.

The Board and the court agreed that "protection of the editorial integrity of a newspaper lies at the core of publishing con-

[85] 283 NLRB No. 54 (Chairman Dotson and Member Johansen; Member Stephens concurring).

[86] *Newspaper Guild Local 10 (Peerless Publications) v. NLRB*, 636 F.2d 550 (1980), denying enf. of 231 NLRB 244 (1977).

trol." However, the court had deemed inadequate the rationale used by the panel majority in the initial decision to justify the employer's unilateral imposition of its work rules/ethics code. The court also found, contrary to the majority but in agreement with former Chairman Fanning's dissents in the original decision and in the *Capital Times* case,[87] that "constituent penalties for violation of rules cannot reasonably 'be separated for Labor Act purposes from the substantive provisions which they are designed to enforce.'"

On further examination of the issues, the Board decided to modify its earlier decision. Thus, the Board concluded, in agreement with the court, that as a general principle rules and their constituent penalties should not be artificially severed from each other for purposes of collective bargaining. The Board reaffirmed the principle that, in order to preserve its editorial integrity, a news publication is free to establish reasonable rules designed to prevent its employees from engaging in activity which would "directly compromise" their position as responsible journalists and the publication as a medium of integrity. The Board emphasized that the degree of control which may be exercised "must be narrowly tailored" and indicated the general standards under which such unilateral action is to be considered.

Starting from the principle that matters affecting terms and conditions of employment are presumptively mandatory subjects of bargaining, the Board concluded that the subject matter which the employer seeks to address must, as a threshold issue, go to the "protection of the core purpose of the enterprise." Where that is the case, the rule must also on its face be (1) narrowly tailored in terms of substance to meet with particularity only the employer's legitimate and necessary objectives, without being overly broad, vague, or ambiguous; and (2) appropriately limited in its applicability to affected employees to accomplish the necessarily limited objectives.

Applying those criteria to the provisions at issue, the Board concluded that neither the general office rules nor the ethics code as a whole could withstand such scrutiny, and that they must therefore be rescinded in their entirety. The Board overruled its earlier decision in *Peerless* and the decision in *Capital Times*, supra, to the extent they were inconsistent.

3. Withdrawal of Recognition

In *Johns-Manville Sales Corp.*,[88] the Board reversed the administrative law judge, and dismissed the allegation that the employer had violated Section 8(a)(5) by withdrawing recognition from the union some 2 months after the expiration of its certification year.

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[87] *Capital Times Co.*, 223 NLRB 651 (1976).

[88] 282 NLRB No. 40 (Chairman Dotson and Members Johansen, Babson, and Stephens).

The union was certified in January 1982 to represent a unit of the employer's production and maintenance employees. The parties began negotiating in March 1982 and in the ensuing year met some 25 times but never reached an agreement. In the meantime, the employer, in July 1982, unilaterally changed its policy of laying off employees in reverse order of seniority and laid off certain employees without regard to their seniority rights. In February 1983, an employee presented to the employer's plant manager a petition requesting a decertification election. The petition was signed by 46 of the employer's 72 employees. After checking the authenticity of the signatures, the employer advised the union that it was suspending negotiations because it had a good-faith doubt as to the union's majority status.

The Board agreed with the judge's finding that the employer violated Section 8(a)(5) in July 1982 when it unilaterally changed its layoff policy and laid off employees without regard to their seniority rights. The Board, however, disagreed with the judge's reasoning that this conduct precluded the employer from relying on the subsequent employee petition as the basis for a good-faith doubt of the union's continuing majority status. In so doing, the Board noted that "it is well settled that an employer may not question a union's majority status 'in a context of illegal antiunion activities, or other conduct by the employer aimed at causing disaffection from the union or indicating that in raising the majority issue the employer was merely seeking to gain time in which to undermine the union.'"

Applying that test to the instant case, the Board concluded that the employer's July 1982 violation was not of such a character that it precluded the assertion of a good-faith doubt of the union's majority status some 8 months later. The Board noted that the July conduct directly affected only three employees who otherwise would have remained working absent the unlawful unilateral action. The Board also noted that the employer had advanced a reasonable business justification for its conduct and that it had continued to meet and bargain with the union for almost 8 months thereafter. Accordingly, the Board reasoned that "we cannot conclude that the Respondent's unlawful conduct in July caused the massive disaffection from the Union evident in the employee petition or that it had such a lingering effect so as to taint the Respondent's reliance on that petition as the basis for a good-faith doubt of the union's majority status."

In *Royal Coach Lines*,[89] a Board panel considered whether an employer violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the union after it voluntarily granted the union recognition. The panel majority found a violation.

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[89] 282 NLRB No. 145 (Members Johansen and Babson; Chairman Dotson dissenting on other grounds.)

In so doing, the panel majority ruled that it was not incumbent on the General Counsel to establish that the union in fact enjoyed majority support when the employer recognized it. Rather, according to the panel majority, in an 8(a)(5) proceeding involving voluntary recognition, the burden is on the employer, the party seeking to escape the bargaining obligation normally arising from voluntary recognition, to adduce affirmative evidence proving the union's lack of majority status at the time of recognition. In this case, no such evidence was presented. The fact that the union did not obtain authorization cards from a majority of the employees until the day the employer granted recognition did not constitute affirmative evidence proving that the union did not enjoy majority status at the time of recognition. The panel majority concluded that the employer incurred an obligation to bargain with the union by voluntarily recognizing it and thus the employer's subsequent refusal to bargain and withdrawal of recognition violated Section 8(a)(5) and (1) of the Act.

Chairman Dotson, dissenting, would have remanded the proceeding for further consideration of whether the Board had jurisdiction over the employer.

4. Refusal to Arbitrate

Section 8(a)(5) makes it unlawful for an employer to refuse to bargain collectively with the representative of its employees. During the report year, a noteworthy case involving a violation of this section issued.

In *Indiana & Michigan Electric Co.*,[90] the Board held that the respondent violated Section 8(a)(5) and (1) when it made a blanket refusal to arbitrate any grievance arising during a contractual hiatus. The grievance clause of the expired contract contained a four-step grievance and a two-step arbitration procedure. After expiration of the contract, the Respondent indicated it would not arbitrate any grievances filed during the hiatus. Nine grievances were processed, but the respondent refused to arbitrate them.

In *Hilton-Davis Chemical Co.*,[91] the Board concluded that during a contractual hiatus employers and unions must continue to meet, confer, and seek agreement in good faith as to grievances arising during that period as well as to terms of the new contract. But the duty to bargain does not compel the parties to submit to arbitration any grievances that they are unable to resolve. In *Nolde Bros. v. Bakery Workers Local 358*,[92] the Supreme Court held that an employer is compelled to arbitrate postexpiration grievances only when the grievances arise under the expired contract and the contract does not negate expressly or by clear implication the presumption favoring postexpiration arbitration of

[90] 284 NLRB No. 7 (Members Babson and Stephens; Chairman Dotson dissenting in part; Member Johansen concurring and dissenting in part).
[91] 185 NLRB 241 (1970).
[92] 430 U.S. 243 (1977).

such disputes. The Court indicated that the fact that arbitration is a creature of the collective-bargaining agreement did not require a holding that termination of the agreement extinguished the obligation to arbitrate grievances arising under the agreement. *Nolde*, therefore, separates postexpiration grievances into those which arise under the contract and those which do not.

Guided by *Hilton-Davis* and *Nolde*, the Board examined the grievance-arbitration procedure and found that, because of further recourse, the first arbitration step was in effect a fifth grievance step. The respondent's abandonment of this arbitration step was therefore considered to be a unilateral change in the grievance procedure and violated Section 8(a)(5). The Board ordered the respondent to process the nine grievances through step 1 of arbitration.

With respect to step 2 arbitration, the Board stated that, as the duty to arbitrate cannot be maintained solely by operation of the Act, the enforceable obligation to arbitrate disputes originating during a contractual hiatus must arise from the collective-bargaining agreement, and that the refusal to arbitrate must amount to a wholesale repudiation of the collective-bargaining agreement. The Board found that, because the respondent refused to arbitrate *any* grievances, including those arbitrable under *Nolde*, its conduct amounted to a wholesale repudiation of its limited contractual obligation to arbitrate and a violation of Section 8(a)(5) and (1) of the Act.

However, before the Board will order arbitration, the commitment to arbitrate must extend, under *Nolde*, to those postexpiration grievances which arise under the contract. A dispute based on postexpiration events arises under the contract within the meaning of *Nolde* only if it concerns contract rights capable of accruing or vesting to some degree during the life of the contract, and ripening or remaining enforceable after the contract expires. In this instance, the Board found that the rights invoked by the employees did not arise under the contract, and the respondent had no contractual obligation to arbitrate any of the nine grievances.

Chairman Dotson, dissenting in part, took issue with the majority's failure to apply its arbitration procedure analysis to the grievance procedure. Under Section 8(d) of the Act, the respondent had an obligation to confer with the bargaining representative about employee grievances. But, according to the Chairman, the postexpiration duty to follow contractual grievance procedures survived only as an adjunct of the limited postexpiration duty to arbitrate grievances which involved rights arising under the expired contract, and which were subject to postexpiration arbitration by the terms of the contract. Chairman Dotson would have found an 8(a)(5) violation with respect to the parties' step 1 arbitration grievances only insofar as the respond-

ent's blanket repudiation of postexpiration action comprehended issues which it would have to take to arbitration.

Member Johansen, dissenting in part, disagreed with his colleagues' conclusion that the remedy should not include an order that the employer arbitrate the nine hiatus grievances. In Member Johansen's view, specific contract rights were invoked by each of the nine grievants. Therefore, the grievance disputes were over provisions of the expired contract and thus "arose under" the contract.

5. Work Transfer or Relocation

In *Otis Elevator Co.*,[93] a Board panel determined an employer's obligation to bargain over the effects of a decision to transfer unit employees where the decision itself was not a mandatory subject of bargaining. The panel majority adopted the administrative law judge's finding that the employer violated Section 8(a)(5) and (1) of the Act by offering a relocation package to two groups of employees it chose to transfer, but reversed the judge's finding that the employer failed to bargain in good faith over the relocation package with respect to a third group of unit employees.

The employer offered transfers to its engineers in three "waves"—January and May 1978 and January 1979. The employer and the union met on several occasions in February and early April 1978 during which the union demanded the employer negotiate about, among other things, the effects of its decision to transfer work to its Connecticut facility. On April 27, 1978, the employer gave the union a booklet detailing a relocation package handled by an outside group. It offered this package to those employees it invited to transfer to Connecticut in January and May 1978. On September 15, 1978, the union presented a "Partial List of Demands" regarding the transfers. Despite its initial statement to the contrary, the employer answered every demand, rejecting all but two. At an October 31, 1978 meeting, the union modified some of its demands. The union made additional modifications on December 1, 1978. The parties last met on January 30 and 31, 1979.

The panel majority found that the employer dealt directly with employees whom it chose to transfer to Connecticut in January and May 1978 by offering its relocation package to them, in violation of Section 8(a)(5). However, the panel majority held that this direct dealing did not indicate that the employer failed to negotiate with the union once the union had presented its demands. The panel majority found that the fact that the employer did not timely notify the union of its decision to transfer employees also did not frustrate bargaining over a relocation package from Sep-

[93] 283 NLRB No. 40 (*Otis Elevator III*) (Members Johansen and Stephens; Chairman Dotson dissenting.) The Board's original decision in this case is reported at 255 NLRB 235 (1981) (*Otis Elevator I*). Its supplemental decision is reported at 269 NLRB 891 (1984) (*Otis Elevator II*).

tember 1978 through January 1979. Thus, the panel majority found no evidence that the employer failed to bargain in good faith.

Chairman Dotson, dissenting, would have found that the employer did not violate Section 8(a)(5) by failing to bargain over the effects of the decision to transfer unit work because he would have found that the union waived its right to bargain in its collective-bargaining agreement with the employer. However, Chairman Dotson agreed with the majority that the employer in any event did not violate Section 8(a)(5) and (1) by failing to bargain in good faith over a relocation package offered to those employees it chose to transfer in January 1979.

In *Central Soya Co.*,[94] the Board held that an employer who consolidated and relocated an existing represented work force with an existing unrepresented work force of slightly smaller size had a duty to recognize and bargain with the union.

The respondent owned and operated a feed mill where for 12 years it recognized and had a collective-bargaining agreement with the union. In July 1980, the respondent became the owner of a newer and more modern facility located nearby. Effective November 3, 1980, the respondent closed its feed mill and 13 bargaining unit employees were transferred to the new facility. Two additional employees who were on authorized sick leave were transferred after their return to work on January 25 and April 22, 1981, respectively. At the time of the transfer, there were 13 employees already working at the new facility who historically had not been represented by any labor organization. Prior to the transfer, the respondent informed the union that it would not recognize it as the representative of the combined work force at the new facility.

In finding the violation, the Board majority found that the operation was not a new and different one for which the respondent had no duty to bargain, but rather relied on the administrative law judge's finding that there was no substantial change in operations since the product, the manufacturing process, and the organization and nature of the work force were the same. The majority found that there was a valid accretion to the represented unit. The majority concluded that the balance between assuring employee free choice and fostering established bargaining relationships should be struck in favor of the long-term bargaining relationship covering the transferred employees who constituted a clear majority of the combined work force.

Chairman Dotson, dissenting, believed that the majority erred in imposing a bargaining agent on the consolidated work force and in treating the unrepresented group of 13 employees as an accretion to the 15 newly arrived represented employees. Citing *Renaissance Center Partnership*,[95] he opined that the accretion

[94] 281 NLRB No. 173 (Members Johansen, Babson, and Stephens; Chairman Dotson dissenting).
[95] 239 NLRB 1247 (1979).

doctrine usually applies to a smaller group of new employees who have common interests with members of an existing larger unit and who have been included in the certified unit or are covered by a current collective-bargaining agreement. He noted that the two groups here were approximately the same size. He believed that application of the accretion doctrine was improper when the accreted group substantially equaled the existing certified or recognized unit because the employees in the accreted group were deprived of their statutory right to express their desires concerning representation.

6. Bankruptcy Issues

In *Otten Truck Line*,[96] a Board panel affirmed the administrative law judge's reliance on *NLRB v. Bildisco & Bildisco*[97] in holding that the employer, an alter ego successor to a corporation in bankruptcy proceedings, violated Section 8(a)(5) in December 1983 by bypassing the union and dealing directly with the employees regarding their wages and benefits. While maintaining the same wage rate paid by the debtor in possession and granting the same holidays, the successor ceased deducting union dues from employees' paychecks, reduced vacation leave, and ceased making payments to the union's health and welfare fund.

The Board, however, reversed the judge's recommended dismissal of the 8(a)(5) allegation that the successor employer also abrogated the 1982–1985 collective-bargaining agreement between the debtor in possession and the union. While the judge correctly stated *Bildisco*'s holding that, from the filing of a petition in bankruptcy until final acceptance, a collective-bargaining agreement is not an enforceable contract within the meaning of Section 8(d) of the Act, he erroneously relied on *BDJ Contracting Co.*[98] in finding that the successor here shared the debtor in possession's *Bildisco* rights. The Board distinguished *BDJ* by stating that in that case the operations of the alter egos themselves were subject to the supervision of the bankruptcy court. In this case, there was no evidence that the successor had been brought under the jurisdiction of the bankruptcy court. Thus, the policy underlying *Bildisco* provided no ground to release the successor employer from its 8(d) obligation as an alter ego to give effect to the terms and conditions of the 1982–1985 collective-bargaining agreement.[99] The 1984 Bankruptcy Amendments and Federal Judgeship Act modifying *Bildisco* did not apply to this case because the petition was filed prior to its enactment.

In *Image Systems*,[100] the Board reversed the administrative law judge and concluded that the respondent violated Section

[96] 282 NLRB No. 73 (Chairman Dotson and Members Johansen and Stephens).
[97] 465 U.S. 513 (1984).
[98] 273 NLRB 1858 (1985).
[99] See *Edward Cooper Painting*, 273 NLRB 1870 at fn. 8 (1985), enfd. 804 F.2d 934 (6th Cir. 1986).
[100] 285 NLRB No. 56 (Chairman Dotson and Members Stephens and Cracraft).

8(a)(5) and (1) of the Act by refusing to execute a written document embodying the full and complete agreement arrived at between the parties with respect to rates of pay, wages, hours, and other terms and conditions of employment notwithstanding the respondent's filing of a petition in bankruptcy.

The record revealed that the parties reached a full and final agreement on a successor contract to replace their most recent collective-bargaining agreement. Subsequently, the union notified the respondent that the required employee ratification of the agreement had been obtained. The respondent agreed that the union would prepare, and forward to it, a written document embodying the agreed-upon terms. The union thereafter mailed copies of the successor contract to the respondent, requesting execution. The respondent returned the documents, informing the union that it had filed for bankruptcy under Chapter 11 of the Bankruptcy Code and had been advised by counsel not to sign any agreement with any third party until a United States trustee gave approval. The bankruptcy petition was filed after the union notified the respondent that the employees had ratified the contract but before the union mailed copies of the contract to the respondent.

The judge, citing *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), found that an employer did not violate the Act by failing to honor a collective-bargaining agreement after the filing of a bankruptcy petition absent bankruptcy court authorization or direction. The judge recommended that the complaint be dismissed subject to reinstatement based solely on circumstances related to the status of the bankruptcy proceedings.

The Board disagreed, concluding that the filing of a petition in bankruptcy did not relieve or suspend the respondent's obligation to execute, on request, the complete and final agreement of the parties. The flaw in the judge's analysis was that it ignored Congress' modification of *Bildisco* in the Bankruptcy Amendments and Federal Judgeship Act of 1984.[101] Because the bankruptcy petition in this case was filed after the July 10, 1984 effective date of the amendments, *Bildisco* was not controlling.

The 1984 amendments established orderly and efficient procedures with which a debtor in possession must comply *before* approval to reject a collective-bargaining agreement will be granted (unlike in *Bildisco* where the terms of a contract became unenforceable upon the filing of the bankruptcy petition). The Board noted the purpose behind the bankruptcy statute (i.e., to permit the successful rehabilitation of debtors) and sought to accommodate that policy with the Act's requirement that an employer honor its agreements with a labor organization. The Board concluded that requiring the respondent to execute the written documents did not undermine the Bankruptcy Code's goals. Such

[101] Pub. L. 98-353 § 541, 98 Stat. 333, 390-391 (1984), codified in 11 U.S.C. § 1113 (1984).

action would in no way prevent the respondent from pursuing any rights it might have under the bankruptcy amendments. The Board concluded that by rendering a decision upholding by formal execution the bargain reached by the parties, it merely required the respondent to comply with the mandates of the two applicable, and in this case entirely compatible, statutes. Thus, the Board found that the respondent violated Section 8(a)(5) and (1) and Section 8(d) of the Act by refusing to execute the agreed-upon contract.

7. Bargaining to Impasse

In *Massillon Community Hospital*,[102] a Board panel held that the employer failed to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act by persistently proposing to the point of impasse that its contract with the union be terminable at will.

During negotiations for a new contract, the parties had resolved all outstanding issues but that of the term of the contract. The union took the position that the parties had agreed on a contract term of 3 years. The employer claimed that no agreement had been reached on this point, and that the contract was therefore "terminable at the will of either party, subject to compliance with applicable statutory notice." In response to the union's renewed claim of agreement on a 3-year term, the employer wrote: "It appears as though we are at impasse over the issue of the term of the agreement. . . . The Hospital's final offer on this issue is for an agreement terminable at will."

The Board agreed with the judge that each side insisted that its position on the contract's term should be adopted by the other and therefore no agreement resulted. The Board found that if the employer had simply proposed a contract with a traditional fixed term different in length from that desired by the union, it would have been proper to find, as the judge did, that neither party acted unlawfully in adamantly pressing its position to impasse. However, the Board found:

> The Act will not permit one party to insist, as a condition precedent to entering into a collective-bargaining agreement, that the other party to the negotiation agree to a provision or take some action which is unlawful or inconsistent with the basic policy of the Act. Thus, it violates the Act for a party to create a bargaining impasse by insisting on an unlawful condition of employment or a term which contravenes the fundamental principles of the Act.

Citing *Chicago Typographical Union 16 (Chicago Newspaper Publishers)*[103] and *Armour & Co.*,[104] the Board held:

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[102] 282 NLRB No. 98 (Chairman Dotson and Members Johansen and Babson).

[103] 86 NLRB 1040 (1949).

[104] 48 NLRB 1412 (1943).

> [A]bsent any lawful or reasonable economic justification, a party's unwillingness to enter into a contract for a fixed term raises in and of itself a presumption that the party is not bargaining in good faith. This is so because the primary objective of collective bargaining, as it is envisioned by the Act, is to stabilize labor relations for periods of reasonable duration.

The Board found that here, the employer, having failed to give a lawful or reasonable justification for its "final offer" of a terminable-at-will contract, violated Section 8(a)(5) and (1) of the Act by demanding to impasse that the union agree to a contract provision "squarely in conflict with the basic principles of the Act."

8. Construction Industry Agreement

Section 8(f) of the Act permits a construction industry employer to enter into a collective-bargaining agreement with a union even though the union has not demonstrated that it represents a majority of the employer's employees. Congress fashioned this exception to Section 8(a)(2) to accommodate the unique employment patterns of the construction industry, in which employees are generally hired on a project-by-project basis, and employment is intermittent. During the report year, the Board issued a major decision which set forth a new policy in interpreting and applying Section 8(f).

In *John Deklewa & Sons,*[105] the Board ruled that a construction industry employer may not unilaterally repudiate a prehire agreement with a union until the agreement expires or until the employees covered by the contract vote to reject their representative. The decision overruled the Board's 1971 decision in *R. J. Smith Construction Co.,*[106] abandoned the so-called conversion doctrine, and modified relevant unit scope rules in 8(f) cases. Under the "conversion doctrine," a bargaining relationship which began as an 8(f) relationship could be found to have "converted" into a full 9(a) relationship by means other than a Board election or voluntary recognition based on a simultaneous showing of majority support. In *Deklewa,* the Board stated that it would apply the following principles in 8(f) cases:

> (1) a collective-bargaining agreement permitted by Section 8(f) shall be enforceable through the mechanisms of Section 8(a)(5) and Section 8(b)(3); (2) such agreements will not bar the processing of valid petitions filed pursuant to Section 9(c) and Section 9(e); (3) in processing such petitions, the appropriate unit normally will be the single employer's employees covered by the agreement; and (4) upon the expiration of such agreements, the signatory union will enjoy no presumption of majority

[105] 282 NLRB No. 184 (Chairman Dotson and Members Johansen and Babson; Member Stephens concurring).

[106] 191 NLRB 693 (1971), enf. denied sub nom. *Operating Engineers Local 150 v. NLRB,* 480 F.2d 1186 (D.C. Cir. 1973).

status, and either party may repudiate the 8(f) bargaining relationship.

Thus, once a contract has expired, the employer may not be compelled to negotiate or adopt a successor agreement based solely on the existence of an 8(f) relationship. Further, the union may not strike or picket to force an employer to sign a successor prehire agreement.

The Board also emphasized that, "in light of the legislative history and the traditional prevailing practice in the construction industry," the burden of proving 9(a) status in construction industry cases is on the party asserting the existence of a 9(a) relationship.

The Board held in *Deklewa* that it would apply the new 8(f) policy set forth there retroactively, i.e., "to all pending cases in whatever stage." This new policy "will provide greater stability in the industry by precluding parties from unilaterally repudiating their voluntary agreements," the Board declared. It added that at the same time the policy fully protects employee free choice principles.

The case arose when the employer notified the union that it was repudiating its prehire agreement in midterm and withdrawing recognition from the union. Applying its new policy, the Board found that the employer violated Section 8(a)(5) and (1) by its unilateral repudiation of the contract and its withdrawal of recognition. Because the employer would have been privileged to withdraw recognition and implement unilateral changes on the expiration of the contract, the Board decided that the make-whole remedy should not extend beyond the contract's expiration date.

In his concurring opinion, Member Stephens approved of all the holdings and most of the reasoning of the majority decision, but set forth his own interpretation of the legislative history of Section 8(f).

D. Union Interference with Employee Rights

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

The Board faces a continuing problem of reconciling the prohibitions of Section 8(b)(1)(A) with the proviso to that section. It is well settled that a union may enforce a properly adopted rule

reflecting a legitimate interest if it does not impair any congressional policy imbedded in the labor laws. However, a union may not, through fine or expulsion, enforce a rule which "invades or frustrates an overriding policy of the labor laws."[107] During the fiscal year, the Board had occasion to consider the applicability of Section 8(b)(1)(A) as a limitation on union action and the types of those actions protected by the proviso to that section.

1. Restriction on Resignation

Section 8(b)(1)(A) makes it unlawful for a union to restrain or coerce employees in the exercise of Section 7 rights. Under this section, a union is prohibited from imposing restrictions on a member's right to resign union membership.[108] Such restrictions are also unlawful when contained in a collective-bargaining agreement.[109] The Board reaffirmed these principles in the following case.

In *Auto Workers Local 128 (Hobart Corp.),*[110] a Board panel held that the union violated Section 8(b)(1)(A) when it refused to accept the resignation of member David Ferguson and when it continued to demand and receive dues pursuant to a checkoff authorization after Ferguson's resignation.

The collective-bargaining agreement between the union and Ferguson's employer provided that employees may resign from the union in writing by registered mail during a specified period. During that period in 1983, the union received from Ferguson a letter of resignation by certified mail. The union refused to accept the resignation. Ferguson's dues-checkoff authorization provided for withholding "such sums . . . as may be established from time to time as union dues." This language, the Board found, made dues payment a quid pro quo for union membership. The parties' agreement also provided that employees may revoke a dues-checkoff authorization in writing during a 10-day period each year or before contract expiration. The record did not indicate whether Ferguson revoked his authorization. After Ferguson's resignation the union continued to demand and receive dues pursuant to his dues-checkoff authorization.

The Board panel found that the union violated the Act by its refusal to accept Ferguson's resignation under the rule in *Neufeld*, supra, and *Phelps Dodge*, supra. The Board declined to pass on the legality of the union's requirement that resignations be sent by registered mail. Assuming that such a restriction was lawful, the Board found that Ferguson's resignation was effective despite his having mailed it by certified mail. *Telephone Traffic Union Local 212 (New York Telephone)*, 278 NLRB 998 (1986). The Board also found that the union violated Section 8(b)(1)(A)

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[107] *Scofield v. NLRB*, 394 U.S. 423, 429 (1969); *NLRB v. Shipbuilders*, 391 U.S. 418 (1968).
[108] *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984).
[109] *Electrical Workers IUE Local 441 (Phelps Dodge)*, 281 NLRB No. 137 (Sept. 30, 1986).
[110] 283 NLRB No. 171 (Members Johansen, Stephens, and Cracraft).

by demanding that dues be withheld from Ferguson's paycheck and by accepting them after his resignation under the rule that, where checkoff authorizations make the payment of dues a quid pro quo for union membership, as had the authorization in this case, resignation from the union will operate by law to revoke the authorization. *Machinists Local 2045 (Eagle Signal)*, 268 NLRB 635 (1984).

In *Food & Commercial Workers Local 81 (MacDonald Meat)*,[111] the Board held that a union's suspension from membership of employees who had resigned their membership did not violate Section 8(b)(1)(A) of the Act. The case involved the respondent's imposition of fines and suspensions of employees who returned to work during a strike against their employers. Pursuant to its decision in *Machinists Local 1414 (Neufeld Porsche-Audi)*[112] and the Supreme Court's decision in *Pattern Makers v. NLRB*,[113] the Board adopted the administrative law judge's finding that the respondent's bylaw prohibiting resignation when a strike was imminent or in progress was invalid and found that fines of employees who resigned membership before returning to work violated Section 8(b)(1)(A) of the Act.[114] The majority, however, reversed the judge and found no violation for the suspension from membership of employees who resigned their memberships and returned to work.

The distinction between unlawful fines and lawful suspensions from membership resulted from a balancing of interests which Congress embodied in Section 8(b)(1)(A) and its proviso. The majority found, "That balance is fundamentally one struck between the interest of a group in its cohesiveness and continuing viability and the interest of individuals in remaining free of the group's control if they so choose." In finding the balance of interests to allow the expulsion and suspension of members who had resigned, the majority noted that "[e]xpelling or suspending someone who has already signified that he does not wish to be a member of the organization from which he is being expelled or suspended is arguably less coercive [than a monetary fine] and it is precisely the kind of action that, as indicated in the legislative history of the proviso, Congress wished to leave unions free to take with relative impunity." With regard to the principle, relied on by the dissent, that employees should be free to leave the union and escape its rules, the majority noted that only actions by a union that constitute restraint or coercion are prohibited. The Board continued, "[A]bsent some threat of monetary penalty, suspending or expelling those who have signified their intent

[111] 284 NLRB No. 131 (Members Johansen, Babson, and Stephens; Chairman Dotson and Member Cracraft dissenting in part).

[112] 270 NLRB 1330 (1984).

[113] 473 U.S. 95 (1985).

[114] The Board found that fines of employees who returned to work without first resigning did not violate the Act.

not to belong to the union, in our view, does not tend to coerce or restrain them.

Finally, the majority found the right of suspension or expulsion to be the logical corollary of the member's right to resign: "Principles of voluntary unionism invoked in [*Neufeld* and *Pattern Makers*] logically apply to all parties to an association; accordingly, just as, in vindication of Section 7 rights, we have protected resigning employees from compelled association with other union members so, in vindication of the interests protected by the proviso, we should protect the union members who choose to stay from compelled association with those who choose to leave."

Chairman Dotson and Member Cracraft dissented from the finding that the suspensions from membership were lawful. They would have found that the suspensions were for postresignation conduct, the failure to pay dues after they had resigned. They stated, "[P]ermitting unions to sanction employees for postresignation conduct—whatever the sanction—vitiates the 'critical' factor that permits unions to discipline members for violating internal rules: the members' freedom to 'leave the union and escape the rule.'"

2. Exclusive Hiring Hall

In *Boilermakers Local 374 (Combustion Engineering),*[115] the Board held that the respondent violated Section 8(b)(1)(A) by requiring applicants for referral from its exclusive hiring hall to post a $100 appeal bond before the union would process a grievance concerning the operation of its exclusive hiring hall.

The respondent maintained referral rules providing registrants with a disputes resolution procedure whereby they could grieve certain action taken by the respondent in the operation of its exclusive job-referral system. The rules required a grievant who desired to process his grievance and be heard before the disputes committee, composed of an employer representative and a union representative, to deposit with the national referral committee "a good-faith cash bond in the amount of $100.00, which shall be forfeited in the event the Disputes Committee finds against the grievant, in which event the cash bond will be used to defray in whole or in part any expenses incurred in processing the grievant's case," but "will be returned to the grievant if the Disputes Committee finds in favor of the grievant."

When the respondent determined that two union members' proof of the requisite field hours required for placement on the primary referral list was insufficient and placed them instead on the trainee referral list, both men attempted to file grievances without posting the $100 appeal bond. The respondent advised the men that they would have to post the $100 appeal bond

[115] 284 NLRB No. 140 (Members Johansen, Babson, and Stephens).

before a hearing with the disputes committee would be convened. No action was taken on their referral grievances until several months later. After unfair labor practice charges had been filed, the respondent's assistant business manager requested a hearing before the disputes committee and submitted a check for $200 to cover these two grievances. The disputes committee ultimately ruled against both men.

The respondent contended that the appeal bond requirement was not unlawful because it was limited to referral grievances, it was an attempt to discourage frivolous grievances, and it levied a reasonable assessment. In view of the state of the record, the Board rejected the respondent's argument as nonmeritorious. The Board found, inter alia, that the bond amount, to be paid in cash, was not an insignificant figure for unemployed individuals, and that because the bond requirement was tied to whether the grievance was actually found to be meritorious, it appeared to go beyond its ostensible purpose of discouraging only frivolous grievances. The Board also found that the respondent had failed to demonstrate the bond requirement was reasonable because the bond was necessary to the effective performance of the union's representative functions, including the processing of grievances. The Board therefore held that the respondent's requirement was arbitrary and breached its duty of fair representation. The Board did not reach the specific question of whether bond requirements for referral grievances are per se unlawful.

3. Discipline Against Supervisor-Member

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

In *Sheet Metal Workers Local 80 (Limbach Mechanical)*,[116] a Board panel found, on the basis of a stipulated record, that a local union had violated Section 8(b)(1)(B) of the Act by maintaining charges against, and expelling, a supervisor-member of its organization for causing the layoff of a union steward, and recommending to the employer that the laid-off employee not be rehired.[117] The Board panel noted that the action taken by the local union against the supervisor-member resulted from the latter's interpretation and administration of the parties' collective-bargaining agreement and not, as claimed by the local union, from any animosity between the supervisor-member and the laid-off steward. Citing established precedent, the Board reasoned

[116] 285 NLRB No. 66 (Chairman Dotson and Members Johansen and Babson).

[117] The Board panel also found that the parent International of the local union, a named respondent, had likewise violated Sec. 8(b)(1)(B) of the Act by ratifying the local union's unlawful conduct.

that a union violates Section 8(b)(1)(B) when disciplinary action against a supervisor-member is "rooted in a dispute between the employer and the union over the interpretation of their collective-bargaining agreement."

The Board noted that in *NLRB v. Electrical Workers IBEW Local 340*,[118] the Supreme Court rejected the Board's "reservoir doctrine"[119] and held that Section 8(b)(1)(B) prohibits discipline of a supervisor-member only for performing 8(b)(1)(B) duties which include collective bargaining, grievance adjustment, and contract interpretation. However, the stipulated record in this case, the Board noted, clearly showed that the supervisor-member actually performed 8(b)(1)(B) duties. On the basis of the stipulated facts, the Board concluded that the supervisor-member had been expelled from membership in the local union because of his interpretation of the collective-bargaining agreement on behalf of his employer, and that the local union's conduct in this regard had the effect of restraining and coercing the employer in the selection of its representative for the purpose of collective bargaining or grievance adjustment in violation of Section 8(b)(1)(B) of the Act.

E. Illegal Secondary Activity

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

In *Carpenters Local 316 (Thornhill Construction)*,[120] a Board panel held that the union violated Section 8(b)(4)(i)(B) when its business agent induced and encouraged individuals employed by a neutral subcontractor on a common construction site at which no valid system of reserved gates was in effect to stop work and walk off the job in honor of a picket line established by another union in furtherance of that union's primary labor dispute with the general contractor on the construction project.

The Laborers had a primary labor dispute with the general contractor on a common construction site. There was no system

[118] 107 S.Ct. 2002.

[119] Under the Board's "reservoir doctrine," all Sec. 2(11) supervisors constituted, in the Board's view, a reservoir of workers available for selection at a future date as 8(b)(1)(B) representatives with collective-bargaining or grievance adjustment authority.

[120] 283 NLRB No. 16 (Chairman Dotson and Members Stephens and Cracraft).

of reserved gates established at the site. The Laborers was engaged in picketing at the site in support of its primary labor dispute with the general contractor. The Carpenters had a collective-bargaining agreement with the carpentry subcontractor on the site. Neither the Laborers nor the Carpenters had a labor dispute with the carpentry subcontractor; the only labor dispute was between the Laborers and the general contractor.

The Carpenters' business agent requested that the carpenter employees of the carpentry subcontractor honor the Laborers' picket line by walking off the job. After consulting with their employer, the carpentry subcontractor, the carpenter employees acceded to the request of the Carpenters' business representative, and left the jobsite.

In finding that the Carpenters violated Section 8(b)(4)(i)(B) by inducing and encouraging the employees of the neutral carpentry subcontractor to walk off the job in honor of the Laborers' primary labor dispute with the general contractor, the Board relied on *Plumbers (Hanson Plumbing)*, 277 NLRB 1231 (1985), in which the Board found that the union in that case violated Section 8(b)(1)(A) 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 Board found that, although the specific section of the Act alleged to have been violated in *Hanson* was different from that alleged to have been violated in the instant case, "the underlying issue presented in . . . *Hanson* is presented here: whether a union may induce its members to honor a lawful primary picket line where those members work for a neutral employer on a common situs at which no valid system of reserved gates is in effect." The Board found that the request of the Carpenters' business representative that the employees of the neutral carpentry subcontractor honor the Laborers' picket line by leaving the jobsite "clearly disclose[d] an object proscribed by Section 8(b)(4)(B)—to cause the neutral employer . . . to cease doing business with the primary employer."

In *Teamsters Local 70 (Chipman Freight)*,[121] a Board panel dismissed a complaint alleging that the union violated Section 8(b)(4)(i) and (ii)(B) of the Act. The complaint alleged that the union unlawfully picketed Chipman Freight with an object of interrupting the business relationships between Chipman and its subhaulers' representatives.

The Board, relying on *Production Workers Local 707 (Checker Taxi)*,[122] held that the union's picketing on behalf of subhaulers, owner-operators who transported containers to and from the Oakland dock area, and who had a dispute with Chipman Freight, was primary activity. The Board found that Chipman

[121] 283 NLRB No. 57 (Members Johansen, Stephens, and Cracraft).
[122] 283 NLRB No. 56.

was not a neutral party but was directly and intimately involved in the underlying dispute. The subhaulers' dispute was solely with Chipman and the union's picketing on behalf of the subhaulers was directed against Chipman. The Board held that because Chipman was not a neutral, the union's picketing against Chipman with either of the alleged objectives was primary activity that did not violate the Act.

F. Recognitional Picketing

In *Laborers Local 133 (Whitaker & Sons)*,[123] a Board panel held that a union which engaged in recognitional picketing for more than 30 days violated Section 8(b)(7)(C) of the Act even though it filed an election petition prior to the expiration of the 30-day period because no charge alleging a violation of Section 8(b)(7)(C) had been filed prior to the petition's dismissal and the petition was not supported by the requisite showing of interest.

