FIFTY-SIXTH

ANNUAL REPORT

OF THE

NATIONAL LABOR RELATIONS BOARD

FOR THE FISCAL YEAR

ENDED SEPTEMBER 30

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Acting Director
Division of Administration

[1] Term expired August 27, 1991.

LETTER OF TRANSMITTAL

NATIONAL LABOR RELATIONS BOARD,
Washington, D.C., May 13, 1994.

SIR: As provided in Section 3(c) of the Labor Management Relations Act, 1947, I submit the Fifty-Sixth Annual Report of the National Labor Relations Board for the fiscal year ended September 30, 1991.

Respectfully submitted,
WILLIAM B. GOULD IV, *Chairman*

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

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A. Summary

The National Labor Relations Board, an independent Federal agency, initiates no cases: it acts only on those cases brought before it. All proceedings originate from filings by the major segment of the public covered by the National Labor Relations Act—employees, labor unions, and private employers who are engaged in interstate commerce. During fiscal year 1991, 38,923 cases were received by the Board.

The public filed 32,271 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 6356 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 296 amendment to certification and unit clarification cases.

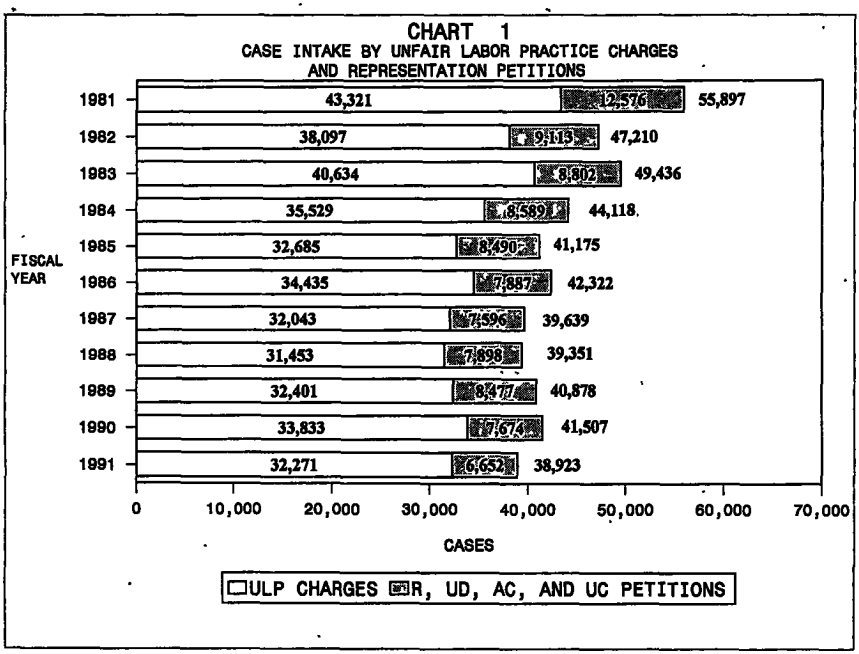
After the initial flood of charges and petitions, the flow narrows because the great majority of the newly filed cases are resolved—and quickly—in NLRB's national network of field offices by dismissals, withdrawals, agreements, and settlements.

At the end of fiscal year 1991, the five-member Board was composed of Chairman James M. Stephens and Members Mary Miller Cracraft, John N. Raudabaugh, Dennis M. Devaney, and Clifford Oviatt Jr. Jerry M. Hunter served as General Counsel.

Statistical highlights of NLRB's casehandling activities in fiscal 1991 include:

- The NLRB conducted 3752 conclusive representation elections among some 195,876 employee voters, with workers choosing labor unions as their bargaining agents in 44.3 percent of the elections.
- Although the Agency closed 38,249 cases, 26,732 cases were pending in all stages of processing at the end of the fiscal year. The closings included 31,593 cases involving unfair labor practice charges and 6235 cases affecting employee representation and 421 related cases.
- Settlements, avoiding formal litigation while achieving the goal of equitable remedies in unfair labor practice situations, numbered 9907.

- The amount of $54,927,978 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 3023 offers of job reinstatements, with 2454 acceptances.
- Acting on the results of professional staff investigations, which produced a reasonable cause to believe unfair labor practices had been committed, Regional Offices of the NLRB issued 3884 complaints, setting the cases for hearing.
- NLRB's corps of administrative law judges issued 636 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.

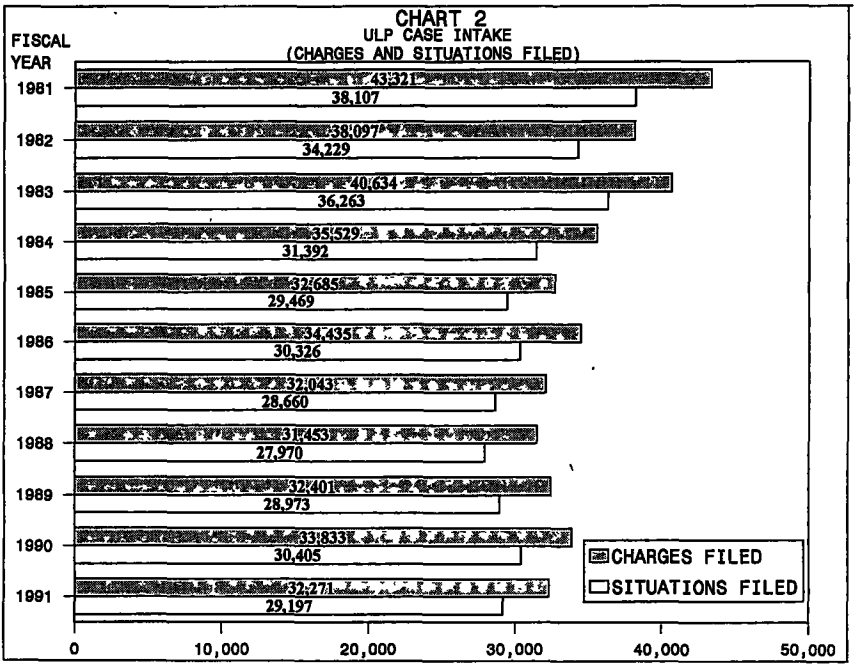
The NLRB does not act on its own motion in either function. It processes only those charges of unfair labor practices and petitions for employee elections which are filed in the NLRB's Regional, Subregional, and Resident Offices, which numbered 52 during fiscal year 1991.

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

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

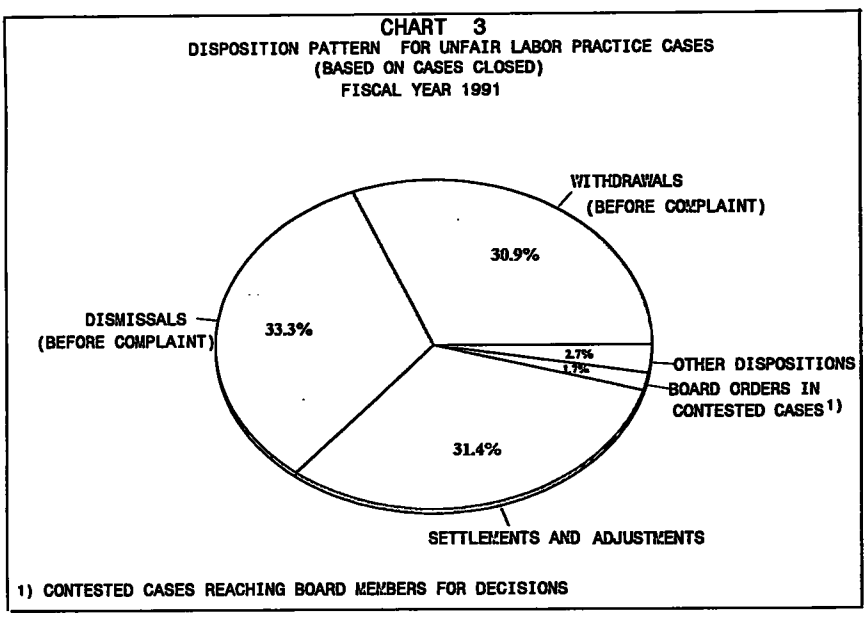
The NLRB has no independent statutory power of enforcement of its decisions and orders. It may, however, seek enforcement in the U.S. courts of appeals, and parties to its cases also may seek judicial review.

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



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

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



B. Operational Highlights

1. Unfair Labor Practices

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

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

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

More than 90 percent of the unfair labor practice cases filed with the NLRB in the field offices are disposed of in a median of some 49 days without the necessity of formal litigation before the Board. About 2 percent of the cases go through to Board decision.

In fiscal year 1991, 32,271 unfair labor practice charges were filed with the NLRB, a decrease of 5 percent from the 33,833 filed in fiscal year 1990. In situations in which related charges are counted as a single unit, there was a 4-percent decrease from the preceding fiscal year. (Chart 2.)

Alleged violations of the Act by employers were filed in 21,099 cases, about 4 percent less than the 21,910 of 1990. Charges against unions decreased 5 percent to 10,024 from 10,579 in 1990.

There were 148 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 11,265 such charges in 53 percent of the total charges that employers committed violations.

Refusal to bargain was the second largest category of allegations against employers, comprising 9834 charges, in about 47 percent of the total charges. (Table 2.)

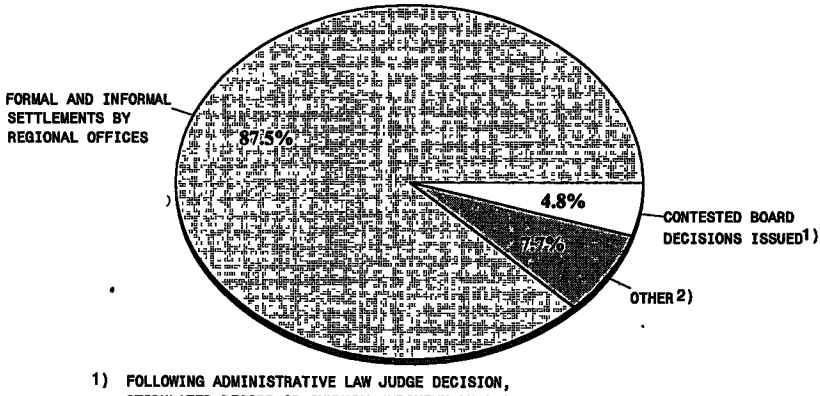
Of charges against unions, the majority (7662) alleged illegal restraint and coercion of employees, about 76 percent. There were 967 charges against unions for illegal secondary boycotts and jurisdictional disputes, a decrease of 23 percent from the 1262 of 1990.

There were 1184 charges (about 12 percent) of illegal union discrimination against employees, an decrease of 7 percent from the 1269 of 1990. There were 211 charges that unions picketed illegally for recognition or for organizational purposes, compared with 265 charges in 1990. (Table 2.)

In charges filed against employers, unions led with 70 percent of the total. Unions filed 16,013 charges and individuals filed 6992.

Concerning charges against unions, 6848 were filed by individuals, or 75 percent of the total of 9118. Employers filed 2122 and other unions filed the 148 remaining charges.

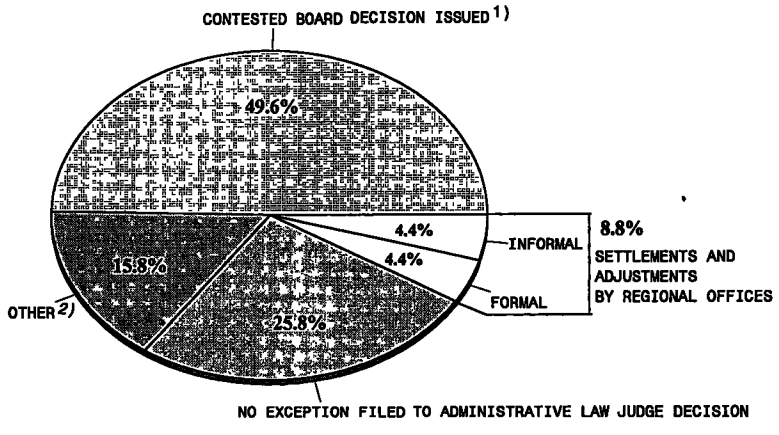
CHART 3A
DISPOSITION PATTERN FOR MERITORIOUS
UNFAIR LABOR PRACTICE CASES
(BASED ON CASES CLOSED)
FISCAL YEAR 1991



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

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

CHART 3B
DISPOSITION PATTERN FOR UNFAIR LABOR PRACTICE CASES AFTER TRIAL
(BASED ON CASES CLOSED)
FISCAL YEAR 1991



1) FOLLOWING ADMINISTRATIVE LAW JUDGE DECISION, STIPULATED RECORD OR SUMMARY JUDGMENT RULING
2) DISMISSALS, WITHDRAWALS AND OTHER DISPOSITIONS

In fiscal year 1991, 31,593 unfair labor practice cases were closed. About 96 percent were closed by NLRB Regional Offices, virtually the same as in 1990. During the fiscal year, 31.4 percent of the cases were settled or adjusted before issuance of administrative law judges' decisions, 30.9 percent were withdrawn before complaint, and 33.3 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 1991, 42 percent of the unfair labor practice cases were found to have merit, a 2 percent increase from 1990.

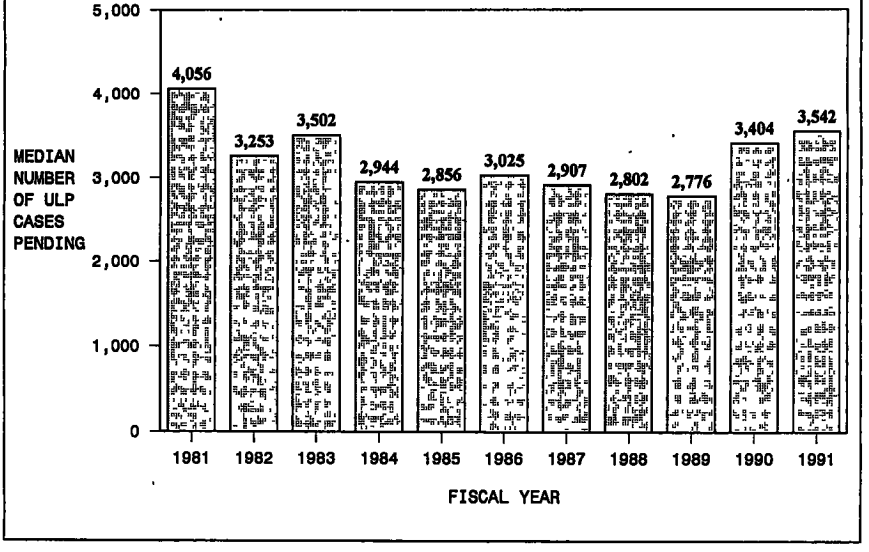
When the Regional Offices determine that charges alleging unfair labor practices have merit, attempts at voluntary resolution are stressed—to improve labor-management relations and to reduce NLRB litigation and related casehandling. Settlement efforts have been successful to a substantial degree. In fiscal year 1991, precomplaint settlements and adjustments were achieved in 9789 cases, or 28.0 percent of the charges. In 1990 the percentage was 27.1. (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 1991, 3884 complaints were issued, compared with 3876 in the preceding fiscal year. (Chart 6.)

Of complaints issued, 83.0 percent were against employers, 16.9 percent against unions, and 0.1 percent against both employers and unions.

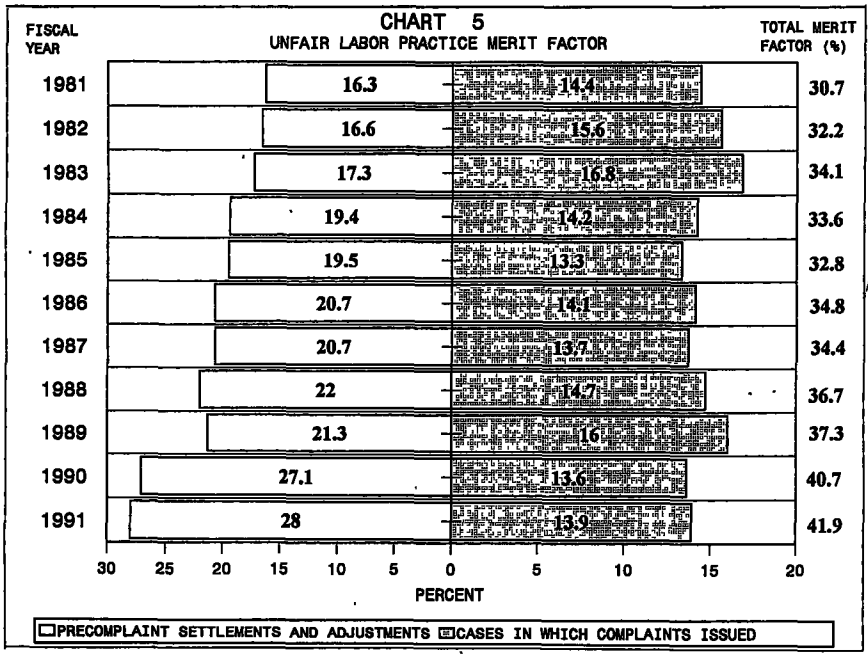
NLRB Regional Offices processed cases from filing of charges to issuance of complaints in a median of 52 days. The 52 days included 15 days in which parties had the opportunity to adjust charges and remedy violations without resorting to formal NLRB processes. (Chart 6.)

CHART 4
NUMBER OF UNFAIR LABOR PRACTICE CASES PENDING UNDER PRELIMINARY INVESTIGATION, MONTH TO MONTH



Additional settlements occur before, during, and after hearings before administrative law judges. The judges issued 636 decisions in

967 cases during 1991. They conducted 622 initial hearings, and 31 additional hearings in supplemental matters. (Chart 8 and Table 3A.)

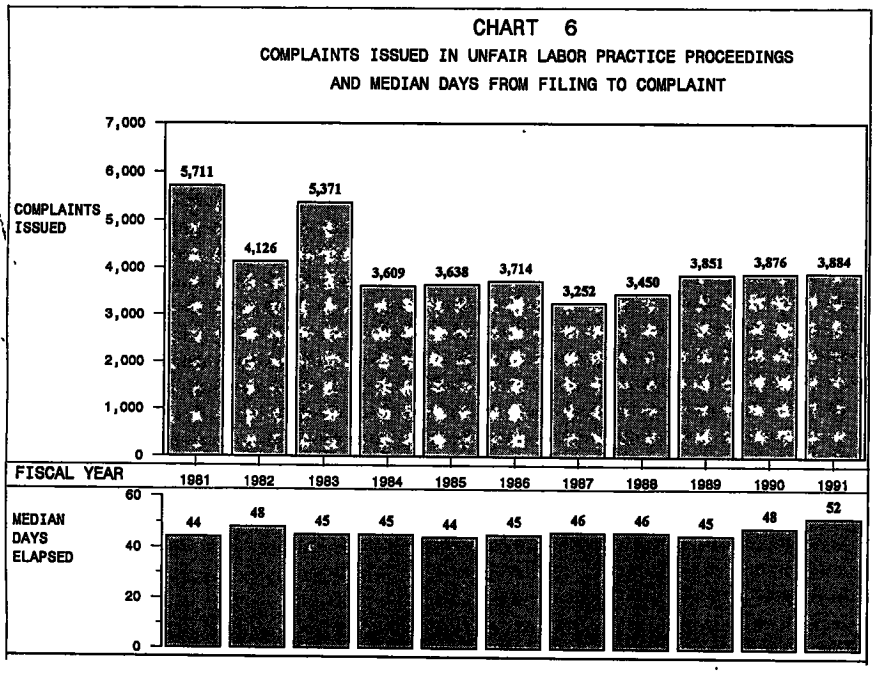


By filing exceptions to judges' findings and recommended rulings, parties may bring unfair labor practice cases to the five-member Board for final NLRB decision.

In fiscal year 1991, the Board issued 774 decisions in unfair labor practice cases contested as to the law or the facts—646 initial decisions, 54 backpay decisions, 31 determinations in jurisdictional work dispute cases, and 37 decisions on supplemental matters. Of the 646 initial decision cases, 561 involved charges filed against employers and 85 had union respondents.

For the year, the NLRB awarded backpay of $53.9 million. (Chart 9.) Reimbursement for unlawfully exacted fees, dues, and fines added another $1,047,094. Backpay is lost wages caused by unlawful discharge and other discriminatory action detrimental to employees, offset by earnings elsewhere after the discrimination. About 3023 employees were offered reinstatement, and 82 percent accepted.

At the end of fiscal 1991, there were 23,530 unfair labor practice cases being processed at all stages by the NLRB, compared with 22,852 cases pending at the beginning of the year.

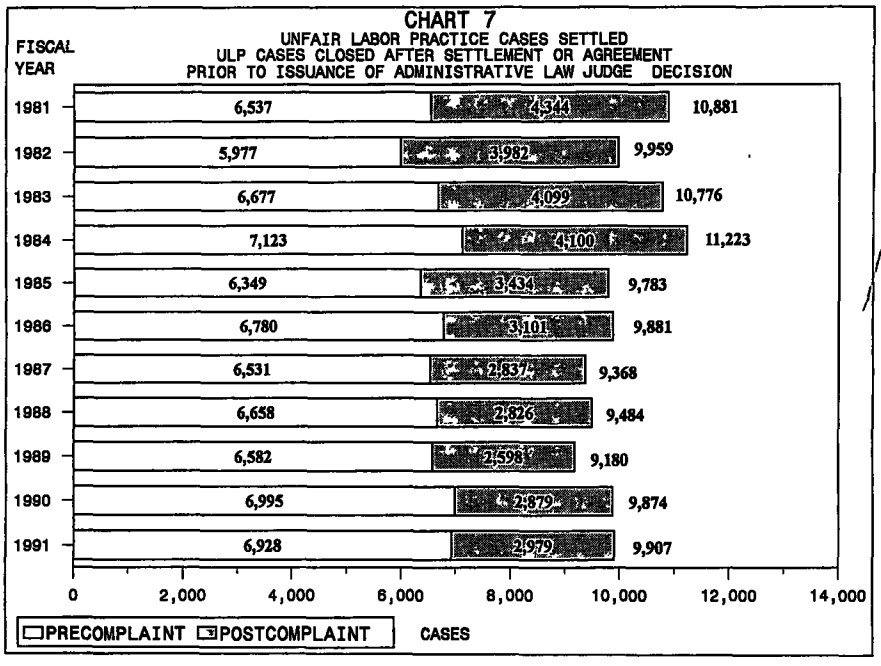


2. Representation Cases

The NLRB received 6652 representation and related case petitions in fiscal 1991, compared with 7674 such petitions a year earlier.

The 1991 total consisted of 5162 petitions that the NLRB conduct secret-ballot elections where workers select or reject unions to represent them in collective bargaining; 1061 petitions to decertify existing bargaining agents; 133 deauthorization petitions for referendums on rescinding a union's authority to enter into union-shop contracts; and 274 petitions for unit clarification to determine whether certain classifications of employees should be included in or excluded from

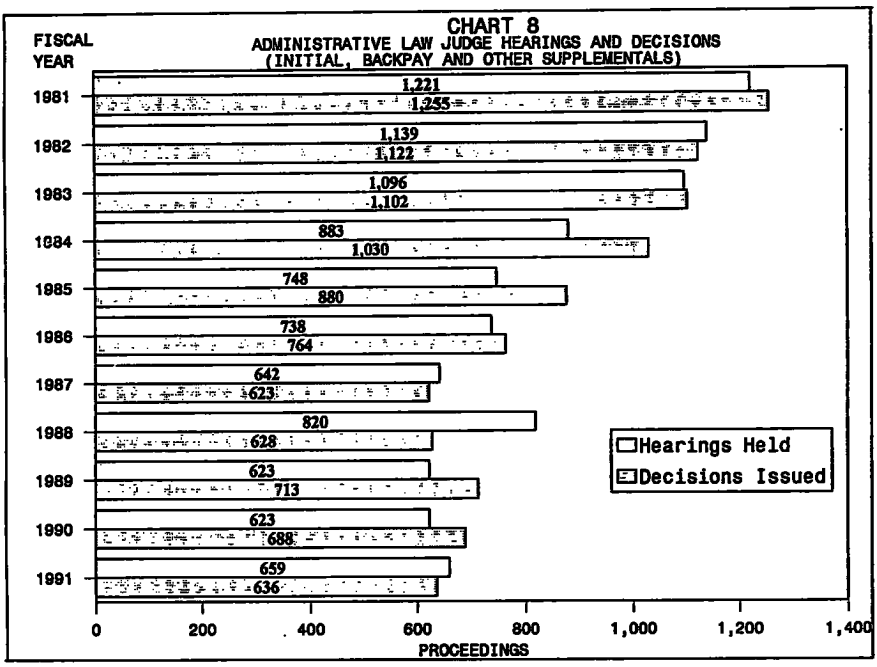
existing bargaining units. Additionally, 22 amendment of certification petitions were filed.



During the year, 6656 representation and related cases were closed, compared with 7839 in fiscal 1990. Cases closed included 5138 collective-bargaining election petitions; 1097 decertification election petitions; 122 requests for deauthorization polls; and 299 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 12.4 percent of representation cases closed by elections, balloting was ordered by NLRB Regional Directors following hearing on points in issue. There were 41 cases where the Board directed elections after transfers of cases from the Regional Office. (Table 10.) There were four cases that resulted in expedited

elections pursuant to the Act's 8(b)(7)(C) provisions pertaining to picketing.



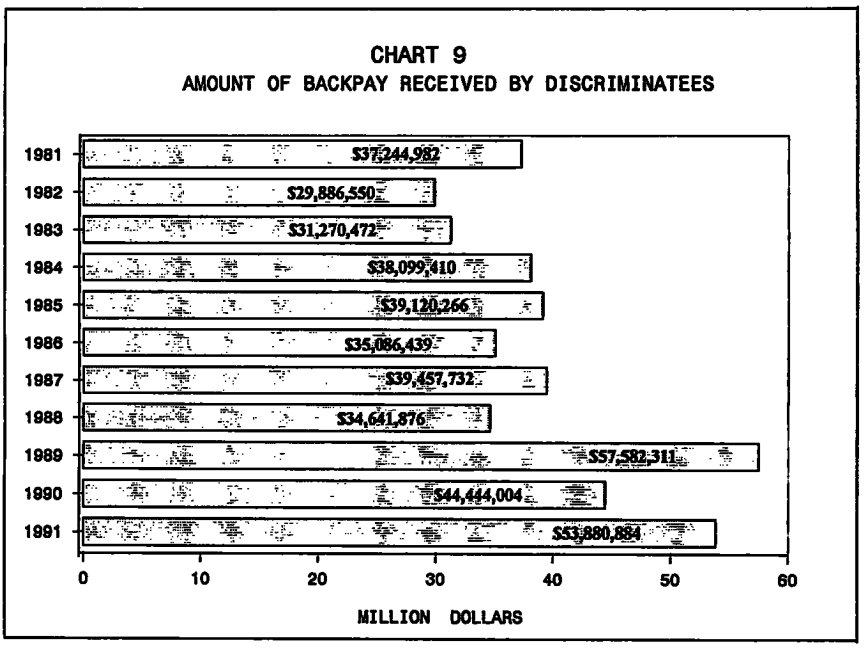
3. Elections

The NLRB conducted 3752 conclusive representation elections in cases closed in fiscal 1991, compared with the 4210 such elections a year earlier. Of 225,842 employees eligible to vote, 195,876 cast ballots, virtually 9 of every 10 eligible.

Unions won 1663 representation elections, or 46.3 percent. In winning majority designation, labor organizations earned bargaining rights or continued as employee representatives for 90,051 workers. The employee vote over the course of the year was 93,593 for union representation and 102,283 against.

The representation elections were in two categories—the 3179 collective-bargaining elections in which workers chose or voted down labor organizations as their bargaining agents, plus the 573 decerti-

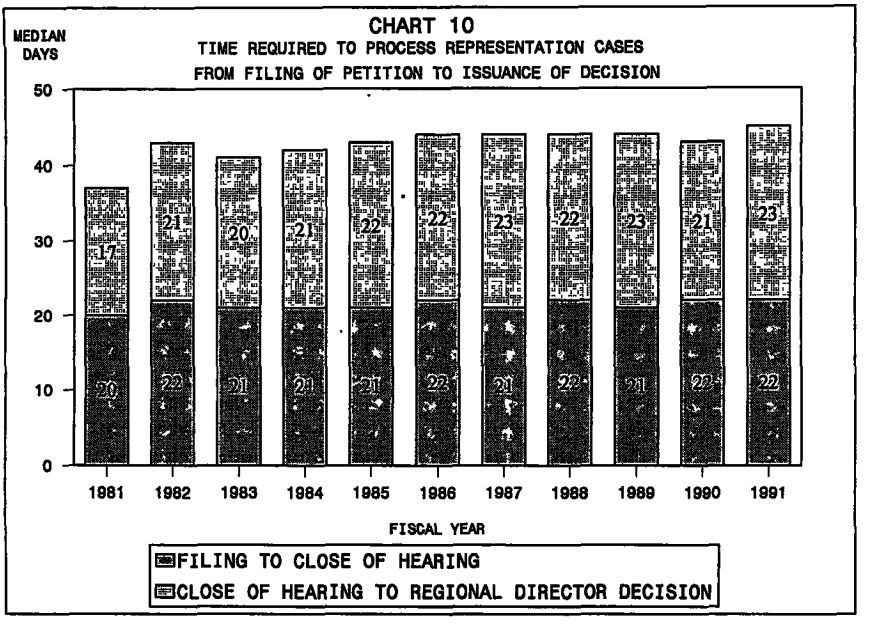
fication elections determining whether incumbent unions would continue to represent employees.



There were 3595 select-or-reject-bargaining-rights (one union on ballot) elections, of which unions won 1533, or 42.6 percent. In these elections, 83,071 workers voted to have unions as their agents, while 99,841 employees voted for no representation. In appropriate bargaining units of employees, the election results provided union agents for 76,906 workers. In NLRB elections the majority decides the representational status for the entire unit.

There were 157 multiunion elections, in which 2 or more labor organizations were on the ballot, as well as a choice for no representa-

tion. Employees voted to continue or to commence representation by 1 of the unions in 130 elections, or 82.8 percent.



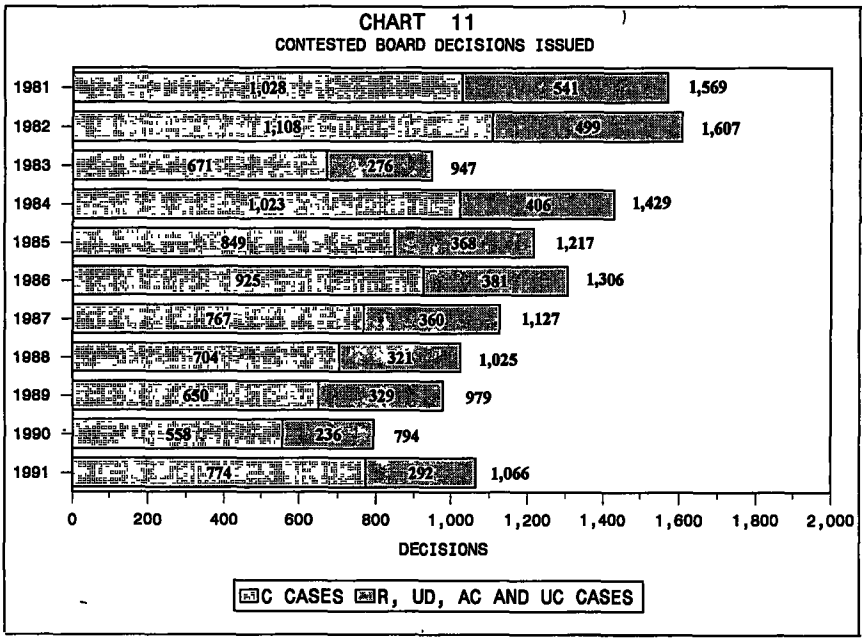
As in previous years, labor organizations lost decertification elections by a substantial percentage. The decertification results brought continued representation by unions in 173 elections, or 30.2 percent, covering 14,174 employees. Unions lost representation rights for 16,643 employees in 400 elections, or 69.8 percent. Unions won in bargaining units averaging 82 employees, and lost in units averaging 42 employees. (Table 13.)

Besides the conclusive elections, there were 223 inconclusive representation elections during fiscal year 1991 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 26 referendums, or 41 percent, while they maintained the right in the other 37 polls which covered 2880 employees. (Table 12.)

For all types of elections in 1991, the average number of employees voting, per establishment, was 52, about the same as 1990. About

75 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 1627 decisions concerning allegations of unfair labor practices and questions relating to employee representation. This total compared with the 1352 decisions rendered during fiscal year 1990.