Two days after the employer began work on a construction project, the union demanded that the employer recognize and bargain with it as the exclusive representative of the employer's laborers at the Weymouth, Massachusetts jobsite. The union began picketing in support of its recognitional demand on January 28, 1985, and picketed until March 15, 1985, for a total of 47 days. On February 22, 1985, the union filed a petition seeking to represent the employer's laborers, but the petition was not supported by a showing of interest indicating that a substantial number of employees at the Weymouth jobsite wished to be represented by the union. Because no 8(b)(7)(C) charge—which would have dispensed with the necessity for a showing of interest—had been filed, the petition was dismissed. On March 8, 1985, after the petition's dismissal, the employer filed a charge alleging that the picketing violated Section 8(b)(7)(C).

The union argued that Section 8(b)(7)(C) of the Act directs the Board to expedite election procedures when a petition is filed within a reasonable time after the commencement of recognitional picketing, without regard to the absence of a showing of interest on the part of the labor organization. Alternatively, the union argued that the time during which its petition was pending prior to the dismissal of that petition, as well as the time during which only one laborer was employed at the jobsite, should not be counted in calculating a reasonable period not to exceed 30 days during which its recognitional picketing would be lawful. The General Counsel, on the other hand, asserted that a petition which does not raise a valid question concerning representation does not preclude the finding of a violation of Section 8(b)(7)(C) based on a charge filed following the petition's dismissal.

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[123] 283 NLRB No. 138 (Chairman Dotson and Members Johansen and Babson).

The Board noted that it had long ago determined that the expedited election procedure contemplated by Section 8(b)(7)(C) is applicable only in an 8(b)(7)(C) proceeding where an 8(b)(7)(C) unfair labor practice charge has been filed. "In the absence of an 8(b)(7)(C) unfair labor practice charge, a union will not be enabled to obtain an expedited election by the mere device of engaging in recognition or organization picketing and filing a representation petition," the Board stated, quoting *Hod Carriers Local 840 (Blinne Construction)*.[124] "Congress did not intend to allow unions to circumvent 9(c) requirements by the mere device of engaging in picketing and filing a petition," the Board said. Absent a charge that its picketing violated the law, there was no justification for allowing the union to avail itself of the expedited election procedure and dispensing with normal showing-of-interests requirements.

The Board also rejected the union's argument that the 11 days during which its unsupported petition was pending prior to the Regional Director's dismissal of that petition should not be counted. In the absence of an 8(b)(7)(C) charge which would trigger the expedited election procedure, a petition which may not otherwise lead to an election in no way protects a union's picketing for recognitional purposes beyond the period allowed by Section 8(b)(7)(C) nor insulates the offending union from liability for its picketing in excess of that allowed by the Act. Because the union picketed for 33 days, even without including the time during which only one laborer was employed at the jobsite, the Board found it unnecessary to address the union's contention that that time should not be counted.

In *Food & Commercial Workers Local 23 (Cranberry Mall)*,[125] the Board held that a meritorious charge against an employer under Section 8(a)(2) of the Act is not a defense against an 8(b)(7)(C) charge against a union. In this case the union picketed the employer. One object of the picketing was recognitional; other picketing objectives were claimed by the union (e.g., area standards). The union did not file a representation petition with the Board within a reasonable time of the commencement of the picketing.

The Board rejected the union's defense that the employer's 8(a)(2) unfair labor practices excused the filing of a petition as required under Section 8(b)(7)(C). The Board reasoned that the 8(a)(2) charge did not moot the unresolved question concerning representation, which would have resulted in the dismissal of the petition (had one been filed).

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[124] 135 NLRB 1153, 1157 (1962).

[125] 283 NLRB No. 21 (Chairman Dotson and Members Johansen and Babson).

G. Deferral to Arbitration

In *Blue Cross Blue Shield*,[126] the Board held that deferral to the contractual grievance-arbitration procedure was not appropriate because the dispute was not arguably cognizable under the parties' contract.

A Board majority agreed with the administrative law judge that unit employees were discriminated against in violation of Section 8(a)(3) and (1) when the respondent denied them equal consideration for a nonunit job vacancy. In agreeing with the judge's finding, the majority relied on the employer's past and current promotional practices, which were found to have been based on union considerations and not job qualifications. Contrary to the respondent's contention, the Board majority found that deferral of this dispute to the grievance-arbitration procedure of the applicable collective-bargaining agreement was not appropriate under *United Technologies Corp.*[127] because the dispute was not cognizable under the existing contract.

The respondent had primarily relied on an interpretation of the contract's fair employment practices clause in support of its contention that the dispute at issue was covered by the contract. The Board majority rejected this contention as "plainly lacking in merit" and "not even ris[ing] to the level of an arguable claim under the contract." In doing so, the majority observed that the fair employment practices clause was oriented toward the elimination of specific kinds of discrimination, which did not include the NLRA and unfair labor practices, and that there was no evidence of the parties' intent or bargaining history to construe the clause any differently.

In dissent, Chairman Dotson found that the dispute arguably arose under the parties' contract. In his view, the initial inquiry was whether the preference system used by the respondent for nonunit transfers violated the contract or whether the union waived rights under the contract. According to the Chairman, such questions are well suited for resolution by grievance and arbitration, as they require resolution of contractual language and bargaining history. The Chairman believed that the majority's holding was not a proper application of the Board's deferral policy as enunciated in *United Technologies*. The Chairman considered the majority's holding as usurping the parties' own agreed-upon method for resolving disputes under the contract and encouraging extensive prearbitral litigation.

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[126] 286 NLRB No. 50 (Members Babson and Stephens; Chairman Dotson dissenting.)
[127] 268 NLRB 557 (1984).

H. Remedial Order Provisions

1. Bargaining Orders

In *Koons Ford of Annapolis*,[128] the Board, finding that the employer had engaged in violations of "an extremely serious nature" designed to thwart the union's organizing campaign, adopted the administrative law judge's recommendation that a bargaining order be issued.

During the union's organizing campaign the employer, through its high-ranking officials, including its president, threatened employees with loss of jobs (i.e., discharge, layoffs, and plant closure). Other unlawful conduct consisted of interrogating employees concerning their union sympathies and the organizational campaign; unlawfully soliciting employees to campaign against the union; and threatening employees with more onerous working conditions, stricter work rules leading to the discharge of employees, and loss of benefits. In addition, the employer unlawfully granted wage increases and redressed employee grievances.

The Board, in finding that the employer's conduct warranted issuing a bargaining order, stated that "in addition to examining the severity of the violations committed, the Board also examines the present effects of the coercive unfair labor practices which would prevent the holding of a fair election." The Board noted that threats of plant closure, discharge, and layoffs were more likely to destroy election conditions for a lengthier period of time than other unfair labor practices. Further, the threats were exacerbated by the fact that the violations were committed by the employer's top official and two department managers. The Board also noted the long-lasting impact of unlawful wage increases because the Board's traditional remedies do not require withdrawing the benefits from the employees.

The Board denied a motion by the employer to reopen the record so that it could present evidence of a change in ownership as well as evidence of employee and management turnover subsequent to the hearing. The Board found that even assuming the accuracy of the facts set forth in the motion the inhibitive effects of the unfair labor practices would most likely persist despite the substantial level of turnover and the passage of time.

The Board noted that similar circumstances were present in *NLRB v. Air Products & Chemicals*, 717 F.2d 141 (4th Cir. 1983), in which the Fourth Circuit enforced a bargaining order issued by the Board. There, the employer engaged in similar unlawful activity (i.e., threats of plant closure, discharge, and loss of benefits) although, as in this case, there were no 8(a)(3) discharges. In issuing the bargaining order, the Board noted, the Fourth Circuit relied on factors which were also present here, namely, the substantial number of employees affected, the serious nature of the

[128] 282 NLRB No. 88 (Chairman Dotson and Members Babson and Stephens).

threats, the extended period over which the violations occurred, and the large number of managers guilty of violations.

In *Color Tech Corp.*,[129] the Board held that a union's request for recognition in an inappropriate unit did not preclude a bargaining order to remedy an employer's acts of unlawful interference.

The employer's lithographic production employees had been represented by the union since 1970. In January 1982, the union started a campaign to organize the photo lab technicians at the employer's plant. A majority of the photo lab technicians signed authorization cards and on February 8 the union demanded recognition. The union did not seek to represent the photo lab technicians in a separate unit, but rather sought their inclusion in the unit of lithographic employees already represented by the union. The employer refused to include the photo lab employees in the contractual unit.

The Board reversed the administrative law judge's finding that the employer's refusal to recognize the union as the representative of the photo lab technicians was a violation of Section 8(a)(5). The Board found that because the photo lab employees were not an accretion to the contractual unit, the employer never rejected a request for bargaining in an appropriate unit. The Board found, however, that the absence of a proper demand for recognition did not preclude issuance of a bargaining order to remedy serious unfair labor practices committed by the employer. The Board also found that the unfair labor practices destroyed the union's majority status and precluded a fair election. It stressed the small size of the unit as well as the employer's unlawful grant of wage increases to the photo lab employees. Further, the authorization cards signed by the photo lab technicians did not suggest that they wanted representation only as part of the contractual unit. The Board added that the "dilemmas" of determining employee choice arose only as a result of the employer's unlawful conduct. The employer was free to reject the demand for bargaining in the inappropriate unit and could have insisted on a Board election before recognizing the union in the appropriate unit of photo lab technicians.

Chairman Dotson, dissenting in part, would have found that the employer's unlawful conduct was not of such magnitude to warrant a bargaining order. Further, the Chairman argued, the union never stated or even intimated that it wished to represent the photo lab technicians separately. The Board's order would require bargaining in a unit not contemplated by the union and there was no evidence that the photo lab technicians themselves wished to be represented in the unit established by the bargaining order.

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[129] 286 NLRB No. 44 (Members Johansen and Stephens; Chairman Dotson dissenting in part).

In *Colfor, Inc.*,[130] the Board had another opportunity to consider an appropriate remedy for an 8(a)(5) violation.

As a result of an earlier unfair labor practice case, the Board had ordered the employer to bargain with the union for a 1-year period, commencing on the date that the employer began good-faith bargaining. Bargaining commenced on November 1, 1982. In May 1983, however, the employer temporarily ceased negotiating for approximately 2 months, refusing to negotiate in the presence of one of the union negotiating committee members who had recently been discharged. On November 4, 1983, the employer again refused to bargain, asserting that the parties had reached an impasse at the conclusion of their previous negotiating session, even though that meeting concluded with the parties agreeing to contact each other to schedule another meeting.

The administrative law judge concluded that the employer violated Section 8(a)(5) and (1) by refusing to bargain with the union for the 2-month period commencing in May and by refusing to bargain with the union beginning on November 4 and at all times thereafter. The judge further concluded that good-faith bargaining had never commenced and therefore ordered a 1-year extension of the certification year.

The Board adopted the judge's findings of 8(a)(5) and (1) violations, but, contrary to the judge, concluded that because a lack of good-faith bargaining was neither alleged in the complaint nor litigated at the hearing, the judge's finding that the employer did not commence good-faith bargaining went beyond the scope of the proceedings.

In fashioning a remedy for the 8(a)(5) violations, the Board began with the proposition that, when a party refuses to bargain during the certification year, the Board will extend the certification year to prevent that party from gaining an advantage from its failure to carry out its bargaining obligation. While the extension is normally for a period which will provide the aggrieved party with a full year of actual bargaining, the Board reasoned that the length of the extension need not be the product of a simple arithmetic calculation. The Board then concluded that a 6-month extension of the certification year would be appropriate, reasoning that a "6-month extension properly takes into account the realities of collective-bargaining negotiations by providing a reasonable period of time in which the union and the respondent can resume negotiations and bargain for a contract without unduly saddling the employees with a bargaining representative which they may no longer wish to have represent them."

The Board further reasoned that the effect of the employer's two refusals to bargain was greater than merely denying the union 2 months of bargaining. Thus, the Board stated that it "is unreasonable to conclude that these parties could resume negotia-

[130] 282 NLRB No. 160 (Chairman Dotson and Members Johansen and Stephens).

tions at the point where they left off over 2 years ago, or that fruitful negotiations could take place during a mere 2 months of bargaining after such a hiatus." Finally, the Board concluded that the 6-month extension of the certification year advanced the policy of the Act to have the relationship between the employer and employees determined by the bargaining process and reduced to written form.

In *St. Regis Paper Co.*,[131] a Board panel held, in a second supplemental decision upon remand from the United States Court of Appeals for the First Circuit,[132] that it agreed with the court that there had been significant changed circumstances in the respondent's operations which were sufficient to render the Board's bargaining order moot.

The Board, in its original decision,[133] had found that the respondent had violated Section 8(a)(5) and (1) of the Act by refusing to recognize the union as the bargaining representative of a certified unit of employees at its main facility, to which the employees at another of its facilities had been accreted.

The court remanded the case to the Board with the instruction that the Board should examine the respondent's many changes in its operations which had occurred since the Board first rendered its decision. The court noted that more than 5 years had passed since the facts underlying the challenged decision had taken place and more than 3 years had passed since the Board first issued its original decision. The changes in the respondent's operations noted by the court included the closing down of the original facility where the unit was certified, as well as the facility where the employees were accreted, and the transfer of personnel and materials to a third facility which was reopened. While three employees had been assigned to the reopened facility, none of them had ever been a member of the union or had dues checked off while they had been employed by the respondent. In view of the respondent's changed operations, the court expressed concern about locking the parties into a lengthy bargaining relationship on the basis of ancient events, and stated that it was reluctant to enforce an order whose current applicability was in doubt and whose obsolescence was a real possibility.

On remand, the majority found that there had been significant changed circumstances in the respondent's operations since the Board's original unit determination; that the Board's bargaining order, if enforced, would have the undesirable result of requiring that current employees be represented by a union they had not chosen to represent them; that the respondent presented evidence that its operations and circumstances were completely different from what they were several years prior thereto when the proceeding originated; and that there was no evidence that the re-

[131] 285 NLRB No. 39 (Chairman Dotson and Member Johansen; Member Stephens dissenting).
[132] 674 F.2d 104 (1982).
[133] 239 NLRB 688 (1978).

spondent was responsible for the deterioration of the unit which the Board had previously found appropriate. The majority noted that changes in the respondent's operations—which resulted in the constant erosion and deterioration of the unit—were involuntary and imposed by factors over which the respondent had very little input or control, i.e., economic cycles which affected the respondent's operations when the market for its product was down, change of seasons, and the normal everyday changes involving the promotion, layoff, transfer, firings, hirings, and death of employees.

The majority concluded that the respondent's bargaining obligation no longer continued, that the bargaining unit was no longer appropriate in view of its reduction in size and the new employees in the unit, that the collective-bargaining agreement between the respondent and the union was inoperable, and that the Board's bargaining order had become moot. The majority vacated that portion of the Board's Order having to do with the respondent's obligation to bargain with the union and its obligation to apply the collective-bargaining agreement to certain of the respondent's facilities.

Member Stephens, dissenting, agreed that the delay in the case was unfortunate, but did not agree that the passage of time and the changes cited by the respondent constituted reasons for withdrawing the bargaining order. He noted that this was not a *Gissel* case;[134] that the union, after its initial certification year, enjoyed a rebuttable presumption of majority; and that "none of the changes cited by the respondent following the court's remand—relocation to a facility 11 miles away, downsizing of operations, and turnover in personnel— would constitute grounds for withdrawing recognition from a union enjoying a rebuttable presumption of majority."

In Member Stephens' view, relieving the respondent of a bargaining obligation that other employers bear regardless of turnover and reductions in plant size simply because litigating the respondent's unfair labor practices had consumed a great amount of time did not effectuate the policies of the Act.

2. Reinstatement and Backpay Issues

In *Dean General Contractors*,[135] the Board held that remedial issues in the construction industry, as in other industries, pertaining to the reinstatement and backpay of an unlawfully discharged employee ordinarily will be resolved during the compliance process. Overruling *Brown & Lambrecht Earth Movers*,[136] the majority held that when reinstatement and backpay issues have not been fully litigated in the original proceeding on the merits,

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

[135] 285 NLRB No. 72 (Members Johansen, Babson, Stephens, and Cracraft; Chairman Dotson dissenting).

[136] 267 NLRB 186 (1983).

it will not presume that all employment ties between a construction industry employer and an unlawfully discharged employee necessarily would have been severed on the completion of the project where the employee had worked. The majority ruled that resolution of reinstatement and backpay issues is best left to compliance.

The employer, a construction contractor, discharged an employee in violation of Section 8(a)(1). At the time of the discharge, the employee was working on a construction project. In remedying the violation, the administrative law judge noted that the project had been completed prior to the hearing and that, under the circumstances, there was little assurance that the employee's former position existed. The judge, therefore, did not order the employer to reinstate the employee and ordered backpay only to the date the project was completed.

Reversing the judge, the majority found that the likelihood of the employee's continued employment with the employer at other projects, absent the unlawful discharge, was not fully litigated. Accordingly, the only basis to deny reinstatement prior to a compliance determination was to presume that the employer would have severed all employment ties to the employee on the completion of the project. Although recognizing the unique characteristics of the industry, including jobs of short duration, the majority held that these characteristics alone did not justify a departure from its traditional make-whole remedy prior to compliance. The majority ruled that a factual inquiry at compliance was preferable to a presumption in favor of the adjudicated wrongdoer and adverse to the aggrieved employee. The majority also noted that encouraging parties to litigate compliance issues in the original proceeding prematurely or unnecessarily would encourage needless litigation.

Chairman Dotson, dissenting in part, would have found that a reinstatement order was inappropriate. In his view, the appropriate remedy for an unlawful discharge from a project of limited duration in the construction industry, once the project is completed, is a requirement that the discharged employee be considered for future employment on a nondiscriminatory basis. Chairman Dotson would have placed the burden on the General Counsel to affirmatively raise reinstatement issues at the original hearing and, in the absence of raising such issues, would have found that the discharged employee presumably had been hired on a project basis only.

Another case during the report year was noteworthy for the rationale given in support of the make-whole remedy.

In *State Distributing Co.*,[137] a Board panel agreed with the administrative law judge that the respondent was a successor to

[137] 282 NLRB No. 151 (Members Johansen, Babson, and Stephens).

Allstate Distributing Co. because it continued operations in the same employing industry and would have hired a majority of the predecessor's work force but for a discriminatory intent to avoid dealing with the union. As a successor employer, the respondent was found to have violated Section 8(a)(5) by refusing to recognize the union and by unilaterally changing working conditions which had been originally established by the collective-bargaining agreement between the union and Allstate. The theory of the violations followed *Love's Barbeque Restaurant No. 62*, 245 NLRB 78 (1979), enfd. in pertinent part sub nom. *Kallman v. NLRB*, 640 F.2d 1094 (9th Cir. 1981). Here, as in that earlier case, the Board, after ordering the respondent to cancel, on the union's request, any unilaterally imposed departures from the established terms and conditions of employment, ordered the respondent to reimburse employees for any loss of wages and benefits as measured against the contractual rates that preceded the unilateral changes. Such reimbursement was to continue for the period from the beginning of the successor operations until, on the basis of good-faith bargaining, either impasse or agreement on new terms was reached.

The Ninth Circuit had rejected the similar make-whole remedy in *Love's Barbeque* and thus the Board specifically explained in this case why it perceived the remedy as necessary. While acknowledging that a successor employer normally has the option, under *NLRB v. Burns Security Services*,[138] of setting new terms at variance with those set by the predecessor's collective-bargaining agreement, the Board noted that here the respondent did not conduct itself lawfully like a *Burns* successor. As a result of its refusal to recognize the union, it created uncertainty as to what terms and conditions might have been embodied in a bargaining agreement had it satisfied its *Burns* obligation by bargaining with the union immediately after setting its initial terms and conditions. The Board also explained that in the present case there were possibly even more uncertainties than had existed in *Love's Barbeque* concerning both *what* terms might have been lawfully agreed on or imposed after impasse and *when* such a resolution might have been reached. The Board found it appropriate to resolve those uncertainties against the respondent in order to give some recompense to the victims of discrimination and prevent the respondent from benefiting from its own unlawful conduct.

In New Horizons for the Retarded,[139] the Board adopted a new formula for the calculation of interest on backpay, abandoning the old formula set out in *Florida Steel Corp.*[140] In *Florida Steel*, the Board, in an effort to keep in line with current economic conditions and more fully compensate discriminatees, abandoned the flat 6-percent interest rate and adopted the adjusted prime

[138] 406 U.S. 272 (1972).
[139] 283 NLRB No. 181 (Chairman Dotson and Members Johansen, Babson, Stephens, and Cracraft).
[140] 231 NLRB 651 (1977).

rate as set out in Section 6621 of the Internal Revenue Code[141] for calculating interest due on backpay. However, as of January 1, 1987, the Tax Reform Act of 1986[142] changed the method by which interest was calculated on tax underpayments and overpayments. That Act replaced the adjusted prime rate formula with the "short-term Federal rate" formula.[143] That Act also set out different rates for the calculation of interest on overpayment of taxes (the short-term Federal rate plus 2 percent) and on underpayment (the short-term Federal rate plus 3 percent).

Because the Board could no longer calculate backpay interest by the adjusted prime rate, it became necessary to select a new method. The Board found that the amended Section 6621 had many of the same characteristics that prompted it to adopt the adjusted prime rate in *Florida Steel.* For example, the short-term rate is subject to market influences, is periodically adjusted, and is easy to administer. The Board then selected the underpayment rate as the new method by which to calculate backpay interest.

Interest on backpay which accrues on or after January 1, 1987, is computed at the short-term Federal rate, while interest on amounts accrued prior to that date are still computed under the formula set out in *Florida Steel.*

In *Starlite Cutting,*[144] the Board granted the General Counsel's motion to clarify when the period of backpay liability begins to run in situations where a discriminatee has not been located. In the preceding Supplemental Decision and Order in the same case,[145] the Board had ordered that the specified backpay of an unlocated discriminatee be held in escrow for a period not exceeding 1 year from the date of the supplemental decision. If the discriminatee was not located within the year, the award would lapse.

The General Counsel's motion for clarification questioned whether delays in payment of backpay money into escrow was intended to toll the running of the year of a respondent's backpay liability.

The Board granted the motion and amended its previous Order, adding:

> [T]he 1-year escrow period shall begin either upon the Respondents' compliance by payment of the backpay for deposit into escrow or upon the date the Board's Supplemental Deci-

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[141] 26 U.S.C. § 6621, added Jan. 3, 1975 (Pub. L. 93–625 § 7(a)(1), 88 Stat. 2114). The adjusted prime rate was defined as the "average predominate prime rate quoted by commercial banks to large businesses as determined by the Board of Governors of the Federal Reserve System." 26 U.S.C. § 6621(c).

[142] Pub. L. 99–514, 100 Stat. 2085 (1986).

[143] The short-term rate is determined by the Secretary of the Treasury based on the average market yield on outstanding marketable obligations of the United States with remaining periods to maturity of 3 years or less. 26 U.S.C. § 1274(d)(1)(C)(i) (Supp. 1985).

[144] 284 NLRB No. 71 (Members Babson, Stephens, and Cracraft; Chairman Dotson and Member Johansen dissenting).

[145] 280 NLRB 854 (1986).

sion and Order becomes final, including enforcement thereof, whichever is later.

The Board explained:

> Thus, if the Respondents pay the money into escrow and do not seek review of the Board's Supplemental Order, the escrow period will end 1 year from the date the money is deposited. If the Respondents seek review and then deposit the money after court enforcement of the Board's Order, the escrow period will end 1 year after the money is deposited. Finally, if the Respondents deposit the money and then seek review, the escrow period will end 1 year after the Board's Order is enforced.

3. Extraordinary Remedy for Repeat Violator

In *S. E. Nichols, Inc.*,[146] a Board panel considered the administrative law judge's recommendation of certain extraordinary notice and access remedies for numerous violations of Section 8(a)(1), (3), and (4) of the Act committed during a union organizing campaign in 1 of the employer's 43 retail department stores. The Board first agreed with the judge that the extent of the violations warranted a broad cease-and-desist order and the standard make-whole remedies.

The judge also recommended several extraordinary remedies, citing the "recidivist" employer's "obdurate flouting of the Act" and its extensive history of similar misconduct during the 16-year period preceding the violations in this case.[147] The judge found the employer's history before the Board and the courts to be similar to that in the *J. P. Stevens* line of cases, and she recommended, with modifications, the corporatewide notice and access remedies parallel to those ordered in *J. P. Stevens & Co.*[148]

The majority agreed with the judge that the employer's history of unfair labor practices required the imposition of extraordinary notice and access remedies, but disagreed with the recommendation that they be applied corporatewide to all 43 stores in the employer's operations. The majority found that the massive multiplant violations by J. P. Stevens were not parallel to S. E. Nichols' history, which involved a smaller number of proceedings, each restricted to one facility. While noting that never before with this employer had the Board extended the geographical scope of the notice and access remedies beyond the individual stores where the violations occurred, the majority approved a limited expansion to encompass all eight stores in the corporate division supervised by the company official who participated in the unfair labor practices in this case and in one pre-

[146] 284 NLRB No. 55 (Members Johansen and Stephens; Chairman Dotson dissenting in part).
[147] Id., slip op. at fn. 11.
[148] 244 NLRB 407 (1979).

vious case involving another store in the same division. The majority view was that this remedy was proportionate to the violations when considered in historical context.

With respect to the remedial questions Chairman Dotson parted company from the majority to the extent the majority ordered *any* additions to the conventional remedies. He observed that, unlike the pattern of conduct in the *J. P. Stevens* cases, there was no evidence that the violations found in previous cases involving this employer currently remained unremedied, and no evidence that corporate policy ever led to extensive and detailed publicizing of the illegal activities at any one store to employees of any other store. The Chairman found that the record contained neither allegation nor proof that the unlawful activities at the store involved in this case affected employees at any other stores or that the union experienced access problems at other stores during the relevant time. He further argued that the employer's history of unfair labor practices did not support a finding that even divisionwide remedies were necessary to offset the coercive effects caused by the employer's conduct at issue in this proceeding.

4. Remedy for Union Violence

In *Teamster Local 703 (Kennicott Bros.)*,[149] the Board considered whether extraordinary remedies should be ordered against a union found to have violated Section 8(b)(1)(A) of the Act by threatening the employer's representatives and the employee petitioner with violence and by brutally assaulting several of the employer's representatives, including its president, prior to a decertification election.

At the time the unfair labor practices occurred, a decertification election was scheduled to be held among the employer's unit employees of wrappers, packers, stockmen, and general warehouse help. Angered because of the decertification petition and the pending election, two union representatives, charged with servicing the unit employees, went to the employer's premises and in front of unit employees shouted obscenities and threatened management and the employee-petitioner with physical violence. They subsequently attacked and beat the employer's president and another management official. The two union representatives fled the premises before the police arrived. Three months later, the union won the decertification election, which the administrative law judge set aside based on his finding that the union's unlawful conduct prevented the holding of a fair and free election.

In agreement with the judge, the majority found that the respondent's conduct was such that its effects could not reasonably be expected to have dissipated during the 3-month period between the coercive conduct and the election and that setting

[149] 284 NLRB No. 115 (Members Johansen, Babson, and Stephens; Chairman Dotson dissenting).

aside the election and directing a second election was an appropriate remedy.

In rejecting the charging party employer's request for additional remedies, i.e., decertification of the union without an election or issuance of an order prohibiting the union or the unit employees from designating the assaulting union representatives as their representatives in any future bargaining between the union and the employer, the majority noted that in order to take the unusual step of decertifying a union, the essential element of a union's record of similar pervasive, flagrant misconduct in other cases was necessary. That element was lacking in this case. Further, the majority distinguished this case from those relied on by the dissent. Thus, in *Allou Distributors*,[150] the Board relied on the union's violent conduct as its reason for not granting a *Gissel* bargaining order. However, the Board in *Allou* believed that it was more important to give the employees the right to decide whether they wanted the union that represented them to continue to represent them in spite of its agent's violent and intimidating misconduct. Also, in *Union Nacional de Trabajadores (Carborundum Co.)*,[151] the Board decertified the union based not only on the union's pattern of violent conduct, but also on its extensive record of similar aggravated misconduct in other cases. Moreover, the majority noted that the First Circuit's comments regarding the Board's decertification order in *NLRB v. Union Nacional de Trabajadores*[152] were instructive and supportive of their position in this case. The court stated "that a decertification order is an extreme measure and should be entered only when the Board has first demonstrated that there are no equally effective alternative means of promoting the objectives of the Act," and that "because of the important employee interests that are at stake the focus should be on promoting peaceful collective bargaining and not on fashioning sanctions to deter Union misconduct." Further, unlike *Fitzsimmons Mfg. Co.*,[153] in which the Board held an employer had not violated Section 8(a)(5) of the Act by refusing to bargain with certain union representatives who had previously behaved violently in bargaining sessions, the present case did not contain an 8(a)(5) allegation and it was entirely speculative whether the charging party would have to negotiate with the offending union representatives. Accordingly, the majority concluded that under these circumstances a direction of a second election was an effective alternative means of promoting the purposes of the Act.

Chairman Dotson, dissenting, believed that the acts committed by the union representatives were sufficiently egregious to warrant granting the extraordinary remedy of decertification of the

[150] 201 NLRB 47 (1973).
[151] 219 NLRB 862 (1975).
[152] 540 F.2d 1, 12–15 (1st Cir. 1976), cert. denied 429 U.S. 1039 (1977).
[153] 251 NLRB 375 (1980), affd. 670 F.2d 663 (6th Cir. 1982).

respondent. Chairman Dotson contended that the remedy found appropriate by the majority was an ineffective use of the Board's power to fashion meaningful remedies for cases involving labor violence and was also another example of the Board's treating dissimilar cases alike.

In rebutting the majority's analysis of the cases on which his proposed remedy relied, Chairman Dotson contended that the majority ignored the procedural and substantive aspects of those cases. Thus, in *Allou*, the important factor was that the Board reacted to the violence perpetrated by the union by denying the union a bargaining order. This signified that unions which engaged in violence would have to pay and the Board would move effectively against them. Additionally, in *Union Nacional*, the Board decertified the union primarily because of its then-current violent misconduct and only relied on the union's past record of similar aggravated misconduct to bolster its decision. Moreover, these cases all involved employer unfair labor practices, while the employer in this case was wholly unoffending. Because the Board was not faced with the dilemma of having to choose between protecting the public interest in discouraging violence versus fully remedying the employer's unfair labor practices, the Chairman argued, it should not have treated this matter as a routine election set aside case, for by doing so it ignored precedent and encouraged brinkmanship.

In light of the violent and intimidating nature of the union representatives' conduct which was directed at the unit employees, Chairman Dotson believed that a free and fair election could never be held as long as the same individuals were allowed access to the charging party's premises. Relying on *Fitzsimmons Mfg. Co.*, Chairman Dotson concluded that because a second election was directed, he would have included in the Order a provision that these two union representatives be precluded from access to the charging party's premises, thereby effectively removing them from representing the respondent in matters affecting the working conditions of these particular unit employees.

I. Equal Access to Justice Act

The Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, and the Board's Rules promulgated thereunder,[154] 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 sub-

[154] Board Rules and Regulations, Secs. 102.143 through 102.155.

stantially justified or that special circumstances make an award unjust." Section 504(a)(2) provides that within 30 days of a final disposition of the case, a party seeking an award must file with the agency an application which shows that the party prevailed and is eligible under the Act to receive the award,[155] itemizes the amount sought, and alleges that the position of the agency was not substantially justified.

In *MacDonald Miller Co.*,[156] a Board panel denied the employer's application for fees and expenses under the Equal Access to Justice Act, finding that the General Counsel's case had a substantial basis in fact and law, and that based on the evidence which she had at the time and inferences that could be drawn from the evidence, it was "more than merely reasonable" for her to proceed with the case.

In the underlying case,[157] a Board panel adopted the administrative law judge's finding that one of the alleged discriminatees was a supervisor and that the General Counsel did not prove that the employer violated Section 8(a)(3) and (1) by discharging the two alleged discriminatees. Thereafter, the employer brought the case under Section 504(a)(1) of the EAJA. With respect to the issue regarding the supervisory status of one of the alleged discriminatees, the judge found that the sole credibility question to be decided was when, "not if," the alleged discriminatee became a foreman (i.e., a supervisor). The judge cited the alleged discriminatee's title, premium wage, duties, and the union's admonition that under its contract with the employer the alleged discriminatee could not simultaneously hold the position of foreman and steward. The judge further found that the General Counsel was not reasonable in taking the position that the alleged discriminatee was not a supervisor or in giving controlling weight to his denials of supervisory status "in the face of the foregoing objective factors."

As to the "traditional theories" on which the General Counsel relied in issuing the complaint alleging that the employer violated Section 8(a)(3) by discharging the two alleged discriminatees because of their union activities, the judge found in the underlying case that the General Counsel had failed to prove employer knowledge and animus, two essential components for an 8(a)(3) discharge allegation under the traditional theories. In his supplemental decision, the judge found that the General Counsel knew that the employer was unaware that the alleged discriminatees had complained to the union about the long-continuing collective-bargaining relationship. The judge found no merit in the General Counsel's attempt to prove animus on the grounds that the alleged discriminatees were union stewards, that the employ-

[155] 5 U.S.C. § 504(b)(1)(B) defines "party" to exclude individuals and certain enterprises from the coverage of the Act.

[156] 283 NLRB No. 98 (Chairman Dotson and Members Johansen and Babson).

[157] 277 NLRB 701 (1985).

er had hired four employees with the alleged discriminatees' job classification before discharging them, and that an employer supervisor had testified that an accusation made by one of the alleged discriminatees that the employer was antiunion was a consideration for the supervisor's suggestion to the employer that this person be discharged.

In addition to relying on traditional theories to sustain the 8(a)(3) allegations, the General Counsel also alleged that discharging the alleged discriminatees because they were the subject of a grievance brought by the union was "inherently destructive" of the employees' rights to engage in collective-bargaining and violated Section 8(a)(3).[158] Citing *Monarch Machine Tool Co.*[159] and *P. W. Supermarkets,*[160] the judge in the underlying case rejected this theory in the context of a nonanimus job loss related to a grievance. He further found that, even assuming that the inherently destructive theory was applicable in the case, the employer effectively rebutted the presumption of illegality by showing under the test set forth in *NLRB v. Fleetwood Trailer Co.*[161] that the discharges had a substantial and legitimate business purpose.

The General Counsel contended that she was substantially justified in bringing this case to the Board because it turned on credibility issues[162] and inferences to be drawn from the facts.[163] The panel agreed with the General Counsel that the judge erred in equating what he believed to be easily resolved credibility issues with the absence of such issues and by failing to draw reasonable inferences from the General Counsel's evidence.[164] It found, contrary to judge, that the "objective factors" covering the alleged discriminatee's supervisory status did not negate a finding that the General Counsel was reasonable in relying on the alleged discriminatee's denial that he was a supervisor to overcome the testimony that he was a supervisor. With respect to the General Counsel's reliance on the traditional theories in filing her complaint, the panel found that it would be reasonable for the General Counsel to infer that the employer had knowledge that the alleged discriminatees had complained to the union about their wage rates, and that they were instrumental in having the union bring the grievance. The panel also found that it would be reasonable to infer that the employer blamed the alleged discriminatees for the hostility which the grievance generated between it and the union, that the employer believed labor

[158] See *NLRB v. Great Dane Trailers,* 388 U.S. 26 (1967).
[159] 227 NLRB 1880 (1977).
[160] 269 NLRB 839 (1984).
[161] 389 U.S. 375 (1967).
[162] See, e.g., *Natchez Coca-Cola Bottling Co.,* 269 NLRB 877, 878 (1984).
[163] See *Bask Paint & Sandblast Co.,* 270 NLRB 514 (1984); *Iowa Parcel Service,* 266 NLRB 392 (1983), enfd. sub nom. *Iowa Express Distribution v. NLRB,* 739 F.2d 1305 (8th Cir. 1984), cert. denied 469 U.S. 1088 (1984), rehearing denied 470 U.S. 1024 (1985).
[164] See, e.g, *Carmel Furniture Corp.,* 277 NLRB 1105 (1985); *Western Publishing Co.,* 276 NLRB 1566 (1985); *Derickson Co.,* 270 NLRB 516 (1984).

relations would be smoother without the alleged discriminatees, and that the employer's discharging them rather than assigning them different work suggested retaliation resulting from the union's pursuit of their grievance. As to the General Counsel's reliance on the inherently destructive theory, the Board found that, unlike the employees in *Monarch Machine Tool Co.* and *P. W. Supermarkets,* the employer in this case did not have substantial business justification for laying off the alleged discriminatees and thus the General Counsel was justified in contending that their discharges were inherently destructive.

In *Leeward Auto Wreckers,*[165] a Board panel found, contrary to the administrative law judge, that the employer was not entitled to an EAJA award for fees and expenses incurred in successfully defending itself against an allegation that it had violated Section 8(a)(5) and (1) of the Act by not notifying the union of its decision to lay off unit employees, assigning nonunit employees to perform unit work, and subcontracting out unit work without bargaining with the union. The judge had found, and the panel agreed, that the General Counsel was substantially justified in issuing the complaint and in proceeding to a hearing in this case. The judge, however, also found that on the fourth day of a 6-day hearing the employer produced documentary evidence which supported its claim that its conduct was consistent with its past practice, was economically motivated, and had been acquiesced in by the union, and that, in light of such evidence, the General Counsel was not justified in continuing to litigate the case beyond the fourth day. The judge concluded that the employer was entitled to an EAJA award for fees and expenses incurred in defending itself beyond the fourth day. The panel disagreed with the judge's finding in this regard. Thus, it noted that while the documentary evidence produced by the employer on the fourth day had the effect of weakening the Government's case, there was no obligation on the General Counsel's part to withdraw the case at that point because the latter could not have known, prior to the judge's issuing a decision, what, if any, weight the judge would give to the employer's documentary evidence and the testimony of its witnesses vis-a-vis that produced by the General Counsel. The panel also noted that the judge's finding that the employer had a valid defense to the complaint allegations was based not only on the documentary evidence submitted by the employer on the fourth day of hearing but also on his resolution of certain conflicts in testimony in favor of the employer. Thus, the panel concluded that under these circumstances the General Counsel was substantially justified in litigating the case to the close of hearing and in filing a posttrial brief with the judge.

[165] 283 NLRB No. 85 (Chairman Dotson and Members Johansen and Babson).

In *Lion Uniform*,[166] the Board reversed the administrative law judge and found that the General Counsel was substantially justified in issuing the unfair labor practice complaint alleging that the applicant violated Section 8(a)(3) and (5) and in rejecting the applicant's offers to settle the case.

On February 9, 1978, the General Counsel issued a complaint against the applicant alleging that its temporary transfer of fire coat production from its Lake City, Tennessee facility to its Beattyville, Kentucky facility violated Section 8(a)(3). The complaint also alleged that the applicant violated Section 8(a)(5) by refusing to bargain over the transfer. At the hearing, the applicant offered to withdraw its answer to the complaint and admit all unfair labor practices so long as the remedial order would allow it to keep fire coat production at its Beattyville facility and to return an equivalent production line to Lake City. The administrative law judge approved the unilateral settlement offer, but the Board reversed and remanded the case for a resolution on the merits.[167] Although the applicant continued to express a desire to settle the proceedings, the General Counsel refused to settle unless the applicant unconditionally restored its fire coat line to Lake City. At the subsequent unfair labor practice hearing, the administrative law judge found the applicant's decision to temporarily transfer its fire coat line was based on legitimate business reasons and that the transfer did not violate Section 8(a)(3) or (5).[168] The Board adopted the judge's decision.[169]

In rejecting the judge's subsequent decision in the EAJA proceedings, the majority found that the General Counsel was substantially justified in pursuing the claims in light of the conflicting statements made by the applicant at the time of the transfer and the applicant's failure to submit evidence to support its asserted business justification defense until the unfair labor practice hearing. The majority also concluded that, because the General Counsel was substantially justified in initiating the case, the General Counsel was also substantially justified in refusing to settle the case without a complete remedy for the claimed violations. Thus, the majority declined to award any fees for the defense of these allegations.

The majority found, however, that the General Counsel was *not* substantially justified in alleging that the applicant violated Section 8(a)(5) on January 5, 1978, when it announced its tentative decision to make the temporary transfer of fire coat production permanent because the applicant's letter announcing the decision emphasized that its decision was "tentative" and that it was willing to bargain over the issue. However, the majority de-

[166] 285 NLRB No. 29 (Members Johansen, Babson, and Stephens; Chairman Dotson dissenting).
[167] 247 NLRB 992 (1980).
[168] The judge found that the applicant did commit several other violations of Sec. 8(a)(1) and a violation of Sec. 8(a)(5).
[169] 259 NLRB 1141 (1982).

clined to award the applicant any fees for its defense of the allegation because it was not a "significant and discrete" part of the proceeding and the applicant suffered no "measurable expenditures" for its defense of the allegation.

Chairman Dotson dissented from the decision. Chairman Dotson found that the General Counsel was not substantially justified in issuing the initial complaint or in rejecting the applicant's numerous settlement offers. Emphasizing that the General Counsel reasonably should have known that the initial decision to transfer the fire coat production line was temporary and was caused by the union's strike at the Lake City facility, and that the applicant expressed its willingness to negotiate over these issues, Chairman Dotson agreed with the judge that the General Counsel acted improperly in pursing the case and in rejecting the applicant's offers to settle.

VI

Supreme Court Litigation

During fiscal year 1987, the Supreme Court decided two cases in which the Board was a party.

A. Union Discipline of Supervisor-Members

In *Electrical Workers IBEW Local 340*,[1] the union fined two of its members, Schoux and Choate, for violating the IBEW constitution by working for employers that did not have a collective-bargaining relationship with the union. The Board found that by disciplining Schoux and Choate, who were employed as supervisors, the union had "restrained or coerced" their employers "in the selection of [their] representatives for the purposes of collective bargaining or the adjustment of grievances," in violation of Section 8(b)(1)(B) of the Act. The Board relied, in part, on its doctrine that all supervisory employees are 8(b)(1)(B) representatives because such employees "form the logical 'reservoir' from which the employer is likely to select his representatives for collective bargaining or grievance adjustment." 271 NLRB 995, 997 (1984).[2] The Board held that, irrespective of whether the union had or was seeking a bargaining relationship with Schoux's or Choate's employer, the discipline could have the effect of forcing the representative to quit, thus depriving the employer of the representative's services.

The Court of Appeals for the Ninth Circuit accepted the Board's findings that Schoux and Choate were 8(b)(1)(B) representatives. However, the court held that Section 8(b)(1)(B) only proscribed union discipline of supervisors working for an employer whose employees the union represented or had demonstrated an interest in representing.

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[1] *NLRB v. Electrical Workers IBEW Local 340*, 107 S.Ct. 2002, affg. 780 F.2d 1489 (9th Cir. 1986).

[2] The Board did not find that Choate actually performed any collective-bargaining or grievance adjustment duties. It found, however, that Schoux had adjusted personal (as distinguished from contractual) grievances, and thus qualified as an 8(b)(1)(B) representative without resort to the "reservoir doctrine."

Resolving a conflict in the circuits,[3] the Supreme Court[4] held that a union does not violate Section 8(b)(1)(B) when it disciplines a supervisor-member who does not participate as the employer's representative in collective bargaining or grievance adjustment, and whose employer has not entered into a collective-bargaining agreement with the union. Thus, the Court rejected the Board's "reservoir doctrine," noting that in *Florida Power*[5] it had "created a restrictive 'adverse-effect' test" to determine when Section 8(b)(1)(B) is violated by union discipline of supervisory employees (107 S.Ct. at 2008). Implicit in *Florida Power*, the Court stated, was the limitation that "an adverse effect on future § 8(b)(1)(B) activities exists *only* when an employer-representative is disciplined for behavior that occurs *while he or she is engaged in § 8(b)(1)(B) duties*—that is, 'collective bargaining or grievance adjustment, or . . . any activities related thereto'" (ibid.). The Court added that it had held in *ABC*[6] that, "before a § 8(b)(1)(B) violation can be sustained, the NLRB must make a factual finding that a union's sanction will adversely affect the employer-representative's performance of collective-bargaining or grievance-adjusting duties" (107 S.Ct. at 2010). The Court concluded that "[o]ne simply cannot discern whether discipline will have an adverse impact on a supervisor-member's future performance of § 8(b)(1)(B) duties when their existence is purely hypothetical" (id. at 2011).

The Court further held that the absence of a collective-bargaining relationship between the employers and the union made the possibility that the union's discipline of Schoux and Choate would coerce their employers in their choice of representatives "too attenuated to form the basis of an unfair labor practice charge" (107 S.Ct. at 2012). The Court reasoned that "when a union has no collective-bargaining relationship with an employer, and does not seek to establish one, both the incentive to affect a supervisor's performance [of § 8(b)(1)(B) duties] and the possibility that an adverse effect will occur vanish" (ibid.).[7] Moreover, the Court said, the union's discipline of Schoux and Choate did "not coerce [their employers] in their *selection* of § 8(b)(1)(B) representatives" (id. at 2013). Any union member who valued union membership would be less willing to serve if the cost of service were loss of membership, which, in turn, would limit the

[3] The Court of Appeals for the Eleventh Circuit had held that, even if a union does not represent or intend to represent a company's employees, Sec. 8(b)(1)(B) is violated by union discipline that pressures a supervisor-member to cease working for a nonunion employer. *NLRB v. Electrical Workers IBEW Local 323*, 703 F.2d 501 (1983).

[4] Justice Brennan delivered the opinion of the Court. Justice Scalia filed an opinion concurring in the result. Justice White, joined by Chief Justice Rehnquist and Justice O'Connor, filed a dissenting opinion.

[5] *Florida Power & Light Co. v. Electrical Workers IBEW Local 641*, 417 U.S. 790 (1974).

[6] *American Broadcasting Cos. v. Writers Guild*, 437 U.S. 411 (1978).

[7] The Court noted (id. at fn. 13) that direct coercion of an employer's choice of representatives would be a violation of Sec. 8(b)(1)(B) whether the union has or seeks a bargaining relationship with an employer.

size of the supervisor pool from which an employer could select its representatives. But this "minimal effect on an employer's selection of § 8(b)(1)(B) representatives is insufficient to support a § 8(b)(1)(B) charge" (id. at 2014).[8]

B. Successor's Obligation to Bargain

In *Fall River*,[9] the Supreme Court upheld the Board's tests for determining whether a purchaser of a business is obligated to bargain with the union that represented its predecessor's work force, refusing to limit the successorship doctrine to a situation where, as in *Burns*,[10] the union was certified shortly before the transition in employers.

In February 1982, Sterlingwale Corporation, which had operated a textile dyeing and finishing plant, ceased production and laid off all of its production employees. It retained a skeleton crew of supervisors and maintenance workers until late summer, when it went out of business altogether. During this period, one of its former officers and the president of one of its major customers formed Fall River Corporation for the purpose of engaging in one aspect of Sterlingwale's business and to take advantage of its assets and work force. Fall River acquired Sterlingwale's plant, its equipment, and some of its inventory and, in September 1982, began operating out of that plant and hiring employees. Its initial hiring goal was 1 full shift, or about 55 to 60 employees; on reaching that goal, it intended to "see how business would be" (107 S.Ct. at 2230) and, business permitting, to expand to 2 shifts.

In October 1982, when Fall River had hired 21 employees, of whom 18 had formerly worked for Sterlingwale, the union that had represented Sterlingwale's production and maintenance workers for some 30 years requested recognition by Fall River and the commencement of collective bargaining. Fall River refused the request, stating that it had "no legal basis." On November 1, 1982, the union charged Fall River with an unlawful refusal to bargain.

By November 1982, Fall River had employees in a full range of jobs, had begun production, and was handling customer orders. By mid-January 1983, it had reached its initial goal of one full shift, and some employees were working a second shift. Of its 55 employees, 36 were ex-Sterlingwale employees. By mid-April, Fall River had 107 employees, and was operating 2 full shifts; for the first time, former Sterlingwale employees were outnumbered, by a small margin. The same working conditions ex-

[8] The Court acknowledged that "*ABC* does suggest in dictum that any discipline that affects a supervisor-member's 'willingness to serve' as a § 8(b)(1)(B) supervisor is unlawful." The Court disavowed this statement, asserting that it was "unnecessary to the disposition of *ABC*" (id. at 2013 fn. 15).

[9] *Fall River Dyeing Corp. v. NLRB*, 107 S.Ct. 2225, affg. 775 F.2d 425 (1st Cir. 1985).

[10] *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

isted as under Sterlingwale, and over half of Fall River's business came from former Sterlingwale customers.

Applying the standards approved in *Burns*, the Board concluded that, in the totality of the circumstances, there was substantial continuity in the employing enterprise; and that Fall River accordingly was a successor to Sterlingwale, and was required to bargain with the union if a majority of its unit employees had been employees of its predecessor. The Board further held that the obligation to bargain attached in mid-January, when Fall River first employed a "substantial and representative complement" of its work force, of whom a majority had been represented by the union when they were employed by Sterlingwale. Finally, the Board held that the union's October 1982 request for recognition, although premature, was a continuing demand, and created an obligation to bargain when the employer reached a representative capacity. The Court of Appeals for the First Circuit enforced the Board's Order and the Supreme Court affirmed that decision.

Initially, the Supreme Court[11] held that a successor's obligation to bargain with the union that represented its predecessor's employees is not limited to a situation in which the union had been recently certified (and thus enjoyed an irrebuttable 1-year presumption of continued majority status), as in *Burns*, but that the obligation extends beyond the certification year (when the union enjoys a rebuttable presumption of continued majority status). The Court explained that both presumptions "are based not so much on an absolute certainty that the union's majority status will not erode following certification" as on the overriding statutory policy of industrial peace, which the presumptions further by "'promot[ing] stability in collective-bargaining relationships, without impairing the free choice of employees'" (107 S.Ct. at 2233). The Court added that the rationale behind the presumptions is "particularly pertinent during a transition between employers [when] a union is in a peculiarly vulnerable position . . . [and] needs the presumptions of majority status . . . to safeguard its members' rights and to develop a relationship with the successor," and when employees "may well feel that their choice of a union is subject to the vagaries of an enterprise's transformation" (id. at 2233–2234). It noted that the new employer is not bound by the substantive provisions of its predecessor's contract, and incurs a presumption-based bargaining obligation only if it "makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecesor" (id. at 2234).

The Court upheld the Board's finding of "substantial continuity" as supported by substantial evidence, particularly noting that

[11] Justice Blackmun delivered the opinion of the Court. Justice Powell, joined by Chief Justice Rehnquist and Justice O'Connor, filed a dissenting opinion.

"from the perspective of the employees, their jobs did not change . . . [and that Fall River] acquired Sterlingwale's assets with the express purpose of taking advantage of its predecessor's work force" (107 S.Ct. at 2236). The Court agreed with the Board that the hiatus between Sterlingwale's shutdown and Fall River's startup was not determinative of the successorship question in the absence of "other indicia of discontinuity." It noted, moreover, that, after the February layoff, Sterlingwale had continued to ship goods to customers, maintain the plant, and make efforts to resurrect the business or find a buyer, and that "from the employees' perspective . . . the hiatus may have been much less than seven months" (id. at 2237).

The Court further concluded that the Board's "substantial and representative complement" rule—which fixes the moment when the determination is to be made whether a majority of the successor's employees are former employees of the predecessor, and thus triggers the successor's bargaining obligation—is reasonable in the successorship context. The Court rejected the employer's contention that the determination regarding a union's representative status should be made only when a new employer has attained a full complement work force as an "approach . . . [which] fails to take into account the significant interest of employees in being represented as soon as possible," particularly during the unsettling transition period. The Court added that the Board's "substantial and representative complement" rule does not place an unreasonable burden on the new employer, for it will "generally know with tolerable certainty when all . . . job classifications have been filled or substantially filled, when it has hired a majority of the employees it intends to hire, and when it has begun normal production" (id. at 2240).

Finally, the Court concluded that the Board's rule that a premature union demand remains in place until the employer reaches a substantial and representative complement makes sense in the successorship situation. The union, which has no established relationship with the successor, is unable to determine when the triggering work force has been hired, and "with little trouble" an employer can treat a premature demand as a continuing one (107 S.Ct. at 2241).

VII

Enforcement Litigation

A. Board Deferral

1. 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 Labor Management Relations Act, 1947 (29 U.S.C. § 173(d)), provides, however, that final adjustment by a method agreed on by the parties 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.

In *Olin Corp.*,[1] the Board reaffirmed and refined the *Spielberg* standards[2] governing the Board's determination whether to defer to an arbitration award. The Board stated that it would find that the unfair labor practice issue had been adequately considered by the arbitrator if "(1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice."

In *Wheeling-Pittsburgh Steel Corp. v. NLRB*,[3] the Sixth Circuit agreed with the Board's conclusion that the second condition was not satisfied in a case where the record affirmatively demonstrated that the arbitrator had not been presented with evidence that was critical to the statutory issues. The union and the employer in that case were parties to a collective-bargaining agreement that excused employees from working under conditions "unsafe beyond the normal hazard inherent in the job."[4] Pursuant to this provision, an employee filed a grievance contesting his discharge for refusing to operate a crane that he believed to be unsafe. The employee's grievance went before an arbitrator, who upheld the employee's discharge, finding that he did not believe

[1] 268 NLRB 573 (1984).
[2] *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).
[3] 821 F.2d 342.
[4] Id. at 344.

in good faith that the crane was unsafe and had not used the contractual procedure for resolving safety complaints.

The court agreed with the Board that the arbitrator had based his decision on a "limited and inaccurate view of the facts," pointing to significant missing evidence and to the arbitrator's erroneous finding that the crane had been repaired before the employee refused to operate it. Accordingly, the court agreed that the evidence considered by the Board was critically different from the evidence before the arbitrator. Concluding that, under the circumstances, "the arbitrator could not have been presented with the facts relevant to resolving the unfair labor practice," the court held that the Board had not abused its discretion by refusing to defer to the arbitrator's award.[5]

2. Precomplaint Settlements

The Board's policy of deferral to precomplaint settlement agreements received approval from the Ninth Circuit in *Mahon v. NLRB*.[6] The case arose out of the discharge of about 20 employees of Alpha Beta Co. for engaging in a sympathy strike. The union invoked the contractual grievance and arbitration procedure and convened a board of adjustment. After hearing evidence, the board deadlocked, but private negotiations between the union and the company produced a settlement providing for reinstatement without backpay for 15 of the employees. The employees voted to accept the settlement, but in addition filed a complaint with the Board seeking backpay.

The Board, reversing the decision of an administrative law judge, deferred to the settlement agreement and dismissed the complaint. The Board considered the factors affecting deferral established in *Olin Corp.*[7] and found that the settlement agreement resulted from the grievance procedure of the controlling collective-bargaining agreement; that the grievance procedure was fair and regular; that all parties, including the employees, had agreed to be bound; and that the settlement was not clearly repugnant to the policies of the Act. The court affirmed, holding that the Board had acted within its discretion in deferring to the settlement. Further, the court distinguished deferral to settlement agreements from deferral to arbitration awards, thereby rendering inapposite some criticism the Board has received in the latter situation.[8] The court concluded that the parties' increased control over the terms of a settlement agreement, compared with their control over the terms of an arbitration award, more readily justified the assumption that the chosen method of dispute resolution addressed and resolved all the potential claims and li-

[5] Id. at 345–346.
[6] 808 F.2d 1342.
[7] 268 NLRB 573 (1984).
[8] See, for example, *Taylor v. NLRB*, 786 F.2d 1516 (11th Cir. 1986) (reversing Board decision to defer to arbitration award).

abilities arising out of their dispute, including those arising under the National Labor Relations Act.

B. Waiver of the Right to Strike

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. In its *Indianapolis Power* decision,[9] the Board overruled an earlier holding[10] and announced a rule that, absent extrinsic evidence that the parties intended otherwise, a broadly worded no-strike provision in the parties' collective-bargaining agreement waives the employees' right to engage in a sympathetic strike.

The *Indianapolis Power* rule was presented to the Third Circuit in a case in which the Board found that the contractual no-strike clause had waived the employees' sympathetic rights.[11] Accordingly, the Board dismissed a complaint alleging that the employer had unlawfully coerced its employees by threatening to discipline them if they observed another union's picket line. Initially, the court rejected the union's contention that the *Indianapolis Power* rule was inconsistent with the settled principle that statutory rights may be relinquished only by clear and unmistakable evidence of such intent. The court concluded that the primary purposes of the Act "[are] not frustrated by a rule allowing the parties to embody in broad contractual terms their mutual desire to include sympathy strikes as part of their no-strike agreement."

The court, however, rejected the Board's view that inquiry into the parties' intent need go no further than to ascertain the "plain meaning" of a broadly phrased no-strike clause. The court allied itself with the view of the District of Columbia Circuit that the Board was required to consider "[e]xtrinsic evidence—whether affirmative or negative in nature— . . . in order to sustain a finding of a comprehensive waiver."[12] In the instant case, the court found, first, that the language and structure of the parties' agreement indicated the union's intent to waive its members' right to strike for any reason, not only over disputes that were amenable to arbitration. The court then examined the extrinsic evidence and found further indication of waiver in the "prevailing law" at the time the no-strike clause was first adopted and in the union's failure to seek to renegotiate the terms of the contract after two arbitration decisions had held that the union had

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[9] *Indianapolis Power & Light Co.*, 273 NLRB 1715 (1985), remanded sub nom. *Electrical Workers IBEW Local 1395 v. NLRB*, 797 F.2d 1027 (D.C. Cir. 1986).

[10] *Operating Engineers Local 18 (Davis-McKee)*, 238 NLRB 652 (1978).

[11] *Electrical Workers IBEW Local 803 v. NLRB*, 826 F.2d 1283.

[12] Id. at 1296 fn. 24, citing *Electrical Workers IBEW Local 1395 v. NLRB*, supra.

waived its members' sympathetic rights. The court therefore upheld the Board's dismissal of the complaint.

C. Employer Discrimination

Section 8(a)(3) of the Act generally proscribes employer "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." In a lead decision, the Board held that an employer did not violate Section 8(a)(3) by hiring temporary employees after lawfully locking out its permanent employees to apply economic pressure in support of a legitimate bargaining position.[13] Relying on Supreme Court precedent,[14] the Board concluded that the employer's conduct was not inherently destructive of employee statutory rights; that its effect on those rights was comparatively slight; that the employer had come forward with a legitimate and substantial business justification; and that, absent specific proof of antiunion motivation, the employer's conduct was lawful.

The Third Circuit upheld the Board's dismissal of the complaint against the employer.[15] In concluding that the employer's conduct was not inherently destructive of employee rights, the court noted the three factors considered by the Eighth Circuit in evaluating whether the use of temporary replacements during a lockout had an inherently destructive or comparatively slight effect on employee rights: (1) whether the replacements were expressly hired only for the duration of the labor dispute and whether a definite date for their termination had been communicated to the union and employees; (2) whether the option of returning to work was available to the employees on their acceptance of the employer's terms; and (3) whether the employer had agreed to continue in effect the union-security clause from the old contract.[16] Addressing the application of those factors to the case before it, the Third Circuit affirmed the administrative law judge's findings that (1) although the employer's advertisements for replacement workers did not specify their temporary nature, the employer intended to return the regular employees to work at the end of the strike; (2) the union could have returned its members to work on terms less profitable than desired; and (3) the employer had agreed to the latest in a series of union proposed security clauses, only to have it withdrawn by the union. The court further concluded that the slight impact on employee rights which the employer's conduct arguably had was negated by the employer's legitimate and substantial business justifica-

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[13] *Harter Equipment*, 280 NLRB No. 71 (June 24, 1986).

[14] *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Brown Food Store*, 380 U.S. 278 (1965); *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).

[15] *Operating Engineers Local 825 (Harter Equipment) v. NLRB*, 829 F.2d 458.

[16] *Inter-Collegiate Press v. NLRB*, 486 F.2d 837, 845 (8th Cir. 1973), cert. denied 416 U.S. 938 (1974).

tion.[17] Thus, the court affirmed the administrative law judge's findings (1) that the employer was in financial straits and the union knew it, and (2) that no temporary replacements were hired until 6 weeks after the commencement of the lockout, during which period no unit work was performed.

Finally, the Third Circuit rejected the union's contention that the Board erred in failing to assess adequately the employer's conduct in terms of Section 8(a)(1) of the Act. Rather, the court held that the Board's analysis, which simultaneously discussed the alleged violation of Section 8(a)(1) and (3), was consistent with the relevant court decisions, which had adopted a similarly congruent analysis.[18]

D. Bargaining Units

During the year, two courts of appeals rejected the suggestion that the Board was statutorily compelled to utilize a standard other than "community of interests" in grouping employees into collective-bargaining units in the health care field. The Board had previously been faulted for applying that traditional standard by several courts of appeals, each of which had concluded that a "disparity of interests" standard was mandated when Congress extended coverage of the Act to employees in the health care field in 1974. In reaching that conclusion, the courts relied on the legislative history accompanying the health care amendments—specifically, on expressions of concern that health care was an industry characterized by small groups of highly specialized employees, and that allowing them to be represented in too many small units could lead to unnecessary strikes, ultimately threatening efficient delivery of health care. In a Senate committee report accompanying the amendments, the sponsors indicated that "[d]ue consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry."[19]

Originally, in *St. Francis I*,[20] the Board attempted to implement this admonition by applying a modified version of the traditional community-of-interests standard. This approach required the Board to consider whether a proposed unit comprised one or more of the seven broad groups of employees commonly found in hospitals. If it did not, the Board would not allow its designation as a separate unit; if it did, the Board then considered whether the employees shared a community of interests sufficient to warrant placing them in a single unit. This approach was criticized by courts of appeals as an inadequate response to the ex-

[17] 829 F.2d at 462–463.

[18] Id. at 463.

[19] S. Rept. No. 93-766 at 5 (1974); *Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act* 12 (G.P.O. 1974).

[20] *St. Francis Hospital*, 265 NLRB 1025 (1982).

pressions of concern in the legislative history about proliferation of bargaining units in the health care industry. Those courts generally indicated that the legislative history of the 1974 amendments mandated the Board to base unit determinations on "*disparity* of interests," by grouping employees together unless their differences from other employees were so marked as to warrant separate representation.[21] The Board responded in *St. Francis II*[22] by adopting the view that the legislative history, and particularly the committee report, obligated it to apply the disparity-of-interests standard.

In 1987, however, one court upheld a community-of-interests unit determination in the health care industry.[23] The Board in that case had upheld the Regional Director's designation of a broad unit including professionals and nonprofessionals, but excluding certain business office clericals as lacking a community of interests. The court rejected the employer's assertion that the Board was bound by the legislative history to apply the *St. Francis II* disparity-of-interests test. Citing congressional endorsements of the Board's discretion in the area, the court held that the Board had satisfied the requirement that the Board give "due consideration" to the problem of proliferation by the Regional Director's explicit references to that problem in his decision.[24]

In the second case, the United States Court of Appeals for the District of Columbia Circuit reversed and remanded *St. Francis II* itself.[25] *St. Francis II* involved the Board's finding that a unit of maintenance employees, a unit found appropriate in *St. Francis I*, was inappropriate under the newly enunciated disparity-of-interests standard. The court concluded that the Board had misinterpreted the legislative history as supporting a congressional mandate to apply disparity of interests. It pointed out that Congress had failed to enact specific proposals to limit the number of units in health care institutions, and had made no reference in the amendments themselves to the committee report on which the Board and the other courts had relied in developing the disparity-of-interests standard. In the court's view, those facts militated against "'a judgment that Congress intended a result that it expressly declined to enact.'"[26] The court therefore remanded the case for the Board to apply "its own judgment and expertise" in developing an appropriate standard, rather than relying on "a

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[21] See, for example, *Long Island College Hospital v. NLRB*, 566 F.2d 833 (2d Cir. 1977); *Allegheny General Hospital v. NLRB*, 608 F.2d 965 (3d Cir. 1979); *NLRB v. Frederick Memorial Hospital*, 691 F.2d 191 (4th Cir. 1982); *Mary Thompson Hospital v. NLRB*, 621 F.2d 858 (7th Cir. 1980); *NLRB v. St. Francis Hospital*, 601 F.2d 404 (9th Cir. 1979); *Presbyterian/St. Luke's Medical Center v. NLRB*, 653 F.2d 450 (10th Cir. 1981).

[22] *St. Francis Hospital*, 271 NLRB 948 (1984).

[23] *St. John's General Hospital v. NLRB*, 825 F.2d 740, 742–744 (3d Cir.).

[24] Id. at 743–744.

[25] *Electrical Workers IBEW Local 474 v. NLRB*, 814 F.2d 697.

[26] Id. at 711, quoting *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974).

clear misreading of" the congressional intent in enacting the 1974 amendments.[27]

E. Bargaining Obligations

1. Good-Faith Bargaining

Sections 8(a)(5), 8(b)(3), and 8(d) of the Act impose on employers and unions alike the obligation to bargain with each other in good faith over the terms and conditions of employment of the employees, but state that "such obligation does not compel either party to agree to a proposal or require the making of a concession." These statutory provisions require employers and unions to enter into negotiations with an open mind and a willingness to reach agreement; thus, neither party may advance proposals with a "take it or leave it" attitude.[28] On the other hand, the Act does not require a party to abandon a bargaining position sincerely maintained, even though the position precludes a compromise or frustrates agreement.[29]

In a case decided during the year,[30] the Seventh Circuit upheld a Board finding that a union lawfully insisted at all times during negotiations that an employer association accept a collective-bargaining contract identical to one the union had simultaneously negotiated with another employer association. In agreeing with the Board that the union's conduct was not prohibited, the court noted that the union discussed its proposal with the association on four different, protracted occasions; that the union exhibited an "open" and "accessible position"; and that the union made at least one concession from its original bargaining position. The court also rejected a claim that the union's action compelled the first association to accept the second association as its bargaining agent in violation of Section 8(b)(1)(B) of the Act. The court noted that the union never asked the association to designate the second association as its agent, and at all times it negotiated directly and exclusively with the first association.

2. Mandatory Subjects of Bargaining

Pursuant to Section 8(d) of the Act, an employer and the representative of its employees have a mutual obligation to bargain in good faith with respect to wages, hours, and other terms and conditions of employment. Such mandatory subjects of bargaining cannot be imposed or changed through the unilateral action of either party to the collective-bargaining relationship.[31] The parties must bargain over the imposition of or change in such mandatory subjects until they reach agreement or impasse.

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[27] Id. at 714.
[28] See *NLRB v. Insurance Agents*, 361 U.S. 477, 486–487 (1960).
[29] See *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952).
[30] *Kankakee-Iroquois County Employers' Assn. v. NLRB*, 825 F.2d 1091.
[31] *NLRB v. Katz*, 369 U.S. 736 (1962).

In *First National Maintenance Corp. v. NLRB*,[32] the Supreme Court held that an employer did not have to bargain over the decision to close down part of its business where the decision had as its focus only the economic profitability of the business, involving a change in the scope and direction of the enterprise, even though the decision also had a direct impact on employment.

The Board interpreted *First National Maintenance Corp.* in *Otis Elevator Co.*,[33] a case involving an employer's decision to transfer certain functions from one plant to another. A plurality of the Board found that the decision was not subject to mandatory bargaining. In so finding, the plurality (Chairman Dotson and Member Hunter) held that an employer must bargain about all decisions which turn on a reduction in labor costs and not on a change in the basic direction or nature of the enterprise.[34]

In *Steelworkers Local 2179 v. NLRB*,[35] the Fifth Circuit affirmed the Board's finding that an employer's decision to relocate functions from one plant to another was not subject to mandatory bargaining because the decision did not turn on labor costs. The court initially noted that, in *First National Maintenance*, the Supreme Court had not dictated to the Board any particular methodology or formula which it must follow. The court then held that the "turns-on-labor-costs" test adopted by the Board plurality in *Otis Elevator* was a reasonably defensible interpretation of the Act and the Supreme Court's opinion in *First National Maintenance Corp.*

F. Union Dues Deductions

Section 302(c)(4) of the Labor Management Relations Act, 1947 (29 U.S.C. § 186(c)(4)), permits employers and unions to agree to the deduction by employers of union dues from employees' wages, "*Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner." Typically, in cases in which the parties have agreed upon a dues deduction system, the assignment form makes the assignment irrevocable for a year or until the contract's termination date. Nonetheless, the Board has held, with court approval, that in certain circumstances an assignment may be revoked or voided prior to the stated date for revocation even though the assignment otherwise conforms to the requirements of Section 302(c)(4). Thus, in *Penn*

[32] 452 U.S. 666 (1981).
[33] 269 NLRB 891 (1984).
[34] Member Dennis and Member Zimmerman, applying somewhat different analyses, separately concurred in the result.
[35] 822 F.2d 559.

Cork & Closures,[36] the Board and the court held that when employees, in an election conducted pursuant to Section 9(e) of the Act, voted to rescind a union's authorization to enter into a union-security clause, the employees' dues assignments were no longer valid and enforceable even though their stated expiration dates fell beyond the date of the election. Similarly, in *Railway Clerks (Yellow Cab),*[37] the Board and the court held that when employees permanently severed their employment with an employer and then resumed working for the employer before the expiration dates of their dues assignments, the assignments could not be utilized to justify dues deductions during the second period of employment. The Board has further held, in a line of cases beginning with *Carpenters San Diego County Council (Campbell Industries),*[38] and summarized in *Machinists Local 2045 (Eagle Signal),*[39] that an employee's resignation from union membership will, as a matter of law, operate to revoke the employee's dues authorization despite the time periods for revocation set out in it, when the circumstances show that the assignment was the quid pro quo for the employee's union membership.

The Board's *Campbell* principle was reviewed for the first time by a court in a case before the Ninth Circuit.[40] Viewing the principle as resting on traditional rules governing contracts, the court held that the principle was "grounded . . . on an erroneous view of the requirements of contract law." The court noted that, under conventional contract law rules, "[a] party's duty to perform even a wholly executory contract is not excused merely because he decides that he no longer wants the consideration for which he has bargained." When, as in the instant case, the employer and the union continue to offer the employee the benefits of union membership, the Ninth Circuit held that, as a matter of contract law, the employee is not free simply to refuse to comply with his part of the bargain—his obligation to pay dues to the date stated for revocation in the assignment. The court noted, however, that there might be other bases besides contract law on which to justify the result reached by the Board, and accordingly remanded the case to the Board for its further consideration.

The court, with one judge dissenting, upheld another part of the Board's decision concerning the effect of Section 1205(a) of the Postal Reorganization Act (39 U.S.C. § 1205(a)). The court agreed with the Board that the provision, which permits dues deductions in the Postal Service and is similar to Section 302(c)(4), does not mandate irrevocability as a matter of law for dues assignments in the Postal Service. The court also held that the Board, and not the Postal Service, has primary responsibility for construing and applying these statutory provisions.

[36] 156 NLRB 411 (1965), enfd. 376 F.2d 52 (2d Cir. 1967), cert. denied 389 U.S. 843 (1967).
[37] 205 NLRB 890 (1973), enfd. 498 F.2d 1105 (5th Cir. 1974).
[38] 243 NLRB 147 (1979).
[39] 268 NLRB 635 (1984).
[40] *NLRB v. Postal Service,* 827 F.2d 548.

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 1987, the Board filed a total of 29 petitions for temporary relief under the discretionary provisions of Section 10(j): 23 against employers and 6 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 15 cases and denied in 3 cases. Of the remaining cases, 12 were settled prior to court action, 1 was withdrawn based on changed circumstances, and 7 remained pending further processing by the courts.

Injunctions were obtained against employers in 12 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 and conduct designed to undermine an incumbent union's representational status, and several instances when an employer's cessation of operations necessitated an injunction to sequester assets to protect an eventual Board backpay order. The cases against unions involved serious picket line misconduct during labor disputes when local authorities appeared unable to control the misconduct, a strike against a health care institution in violation of the notice requirements of Section 8(g) of the Act, and a refusal to bargain in good faith in a multiemployer association unit.

Several cases decided during the past year were of sufficient interest to warrant particular attention.

In *Asseo v. Pan American Grain Co.*,[1] the First Circuit joined the Second and Sixth Circuits[2] in holding that interim injunctive relief under Section 10(j) may appropriately include an order directing an employer to bargain with the union based on a show-

[1] 805 F.2d 23.

[2] *Seeler v. Trading Port*, 517 F.2d 33 (2d Cir. 1975); *Levine v. C & W Mining Co.*, 610 F.2d 432 (6th Cir. 1979).

ing that after a majority of unit employees had signed cards designating the union as their bargaining representative, the employer committed serious unfair labor practices rendering unlikely the possibility of holding a fair Board election. In addition, the court, relying on the Third Circuit's holding in *Eisenberg v. Wellington Hall Nursing Home*,[3] upheld the district court's order directing the employer to reinstate four union supporters who had been discharged during the course of the organizing drive.

The appellate court rejected the employer's claim that the district court improperly relied on employee affidavits in finding reasonable cause to believe the employer committed the violations alleged, and held that the district court also properly discounted contrary affidavits signed by the employees at the behest of the employer's attorney in circumstances which, according to the testimony of the employees, were surrounded with an atmosphere of coercion. The appellate court also sanctioned the district court's reliance on portions of the transcript of the hearing in the underlying administrative proceeding, noting that "[t]he dispositive question is not their classification as hearsay but whether, weighing all the attendant factors, including the need for expedition, this type of evidence was appropriate given the character and objectives of the injunctive proceeding." 805 F.2d at 26. Finally, the appellate court rejected the employer's argument that the district court "could not properly reinstate the four employees since five or six months had passed since they were discharged," noting that the Board was entitled to time to "investigate and deliberate." However, the circuit court stated that it considered the Board's request for 10(j) relief "to be a promise of a speedy disposition [of the administrative proceeding] with the risk of dissolution, or modification, by the court, on motion of the employer, if the promise is not kept." 805 F.2d at 29.

In *Gottfried v. Frankel*,[4] the Sixth Circuit affirmed a district court's grant of an injunction directing the employer, at a time when it was bargaining with an incumbent union for a labor agreement to replace one which had expired, to cease and desist from interfering with or discriminating against employees because of their union activities. However, the court reversed that portion of the order that enjoined the employer from "failing or refusing to bargain in good faith with the Union."

Preliminarily, the Sixth Circuit disposed of a series of procedural defenses interposed by the employer, ruling: (1) that the district court did not lack jurisdiction over the case because the petition was filed in the name of the Regional Director rather than by the Board itself; (2) that the 10(j) petition served on the employer was not defective because it was unaccompanied by a summons pursuant to Fed.R.Civ.P. 4; and (3) that the district

[3] 651 F.2d 902, 906–907 (1981).
[4] 818 F.2d 485.

court could rely on the transcript of the first weeks of the hearing before the Board, together with affidavits, and that live testimony was not a prerequisite to 10(j) relief.

Turning to the merits of the petition, the appellate court affirmed the district court's finding that there was reasonable cause to believe the employer violated Section 8(a)(1) and (3) of the Act, as alleged. While acknowledging that reasonable cause would not exist if the employer's version of the facts were accepted, the court observed that the employer's evidence merely established that there were "conflicts in the evidence," not that the district court's reasonable cause findings were erroneous. However, because the parties had stipulated that "this was not a 'refusal to bargain' case," the circuit court reversed the district court's finding of reasonable cause to believe the employer violated Section 8(a)(5) of the Act.