A breakdown of Board decisions follows:

Total Board decisions		**1,627**
Contested decisions		**1066**
Unfair labor practice decisions	774	
Initial (includes those based on stipulated record)	646	
Supplemental	43	
Backpay	54	
Determinations in jurisdictional disputes	31	

Representation decisions		286	
After transfer by Regional Directors for initial decision	6		
After review of Regional Director decisions	64		
On objections and/or challenges	216		
Other decisions		6	
Clarification of bargaining unit	4		
Amendment to certification	0		
Union-deauthorization	2		
Noncontested decisions			**561**
Unfair labor practice	276		
Representation	284		
Other	1		

The majority (66 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 1991 about 5 percent of all meritorious charges and 50 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

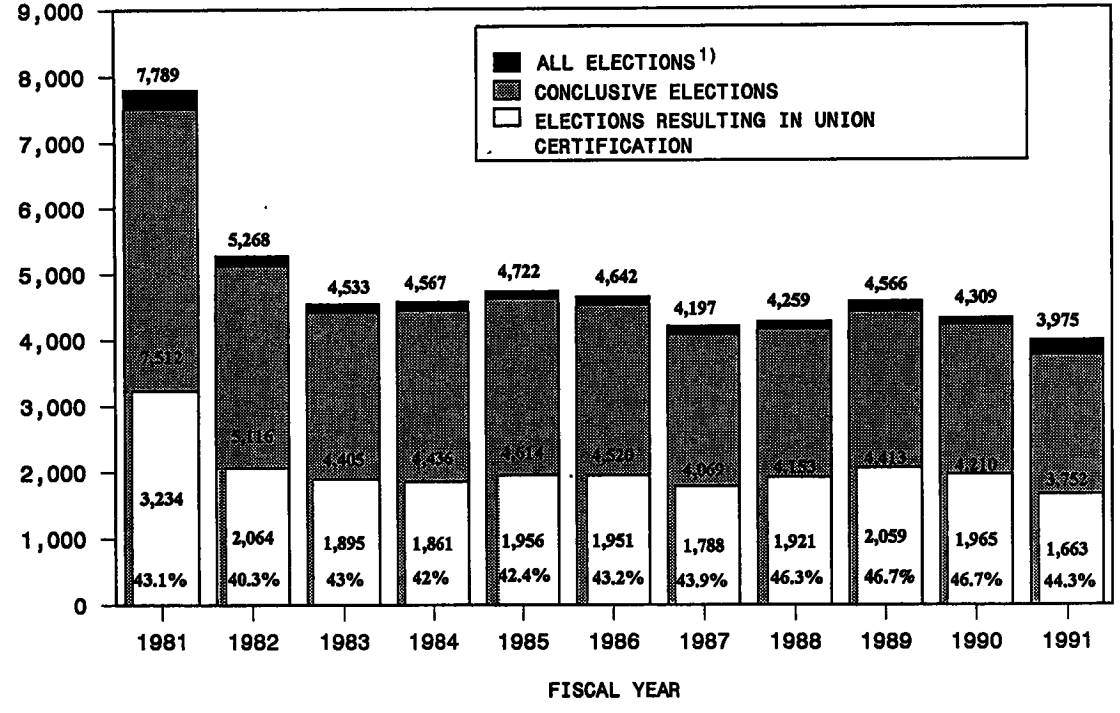
NLRB Regional Directors issued 819 decisions in fiscal 1991, compared with 1380 in 1990. (Chart 13 and Tables 3B and 3C.)

c. Administrative Law Judges

With a leveling in case filings alleging unfair labor practices, administrative law judges issued 636 decisions and conducted 659 hearings. (Chart 8 and Table 3A.)

CHART 12

REPRESENTATION ELECTIONS CONDUCTED
(BASED ON CASES CLOSED DURING YEAR)



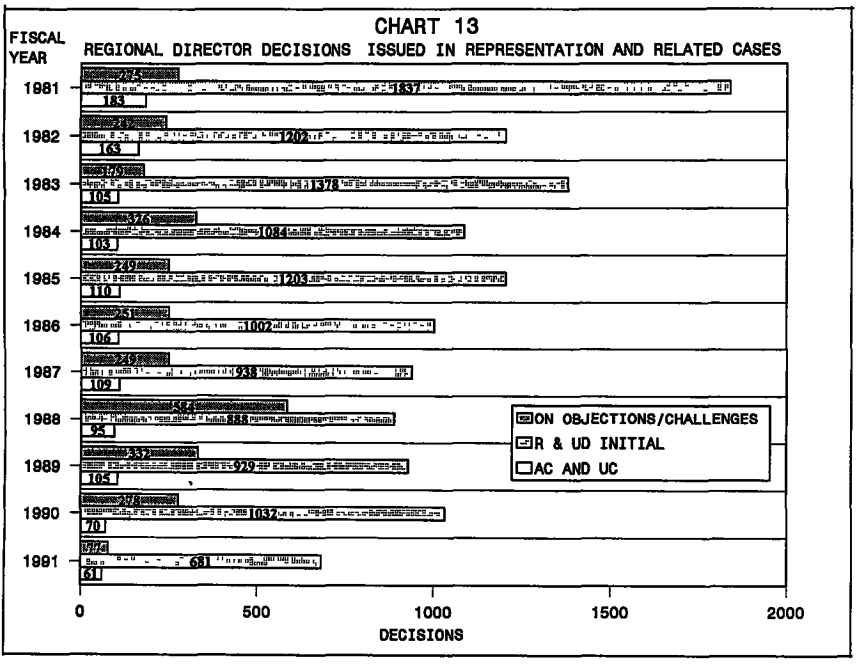
1) ALL ELECTIONS INCLUDE THOSE RESULTING IN CERTIFICATION, THOSE RESULTING IN A RERUN OR RUNOFF ELECTION, AND THOSE IN WHICH A PETITION WAS WITHDRAWN OR DISMISSED BEFORE CERTIFICATION.

5. Court Litigation

a. Appellate Courts

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

In fiscal year 1991, 178 cases involving the NLRB were decided by the United States courts of appeals compared with 161 in fiscal year 1990. Of these, 86.5 percent were won by NLRB in whole or in part compared to 88.9 percent in fiscal year 1990; 5.6 percent were remanded entirely compared with 3.7 percent in fiscal year 1990; and 7.9 percent were entire losses compared with 7.4 percent in fiscal year 1990.



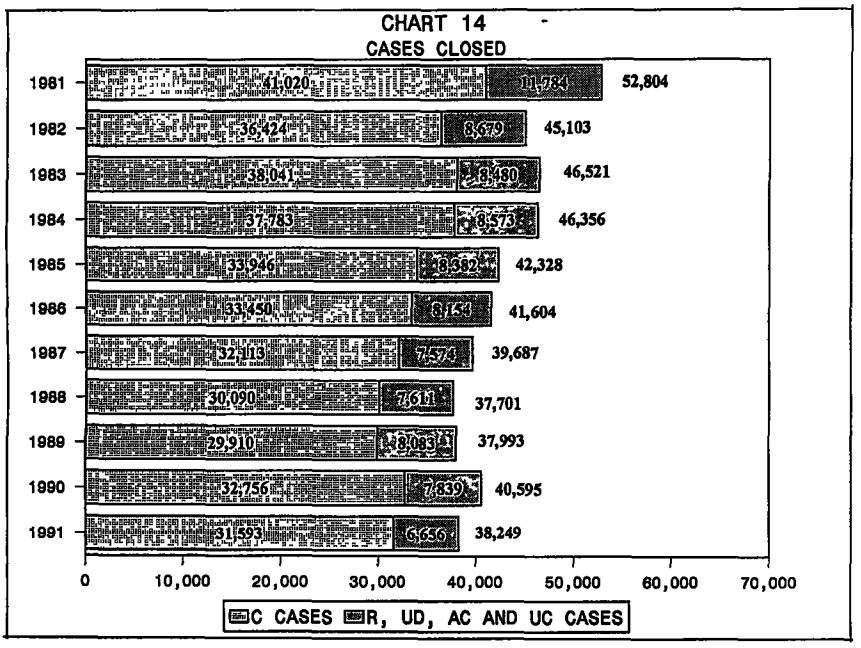
b. The Supreme Court

In fiscal 1991, there were two Board cases decided by the Supreme Court. The Board participated as amicus in one case and the Board's position prevailed in that case.

c. Contempt Actions

In fiscal 1991, 77 cases were referred to the contempt section for consideration of contempt action. There were 17 contempt proceedings instituted. There were 15 contempt adjudications awarded in

favor of the Board; 11 cases in which the court directed compliance without adjudication; 1 case in which the petition was withdrawn; and no cases in which the Board's petition was denied.



d. Miscellaneous Litigation

There were 23 additional cases involving miscellaneous litigation decided by appellate, district, and bankruptcy courts. The NLRB's position was upheld in all these cases. (Table 21.)

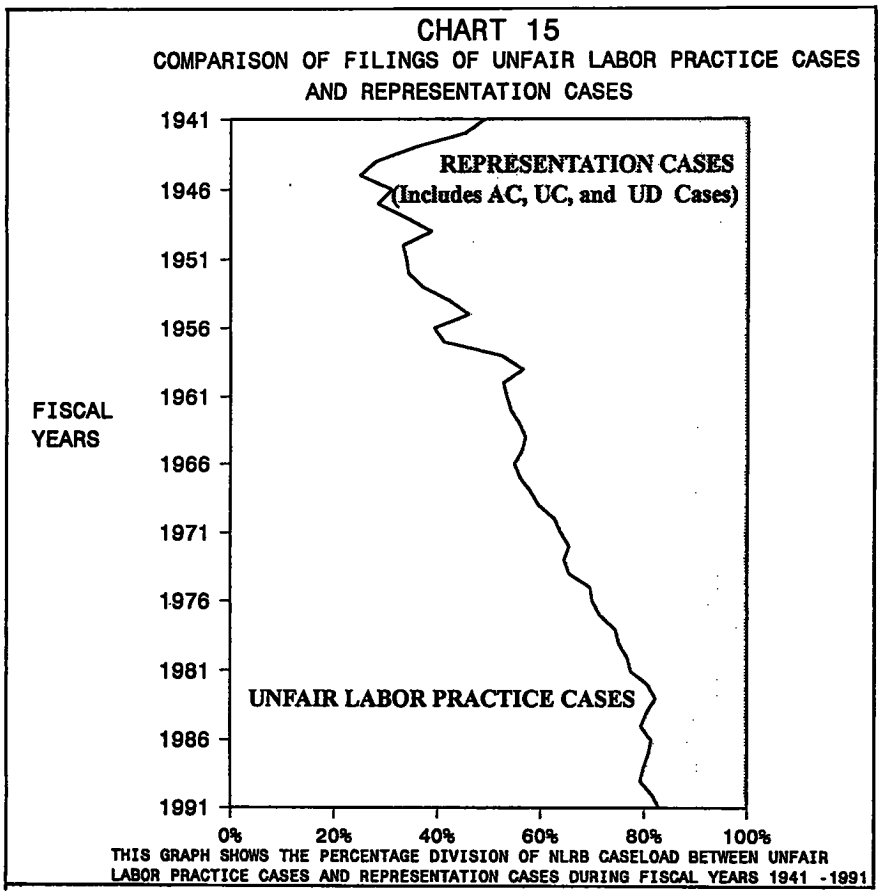
e. Injunction Activity

The NLRB sought injunctions pursuant to Sections 10(j) and 10(l) in 55 petitions filed with the U.S. district courts, compared with 51 in fiscal year 1990. (Table 20.) Injunctions were granted in 21, or 84 percent, of the 25 cases litigated to final order.

NLRB injunction activity in district courts in 1990:

Granted	21
Denied	4
Withdrawn	3

Dismissed	2
Settled or placed on court's inactive lists	21
Awaiting action at end of fiscal year	17



C. Decisional Highlights

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

II on "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. Nonadmissions Clauses in Board Notices

In *Pottsville Bleaching Co.*,[1] the full Board decided that it will not permit the inclusion of a nonadmissions clause in a Board notice under any circumstances. The Board pointed out that its notice, in most cases, is the principal means by which the Board communicates to those affected by a respondent's unfair labor practice what conduct the Board is requiring of the respondent. Further, the Board held that inclusion of a nonadmissions clause in the Board notice could be confusing to those reading the notice and could undermine its effectiveness.

2. Section 10(b) and the Continuing Violation Theory

In *A & L Underground*,[2] the Board held that unfair labor practice charges concerning the repudiation of a collective-bargaining agreement or any subsequent breaches of that agreement must be filed within 6 months after the charging party has clear and unequivocal notice of the repudiation. The Board majority found that the employer clearly and unequivocally repudiated any agreement it had with the union no later than December 4, 1986. Because the union did not file a charge until August 24, 1987, more than 6 months after the repudiation, the Board majority found that the charge was time-barred under Section 10(b) and dismissed the complaint. The Board rejected the union's claim that the charge was not time-barred with respect to the employer's continuing failure to comply with the agreement during the 6 months prior to the date the charge was filed. Thus the Board overruled *Al Bryant, Inc.*,[3] which had held such charges to be timely with respect to the failure to comply with the contract during the 10(b) period. Rather, the Board concluded that the continuing violation theory cannot properly be applied to a clear and total contract repudiation since the employer's failure to apply the contract thereafter is little more than the effect or result of the repudiation. The Board noted, however, that the continuing violation theory would still be applicable in cases where there was no clear and unequivocal repudiation.

3. Filing of Election Objections

In *John I. Haas, Inc.*,[4] the Board overruled *Drum Lithographers*,[5] and applied the "postmark" rule to election objections. Therefore,

[1] 301 NLRB 1095.
[2] 302 NLRB 467.
[3] 260 NLRB 128 (1982), enfd. 711 F.2d 543 (3d Cir. 1983), cert. denied 464 U.S. 1039 (1984).
[4] 301 NLRB 300.
[5] 287 NLRB 22 (1987).

election objections will be considered timely if deposited with a delivery service that will provide a record showing that the objections were tendered to the delivery service in sufficient time for delivery by the due date, but in no event any later than the day before the due date. The Board stated that experience has shown that an objecting party acting in good faith and with all due diligence may still find its objections rejected as untimely filed under *Drum Lithographers* because they did not arrive at the Regional Office on the due date. Therefore, the Board concluded that application of the "postmark" rule to election objections will provide a simple, fair, and effective solution to the problem. Accordingly, Section 102.111(b) of the Board Rules and Regulations will be revised to remove election objections from the documents excluded from the "postmark" rule, the Board decided.

4. Threat of Job Loss

In *Baddour, Inc.*,[6] the Board held that the employer unlawfully threatened employees with job loss in the event of a strike, where during its campaign speeches the employer told employees without other explanation that "union strikers can lose their jobs" and "you could end up losing your job by being replaced with a new permanent worker." The Board majority found that the phrase "lose your job" conveys to the ordinary employee the clear message that employment will be terminated, and that this message is reinforced when the employee is told that his/her job will be lost because of replacement by a "permanent" worker. In these circumstances, where the single reference to permanent employment is coupled with a threat of job loss, the Board majority concluded that it was not reasonable to suppose that the ordinary employee will interpret the words to mean that he/she has a right under *Laidlaw Corp.*[7] to return to the job once the permanent replacement leaves.

5. Paid Union Organizers

In *Escada (USA), Inc.*,[8] the Board majority adopted the administrative law judge's finding that the employer violated Section 8(a)(3) by discharging an employee, who was also a paid union organizer intern, because of his union activities. The judge rejected the employer's argument that the discriminatee, as an employee of the union, was not an "employee" under Section 2(3) entitled to the Act's protection. The Board majority agreed with the judge, citing *Oak Apparel*,[9] *H. B. Zachry Co.*,[10] and *Willmar Electric Service*[11] for the proposition that paid organizers "are entitled to the same protected Sec. 2(3) 'employee' status as other applicants." The Board further noted that although "paid union organizers who obtain employment with a com-

[6] 303 NLRB 275.
[7] 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1969).
[8] 304 NLRB 845.
[9] 218 NLRB 701 (1975).
[10] 289 NLRB 838 (1988).
[11] 303 NLRB 245.

pany may be temporary employees excluded from any bargaining unit,'' they nonetheless are entitled to the Act's full protection.

6. Refusal to Execute Agreement

In *Beatrice/Hunt-Wesson*,[12] the Board held that the employer did not violate Section 8(a)(5) by refusing to execute a collective-bargaining agreement on the ground that the agreement had not been ratified by the bargaining unit members. The Board found that the parties had discussed and agreed during negotiations for the contract ''to submit their 'tentative agreement' containing a controversial wage proposal for ratification by the bargaining unit members.'' Thus, the Board concluded that ''rather than the Union imposing the limitation of notification on itself, both parties . . . agreed to require ratification by the bargaining unit members to make their 'tentative agreement' binding.'' The General Counsel's argument that the employer did not have standing to challenge the union's method of ratification was rejected, with the Board holding that ratification was not an internal union procedure within the union's exclusive domain and control since the parties had clearly agreed that ratification was a precondition to the contract and had discussed the notification process.

D. Financial Statement

The obligations and expenditures of the National Labor Relations Board for the fiscal year ended September 30, 1991, are as follows, in thousands of dollars:

Personnel compensation	$101,373
Personnel benefits	16,526
Benefits for former personnel	59
Travel and transportation of persons	2,656
Transportation of things	136
Rent, communications, and utilities	19,258
Printing and reproduction	319
Other services	4,477
Supplies and materials	1,094
Equipment	1,730
Insurance claims and indemnities	82
Total obligations and expenditures[13]	$147,710

[12] 302 NLRB 224

[13] Includes $452 for reimbursables from the administrative law judge loan program

II

NLRB Jurisdiction

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

A. Nonprofit Charitable Organizations

In *Goodwill Industries of Denver*,[6] the Board held that it will not decline to assert jurisdiction over a nonprofit or charitable employer solely because of the employer's worthy rehabilitative purpose. Rather, the Board will assert jurisdiction when (1) the employer's business has a sufficient impact on interstate commerce to warrant the exercise

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

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

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

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

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

[6] 304 NLRB 764 (Chairman Stephens and Members Cracraft and Oviatt).

of jurisdiction and (2) those employed are employees within the meaning of Section 2(3) of the Act. In making the latter determination, the Board will find employee status when the employment relationship "is guided to a great extent by business considerations and may be characterized as a typically industrial relationship" but will not find employee status when the relationship is "primarily rehabilitative and working conditions are not typical of private sector working conditions."