With respect to the propriety of injunctive relief, the court rejected the employer's argument that Board delay in filing the 10(j) petition required denial of the relief sought, finding

> no authority for the proposition that district courts are *required* to consider the delay in filing a section 10(j) petition, or that a failure to consider the delay is a proper basis for overturning the grant of injunctive relief. Rather . . . the appropriate focus is on whether it is necessary to return the parties to status quo pending the Board's proceedings in order to protect the Board's remedial powers under the NLRA, and whether achieving status quo is possible.

818 F.2d at 495 (emphasis in original). Applying this standard, the court concluded that reinstatement of a union activist and other union members "was just and proper, especially in light of the evidence of a drop in union membership and the important role [the activist] played in developing union support." 818 F.2d at 495–496. Accordingly, because "the district court found reasonable cause to believe that [the employer's] activities were designed to discourage union membership, it is appropriate to return the parties to status quo in an attempt to counter the effects of these activities." Id. at 496. Further, the court rejected the claim that injunctive relief was unnecessary because the unfair labor practices were not ongoing, "since the prior activities could have lingering effects on union activity." Ibid.

In *Eisenberg v. Honeycomb Plastics Corp.*,[5] the district court found reasonable cause to believe that the employer had engaged in a pervasive campaign of unfair labor practices, including discriminatory discharges, to defeat a union's organizing campaign. In concluding that 10(j) relief, including the interim reinstatement of the discriminatees, was just and proper, the court distinguished the Third Circuit's decision in *Lenape Products*,[6] affirm-

[5] 125 LRRM 3257 (D.N.J.).

[6] *Eisenberg v. Lenape Products*, 781 F.2d 999 (1986). See 51 NLRB Ann. Rep. 169 (1986).

ing a denial of interim reinstatement under Section 10(j), finding that, unlike in *Lenape*, the discharges were retaliatory for union activity and had, in fact, chilled union support among the unit employees.[7] And, because the case involved the "nascent stages of organizational activity,"[8] the court also found inapposite *Suburban Lines*,[9] in which the Third Circuit affirmed the denial of a 10(j) reinstatement order based on the lower court's finding that the discharged employees had been represented by a "small and intimate" union for 15 years, which could easily "reconstitute itself" following a Board order. The court also concluded that because there was reasonable cause to believe that the union had obtained a card majority, and that the employer's violations precluded the holding of a fair election, a *Gissel*-style interim, remedial bargaining order also was just and proper.[10]

In *Silverman v. Imperia Foods*,[11] a district court found reasonable cause to believe that the employer had discriminatorily accelerated an economically motivated decision to relocate its factory from New York to New Jersey because of its employees' current bargaining demands for a new agreement.[12] After initially stating to its employees that it wished to retain them at the new location, the employer denied most of its workers jobs at the new plant and ceased bargaining with the incumbent union. The court concluded that 10(j) relief, including mass reinstatement of the discharged employees and an affirmative bargaining order, was necessary to "re-establish the conditions as they existed before the employer's unlawful campaign."[13] Absent such relief, the court reasoned, any final Board order would be "too late to prevent [the employer] from obtaining its objectives by unfair labor practices."[14]

Two district courts during the year concluded that interim reinstatement of a single alleged discriminatee was "just and proper" to prevent irreparable injury to employee statutory rights. In *Hoffman v. Burgundy Motors*,[15] the discriminatee was the sole union organizer in a small unit, whose discharge threatened to nip in the bud the union's nascent campaign. In *Seeler v. Accurate Die Casting Co.*,[16] the reinstated employee was chairman of the incumbent union's negotiating committee. It is note-

[7] 125 LRRM at 3271.

[8] Ibid.

[9] *Kobell v. Suburban Lines*, 731 F.2d 1076 (1984). See 49 NLRB Ann. Rep. 140 (1984).

[10] 125 LRRM at 3278. The court relied on the First Circuit's decision in *Asseo v. Pan American Grain Co.*, supra. The Third Circuit has not yet passed on the appropriateness of *Gissel* bargaining orders under Sec. 10(j). See generally 51 NLRB Ann. Rep. 169 (1986).

[11] 646 F.Supp. 393 (S.D.N.Y.)

[12] The court relied on *Ox-Wall Products Mfg. Co.*, 135 NLRB 840 (1962), enfd. 310 F.2d 878 (2d Cir. 1962).

[13] 646 F.Supp. at 400, citing *Seeler v. Trading Port*, 517 F.2d 33, 38 (2d Cir. 1975).

[14] Ibid., quoting from *Reynolds v. Curley Printing Co.*, 247 F.Supp. 317, 324 (M.D.Tenn. 1965).

[15] Civil No. B-86-421 (WWE) (D.Conn.).

[16] 86-CV-746 (N.D.N.Y.).

worthy that the respondent in this case was a debtor in possession operating under the protection of the Bankruptcy Code.[17]

The duty of a labor organization to bargain in a multiemployer association unit was considered in *Green v. Southern California Pipe Trades District Council 16.*[18] The district court found reasonable cause to believe that, during the term of an existing labor agreement in an associationwide unit and without the consent of the association, the union unlawfully dealt directly with several employer-members of the association regarding changes in contractual conditions and benefits, and subsequently entered into new contracts with them that modified the terms of the extant association agreement. In order to avoid a threatened disintegration of the associationwide unit, the court ordered the union to cease dealing directly with members of the association, to rescind the new agreements negotiated with association members, to comply with the terms of the extant association contract, and to bargain in good faith in the multiemployer association unit.

Two cases decided during the report period involved employers that were respondents in ongoing unfair labor practice proceedings in which the General Counsel was seeking a backpay remedy.[19] During the litigation the employers ceased operations and were in the process of either selling their businesses or liquidating their assets. In both cases the employers were unwilling to escrow the estimated backpay liability from the proceeds of the sale or liquidation. The district courts granted 10(j) decrees ordering a sequestration of the estimated amount of backpay liability, and enjoined the improper dissipation or dispersal of the employers' assets pending Board adjudication of the unfair labor practice complaints.

Finally, in *Szabo v. U.S. Marine Corp.*,[20] the Seventh Circuit affirmed in part and vacated in part an order adjudicating the employer in civil contempt of a 10(j) order which had directed the employer, as a *Burns*[21] successor, to recognize and bargain with the union.[22] Initially, the court of appeals ruled that the central portion of the 10(j) injunction order, directing the employer, in the language of the statute, to "bargain in good faith," was not too vague to be enforced by a contempt decree. The court observed that the employer had not appealed from that order. In any event, the court held (819 F.2d at 718):

> [I]n ordering U.S. Marine to comply with the relevant provisions of the National Labor Relations Act the injunction implicitly incorporated the basic principles that the Labor Board

[17] See generally *Ahrens Aircraft v. NLRB*, 703 F.2d 23 (1st Cir. 1983).

[18] CV 87-06157 RSWL (C.D.Cal.).

[19] *Pascarell v. Alpine Fashions*, 126 LRRM 2242 (D.N.J.); *Fleischut v. Memphis Dinettes*, Civil No. 87-2239 HB (W.D.Tenn.), as amended, stay denied pending appeal, No. 87-5408 (6th Cir.), voluntarily dismissed as moot (6th Cir.).

[20] 819 F.2d 714.

[21] *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

[22] 116 LRRM 2663 (E.D.Wis. 1984).

and the courts have developed to guide the application of these provisions. The district court was not required to spell out those principles in the injunction; it was enough that the injunction, by using familiar terms of art, evoked those principles.

Turning to the specific conduct found contumacious by the district court, the appellate court reversed that portion of the adjudication holding the employer in contempt for its 1-month delay in supplying certain information that the union had requested in aid of bargaining. Most of the delay had resulted from the employer's request to the union for an explanation of the information's relevance. In the court's view, the relevance of the information was not obvious and supplying it could have compromised the privacy of employees. Therefore, the court concluded that "the company was entitled to ask what its relevance was before disclosing it." Ibid.

The principal conduct the district court found contumacious of its injunction order was the employer's direct dealings with its employees through a "Safety & Progress Committee" formed by the employer. In purgation, the district court had enjoined the employer from continuing to maintain or deal with the committee, and had also directed the employer "not to solicit questions or grievances from employees" and to refrain from making "remarks reflecting an anti-union animus." The circuit court affirmed only in part. In the Seventh Circuit's view, the employer's obligations under Section 8(a)(5) forbade it from dealing with individual employees respecting topics that might be involved in the negotiations between the union and the employer, such as wages, hours, benefits, vacations, and the like, but did not interdict the employer's direct dealings with employees with regard to such petty complaints as "excessive cold or other hazards or discomforts." 819 F.2d at 720. Moreover, the employer was not privileged to couch "its refusal [to respond to a worker's complaint] in terms that might be thought to imply that the union was preventing the satisfaction of the worker's demand." Ibid. Because the committee "was the principal agency of this violation . . . the district court was . . . entitled to enjoin further meetings of the committee in order to assure compliance with the injunction." 819 F.2d at 721. However, the district court's broad prohibition against any solicitation of grievances failed to comport with the circuit court's distinction between bargainable subjects and petty complaints; moreover, the lower court's injunction against *all* expressions of union animus conflicted with the employer's right under the first amendment, as well as under Section 8(c) of the Act, to express its hostility towards the union. The appellate court remanded the matter to the district court with instructions to modify its purgation order accordingly.

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),[23] or Section 8(b)(7),[24] and against an employer or union charged with a violation of Section 8(e),[25] 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.[26] In addition, under Section 10(l) a temporary restraining order pending the hearing on the petition for an injunction may be obtained, without notice to the respondent, on a showing that "substantial and irreparable injury to the charging party will be unavoidable" unless immediate injunctive relief is granted. Such ex parte relief, however, may not extend beyond 5 days.

In this report period, the Board filed 67 petitions for injunctions under Section 10(l). Of the total caseload, comprised of this number together with 11 cases pending at the beginning of the period, 22 cases were settled, 2 were dismissed, 4 were withdrawn, and 14 were pending court action at the close of the report year. During this period, 35 petitions went to final order, the courts granting injunctions in 15 cases and denying them in 10 cases. Injunctions were issued in 53 cases involving secondary boycott action proscribed by Section 8(b)(4)(B), as well as in instances involving a violation of Section 8(b)(4)(A), which proscribes certain conduct to obtain hot cargo agreements barred by Section 8(e). Injunctions were granted in six cases involving jurisdictional disputes in violation of Section 8(b)(4)(D). Injunc-

[23] Sec. 8(b)(4)(A), (B), and (C), as enacted by the Labor Management Relations Act, 1947, prohibited certain types of secondary strikes and boycotts, strikes to compel employers or self-employed persons to join labor or employer organizations, and strikes against Board certifications of bargaining representatives. These provisions were enlarged by the 1959 amendments of the Act (Title VII of the Labor-Management Reporting and Disclosure Act) to prohibit not only strikes and the inducement of work stoppages for these objects, but also to proscribe threats, coercion, and restraint addressed to employers for these objects, and to prohibit conduct of this nature where an object was to compel an employer to enter into a hot cargo agreement declared unlawful in another section of the Act, Sec. 8(e).

[24] Sec. 8(b)(7), incorporated in the Act by the 1959 amendments, makes organizational or recognitional picketing under certain circumstances an unfair labor practice.

[25] 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.

[26] Sec. 8(b)(4)(D) was enacted as part of the Labor Management Relations Act, 1947.

tions were also issued in eight cases to proscribe alleged recognitional or organizational picketing in violation of Section 8(b)(7).

Of the 10 cases in which injunctions were denied, 9 involved secondary picketing activity by labor organizations, and 1 involved recognitional picketing.

Two cases of particular interest were decided during the fiscal year.

In *Sharp v. Omaha Building Trades Council (Simon & Associates)*,[27] the Eighth Circuit affirmed a 10(l) injunction enjoining the respondent, a local building trades council, from threatening, restraining, or coercing an employer with an object of forcing that employer to cease doing business with a nonunion contractor in violation of Section 8(b)(4)(ii)(B). The council is a consortium of individual local building trades unions comprised exclusively of local union delegates. It does not engage in collective bargaining as the representative of any particular unit of employees nor does it bargain on behalf of its local affiliates. The sole basis for the council's appeal was that the district court had committed reversible error in finding reasonable cause to believe the council was a "labor organization" within the meaning of Section 2(5) of the Act.[28] The appellate court affirmed the district court's finding of reasonable cause based, inter alia, on

> evidence that the Council compels local unions to incorporate a particular jurisdictional dispute resolution procedure into their collective bargaining agreements, and the Council itself may act as a mediator in such disputes [and] make direct contacts with employers to . . . facilitate resolution of labor disputes.

821 F.2d at 517. In this respect, the court of appeals observed that the statutory phrase "dealing with employers" has been broadly construed, and reasonably could encompass such contacts with employers even if the council were not, itself, the designated bargaining representative of the employees on whose behalf it was acting.

In *Walsh v. Hotel & Restaurant Employees Local 26 (Hancock Ins.)*,[29] the district court was presented with a claim that the union violated Section 8(b)(4)(B) by threatening to disrupt the running of the Boston Marathon because it was sponsored by John Hancock Ins. Co. (Hancock), the owner of a hotel with which the union had a labor dispute. The court found reasonable cause to believe that both Hancock and the Boston Athletic Association, organizer of the marathon, were neutrals in the union's

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[27] 821 F.2d 516.

[28] Sec. 2(5) of the Act, 29 U.S.C. § 152(5), defines a labor organization as:

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

[29] 671 F.Supp. 75 (D.Mass.).

dispute with the hotel. Thus, although Hancock owned the hotel, it was operated under a management contract with Hotels of Distinction, Inc. (Distinction). The responsibility for labor relations policies at the hotel was left to Distinction and there was no evidence that Hancock had injected itself into the conduct of those labor policies. The court also found reasonable cause to believe the union had made statements and engaged in conduct demonstrating that it intended to engage in picketing or other acts of restraint and coercion designed to disrupt the running of the marathon and that such conduct, in these circumstances, violated Section 8(b)(4)(B). Accordingly, the court entered an order pursuant to Section 10(l) enjoining the union from, inter alia, picketing or otherwise obstructing or interfering with the running of the April 20, 1987 Boston Marathon or from picketing any property of Hancock other than the hotel with signs referring to the union's labor dispute with the hotel. Finally, however, the court concluded that it would not be appropriate to issue an order that would restrict the union's first amendment right to use "purely informative signs, pamphlets, handbills and the like . . . describ[ing] the existence of a labor dispute, so long as the publication of these matters is not attended by action designed to restrain or coerce the actions of others.[30]

[30] The union's appeal from this order was pending in the First Circuit at the close of the fiscal year. No. 87-1485.

IX

Contempt Litigation

In fiscal year 1987, 117 cases were referred to the Contempt Litigation Branch for consideration of contempt or other appropriate action to achieve compliance with court decrees, as compared to 124 cases in fiscal year 1986. Voluntary compliance was achieved in 19 cases during the fiscal year, without the necessity of filing a contempt petition, while in 59 others it was determined that contempt was not warranted.

During the same period, 20 civil contempt proceedings were instituted,[1] as compared to 1 criminal and 24 civil proceedings in

[1] *NLRB v. Carpenters Local 162, et al.*, in No. 86-7110 (9th Cir.)(civil contempt for secondary picketing, and against Bay Counties District Council for sanctioning and supporting union's unlawful picketing); *Green Country Casting Corp. v. NLRB*, in No. 82-1957 (10th Cir.) (civil contempt against company and its president for discharging employee in retaliation for union activity); *NLRB v. Illinois Disposal Services*, in No. 85-3024 (7th Cir.) (civil contempt for failing to reinstate or properly reinstate discriminatees and failing to remove disciplinary action from personnel records); *NLRB v. Carlow's Ltd.*, in No. 83-3371 (3d Cir.) (civil contempt for refusing to provide information to bargaining representative and making unilateral changes in terms of employment); *NLRB v. John Mahoney Construction Co.*, in No. 85-1607 (1st Cir.) (civil contempt for failure to bargain with union); *NLRB v. Spartan Business Equipment*, in Nos. 85-4085 and 86-4093 (2d Cir.) (civil contempt for failure to comply with consent backpay judgment); *NLRB v. Teamsters Local 164*, in No. 83-5689 (6th Cir.) (civil contempt against union and its president for failure to properly reinstate discriminatees, laying off discriminatee, and unilaterally changing terms of employment); *NLRB v. Esco Elevators*, in No. 86-4054 (5th Cir.) (civil contempt for failure to properly reinstate employee); *NLRB v. Arnold Cleaners*, in No. 86-5758 (6th Cir.) (civil contempt for failure to bargain and furnish information to union); *NLRB v. Stambaugh's Air Service*, in No. 83-3439 (3d Cir.) (civil contempt for delay in furnishing bargaining information, failure to bargain in good faith, and implementation of unilateral changes); *NLRB v. Ana Moya de Gaudier, et al.*, in No. 82-1267 (1st Cir.) (civil contempt against individual proprietors for failure to pay backpay judgment); *NLRB v. Iron Workers Local 15 Joint Apprenticeship Committee*, in Nos. 86-4060 and 86-4080 (2d Cir.) (civil contempt against Joint Apprenticeship Committee for failure to offer reinstatement to discriminatee, to post notices, and to pay court costs); *NLRB v. R. M. Eyre & Associates*, in No. 86-7612 (9th Cir.) (civil contempt for failure to provide payroll records sufficient to calculate contributions owed to union trust funds); *NLRB v. Newspaper & Mail Deliverers*, in No. 86-4004 (2d Cir.) (assessment of fines for failure to obey prior purgation order directing posting and publication of notices); *NLRB v. Laborers Local 1140*, in No. 19297 (8th Cir.) (assessment of compliance fines against union for engaging in secondary boycott activity in violation of previous contempt purgation order imposing prospective fines); *NLRB v. Fancy Trims, Inc., et al.*, in No. 85-4016 (2d Cir.) (assessment of fines against company and its alleged alter egos for failure to comply with prior contempt purgation order directing reinstatement, bargaining, and notice posting and imposition of prospective fines against companies' secretary-treasurer); *NLRB v. Laborers Fund Corp.*, in No. 81-7401 (9th Cir.) (assessment of previously suspended fines against Fund; assessment of fines against Fund Administrator David Johnson for delays in restoration of terms and conditions of employment imposed by prior contempt purgation order); *NLRB v. Mine Workers, et al.*, in Nos. 80-1680, 82-1998, 84-2307, and 85-1003 (4th Cir.) (assessment of $10,000 per violation fines against the International, District 29, and Locals 2271, 6529, 1525, 2542, 6608, 1440, 2248, and 4942; $15,000 per violation fine against District 17; and $1000 per violation fines against individual union officers; and directing the International's payment of $40,000 compliance bond for respondents' failure to sign, post, mail, and distribute notices and other contempt documents as required by previous contempt adjudication); *NLRB v. Mine Workers, et al.*, in

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fiscal year 1986. These included six motions for assessment of fines[2] and two motions for writs of body attachment.[3]

Twenty-three contempt or equivalent adjudications were awarded in favor of the Board,[4] including 5 where compliance

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Nos. 80–1680, 82–1998, 84–2307, and 85–1003 (4th Cir.) (assessment of additional fines against District 17 for failure to pay previously assessed fine and assessment of fine and body attachment against District 17 President Robert Phalen); *NLRB v. Newspaper & Mail Deliverers*, in No. 86–4004 (2d Cir.) (assessment of additional daily fines for failure to pay $25,000 fine previously assessed because of refusal to obey prior purgation order directing posting and publication of notices, and for writ of body attachment against Union Business Representative Joseph Cotter).

[2] *NLRB v. Newspaper & Mail Deliverers*, in No. 86–4004 (2d Cir.); *NLRB v. Laborers Local 1140*, in No. 19297 (8th Cir.); *NLRB v. Fancy Trims, Inc., et al.*, in No. 85–4016 (2d Cir.); *NLRB v. Laborers Fund Corp.*, in No. 81–7401 (9th Cir.); *NLRB v. Mine Workers, et al.*, in Nos. 80–1680, 82–1998, 84–2307, and 85–1003 (4th Cir.); *NLRB v. Mine Workers, et al.*, in Nos. 80–1680, 82–1998, 84–2307, and 85–1003 (4th Cir.).

[3] *NLRB v. Mine Workers, et al.*, in Nos. 80–1680, 82–1998, 84–2307, and 85–1003 (4th Cir.); *NLRB v. Newspaper & Mail Deliverers*, in No. 86–4004 (2d Cir.).

[4] *NLRB v. Kelly Construction*, in No. 84–5893 (6th Cir.) (default civil contempt adjudication for failure to reinstate discriminatees, remove disciplinary action from personnel files, provide payroll records, and post notices; order directing reimbursement of Board costs and attorneys' fees and imposing prospective noncompliance fines of $1000 per violation and $100 per day); *NLRB v. Gonzalez*, in Nos. 79–4055 and 84–4124 (2d Cir.) (default civil contempt adjudication for failure to pay backpay; order directing reimbursement of Board costs and attorneys' fees and imposing prospective noncompliance fines of $1000 per day); *NLRB v. Service Employees Local 77*, in No. 83–7193 (9th Cir.) (civil contempt for secondary picketing; order directing reimbursement of Board costs and attorneys' fees and imposing prospective noncompliance fines of $10,000 per violation and $500 per day); *NLRB v. Newspaper & Mail Deliverers*, in No. 86–4004 (2d Cir.) (civil contempt for failure to post notices; order directing reimbursement of Board costs and attorneys' fees and imposing prospective noncompliance fines of $10,000 per violation and $1000 per day); *NLRB v. Southwire Co.*, 801 F.2d 1252 (11th Cir.) (rehearing denied) (civil contempt for violating 8(a)(1) provisions of judgment; order directing reimbursement of Board costs and attorneys' fees and imposing prospective noncompliance fines of $10,000 per violation); *NLRB v. Food & Commercial Workers Local 1357*, in No. 86–3459 (3d Cir.) (consent contempt adjudication for failure to make proper offer of reinstatement to discriminatee); *NLRB v. Sentry Detective Agency*, in No. 85–7081 (9th Cir.) (default civil contempt adjudication for failure to offer reinstatement to discriminatees, remove disciplinary action from personnel records, provide payroll records, and post notices; order directing reimbursement of Board costs and attorneys' fees and imposing prospective noncompliance fines of $1000 per day); *NLRB v. Cuyahoga Carpet Installation*, in No. 84–5122 (6th Cir.) (consent order directing payment of $90,000 in backpay and imposing prospective noncompliance fines of $2000 per day); *Green Country Casting Corp. v. NLRB*, in No. 82–1957 (10th Cir.) (consent contempt adjudication against company and its president for discharging employee in retaliation for union activity; order directing partial reimbursement of Board costs and attorneys' fees, payment of $22,500 in backpay, and imposing prospective noncompliance fines of $5000 per violation and $500 per day); *NLRB v. John Mahoney Construction Co.*, in No. 85–1607 (1st Cir.) (default civil contempt adjudication for failure to bargain with union; order directing reimbursement of Board costs and attorneys' fees and imposing prospective noncompliance fines of $10,000 per violation and $1000 per day, and fines against company agents of $100 per day); *NLRB v. Wayne Drapery Service*, in No. 86–5141 (6th Cir.) (default civil contempt adjudication for failure to post notices, furnish payroll records, and notify Region of compliance steps; order directing reimbursement of Board costs and attorneys' fees and imposing prospective noncompliance fines of $10,000 per violation and $1000 per day); *NLRB v. Mine Workers, et al. (L & J Equipment)*, in No. 84–3497 (3d Cir.) (consent contempt adjudication for engaging in 8(b)(1)(A) picket line misconduct; order imposing prospective noncompliance fines of $10,000 per violation against union, $1000 per violation against individual respondents, and $750 per violation against union members); *NLRB v. Teamsters Local 70*, in No. 82–7451 (9th Cir.) (consent contempt adjudication for secondary conduct; order directing reimbursement of Board costs and expenses, not including attorneys' fees, and imposing prospective noncompliance fines of $5000 per violation and $1000 per day); *NLRB v. J & S Air Freight*, in No. 84–3005 (7th Cir.) (consent contempt adjudication for refusing to execute collective-bargaining agreement reached with union; order directing reimbursement of Board costs and attorneys' fees and imposing prospective noncompliance fines of $1000 per day); *NLRB v. Arnold Cleaners*, in No. 86–5758 (6th Cir.) (default contempt adjudication for failure to bargain and furnish information to union; order directing reimbursement of Board costs and attorneys' fees and payment of union's bargaining costs and expenses, and imposing prospective noncompliance fines of $5000 per violation and $500 per day and fines of $200 per day against officers or agents impeding compliance); *NLRB v. Teamsters Local 85*, in Nos. 71–1293 and 25,983 (9th

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fines were assessed,[5] 2 in which writs of body attachment were issued,[6] and 1 in which the court ordered the civil arrest of the respondent's agent and assessed fines against the respondent.[7] Two cases were consummated by settlement orders requiring compliance,[8] one was withdrawn on cessation of the respondent's business,[9] and one was remanded to the Board for further proceedings.[10]

Cir.) (consent contempt adjudication for secondary conduct in violation of prior contempt adjudication; order assessing $22,500 in previously imposed fines, imposing increased prospective noncompliance fines of $12,500 per violation and $7500 per day, and directing partial reimbursement of Board costs and attorneys' fees); *NLRB v. Mine Workers, et al.*, in Nos. 80–1680, 82–1998, 84–2307, and 85–1003 (4th Cir.) (consent contempt adjudication for engaging in 8(b)(1)(A) conduct; order assessing $125,000 in previously imposed fines against District 17 in violation of prior contempt adjudication, imposing a three-state cease-and-desist order for further 8(b)(1)(A) conduct directed against employees of any employer involved in disputes with any coal-related employer, directing establishment of International education, monitoring, and disciplinary system for future strike-related and picketing activity, imposing increased prospective noncompliance fine of $15,000 per violation against District 17, $10,000 per violation against the International and other named affiliates, $1000 per violation against union officers, $750 per violation against pickets and union members, and additional $10,000 fines for conduct resulting in serious bodily harm, and directing International to establish $40,000 compliance bond); *NLRB v. Newspaper & Mail Deliverers*, in No. 86–4004 (2d Cir.) (assessment of $25,000 fines for violation of prior contempt adjudication directing posting and publication of notices; order directing reimbursement of Board costs and attorneys' fees and imposing prospective noncompliance fines of $10,000 per violation and $1000 per day, and $100 per day against officers); *NLRB v. Fancy Trims, Inc., et al.*, in No. 85–4016 (2d Cir.) (default contempt adjudication assessing $10,000 plus $1000 per day in previously imposed fines against company and its alter egos for violation of prior contempt adjudication directing reinstatement of discriminatees, bargaining, and notice posting; order imposing increased prospective noncompliance fines of $25,000 per violation and $2500 per day against the companies and noncompliance fines of $250 per day against companies' secretary-treasurer, and directing reimbursement of Board's costs and attorneys' fees); *NLRB v. Roofers Local 30, et al.*, in No. 86–3324 (3d Cir.) (consent contempt adjudication assessing $45,000 in previously imposed fines for violation of prior contempt adjudication directing cessation of further 8(b)(1)(A) conduct; order imposing increased prospective noncompliance fines of $100,000 per violation against the union and $5000 per violation against individual respondents or other union officers and agents, and directing reimbursement of Board costs and attorneys' fees); *NLRB v. Laborers Fund Corp., et al.*, in No. 81–7401 (9th Cir.) (contempt adjudication for violation of prior contempt adjudication directing restoration of employment conditions unilaterally rescinded by the Fund and cessation of unilateral conduct; order issuing writ of body attachment against Fund Administrator David Johnson, assessing $5000 in previously imposed fines and suspending remainder against Fund, imposing prospective noncompliance fines of $100 per day against individual members of Fund's board of trustees and Fund administrator, directing Fund Attorney Victor Van Bourg to reimburse the Board for $2500 for excess costs and attorneys' fees incurred by the Board because of his misconduct in violation of 28 U.S.C. § 1927 and Fed.R.Civ.P 11, and dismissing criminal contempt proceedings as unnecessary); *NLRB v. Perschke Hay & Grain*, in No. 78–1741 (7th Cir.) (writ of body attachment for failure to negotiate installment agreement acceptable to Board for payment of backpay, in violation of prior contempt adjudication); *NLRB v. James K. Sterritt, Inc., et al.*, in Nos. 75–4044 and 76–4253 (2d Cir.) (order directing rearrest of James K. Sterritt until he purges prior contempt by paying $144,545 in backpay; reimbursing Board costs and attorneys' fees and assessing $1,343,500 in compliance fines, 90 percent to be remitted on full purgation within 30 days; and adjudging additional individual and corporate respondents in contempt as aiders and abettors).

[5] *NLRB v. Teamsters Local 85*, in Nos. 71–1293 and 25,983 (9th Cir); *NLRB v. Mine Workers, et al.*, in Nos. 80–1680, 82–1998, 84–2307, and 85–1003 (4th Cir.); *NLRB v. Newspaper & Mail Deliverers*, in No. 86–4004 (2d Cir.); *NLRB v. Fancy Trims, Inc., et al.*, in No. 85–4016 (2d Cir.); *NLRB v. Roofers Local 30, et al.*, in No. 86–3324 (3d Cir.)

[6] *NLRB v. Perschke Hay & Grain*, in No. 78–1741 (7th Cir.); *NLRB v. James K. Sterritt, Inc., et al.*, in Nos. 75–4044 and 76–4253 (2d Cir.)

[7] *NLRB v. Laborers Fund Corp., et al.*, in No. 81–7401 (9th Cir.).

[8] *NLRB v. Perschke Hay & Grain*, in No. 78–1741 (7th Cir.) (settlement order directing installment payments of backpay and abating writ of body attachment on condition of full compliance); *NLRB v. Allied Riggers*, in Nos. 85–5493 and 86–5066 (6th Cir.) (consent order providing for payment of backpay).

[9] *NLRB v. Illinois Disposal Service*, in No. 85–3024 (7th Cir.) (order dismissing proceedings on Board's motion following discontinuance of company's business).

[10] *NLRB v. Gamco Industries*, 820 F.2d 289 (9th Cir.).

One motion for a protective restraining order was filed.[11]

During the fiscal year, the Contempt Litigation Branch collected $321,417 in fines and $530,228 in backpay, while recouping $57,054 in court costs and attorneys' fees incurred in contempt litigation.

A number of the proceedings during the fiscal year were noteworthy. In *NLRB v. Laborers Fund Corp.*,[12] the Ninth Circuit issued an order finding the Fund in civil contempt for the third time, based on its failure to restore working conditions, its undue delay in furnishing its records to the Board for inspection and copying, its delay in posting notices, and its failure to file sworn compliance reports and to pay previously assessed fines and attorneys' fees. The court assessed fines of $100 a day for each day of noncompliance by the Fund, with a provision for suspension of all but $5000 if compliance was achieved within 15 days of entry of the order. In addition, the court issued a writ of body attachment against the Fund secretary, David Johnson, to coerce compliance, and awarded $2500 in excess costs and attorneys' fees against Fund Attorney Victor Van Bourg because of his "intentional misconduct" in misleading the court concerning the extent of the Fund's compliance, in violation of 28 U.S.C. § 1927 and Fed.R.Civ.P. 11.

In *NLRB v. Southwire Co.*,[13] the Eleventh Circuit found that the company had violated prior judgments and a prior contempt adjudication of the court by prohibiting the lawful distribution of union campaign materials; by threatening employees with discharge for engaging in such activities; by disparately enforcing a no-littering policy to discourage the distribution of union literature; by discriminatorily preventing employees from displaying union campaign materials on their lockers and personal effects while permitting the display of nonwork-related materials; by permitting the posting of nonwork-related materials on company bulletin boards but denying employee requests to post prounion materials; and by engaging in other acts of interference, restraint, and coercion. In entering its adjudication, the court rejected the company's assertion that a 13-year old judgment was too stale to support a contempt adjudication. The court also entered a prospective fine against the company of $10,000 per violation despite its finding that the company violations were not flagrant, and that some had been committed by supervisors in disregard of company instructions to the contrary.

In *NLRB v. Newspaper & Mail Deliverers*, two orders issued during the fiscal year.[14] On October 30, 1986, the Second Circuit issued an order finding that the union was in civil contempt of a judgment issued on March 14, 1986, because of its failure to

[11] *NLRB v. Amason, Inc.*, in No. 84-1561 (4th Cir.).
[12] 124 LRRM 2083 (special master's report), affd. 124 LRRM 2078.
[13] 801 F.2d 1252.
[14] No. 86-4004 (2d Cir.).

post and publish Board notices. It ordered the union to pay the Board's costs and attorneys' fees and entered a prospective fine of $10,000 for each subsequent violation and $1000 per day for each day of noncompliance. When the union continued its refusal to comply, a second contempt proceeding was commenced. On May 4, 1987, the court issued an order holding the union in further civil contempt and fining it $25,000 because of its prior contumacy.

A case of considerable interest in the development of the law of successorship liability in contempt proceedings was presented in *Gamco Industries.*[15] In that case a panel of the Ninth Circuit unanimously rejected the holding of the Sixth Circuit in *Great Lakes Chemical Corp. v. NLRB*[16] that due process requires that an employer's status as a successor bound by a prior decree entered against a predecessor must be determined in the first instance by the Board and cannot, except in rare cases, be decided initially by the court in contempt proceedings against the successor. Nevertheless, the court went on to hold, by a divided panel, that policy considerations of deferring to the Board's expertise and assuring unanimity of decisions militated against the court's exercising its jurisdiction to make the initial successorship determination except in the most clearcut case.[17] Deeming the case before it to be not such a clearcut case, the court remanded the proceedings to the Board to allow it to serve, in essence, as the court's special master on the successorship issue. Judge Leavy, in dissent, would have had the court decide successorship in the first instance, reasoning that contempt is purely a judicial function and the court alone has responsibility to define the scope of its own decrees. "Both judicial responsibility and economy to the parties urge that [the court] determine whether Galaxie is [Gamco's] 'successor'. . . . By confessing uncertainty, as the Court does today, we put in the hands of everyone against whom we rule the power to delay our enforcement by presenting something other than the 'clearest' case," he concluded. (820 F.2d at 294–295.)

During the fiscal year, the Board concluded extensive negotiations with the United Mine Workers of America and numerous of its affiliates and representatives, and reached a comprehensive settlement that resolved numerous unfair labor practice cases involving allegations of widespread strike misconduct in violation of the National Labor Relations Act and several outstanding Federal court orders. The Third and Fourth Circuits and two Federal district courts in West Virginia (in 10(j) proceedings) entered contempt adjudications against the Mine Workers.[18] These

[15] *NLRB v. Gamco Industries, et al.*, 820 F.2d 289 (9th Cir. 1987) (rehearing denied).
[16] 746 F.2d 334 (1984).
[17] Compare *Great Lakes* with *Computer Sciences Corp v. NLRB*, 677 F.2d 804 (11th Cir. 1982).
[18] *NLRB v. Mine Workers, et al.*, Nos. 80–1680, 82–1998, 84–2307, and 85–1003 (4th Cir.); *NLRB v. Mine Workers, et al.*, No. 84–3497 (3d Cir.); and district court cases.

court orders, which the Mineworkers did not oppose, and the simultaneous settlement of approximately 80 administrative charges pending before the Board resolved extensive litigation between the NLRB and the UMWA arising out of the union's selective strike campaign conducted in 1984–1985. Most of these cases involved violent conduct and property damage committed by the unions against certain affiliates of the A. T. Massey Coal Company in West Virginia and Kentucky. Other cases brought against the union involved charges of strike misconduct, secondary boycott activity, and unlawful recognitional picketing by the union directed against other coal industry employers in West Virginia, Kentucky, and Pennsylvania.

In April 1985, the Board obtained injunctions from the Federal district courts in West Virginia prohibiting the strike misconduct directed at certain Massey affiliates and others with whom Massey did business. In July 1985, the UMWA was held in contempt for violating those orders; in November 1985, the Board requested that the district courts find the union to be in further contempt of the orders and impose fines on the union and a number of individuals. Contempt petitions were also filed in the Third and Fourth Circuits in 1985, seeking to have the UMWA found in contempt of court for violating prior circuit court orders prohibiting the union from engaging in strike misconduct. After extensive negotiations during 1986, agreement was reached on a comprehensive settlement of these matters.

On April 24, 1987, a contempt adjudication was entered by the Fourth Circuit against the Mine Workers International, Districts 17 and 29, and Locals 1440, 1525, 2248, 2271, 2542, 4942, 6529, and 6608. The order imposes extensive obligations on the unions and anyone acting in concert with them in violation of the court decree. It prohibits unlawful picketing or strike activity against Massey and its affiliates or anyone doing business with Massey in whatever State such conduct should occur. Strike or picket line misconduct occurring in West Virginia, Kentucky, and Pennsylvania, which involves employees of any coal industry employer, is also prohibited. This three-state area has been the site of the vast majority of prior UMWA strike misconduct cases. Prospective noncompliance fines of $10,000 for each future violation of the court judgment have been ordered against the UMWA International and its affiliates. Officers and individual pickets and members of the UMWA are also subject to fines of $1000 and $750, respectively, for future violations. Up to $10,000 per violation in additional fines could be ordered by the court if the violations result in serious bodily injury. In addition, UMWA District 17, which violated a prior contempt order of the Fourth Circuit, was required to pay $125,000 for its unlawful conduct; future fines of $15,000 per violation are imposed against that district under the terms of the proposed order.