Goodwill Industries of Denver employs handicapped individuals—classified as client/trainees and client/employees—as well as nonhandicapped individuals at the Lowry Air Force Base commissary in Colorado. Both the client/trainees and client/employees are permitted to work at their own pace, with a focus on counseling regarding work difficulties, and discipline and discharge is imposed only in extreme circumstances. These individuals additionally receive various rehabilitative and counseling services. The Board found that these individuals are not statutory employees because their working conditions are not primarily guided by economic or business considerations and are not typical of those employed in the private sector. In contrast, the Board found the nonhandicapped individuals to be statutory employees because they do not receive rehabilitative services and are subject to discharge for failure to meet production standards.

The Board additionally found that the employer clearly satisfied the Board's jurisdictional standards for retail enterprises. Thus, the Board directed an election limited solely to those individuals found to be statutory employees. The Board overruled *Goodwill Industries of Southern California*[7] to the extent it conflicted with the Board's articulation in this case of the principles guiding its assertion of jurisdiction over nonprofit, charitable organizations.

B. Community Action Agency

In *Albany County Opportunity*,[8] the Board held that the respondent employer was a political subdivision of the State of New York and as such was exempt from the Board's jurisdiction, since a majority of the respondent's board of directors was responsible to "individuals who are responsible to public officials or to the general electorate." *NLRB v. Natural Gas Utility District of Hawkins County*.[9]

The majority of Members Cracraft and Devaney found that the case was controlled by *Economic Security Corp.*[10] and *Woodbury County Community Action Agency*,[11] where the Board held that nonprofit community organizations which by virtue of Federal and state law are composed of a tripartite board of directors which encompass equal parts consisting of (1) public officials or their representatives; (2) members and representatives of different political, religious, or busi-

[7] 231 NLRB 536 (1977).
[8] 300 NLRB 886 (Members Cracraft and Devaney, Chairman Stephens dissenting).
[9] 402 U.S. 600 (1971).
[10] 299 NLRB 562 (Members Cracraft, Devaney, and Oviatt).
[11] 299 NLRB 554 (Members Cracraft and Devaney, Chairman Stephens dissenting).

ness groups in the community; and (3) "elected" members representative of the poor in the area to be served by the entity are exempt from the Board's jurisdiction. The Board found that here the respondent's bylaws had incorporated the Federal and state law requirements that one-third of its board of directors consists of public officials and their representatives, and that one-third be chosen under the "democratic selection process" designed to ensure the representation of the poor in the area to be served. Thus, the majority of the respondent's board was responsible by law to public officials or the general electorate.

Chaiman Stephens dissented and would have asserted jurisdiction for the reasons set forth in his dissent in *Woodbury County Community Action Agency*, supra.

C. *Res-Care* Doctrine

In *Ebon Research Systems*,[12] the Board, on remand from the United States Court of Appeals for the District of Columbia Circuit,[13] reaffirmed its original determination to assert jurisdiction under its *Res-Care* standard.[14]

The Board found that the respondent failed to sustain its burden of proving that it did not retain sufficient control over the primary economic aspects of employees working pursuant to certain animal-care service contracts, which were the focus of the court's remand. In the absence of such proof, and in light of the substantial control retained by the respondent over these employees' noneconomic terms and conditions of employment, the Board held that the respondent had sufficient labor relations control within the meaning of *Res-Care* to enable it to engage in meaningful collective bargaining.

The employer provided research consulting services to governmental agencies, exempt from Board jurisdiction, pursuant to three service contract relationships that were subject to the requirements of the Service Contract Act of 1965.[15] The service contract relationship that presented problems with respect to the Board's assertion of jurisdiction concerned two successive, 1-year cost-plus-fixed-fee reimbursement contracts negotiated between the respondent and the Small Business Association (SBA) and requiring the respondent to perform animal-care and research support functions for the National Institute of Occupational Safety and Health (NIOSH).

Both of these animal-care contracts did not specify wage rates or the kinds of benefits to be paid to covered job classifications, although the successor contract provided for provisional reimbursement of fringe benefits as a percentage of direct labor costs. The contracts required the respondent periodically to submit vouchers for reimbursement specifying the wage rate and amount charged for direct labor costs and indirect costs (fringe benefits and overhead). The

[12] 302 NLRB 762 (Chairman Stephens and Members Cracraft and Oviatt).
[13] *Ebon Research Systems v. NLRB*, 880 F.2d 1396 (D.C. Cir. 1989).
[14] *Res-Care, Inc.*, 280 NLRB 670 (1986).
[15] 41 U.S.C. §351.

Government contracting officer could audit these vouchers, determine that a cost is "disallowable," and reduce any contract payment by the amount of the disallowed cost. There was no evidence that the contracting officer ever disallowed the respondent's cost reimbursement claims. The contracts provided a mechanism permitting midterm renegotiation. The Government contracting officer had the responsibility for negotiating with the respondent about any changes in the contracts.

Significantly, the contracts incorporated by reference clause 3 of the former Department of Health, Education and Welfare (HEW) General Provisions for Negotiated Cost-Plus-Fixed-Fee Type Contract. Clause 3 provided that the Government is not obligated to reimburse the respondent for costs incurred in excess of the estimated cost set forth in the "Schedule," without the Government contracting officer's written approval. The "Schedule" included labor costs set forth in the respondent's budget proposal submitted when negotiating the service contract.

On review of the Board's original decision asserting jurisdiction, the court focused on the animal-care contracts' incorporation by reference of clause 3 and on the specific compensation rates and estimated hours set forth in the respondent's proposed budget. The court explained why the Board's jurisdictional analysis was inadequate to fit its extension of jurisdiction over the respondent within its *Res-Care* doctrine, under which the Board decided not to assert jurisdiction.

Reviewing the jurisdictional issue in light of the court's opinion and the entire record, the Board initially observed that the provisions relative to employee fringe benefits differed significantly from those at issue in *Res-Care* because the exempt entities here did not review or specify the kinds of fringe benefits that the respondent could provide its employees. The respondent set fringe benefits subject at most to possible disallowance of reimbursement claims by the NIOSH contracting officer if overall fringe benefits costs exceeded a "provisional" ceiling set as a percentage of direct labor costs. The Board relied on precedent holding that an exempt entity's control of a private employer's ability to increase wages does not preclude meaningful bargaining where the employer retains control over all other economic (i.e., fringe benefits) and noneconomic bargainable subjects. With respect to noneconomic terms and conditions of employment, the Board found that the respondent retained and exercised far greater control than the private contractor in *Res-Care*.

The Board next addressed the critical question of whether the exempt entities retained such a high degree of control over the wage rates of the respondent's employees covered by the animal-care contracts as to preclude meaningful bargaining. This potential control was based on (1) evidence of the incorporation into the animal-care contracts, through clause 3 of HEW's general provisions, of labor cost items from the respondent's contract proposal and (2) the authority of the contracting officer to disallow reimbursement of costs that varied from those in the proposal.

The Board found that the respondent failed to prove that the potential wage controls would, in practice, have any significant impact on its ability to vary wages and fringe benefits through collective bargaining. Rather, all the evidence indicated that proposals or claims for increased labor costs resulting from collective bargaining would be routinely accepted by the contracting officer.[16] The respondent offered no countervailing evidence. In the event the contracting officer did disallow a claim and/or refuse to permit contractual modifications reflecting a collectively bargained wage cost increase, the Board observed that the Service Contract Act would mandate recognizing the increase in the parties' next service contract. In any event, the Board found that the respondent could bargain for contractual language protecting it from the consequences of adverse action by the contracting officer.

In these circumstances, the Board concluded that the respondent retained sufficient labor relations control within the meaning of *Res-Care*. Accordingly, the Board reaffirmed its original assertion of jurisdiction over the respondent.

In *Career Systems Development Corp.*,[17] the Board majority asserted jurisdiction over an employer operating an educational and treatment center whose contract with the Pennsylvania Department of Public Welfare (DPW) enables it to retain control over noneconomic labor relations matters and substantial discretion over the allocation of employee wages and fringe benefits. The majority of Chairman Stephens and Member Cracraft found that although the employer had to seek prior approval for shifts of funds from other areas into the general salary category, it is free to allocate the money among the various employees and managers as it sees fit. They concluded that the DPW's control over general expenditure categories does not amount to a "final, practical say over wages and benefits" equivalent to that which prompted the Board to decline jurisdiction in *Res-Care*.[18]

In dissent, Member Devaney would apply *Res-Care*, supra, and decline to assert jurisdiction over the employer because, in his view, the employer's contract—particularly the need to obtain prior approval from DPW for reallocations involving salaries—substantially restricts the employer's discretion with respect to economic terms and conditions of employment and thus precludes meaningful collective bargaining. Moreover, Member Devaney asserted that, notwithstanding that the employer has independent authority over firing, discipline, promotions, demotions, and establishes its own policies regarding at-

[16] Probative testimony established that pursuant to the Service Contract Act, the contracting officer "normally" would approve as "allowable costs" wage increases arising from a bona fide collective-bargaining agreement as long as they were reasonably encompassed by prevailing rates for comparable skills in the geographic locale. The compensation and period of performance articles for the successor animal-care contract were twice renegotiated, resulting in an increase in overall contract value and length. In addition, the respondent admitted that the contracting officer could agree with it to accommodate an employee's salary increase by amending the contract.

[17] 301 NLRB 434 (Chairman Stephens and Member Cracraft; Member Devaney dissenting).

[18] 280 NLRB 670 (1986).

tendance, performance appraisals, and merit reviews, it is the DPW that determines minimum staffing levels and employee qualifications.

III

Board Procedure

The Board processes alleged violations of the National Labor Relations Act through specific investigative and adjudicative procedures. The filing of an unfair labor practice charge activates the Board's machinery. The Board investigates the charge through the appropriate Regional Office. The Regional Director may dispose of the case at this level by approving a settlement agreement executed by the parties. Alternatively, the General Counsel might dismiss the case as lacking merit. If the General Counsel issues an unfair labor practice complaint, the case proceeds to a hearing before an administrative law judge. The judge issues a decision at the conclusion of the hearing. The parties may file exceptions to this decision. On the basis of the judge's decision and the parties' exceptions, the Board renders a final Decision and Order, dismissing the complaint or directing appropriate remedial action. During the report year, the Board decided significant cases involving each of these stages of the Board's unfair labor practice procedures.

A. Nonadmissions Clause

In *Pottsville Bleaching Co.*,[1] the full Board granted the General Counsel's request for special permission to appeal an administrative law judge's order approving an informal settlement agreement, over objections from both the Charging Party and the General Counsel, which included a nonadmissions clause in the Notice. The Board decided that it will not permit inclusion of a nonadmissions clause in a Board notice under any circumstances.

During the hearing before an administrative law judge, the employer offered to enter into an informal settlement agreement with a nonadmissions clause contingent on inclusion of the nonadmissions clause in the Board's notice.

Counsel for the General Counsel and Teamsters Local 115 did not object to a nonadmissions clause in the settlement agreement but opposed its inclusion in the notice.

Over objection of both the General Counsel and the union, the judge accepted the informal settlement agreement. Thereafter, the General Counsel filed a motion for special permission to appeal the judge's ruling.

[1] 301 NLRB 1095 (Chairman Stephens and Members Cracraft, Devaney, Oviatt, and Raudabaugh).

The Board pointed out that its notice, in most cases, is the principal means by which the Board communicates to those affected by a respondent's unfair labor practices what conduct the Board is requiring of the respondent.

Inclusion of a nonadmissions clause in the Board notice could be confusing to those reading the notice and could undermine its effectiveness, the Board held.

The Board wrote: "Further, if we were to set a precedent whereby those respondents who insisted could routinely secure a nonadmissions clause in the notice as a price of settlement, the General Counsel and charging parties might have little incentive in cases without affirmative remedies to agree to settle the case."

Accordingly, the Board vacated the judge's order approving the informal settlement agreement and remanded the matter to the judge for further appropriate action.

In *Electronic Workers IUE Local 825 (Central Industries)*,[2] a Board majority approved a settlement stipulation entered into between the respondent union and the General Counsel containing a nonadmissions clause.[3] Member Oviatt did not approve the settlement stipulation because of the inclusion of the nonadmissions clause.

The panel majority, contrary to Member Oviatt, saw no reason to reject the settlement stipulation merely because it contained a nonadmissions clause. It noted in this regard that while the respondent was twice previously found to be in contempt of court for engaging in conduct similar to that alleged in the affidavits submitted by the employer, "a respondent's recidivism does not constitute a bar to approval by the Board of a settlement agreement containing a nonadmissions clause." It found no evidentiary support for Member Oviatt's contention that the respondent union may have engaged in misconduct after executing the settlement stipulation. It noted that the only evidence in this regard consists of the four affidavits submitted by the employer, which Member Oviatt conceded did not establish with any degree of certainty that the respondent or its agents were responsible for the alleged misconduct described therein.

Further, for the reasons stated in the Board's decision in *Mine Workers (Island Creek Coal)*,[4] issued on the same day, the panel majority found unwarranted Member Oviatt's concern that the nonadmissions clause could be read as suggesting that the respondent has not engaged in any wrongdoing. The panel majority stated that "on balance, the remedy provided by the parties' settlement stipulation, including a court-enforceable broad cease-and-desist order and wide dissemination of the Board's notice, fully effectuates the purposes and policies of the Act and adequately balances the risks of fur-

[2] 302 NLRB 954 (Members Cracraft and Devaney, Member Oviatt dissenting).

[3] The employer declined to enter into the settlement stipulation on grounds that the union allegedly had continued to engage in unlawful conduct The panel majority, however, found that four affidavits which the employer submitted from four individuals, purportedly showing that acts of vandalism continued to occur on the employer's property, failed to establish with any degree of certainty that the union or its agents were responsible for such misconduct.

[4] 302 NLRB 949 (Chairman Stephens and Members Cracraft, Devaney, and Raudabaugh; Member Oviatt dissenting).

ther litigation against an acceptable closure of this case by settlement."

In declining to approve the settlement stipulation with a nonadmissions clause, Member Oviatt noted that although the conduct described in the four affidavits submitted by the employer had not with certainty been established as the responsibility of the union or its agents, on two prior occasions the union was found to be in contempt of court for engaging in conduct similar to that described in the affidavits. Given the history of contumacious conduct by the union and the possibility that it may still not be in compliance with court orders enjoining such conduct, Member Oviatt declined to approve the settlement stipulation with the nonadmissions clause. As stated in his dissenting opinion in *Mine Workers (Island Creek Coal)*, supra, Member Oviatt expressed the view that such a clause could be read to suggest that the respondent has done nothing wrong.

In *Mine Workers (Island Creek Coal)*,[5] the Board approved a settlement stipulation that provided for issuance of a broad, nationwide order against the Mine Workers prohibiting it from engaging in unlawful secondary conduct, notwithstanding that several of the charging party employers objected to the settlement on the ground that it contained a nonadmissions clause and did not include extraordinary notice requirements.

The Board majority of Chairman Stephens and Members Cracraft, Devaney, and Raudabaugh rejected Member Oviatt's dissenting view that inclusion of a nonadmissions clause implies that the Board condones the Mine Workers' illegal activity. Rather, the majority stated, the inclusion of such a clause merely reflects that the settlement was the result of a compromise prior to a final adjudication on the merits.

With respect to the settlement's notice provisions, the majority likewise rejected Member Oviatt's dissenting view that the settlement's traditional notice-posting requirements were inadequate to signal to union members that the alleged illegal activity is prohibited and will not be tolerated. Although acknowledging that it could not be said with certainty that additional notice-posting requirements would not have been included by the Board in a final order after litigation, the majority reiterated that the issue presented was the appropriateness of a settlement and not the appropriateness of a final Board order.

Finally, in addition to the breadth and scope of the cease-and-desist order against the Mine Workers, the majority noted several other factors favoring approval of the settlement in the case: the early stage of the litigation (prior to the hearing), the inherent risks and uncertainties of litigation generally, and the fact that the General Counsel had recommended approval of the settlement. In these circumstances, the majority found that, on balance, it would effectuate the purposes and policies of the Act to approve the settlement.

Dissenting, Member Oviatt noted the long history of economic violence and harassment of this kind in the mining industry. In his view,

[5] Ibid.

the settlement was inadequate in resolving the instant charges of such misconduct since the settlement's nonadmissions clause would leave the clear impression, particularly in the mining industry, that any party engaging in such activity will not be held accountable. Further, in his view, the settlement's provision for mere posting of a notice was not enough to signal to union members that such allegedly pervasive and widespread illegal activity is prohibited by law and will not be tolerated. Accordingly, contrary to the majority, he would not have approved the settlement.

B. Adequacy of Non-Board Settlement

In *Longshoremen ILA Local 1814 (Amstar Sugar)*,[6] a panel majority granted the charging party employer's request to withdraw its charge that the union had struck without timely providing the 8(d) notice to the Federal and state mediation services. In so doing, the majority accepted a non-Board settlement that had been entered into by the parties over objections from the General Counsel, and reached after the administrative law judge's decision had issued.

On November 22, 1989, the judge found that the union violated Section 8(b)(3) by first sending its 8(d)(3) notices late, i.e., more than 30 days after the 8(d)(1) notice of termination of the collective-bargaining agreement, and then, on September 30, 1989, striking within 30 days of the mediation services' receipt of the 8(d)(3) notices. On December 1, 1989, Amstar and the union executed a settlement in which Amstar agreed to rescind suspensions and provide backpay and reinstatement for certain employees in return for the union's withdrawal of grievances then pending arbitration. Amstar also agreed to seek withdrawal of the instant unfair labor practice charge. Further, the union ended its strike and promised that in the future neither it nor its members would interfere with Amstar's operations.

Members Cracraft and Devaney applied *Independent Stave Co.*,[7] and found that the private settlement sufficiently assured adequate protection of the policies underlying the Act. First, they found that Amstar and the union were fully satisfied by the settlement which provided essentially the same remedy as the cease-and-desist order the Board would have ordered on adopting the judge's decision. The majority noted that the General Counsel had opposed the settlement, but it rejected his contentions that the strike itself coercively influenced Amstar to settle and that allowing withdrawal of a charge after a judge has found the alleged violation would remove the incentive from other parties to settle cases before complaint.

The majority further found that, on the particular facts of this case, the settlement was reasonable even though reached late in the decisional process, after the judge's decision issued. Although the union did provide the 8(d)(3) notices, the mediation services actually had only between 20 and 26 days rather then the required 30 days

[6] 301 NLRB 764 (Members Cracraft and Devaney; Chairman Stephens dissenting).
[7] 287 NLRB 740 (1987).

to aid negotiations between the parties. The majority agreed with the district court in a 10(j) proceeding that these are not insignificant periods. Finally, the majority found no evidence of fraud, coercion, or duress by any party or any history of the union's having violated the Act or breached any previous settlement agreements.

In dissent, Chairman Stephens said that he would deny the request to withdraw the charge. He agreed with the General Counsel that the public interest in remedying this unfair labor practice overrode the agreement of two of the parties that the proceeding be concluded prior to a Board decision on the merits. In terms of the *Independent Stave* factors, Chairman Stephens relied on the General Counsel's opposition to the settlement, the absence of significant litigation risk for the General Counsel as proponent of the complaint, judgment that the remedy was inadequate in light of the late stage of the litigation at which the union offered to settle, and what he saw as the coercion of an unlawful strike impelling Amstar's agreement to the settlement.

C. Sufficient Answer

In *M. J. McNally, Inc.*,[8] the Board addressed the adequacy of the respondent's answer to the complaint.

The respondent's president filed a one-page letter purporting to be an answer to the complaint, in which he denied "the fact in Paragraph 12 [of the complaint]" that he "abrogated and refused to abide by the terms of the collective-bargaining agreement," and asserted that "I feel the union did not live up to its agreement by sending me inferior carpenters who were unable to perform the job . . . ." The respondent was not represented by counsel in this proceeding.

The majority of Members Cracraft and Devaney found that the respondent's letter specifically referred to complaint paragraph 12 when it denied that the respondent abrogated and refused to abide by the collective-bargaining agreement. The majority concluded that the letter clearly denied the complaint paragraph containing the operative facts of the alleged unfair labor practices, and effectively denied the conclusory complaint paragraph which alleged that the respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act. The majority noted that while the respondent's additional argument that the union did not live up to its agreement would not constitute a defense to the allegations in the complaint, this is not relevant to deciding the sufficiency of the answer. The majority further noted that although the Board recognizes the importance of strict compliance with procedural rules, the Board also is cognizant of the fact that the law favors a determination on the merits. The majority thus concluded that under the circumstances of this case, it would deny the General Counsel's Motion for Summary Judgment. Member Devaney additionally noted that the respondent's pro se answer denied the gravamen of the complaint.

[8] 302 NLRB 120 (Members Cracraft and Devaney; Chairman Stephens dissenting).

In dissent, Chairman Stephens would have granted the General Counsel's Motion for Summary Judgment. Chairman Stephens stated that he did not view the respondent's sentence that the union did not live up to the agreement as being independent of the respondent's denial that it abrogated the terms of the contract. He stated that, in context, it is apparent that the respondent's sole contention is that the union failed to fulfill its responsibility to refer qualified carpenters, and that this constitutes a defense to any claimed breach by the respondent in fulfilling its obligation under the contract. Chairman Stephens would further find that the respondent's asserted affirmative defense does not justify its abrogation of the contract, and thus that the respondent violated Section 8(a)(5) and (1).

D. Reach of Section 10(b)

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."

In *A & L Underground*,[9] the Board held that unfair labor practice charges concerning the repudiation of a collective-bargaining agreement or any subsequent breaches of that agreement must he filed within 6 months after the charging party has clear and equivocal notice of the repudiation.

Section 10(b) provides that unfair labor practice charges are time-barred unless filed within 6 months after the unfair labor practice occurred. The majority of Chairman Stephens and Members Cracraft and Oviatt found that A & L Underground clearly and unequivocally repudiated any agreement it had with the union no later than December 4, 1986; because the union did not file a charge until August 24, 1987, more than 6 months after the repudiation, the majority found that the charge was time-barred under Section 10(b) and dismissed the complaint.

The majority rejected the union's claim that the charge was not time-barred with respect to the respondent's continuing failure to comply with the agreement during the 6 months prior to the date the charge was filed. Overruling *Al Bryant, Inc.*,[10] in which such charges were found timely with respect to the failure to comply with the contract during the 10(b) period, the majority concluded that the continuing violation theory "cannot properly apply to a clear and total contract repudiation," because the respondent's failure to apply the contract thereafter is little more than the effect or result of the repudiation. The majority noted that, in cases where no clear and unequivocal repudiation occurs, the continuing violation theory would be applicable, that the 10(b) bar would not apply unless the respondent's

[9] 302 NLRB 467 (Chairman Stephens and Members Cracraft and Oviatt; Member Devaney dissenting).
[10] 260 NLRB 128 (1982), enfd. 711 F.2d 543 (3d Cir. 1983), cert. denied 464 U.S. 1039 (1984).

repudiation was clear and unequivocal, and that the burden of proving this defense rested with the respondent.

Member Devaney, dissenting, would have retained the continuing violation theory even in cases involving a prior clear and unequivocal repudiation of the agreement. He would have found that each failure by the employer to comply with the collective-bargaining agreement's provisions respecting terms and conditions of employment was a separate and distinct violation for purposes of Section 10(b), noting that the General Counsel could prove a violation in this setting without relying on 10(b) events such as A & L Underground's December 4, 1986 repudiation. Accordingly, Member Devaney would adhere to *Al Bryant*'s holding and find that when a complaint alleges that respondent has violated the Act by repudiating or failing to comply with the terms of an agreement, the complaint will not be time-barred as long as the charge was filed during the term or within 6 months after the expiration of the agreement. However, the remedy in such cases would normally be limited to the 6-month period preceding the charge.

In *Bay Metal Cabinets*,[11] the Board held that Section 10(b) did not preclude finding that an employer distributed overly broad no-solicitation and no-distribution rules in violation of Section 8(a)(1).

The majority of Chairman Stephens and Member Cracraft found that a Regional Director's partial dismissal of charge allegations "involving . . . the promulgation of a Personnel Manual" encompassed only an allegation that the personnel manual was promulgated for retaliatory purposes to squelch union activities. The Board majority found that another aspect of the charge, pertaining to the overly broad rules, remained viable. Because the overbreadth allegation was never dismissed, as a factual matter, the Regional Director did not seek to resurrect a dismissed charge allegation and, therefore, Section 10(b) did not preclude the allegation.

Member Oviatt dissented. In his view, the Regional Director sought to resurrect a dismissed charge because the partial dismissal letter on its face dismissed all the allegations regarding the "personnel manual."

[11] 302 NLRB 152 (Chairman Stephens and Members Cracraft and Oviatt).

IV

Representation Proceedings

The Act requires that an employer bargain with the representative designated by a majority of its employees in a unit appropriate for collective bargaining. But it does not require that the representative be designated by any particular procedure as long as the representative is clearly the choice of a majority of the employees. As one method for employees to select a majority representative, the Act authorizes the Board to conduct representation elections. The Board may conduct such an election after a petition has been filed by or on behalf of a group of employees or by an employer confronted with a claim for recognition from an individual or a labor organization.

Incident to its authority to conduct elections, the Board has the power to determine the unit of employees appropriate for collective bargaining and to formally certify a collective-bargaining representative on the basis of the results of the election. Once certified by the Board, the bargaining agent is the exclusive representative of all employees in the appropriate unit for collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

The Act also empowers the Board to conduct elections to decertify incumbent bargaining agents that have been previously certified or that are being currently recognized by the employer. Decertification petitions may be filed by employees, by individuals other than management representatives, or by labor organizations acting on behalf of employees.

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

A. Showing of Interest

In *Stockton Roofing Co.*,[1] the Board held that the petitioner's recently expired 8(f) contract constituted an adequate showing of interest to support an RC petition.

For several decades, the employer, who engages in construction, and the petitioner were parties to a series of collective-bargaining agreements covering the employer's roofers. The latest contract ex-

[1] 304 NLRB 699 (Members Cracraft and Oviatt; Member Raudabaugh dissenting).

pired on September 7, 1990; the employer, who engaged in unsuccessful negotiations for a new agreement, terminated the bargaining relationship on September 8. On September 26, the petitioner submitted its recently expired 8(f) contract as evidence of its showing of interest in support of its September 21 petition for a unit of the employer's roofing employees.

The majority of Members Cracraft and Oviatt found that recognizing a recently expired 8(f) contract as a showing of interest accords with the Board's rationale in *Deklewa*[2] by ensuring "'the constant availability of an electoral mechanism' to allow the employees to decide whether the union will continue as their bargaining representative" and, by expeditiously clarifying the union's representative status, encouraging labor stability. The majority emphasized that a union that has bargained for, and administered an 8(f) contract is "not a stranger to the employees." Further, under an 8(f) contract, the union will often be the initial employment referral source and the substantial majority of such referrals are union members. "Thus, it is likely that a substantial number of employees in a unit where there is a recently expired 8(f) contract will be interested in union representation," a conclusion supported by a recent Board study of elections. Applying to 8(f) cases the Board's existing showing-of-interest rules, which permit a petitioning 9(a) union to use its recently expired contract as a showing of interest comports with the Board's expressed intention in *Deklewa* to apply in 8(f) situations the Board's existing eligibility and election rules to the extent feasible. Permitting a union to rely on a recently expired contract is a fair balance to an employer's right to only demonstrate that it is signatory to an 8(f) agreement to support the objective considerations requirement of an RM petition.

Member Raudabaugh, dissenting, believed that the existence of an 8(f) relationship fails to evidence representational desire of unit employees and that a recently expired 8(f) agreement therefore cannot serve as a showing of interest to support an RC petition. He noted that there is no evidence that the employer's pool of employees was comprised wholly, or even mostly, of union members; that unlike unions seeking to resecure 9(a) status following withdrawal of recognition, the petitioner here was never the majority representative, and that even assuming that a union-party to an 8(f) contract who files an RC petition during the life of the contract need not present a 30-percent showing of interest, the petitioner is not the incumbent 8(f) representative or currently a party to an enforceable contract.

B. Qualification of Bargaining Representative

In *Elite Protective & Security Services*,[3] the Board held that the petitioning union was not disqualified from representing guards because the record failed to establish that the union impermissibly admitted to membership employees other than guards.

[2] *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. 843 F.2d 770 (3d Cir. 1988).
[3] 300 NLRB 832 (Members Cracraft and Devaney; Member Oviatt dissenting).

The majority of Members Cracraft and Devaney found that although the union apparently had no requirements as to who could become an associate, it did not follow that any nonguard could, would, or had become a member of the union. Absent such specific evidence, the union could not be disqualified under Section 9(b)(3), which precludes certification of a labor organization in a bargaining unit of guards if such organization admits to membership employees other than guards. The majority noted the Board's longstanding practice indicating a reluctance to disqualify a union from representing guards based on supposition or speculation that nonguards are members of the union.

Member Oviatt, dissenting, believed that because there were no restrictions on who could become an "associate" of the union, and that being an "associate" was akin to being a "member" under Section 9(b)(3), it followed that anyone could join the union, and thus employees other than guards could be admitted to the union. In such circumstances, the dissent noted, Section 9(b)(3) prohibits certification of the union to represent guards.

In *Purolator Courier Corp.*,[4] the Board held that the employer's courier-guards were not guards within the meaning of Section 9(b)(3) as their basic function did not "involve, directly and substantially, the protection of valuable property of the Employer's customers." Accordingly, the Board concluded that the petitioner was not barred under Section 9(b)(3) from being certified as the bargaining representative of these employees.

The courier-guards were responsible for the pickup, transportation, and delivery of a wide variety of printed materials and common freight. In finding these employees not to be guards, the Board considered that "[t]he courier-guards receive only minimal training and instruction regarding the protection and safety of customer property; they are not trained or authorized to use physical force or weapons; they have job duties that merely require the pickup, transport, and delivery of customer property with minimal access to customer premises; they are minimally accountable to the Employer for the property involved; and they are held out to the public by the Employer as delivery persons and not guards." The Board noted that the courier-guards' function appears to be markedly similar to that of UPS and Postal Service drivers who have never, to the Board's knowledge, been considered guards.

Accordingly, the Board concluded that the petitioner was not barred under Section 9(b)(3) from being certified as the bargaining representative of these employees.

[4] 300 NLRB 812 (Chairman Stephens and Members Cracraft, Devaney, and Oviatt).

C. Appropriate Unit Issues

1. Radio On-Air Unit

In *Perry Broadcasting*,[5] the Board held that the petitioned-for unit limited to on-air employees at the employer's radio broadcasting facility was an appropriate unit for collective bargaining.

The employer operates two radio stations from its broadcast studio. Citing *KJAZ Broadcasting Co.*,[6] the Regional Director for Region 1 found that the usual distinction between on-air and off-air employees had "broken down" and concluded that only a unit of all employees was appropriate.[7] In reversing the Regional Director's decision, the Board held that *KJAZ* is a narrow exception to the long-recognized distinction for bargaining purposes between on-air and off-air employees. The Board quoted from *Hampton Roads Broadcasting Corp.*,[8] which was based on the finding that on-air employees possessed a special talent: "Voice, diction, personality, the ability to persuade through the spoken word—these are the tests by which announcers are judged, and these are qualifications wholly unrelated to the jobs performed by others."

The Board found *KJAZ* is factually distinguishable. In *KJAZ*, sales employees wrote 75 percent of the advertisement scripts, one sales employee regularly taped commercials for broadcast, and on-air and off-air employees were jointly responsible for the production of commercials. By contrast, in this case the off-air employees did not regularly or frequently write advertisements, their voices were not regularly or frequently used to tape commercials, and on-air employees were solely responsible for the production of commercials.

The Board further relied on other factors in finding that the on-air employees shared a sufficiently distinct community of interest to constitute a separate appropriate unit. On-air employees are hired for their talents, on-air and off-air employees do not interchange work, and on-air employees work different, irregular hours and are differently compensated, it noted.

2. Merged Unit

In *West Lawrence Care Center*,[9] the Board declined to apply its unit merger doctrine to block an election in a single-employer unit with a 15-year bargaining history because of the employer's and the union's failure to establish that multiemployer bargaining replaced single-employer bargaining until the execution of an associationwide bargaining agreement less than 10 months before the filing of the decertification and representation petitions. The majority of Chairman Stephens and Members Oviatt and Raudabaugh found that these unusual factual circumstances brought the instant case within an excep-

[5] 300 NLRB 1140 (Chairman Stephens and Members Cracraft, Devaney, and Oviatt).

[6] 272 NLRB 196 (1984).

[7] The unit found by the Regional Director included 11 announcers, 6 sales employees, a traffic manager, and a receptionist.

[8] 100 NLRB 238, 239 (1952).