To ensure that future strikes within the three-state area are conducted in a lawful manner, the UMWA has been required to: (1) hold training sessions to instruct its members concerning their legal obligations under the court orders; (2) appoint responsible agents to be present at, and in charge of, each picketing location at all times; (3) inform the NLRB of future strike activity; and (4) maintain lists of assigned picketers. The UMWA International must also investigate charges of future strike misconduct, and impose discipline, where appropriate, on offending members. Such sanctions could involve removal from the picket line, discontinuance of strikers' benefits, and imposition of internal discipline, including expulsion from membership. Under the order, the International is required to direct its subordinate bodies to cease any unauthorized picketing which violates the contempt adjudication. The court's order also requires the union to give wide publicity to the court's action by reading and mailing the order to its members in the three-state area and by publishing it in local newspapers in areas where the contemptuous conduct occurred.

The settlement also provided that a contempt adjudication be entered in the Third Circuit containing similar provisions covering conduct directed at L & J Equipment Co., Inc. of Masontown, Pennsylvania, and anyone doing business with it; that adjudication was entered on July 20, 1987.

The U.S. district court contempt proceedings were resolved by entry of contempt adjudications requiring payment by the International of $100,000 in fines and over $14,000 in compensatory damages to various employers and individuals.

In addition to the Federal court proceedings, the UMWA agreed to resolve pending unfair labor practice charges through the entry of 6 formal settlements and 10 informal settlements. These settlements dispose of strike misconduct cases involving the UMWA International, 6 districts, and 21 locals. In the NLRB's Cincinnati Regional Office (Region 9) alone, covering parts of West Virginia and Kentucky, 73 pending cases, filed by a total of 14 separate employers, were settled. These formal settlements, which have been approved by the Board, provide for the entry of court orders against the unions which will permit the NLRB to bring contempt proceedings if they engage in future violations.

Finally, the fiscal year marked the successful conclusion of the long-running contempt litigation in *James K. Sterritt, Inc.*[19] The Board had awarded $79,393 to seven discriminatees in a 1976 supplemental decision and, when the respondent refused to comply with the court's enforcement judgment, the Board sought and obtained a contempt adjudication in the Second Circuit against the respondent and its owner. Only after extensive

[19] *NLRB v. James K. Sterritt, Inc., et al.*, Nos. 75-4044 and 76-4253 (2d Cir.).

subsequent litigation was the Agency able to achieve full compliance, more than 11 years after the Board had liquidated backpay and some 13 years after the discriminatory layoffs.

During this period, the respondent and members of his family engaged in various schemes of avoidance to defeat recovery. Fraudulent conveyances of property, bankruptcy filings under three different chapters of the Bankruptcy Code, and the creation of alter ego corporations through which the respondent continued to conduct its trucking operations were but a few of the strategies resorted to by the respondent. Body attachment proved unsuccessful when the respondent obtained an ex parte release on alleged medical incapacity to endure confinement.

In 1985, however, after engaging in extensive discovery under the auspices of the bankruptcy court, the Board developed a compelling record of fraudulent intrafamilial transactions which resulted not only in proof of liability of additional respondents but also in the dismissal of various bankruptcy proceedings and the removal of the automatic bankruptcy stay.

Utilizing state collection procedures, the Board obtained a restraining order which prevented the respondent's principal customer from paying any monies to the respondent. Because the customer, despite the outstanding court orders, assisted the respondent in its efforts to evade compliance by agreeing to transfer its trucking account to a new alter ego of the respondent, and by participating in certain related schemes calculated to conceal from the Board the true nature of the respondent's actions, the Board in 1986 filed a new motion in the Second Circuit in which it alleged that the customer, a nonparty to a court judgment, was bound by the judgment as an aider and abettor, and therefore was jointly and severally liable by aiding and abetting the respondent's evasion of the court's directives. In addition, the Board again sought the civil arrest of the respondent's owner, and named the new alter ego and two additional family members as the respondents in contempt.

Following trial, a special master sustained virtually all of the Board's allegations, including the allegation of aider-and-abettor liability. By order of August 17, 1987, the Second Circuit adjudicated all the respondents in contempt and directed Sterritt's rearrest.

Following entry of this order, a settlement was reached with all the respondents, including the principal customer, which provided for payment of full backpay and interest totaling $153,669.06, compliance fines in the amount of $25,000, and approximately $70,000 in costs and attorneys' fees to the Board. The Board consented to holding the arrest order in abeyance pending full compliance with the court's directives.

X

Special Litigation

A. Litigation Involving the Freedom of Information Act

In *Injex Industries v. NLRB*,[1] the District Court for the Northern District of California granted the Board's Motion for Summary Judgment and denied disclosure of impounded election ballots. The United Automobile, Aerospace and Agricultural Implement Workers of America (the union) had filed an election petition with the Board. Two days prior to the election, the union also filed charges of unfair labor practices. The Board allowed the election to occur and impounded the ballots while it conducted an investigation of the charges. Subsequent to the election, the Board's General Counsel issued a complaint against Injex and the Board granted the union's request to withdraw its election petition over Injex's objection. The parties eventually settled the unfair labor practice proceeding. Injex then made a request for disclosure of the impounded ballots under the Freedom of Information Act (the FOIA). When the Board denied the request, Injex filed suit in district court. The court granted the Board's Motion for Summary Judgment based on two theories. First, the court observed that the decisions the Board had made concerned representation proceedings which are not generally reviewable by a district court. The court held that because the Board had impounded the ballots pursuant to its authority under its Rules and Regulations (29 C.F.R. § 102.67(b)) and the National Labor Relations Act (29 U.S.C. § 159), the *Leedom v. Kyne*[2] exception to the rule of nonreviewability of Board representation decisions did not apply. Accordingly, because the court viewed the FOIA request as an attempt by Injex to circumvent this rule, the court concluded that the request was properly rejected.

Secondly, the court held that Exemption 7(A) of the FOIA (5 U.S.C. § 552(b)(7)(A)) protected the ballots from disclosure. Injex had conceded that the ballots were "records compiled for law enforcement purposes," the first prong of Exemption 7(A). The court determined that the second prong of Exemption 7(A), that disclosure could "reasonably be expected to interfere with enforcement proceedings," had also been satisfied. Quoting

[1] Civil No. C-86-3850.
[2] 358 U.S. 184 (1958).

NLRB v. Waterman Steamship Corp.,[3] the court noted that "control over the election proceeding and the determination of the steps necessary to conduct [the] election fairly [are] matters which Congress entrusted to the Board alone." The court then concluded that disclosure of the ballots would be "contrary to the statutory scheme established by Congress" because a party other than the Board would be tallying the ballots; disclosure would thus undercut the Board's decision and purpose for impounding the ballots and approving withdrawal of the election petition. The court further noted that to allow such disclosure through the FOIA would raise the concern of the manipulation of elections and the use of the tally for improper purposes.

B. Litigation Involving the Equal Access to Justice Act

The Seventh Circuit issued four decisions during this year applying the Equal Access to Justice Act. In *Sonicraft, Inc. v. NLRB*,[4] the Seventh Circuit granted the Board's motion to dismiss as untimely Sonicraft's appeal of the Board's denial of an award of attorney's fees under 5 U.S.C. § 504. The Board denial issued September 26, 1986, and on October 30, 1986, the court received by mail Sonicraft's petition for review postmarked October 27, 1986. The court held that the appeal was filed when received, and that because the 30-day EAJA deadline is jurisdictional, the petition was accordingly untimely; the misleading advice Sonicraft claimed to have received from the court clerk's office, to the effect that a petition mailed within 30 days would be timely, could not enlarge the court's jurisdiction. Finally, the court found, contrary to Sonicraft's contention, that the Board's Rule adding 3 days for mailing to certain filing deadlines was not applicable to questions of appellate court jurisdiction.

In *Western Publishing Co. v. NLRB*,[5] the Seventh Circuit again affirmed the Board's motion to dismiss an appeal of a Board denial of an EAJA award. Western had filed its petition for review with the court almost 9 months after the Board Order issued. The court, citing *Sonicraft, Inc. v. NLRB*, supra, held that the 30-day time limitation is jurisdictional and that it lacked the power to waive it. Further, it held that the 1985 amendments to EAJA's time limitation applies to cases such as this, in which only the fee petition was pending on the effective date of the EAJA amendments. To hold otherwise, the court stated, would be contrary to the legislative intent to expedite the review process. Further, because the parties can be charged with knowledge of the law, the court reasoned that there was no unfairness in applying the deadlines to them. Accordingly, Western's petition for review was dismissed.

[3] 309 U.S. 206, 226 (1940).
[4] 814 F.2d 385.
[5] 821 F.2d 459.

In *NLRB v. Quality C.A.T.V.*,[6] the Seventh Circuit denied Quality's application for attorney's fees under the EAJA (28 U.S.C. § 2412(d)(1)(A)). While the court had previously vacated and remanded to the Board its Order requiring reinstatement and backpay for two employees, the court in this case held that Quality was not entitled to EAJA fees because it was not yet the "prevailing party" as required by 28 U.S.C. § 2412(d). The court explained that the Board on remand could still order Quality to reinstate the two employees and provide them with backpay. Because the Board could still obtain all the relief it originally sought, the court held that Quality could not be found to have achieved any substantial success on the merits. In so finding, the court distinguished this case from its decision in *Continental Web Press v. NLRB*,[7] in which the court had held that the Board could not, on remand, reinstate its bargaining order; setting aside the bargaining order had been the company's main objective in the appellate court. In the circumstances of this case, the court found that it was appropriate to deny Quality's application for attorney's fees "at this time."

Finally, in *Adams & Westlake v. NLRB*,[8] the Seventh Circuit affirmed a Board Order denying an application for attorney's fees and expenses under the EAJA. In the underlying proceedings, the administrative law judge found that Adams & Westlake (the company) was a successor employer, but that its refusal to recognize and bargain with the union was based on a good-faith doubt that the union continued to enjoy majority status according to unrebutted testimony by the company's general manager. While the judge had described this witness as one who sought to "tailor his testimony to fit the needs of [the company's] defense," the judge chose to credit his testimony in this regard and to reject the General Counsel's argument that the company's delay in raising the good-faith doubt defense was evidence of its after-the-fact fabrication. Therefore, the judge recommended dismissal of the complaint. No exceptions were filed and the Board adopted the recommended Order. Thereafter, the Board upheld the judge's dismissal of the company's application for fees under the EAJA on the basis that the General Counsel's position in issuing the complaint and proceeding to a hearing and decision was substantially justified.

The Seventh Circuit agreed. First, the court noted that the General Counsel had prevailed on the issue of the company's successor status. Because there is a presumption of continued union majority status, it was the company's burden to establish its good-faith doubt; here, the General Counsel reasonably doubted the "quality" of the general manager's testimony and whether his asserted good-faith doubt existed at the time of the refusal to

[6] Docket Nos. 86-1811 and 86-1988.
[7] 767 F.2d 321, 323 (1985).
[8] 814 F.2d 1161.

bargain or was later fabricated. Moreover, in view of the fact that the unit consisted of 14 employees, the court noted that if the judge had accepted the General Counsel's argument that one of the seven employee statements relied on by the company's general manager was unreliable, the company's defense would have failed. Accordingly, the court concluded that substantial evidence supported the Board's conclusion that the General Counsel's position was substantially justified, and that no fees were warranted here.

C. Litigation Involving the Board's Jurisdiction

In *Electrical Workers IBEW Local 3 v. NLRB*,[9] the District Court for the Southern District of New York dismissed a request for declaratory judgment, finding that it lacked jurisdiction to review the complained-of Board representation decision. Local 3, a nonguard union, sought to organize and represent a group of employees who monitored a fire management safety system. The Regional Director dismissed Local 3's election petition because the "technicians" it sought to represent were found to be guards within the meaning of Section 9(b)(3) of the Act. The Board denied Local 3's request for review. The union then filed suit in the district court seeking a declaration that the Board violated a mandate imposed by the Act. The court noted that the Board has wide discretion under Section 9(b) and that its decisions regarding representation proceedings are generally nonreviewable. The court found that the Board decision here was consistent with prior Board cases. The court readily dismissed Local 3's argument that the *Leedom v. Kyne*[10] exception to nonreviewability applied in this instance. The court stated that "*Kyne* only applies when there has been a violation of a specific statutory mandate." It concluded that the Board was far from violating such a mandate and was, in fact, "obeying the directive of Section 9(b)(3) when it dismissed the plaintiff's petition." The court also dismissed Local 3's assertion that the Board had permanently deprived the "technicians" of union representation, noting that the employees were "guards" and as such could join a guard union.

In *Pipefitters Local 537 v. Dotson*,[11] the District Court for the District of Columbia dismissed a request for injunctive relief against the Board, which had dismissed a representation petition and revoked the certification of an international union over the union's objections. In the spring of 1985, an agent of Pipefitters Local 537 began to organize the eight pipefitters employed by MMI. On May 3, the union agent filed a representation petition and five signed authorization cards with the Board. The petition was submitted only in the Local parent's name, i.e., United Asso-

[9] Docket 86 Civ. 7204.
[10] 358 U.S. 183 (1958).
[11] Docket 86-1960.

ciation of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (the International). However, the authorization cards, the campaign literature, and the correspondence with the Board were all in the Local's name. Although the International took no part in the election, the Board certified it as the employees' representative because its name appeared on the petition and ballots. The employer, MMI, refused to bargain with the Local because it was not the certified union. The union then filed a petition to correct the error and amend the certification by substituting the Local for the International. The Board, reversing the Regional Director's granting of the Local's petition, dismissed the amended and underlying petition and revoked the International's certification. It found the election and certification to be invalid because of the error in placing the International's name on the petition and ballots.

The Local filed suit in the district court seeking injunctive relief under *Leedom v. Kyne*. The court found that the Board's representation decisions are not final and thus not subject to judicial review. It further found that the *Kyne* exception to this rule "is limited to the extraordinary situation where the NLRB violates a 'clear and mandatory' statutory provision." The court reasoned that although Section 9(c)(1) requires that the Board certify the results of an election, it does not compel the Board to certify a union that was not named on the petition or ballots. The court concluded, contrary to the Local's assertion, that the Board had not violated a clear and specific statutory mandate. Therefore, the court found *Kyne* inapplicable and dismissed the complaint because it lacked subject matter jurisdiction to review the Board's action. Finally, the court noted that the Local was not without a remedy because it could file a new petition naming it, and not the International, as the employees' representative.

D. Litigation Involving the Bankruptcy Code

In *In re S.T.R. Corp.*,[12] the United Food and Commercial Workers Union and its pension and health and welfare trust funds filed charges against STR, a corporation in Chapter 11 bankruptcy. STR sought to stay the Board proceedings. The bankruptcy court concluded that the automatic stay provisions of Section 362 of the Bankruptcy Code (11 U.S.C. § 362) do not apply to a governmental unit enforcing its policy or regulatory power, citing *NLRB v. Evans Plumbing Co.*[13] and cases which consistently upheld that decision. In addition, the bankruptcy court concluded that 11 U.S.C. § 105, which gives the bankruptcy court the power to issue a discretionary stay, did not permit the court to stay the Board's proceeding because the "wording

[12] 66 B.R. 49 (Bankr. N.D.Ohio).
[13] 639 F.2d 2291 (5th Cir. 1981).

of Section 105 fails to grant the Court additional jurisdiction; it simply allows the Court to protect jurisdiction granted elsewhere in the Bankruptcy Code." The court concluded that although it had jurisdiction over the estate and the debtor "and may order the debtor to take any action or abstain therefrom," it did not have jurisdiction to enjoin governmental agencies from adjudicating the regulatory laws which they enforce.

In *In re Lakes Drywall,*[14] the Painters and Carpenters Unions had filed unfair labor practice charges against Lakes, which was in Chapter 7 liquidation, and Sound Construction Specialties, Inc., which was in Chapter 11 reorganization. The issues before the Board were whether Lakes had diverted work customarily performed by Lakes' employees to Sound; whether Sound, as the alter ego to Lakes, was bound by the collective-bargaining agreements in effect between Lakes and the two unions; and whether the two companies were obligated to maintain the terms and conditions of the two contracts postexpiration. The bankruptcy court granted an initial stay of the Board's proceedings pending its ruling on whether Lakes and Sound were entitled to further injunctive relief.

Subsequently, the court issued a decision concluding that the outstanding issues in both Board proceedings presented questions of Federal labor law, and neither the Supreme Court's *Bildisco* decision,[15] nor the subsequent amendments to the Code, resolved the jurisdictional question. Recognizing the "overwhelming weight of authority" that unfair labor practice proceedings are not automatically stayed and that the issues of alter ego and backpay are questions for the Board to determine, the court held that a stay was not appropriate under either Section 365 or 105 of the Code because the Board would not seek to obtain assets on conclusion of its proceedings outside the jurisdiction of the bankruptcy court.

Ridley Janitorial Service v. Service Employees[16] involved an attempt by the debtor employer in a bankruptcy proceeding under Chapter 11 to enjoin the Board from holding a representation election. The court held that the automatic stay provisions of the Code did not apply to the Board proceeding, and that although the court had power under Code Section 105 to grant injunctive relief when "there is threatened harm or interference with the sound administration of the estate," an injunction was not appropriate in this case. Mindful of "the posture of noninterference advocated by the Supreme Court in *NLRB v. Bildisco and Bildisco,*" the bankruptcy court determined that a balancing of the interests between the parties did not show that the debtor would be prejudiced by allowing the proposed election to take place. The court noted that enjoining the election would deprive the

[14] Docket B84-03064 (Bankr. W.D.Wash.).
[15] *NLRB v. Bildisco & Bildisco,* 465 U.S. 513 (1984).
[16] Adv. No. 87-0103-2-1 (Bankr. W.D.Mo.).

workers "not only of the chance to accept organization, but also the opportunity to reject it." In addition, refusing to permit the employees to organize would deprive them of the opportunity to bargain with one voice for change in such areas as working conditions.

E. The General Counsel's Prosecutorial Authority

In *Rex Reed v. Collyer*,[17] the executive vice president of the National Right to Work Legal Defense Foundation sought district court review of the General Counsel's refusal to issue an unfair labor practice complaint on allegations of an unlawful preferential prehire agreement between the United Automobile Workers and the General Motors Corporation at its new Saturn plant. The court dismissed Reed's request for an order requiring the issuance of an unfair labor practice complaint, finding that it lacked subject matter jurisdiction over the General Counsel's prosecutorial decision. The court based its decision on (1) the language of the Act which provides that such decisions are final, (2) the legislative history of the Act which "exposes a clear recognition on the part of Congress that such discretion . . . was intended," and (3) the Supreme Court's consistent upholding of the General Counsel's unreviewable discretion, followed by all the circuits.

[17] Docket No. 1-87-0004 (M.D.Tenn.).

INDEX OF CASES DISCUSSED

APPENDIX

GLOSSARY OF TERMS USED IN STATISTICAL TABLES

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

Adjusted Cases

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

Advisory Opinion Cases

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

Agreement of Parties

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

Amendment of Certification Cases

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

Backpay

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

Backpay Hearing

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

Backpay Specification

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

Case

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

Certification

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

Challenges

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

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

Charge

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

Complaint

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

Election, Runoff

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

Election, Stipulated

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

Eligible Voters

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

Fees, Dues, and Fines

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

Fines

See "Fees, Dues, and Fines."

Formal Action

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

Formal Agreement (in unfair labor practice cases)

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

Compliance

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

Dismissed Cases

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

Dues

See "Fees, Dues, and Fines."

Election, Consent

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

Election, Directed

Board-Directed

An election conducted by the Regional Director pursuant to a decision and direction of election by the Board. Postelection rulings are made by the Regional Director or by the Board.

Regional Director-Directed

An election conducted by the Regional Director pursuant to a decision and direction of election issued by the Regional Director after a hearing. Postelection rulings are made by the Regional Director or by the Board.

Election, Expedited

An election conducted by the Regional Director pursuant to a petition filed within 30 days of the commencement of picketing in a situation in which a meritorious 8(b)(7)(C) charge has been filed. The election is conducted under priority conditions and without a hearing unless the Regional Director believes the proceeding raises questions which cannot be decided without a hearing.

Postelection rulings on objections and/or challenges are made by the Regional Director and are final and binding unless the Board grants an appeal on application by one of the parties.

Election, Rerun

An election held after an initial election has been set aside either by the Regional Director or by the Board.

Informal Agreement (in unfair labor practice cases)

A written agreement entered into between the party charged with committing an unfair labor practice, the Regional Director, and (in most cases) the charging party requiring the charged party to take certain specific remedial action as a basis for the closing of the case. Cases closed in this manner are included in "adjusted" cases.

Injunction Petitions

Petitions filed by the Board with respective U.S. district courts for injunctive relief under Section 10(j) or Section 10(e) of the Act pending hearing and adjudication of unfair labor practice charges before the Board. Also, petitions filed with the U.S. court of appeals under Section 10(e) of the Act.

Jurisdictional Disputes

Controversies between unions or groupings of employees as to which employees will perform specific work. Cases involving jurisdictional disputes are received by the Board through the filing of charges alleging a violation of Section 8(b)(4)(D). They are initially processed under Section 10(k) of the Act which is concerned with the determination of the jurisdictional dispute itself rather than with a finding as to whether an unfair labor practice has been committed. Therefore, the failure of a party to comply with the Board's determination of dispute is the basis for the issuance of an unfair labor practice complaint and the processing of the case through usual unfair labor practice procedures.

Objections

Any party to an election may file objections alleging that either the conduct of the election or the conduct of a party to the election failed to meet the Board's standards. An election will be set aside if eligible employee-voters have not been given an adequate opportunity to cast their ballots, in secrecy and without hindrance from fear or other interference with the expression of their free choice.

Petition

See "Representation Cases." Also see "Other Cases—AC, UC, and UD" under "Types of Cases."

Proceeding

One or more cases included in a single litigated action. A "proceeding" may be a combination of C and R cases consolidated for the purpose of hearing.

Representation Cases

This term applies to cases bearing the alphabetical designations RC, RM, or RD. (See "R Cases" under "Types of Cases," this glossary, for specific definitions of these terms.) All three types of cases are included in the term "representation" which deals generally with the problem of which union, if any, shall represent employees in negotiations with their employer. The cases are intitated by the filing of a petition by a union, an employer, or a group of employees.

Representation Election

An election by secret ballot conducted by the Board among the employees in an appropriate collective-bargaining unit to determine whether the employees wish to be represented by a particular labor organization for purposes of collective bargaining. The tables herein reflect only final elections which result in the issuance of a certification of representative if a union is chosen, or a certification of results if the majority has voted for "no union."

Situation

One or more unfair labor practice cases involving the same factual situation. These cases are processed as a single unit of work. A situation may include one or more CA cases, a combination of CA and CB cases, or combination of other types of C cases. It does not include representation cases.

Types of Cases

General: Letter designations are given to all cases depending upon the subsection of the Act allegedly violated or otherwise describing the general nature of each case. Each of the letter designations appearing below is descriptive of the case it is associated with.

C Cases (unfair labor practice cases)

A case number which contains the first letter designation C, in combination with another letter, i.e., CA, CB, etc., indicates that it involves a charge that an unfair labor practice has been committed in violation of one or more subsections of Section 8.

CA: A charge that an employer has committed unfair labor practices in violation of Section 8(a)(1), (2), (3), (4), or (5), or any combination thereof.

CB: A charge that a labor organization has committed unfair labor practices in violation of Section 8(b)(1), (2), (3), (5), or (6), or any combination thereof.

CC: A charge that a labor organization has committed unfair labor practices in violation of Section 8(b)(4)(i) and/or (A), (B), or (C), or any combination thereof.

CD: A charge that a labor organization has committed an unfair labor practice in violation of Section 8(b)(4)(i) or (ii)(D). Preliminary actions under Section 10(k) for the determination of jurisdictional disputes are processed as CD cases. (See "Jurisdictional Disputes" in this glossary.)

CE: A charge that either a labor organization or an employer, or both jointly, have committed an unfair labor practice in violation of Section 8(e).

CG: A charge that a labor organization has committed unfair labor practices in violation of Section 8(g).

CP: A charge that a labor organization has committed unfair labor practices in violation of Section 8(b)(7)(A), (B), or (C), or any combination thereof.

R Cases (representation cases)

A case number which contains the first letter designation R, in combination with another letter, i.e., RC, RD, RM, indicates that it is a petition for investigation and determination of a question concerning representation of employees, filed under Section 9(c) of the act.

RC: A petition filed by a labor organization or an employee alleging that a question concerning representation has arisen and seeking an election for determination of a collective-bargaining representative.

RD: A petition filed by employees alleging that the union previously certified or currently recognized by the employer as their collective-bargaining representative no longer represents a majority of the employees in the appropriate unit and seeking an election to determine this.

RM: A petition filed by an employer alleging that a question concerning representation has arisen and seeking an election for the determination of a collective-bargaining representative.

Other Cases

AC: (Amendment of Certification cases): A petition filed by a labor organization or an employer for amendment of an existing certification to reflect changed circumstances, such as changes in the name or affiliation of the labor organization involved or in the name or location of the employer involved.

AO: (Advisory Opinion cases): As distinguished from the other types of cases described above, which are filed in and processed by Regional Offices of the Board, AO or "advisory opinion" cases are filed directly with the Board in Washington and seek a determination as to whether the Board would or would not assert jurisdiction, in any given situation on the basis of its current standards, over the party or parties to a proceeding pending before a state or territorial agency or a court. (See subpart H of the Board's Rules and Regulations, Series 8, as amended.)

UC: (Unit Clarification cases): A petition filed by a labor organization or an employer seeking a determination as to whether certain classification of 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.

SUBJECT INDEX TO ANNUAL REPORT TABLES

Readers are encouraged to communicate with the Agency as to questions on the tables by writing to the Office of the Executive Secretary, National Labor Relations Board, 1717 Pennsylvania Avenue, NW., Washington, D.C. 20570.

Table 1.—Total Cases Received, Closed, and Pending, Fiscal Year 1987[1]

	Total	Identification of filing party					
		AFL-CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
All cases							
Pending October 1, 1986	19,989	8,134	1,935	740	1,139	6,348	1,693
Received fiscal 1987	39,639	13,879	4,121	835	1,714	15,528	3,562
On docket fiscal 1987	59,626	22,011	6,056	1,575	2,853	21,876	5,255
Closed fiscal 1987	39,687	13,485	4,132	938	1,676	15,845	3,611
Pending September 30, 1987	19,939	8,526	1,924	637	1,177	6,031	1,644
Unfair labor practice cases[2]							
Pending October 1, 1986	17,380	6,938	1,498	673	941	5,853	1,477
Received fiscal 1987	32,043	10,798	2,583	657	1,252	13,911	2,842
On docket fiscal 1987	49,422	17,735	4,081	1,330	2,193	19,764	4,319
Closed fiscal 1987	32,113	10,364	2,619	759	1,203	14,232	2,936
Pending September 30, 1987	17,309	7,371	1,462	571	990	5,532	1,383
Representation cases[3]							
Pending October 1, 1986	2,404	1,158	418	65	181	437	145
Received fiscal 1987	6,994	2,934	1,505	168	422	1,423	542
On docket fiscal 1987	9,397	4,091	1,923	233	603	1,860	687
Closed fiscal 1987	6,965	2,973	1,472	168	428	1,410	514
Pending September 30, 1987	2,432	1,118	451	65	175	450	173
Union-shop deauthorization cases							
Pending October 1, 1986	58	—	—	—	—	58	—
Received fiscal 1987	186	—	—	—	—	186	—
On docket fiscal 1987	244	—	—	—	—	244	—
Closed fiscal 1987	196	—	—	—	—	196	—
Pending September 30, 1987	48	—	—	—	—	48	—
Amendment of certification cases							
Pending October 1, 1986	15	5	6	0	4	0	0
Received fiscal 1987	43	28	0	2	9	0	4
On docket fiscal 1987	58	33	6	2	13	0	4
Closed fiscal 1987	49	30	5	2	9	0	3
Pending September 30, 1987	9	3	1	0	4	0	1
Unit clarification cases							
Pending October 1, 1986	132	33	13	2	13	0	71
Received fiscal 1987	373	119	33	8	31	8	174
On docket fiscal 1987	505	152	46	10	44	8	245
Closed fiscal 1987	364	118	36	9	36	7	158
Pending September 30, 1987	141	34	10	1	8	1	87

[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.

Table 1A.—Unfair Labor Practice Cases Received, Closed, and Pending, Fiscal Year 1987[1]

	Total	Identification of filing party					
		AFL–CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
CA cases							
Pending October 1, 1986	13,520	6,766	1,486	662	892	3,713	1
Received fiscal 1987	22,475	10,718	2,560	624	1,193	7,380	0
On docket fiscal 1987	35,994	17,483	4,046	1,286	2,085	11,093	1
Closed fiscal 1987	22,246	10,287	2,594	727	1,139	7,499	0
Pending September 30, 1987	13,748	7,196	1,452	559	946	3,594	1
CB cases							
Pending October 1, 1986	3,053	164	11	9	25	2,135	709
Received fiscal 1987	7,791	66	21	16	43	6,530	1,115
On docket fiscal 1987	10,844	230	32	25	68	8,665	1,824
Closed fiscal 1987	8,013	62	24	16	38	6,729	1,144
Pending September 30, 1987	2,831	168	8	9	30	1,936	680
CC cases							
Pending October 1, 1986	527	3	0	0	13	1	510
Received fiscal 1987	1,136	5	0	15	8	0	1,108
On docket fiscal 1987	1,663	8	0	15	21	1	1,618
Closed fiscal 1987	1,185	6	0	12	14	0	1,153
Pending September 30, 1987	478	2	0	3	7	1	465
CD cases							
Pending October 1, 1986	99	3	1	0	3	0	92
Received fiscal 1987	294	6	1	1	4	0	282
On docket fiscal 1987	393	9	2	1	7	0	374
Closed fiscal 1987	291	6	1	1	4	0	279
Pending September 30, 1987	102	3	1	0	3	0	95
CE cases							
Pending October 1, 1986	47	0	0	1	7	2	37
Received fiscal 1987	45	1	1	0	1	1	41
On docket fiscal 1987	92	1	1	1	8	3	78
Closed fiscal 1987	59	1	0	1	6	2	49
Pending September 30, 1987	33	0	1	0	2	1	29
CG cases							
Pending October 1, 1986	11	0	0	0	0	0	11
Received fiscal 1987	28	0	0	0	1	0	27
On docket fiscal 1987	39	0	0	0	1	0	38
Closed fiscal 1987	30	0	0	0	0	0	30
Pending September 30, 1987	9	0	0	0	1	0	8
CP cases							
Pending October 1, 1986	123	2	0	1	1	2	117
Received fiscal 1987	274	2	0	1	2	0	269
On docket fiscal 1987	397	4	0	2	3	2	386
Closed fiscal 1987	289	2	0	2	2	2	281
Pending September 30, 1987	108	2	0	0	1	0	105

[1] See Glossary of terms for definitions.

Table 1B.—Representation Cases Received, Closed, and Pending, Fiscal Year 1987[1]

	Total	Identification of filing party					
		AFL–CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
RC cases							
Pending October 1, 1986	1,829	1,158	418	65	181	7	—
Received fiscal 1987	5,036	2,934	1,505	168	422	7	—
On docket fiscal 1987	6,864	4,091	1,923	233	603	14	—
Closed fiscal 1987	5,052	2,973	1,472	168	428	11	—
Pending September 30, 1987	1,812	1,118	451	65	175	3	—
RM cases							
Pending October 1, 1986	145	—	—	—	—	—	145
Received fiscal 1987	542	—	—	—	—	—	542
On docket fiscal 1987	687	—	—	—	—	—	687
Closed fiscal 1987	514	—	—	—	—	—	514
Pendmg September 30, 1987	173	—	—	—	—	—	173
RD cases							
Pending October 1, 1986	430	0	0	0	0	430	—
Received fiscal 1987	1,416	0	0	0	0	1,416	—
On docket fiscal 1987	1,846	0	0	0	0	1,846	—
Closed fiscal 1987	1,399	0	0	0	0	1,399	—
Pending September 30, 1987	447	0	0	0	0	447	—

[1] See Glossary for denfinitions of terms.

Table 2.—Types of Unfair Labor Practices Alleged, Fiscal Year 1987

	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	22,475	100.0
8(a)(1)	3,336	14.8
8(a)(1)(2)	213	0.9
8(a)(1)(3)	8,219	36.6
8(a)(1)(4)	148	0.7
8(a)(1)(5)	7,073	31.5
8(a)(1)(2)(3)	235	1.0
8(a)(1)(2)(4)	4	0.0
8(a)(1)(2)(5)	130	0.6
8(a)(1)(3)(4)	536	2.4
8(a)(1)(3)(5)	2,274	10.1
8(a)(1)(4)(5)	20	0 1
8(a)(1)(2)(3)(4)	24	0 1
8(a)(1)(2)(3)(5)	131	0.6
8(a)(1)(2)(4)(5)	3	0.0
8(a)(1)(3)(4)(5)	108	0.5
8(a)(1)(2)(3)(4)(5)	21	0 1
Recapitulation[1]		
8(a)(1)[2]	22,475	100 0
8(a)(2)	761	3 4
8(a)(3)	11,548	51.4
8(a)(4)	864	3 8
8(a)(5)	9,760	43 4
B Charges filed against unions under Sec 8(b)		
Subsections of Sec. 8(b). Total cases	9,495	100.0
8(b)(1)	5,867	61 8
8(b)(2)	117	1 2
8(b)(3)	306	3 2
8(b)(4)	1,430	15 1
8(b)(6)	5	0.1
8(b)(7)	274	2 9
8(b)(1)(2)	1,073	11.3
8(b)(1)(3)	304	3.2
8(b)(1)(5)	3	0 0
8(b)(1)(6)	5	0 1
8(b)(2)(3)	8	0 1
8(b)(3)(5)	1	0 0
8(b)(1)(2)(3)	93	1.0
8(b)(1)(2)(5)	2	0.0
8(b)(1)(2)(6)	2	0 0
8(b)(1)(3)(5)	2	0 0
8(b)(1)(2)(3)(6)	2	0.0
8(b)(1)(2)(5)(6)	1	0.0
Recapitulation[1]		
8(b)(1)	7,354	77 5
8(b)(2)	1,298	13.7
8(b)(3)	716	7.5
8(b)(4)	1,430	15.1
8(b)(5)	9	0.1
8(b)(6)	15	0.2
8(b)(7)	274	2.9

Table 2.—Types of Unfair Labor Practices Alleged, Fiscal Year 1987—Continued

	Number of cases showing specific allegations	Percent of total cases
B1 Analysis of 8(b)(4)		
Total cases 8(b)(4)	1,430	100.0
8(b)(4)(A)	63	4.4
8(b)(4)(B)	984	68.8
8(b)(4)(C)	13	0 9
8(b)(4)(D)	294	20 6
8(b)(4)(A)(B)	65	4 5
8(b)(4)(A)(C)	1	0 1
8(b)(4)(B)(C)	7	0 5
8(b)(4)(A)(B)(C)	3	0.2
Recapitulation[1]		
8(b)(4)(A)	132	9 2
8(b)(4)(B)	1,059	74 1
8(b)(4)(C)	24	1 7
8(b)(4)(D)	294	20 6
B2. Analysis of 8(b)(7)		
Total cases 8(b)(7)	274	100.0
8(b)(7)(A)	55	20.1
8(b)(7)(B)	14	5 1
8(b)(7)(C)	188	68.6
8(b)(7)(A)(B)	2	0 7
8(b)(7)(A)(C)	11	4 0
8(b)(7)(B)(C)	2	0 7
8(b)(7)(A)(B)(C)	2	0 7
Recapitulation[1]		
8(b)(7)(A)	70	25 5
8(b)(7)(B)	20	7 3
8(b)(7)(C)	203	74 1
C Charges filed under Sec 8(e)		
Total cases 8(e)	45	100 0
Against unions alone	45	100.0
D Charges filed under Sec 8(g)		
Total cases 8(g)	28	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 1987[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	73	70	—	—	—	70	—	—	—	—	—	—	—
Complaints issued	4,295	3,252	2,630	314	109	—	3	2	3	14	49	23	105
Backpay specifications issued	70	58	52	4	0	—	0	0	0	0	0	2	0
Hearings completed, total	717	658	543	77	18	16	0	0	0	4	0	0	0
Initial ULP hearings	687	629	515	76	18	16	0	0	0	4	0	0	0
Backpay hearings	19	19	19	0	0	—	0	0	0	0	0	0	0
Other hearings	11	10	9	1	0	—	0	0	0	0	0	0	0
Decisions by administrative law judges, total	668	623	528	72	20	—	0	0	0	0	0	0	0
Initial ULP decisions	619	584	491	70	20	—	0	0	0	3	0	0	0
Backpay decisions	29	23	22	1	0	—	0	0	0	0	0	0	0
Supplemental decisions	20	16	15	1	0	—	0	0	0	0	0	0	0
Decisions and orders by the Board, total	1,599	1,007	759	152	46	18	0	0	1	3	6	13	9
Upon consent of parties:													
Initial decisions	130	64	44	17	0	—	0	0	0	1	0	0	2
Supplemental decisions	0	0	0	0	0	—	0	0	0	0	0	0	0
Adopting administrative law judges' decisions (no exceptions filed):													
Initial ULP decisions	254	176	140	25	8	—	0	0	0	0	2	0	1
Backpay decisions	0	0	0	0	0	—	0	0	0	0	0	0	0
Contested:													
Initial ULP decisions	1,124	715	540	99	35	18	0	0	1	2	4	11	5
Decisions based on stipulated record	24	19	16	3	0	—	0	0	0	0	0	0	0
Supplemental ULP decisions	20	11	8	0	2	—	0	0	0	0	0	0	1
Backpay decisions	47	22	11	8	1	—	0	0	0	0	0	2	0

[1] See Glossary of terms for definitions.