[9] 305 NLRB 212 (Chairman Stephens and Members Oviatt and Raudabaugh; Member Devaney dissenting)

tion to the general rule that a decertification petition must be coextensive with the currently certified or recognized unit.[10]

In late 1985, the union was advised of the formation of an association of six health care employers with whom it previously held separate negotiations. The union agreed to negotiate on a multiemployer basis; it initially met separately with each employer and then, on August 1, 1986, notified the association and the employer-members that it was submitting "to interest arbitration the issue of economic terms and conditions of employment in accord with the [individual] agreement[s] between the parties." The union thereafter initiated state court proceedings, on an individual basis, for judicial confirmation of the award with respect to each employer. The union and the association executed a written agreement on October 18, 1988, retroactively effective from April 1, 1986, to April 1, 1990. The instant petitions were filed on July 5 and 21, 1989, respectively.

The majority found the October 18, 1988 agreement to be the only solid evidence of a change from the prior lengthy individual bargaining relationship to one that is associationwide, and concluded that, like in *Miron Building Products Co.*,[11] a multiemployer bargaining history of less than a year does not warrant the finding that the multiemployer unit only is appropriate. The majority found *Gibbs & Cox*[12] and *Green-Wood Cemetery*[13] distinguishable on their facts and, therefore, entirely consistent with the contrary result reached in the instant case. The majority concluded that the long-established single employer units and lack of a substantial history of group bargaining in this case warranted allowing the employer's employees to vote on the question of their representation.

In dissent, Member Devaney found sufficient evidence that the petitioned-for single-employer unit was merged into the multiemployer unit in 1985, and asserted that the majority has not only failed to follow precedent set out in *Wisconsin Bell*,[14] but has also overruled it without discussion, and thus has undermined its announced goal of bargaining stability.

In response, the majority (1) pointed out that *Wisconsin Bell*, supra, presents somewhat different considerations from the instant case, (2) noted that it does not rely on *Wisconsin Bell*'s majority opinion to the extent that it embraces principles inconsistent with *Miron Building Products*, supra, and (3) emphasized that it does not accept the reasoning of the dissent in *Wisconsin Bell*, which rested on the dissenting opinion in *Gibbs & Cox*, supra.

[10] *Mo's West*, 283 NLRB 130 (1987).
[11] 116 NLRB 1406 (1956).
[12] 280 NLRB 953 (1986).
[13] 280 NLRB 1359 (1986).
[14] 283 NLRB 1165 (1987).

3. Health Care Unit

In *St. Margaret Memorial Hospital*,[15] the Board denied review of an Acting Regional Director's Decision and Direction of Election and concluded that, under the standard set forth in the Board's final rule on collective-bargaining units in the health care industry (the Rule), upheld by the Supreme Court in *American Hospital Assn. v. NLRB*,[16] the employer's request for review of the petitioned-for skilled maintenance unit raised no substantial issues warranting review.

The Board adopted the Acting Regional Director's decision that the employer's request for review did not raise any arguments constituting "extraordinary circumstances" under the rule justifying a Board adjudication to determine the appropriate unit. In support of its extraordinary circumstances contention, the employer cited several cases and urged that the "binding" precedent of the United States Court of Appeals for the Third Circuit hold that a collective-bargaining unit limited to skilled maintenance employees is not an appropriate unit. The employer further urged that extraordinary circumstances exist here because of an alleged strong community of interest existing between the skilled maintenance workers and other nonprofessional employees.

The Board adopted the Acting Regional Director's finding that the extraordinary circumstances exception is to be narrowly construed and that the community-of-interest factors raised by the employer were among those extensively considered and analyzed by the Board when it adopted the Rule finding that a unit of skilled maintenance employees is separately appropriate for collective-bargaining purposes. The Board also adopted the Acting Regional Director's finding that the Supreme Court endorsed the appropriateness of the units recognized by the Rule because the Rule was based on a "reasoned analysis" of the rulemaking record and on the Board's years of experience in the adjudication of health care issues.

Thus, in these circumstances, notwithstanding that legal precedent concerning unit determinations which are contrary to the appropriateness of the eight separate units recognized by the Rule were not expressly overruled by the Court's *American Hospital Assn.* decision, it cannot be concluded that the Third Circuit's precedent compels a finding that extraordinary circumstances exist here warranting an adjudication of the appropriateness of the petitioned-for unit.

4. Professional Unit

On remand from the United States Court of Appeals for the Sixth Circuit, the Board issued a supplemental decision in *Twin City Hospital Corp.*,[17] in which it analyzed two of the four statutory criteria for determining the professional status of laboratory employees. The Board reversed its earlier finding that the respondent violated Section 8(a)(5) and (1) when it refused to bargain with a unit of professional

[15] 303 NLRB 923 (Chairman Stephens and Members Cracraft, Devaney, Oviatt, and Raudabaugh).
[16] 499 U.S. 606.
[17] 304 NLRB 173 (Chairman Stephens and Members Cracraft and Oviatt).

employees that included medical technologists and medical laboratory technologists, who were allegedly nonprofessional employees.

After the parties had been afforded an opportunity to adduce additional evidence as to the nature of the work performed by these employees, the administrative law judge transferred the matter directly to the Board without making any credibility resolutions, findings of fact, or recommendations, and without issuing a decision under Section 102.45 of the Rules and Regulations.

Section 2(12) of the Act defines "professional employee" as

> (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged source of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance or routine mental, manual, or physical processes.

After considering the entire record, the Board found that the medical technologists and medical laboratory technologists in question in this case do not consistently exercise independent judgment and discretion in the performance of their duties and that the work is not predominantly intellectual in character. The Board noted that the technologists mainly perform various laboratory tests on patient samples pursuant to requests by a physician. The technologists collect the samples, perform quality control work, maintain the testing machines, distribute the lab reports, and prepare various laboratory paperwork.

Based on its finding that the technologists were not professionals, the Board vacated the bargaining order with respect to that unit. Because the scope of the nonprofessional unit remains unchanged, the bargaining order with respect to that unit was affirmed, however, notwithstanding the fact that the respondent is being required to bargain with a unit that now included medical technologists and medical laboratory technologists, classifications that were not previously part of the unit when the election was conducted.[18]

D. Election Objections

In *American Nuclear Resources*,[19] a panel majority of the Board held that the employer, which was involved in the on-site operation of an atomic powerplant, did not engage in objectionable conduct by keeping a list of employees who went to the polling location because it had a legitimate interest in maintaining a secure workplace.

[18] Even if all the technologists' votes were included in the tally of votes, they would not alter the results.
[19] 300 NLRB 567 (Members Devaney and Oviatt; Chairman Stephens dissenting).

The election was held at the training center. The employer made a "release list" and as the employees left the plant to be driven by van to the training center a supervisor made a mark beside the employees' names. As the employees entered the training center another supervisor made a mark beside their names and directed them down the hallway to the polling place. The supervisor could not see the employees after they entered the hallway. After entering the center the employees could go to the polling area, to the cafeteria upstairs, or leave the building.

The general contractor requires that the employer know where the employees are. The employees knew that they were routinely monitored "and that listkeeping is a normal security procedure." The majority of the panel, therefore, found it reasonable for the employer to use checklists during the election. They found that using a sign-in sheet "would have been unduly cumbersome." The majority stated that "it is not self-evident that these employees would have tended to be intimidated and there is no evidence that any employee was coerced by the listkeeping."

In dissent, Chairman Stephens would have found that the election should be set aside due to the employer's listkeeping in plain view of all employees arriving to vote.[20] He noted that Board policy prohibits listkeeping by the parties at or near the polls.[21] He stated that the listkeeping here was neither de minimis nor linked to a limited legitimate objective. All the voters were aware of the listkeeping, and the supervisor was in a position to see whether the employees "turned down the hallway leading" to the polling areas."

Further, Chairman Stephens would not recognize an exception based on the "safety-related practice of closely surveilling employees' activities." He pointed out that "[t]he election was not conducted in the nuclear plant, and the interest of the [general contractor] in keeping track of who remained in that building was served by a check of who boarded the van . . . ."

Chairman Stephens also noted the usual practice was to have employees sign a logbook when they entered the training center. He stated that the employer did not show why it needed to change its practices as signing such a book would not have taken more than a few seconds and thus would not have been "cumbersome."

In *John I. Haas, Inc.*,[22] the Board overruled *Drum Lithographers*,[23] and applied the "postmark" rule to election objections. Under the Board's holding, election objections will be considered timely if deposited with a delivery service that will provide a record showing that the objections were tendered to the delivery service in sufficient time for delivery by the due date, but in no event any later than the day before the due date.

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[20] Chairman Stephens explicitly stated that he did "not reach the question on whether there would be a sustainable objection had the list-checking been limited to monitoring who boarded the van . . . ."

[21] Citing *Piggly Wiggly*, 168 NLRB 792 (1967); *Belk's Department Store*, 98 NLRB 280 (1952); *International Stamping Co.*, 97 NLRB 921, 922–923 (1951).

[22] 301 NLRB 300 (Chairman Stephens and Members Cracraft, Devaney, Oviatt, and Raudabaugh).

[23] 287 NLRB 22 (1987).

In *Drum Lithographers*—the first case since the Board in 1986 revised its rules to construe Section 102.111(b) as requiring that election objections be received in the Regional Office on or before the due date—the Board (Member Cracraft dissenting) declined to accept as timely filed objections that were postmarked 2 days before the due date from a location 15 miles from the Regional Office.

The assumptions underlying the majority decision in *Drum Lithographers* about an objecting party's being able to ensure delivery on the due date have proved "too optimistic," the Board stated.

Experience has shown, the Board said, that an objecting party acting in good faith and with all due diligence may still find its objections rejected under *Drum Lithographers* because they did not arrive at the Regional Office on the due date.

The Board concluded that application of the "postmark" rule to election objections will provide a simple, fair, and effective solution to the problem.

Accordingly, Section 102.111(b) of the Board Rules and Regulations will be revised to remove election objections from the documents excluded from the "postmark" rule, the Board decided.

By "postmark" the Board included timely depositing objections with a delivery service that will provide a record showing that the objections were tendered to the delivery service in sufficient time for delivery by the due date, but in no event any later than the day before the due date.

Member Cracraft would go further and accept documents when the objecting party takes every precaution necessary to ensure compliance with Board rules.

Because objections of Teamsters Local 760 in the instant case were timely filed under the "postmark" rule, the Board remanded the case to the Regional Director to process them.

The union objections in this case were not delivered to the Regional Director by the due date that the delivery service had assured that delivery would take place, and the messenger service accepted full responsibility for the late delivery of the objections.

In *B & D Plastics*,[24] the Board directed a second election after the employer granted all employees a paid day off, with no strings attached, 2 days before the election, solely in connection with its admitted purpose to deliver the final message in its antiunion campaign.

Two days before the election the employer sponsored a cookout. It announced that it would shut down its three-shift operation for the day to enable all employees to attend, but that attendance was voluntary. It informed its employees that it would pay them for the day, regardless of whether they chose to attend the cookout. It also announced that it would "say everything it had to say about the election." Two of the employer's top-ranking officials delivered antiunion speeches at the cookout.

The majority, Chairman Stephens and Member Oviatt, found that employees, including those who elected not to attend the cookout and

[24] 302 NLRB 245 (Chairman Stephens and Member Oviatt; Member Devaney dissenting).

listen to the employer's speeches, received what was tantamount to a substantial bonus for no other reason than the upcoming election, and that employees reasonably could have viewed this conduct as intended to influence their voted in favor of the employer's position. The majority rejected the employer's asserted business justification, finding that the employer's contention that the shutdown and cookout were a necessary means of gathering all three shifts of employees together incorrectly assumed that the employer's desire to address the employees en masse at the end of its campaign without asking any of them to come to the plant outside their shifts must be accommodated without regard to the forseeable effect of the conduct on employees' free choice. The majority found that the grant of such a benefit in these circumstances constituted objectionable conduct and warranted that the election results be overturned and a second election conducted.

Member Devaney, dissenting, noted that the employer had held cookouts for its employees some three times in the previous 5 years and had paid employees their regular wages. Because he believed, contrary to the majority, that the employer's conduct was consistent with its past practice, he found that the employer's using the occasion of the cookout as a forum to end its antiunion campaign did not alter the nature of the cookout so as to make it an impermissible benefit.

In *Phillips Chrysler Plymouth*,[25] a panel majority of the Board reversed a Regional Director's decision and held that laboratory conditions of the election were destroyed by two union organizers. The organizers were talking with bargaining unit employees in the shop area 75 minutes before the scheduled election. When the employer's president asked the organizers to wait in the reception area until the preelection conference, the organizers initiated a "shouting match" and refused the employer's request that they leave. The police were called and spoke to the organizers who remained in the shop area. This incident occurred in the presence of unit employees.

To determine whether the union organizers' conduct destroyed the laboratory conditions of the election the majority analyzed whether the conduct "reasonably tend[ed] to interfere with the employees' free and uncoerced choice in the election." *Baja's Place*.[26] In doing so, the majority considered, inter alia: the severity of the misconduct and whether it was likely to cause fear among employees in the bargaining unit; the number of unit employees subjected to the misconduct; the proximity of the misconduct to the election date; the extent the misconduct was disseminated among unit employees; the degree of persistence of the misconduct in the minds of unit employees; and the closeness of the final vote. *Avis Rent-A-Car System*.[27]

Applying these factors, the majority found that the incident destroyed the laboratory conditions of the election.[28] Thus, the incident

[25] 304 NLRB 16 (Members Oviatt and Raudabaugh, Member Devaney dissenting).
[26] 268 NLRB 868 (1984).
[27] 280 NLRB 580, 581 (1986).
[28] *Great Atlantic & Pacific Tea Co.*, 120 NLRB 765 (1958); *Kennicott Bros.*, 284 NLRB 1125 (1987); *John M. Horn Lumber Co. v. NLRB*, 859 F.2d 1242 (6th Cir. 1988).

continued for some time in an employee work area, in the presence of unit employees. The organizers, who had no legal right to be there,[29] "repeatedly and belligerently" refused the employer president's requests to leave. The majority further found that if the incident was not witnessed by all unit employees it must quickly have been made known to them. Moreover, the majority concluded that the effect of "This direct challenge to the employer's assertion of its property rights could not have been lost on the employees as they began to vote 75 minutes later." "The message undoubtedly conveyed to employees . . . was that the employer was powerless to protect its own legal rights in a confrontation with the Union." The incident was especially significant to the majority because a shift of one vote could have changed the outcome of this election.

Member Devaney, dissenting, found that the union organizers' conduct did not interfere with employee free choice. Specifically, Member Devaney felt it was unlikely that the employees inferred from the union agents' refusal to leave that the employer was powerless to protect its legal rights against the union. Member Devaney reasoned that it was more likely that, because the police spoke with the union organizers and did not insist they leave, that employees assumed the union agents had a right to remain *because of the election.* Moreover, Member Devaney found this case factually distinguishable from the cases relied on by the majority to set aside the election.

In *Poplar Living Center*,[30] the Board held that a union's picketing at one of the employer's health care facilities without having served required notices in compliance with Section 8(g) did not amount to grounds for setting aside an election at another employer facility.

Chairman Stephens and Members Devaney and Oviatt concluded that like Section 8(e), Section 8(g) deals "only with the terms of agreement between an employer and a labor organization, regardless of whether it is publicized to employees."[31] Specifically, Section 8(g) was enacted to assure that arrangements could be made to maintain the continuity of patient care in the event of strikes or picketing at health care institutions. But it is only those unfair labor practices which pose "a threat of restraint and coercion of employees" that can logically serve as a ground for setting aside an election. Here, the Board concluded, the employer had suggested no way in which the labor organization's publicizing of its Eventide picketing to the Poplar employees threatened to "restrain or coerce" them or any other employees.

[29] *NLRB v. Babcock & Wilcox Co*, 351 U.S. 105 (1956).

[30] 300 NLRB 888 (Chairman Stephens and Members Devaney and Oviatt).

[31] *Holt Bros.*, 146 NLRB 383 (1964).

E. Voter Eligibility

In *Apex Paper Box Co.*,[32] a panel majority of the Board held that three employees laid off prior to the payroll eligibility period and recalled to work prior to the election did not have a reasonable expectation of recall as of the payroll eligibility period and, therefore, were not eligible to vote in the election.

Chairman Stephens and Members Oviatt and Raudabaugh found that the reasonable expectation of recall of laid-off employees must be determined as of the payroll eligibility period which, they noted, was consistent with the Board's longstanding requirement that employees must be employed both during the payroll eligibility period and on the date of the election. They believed that such a requirement would prevent an employer from manipulating facts relating to the likelihood of recall between the eligibility and the election dates. The majority noted that the subsequent recall of laid-off employees prior to, or soon after, the election does not in and of itself require the conclusion that the layoff is to be regarded at all times as temporary.

The majority concluded that the evidence established that the three laid-off employees had no reasonable expectation of recall as of the payroll eligibility date relying on testimony that the employer's operation was a total loss; the absence of evidence that the employer intended to rebuild the facility or purchase a new facility; the inability of the employer's other facilities to absorb more labor; the unavailability of the necessary machinery; that the employer had only added one more machine by the time of the hearing; the absence of any employer policy regarding recalling laid-off employees; the lack of information given to employees regarding when they might be expected to be recalled; and testimony indicating employees had only been recalled already because of attrition.