Table 3B.—Formal Actions Taken in Representation and Union Deauthorization Cases, Fiscal Year 1987[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	1,242	1,192	931	72	189	4
Initial hearings	1,051	1,026	805	63	158	4
Hearings on objections and/or challenges	191	166	126	9	31	0
Decisions issued, total	1,036	1,007	790	57	160	22
By Regional Directors	939	916	728	50	138	22
Elections directed	822	800	639	38	123	22
Dismissals on record	117	116	89	12	15	0
By Board	97	91	62	7	22	0
Transferred by Regional Directors for initial decision	23	22	10	4	8	0
Elections directed	1	1	1	0	0	0
Dismissals on record	22	21	9	4	8	0
Review of Regional Directors' decisions:						
Requests for review received	499	496	448	11	37	0
Withdrawn before request ruled upon	0	0	0	0	0	0
Board action on request ruled upon, total	340	329	280	13	36	0
Granted	63	58	48	2	8	0
Denied	275	269	230	11	28	0
Remanded	2	2	2	0	0	0
Withdrawn after request granted, before Board review	10	9	8	0	1	0
Board decision after review, total	74	69	52	3	14	0
Regional Directors' decisions:						
Affirmed	36	33	25	2	6	0
Modified	21	21	15	1	5	0
Reversed	17	15	12	0	3	0
Outcome:						
Election directed	51	50	39	3	8	0
Dismissals on record	23	19	13	0	6	0

Table 3B.—Formal Actions Taken in Representation and Union Deauthorization Cases, Fiscal Year 1987[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	991	941	800	34	107	11
By Regional Directors	265	241	207	9	25	8
By Board	726	700	593	25	82	3
In stipulated elections	673	652	552	23	77	4
No exceptions to Regional Directors' reports	453	435	385	13	37	4
Exceptions to Regional Directors' reports	220	217	167	10	40	0
In directed elections (after transfer by Regional Director)	50	45	38	2	5	0
Review of Regional Directors' supplemental decisions:						
Request for review received	152	148	133	4	11	0
Withdrawn before request ruled upon	2	2	2	0	0	0
Board action on request ruled upon, total	158	142	128	4	10	1
Granted	21	21	19	1	1	0
Denied	135	119	107	3	9	1
Remanded	2	2	2	0	0	0
Withdrawn after request granted, before Board review	0	0	0	0	0	0
Board decision after review, total	3	3	3	0	0	0
Regional Directors' decisions:						
Affirmed	1	1	1	0	0	0
Modified	1	1	1	0	0	0
Reversed	1	1	1	0	0	0

[1] See Glossary of terms for definitions.

Table 3C.—Formal Actions Taken in Amendment of Certification and Unit Clarification Cases, Fiscal Year 1987[1]

Types of formal actions taken	Cases in which formal actions taken	Formal actions taken by type of case	
		AC	UC
Hearings completed	111	6	98
Decisions issued after hearing	121	6	107
By Regional Directors	116	6	103
By Board	5	0	4
Transferred by Regional Directors for initial decision	3	0	2
Review of Regional Directors' decisions:			
Requests for review received	10	2	11
Withdrawn before request ruled upon	0	0	0
Board action on requests ruled upon, total	15	2	11
Granted	6	1	5
Denied	7	1	5
Remanded	2	0	1
Withdrawn after request granted, before Board review	0	0	0
Board decision after review, total	2	0	2
Regional Directors' decisions:			
Affirmed	1	0	2
Modified	1	0	0
Reversed	0	0	0

[1] See Glossary of terms for definitions.

Table 4.—Remedial Actions Taken in Unfair Labor Practice Cases Closed, Fiscal Year 1987[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]10,122	—	—	—	—	—	—	—	—	—	—	—	—
Notice posted	2,962	2,202	1,623	67	25	327	160	760	564	35	3	120	38
Recognition or other assistance withdrawn	26	26	15	0	3	7	1	—	—	—	—	—	—
Employer-dominated union disestablished	9	9	8	0	0	1	0	—	—	—	—	—	—
Employees offered reinstatement	2,455	2,455	1,989	66	44	257	99	—	—	—	—	—	—
Employees placed on preferential hiring list	1,038	1,038	864	25	21	99	29	—	—	—	—	—	—
Hiring hall rights restored	293	—	—	—	—	—	—	293	205	11	10	52	15
Objections to employment withdrawn	279	—	—	—	—	—	—	279	197	9	10	50	13
Picketing ended	407	—	—	—	—	—	—	407	403	2	0	2	0
Work stoppage ended	63	—	—	—	—	—	—	63	61	2	0	0	0
Collective bargaining begun	2,920	2,698	2,453	38	9	109	89	222	217	0	0	4	1
Backpay distributed	3,120	2,766	2,363	54	34	219	96	354	256	12	10	58	18
Reimbursement of fees, dues, and fines	1,464	1,068	888	26	21	102	31	396	308	11	10	53	14
Other conditions of employment improved	3,072	2,128	2,067	17	7	21	16	944	924	4	11	5	0
Other remedies	0	0	0	0	0	0	0	0	0	0	0	0	0
B. By number of employees affected:													
Employees offered reinstatement, total	4,307	4,307	3,297	262	185	312	251	—	—	—	—	—	—
Accepted	3,286	3,286	2,844	17	106	164	155	—	—	—	—	—	—
Declined	1,021	1,021	453	245	79	148	96	—	—	—	—	—	—
Employees placed on preferential hiring list	1,014	1,014	273	1	720	20	0	0	0	0	0	0	0
Hiring hall rights restored	2,134	—	—	—	—	—	—	2,134	2,105	7	0	5	17
Objections to employment withdrawn	45	—	—	—	—	—	—	45	34	0	0	3	8

Table 4.—Remedial Actions Taken in Unfair Labor Practice Cases Closed, Fiscal Year 1987[1]—Continued

Action taken	Total all	Remedial action taken by—											
		Employer						Union					
		Total	Pursuant to—					Total	Pursuant to—				
			Agreement of parties		Recommendation of administrative law judge	Order of—			Agreement of parties		Recommendation of administrative law judge	Order of—	
			Informal settlement	Formal settlement		Board	Court		Informal settlement	Formal settlement		Board	Court
Employees receiving backpay:													
From either employer or union	17,140	16,973	12,220	523	1,036	1,715	1,479	167	108	8	0	21	30
From both employer and union	206	202	35	0	0	152	15	4	4	0	0	0	0
Employees reimbursed for fees, dues, and fines:													
From either employer or union	3,010	637	512	28	16	80	1	2,373	2,228	4	0	104	37
From both employer and union	91	91	78	0	0	11	2	0	0	0	0	0	0
C. By amounts of monetary recovery, total	$40,635,903	$36,988,464	$22,353,556	$736,672	$4,220,394	$5,490,978	$4,186,864	$3,647,439	$301,542	$108,342	0	$63,897	$3,173,658
Backpay (includes all monetary payments except fees, dues, and fines)	39,457,732	35,943,830	21,527,974	735,648	4,085,394	5,427,881	4,166,933	3,513,902	212,997	104,985	0	52,050	3,143,870
Reimbursement of fees, dues, and fines	1,178,171	1,044,634	825,582	1,024	135,000	63,097	19,931	133,537	88,545	3,357	0	11,847	29,788

[1] See Glossary of terms for definitions. Data in this table are based on unfair labor practice cases that were closed during fiscal year 1987 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 1987[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	1,600	1,282	945	325	7	2	2	0	1	299	207	13	79	4	1	14
Tobacco manufacturers	16	15	3	12	0	0	0	0	0	1	1	0	0	0	0	0
Textile mill products	246	196	153	39	1	0	0	0	3	49	37	5	7	1	0	0
Apparel and other finished products made from fabric and similar materials	323	275	214	58	1	0	0	0	2	48	38	5	5	0	0	0
Lumber and wood products (except furniture)	520	375	328	41	4	0	0	0	2	127	91	14	22	1	14	3
Furniture and fixtures	424	345	278	63	3	0	0	0	1	71	41	10	20	3	0	5
Paper and allied products	600	501	364	122	15	0	0	0	0	93	69	3	21	2	0	4
Printing, publishing, and allied products	863	675	496	174	3	1	0	0	1	156	111	6	39	4	0	28
Chemicals and allied products	719	555	452	95	5	2	0	0	1	151	110	2	39	1	4	8
Petroleum refining and related industries	176	153	112	32	6	1	0	0	2	22	14	1	7	0	0	1
Rubber and miscellaneous plastic products	487	379	307	70	1	0	0	0	1	103	78	4	21	4	0	1
Leather and leather products	62	53	43	10	0	0	0	0	0	9	7	0	2	0	0	0
Stone, clay, glass, and concrete products	828	595	432	132	15	7	2	0	7	221	178	13	30	5	0	7
Primary metal industries	1,124	975	668	291	10	1	1	0	4	139	95	5	39	7	2	1
Fabricated metal products (except machinery and transportation equipment)	1,364	1,105	839	234	25	4	0	0	3	250	187	14	49	2	1	6
Machinery (except electrical)	1,263	1,038	759	245	13	14	2	0	5	211	151	16	44	6	2	6
Electrical and electronic machinery, equipment, and supplies	779	668	466	200	1	1	0	0	0	97	74	2	21	5	2	7
Aircraft and parts	412	394	249	144	0	1	0	0	0	17	12	0	5	1	0	0
Ship and boat building and repairing	323	294	218	63	7	1	0	0	5	29	29	0	0	0	0	0
Automotive and other transportation equipment	1,026	890	580	301	5	1	0	0	3	127	98	1	28	3	1	5
Measuring, analyzing, and controlling instruments; photographic, medical, and optical goods, watches and clocks	230	179	139	36	1	1	0	0	2	50	39	2	9	0	0	1
Miscellaneous manufacturing industries	1,059	840	524	296	11	5	0	0	4	194	150	9	35	17	0	8
Manufacturing	14,444	11,782	8,569	2,983	134	42	7	0	47	2,464	1,817	125	522	66	27	105

Table 5.—Industrial Distribution of Cases Received, Fiscal Year 1987[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	54	47	32	14	1	0	0	0	0	7	7	0	0	0	0	0
Coal mining	429	400	304	71	7	0	2	0	16	28	15	12	1	0	0	1
Oil and gas extraction	40	33	21	11	1	0	0	0	0	7	4	0	3	0	0	0
Mining and quarrying of nonmetallic minerals (except fuels)	58	41	28	5	6	0	0	0	2	15	10	1	4	0	1	1
Mining	581	521	385	101	15	0	2	0	18	57	36	13	8	0	1	2
Construction	4,273	3,607	1,723	945	604	193	17	0	125	636	440	148	48	5	0	25
Wholesale trade	1,926	1,438	1,081	297	45	8	3	0	4	462	306	40	116	14	1	11
Retail trade	3,591	2,773	2,091	549	79	7	4	0	43	756	415	102	239	28	2	32
Finance, insurance, and real estate	590	440	336	82	20	0	1	0	1	132	103	6	23	4	0	14
U.S. Postal Service	1,764	1,764	1,328	436	0	0	0	0	0	0	0	0	0	0	0	0
Local and suburban transit and interurban highway passenger transportation	507	358	261	91	3	0	3	0	0	143	134	1	8	2	0	4
Motor freight transportation and warehousing	2,007	1,584	1,161	358	47	4	3	0	11	402	322	28	52	5	0	16
Water transportation	328	298	123	132	39	2	0	0	2	27	21	1	5	1	1	1
Other transportation	343	273	199	55	15	3	0	0	1	65	59	0	6	2	0	3
Communication	925	779	472	293	11	3	0	0	0	135	81	5	49	1	0	10
Electric, gas, and sanitary services	633	476	358	107	8	1	1	0	1	139	105	8	26	0	1	17
Transportation, communication, and other utilities	4,743	3,768	2,574	1,036	123	13	7	0	15	911	722	43	146	11	2	51
Hotels, rooming houses, camps, and other lodging places	867	730	533	174	13	3	0	0	7	123	102	5	16	4	1	9
Personal services	275	184	154	30	0	0	0	0	0	82	44	6	32	7	0	2
Automotive repair, services, and garages	350	230	187	42	1	0	0	0	0	113	76	5	32	4	0	3
Motion pictures	242	222	117	90	6	5	2	0	2	18	13	4	1	0	0	2
Amusement and recreation services (except motion pictures)	367	302	215	75	8	0	0	0	4	59	34	5	20	5	0	1
Health services	2,438	1,783	1,470	268	15	1	0	28	1	563	429	17	117	19	4	69
Educational services	247	183	150	27	5	1	0	0	0	54	48	0	6	0	0	10
Membership organizations	433	388	222	149	10	7	0	0	0	28	24	2	2	0	1	16
Business services	1,513	1,192	846	304	29	8	1	0	4	295	236	12	47	10	3	13
Miscellaneous repair services	106	82	57	24	1	0	0	0	0	24	16	2	6	0	0	0
Legal services	39	32	22	7	1	2	0	0	0	5	4	0	1	0	0	2
Museums, art galleries, and botanical and zoological gardens	6	4	1	3	0	0	0	0	0	2	1	0	1	0	0	0

Table 5.—Industrial Distribution of Cases Received, Fiscal Year 1987[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	216	139	124	14	1	0	0	0	0	75	62	0	13	0	0	2
Miscellaneous services	135	104	72	26	5	0	1	0	0	28	22	1	5	1	1	1
Services	7,234	5,575	4,170	1,233	95	27	4	28	18	1,469	1,111	59	299	50	10	130
Public administration	493	375	218	129	21	4	0	0	3	107	86	6	15	8	0	3
Total, all industrial groups	39,639	32,043	22,475	7,791	1,136	294	45	28	274	6,994	5,036	542	1,416	186	43	373

[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 1987[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	116	88	64	21	3	0	0	0	0	27	22	1	4	1	0	0
New Hampshire	54	36	34	2	0	0	0	0	0	17	13	0	4	1	0	0
Vermont	38	29	23	6	0	0	0	0	0	8	5	1	2	0	0	1
Massachusetts	949	779	550	139	53	27	1	0	9	150	110	11	29	4	1	15
Rhode Island	164	125	109	14	2	0	0	0	0	33	27	2	4	3	1	2
Connecticut	669	569	449	115	3	0	0	2	0	90	74	3	13	3	0	7
New England	1,990	1,626	1,229	297	61	27	1	2	9	325	251	18	56	12	2	25
New York	3,627	2,906	1,764	993	83	30	5	8	23	652	556	25	71	8	1	60
New Jersey	1,441	1,114	828	218	37	22	2	1	6	301	229	14	58	16	0	10
Pennsylvania	2,557	2,068	1,492	425	101	29	3	0	18	446	366	14	66	15	3	25
Middle Atlantic	7,625	6,088	4,084	1,636	221	81	10	9	47	1,399	1,151	53	195	39	4	95
Ohio	2,417	1,991	1,462	418	85	8	2	1	15	398	279	29	90	11	2	15
Indiana	1,371	1,156	820	287	25	19	2	9	3	190	145	9	36	9	3	13
Illinois	2,488	2,036	1,298	512	129	49	1	1	46	417	308	25	84	18	7	10
Michigan	2,198	1,779	1,291	394	81	6	0	0	7	388	276	16	96	16	1	14
Wisconsin	788	630	464	129	25	5	2	2	3	137	104	9	24	3	1	17
East North Central	9,262	7,592	5,335	1,740	345	87	7	4	74	1,530	1,112	88	330	57	14	69
Iowa	320	233	178	42	8	4	0	0	1	79	51	7	21	0	1	7
Minnesota	547	384	264	74	31	4	0	0	11	159	105	11	43	2	0	2
Missouri	1,280	1,022	685	240	61	25	0	2	9	250	163	15	72	4	0	4
North Dakota	54	28	16	11	1	0	0	0	0	24	23	1	0	0	0	2
South Dakota	28	18	18	0	0	0	0	0	0	10	10	0	0	0	0	0
Nebraska	114	94	66	17	11	0	0	0	0	20	15	3	2	0	0	0
Kansas	211	171	124	41	4	1	0	0	1	38	26	2	10	0	0	2
West North Central	2,554	1,950	1,351	425	116	34	0	2	22	580	393	39	148	6	1	17
Delaware	73	49	42	6	0	1	0	0	0	21	16	1	4	1	0	2
Maryland	689	549	347	198	2	0	0	0	2	136	115	6	15	1	0	3

Table 6A.—Geographic Distribution of Cases Received, Fiscal Year 1987[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	212	174	128	44	2	0	0	0	0	29	24	0	5	0	0	9
Virginia	490	400	300	98	1	0	0	0	1	87	76	2	9	0	0	3
West Virginia	522	459	339	83	18	5	0	0	14	61	47	10	4	1	0	1
North Carolina	430	357	294	61	1	0	1	0	0	72	60	3	9	0	0	1
South Carolina	141	116	79	36	1	0	0	0	0	25	21	0	4	0	0	0
Georgia	713	597	439	143	9	6	0	0	0	114	81	8	25	0	0	2
Florida	900	739	586	144	5	0	1	0	3	156	134	5	17	0	0	5
South Atlantic	4,170	3,440	2,554	813	39	12	2	0	20	701	574	35	92	3	0	26
Kentucky	630	536	453	80	1	0	2	0	0	84	68	5	11	2	2	6
Tennessee	916	756	643	108	3	0	0	0	2	150	123	6	21	0	1	9
Alabama	457	348	276	69	2	0	0	0	1	104	83	3	18	0	1	4
Mississippi	261	233	209	24	0	0	0	0	0	27	22	1	4	0	0	1
East South Central	2,264	1,873	1,581	281	6	0	2	0	3	365	296	15	54	2	4	20
Arkansas	190	161	142	19	0	0	0	0	0	29	16	1	12	0	0	0
Louisiana	249	225	147	74	0	0	0	0	4	24	13	4	7	0	0	0
Oklahoma	265	213	166	45	2	0	0	0	0	52	40	5	7	0	0	0
Texas	1,116	978	697	273	6	0	0	0	2	133	94	8	31	0	2	3
West South Central	1,820	1,577	1,152	411	8	0	0	0	6	238	163	18	57	0	2	3
Montana	207	135	106	20	4	0	0	0	5	64	31	5	28	3	0	5
Idaho	118	97	71	13	0	13	0	0	0	21	12	0	9	0	0	0
Wyoming	32	20	15	5	0	0	0	0	0	12	4	1	7	0	0	0
Colorado	595	488	375	107	5	0	0	0	1	106	75	2	29	1	0	0
New Mexico	149	117	91	25	1	0	0	0	0	27	20	2	5	1	0	4
Arizona	393	307	215	83	5	0	1	0	3	81	71	1	9	0	0	5
Utah	116	87	63	24	0	0	0	0	0	26	20	2	4	0	0	3
Nevada	395	346	228	94	14	3	0	0	7	47	30	7	10	0	0	2
Mountain	2,005	1,597	1,164	371	29	16	1	0	16	384	263	20	101	5	0	19

Table 6A.—Geographic Distribution of Cases Received, Fiscal Year 1987[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	1,097	795	524	187	71	6	2	0	5	260	123	32	105	12	14	16
Oregon	482	354	266	64	19	0	2	0	3	110	49	22	39	7	0	11
California	5,588	4,538	2,795	1,418	205	29	18	9	64	948	546	193	209	36	2	64
Alaska	131	109	77	25	6	0	0	0	1	20	13	4	3	1	0	1
Hawaii	297	232	155	64	8	1	0	0	4	57	47	3	7	5	0	3
Guam	1	1	1	0	0	0	0	0	0	0	0	0	0	0	0	0
Pacific	7,596	6,029	3,818	1,758	309	36	22	9	77	1,395	778	254	363	61	16	95
Puerto Rico	327	254	197	52	2	1	0	2	0	68	47	2	19	1	0	4
Virgin Islands	26	17	10	7	0	0	0	0	0	9	8	0	1	0	0	0
Outlying areas	353	271	207	59	2	1	0	2	0	77	55	2	20	1	0	4
Total, all States and areas	39,639	32,043	22,475	7,791	1,136	294	45	28	274	6,994	5,036	542	1,416	186	43	373

[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 1987[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	669	569	449	115	3	0	0	2	0	90	74	3	13	3	0	7
Maine	116	88	64	21	3	0	0	0	0	27	22	1	4	1	0	0
Massachusetts	949	779	550	139	53	27	1	0	9	150	110	11	29	4	1	15
New Hampshire	54	36	34	2	0	0	0	0	0	17	13	0	4	1	0	0
Rhode Island	164	125	109	14	2	0	0	0	0	33	27	2	4	3	1	2
Vermont	38	29	23	6	0	0	0	0	0	8	5	1	2	0	0	1
Region I	1,990	1,626	1,229	297	61	27	1	2	9	325	251	18	56	12	2	25
Delaware	73	49	42	6	0	1	0	0	0	21	16	1	4	1	0	2
New Jersey	1,441	1,114	828	218	37	22	2	1	6	301	229	14	58	16	0	10
New York	3,627	2,906	1,764	993	83	30	5	8	23	652	556	25	71	8	1	60
Puerto Rico	327	254	197	52	2	1	0	2	0	68	47	2	19	1	0	4
Virgin Islands	26	17	10	7	0	0	0	0	0	9	8	0	1	0	0	0
Region II	5,494	4,340	2,841	1,276	122	54	7	11	29	1,051	856	42	153	26	1	76
District of Columbia	212	174	128	44	2	0	0	0	0	29	24	0	5	0	0	9
Maryland	689	549	347	198	2	0	0	0	2	136	115	6	15	1	0	3
Pennsylvania	2,557	2,068	1,492	425	101	29	3	0	18	446	366	14	66	15	3	25
Virginia	490	400	300	98	1	0	0	0	1	87	76	2	9	0	0	3
West Virginia	522	459	339	83	18	5	0	0	14	61	47	10	4	1	0	1
Region III	4,470	3,650	2,606	848	124	34	3	0	35	759	628	32	99	17	3	41
Alabama	457	348	276	69	2	0	0	0	1	104	83	3	18	0	1	4
Florida	900	739	586	144	5	0	1	0	3	156	134	5	17	0	0	5
Georgia	713	597	439	143	9	6	0	0	0	114	81	8	25	0	0	2
Kentucky	630	536	453	80	1	0	2	0	0	84	68	5	11	2	2	6
Mississippi	261	233	209	24	0	0	0	0	0	27	22	1	4	0	0	1
North Carolina	430	357	294	61	1	0	1	0	0	72	60	3	9	0	0	1

Table 6B.—Standard Federal Administrative Regional Distribution of Cases Received, Fiscal Year 1987[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	141	116	79	36	1	0	0	0	0	25	21	0	4	0	0	0
Tennessee	916	756	643	108	3	0	0	0	2	150	123	6	21	0	1	9
Region IV	4,448	3,682	2,979	665	22	6	4	0	6	732	592	31	109	2	4	28
Illinois	2,488	2,036	1,298	512	129	49	1	1	46	417	308	25	84	18	7	10
Indiana	1,371	1,156	820	287	25	19	2	0	3	190	145	9	36	9	3	13
Michigan	2,198	1,779	1,291	394	81	6	0	0	7	388	276	16	96	16	1	14
Minnesota	547	384	264	74	31	4	0	0	11	159	105	11	43	2	0	2
Ohio	2,417	1,991	1,462	418	85	8	2	1	15	398	279	29	90	11	2	15
Wisconsin	788	630	464	129	25	5	2	2	3	137	104	9	24	3	1	17
Region V	9,809	7,976	5,599	1,814	376	91	7	4	85	1,689	1,217	99	373	59	14	71
Arkansas	190	161	142	19	0	0	0	0	0	29	16	1	12	0	0	0
Louisiana	249	225	147	74	0	0	0	0	4	24	13	4	7	0	0	0
New Mexico	149	117	91	25	1	0	0	0	0	27	20	2	5	1	0	4
Oklahoma	265	213	166	45	2	0	0	0	0	52	40	5	7	0	0	0
Texas	1,116	978	697	273	6	0	0	0	2	133	94	8	31	0	2	3
Region VI	1,969	1,694	1,243	436	9	0	0	0	6	265	183	20	62	1	2	7
Iowa	320	233	178	42	8	4	0	0	1	79	51	7	21	0	1	7
Kansas	211	171	124	41	4	1	0	0	1	38	26	2	10	0	0	2
Missouri	1,280	1,022	685	240	61	25	0	2	9	250	163	15	72	4	0	4
Nebraska	114	94	66	17	11	0	0	0	0	20	15	3	2	0	0	0
Region VII	1,925	1,520	1,053	340	84	30	0	2	11	387	255	27	105	4	1	13
Colorado	595	488	375	107	5	0	0	0	1	106	75	2	29	1	0	0
Montana	207	135	106	20	4	0	0	0	5	64	31	5	28	3	0	5
North Dakota	54	28	16	11	1	0	0	0	0	24	23	1	0	0	0	2
South Dakota	28	18	18	0	0	0	0	0	0	10	10	0	0	0	0	0
Utah	116	87	63	24	0	0	0	0	0	26	20	2	4	0	0	3
Wyoming	32	20	15	5	0	0	0	0	0	12	4	1	7	0	0	0

Table 6B.—Standard Federal Administrative Regional Distribution of Cases Received, Fiscal Year 1987[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	1,032	776	593	167	10	0	0	0	6	242	163	11	68	4	0	10
Arizona	393	307	215	83	5	0	1	0	3	81	71	1	9	0	0	5
California	5,588	4,538	2,795	1,418	205	29	18	9	64	948	546	193	209	36	2	64
Hawaii	297	232	155	64	8	1	0	0	4	57	47	3	7	5	0	3
Guam	1	1	1	0	0	0	0	0	0	0	0	0	0	0	0	0
Nevada	395	346	228	94	14	3	0	0	7	47	30	7	10	0	0	2
Region IX	6,674	5,424	3,394	1,659	232	33	19	9	78	1,133	694	204	235	41	2	74
Alaska	131	109	77	25	6	0	0	0	1	20	13	4	3	1	0	1
Idaho	118	97	71	13	0	13	0	0	0	21	12	0	9	0	0	0
Oregon	482	354	266	64	19	0	2	0	3	110	49	22	39	7	0	11
Washington	1,097	795	524	187	71	6	2	0	5	260	123	32	105	12	14	16
Region X	1,828	1,355	938	289	96	19	4	0	9	411	197	58	156	20	14	28
Total, all States and areas	39,639	32,043	22,475	7,791	1,136	294	45	28	274	6,994	5,036	542	1,416	186	43	373

[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 1987[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	32,113	100 0	0.0	22,246	100.0	8,013	100.0	1,185	100.0	291	100.0	59	100.0	30	100.0	289	100.0
Agreement of the parties	9,231	28.7	100 0	7,045	31.6	1,395	17.4	640	54.0	2	0.6	18	30.5	10	33.3	121	41.8
Informal settlement	9,007	28.0	97.6	6,967	31.3	1,377	17.1	536	45.2	2	0.6	18	30.5	10	33.3	97	33.5
Before issuance of complaint	6,394	19.9	69.3	4,846	21.7	1,034	12.9	422	35.6	[2]	—	8	13 5	7	23.3	77	26.6
After issuance of complaint, before opening of hearing	2,542	7.9	27.5	2,053	9.2	340	4.2	114	9.6	2	0.6	10	16.9	3	10.0	20	6.9
After hearing opened, before issuance of administrative law judge's decision	71	0.2	0.8	68	0.3	3	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Formal settlement	224	0.7	2.4	78	0.3	18	0.2	104	8 7	0	0.0	0	0.0	0	0.0	24	8.3
After issuance of complaint, before opening of hearing	175	0.5	1.9	36	0.1	14	0.1	101	8.5	0	0.0	0	0 0	0	0.0	24	8.3
Stipulated decision	14	0.0	0.2	8	0.0	1	0.0	5	0.4	0	0.0	0	0.0	0	0 0	0	0.0
Consent decree	161	0.5	1.7	28	0.1	13	0 1	96	8.1	0	0.0	0	0.0	0	0.0	24	8.3
After hearing opened	49	0.2	0.5	42	0 1	4	0.0	3	0.2	0	0.0	0	0.0	0	0.0	0	0.0
Stipulated decision	12	0.0	0.1	10	0.0	2	0 0	0	0.0	0	0.0	0	0.0	0	0 0	0	0.0
Consent decree	37	0.1	0.4	32	0.1	2	0.0	3	0.2	0	0.0	0	0.0	0	0.0	0	0 0
Compliance with	754	2.3	100.0	575	2.5	145	1.8	27	2.2	0	0.0	3	5.0	0	0.0	4	1.3
Administrative law judge's decision	56	0.2	7 4	42	0.1	14	0.1	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Board decision	477	1.5	63.3	350	1.5	101	1.2	21	1.7	0	0.0	2	3.3	0	0 0	3	1.0
Adopting administrative law judge's decision (no exceptions filed)	137	0.4	18.2	105	0.4	20	0.2	10	0.8	0	0.0	0	0.0	0	0.0	2	0.6
Contested	340	1.1	45.1	245	1.1	81	1.0	11	0 9	0	0.0	2	3.3	0	0.0	1	0.3
Circuit court of appeals decree	219	0.7	29.0	181	0.8	30	0.3	6	0.5	0	0.0	1	1.6	0	0.0	1	0.3

Table 7.—Analysis of Methods of Disposition of Unfair Labor Practice Cases Closed, Fiscal Year 1987[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	2	0.0	0.3	2	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Withdrawal	9,928	30.9	100.0	7,194	32.3	2,244	28.0	353	29.7	0	0.0	19	32 2	13	43 3	105	36.3
Before issuance of complaint	9,620	30.0	96.9	6,940	31.1	2,204	27.5	345	29.1	[2]	——	17	28.8	13	43.3	101	34.9
After issuance of complaint, before opening of hearing	218	0 7	2.2	169	0.7	37	0.4	8	0.6	0	0.0	0	0.0	0	0.0	4	1.3
After hearing opened, before administrative law judge's decision	86	0.3	0 9	83	0.3	3	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0 0
After administrative law judge's decision, before Board decision	4	0.0	0.0	2	0 0	0	0 0	0	0.0	0	0 0	2	3.3	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	11,847	36.9	100 0	7,368	33.1	4,229	52.7	164	13.8	1	0.3	19	32.2	7	23.3	59	20.4
Before issuance of complaint	10,848	33.8	91 6	6,716	30.1	3,905	48.7	149	12 5	[2]	——	18	30.5	6	20.0	54	18.6
After issuance of complaint, before opening of hearing	90	0.3	0.8	49	0.2	41	0.5	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
After hearing opened, before administrative law judge's decision	10	0.0	0 1	2	0.0	7	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1	0.3
By administrative law judge's decision	3	0 0	0.0	3	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
By Board decision	780	2.4	6.6	522	2.3	243	3 0	11	0.9	0	0.0	1	1.6	0	0.0	3	1.0
Adopting administrative law judge's decision (no exceptions filed)	13	0.0	0.1	11	0.0	2	0 0	0	0 0	0	0 0	0	0.0	0	0.0	0	0.0
Contested	767	2.4	6.5	511	2.2	241	3.0	11	0.9	0	0.0	1	1.6	0	0.0	3	1.0
By circuit court of appeals decree	116	0.4	1.0	76	0.3	33	0.4	4	0.3	1	0.3	0	0 0	1	3.3	1	0.3
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)	288	0.9	0.0	0	0.0	0	0.0	0	0.0	288	98.9	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)	65	0.2	0.0	64	0.2	2	0.0	1	0.0	0	0.0	0	0.0	0	0.0	0	0.0

[1] See Table 8 for summary of disposition by stage. See Glossary of terms for definitions.
[2] CD cases closed in this stage are processed as jurisdictional disputes under Sec. 10(k) of the Act. See Table 7A.

Table 7A.—Analysis of Methods of Disposition of Jurisdictional Dispute Cases Closed Prior to Unfair Labor Practice Proceedings, Fiscal Year 1987[1]

Method and stage of disposition	Number of cases	Percent of total closed
Total number of cases closed before issuance of complaint	288	100.0
Agreement of the parties—informal settlement	136	47.2
Before 10(k) notice	95	33.0
After 10(k) notice, before opening of 10(k) hearing	36	12.5
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	5	1.7
Compliance with Board decision and determination of dispute	1	0.3
Withdrawal	113	39.2
Before 10(k) notice	97	33.7
After 10(k) notice, before opening of 10(k) hearing	10	3.5
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	6	2.1
After Board decision and determination of dispute	0	0.0
Dismissal	38	13.2
Before 10(k) notice	26	9.0
After 10(k) notice, before opening of 10(k) hearing	7	2.4
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	5	1.7

[1] See Glossary of terms for definitions.

Table 8.—Disposition by Stage of Unfair Labor Practice Cases Closed, Fiscal Year 1987[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	32,113	100.0	22,246	100.0	8,013	100.0	1,185	100 0	291	100.0	59	100.0	30	100.0	289	100.0
Before issuance of complaint	27,150	84.5	18,502	83.2	7,143	89.1	916	77.3	288	99.0	43	72.9	26	86.7	232	80.3
After issuance of complaint, before opening of hearing	3,025	9.4	2,307	10 4	432	5 4	223	18.8	2	0 7	10	16 9	3	10.0	48	16.6
After hearing opened, before issuance of administrative law judge's decision	233	0.7	211	0.9	17	0.2	4	0.3	0	0.0	0	0.0	0	0.0	1	0.3
After administrative law judge's decision, before issuance of Board decision	65	0.2	49	0.2	14	0.2	0	0.0	0	0.0	2	3.4	0	0.0	0	0 0
After Board order adopting administrative law judge's decision in absence of exceptions	165	0.5	131	0.5	22	0 3	10	0.8	0	0 0	0	0.0	0	0.0	2	0 7
After Board decision, before circuit court decree	1,128	3.4	777	3.4	322	4.0	22	1.9	0	0.0	3	5.1	0	0.0	4	1.4
After circuit court decree, before Supreme Court action	345	1.0	267	1 2	63	0.8	10	0.8	1	0 3	1	1.7	1	3.3	2	0.7
After Supreme Court action	2	0.0	2	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0 0	0	0.0

[1] See Glossary of terms for definitions.

Table 9.—Disposition by Stage of Representation and Union Deauthorization Cases Closed, Fiscal Year 1987[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	6,965	100.0	5,052	100.0	514	100 0	1,399	100.0	196	100.0
Before issuance of notice of hearing	2,416	34.7	1,400	27.7	276	53 7	740	52.9	158	80 6
After issuance of notice, before close of hearing	3,444	49.4	2,784	55.1	173	33.7	487	34.8	10	5.1
After hearing closed, before issuance of decision	121	1.7	90	1.8	6	1 2	25	1.8	3	1 5
After issuance of Regional Director's decision	930	13.4	739	14.6	53	10.3	138	9 9	24	12.2
After issuance of Board decision	54	0.8	39	0.8	6	1.2	9	0.6	1	0 5

[1] See Glossary of terms for definitions.

Table 10.—Analysis of Methods of Disposition of Representation and Union Deauthorization Cases Closed, Fiscal Year 1987[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	6,965	100.0	5,052	100 0	514	100.0	1,399	100.0	196	100.0
Certification issued, total	4,146	59.5	3,189	63.1	187	36.4	770	55.0	79	40.3
After:										
Consent election	91	1.3	63	1.2	4	0.8	24	1.7	9	4.6
Before notice of hearing	31	0.4	22	0.4	2	0.4	7	0.5	9	4.6
After notice of hearing, before hearing closed	60	0.9	41	0.8	2	0.4	17	1.2	0	0.0
After hearing closed, before decision	0	0.0	0	0.0	0	0.0	0	0 0	0	0.0
Stipulated election	3,393	48.7	2,599	51.4	148	28.8	646	46.2	46	23.5
Before notice of hearing	1,122	16.1	734	14.5	77	15.0	311	22.2	40	20.4
After notice of hearing, before hearing closed	2,249	32.3	1,848	36.6	70	13.6	331	23.7	5	2.6
After hearing closed, before decision	22	0.3	17	0.3	1	0.2	4	0.3	1	0.5
Expedited election	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Regional Director-directed election	661	9.5	526	10.4	35	6 8	100	7 1	24	12.2
Board-directed election	1	0.0	1	0 0	0	0.0	0	0.0	0	0.0
By withdrawal, total	1,315	18.9	1,059	21.0	93	18.1	163	11 7	8	4.1
Before notice of hearing	108	1.6	79	1 6	6	1 2	23	1 6	3	1.5
After notice of hearing, before hearing closed	999	14.3	815	16.1	79	15.4	105	7.5	4	2.0
After hearing closed, before decision	87	1.2	65	1.3	3	0.6	19	1.4	1	0.5
After Regional Director's decision and direction of election	121	1 7	100	2.0	5	1.0	16	1.1	0	0.0
After Board decision and direction of election	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
By dismissal, total	1,504	21.6	804	15.9	234	45.5	466	33.3	109	55.6
Before notice of hearing	1,155	16 6	565	11.2	191	37.2	399	28.5	106	54.1
After notice of hearing, before hearing closed	136	2.0	80	1.6	22	4.3	34	2.4	1	0 5
After hearing closed, before decision	12	0.2	8	0.2	2	0 4	2	0 1	1	0 5
By Regional Director's decision	148	2.1	113	2.2	13	2.5	22	1 6	0	0 0
By Board decision	53	0.8	38	0.8	6	1.2	9	0.6	1	0 5

[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 1987

	AC	UC
Total, all	49	364
Certification amended or unit clarified	10	41
Before hearing	0	0
By Regional Director's decision	0	0
By Board decision	0	0
After hearing	10	41
By Regional Director's decision	10	41
By Board decision	0	0
Dismissed	33	213
Before hearing	0	10
By Regional Director's decision	0	10
By Board decision	0	0
After hearing	33	203
By Regional Director's decision	32	201
By Board decision	1	2
Withdrawn	6	110
Before hearing	6	110
After hearing	0	0

Table 11.—Types of Elections Resulting in Certification in Cases Closed, Fiscal Year 1987[1]

Type of case	Total	Type of election				
		Consent	Stipulated	Board-directed	Regional Director-directed	Expedited elections under 8(b)(7)(C)
All types, total:						
Elections	4,168	100	3,382	7	679	0
Eligible voters	247,779	3,800	188,979	1,124	53,876	0
Valid votes	217,261	3,296	167,565	1,030	45,370	0
RC cases:						
Elections	3,149	62	2,580	4	503	0
Eligible voters	198,865	2,071	151,543	1,086	44,165	0
Valid votes	175,145	1,832	134,593	999	37,721	0
RM cases:						
Elections	165	4	124	0	37	0
Eligible voters	5,370	34	4,404	0	932	0
Valid votes	4,613	31	3,880	0	702	0
RD cases:						
Elections	755	23	631	1	100	0
Eligible voters	37,590	741	30,676	20	6,153	0
Valid votes	32,721	604	27,085	17	5,015	0
UD cases:						
Elections	99	11	47	2	39	0
Eligible voters	5,954	954	2,356	18	2,626	0
Valid votes	4,782	829	2,007	14	1,932	0

[1] See Glossary of terms for definitions.