Member Cracraft, dissenting, would have found that the employees laid off prior to the payroll eligibility period and recalled to substantially equivalent positions prior to the election were eligible to vote in the election. Member Cracraft believes that the appropriate analysis is whether the employees were temporarily or permanently laid off, and would find, following *Sylvania Electric Products*,[33] that laid-off employees recalled prior to the election are only temporarily laid off and, therefore, they are eligible to vote. Member Cracraft would not apply the reasonable expectancy of recall test where employees are recalled prior to the election, and she believes that reasonable expectancy of recall should be determined as of the date of the layoffs.

Member Devaney, dissenting, would have found that the three employees laid off prior to the payroll eligibility period and recalled prior to the election to substantially equivalent positions are eligible to vote in an election. Member Devaney also would follow *Sylvania*

[32] 302 NLRB 67 (Chairman Stephens and Members Oviatt and Raudabaugh; Members Cracraft and Devaney dissenting).

[33] 91 NLRB 296 (1950).

Electric Products, and agreed with Member Cracraft that the reasonable expectation of recall test is inapplicable.

In *S. K. Whitty & Co.*,[34] the Board revised the *Daniel Construction Co.*[35] eligibility formula for elections involving construction employers who engage in project-by-project hiring by including the factor of recurrent employment or a single period or at least 90 days of employment. Thus, the Board held that it would find eligible all unit employees "(1) who have been employed for at least two periods of employment cumulatively amounting to 30 days or more in the 12-month period immediately preceding the eligibility date, *or* (2) who have had some employment in the 12-month period and have had at least two periods of employment cumulatively amounting to 45 days or more in the 24-month period immediately preceding the eligibility date, *or* (3) who have had one period of employment of 90 days or more in the 12-month period immediately preceding the eligibility date."

The majority of Chairman Stephens and Members Oviatt and Raudabaugh observed that "[t]he central purpose of the Board in devising the *Daniel Construction* formula was to identify individuals who formed a core group of employees to whom the employer was likely to turn on a fairly regular basis or who otherwise had a reasonable expectation of reemployment with the employer." While continuing to endorse the purposes of the *Daniel Construction* formula, the majority concluded that it did not fully serve its intended purposes because it was "somewhat over inclusive." The majority, therefore, added a recurrency factor and held that unless an employee had been recalled to work on at least two occasions over a 1- or 2-year period, the employee had no reasonable expectation of continued employment and thus lacked a sufficient interest in the employer's conditions of employment to warrant inclusion in the voting group. The majority further held, based on their expertise, that in the absence of recurrent employment, a single period of employment of at least 90 days in the year preceding the eligibility date was a period of sufficient duration to indicate a likelihood of future employment with the employer.

Members Cracraft and Devaney, dissenting, stated that the majority cited no significant change in the industry and no concrete evidence that would justify departure from the *Daniel Construction* formula which had been applied successfully by the Board for 30 years.

The dissenting members believed that a likely impact of the majority's recurrent employment factor would be "to limit meaningful organization to employees of large contractors that operate multiple projects during the course of a year." With regard to the majority's requirement of a single period of employment of at least 90 days,

[34] 304 NLRB 776 (Chairman Stephens and Members Oviatt and Raudabaugh; Members Cracraft and Devaney dissenting).

[35] 133 NLRB 264 (1961), as modified in 167 NLRB 1078, 1081 (1967). Under that formula, all unit employees were eligible if they had been employed for a total of 30 days or more within the 12-month period immediately preceding the eligibility date for the election, or had had some employment in that period and had been employed 45 days or more within the 24-month period immediately preceding the eligibility date. Employees who voluntarily quit or were terminated for cause prior to the completion of the last job for which they were employed were not eligible under the formula.

they said the likely impact of the requirement would be "to limit meaningful organization to employees who work on large projects or who belong to a craft that works for the duration of a project."

F. Recognition Bar Rule

In *King Manor Care Center*,[36] the Board held that where there are simultaneous union campaigns, an employer's recognition of one union does not bar the petition filed by the unrecognized union.

The majority of Chairman Stephens and Members Oviatt and Raudabaugh denied the joint employers' motion for reconsideration of the Board's denial of review of the Regional Director's finding that the recognition of one union by the joint employer did not bar the petition filed by a competing, unrecognized union. The joint employer had recognized an intervening union as the representative of two separate units of employees. Prior to that recognition, another union began organizing employees of the joint employers, and secured authorization cards prior to the joint employers' recognition of the other union.

Relying on *Rollins Transportation System*,[37] the Board majority concluded that since the petitioning union had been actively involved in organizing employees at the joint employers' facility prior to time of recognition of the other union, the recognition did not act as a bar to the petition, and the employees should be entitled freely to choose their representative through a Board election. In agreeing with the majority, Member Raudabaugh noted that there was simultaneous organizing by both unions, and that the petition was filed only 4 days after one of the joint employers extended recognition to the other union. Member Raudabaugh did not pass on whether he would reach the same result where a longer period elapsed between recognition and petition.

Member Cracraft dissented, citing her dissent in *Rollins Transportation System*. In his separate dissent, Member Devaney, for the reasons stated by Member Cracraft in her dissent in *Rollins*, would find that the joint employers' lawful, good-faith recognition of the intervening union resolved any question concerning representation, and thus barred the rival's petition for a reasonable period of time. Member Devaney believed that the operative event in determining the existence of a recognition bar should be the filing of the petition, not the start of the organizing campaign.

G. Contract Bar Rule

The issue in *Comtel Systems Technology*[38] arose after a collective-bargaining agreement was executed by a union and a construction in-

[36] 303 NLRB 19 (Chairman Stephens and Members Oviatt and Raudabaugh, Members Cracraft and Devaney dissenting).

[37] 296 NLRB 793 (1989).

[38] 305 NLRB 287 (Chairman Stephens and Members Oviatt and Raudabaugh; Member Devaney dissenting).

dustry multiemployer association; that contract execution followed the association's grant of the union's request for recognition as the 9(a) representative of the unit employees. The issue was whether the multiemployer agreement would bar an RM petition filed by an individual employer-member of the association for an election among its employees if the evidence did not show that a majority of the employer's unit employees supported the union at the time 9(a) recognition was granted by the association.

The Board, applying its contract bar doctrine in light of its decision in *John Deklewa & Sons*,[39] held that the multiemployer agreement would not bar the election. Reversing the Regional Director, it accordingly ordered that the RM petition filed by employer Comtel be reinstated.

The Board assumed without deciding that the association had formed a 9(a) bargaining relationship with the union on the basis of the union's claim that it possessed authorization cards from a majority of the employees in the multiemployer unit. The Board acknowledged that prior to the issuance of *Deklewa* some case law indicated that if a construction industry employer joined a multiemployer association and adopted the association's 9(a) union agreement, that employer's employees would be "merged into [the] multi-employer unit . . . without regard to whether a majority of that employer's employees supported the union at the time the employer joined . . . ."[40] The Board noted, however, that in *Deklewa*, it had overruled those cases, stating that "the employees of a single employer cannot be precluded from expressing their representational desires simply because their employer had joined a multiemployer association."[41] The Board found it reasonable to apply that rule to employers who joined the association shortly before initial recognition was granted, as well as to employers who joined after the association's formation, so long as the question concerning the existence of majority support for the union was raised within a reasonable time after recognition was granted.

Applying its legal standard to the record in the case, the Board noted that Comtel filed its petition approximately 5-1/2 months after the association had granted recognition and that the evidence indicated that no more than three out of Comtel's six unit employees supported the union when recognition was granted. The Board concluded, therefore, that "when Comtel filed its RM petition, it was doing so as an employer bound by an 8(f) agreement filing for an election in an appropriate single-employer unit." Because, under *Deklewa*, an 8(f) agreement would not bar an election petition, and an RM petition could be processed without the necessity of showing "objective con-

[39] 282 NLRB 1375, 1379, 1385 (1987).

[40] Citing *Amado Electric*, 238 NLRB 37 fn. 1 (1978); *Authorized Air Conditioning Co.*, 236 NLRB 131 fn. 2 (1978).

[41] *Deklewa*, supra at 1385 fn. 42.

sideration'' for believing that the union lacked a majority,[42] it was appropriate to process the petition in this case.

Member Devaney dissented, finding that the overruling of the merger doctrine was irrelevant because it concerned the addition of a previously unrepresented group to an established unit, whereas this case concerned an initial recognition situation. In his view the majority opinion undermined ''the viability of multiemployer units in the construction industry.'' He also argued that it was inconsistent with the statement in *Deklewa* disavowing any suggestion that, with regard to rules concerning voluntary recognition, unions would ''have less favored status with respect to those outside the construction industry.''[43] The majority responded that its disposition of the case was not inconsistent with the law applicable to cases outside the construction industry because, in such cases, a collective-bargaining agreement based on voluntary recognition would be vulnerable to an 8(a)(2) charge filed within 6 months of the agreement's execution if a majority of the individual employer's employees had not manifested support for the union at the time of recognition.[44]

[42] Id. at 1385.

[43] Quoting *Deklewa*, supra at 1387 fn. 53.

[44] Citing *Mohawk Business Machines Corp.*, 116 NLRB 248 (1956), and *Alton-Wood River Building Trades Council (Kapp-Evans Construction)*, 144 NLRB 260 (1963).

V

Unfair Labor Practices

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

This chapter deals with decisions of the Board during fiscal 1991 that involved novel questions or set precedents that may be of substantial importance in the future administration of the Act.

A. Employer Interference with Employee Rights

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

1. Reporting "Abusive Treatment"

In *Arcata Graphics*,[1] a panel majority of the Board granted the General Counsel's Motion for Summary Judgment and found, based on the undisputed facts, that the employer violated Section 8(a)(1) when it distributed a letter to its employees advising them to report to management if they were "threatened or subjected to abusive treatment to sign a union authorization card."

[1] 304 NLRB 541 (Chairman Stephens and Member Cracraft; Member Oviatt dissenting).

The majority found that "the Respondent's request to report 'abusive treatment' could be interpreted by some employees to be broad enough to cover lawful attempts by union supporters to persuade employees to sign union cards during their nonworking time and off the Respondent's premises," conduct that is clearly protected organizational activity. The majority noted that the seriousness of the conduct which the employer requests the employees to report—in this case, "abusive treatment"—is not determinative; rather, the issue is whether the statement is "so vague as to invite employees generally to inform on fellow workers who were engaged in union activity."[2] The majority concluded that the request was not limited to reports on matters that could properly be within the employer's concerns, such as "threats," but could be broadly interpreted and therefore "tend to restrain the union proponent from attempting to persuade any employee through fear that his conduct would be reported to management."[3]

Although agreeing that employees should not be requested to report on the protected activities of coworkers, Member Oviatt, dissenting, believed that employees who subject other employees to "abusive treatment" are not engaging in protected activities. He noted that the letter was a response to employee complaints and, therefore, that the employer's request to report "abusive treatment" by union card solicitors must be assessed "with a view to the pragmatics of maintaining order and plant discipline in the course of a union campaign."[4]

2. Threat of Job Loss and Loss of Benefits

In *Baddour, Inc.*,[5] the Board held that the employer unlawfully threatened employees with job loss in the event of a strike.

The majority of Chairman Stephens and Members Cracraft, Oviatt, and Raudabaugh stressed that during its campaign speeches the employer told employees without other explanation that "union strikers can lose their jobs" and "you could end up losing your job by being replaced with a new permanent worker." The majority concluded that the phrase "lose your job" conveys to the ordinary employee the clear message that employment will be terminated and that this message is reinforced when the employee is told that his/her job will be lost because of replacement by a "permanent" worker. In these circumstances, where the single reference to permanent employment is coupled with a threat of job loss, the majority found that it was not reasonable to suppose that the ordinary employee will interpret the words to mean that he/she had a right under *Laidlaw Corp.*[6] to return to the job.

Chairman Stephens agreed that the employer's campaign speeches had a coercive tendency that violated Section 8(a)(1). While noting that an employer is no doubt privileged to explain that it had a right

[2] *Liberty House Nursing Homes*, 245 NLRB 1194, 1197 (1979).
[3] *Sunbeam Corp.*, 287 NLRB 996, 997 (1988).
[4] *Liberty House*, supra at 1197.
[5] 303 NLRB 275 (Chairman Stephens and Members Cracraft, Oviatt, and Raudabaugh; Member Devaney dissenting).
[6] 171 NLRB 1366 (1968).

to hire permanent replacements, Chairman Stephens found that the employer crossed into the zone of coercive speech by telling its employees that they "could *end up* losing [their] job by being replaced . . . ." (Emphasis added.) Chairman Stephens found that such comments, made in the context of remarks which treated strikes as an inevitable, but ultimately futile, consequence of unionization, suggested that the employer would not regard the employees as having any employment status following the conclusion of any strike.

Member Devaney, dissenting, would not have found that the employer's statements regarding the consequences of an economic strike constitutes a threat of job loss violating Section 8(a)(1). Because the statements in the employer's speeches to employees specifically linked job loss to permanent replacements, Member Devaney found that they did not constitute an absolute threat of job loss or threat to punish employees for striking. Thus, Member Devaney found that the campaign statements at issue were not coercive, but rather served as a legitimate explanation to employees about the consequences of their engaging in an economic strike.

In *KEZI, Inc.*,[7] the Board found lawful telling employees that a pension plan to be implemented in the future would not include "employees who are members of a collective-bargaining unit with whom retirement benefits were the subject of collective bargaining."

After the employer distributed the memo containing the above statement to employees, there was a decertification petition. The question of the lawfulness of the memo arose in the context of examining whether the decertification petition was tainted by an 8(a)(5) violation.

The Board found the language lawful because it makes clear that employees can be excluded from the plan only after there has been full good-faith bargaining on retirement benefits with the union—bargaining in which the parties may negotiate over inclusion of the unit employees in that plan or another. The Board found this because of the use of the word "were" in the memo, which it construed as relating to a completed action. Therefore, union employees could not be excluded until after collective bargaining on the subject was finished.

The Board noted that the language resembles that found lawful in several earlier Board decisions, including *Lynn Edwards Corp.*[8] and *Sarah Neuman Nursing Home.*[9]

3. Employer Release Form

First National Supermarkets[10] presented the issue of whether a release form proffered by an employer in order to settle a grievance unlawfully prohibited the filing of unfair labor practice charges by the grievant concerning future incidents. A panel majority of the Board ruled that the employer's release form was not unlawfully overbroad.

[7] 300 NLRB 594 (Chairman Stephens and Members Cracraft and Devaney).
[8] 290 NLRB 202 (1988).
[9] 270 NLRB 663, 680–691 (1984).
[10] 302 NLRB 727 (Chairman Stephens and Member Cracraft; Member Oviatt dissenting).

The charging party was discharged and thereafter filed a grievance concerning vacation pay allegedly owed to him. The employer offered to settle the grievance if he would sign a release which provided that he would "release and forever discharge" the employer and the union "from any and all grievances, complaints, charges and/or claims of any kind which are now pending or which could be filed in the future relating to or arising out of my total employment and my termination with [the employer]." The charging party refused to sign the release and filed unfair labor practice charges.

The majority viewed the release in the context of the parties' "lengthy dispute" commencing with the charging party's discharge and including his vacation pay claim and concluded that the phrase "total employment" limited the filing of charges only to his past employment with the employer through to his discharge. The panel majority observed that it "would not be reasonable to conclude that the parties . . . intended to compromise the rights and obligations that would grow out of any future employment relationship, the possibility of which is wholly speculative." The majority accordingly concluded that the employer did not violate the Board's established rule that a release may not prohibit the filing of charges regarding future labor disputes.

In dissent, Member Oviatt would have found the release to be unlawful. He viewed the phrase "total employment" as unambiguously precluding any claims arising not only out of the charging party's employment prior to his termination, but also any claims arising out of any future employment with the employer. The dissent further observed that any ambiguity in the release should be attributed to the party who unilaterally drafted the release, i.e., the employer.

4. Suspending Employee Evaluations

In *Retlaw Broadcasting Co.*,[11] a panel majority held that an employer did not violate Section 8(a)(1) by suspending annual employee evaluations after a union had filed a representation petition.