Table 11A.—Analysis of Elections Conducted in Representation Cases Closed, Fiscal Year 1987

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	4,197	9	119	4,069	3,257	7	101	3,149	168	0	3	165	772	2	15	755
Rerun required	—	—	89	—	—	—	77	—	—	—	3	—	—	—	9	—
Runoff required	—	—	30	—	—	—	24	—	—	—	0	—	—	—	6	—
Consent elections	89	0	0	89	62	0	0	62	4	0	0	4	23	0	0	23
Rerun required	—	—	0	—	—	—	0	—	—	—	0	—	—	—	0	—
Runoff required	—	—	0	—	—	—	0	—	—	—	0	—	—	—	0	—
Stipulated elections	3,425	5	85	3,335	2,651	3	68	2,580	127	0	3	124	647	2	14	631
Rerun required	—	—	64	—	—	—	53	—	—	—	3	—	—	—	8	—
Runoff required	—	—	21	—	—	—	15	—	—	—	0	—	—	—	6	—
Regional Director-directed	666	4	22	640	528	4	21	503	37	0	0	37	101	0	1	100
Rerun required	—	—	13	—	—	—	12	—	—	—	0	—	—	—	1	—
Runoff required	—	—	9	—	—	—	9	—	—	—	0	—	—	—	0	—
Board-directed	17	0	12	5	16	0	12	4	0	0	0	0	1	0	0	1
Rerun required	—	—	12	—	—	—	12	—	—	—	0	—	—	—	0	—
Runoff required	—	—	0	—	—	—	0	—	—	—	0	—	—	—	0	—
Expedited—Sec. 8(b)(7)(C)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Rerun required	—	—	0	—	—	—	0	—	—	—	0	—	—	—	0	—
Runoff required	—	—	0	—	—	—	0	—	—	—	0	—	—	—	0	—

[1] The total of representation elections resulting in certification excludes elections held in UD cases which are included in the totals in Table 11.

Table 11B.—Representation Elections in Which Objections and/or Determinative Challenges Were Ruled On in Cases Closed, Fiscal Year 1987

	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	4,197	368	8.8	124	3.0	29	0.7	397	9.5	153	3.6
By type of case:											
In RC cases	3,257	313	9.6	101	3.1	28	0.9	341	10.5	129	4.0
In RM cases	168	11	6.5	4	2.4	0	0.0	11	6.5	4	2.4
In RD cases	727	44	5.7	19	2.5	1	0.1	45	5 8	20	2.6
By type of election:											
Consent elections	89	7	7.9	5	5.6	3	3.4	10	11.2	8	9.0
Stipulated elections	3,425	305	8 9	90	2.6	23	0 7	328	9.6	113	3.3
Expedited elections	0	0	—	0	—	0	—	0	—	0	—
Regional Director-directed elections	666	53	8 0	27	4.1	3	0.5	56	8.4	30	4.5
Board-directed elections	17	3	17.6	2	11.8	0	0.0	3	17.6	2	11.8

[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 1987[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	504	100.0	174	34.5	311	61.7	19	3.8
By type of case:								
RC cases	442	100.0	155	35.1	270	61.1	17	3.8
RM cases	11	100.0	3	27.3	7	63.6	1	9.1
RD cases	51	100.0	16	31.4	34	66.6	1	2.0
By type of election.								
Consent elections	11	100.0	6	54.5	5	45.5	0	—
Stipulated elections	383	100.0	129	33.7	241	62.9	13	3.4
Expedited elections	0	—	0	—	0	—	0	—
Regional Director-directed elections	106	100.0	39	36.8	61	57.5	6	5.7
Board-directed elections	4	100.0	0	—	4	100.0	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 1987[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	504	107	397	304	76.6	93	23.4
By type of case:							
RC cases	442	101	341	259	76.0	82	24.0
RM cases	11	0	11	9	81.8	2	18.2
RD cases	51	6	45	36	80.0	9	20.0
By type of election:							
Consent elections	11	1	10	6	60.0	4	40.0
Stipulated elections	383	55	328	257	78.4	71	21.6
Expedited elections	0	0	0	0	—	0	—
Regional Director-directed elections	106	50	56	40	71.4	16	28.6
Board-directed elections	4	1	3	1	33.3	2	66.7

[1] See Glossary of terms for definitions.
[2] See Table 11E for rerun elections held after objections were sustained. In 20 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 1987[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	67	100.0	22	32.8	45	67.2	31	46.3
By type of case.								
RC cases	55	100.0	20	36.4	35	63.6	27	49.1
RM cases	3	100.0	0	0.0	3	100.0	0	—
RD cases	9	100.0	2	22.2	7	77.8	4	44.4
By type of election·								
Consent elections	1	100.0	0	0.0	1	100.0	0	—
Stipulated elections	46	100.0	17	47.0	29	63.0	23	50.0
Expedited elections	0	—	0	—	0	—	0	—
Regional Director-directed elections	15	100.0	4	26.7	11	73.3	6	40.0
Board-directed elections	5	100.0	1	20.0	4	80.0	2	40.0

[1] See Glossary of terms for definitions.
[2] More than 1 rerun election was conducted in 22 cases; however, only the final election is included in this table.

Table 12.—Results of Union-Shop Deauthorization Polls in Cases Closed, Fiscal Year 1987

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	99	45	45.4	54	54.5	5,954	1,732	29.0	4,222	70.9	4,782	80.3	2,203	37.0
AFL–CIO unions	67	31	46.2	36	53.7	4,800	1,494	31.1	3,306	68.8	3,990	83.1	1,834	38.2
Teamsters	18	10	55.5	8	44.4	476	107	22.4	369	77.5	389	81.7	169	35.5
Other national unions	1	0	0.0	1	100.0	18	0	0.0	18	100.0	17	94.4	10	55.5
Other local unions	13	4	30 7	9	69.2	660	131	19.8	529	80.1	386	58.4	190	28 7

[1] Sec. 8(a)(3) of the Act requires that to revoke a union-shop agreement a majority of the employees eligible to vote must vote in favor of deauthorization.

Table 13.—Final Outcome of Representation Elections in Cases Closed, Fiscal Year 1987[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	2,398	43 4	1,041	1,041	—	—	—	1,357	153,453	55,054	55,054	—	—	—	98,399
Teamsters	1,147	36.6	420	—	420	—	—	727	44,014	12,426	—	12,426	—	—	31,588
Other national unions	103	45.6	47	—	—	47	—	56	7,114	3,448	—	—	3,448	—	3,666
Other local unions	193	50.3	97	—	—	—	97	96	8,478	4,267	—	—	—	4,267	4,211
1-union elections	3,841	41 8	1,605	1,041	420	47	97	2,236	213,059	75,195	55,054	12,426	3,448	4,267	137,864
AFL-CIO v AFL-CIO	29	51 7	15	15	—	—	—	14	4,374	1,387	1,387	—	—	—	2,987
AFL-CIO v. Teamsters	50	80.0	40	18	22	—	—	10	4,308	3,491	1,796	1,695	—	—	817
AFL-CIO v. National	21	52.4	11	7	—	4	—	10	3,325	1,388	1,141	—	247	—	1,937
AFL-CIO v. Local	83	91 6	76	19	—	—	57	7	11,619	10,821	4,282	—	—	6,539	798
Teamsters v National	5	80.0	4	—	2	2	—	1	309	96	—	39	57	—	213
Teamsters v. Local	13	92.3	12	—	6	—	6	1	780	649	—	506	—	143	131
Teamsters v Teamsters	3	100.0	3	—	3	—	—	0	212	212	—	212	—	—	0
National v. Local	2	100.0	2	—	—	2	0	0	209	209	—	—	209	0	0
National v. National	12	83 3	10	—	—	—	10	2	2,202	1,508	—	—	—	1,508	694
2-union elections	218	79.4	173	59	33	8	73	45	27,338	19,761	8,606	2,452	513	8,190	7,577
AFL-CIO v AFL-CIO v. Teamsters	1	100.0	1	1	0	—	—	0	11	11	11	0	—	—	0
AFL-CIO v AFL-CIO v. National	1	100 0	1	1	—	0	—	0	29	29	29	—	0	—	0
AFL-CIO v. AFL-CIO v. Local	1	100.0	1	1	—	—	0	0	60	60	60	—	—	0	0
AFL-CIO v Teamsters v National	1	100.0	1	0	1	0	—	0	17	17	0	17	0	—	0
AFL-CIO v. Teamsters v. Local	3	100.0	3	1	1	—	1	0	337	337	83	141	—	113	0
AFL-CIO v. Local v. Local	2	100.0	2	1	—	—	1	0	956	956	779	—	—	177	0
Teamsters v. Local v. Local	1	100.0	1	—	1	—	0	0	18	18	—	18	—	0	0
3 (or more)-union elections	10	100.0	10	5	3	0	2	0	1,428	1,428	962	176	0	290	0
Total representation elections	4,069	43.9	1,788	1,105	456	55	172	2,281	241,825	96,384	64,622	15,054	3,961	12,747	145,441

Table 13.—Final Outcome of Representation Elections in Cases Closed, Fiscal Year 1987[1]—Continued

Participating unions	Total elections[2]	Elections won by unions						Elections in which no representative chosen	Employees eligible to vote						In elections where no representative chosen
		Percent won	Total won	AFL–CIO unions	Teamsters	Other national unions	Other local unions		Total	In elections won	In units won by				
											AFL–CIO unions	Teamsters	Other national unions	Other local unions	
B. Elections in RC cases															
AFL–CIO	1,808	49.6	897	897	—	—	—	911	121,827	43,176	43,176	—	—	—	78,651
Teamsters	894	41.5	371	—	371	—	—	523	37,064	10,097	—	10,097	—	—	26,967
National	87	49.4	43	—	—	43	—	44	6,434	3,344	—	—	3,344	—	3,090
Local	148	61 5	91	—	—	—	91	57	6,977	3,962	—	—	—	3,962	3,015
1-union elections	2,937	47.7	1,402	897	371	43	91	1,535	172,302	60,579	43,176	10,097	3,344	3,962	111,723
AFL–CIO v. AFL–CIO	28	53.6	15	15	—	—	—	13	3,643	1,387	1,387	—	—	—	2,256
AFL–CIO v Teamsters	45	80 0	36	16	20	—	—	9	4,169	3,400	1,764	1,636	—	—	769
AFL–CIO v. National	19	47 4	9	5	—	4	—	10	2,986	1,049	802	—	247	—	1,937
AFL–CIO v. Local	78	91.0	71	17	—	—	54	7	10,732	9,934	3,616	—	—	6,318	798
Teamsters v. National	5	80.0	4	—	2	2	—	1	309	96	—	39	57	—	213
Teamsters v. Local	11	90 9	10	—	4	—	6	1	752	621	—	478	—	143	131
Teamsters v. Teamsters	2	100.0	2	—	2	—	—	0	133	133	—	133	—	—	0
National v Local	2	100.0	2	—	—	2	0	0	209	209	—	—	209	0	0
Local v. Local	12	83.3	10	—	—	—	10	2	2,202	1,508	—	—	—	1,508	694
2-union elections	202	78.7	159	53	28	8	70	43	25,135	18,337	7,569	2,286	513	7,969	6,798
AFL–CIO v. AFL–CIO v. Teamsters	1	100.0	1	1	0	—	—	0	11	11	11	0	—	—	0
AFL–CIO v. AFL–CIO v. National	1	100.0	1	1	—	0	—	0	29	29	29	—	0	0	0
AFL–CIO v. AFL–CIO v. Local	1	100 0	1	1	—	—	0	0	60	60	60	—	—	0	0
AFL–CIO v. Teamsters v. National	1	100.0	1	0	1	0	—	0	17	17	0	17	0	—	0
AFL–CIO Teamsters v. Local	3	100.0	3	1	1	—	1	0	337	337	83	141	—	113	0
AFL–CIO Local v. Local	2	100.0	2	1	—	—	1	0	956	956	779	—	—	177	0
Teamsters v. Local v Local	1	100.0	1	—	1	—	0	0	18	18	—	18	—	0	0
3 (or more)-union elections	10	100.0	10	5	3	0	2	0	1,428	1,428	962	176	0	290	0
Total RC elections	3,149	49 9	1,571	955	402	51	163	1,578	198,865	80,344	51,707	12,559	3,857	12,221	118,521

Table 13.—Final Outcome of Representation Elections in Cases Closed, Fiscal Year 1987[1]—Continued

Participating unions	Total elections[2]	Elections won by unions						Elections in which no representative chosen	Employees eligible to vote						In elections where no representative chosen
		Percent won	Total won	AFL–CIO unions	Teamsters	Other national unions	Other local unions		Total	In elections won	In units won by				
											AFL–CIO unions	Teamsters	Other national unions	Other local unions	
C. Elections in RM cases															
AFL–CIO	95	21 1	20	20	—	—	—	75	3,669	575	575	—	—	—	3,094
Teamsters	48	16 7	8	—	8	—	—	40	1,204	189	—	189	—	—	1,015
National	7	42.9	3	—	—	3	—	4	151	78	—	—	78	—	73
Local	10	10.0	1	—	—	—	1	9	164	38	—	—	—	38	126
1-union elections	160	20 0	32	20	8	3	1	128	5,188	880	575	189	78	38	4,308
AFL–CIO v Teamsters	1	100 0	1	0	1	—	—	0	3	3	0	3	—	—	0
AFL–CIO v National	1	100 0	1	1	—	0	—	0	29	29	29	—	0	—	0
AFL–CIO v Local	1	100 0	1	—	0	—	1	0	64	64	—	0	—	64	0
Teamsters v Local	1	100.0	1	—	1	—	0	0	7	7	—	7	—	0	0
Teamsters v Teamsters	1	100 0	1	—	1	—	—	0	79	79	—	79	—	—	0
2-union elections	5	100 0	5	1	3	0	1	0	182	182	29	89	0	64	0
Total RM elections	165	22.4	37	21	11	3	2	128	5,370	1,062	604	278	78	102	4,308
D Elections in RD cases															
AFL–CIO	495	25.1	124	124	—	—	—	371	27,957	11,303	11,303	—	—	—	16,654
Teamsters	205	20 0	41	—	41	—	—	164	5,746	2,140	—	2,140	—	—	3,606
National	9	11 1	1	—	—	1	—	8	529	26	—	—	26	—	503
Local	35	14 3	5	—	—	—	5	30	1,337	267	—	—	—	267	1,070
1-union elections	744	23.0	171	124	41	1	5	573	35,569	13,736	11,303	2,140	26	267	21,833
AFL–CIO v AFL–CIO	1	0 0	—	—	—	—	—	1	731	—	—	—	—	—	731
AFL–CIO v. Teamsters	4	75 0	3	2	1	—	—	1	136	88	32	56	—	—	48
AFL–CIO v National	1	100.0	1	1	—	—	—	—	310	310	310	—	—	—	—
AFL–CIO v. Local	4	100.0	4	2	—	—	2	—	823	823	666	—	—	157	—
Teamsters v Local	1	100 0	1	—	1	—	0	—	21	21	—	21	—	—	—
2-union elections	11	81 8	9	5	2	—	2	2,021	1,242	1,008	77	—	157	779	

Table 13.—Final Outcome of Representation Elections in Cases Closed, Fiscal Year 1987[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	755	23.8	180	129	43	1	7	575	37,590	14,978	12,311	2,217	26	424	22,612

[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 1987[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	136,221	31,859	31,859	—	—	—	15,909	29,075	29,075	—	—	—	59,378
Teamsters	38,657	7,341	—	7,341	—	—	3,241	8,817	—	8,817	—	—	19,258
Other national unions	6,079	1,919	—	—	1,919	—	986	989	—	—	989	—	2,185
Other local unions	7,021	2,556	—	—	—	2,556	795	1,135	—	—	—	1,135	2,535
1-union elections	187,978	43,675	31,859	7,341	1,919	2,556	20,931	40,016	29,075	8,817	989	1,135	83,356
AFL–CIO v. AFL–CIO	3,797	908	908	—	—	—	305	1,030	1,030	—	—	—	1,554
AFL–CIO v. Teamsters	3,866	2,813	1,228	1,585	—	—	305	277	107	170	—	—	471
AFL–CIO v. National	2,844	1,223	762	—	461	—	59	569	224	—	345	—	993
AFL–CIO v. Local	9,476	7,972	2,974	—	—	4,998	809	232	162	—	—	70	463
Teamsters v. National	285	79	—	44	35	—	4	92	—	8	84	—	110
Teamsters v. Local	686	550	—	304	—	246	16	29	—	9	—	20	91
Teamsters v. Teamsters	194	163	—	163	—	—	31	0	—	0	—	—	0
National v Local	202	191	—	—	111	80	11	0	—	—	0	0	0
Local v. Local	1,875	1,212	—	—	—	1,212	37	121	—	—	—	121	505
2-union elections	23,225	15,111	5,872	2,096	607	6,536	1,577	2,350	1,523	187	429	211	4,187
AFL–CIO v. AFL–CIO v. Teamsters	5	5	5	0	—	—	0	0	—	0	0	0	0
AFL–CIO v. AFL–CIO v. National	28	28	16	—	12	—	0	0	0	—	0	—	0
AFL–CIO v. AFL–CIO v. Local	41	37	28	—	—	9	4	0	0	—	—	0	0
AFL–CIO v Teamsters v. National	16	15	1	13	1	—	1	0	0	0	0	—	0
AFL–CIO v. Teamsters v. Local	315	306	110	92	—	104	9	0	—	—	—	0	0
AFL–CIO v Local v. Local	855	845	384	—	—	461	10	0	0	—	—	0	0
Teamsters v. Local v. Local	16	16	—	9	—	7	0	—	—	0	—	0	0
3-union elections	1,276	1,252	544	114	13	581	24	0	0	0	0	0	0
Total representation elections	212,479	60,038	38,275	9,551	2,539	9,673	22,532	42,366	30,598	9,004	1,418	1,346	87,543

Table 14.—Valid Votes Cast in Representation Elections, by Final Results of Election, in Cases Closed, Fiscal Year 1987[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	108,702	25,364	25,364	—	—	—	12,091	23,714	23,714	—	—	—	47,533
Teamsters	32,469	6,011	—	6,011	—	—	2,479	7,687	—	7,687	—	—	16,292
Other national unions	5,572	1,863	—	—	1,863	—	957	845	—	—	845	—	1,907
Other local unions	5,777	2,386	—	—	—	2,386	717	818	—	—	—	818	1,856
1-union elections	152,520	35,624	25,364	6,011	1,863	2,386	16,244	33,064	23,714	7,687	845	818	67,588
AFL–CIO v. AFL–CIO	3,109	908	908	—	—	—	305	719	719	—	—	—	1,177
AFL–CIO v. Teamsters	3,750	2,745	1,206	1,539	—	—	303	258	107	151	—	—	444
AFL–CIO v. National	2,509	897	571	—	326	—	50	569	224	—	345	—	993
AFL–CIO v. Local	8,828	7,362	2,649	—	—	4,713	771	232	162	—	—	70	463
Teamsters v. National	285	79	—	44	35	—	4	92	—	8	84	—	110
Teamsters v. Local	664	531	—	289	—	242	13	29	—	9	—	20	91
Teamsters v. Teamsters	127	96	—	96	—	—	31	0	—	0	—	—	0
National v. Local	202	191	—	—	111	80	11	0	—	—	0	0	0
Local v. Local	1,875	1,212	—	—	—	1,212	37	121	—	—	—	121	505
2-union elections	21,349	14,021	5,334	1,968	472	6,247	1,525	2,020	1,212	168	429	211	3,783
AFL–CIO v. AFL–CIO v. Teamsters	5	5	5	0	—	—	0	0	0	0	—	—	0
AFL–CIO v. AFL–CIO v. National	28	28	16	—	12	—	0	0	0	—	0	—	0
AFL–CIO v. AFL–CIO v. Local	41	37	28	—	—	9	4	0	0	—	—	0	0
AFL–CIO v. Teamsters v. National	16	15	1	13	1	—	1	0	0	0	0	—	0
AFL–CIO v. Teamsters v. Local	315	306	110	92	—	104	9	0	0	0	—	0	0
AFL–CIO v. Local v. Local	855	845	384	—	—	461	10	0	0	—	—	0	0
Teamsters v. Local v. Local	16	16	—	9	—	7	0	0	—	0	—	0	0
3-union elections	1,276	1,252	544	114	13	581	24	0	0	0	0	0	0
Total RC elections	175,145	50,897	31,242	8,093	2,348	9,214	17,793	35,084	24,926	7,855	1,274	1,029	71,371

Table 14.—Valid Votes Cast in Representation Elections, by Final Results of Election, in Cases Closed, Fiscal Year 1987[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	3,179	368	368	—	—	—	163	763	763	—	—	—	1,885
Teamsters	1,029	112	—	112	—	—	64	241	—	241	—	—	612
Other national unions	121	43	—	—	43	—	20	15	—	—	15	—	43
Other local unions	124	22	—	—	—	22	10	23	—	—	—	23	69
1-union elections	4,453	545	368	112	43	22	257	1,042	763	241	15	23	2,609
AFL–CIO v. Teamsters	1	1	0	1	—	—	0	0	0	0	—	—	0
AFL–CIO v. National	29	24	23	0	1	—	5	0	0	—	0	—	0
AFL–CIO v. Local	56	32	3	—	—	29	24	0	0	—	—	0	0
Teamsters v. Local	7	4	0	4	—	0	3	0	—	0	—	0	0
Teamsters v. Teamsters	67	67	—	67	—	—	0	0	—	0	—	—	0
2-union elections	160	128	26	72	1	29	32	0	0	0	0	0	0
Total RM elections	4,613	673	394	184	44	51	289	1,042	763	241	15	23	2,609
D. Elections in RD cases													
AFL–CIO	24,340	6,127	6,127	—	—	—	3,655	4,598	4,598	—	—	—	9,960
Teamsters	5,159	1,218	—	1,218	—	—	698	889	—	889	—	—	2,354
Other national unions	386	13	—	—	13	—	9	129	—	—	129	—	235
Other local unions	1,120	148	—	—	—	148	68	294	—	—	—	294	610
1-union elections	31,005	7,506	6,127	1,218	13	148	4,430	5,910	4,598	889	129	294	13,159
AFL–CIO v. AFL–CIO	688	0	0	—	—	—	0	311	311	—	—	—	377
AFL–CIO v. Teamsters	115	67	22	45	—	—	2	19	0	19	—	—	27
AFL–CIO v. National	306	302	168	—	134	—	4	0	0	—	0	—	0
AFL–CIO v. Local	592	578	322	—	—	256	14	0	0	—	—	0	0
Teamsters v. Local	15	15	—	11	—	4	0	0	—	0	—	0	0

Table 14.—Valid Votes Cast in Representation Elections, by Final Results of Election, in Cases Closed, Fiscal Year 1987[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	
2-union elections	1,716	962	512	56	134	260	20	330	311	19	0	0	404
Total RD elections	32,721	8,468	6,639	1,274	147	408	4,450	6,240	4,909	908	129	294	13,563

[1] See Glossary of terms for definitions.

Table 15A.—Geographic Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1987

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	17	7	5	2	0	0	10	1,094	999	388	348	40	0	0	611	265
New Hampshire	4	1	1	0	0	0	3	45	43	18	8	10	0	0	25	3
Vermont	2	0	0	0	0	0	2	264	253	110	18	8	84	0	143	0
Massachusetts	95	43	27	13	1	2	52	6,049	5,447	2,626	1,865	485	182	94	2,821	2,430
Rhode Island	25	12	7	2	3	0	13	1,205	1,132	577	388	57	132	0	555	598
Connecticut	37	21	11	5	0	5	16	1,682	1,506	857	351	194	0	312	649	901
New England	180	84	51	22	4	7	96	10,339	9,380	4,576	2,978	794	398	406	4,804	4,197
New York	349	180	115	39	4	22	169	20,606	16,270	8,098	5,158	1,056	661	1,223	8,172	8,598
New Jersey	177	72	41	16	0	15	105	9,306	8,050	4,219	2,555	674	30	960	3,831	4,029
Pennsylvania	274	138	84	31	3	20	136	15,851	14,355	6,971	4,497	1,454	60	960	7,384	6,248
Middle Atlantic	800	390	240	86	7	57	410	45,763	38,675	19,288	12,210	3,184	751	3,143	19,387	18,875
Ohio	239	93	65	19	5	4	146	13,483	12,286	5,266	3,915	982	333	36	7,020	4,164
Indiana	105	40	22	15	0	3	65	6,158	5,972	2,606	1,637	757	0	212	3,366	1,523
Illinois	224	98	57	22	11	8	126	11,077	9,417	5,132	3,361	847	501	423	4,285	6,367
Michigan	282	127	89	31	4	3	155	16,573	14,563	6,849	5,189	1,146	460	54	7,714	6,599
Wisconsin	109	53	29	18	3	3	56	6,809	6,052	3,279	2,403	578	153	145	2,773	3,524
East North Central	959	411	262	105	23	21	548	54,100	48,290	23,132	16,505	4,310	1,447	870	25,158	22,177
Iowa	42	21	11	9	0	1	21	1,518	1,319	581	383	190	0	8	738	569
Minnesota	96	39	27	7	1	4	57	4,167	3,648	1,726	1,187	366	21	152	1,922	2,031
Missouri	180	75	45	23	5	2	105	6,891	6,006	2,706	1,981	548	68	109	3,300	3,002
North Dakota	15	11	8	1	1	1	4	484	447	331	136	21	84	90	116	336
South Dakota	5	2	2	0	0	0	3	301	289	110	108	2	0	0	179	103
Nebraska	12	4	2	2	0	0	8	757	629	246	195	51	0	0	383	207
Kansas	32	12	9	3	0	0	20	1,505	1,331	682	588	94	0	0	649	876
West North Central	382	164	104	45	7	8	218	15,623	13,669	6,382	4,578	1,272	173	359	7,287	7,124

Table 15A.—Geographic Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1987—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	10	5	3	1	0	1	5	1,470	1,277	840	624	24	163	29	437	796
Maryland	66	24	12	8	0	4	42	3,234	2,859	1,249	716	230	107	196	1,610	923
District of Columbia	14	10	9	0	0	1	4	1,723	1,352	998	788	0	0	210	354	1,386
Virginia	53	29	22	1	2	4	24	5,508	5,030	2,396	1,958	267	34	137	2,634	1,608
West Virginia	43	23	13	8	2	0	20	2,291	2,102	960	833	90	37	0	1,142	594
North Carolina	38	19	13	6	0	0	19	3,593	3,201	1,353	1,241	111	0	1	1,848	1,300
South Carolina	15	5	3	1	0	1	10	1,434	1,331	702	481	34	0	187	629	463
Georgia	68	27	18	3	0	6	41	5,727	5,288	2,446	1,719	383	0	344	2,842	1,728
Florida	88	40	26	11	1	2	48	3,806	3,631	1,801	1,096	443	52	210	1,830	1,447
South Atlantic	395	182	119	39	5	19	213	28,786	26,071	12,745	9,456	1,582	393	1,314	13,326	10,245
Kentucky	70	29	18	9	1	1	41	4,692	4,376	2,030	1,414	541	29	46	2,346	1,278
Tennessee	96	42	27	11	1	3	54	12,618	11,067	5,284	3,803	1,228	35	218	5,783	5,704
Alabama	60	31	22	1	1	7	29	4,551	4,140	2,222	1,592	16	5	609	1,918	1,864
Mississippi	21	13	11	2	0	0	8	1,880	1,809	885	858	27	0	0	924	1,172
East South Central	247	115	78	23	3	11	132	23,741	21,392	10,421	7,667	1,812	69	873	10,971	10,018
Arkansas	27	10	7	2	0	1	17	3,011	2,662	1,072	1,037	22	0	13	1,590	444
Louisiana	15	5	2	3	0	0	10	1,283	1,176	456	418	38	0	0	720	79
Oklahoma	35	12	12	0	0	0	23	2,953	2,649	1,130	1,037	74	19	0	1,519	755
Texas	78	29	16	4	0	9	49	5,228	4,581	2,376	1,352	131	0	893	2,205	2,180
West South Central	155	56	37	9	0	10	99	12,475	11,068	5,034	3,844	265	19	906	6,034	3,458
Montana	35	16	11	4	1	0	19	1,364	1,204	539	215	86	238	0	665	588
Idaho	13	6	3	3	0	0	7	905	805	239	216	23	0	0	566	87
Wyoming	5	4	4	0	0	0	1	278	254	139	139	0	0	0	115	231
Colorado	57	28	17	10	0	1	29	2,282	1,938	1,041	461	534	0	46	897	1,405
New Mexico	13	4	4	0	0	0	9	632	570	231	152	79	0	0	339	151
Arizona	49	21	10	9	0	2	28	4,816	4,453	1,738	1,029	466	0	243	2,715	767
Utah	13	8	7	1	0	0	5	644	602	303	295	8	0	0	299	512

Table 15A.—Geographic Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1987—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	14	8	6	1	0	1	6	645	579	361	271	81	0	9	218	355
Mountain	199	95	62	28	1	4	104	11,566	10,405	4,591	2,778	1,277	238	298	5,814	4,096
Washington	168	68	39	26	0	3	100	6,871	5,805	3,007	1,853	879	42	233	2,798	3,686
Oregon	64	21	11	7	1	2	43	2,847	2,444	1,232	736	288	40	168	1,212	1,122
California	442	170	84	61	3	22	272	21,883	18,832	8,743	4,760	2,692	171	1,120	10,089	8,436
Alaska	12	6	4	0	1	1	6	999	746	353	276	4	39	34	393	355
Hawaii	18	3	2	1	0	0	15	1,785	1,433	493	230	86	177	0	940	166
Guam	1	0	0	0	0	0	1	24	19	8	8	0	0	0	11	0
Pacific	705	268	140	95	5	28	437	34,409	29,279	13,836	7,863	3,949	469	1,555	15,443	13,765
Puerto Rico	38	18	7	4	0	7	20	3,647	3,019	1,548	452	110	0	986	1,471	1,451
Virgin Islands	9	5	5	0	0	0	4	1,376	1,231	851	542	0	0	309	380	978
Outlying Areas	47	23	12	4	0	7	24	5,023	4,250	2,399	994	110	0	1,295	1,851	2,429
Total, all States and areas	4,069	1,788	1,105	456	55	172	2,281	241,825	212,479	102,404	68,873	18,555	3,957	11,019	110,075	96,384

[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 1987

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	17	7	5	2	0	0	10	1,094	999	388	348	40	0	0	611	265
New Hampshire	2	1	1	0	0	0	1	8	8	3	3	0	0	0	5	3
Vermont	2	0	0	0	0	0	2	264	253	110	18	8	84	0	143	0
Massachusetts	76	39	24	12	1	2	37	4,919	4,390	2,096	1,372	448	182	94	2,294	1,587
Rhode Island	24	11	6	2	3	0	13	1,067	999	506	317	57	132	0	493	460
Connecticut	32	19	10	4	0	5	13	1,491	1,333	781	331	139	0	311	552	780
New England	153	77	46	20	4	7	76	8,843	7,982	3,884	2,389	692	398	405	4,098	3,095
New York	310	170	105	39	4	22	140	18,309	14,352	6,985	4,246	1,054	527	1,158	7,367	7,283
New Jersey	149	67	40	13	0	14	82	8,171	7,119	3,849	2,351	552	23	923	3,270	3,700
Pennsylvania	242	132	81	29	3	19	110	15,070	13,660	6,706	4,374	1,339	60	933	6,954	6,088
Middle Atlantic	701	369	226	81	7	55	332	41,550	35,131	17,540	10,971	2,945	610	3,014	17,591	17,071
Ohio	193	85	59	17	5	4	108	11,299	10,311	4,446	3,228	852	332	34	5,865	3,439
Indiana	97	37	20	14	0	3	60	5,870	5,694	2,464	1,528	724	0	212	3,230	1,425
Illinois	179	88	50	20	11	7	91	8,662	7,333	4,094	2,449	769	501	375	3,239	4,835
Michigan	225	112	76	29	4	3	113	13,032	11,403	5,363	3,869	980	460	54	6,040	5,479
Wisconsin	89	49	26	17	3	3	40	5,926	5,258	3,004	2,152	554	153	145	2,254	3,375
East North Central	783	371	231	97	23	20	412	44,789	39,999	19,371	13,226	3,879	1,446	820	20,628	18,553
Iowa	35	17	8	8	0	1	18	1,387	1,200	533	339	186	0	8	667	506
Minnesota	72	33	22	6	1	4	39	3,469	3,033	1,455	932	350	21	152	1,578	1,768
Missouri	135	62	34	21	5	2	73	5,203	4,567	2,023	1,383	463	68	109	2,544	1,887
North Dakota	15	11	8	1	1	1	4	484	447	331	136	21	84	90	116	336
South Dakota	5	2	2	0	0	0	3	301	289	110	108	2	0	0	179	103
Nebraska	11	4	2	2	0	0	7	748	622	246	195	51	0	0	376	207
Kansas	25	11	8	3	0	0	14	909	789	369	275	94	0	0	420	450
West North Central	298	140	84	41	7	8	158	12,501	10,947	5,067	3,368	1,167	173	359	5,880	5,257

Table 15B.—Geographic Distribution of Collective-Bargaining Elections Held in Cases Closed, Fiscal Year 1987—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	9	5	3	1	0	1	4	1,446	1,253	835	624	19	163	29	418	796
Maryland	57	24	12	8	0	4	33	2,670	2,443	1,107	692	227	1	187	1,336	923
District of Columbia	13	9	8	0	0	1	4	1,128	898	556	506	0	0	50	342	791
Virginia	49	27	22	1	1	3	22	5,173	4,744	2,256	1,863	261	21	111	2,488	1,531
West Virginia	41	22	12	8	2	0	19	2,131	1,971	876	749	90	37	0	1,095	465
North Carolina	33	15	10	5	0	0	18	3,171	2,802	1,129	1,041	87	0	1	1,673	923
South Carolina	12	4	2	1	0	1	8	1,301	1,216	651	430	34	0	187	565	394
Georgia	57	25	17	2	0	6	32	4,729	4,333	2,093	1,499	250	0	344	2,240	1,439
Florida	81	36	25	8	1	2	45	3,553	3,380	1,667	1,026	379	52	210	1,713	1,333
South Atlantic	352	167	111	34	4	18	185	25,302	23,040	11,170	8,430	1,347	274	1,119	11,870	8,595
Kentucky	61	28	17	9	1	1	33	4,165	3,874	1,786	1,203	508	29	46	2,088	1,207
Tennessee	81	37	22	11	1	3	44	10,572	9,204	4,630	3,274	1,106	35	215	4,574	5,228
Alabama	52	30	21	1	1	7	22	4,326	3,931	2,133	1,503	16	5	609	1,798	1,808
Mississippi	18	12	11	1	0	0	6	1,728	1,660	820	802	18	0	0	840	1,155
East South Central	212	107	71	22	3	11	105	20,791	18,669	9,369	6,782	1,648	69	870	9,300	9,398
Arkansas	21	8	5	2	0	1	13	1,279	1,179	456	421	22	0	13	723	187
Louisiana	12	5	2	3	0	0	7	1,032	946	405	367	38	0	0	541	79
Oklahoma	28	9	9	0	0	0	19	1,845	1,651	624	531	74	19	0	1,027	144
Texas	62	26	14	3	0	9	36	4,479	3,912	2,103	1,253	109	0	741	1,809	2,108
West South Central	123	48	30	8	0	10	75	8,635	7,688	3,588	2,572	243	19	754	4,100	2,518
Montana	24	13	8	4	1	0	11	1,184	1,054	486	168	80	238	0	568	524
Idaho	10	6	3	3	0	0	4	817	744	215	192	23	0	0	529	87
Wyoming	1	1	1	0	0	0	83	73	38	38	0	0	0	0	35	83
Colorado	38	24	16	7	0	1	14	1,659	1,370	880	411	432	0	37	490	1,326
New Mexico	9	3	3	0	0	0	6	509	454	185	114	71	0	0	269	126
Arizona	40	18	9	7	0	2	22	4,458	4,117	1,590	944	403	0	243	2,527	676
Utah	11	8	7	1	0	0	3	612	577	297	291	6	0	0	280	512

Table 15B.—Geographic Distribution of Collective-Bargaining Elections Held in Cases Closed, Fiscal Year 1987—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	7	5	1	0	1	4	540	499	305	223	73	0	9	194	281
Mountain	144	80	52	23	1	4	64	9,862	8,888	3,996	2,381	1,088	238	289	4,892	3,615
Washington	102	56	30	23	0	3	46	4,867	4,202	2,351	1,317	766	42	226	1,851	2,725
Oregon	44	18	10	5	1	2	26	2,292	2,004	1,013	629	180	40	164	991	920
California	335	145	68	54	3	20	190	17,949	15,474	7,407	4,013	2,226	160	1,008	8,067	7,030
Alaska	9	4	3	0	1	0	5	182	173	68	25	4	39	0	105	34
Hawaii	15	3	2	1	0	0	12	1,742	1,391	481	230	78	173	0	910	166
Guam	1	0	0	0	0	0	1	24	19	8	8	0	0	0	11	0
Pacific	506	226	113	83	5	25	280	27,056	23,263	11,328	6,222	3,254	454	1,398	11,935	10,875
Puerto Rico	34	18	7	4	0	7	16	3,579	2,955	1,532	442	110	0	980	1,423	1,451
Virgin Islands	8	5	5	0	0	0	3	1,327	1,196	851	542	0	0	309	345	978
Outlying Areas	42	23	12	4	0	7	19	4,906	4,151	2,383	984	110	0	1,289	1,768	2,429
Total, all States and areas	3,314	1,608	976	413	54	165	1,706	204,235	179,758	87,696	57,325	16,373	3,681	10,317	92,062	81,406

[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 1987

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	2	0	0	0	0	0	2	37	35	15	5	10	0	0	20	0
Vermont	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Massachusetts	19	4	3	1	0	0	15	1,130	1,057	530	493	37	0	0	527	843
Rhode Island	1	1	1	0	0	0	0	138	133	71	71	0	0	0	62	138
Connecticut	5	2	1	1	0	0	3	191	173	76	20	55	0	1	97	121
New England	27	7	5	2	0	0	20	1,496	1,398	692	589	102	0	1	706	1,102
New York	39	10	10	0	0	0	29	2,297	1,918	1,113	912	2	134	65	805	1,315
New Jersey	28	5	1	3	0	1	23	1,135	931	370	204	122	7	37	561	329
Pennsylvania	32	6	3	2	0	1	26	781	695	265	123	115	0	27	430	160
Middle Atlantic	99	21	14	5	0	2	78	4,213	3,544	1,748	1,239	239	141	129	1,796	1,804
Ohio	46	8	6	2	0	0	38	2,184	1,975	820	687	130	1	2	1,155	725
Indiana	8	3	2	1	0	0	5	288	278	142	109	33	0	0	136	98
Illinois	45	10	7	2	0	1	35	2,415	2,084	1,038	912	78	0	48	1,046	1,532
Michigan	57	15	13	2	0	0	42	3,541	3,160	1,486	1,320	166	0	0	1,674	1,120
Wisconsin	20	4	3	1	0	0	16	883	794	275	251	24	0	0	519	149
East North Central	176	40	31	8	0	1	136	9,311	8,291	3,761	3,279	431	1	50	4,530	3,624
Iowa	7	4	3	1	0	0	3	131	119	48	44	4	0	0	71	63
Minnesota	24	6	5	1	0	0	18	698	615	271	255	16	0	0	344	263
Missouri	45	13	11	2	0	0	32	1,688	1,439	683	598	85	0	0	756	1,115
North Dakota	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
South D0akota	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Nebraska	1	0	0	0	0	0	1	9	7	0	0	0	0	0	7	0
Kansas	7	1	1	0	0	0	6	596	542	313	313	0	0	0	229	426
West North Central	84	24	20	4	0	0	60	3,122	2,722	1,315	1,210	105	0	0	1,407	1,867

Table 15C.—Geographic Distribution of Decertification Elections Held in Cases Closed, Fiscal Year 1987—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	24	24	5	0	5	0	0	19	0
Maryland	9	0	0	0	0	0	9	564	416	142	24	3	106	9	274	0
District of Columbia	1	1	1	0	0	0	0	595	454	442	282	0	0	160	12	595
Virginia	4	2	0	0	1	1	2	335	286	140	95	6	13	26	146	77
West Virginia	2	1	1	0	0	0	1	160	131	84	84	0	0	0	47	129
North Carolina	5	4	3	1	0	0	1	422	399	224	200	24	0	0	175	377
South Carolina	3	1	1	0	0	0	2	133	115	51	51	0	0	0	64	69
Georgia	11	2	1	1	0	0	9	998	955	353	220	133	0	0	602	289
Florida	7	4	1	3	0	0	3	253	251	134	70	64	0	0	117	114
South Atlantic	43	15	8	5	1	1	28	3,484	3,031	1,575	1,026	235	119	195	1,456	1,650
Kentucky	9	1	1	0	0	0	8	527	502	244	211	33	0	0	258	71
Tennessee	15	5	5	0	0	0	10	2,046	1,863	654	529	122	0	3	1,209	476
Alabama	8	1	1	0	0	0	7	225	209	89	89	0	0	0	120	56
Mississippi	3	1	0	1	0	0	2	152	149	65	56	9	0	0	84	17
East South Central	35	8	7	1	0	0	27	2,950	2,723	1,052	885	164	0	3	1,671	620
Arkansas	6	2	2	0	0	0	4	1,732	1,483	616	616	0	0	0	867	257
Louisiana	3	0	0	0	0	0	3	251	230	51	51	0	0	0	179	0
Oklahoma	7	3	3	0	0	0	4	1,108	998	506	506	0	0	0	492	611
Texas	16	3	2	1	0	0	13	749	669	273	99	22	0	152	396	72
West South Central	32	8	7	1	0	0	24	3,840	3,380	1,446	1,272	22	0	152	1,934	940
Montana	11	3	3	0	0	0	8	180	150	53	47	6	0	0	97	64
Idaho	3	0	0	0	0	0	3	88	61	24	24	0	0	0	37	0
Wyoming	4	3	3	0	0	0	1	195	181	101	101	0	0	0	80	148
Colorado	19	4	1	3	0	0	15	623	568	161	50	102	0	9	407	79
New Mexico	4	1	1	0	0	0	3	123	116	46	38	8	0	0	70	25
Arizona	9	3	1	2	0	0	6	358	336	148	85	63	0	0	188	91
Utah	2	0	0	0	0	0	2	32	25	6	4	2	0	0	19	0

Table 15C.—Geographic Distribution of Decertification Elections Held in Cases Closed, Fiscal Year 1987—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	3	1	1	0	0	0	2	105	80	56	48	8	0	0	24	74
Mountain	55	15	10	5	0	0	40	1,704	1,517	595	397	189	0	9	922	481
Washington	66	12	9	3	0	0	54	2,004	1,603	656	536	113	0	7	947	961
Oregon	20	3	1	2	0	0	17	555	440	219	107	108	0	4	221	202
California	107	25	16	7	0	2	82	3,934	3,358	1,336	747	466	11	112	2,022	1,406
Alaska	3	2	1	0	0	1	1	817	573	285	251	0	0	34	288	321
Hawaii	3	0	0	0	0	0	3	43	42	12	0	8	4	0	30	0
Guam	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Pacific	199	42	27	12	0	3	157	7,353	6,016	2,508	1,641	695	15	157	3,508	2,890
Puerto Rico	4	0	0	0	0	0	4	68	64	16	10	0	0	6	48	0
Virgin Islands	1	0	0	0	0	0	1	49	35	0	0	0	0	0	35	0
Outlying Areas	5	0	0	0	0	0	5	117	99	16	10	0	0	6	83	0
Total, all States and areas	755	180	129	43	1	7	575	37,590	32,721	14,708	11,548	2,182	276	702	18,013	14,978

[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 1987

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	181	71	36	30	2	3	110	15,012	13,366	6,672	3,912	1,502	112	1,146	6,694	5,604
Tobacco manufacturers	2	1	0	0	1	0	1	9	9	6	0	0	6	0	3	6
Textile mill products	30	10	9	1	0	0	20	2,863	2,646	993	897	90	0	6	1,653	667
Apparel and other finished products made from fabric and similar materials	17	6	5	1	0	0	11	1,369	1,247	411	371	40	0	0	836	346
Lumber and wood products (except furniture)	74	30	20	8	0	2	44	6,756	6,302	3,118	2,392	683	0	43	3,184	2,815
Furniture and fixtures	45	18	13	2	2	1	27	3,727	3,298	1,573	1,377	148	25	23	1,725	1,814
Paper and allied products	59	29	21	6	1	1	30	3,653	3,303	1,440	1,093	154	60	133	1,863	1,290
Printing, publishing, and allied products	78	36	23	8	0	5	42	5,639	4,943	2,672	2,193	212	3	264	2,271	3,219
Chemicals and allied products	101	38	20	8	0	10	63	7,521	7,029	3,258	2,041	460	1	756	3,771	2,062
Petroleum refining and related industries	19	7	1	4	0	2	12	1,252	1,155	623	239	107	0	277	532	457
Rubber and miscellaneous plastic products	85	32	26	5	1	0	53	9,782	9,087	4,487	3,293	766	90	338	4,600	3,891
Leather and leather products	3	2	1	1	0	0	1	184	175	86	58	28	0	0	89	121
Stone, clay, glass, and concrete products	113	65	20	17	1	27	48	7,676	6,959	4,344	1,832	462	11	2,039	2,615	4,511
Primary metal industries	87	38	29	8	0	1	49	6,616	6,237	2,774	2,416	230	1	127	3,463	1,759
Fabricated metal products (except machinery and transportation equipment)	198	83	67	8	4	4	115	13,030	12,044	5,138	4,456	385	163	134	6,906	4,150
Machinery (except electrical)	143	56	41	11	0	4	87	9,179	8,493	3,896	3,276	534	12	74	4,597	3,569
Electrical and electronic machinery, equipment, and supplies	70	31	24	4	0	3	39	6,487	5,957	2,619	1,909	515	18	177	3,338	2,247
Aircraft and parts	85	29	23	3	2	1	56	11,350	10,332	4,716	3,609	912	130	65	5,616	3,919
Ship and boat building and repairing	17	8	6	0	0	2	9	1,432	1,189	447	286	19	0	142	742	421
Automotive and other transportation equipment	18	9	4	2	1	2	9	2,874	2,478	1,158	944	127	6	81	1,320	348
Measuring, analyzing, and controlling instruments; photographic, medical, and optical goods; watches and clocks	38	12	9	2	0	1	26	2,832	2,680	985	876	73	0	36	1,695	517
Miscellaneous manufacturing industries	130	55	29	20	1	5	75	5,971	4,979	2,260	1,191	922	27	120	2,719	2,242
Manufacturing	1,593	666	427	149	16	74	927	125,214	113,908	53,676	38,661	8,369	665	5,981	60,232	45,975
Metal mining	5	3	2	0	1	0	2	647	578	301	142	3	156	0	277	510
Coal mining	11	3	0	0	3	0	8	526	485	258	12	0	167	79	227	195
Oil and gas extraction	4	1	1	0	0	0	3	340	321	138	85	0	0	53	183	45

Table 16.—Industrial Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1987—Continued

Industrial group[1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL–CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL–CIO unions	Teamsters	Other national unions	Other local unions		
Mining and quarrying of nonmetallic minerals (except fuels)	12	5	3	1	1	0	7	494	429	168	146	9	13	0	261	62
Mining	32	12	6	1	5	0	20	2,007	1,813	865	385	12	336	132	948	812
Construction	255	118	93	14	6	5	137	7,092	6,089	3,139	2,264	257	177	441	2,950	3,130
Wholesale trade	261	88	37	40	2	9	173	9,376	8,509	3,922	1,538	1,898	124	362	4,587	2,780
Retail trade	427	163	105	46	1	11	264	14,965	12,787	5,702	3,808	1,464	17	413	7,085	5,327
Finance, insurance, and real estate	70	41	30	8	1	2	29	2,932	2,584	1,347	958	263	33	93	1,237	1,622
U S Postal Service	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Local and suburban transit and interurban highway passenger transportation	69	39	14	24	0	1	30	4,143	3,363	1,836	560	1,078	0	198	1,527	2,007
Motor freight transportation and warehousing	219	81	11	63	6	1	138	5,287	4,603	2,123	385	1,545	145	48	2,480	1,837
Water transportation	11	3	0	0	2	1	8	491	449	191	164	3	13	11	258	31
Other transportation	42	27	6	18	0	3	15	1,857	1,572	750	413	285	0	52	822	756
Communication	95	34	29	3	0	2	61	3,743	3,067	1,827	1,224	54	163	386	1,240	1,948
Electric, gas, and sanitary services	90	45	25	19	0	1	45	3,717	3,421	1,646	1,058	496	30	62	1,775	1,490
Transportation, communication, and other utilities	526	229	85	127	8	9	297	19,238	16,475	8,373	3,804	3,461	351	757	8,102	8,069
Hotels, rooming houses, camps, and other lodging places	72	23	20	3	0	0	49	6,461	5,092	1,739	1,291	282	164	2	3,353	1,489
Personal services	45	19	7	10	0	2	26	1,405	1,236	613	280	240	0	93	623	720
Automotive repair, services, and garages	76	36	13	23	0	0	40	1,436	1,267	605	228	377	0	0	662	524
Motion pictures	5	2	2	0	0	0	3	28	23	12	12	0	0	0	11	18
Amusement and recreation services (except motion pictures)	23	5	3	1	0	1	18	866	763	317	182	121	0	14	446	149
Health services	352	193	152	17	8	16	159	35,524	29,602	15,121	11,175	1,121	1,639	1,186	14,481	17,317
Educational services	43	18	10	0	1	7	25	2,690	2,380	1,347	765	60	33	489	1,033	1,037
Membership organizations	19	12	2	2	1	7	7	432	350	137	71	14	8	44	213	153
Business services	177	98	67	10	4	17	79	7,575	6,069	3,319	2,071	439	169	640	2,750	4,300
Miscellaneous repair services	15	8	6	2	0	0	7	250	239	114	87	23	0	4	125	122

Table 16.—Industrial Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1987—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	0	0	0	0	0	1	50	44	9	9	0	0	0	35	0
Legal services	7	6	4	0	0	2	1	107	101	75	50	0	0	25	26	99
Social services	43	33	23	2	0	8	10	2,984	2,165	1,278	854	97	0	327	887	1,783
Miscellaneous services	14	8	6	0	1	1	6	844	678	520	287	0	231	2	158	680
Services	892	461	315	70	15	61	431	60,652	50,009	25,206	17,362	2,774	2,244	2,826	24,803	28,391
Public administration	13	10	7	1	1	1	3	349	305	174	93	57	10	14	131	278
Total, all industrial groups	4,069	1,788	1,105	456	55	172	2,281	241,825	212,479	102,404	68,873	18,555	3,957	11,019	110,075	96,384

[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 1987[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	204,235	3,314	100.0	—	976	100.0	413	100.0	54	100.0	165	100.0	1,706	100.0
Under 10	3,824	674	20.3	20.3	213	21.8	143	34.6	12	22.2	27	16.4	279	16.4
10 to 19	9,437	670	20.2	40.5	212	21.7	106	25.7	9	16.7	25	15.2	318	18.6
20 to 29	9,668	397	12.0	52.5	116	11.9	43	10.4	9	16.7	18	10.9	211	12.4
30 to 39	8,590	254	7.7	60 2	78	8.0	24	5.8	4	7.4	11	6.7	137	8.0
40 to 49	9,614	218	6.6	66.8	57	5.8	26	6.3	1	1.9	11	6.7	123	7.2
50 to 59	9,189	171	5.2	72.0	68	7 0	16	3.9	2	3.7	3	1.8	82	4.8
60 to 69	8,646	135	4.1	76.1	37	3.8	6	1.5	3	5.6	10	6.1	79	4.6
70 to 79	7,222	97	2.9	79 0	24	2.5	8	1.9	2	3.7	4	2.4	59	3.5
80 to 89	7,648	91	2.7	81.7	24	2.5	10	2.4	1	1.9	8	4.8	48	2.8
90 to 99	7,999	85	2.6	84.3	23	2.4	7	1.7	0	0.0	7	4.2	48	2.8
100 to 109	5,604	54	1.6	85.9	21	2.2	5	1.2	0	0.0	6	3.6	22	1.3
110 to 119	6,410	56	1.7	87.6	16	1.6	1	0.2	2	3.7	5	3.0	32	1.9
120 to 129	5,377	43	1.3	88.9	11	1 1	3	0.7	0	0.0	7	4.2	22	1.3
130 to 139	5,002	37	1.1	90.0	9	0.9	3	0.7	1	1.9	2	1.2	22	1.3
140 to 149	5,081	35	1 1	91.1	8	0.8	4	1.0	1	1 9	2	1 2	20	1 2
150 to 159	3,705	24	0.7	91.8	3	0.3	3	0.7	0	0.0	2	1.2	16	0.9
160 to 169	4,769	29	0.9	92 7	6	0 6	0	0 0	3	5.6	2	1.2	18	1.1
170 to 179	3,495	20	0.6	93.3	6	0.6	0	0.0	0	0.0	2	1.2	12	0.7
180 to 189	2,388	13	0 4	93.7	1	0.1	0	0.0	0	0.0	1	0.6	11	0.6
190 to 199	3,511	18	0.5	94.2	5	0.5	0	0.0	0	0.0	1	0.6	12	0.7
200 to 299	20,460	86	2.6	96.8	19	1.9	1	0.2	1	1.9	7	4.2	58	3.4
300 to 399	16,334	47	1 4	98.2	7	0.7	3	0.7	2	3.7	0	0 0	35	2.1
400 to 499	9,154	21	0.6	98.8	4	0.4	0	0.0	0	0.0	1	0.6	16	0.9
500 to 599	8,141	15	0.5	99.3	1	0 1	1	0.2	0	0 0	1	0.6	12	0.7
600 to 799	8,288	12	0.4	99.7	3	0.3	0	0.0	0	0.0	1	0.6	8	0.5
800 to 999	4,404	5	0.2	99.9	1	0.1	0	0.0	1	1.9	1	0.6	2	0.1
1,000 to 1,999	8,089	6	0.2	100.0	2	0 2	0	0.0	0	0 0	0	0.0	4	0.2
2,000 to 2,999	2,186	1	0.0	100.0	1	0.1	0	0.0	0	0.0	0	0.0	0	0.0

Table 17.—Size of Units in Representation Elections in Cases Closed, Fiscal Year 1987[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	37,590	755	100.0	—	129	100.0	43	100.0	1	100.0	7	100.0	575	100.0
Under 10	1,110	196	26.0	26.0	9	7.0	6	14.0	0	0.0	0	0.0	181	31.5
10 to 19	2,415	175	23.2	49.2	26	20 2	7	16.3	0	0.0	1	14.3	141	24.5
20 to 29	2,327	98	13 0	62.2	19	14.7	9	20.9	1	100.0	0	0.0	69	12.0
30 to 39	2,122	62	8.2	70.4	12	9.3	4	9.3	0	0.0	0	0.0	46	8.0
40 to 49	2,092	47	6.2	76.6	8	6.2	2	4.7	0	0.0	0	0.0	37	6.4
50 to 59	1,673	31	4.1	80.7	6	4 7	6	14.0	0	0.0	2	28.6	17	3.0
60 to 69	1,149	18	2.4	83.1	3	2.3	0	0.0	0	0.0	2	28.6	13	2.3
70 to 79	1,107	15	2.0	85.1	5	3.9	0	0.0	0	0.0	0	0.0	10	1.7
80 to 89	1,096	13	1.7	86.8	4	3.1	1	2.3	0	0.0	1	14.3	7	1.2
90 to 99	1,122	12	1.6	88.4	2	1.6	1	2.3	0	0.0	1	14.3	8	1.4
100 to 109	1,048	10	1.3	89.7	3	2.3	2	4.7	0	0.0	0	0.0	5	0.9
110 to 119	1,027	9	1.2	90.9	2	1.6	2	4.7	0	0.0	0	0.0	5	0.9
120 to 129	496	4	0.5	91.4	1	0.8	0	0.0	0	0.0	0	0.0	3	0.5
130 to 139	945	7	0.9	92.3	1	0.8	1	2.3	0	0.0	0	0.0	5	0.9
140 to 149	583	4	0.5	92.8	1	0.8	0	0 0	0	0.0	0	0.0	3	0.5
150 to 159	620	4	0.5	93 3	2	1.6	1	2.3	0	0.0	0	0.0	1	0.2
160 to 169	826	5	0.7	94.0	2	1.6	0	0 0	0	0.0	0	0 0	3	0.5
170 to 199	1,450	8	1.1	95.1	5	3.9	0	0.0	0	0.0	0	0.0	3	0.5
200 to 299	3,093	13	1.7	96.8	6	4.7	0	0.0	0	0.0	0	0.0	7	1.2
300 to 499	7,346	19	2.5	99.3	10	7.8	1	2.3	0	0.0	0	0.0	8	1.4
500 to 799	1,834	3	0.4	99.7	1	0.8	0	0.0	0	0.0	0	0.0	2	0.3
800 and over	2,109	2	0.3	100.0	1	0.8	0	0.0	0	0.0	0	0.0	1	0.2

[1] See Glossary of terms for definitions.

Table 18.—Distribution of Unfair Labor Practice Situations Received, by Number of Employees in Establishments, Fiscal Year 1987[1]

Size of establishment (number of employees)	Total number of situations	Total		Type of situations																	
				CA		CB		CC		CD		CE		CG		CP		CA–CB combinations		Other C combinations	
		Percent of all situations	Cumulative percent of all situations	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class
Total	[2]28,660	100.0	——	19,782	100.0	6,170	100.0	929	100.0	214	100.0	37	100.0	23	100.0	219	100.0	1,167	100.0	119	100.0
Under 10	7,604	26.5	26.5	4,803	24.3	1,927	31.2	372	40.0	92	43.0	18	48.6	7	30.4	85	38.8	240	20.6	60	50.4
10–19	2,386	8.3	34.8	1,800	9 1	296	4.8	124	13.3	39	18.2	2	5.4	2	8 7	40	18.3	68	5.8	15	12.6
20–29	1,877	6.5	41 3	1,447	7.3	244	4.0	84	9.0	17	7.9	3	8.1	0	0.0	22	10.0	51	4.4	9	7.6
30–39	1,403	4.9	46.2	1,024	5.2	253	4.1	53	5.7	5	2.3	1	2.7	0	0.0	16	7.3	47	4.0	4	3.4
40–49	976	3.4	49.6	760	3.8	130	2.1	30	3.2	6	2.8	2	5 4	0	0.0	7	3 2	34	2 9	7	5.9
50–59	1,285	4.5	54.1	902	4.6	246	4.0	60	6.5	7	3.3	0	0.0	1	4.3	18	8 2.	47	4.0	4	3.4
60–69	800	2.8	56.9	633	3.2	119	1.9	11	1 2	5	2.3	1	2.7	0	0.0	2	0 9	26	2.2	3	2.5
70–79	690	2.4	59.3	533	2.7	120	1.9	18	1 9	2	0.9	0	0.0	0	0.0	1	0.5	14	1.2	2	1.7
80–89	516	1.8	61.1	398	2 0	92	1 5	12	1 3	2	0.9	0	0.0	0	0.0	2	0.9	10	0.9	0	0.0
90–99	283	1.0	62.1	241	1.2	32	0.5	1	0.1	0	0.0	0	0.0	0	0.0	3	1.4	6	0.5	0	0.0
100–109	1,343	4 7	66.8	874	4.4	357	5.8	30	3.2	6	2.8	2	5.4	3	13.0	3	1.4	68	5.8	0	0.0
110–119	220	0.8	67.6	183	0.9	28	0.5	2	0.2	1	0.5	0	0.0	0	0.0	0	0.0	6	0.5	0	0.0
120–129	436	1.5	69.1	326	1.6	69	1 1	15	1.6	2	0.9	1	2.7	0	0.0	4	1.8	15	1 3	4	3.4
130–139	163	0.6	69.7	118	0.6	32	0.5	1	0.1	1	0.5	0	0.0	0	0.0	0	0.0	11	0.9	0	0.0
140–149	138	0.5	70.2	111	0.6	16	0.3	2	0.2	0	0.0	0	0.0	0	0.0	0	0.0	8	0.7	1	0.8
150–159	544	1.9	72.1	392	2.0	116	1.9	8	0.9	4	1.9	0	0.0	0	0.0	2	0 9	22	1.9	0	0.0
160–169	129	0.5	72.6	98	0 5	16	0.3	2	0.2	3	1.4	0	0.0	0	0.0	2	0.9	7	0.6	1	0.8
170–179	153	0.5	73.1	119	0.6	26	0.4	2	0.2	1	0.5	0	0.0	0	0.0	1	0.5	4	0.3	0	0.0
180–189	113	0.4	73.5	81	0.4	26	0 4	0	0.0	1	0 5	0	0.0	1	4.3	0	0 0	4	0.3	0	0.0
190–199	52	0.2	73 7	42	0.2	9	0 1	0	0 0	0	0.0	0	0.0	0	0.0	0	0 0	1	0.1	0	0.0
200–299	1,646	5.7	79 4	1,137	5.7	382	6.2	38	4 1	8	3.7	2	5.4	2	8.7	3	1 4	71	6.1	3	2.5
300–399	1,029	3.6	83 0	694	3.5	244	4.0	9	1.0	3	1.4	1	2.7	0	0.0	2	0.9	76	6.5	0	0.0
400–499	600	2.1	85.1	428	2.2	133	2.2	3	0.3	2	0.9	0	0.0	1	4.3	1	0.5	30	2.6	2	1.7
500–599	594	2.1	87.2	359	1.8	189	3.1	9	1.0	2	0.9	1	2.7	0	0.0	0	0.0	33	2.8	1	0.8
600–699	323	1.1	88.3	235	1.2	67	1.1	1	0.1	0	0.0	0	0.0	0	0.0	1	0 5	19	1.6	0	0.0
700–799	265	0.9	89.2	168	0.8	72	1.2	4	0.4	1	0.5	0	0.0	2	8.7	1	0.5	17	1.5	0	0.0
800–899	278	1.0	90.2	204	1.0	60	1.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	14	1.2	0	0.0
900–999	109	0 4	90.6	78	0.4	27	0.4	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	4	0.3	0	0.0
1,000–1,999	1,168	4.1	94.7	717	3.6	349	5.7	13	1 4	1	0.5	2	5.4	2	8.7	3	1.4	79	6.8	2	1.7
2,000–2,999	475	1.7	96.4	286	1.4	144	2.3	9	1.0	0	0.0	0	0.0	1	4.3	0	0.0	35	3.0	0	0.0
3,000–3,999	252	0.9	97.3	127	0.6	93	1.5	10	1.1	2	0.9	1	2.7	0	0.0	0	0.0	19	1.6	0	0.0

Table 18.—Distribution of Unfair Labor Practice Situations Received, by Number of Employees in Establishments, Fiscal Year 1987[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	164	0.6	97.9	97	0.5	50	0.8	2	0.2	0	0.0	0	0.0	0	0.0	0	0.0	15	1.3	0	0 0
5,000–9,999	368	1.3	99.2	206	1.0	122	2.0	3	0.3	1	0.5	0	0.0	1	4 3	0	0.0	35	3.0	0	0.0
Over 9,999	278	1.0	100.2	161	0.8	84	1.4	1	0.1	0	0.0	0	0.0	0	0.0	0	0.0	31	2.7	1	0.8

[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 1987; and Cumulative Totals, Fiscal Years 1936–1987

	Fiscal year 1987									July 5, 1935–Sept. 30, 1987	
	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	226	182	38	0	6	—	—	—	—	—	—
On petitions for review and/or enforcement	199	164	29	0	6	100.0	100.0	—	100.0	9,492	100.0
Board orders affirmed in full	158	133	22	0	3	81.1	75 9	—	50.0	6,148	64.8
Board orders affirmed with modification	9	8	1	0	0	4.9	3.5	—	0.0	1,364	14.4
Remanded to Board	14	9	4	0	1	5.5	13.8	—	16.6	468	4.9
Board orders partially affirmed and partially remanded	7	5	1	0	1	3.0	3.4	—	16.7	179	1 9
Board orders set aside	11	9	1	0	1	5.5	3.4	—	16.7	1,333	14.0
On petitions for contempt	27	18	9	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	23	14	9	0	0	77.8	100.0	—	—	—	—
Court orders denying petition	1	1	0	0	0	5.6	0.0	—	—	—	—
Court orders directing compliance without contempt adjudication	2	2	0	0	0	11.1	0 0	—	—	—	—
Contempt petitions withdrawn without compliance	1	1	0	0	0	5.5	0.0	—	—	—	—
Proceedings decided by U.S. Supreme Court[3]	2	1	1	0	0	100.0	100.0	—	—	245	100.0
Board orders affirmed in full	1	1	0	0	0	100 0	—	—	—	147	60.0
Board orders affirmed with modification	0	0	0	0	0	—	—	—	—	18	7.4
Board orders set aside	1	0	1	0	0	—	100.0	—	—	42	17.1
Remanded to Board	0	0	0	0	0	—	—	—	—	19	7.8
Remanded to court of appeals	0	0	0	0	0	—	—	—	—	16	6.5
Board's request for remand or modification of enforcement order denied	0	0	0	0	0	—	—	—	—	1	0.4
Contempt cases remanded to court of appeals	0	0	0	0	0	—	—	—	—	1	0.4
Contempt cases enforced	0	0	0	0	0	—	—	—	—	1	0.4

[1] "Proceedings" are comparable to "cases" reported in annual reports prior to fiscal 1964. This term more accurately describes the data inasmuch as a single "proceeding" often includes more than one "case." See Glossary of terms for definitions

[2] A proceeding in which the Board had entered an order dismissing the complaint and the charging party appealed such dismissal in the courts of appeals.

[3] The Board appeared as "amicus curiae" in 2 cases.

Table 19A.—Proceedings Decided by Circuit Courts of Appeals on Petitions for Enforcement and/or Review of Board Orders, Fiscal Year 1987, Compared With 5-Year Cumulative Totals, Fiscal Years 1982 Through 1986[1]

Circuit courts of appeals (headquarters)	Total fiscal year 1987	Total fiscal years 1982–1986	Affirmed in full				Modified				Remanded in full				Affirmed in part and remanded in part				Set aside			
			Fiscal year 1987		Cumulative fiscal years 1982–1986		Fiscal year 1987		Cumulative fiscal years 1982–1986		Fiscal year 1987		Cumulative fiscal years 1982–1986		Fiscal year 1987		Cumulative fiscal years 1982–1986		Fiscal year 1987		Cumulative fiscal years 1982–1986	
			Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total all circuits	199	1,597	158	79.4	1,105	69.2	9	4.5	141	8.8	14	7.0	109	6.8	7	3.5	44	2.8	11	5.6	198	12.4
1. Boston, MA	2	56	2	100.0	35	62.5	0	0.0	7	12.5	0	0.0	3	5.4	0	0.0	2	3.5	0	0.0	9	16.1
2. New York, NY	21	127	19	90.4	92	72.4	0	0.0	9	7.1	1	4.8	5	3.9	0	0.0	4	3.2	1	4.8	17	13.4
3. Phila., PA	25	156	24	96.0	115	73.7	0	0.0	12	7.7	1	4.0	12	7.7	0	0.0	4	2.6	0	0.0	13	8.3
4. Richmond, VA	15	118	13	86.7	75	63.6	2	13.3	16	13.6	0	0.0	5	4.2	0	0.0	3	2.5	0	0.0	19	16.1
5. New Orleans, LA	9	129	6	66.7	95	73.7	2	22.2	10	7.7	0	0.0	7	5.4	1	11.1	3	2.3	0	0.0	14	10.9
6. Cincinnati, OH	31	248	20	64.4	166	66.9	2	6.5	25	10.1	2	6.5	14	5.7	2	6.5	4	1.6	5	16.1	39	15.7
7. Chicago, IL	21	163	18	85.7	94	57.7	0	0.0	23	14.1	2	9.5	12	7.4	0	0.0	2	1.2	1	4.8	32	19.6
8. St. Louis, MO	11	104	9	81.8	76	73.1	1	9.1	12	11.5	0	0.0	8	7.7	0	0.0	3	2.9	1	9.1	5	4.8
9. San Francisco, CA	35	316	29	82.8	233	73.7	1	2.9	17	5.4	3	8.5	21	6.7	1	2.9	15	4.7	1	2.9	30	9.5
10. Denver, CO	2	44	1	50.0	34	77.2	0	0.0	2	4.6	1	50.0	2	4.6	0	0.0	0	0.0	0	0.0	6	13.6
11. Atlanta, GA	10	56	9	90.0	41	73.2	0	0.0	5	8.9	0	0.0	2	3.6	0	0.0	0	0.0	1	10.0	8	14.3
Washington, DC	17	80	8	47.0	49	61.3	1	5.9	3	3.7	4	23.5	18	22.5	3	17.7	4	5.0	1	5.9	6	7.5

[1] Percentages are computed horizontally by current fiscal year and total fiscal years.

Table 20.—Injunction Litigation Under Sections 10(e), 10(j), and 10(l), Fiscal Year 1987

	Total proceedings	Injunction proceedings		Total dispositions	Disposition of injunctions						Pending in district court Sept. 30, 1987
		Pending in district court Oct. 1, 1986	Filed in district court fiscal year 1987		Granted	Denied	Settled	Withdrawn	Dismissed	Inactive	
Under Sec. 10(e) total	0[1]	0	0	0	0	0	0	0	0	0	0
Under Sec. 10(j) total	32	5	27	23	15	0	8	0	0	0	9
8(a)(1)	4	0	4	1	1	0	0	0	0	0	3
8(a)(1)(3)	4	2	2	1	0	0	1	0	0	0	4
8(a)(1)(5)	7	1	6	6	4	0	2	0	0	0	0
8(a)(1)(3)(5)	13	0	13	13	10	0	3	0	0	0	0
8(b)(1)	4	2	2	2	0	0	2	0	0	0	2
Under Sec. 10(l) total	67	11	56	53	15	10	22	4	2	0	14
8(b)(4)(A)	2	0	2	1	1	0	0	0	0	0	1
8(b)(4)(A)(B)	1	0	1	1	1	0	0	0	0	0	0
8(b)(4)(B)	49	7	42	41	12	9	18	2	0	0	11
8(b)(4)(B); 8(e)	1	1	0	0	0	0	0	0	0	0	0
8(b)(4)(D)	6	0	6	6	0	0	4	2	0	0	0
8(b)(4)(D); 7(C)	1	1	0	0	0	0	0	0	0	0	0
8(b)(7)(B)	1	1	0	0	0	0	0	0	0	0	0
8(b)(7)(C)	6	1	5	4	1	1	0	0	2	0	2

[1] In courts of appeals.

Table 21.—Special Litigation Involving NLRB; Outcome of Proceedings in Which Court Decisions Issued in Fiscal Year 1987

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	35	31	4	13	10	3	17	16	1	5	5	0
NLRB-initiated actions or interventions	4	4	0	2	2	0	2	2	0	0	0	0
To enforce subpoena	2	2	0	2	2	0	0	0	0	0	0	0
To prevent conflict between NLRA and 301 suite	2	2	0	0	0	0	2	2	0	0	0	0
Action by other parties	31	27	0	0	0	0	2	2	0	5	5	0
To restrain NLRB from	7	7	0	0	0	0	0	0	0	0	0	0
Proceeding in R case	2	2	0	0	0	0	1	1	0	1	1	0
Proceeding in unfair labor practice case	5	5	0	0	0	0	1	1	0	4	4	0
To compel NLRB to	24	20	4	11	8	3	13	12	1	0	0	0
Issue complaint	8	8	0	1	1	0	7	7	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	1	1	1	0	1	1	1	0	0	0	0
Pay fees under Equal Access to Justice Act	9	7	2	9	7	2	0	0	0	0	0	0
Pay fees in FOIA	1	0	1	0	0	0	1	0	1	0	0	0
Comply with third-party subpoena	1	1	0	0	0	0	1	1	0	0	0	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 1987[1]

	Total	Number of cases			
		Identification of petitioner			
		Employer	Union	Courts	State boards
Pending October 1, 1986	0	0	0	0	0
Received fiscal 1987	4	4	0	0	0
On docket fiscal 1987	4	4	0	0	0
Closed fiscal 1987	3	3	0	0	0
Pending September 30, 1987	1	1	0	0	0

[1] See Glossary of terms for definitions.

Table 22A.—Disposition of Advisory Opinion Cases, Fiscal Year 1987[1]

Action taken	Total cases closed
	3
Board would assert jurisdiction	2
Board would not assert jurisdiction	0
Unresolved because of insufficient evidence submitted	0
Dismissed	1
Withdrawn	0

[1] See Glossary of terms for definitions.

Table 23.—Time Elapsed for Major Case Processing Stages Completed, Fiscal Year 1987; and Age of Cases Pending Decision, September 30, 1987

Stage	Median days
I. Unfair labor practice cases:	
A. Major stages completed—	
1. Filing of charge to issuance of complaint	46
2. Complaint to close of hearing	112
3. Close of hearing to issuance of administrative law judge's decision	117
4. Administrative law judge's decision to issuance of Board decision	315
5. Filing of charge to issuance of Board decision	709
B. Age[1] of cases pending administrative law judge's decision, September 30, 1987	301
C. Age[1] of cases pending Board decision, September 30, 1987	301
II. Representation cases:	
A. Major stages completed—	
1. Filing of petition of notice of hearing issued	8
2. Notice of hearing to close of hearing	13
3. Close of hearing to—	
Board decision issued	240
Regional Director's decision issued	23
4. Filing of petition to—	
Board decision issued	301
Regional Director's decision issued	45
B. Age[2] of cases pending Board decision, September 30, 1987	1,120
C. Age[2] of cases pending Regional Director's decision, September 30, 1987	29

[1] From filing of charge.
[2] From filing of petition.

Table 24.—NLRB Activity Under the Equal Access to Justice Act, Fiscal Year 1987

I. Applications for fees and expenses before the NLRB·	
A. Filed with Board	[1]12
B. Hearings held	0
C. Awards ruled on.	
1. By administrative law judges.	
Granting	3
Denying	8
2 By Board:	
Granting	1
Denying	6
D. Amount of fees and expenses in cases ruled on by Board:	
Claimed	$457,932,.00
Recovered	$126,765.69
II. Applications for fees and expenses before the circuit courts of appeals:	
A. Awards ruled on.	
Granting	1
Denying	6
B. Amounts of fees and expenses recovered pursuant to court award	$25,000.00

[1] In one case, seven applications were filed.

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