While affirming the rule that during an election campaign an employer is required to proceed with expected wage or benefit adjustments, the Board held that the facts of this case fell squarely within the narrow exception carved out by the *Uarco*[12]*–Atlantic Forest Products*[13] line of cases. The exception states that an "employer may postpone such a wage increase or benefit adjustment so long as it '[makes] clear' to employees that the adjustment would occur whether or not they select a union, and that the 'sole purpose' of the adjustment's postponement is to avoid the appearance of influencing the election's outcome."[14]

In *Retlaw*, the employer annually evaluated its employees' performance as a basis for granting wage increases. It suspended this policy after the union filed a representation petition. The employer represent-

[11] 302 NLRB 381 (Members Oviatt and Devaney, Chairman Stephens dissenting).
[12] *Uarco, Inc.*, 169 NLRB 1153 (1968).
[13] *Atlantic Forest Products*, 282 NLRB 855 (1987).
[14] Id. at 858, quoting *Uarco*, 169 NLRB at 1154.

ative discussed with the employees the reason for the suspension on six occasions, five of which occurred before the election. The representatives stressed that they were suspending the evaluations in order to avoid the possibility that the evaluations would be construed as a bribe to encourage the employees not to vote for the union. The employees were assured that the results of the election would not affect the continuance of the evaluation process.

After the union won the election, the employer filed objections which were overruled by the Regional Director and she certified the union. The employer filed a request for review of the Regional Director's decision and certification with the Board. The employer continued to suspend the evaluation process while its request for review of the Regional Director's decision and certification was pending before the Board. Before the Board ruled on the employer's request for review, the union filed a charge alleging that the suspension violated Section 8(a)(1). The General Counsel issued a complaint. The administrative law judge agreed, finding that the employer had violated Section 8(a)(1) by suspending the annual evaluations after the union had filed a representation petition.

The Board reversed the judge and found that the employer did not violate Section 8(a)(1). It reasoned that the employer had "made no attempt to capitalize on the suspension of the evaluations to discourage employees' union activity." There was no indication that the suspension was in retaliation for employee union support. Rather, the employer emphasized that the evaluations would be reinstated when it was legal to do so. The Board found that the issuance of a complaint did not remove the predicate for the exception. Had the employer reinstated the evaluation after the issuance of the complaint, it still would have been exposed to critical period scrutiny in the representation proceeding. Thus, the Board concluded that the employer's conduct was consistent with conduct found lawful under the *Uarco–Forest Line Products* line of cases.

In dissent, Chairman Stephens would have held that the employer's conduct did violate Section 8(a)(1) after the Regional Director issued the complaint. According to the Chairman, the employer's rationale for the exception ceased to exist after the complaint issued. The exception was designed to allow an employer to avoid committing an unfair labor practice when it confers benefits shortly before an election. But once the Regional Director issued the complaint alleging that the employer unlawfully was withholding evaluations the predicate for the exception no longer existed because the employer was no longer in danger of violating the Act by resuming the evaluation process.

The Chairman believed it unlikely that the Regional Director "having issued a complaint alleging that the [employer] had unlawfully *suspended* annual evaluations and wage increases, then would have found merit in a contention that the [employer] interfered with the election by *reinstating* those evaluations and wage increases." (Emphasis added.) Thus, the employer's refusal to reinstate the evaluation policy was a bad-faith effort to foster antiunion sentiments by "tacitly

blaming the Union and the union organizing effort for the employees not being evaluated and receiving raises according to the Respondent's established practice."

5. *Weingarten* Rights

In *Safeway Stores*,[15] the Board adopted the administrative law judge's findings that the employer violated Section 8(a)(3) and (1) by suspending and discharging an employee because he asserted his *Weingarten*[16] rights to have the presence of a union representative during an investigatory interview in which he was directed to take a drug test.

Employee Hawkins was a truckdriver for the employer with a history of chronic absenteeism. As a result of a union-negotiated settlement agreement, he was reinstated after being discharged for excessive absenteeism and a drug problem. Further, although the settlement agreement required him to complete a drug/alcohol rehabilitation program and subjected him to termination if he acquired one unexcused absence within a 6-month period, it did not require that he subject to random drug testing by the employer.

A couple of months later after the settlement agreement, the employer had an occasion to meet with Hawkins to question him about a recent absence. Hawkins was called into a meeting with the safety supervisor and the truckdriver supervisor and asked to take a drug test because of his absenteeism. Hawkins explained that his absences were because of chronic kidney problems which the employer knew about from the settlement discussions. However, it chose to ignore Hawkins' explanation and insisted that he submit to a drug test.

At this point, Hawkins requested representation by his union business agent who was familiar with the settlement agreement which precluded any random drug testing. The supervisors refused Hawkins' request as well as his subsequent request for a union steward. Hawkins was suspended when he refused to participate any further in the meeting without union representation. Subsequently, Hawkins was discharged allegedly for an unexcused absence in violation of the settlement agreement.

The judge found that it was the employer's labor relations policy to provide union representation to its employees during investigatory interviews and that, contrary to the employer, this interview was investigatory in nature because Hawkins had every reason to fear that the interview and the drug test could result in disciplinary action given his recent reinstatement and the terms of the settlement agreement. The judge applied the principles set forth in *NLRB v. Weingarten*,[17] and found that Hawkins' request for representation by the union was an exercise of his statutory rights under Section 7 of the Act and that the employer was obligated to respect his request even if it meant delaying the interview or if a steward was available,

[15] 303 NLRB 989 (Chairman Stephens and Members Devaney and Raudabaugh).
[16] *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).
[17] Ibid.

providing Hawkins with a steward before proceeding with the interview.

Thus, the judge further found that the General Counsel had made a prima facie case and that the employer had failed to establish that it would have discharged Hawkins for legitimate reasons absent his protected conduct.[18] Therefore, the judge found that the suspension for refusing to participate in an investigatory interview conducted in derogation of Hawkins' Section 7 right to refuse to participate in that interview without union representation also violated Section 8(a)(1). Accordingly, he concluded that the employer had violated Section 8(a)(1) by suspending and discharging Hawkins for refusing to participate in an interview conducted in derogation of his Section 7 right to a representative at the interview.

In its exceptions, the employer argued that the suspension was not unlawful because it had made the decision to suspend Hawkins for failure to take the drug test before he asserted his *Weingarten* rights. The Board rejected the employer's argument noting that the drug test was part of the inquiry into Hawkins' absenteeism and the employer's disregard of his requests for union assistance and suspension for not taking the drug test was, in effect, penalizing Hawkins for claiming *Weingarten* rights with respect to the larger controversy. Therefore, based on these circumstances, the Board concluded that "the suspension cannot be divorced from Hawkins' assertion of *Weingarten* rights, and it is unlawful just as is the discharge."

The employer, relying on *Taracorp, Inc.*,[19] also contended that the judge's reinstatement remedy was inappropriate. The Board also rejected this contention. In doing so, the Board distinguished *Taracorp* from the instant matter. In *Taracorp*, an employee was discharged for misconduct unrelated to protected activity and the investigatory interview had violated the employee's *Weingarten* rights.

The Board reversed the judge's reinstatement remedy because there was no nexus between the unfair labor practice (denial of representation at the interview) and the reason for the discharge (the employee's earlier misconduct).[20] Whereas, here, the employer's reasons for the discharge were pretextual and the real reason was that Hawkins refused to participate in an investigatory interview without the assistance of a union steward. The Board concluded that "[t]he nexus between the statutory right and the discharge [was] clear. The reinstatement and backpay order remedies the suspension and discharge."[21]

6. Protected Activity

The issue addressed by the Board in *Southern Services*[22] is "the appropriate legal standard to be applied when employees who regularly and exclusively work on the premises of an employer other than their own distributed union literature to fellow employees at the

[18] *Wright Line*, 251 NLRB 1083 (1980); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).
[19] 273 NLRB 221 (1984).
[20] Id. at 223.
[21] 303 NLRB 989.
[22] 300 NLRB 1154 (Chairman Stephens and Member Cracraft; Member Oviatt concurring).

worksite at a time when they are on the property pursuant to their employment relationship." Contrary to the administrative law judge, the Board found that the proper standard is that set forth in *Republic Aviation v. NLRB*.[23]

Coca Cola Company (Coke) has an office in a complex of buildings surrounded by a fence where Southern Services, Inc. (SSI), a subcontractor to Coke, regularly performs janitorial work. The SSI employees work exclusively at the Coke complex. Coke maintains a no-solicitation/no-distribution policy with respect to nonemployees at the complex. The Board found that Coke and SSI violated Section 8(a)(1) by refusing to allow an SSI employee to distribute union literature to fellow SSI employees in nonworking areas of Coke property during nonworking time.

Chairman Stephens and Member Cracraft in the majority opinion stressed the distinction between *Republic Aviation*, supra, which governs solicitation and distribution by employees properly on company property pursuant to the employment relationship, and *Babcock & Wilcox*,[24] in which nonemployee organizers attempted to enter an employer's property to distribute union literature. The SSI employees did not trespass on Coke's property but were reporting to work pursuant to their employment relationship. Thus, the proper standard was that enunciated in *Republic Aviation*, supra.

Applying the *Republic Aviation* standard, the Board majority found that Coke and SSI violated Section 8(a)(1) by refusing to allow SSI employee Patricia Copeland to distribute union leaflets, noting that "the Respondents have not shown that the SSI employees' distribution of union literature to fellow SSI employees during nonworking time in nonworking areas of the Coke worksite would interfere with maintaining production or discipline at the Coke worksite."

Member Oviatt, in a concurring opinion, agreed that the employers violated Section 8(a)(1) by preventing SSI employee Copeland from distributing the union leaflets. Because of the particular circumstances of this case, including the fact that Copeland was employed by SSI only for the Coca Cola headquarters job and had no other workplace where she could reach her fellow SSI employees, Member Oviatt was willing to apply the *Republic Aviation* standard. However, he noted that he would be cautious about extending *Republic Aviation* to other situations involving union solicitation or distribution of union literature by a subcontractor's employees.

B. Employer Discrimination Against Employees

1. Discriminatory Discharge

a. Paid Union Organizers

In *Escada (USA), Inc.*,[25] a panel majority adopted the judge's finding that the employer violated Section 8(a)(3) by discharging an em-

[23] 324 U.S. 793 (1945).
[24] 351 U.S. 105 (1956).
[25] 304 NLRB 845 (Chairman Stephens and Members Cracraft and Devaney; Member Oviatt dissenting).

ployee, who was also a paid union organizer intern, because of his union activities.

The employer was engaged in the warehousing, distribution, and nonretail sale of women's apparel. It hired an employee who, unknown to it, was a union organizer intern sent and paid by the union. After his hire, the employee discussed the union with other employees and obtained signed authorization cards from a majority of them. The employer knew of the employee's union activities. The day after the employee and several coworkers attended a union meeting, the employer discharged the employee purportedly for harassing employees and for talking to them instead of working.

The administrative law judge found the employer's explanation for the discharge pretextual and determined that the discharge was motivated by the employees' union activities. The judge further rejected the employer's argument that the discriminatee, as an employee of the union, was not an "employee" under Section 2(3) entitled to the Act's protection. Relying on *Oak Apparel*[26] and *H. B. Zachry Co.*,[27] the judge found that the paid union organizer intern was an employee within the meaning of the Act. Although the judge noted that the Fourth Circuit Court of Appeals had refused to enforce the Board's decision in *Zachry*,[28] he said he was unsure whether the court's holding mandated the finding urged by the employer and that, in any event, he was bound by Board precedent.

The Board majority agreed with the judge that the discharge violated Section 8(a)(3). Citing *Oak Apparel, H. B. Zachry*, and *Willmar Electric Service*,[29] the majority further agreed with the judge's finding that paid organizers "are entitled to the same protected Sec. 2(3) 'employee' status as other applicants." Although the majority noted that "paid union organizers who obtain employment with a company may be temporary employees excluded from any bargaining unit," they nonetheless are entitled to the Act's full protections. *299 Lincoln Street.*[30]

Member Oviatt, dissenting, would reverse the judge and dismiss the 8(a)(3) allegation. Member Oviatt would overrule *Oak Apparel* and its progeny and, for the reasons stated by the Fourth Circuit in *H. B. Zachry v. NLRB*, find that paid union organizers are not employees within the meaning of the Act. Thus, Member Oviatt notes that although, as in *Zachry*, the alleged discriminatee shared some external characteristics with the employer's other employees, he remained in the union's employ and performed services for the employer only because instructed to do so by the union. Further, according to Member Oviatt, "it was not merely the temporary nature of the [alleged discriminatee's] interest in employment that set him apart 'from a bona fide applicant, but the entire character of the future employment relationship.'" Finally, he noted that, as found by the Fourth Circuit,

[26] 218 NLRB 701 (1975).
[27] 289 NLRB 838 (1988).
[28] *H. B. Zachry v. NLRB*, 886 F.2d 70 (4th Cir. 1989).
[29] 303 NLRB 245 (Chairman Stephens and Members Cracraft and Devaney).
[30] 292 NLRB 172, 180 (1988).

the protections offered employers under *NLRB v. Babcock & Wilcox*,[31] to prohibit unions from entering their premises for organizing, would be ineffective if the employer is required to let the discriminatee organize on its property because he had obtained entrance as an "employee."

In *Willmar Electric Service*,[32] the Board held that the employer violated Section 8(a)(3) and (1) by refusing to hire a job applicant who was employed as a full-time union organizer.

The applicant received no specific direction from the union to seek employment with the employer. He testified that if hired, he would take a leave of absence from employment by the union and limit any organizational activity to personal time at lunch and after work. He was willing to take a reduction in pay to work for the employer and he did not know whether the union would reimburse him for any shortfall in compensation. Finally, there was no showing that he would terminate his job with the employer at the end of any organizing campaign rather than after completion of the employer's construction project close to his home.

The Board reviewed the Fourth Circuit's analysis denying enforcement of the Board's Order in *H. B. Zachry Co. v. NLRB*,[33] and decided to adhere to the Board's holding in that case "that individuals who are full-time paid union organizers while applying for a job are protected Section 2(3) employees who cannot be discriminatorily denied employment simply on the basis of that union activity or status."

The Board found that the foregoing factual circumstances indicated that the applicant here would not have been an employee working for two different employers at the same time and during the same working hours. Therefore, it found this case factually distinguishable from *Zachry* on points critical to the court's analysis because the instant application did not raise the same concerns about divided employment loyalties and interests as were present there. Given the employer's manifestation of an antiunion hiring policy by its unlawful refusal to hire another applicant and by several unlawful statements, the Board affirmed the administrative law judge's finding that the employer's refusal to hire the union organizer was unlawfully motivated.

b. Visiting NLRB Office

In *BMC America*,[34] the Board majority reversed an administrative law judge and held that the respondent violated Section 8(a)(4) by discharging employees for leaving work to go to the Board's Regional Office for work-related information.

In February 1988, BMC America agreed to purchase BMC Products. The closing date was March 11, 1988. The Chemical Workers represented BMC Products' employees. The collective-bargaining agreement ran until May 31, 1990. BMC America advised the union

[31] 351 U.S. 105, 110 (1956).
[32] 303 NLRB 245 (Chairman Stephens and Members Cracraft and Devaney).
[33] 886 F.2d 70 (4th Cir. 1989), enf. denied 289 NLRB 838 (1988).
[34] 304 NLRB 362 (Members Cracraft and Devaney; Chairman Stephens dissenting).

that it would not assume the collective-bargaining agreement. The union then negotiated a new contract with BMC America.

On March 10, 1988, the union and BMC Products informed employees about the sale and that the closing would be the next day, and advised those interested in employment to fill out applications the next day. The union discussed the new contract with the employees. Employee Alejandres complained about the short notice and about a possible breach of the old contract. When he said he would go to the Labor Department to determine whether the company was "in the right," the union agent replied, "Do what you want."

The next day, an employee attempted to speak to a supervisor about the possible contract breach, but the supervisor did not want to discuss the matter. Several employees decided to go to the Board's Regional Office to determine whether the company had any obligation to them. Eight employees went to the personnel office before leaving to go to the Board. Manager Rosenia asked what they were doing. When one employee replied that they were going to the Board, Rosenia asked why. When the employees did not respond, Rosenia raised his voice and said to the group, "If you punch your card out, you are gone from the company."

The employees went to the Regional Office. Because Rosenia had told them they would be discharged for leaving work, an employee filed a charge.

The judge found that BMC Products acted pursuant to company rules providing for discharge for failing to do assigned work. He also found that the employees refused to tell Rosenia the nature of their grievances, and the judge implied that this failure to discuss their grievances rendered their resort to the Board unprotected activity. He therefore found that the discharges were lawful.

The Board majority reversed, relying on *Ohmite Mfg. Co.*[35] The majority held that the employees had a real need to go to the Board based on apprehension about their jobs and losing benefits even if they retained their jobs. Further, the majority found that the employees had tried unsuccessfully to obtain answers to their concerns and that, with only a few hours remaining before the changes occurred, they decided to leave work to speak to a Board agent at a time when they thought their actions might have some effect.

The majority also found that the employees demonstrated this need to management based on Alejandres' raising of concerns at the March 10 meeting that management attended. Given that the employees told Rosenia they were leaving to go to the Regional Office and that they had 1 day earlier voiced their concerns in his presence, the Board majority concluded that management was aware of the employees' concerns and that they were going to the Regional Office because of those concerns.

The Board majority concluded that BMC Products violated Section 8(a)(4) by discharging the eight employees who left work with the stated intention of going to the Board.

[35] 290 NLRB 1036 (1988).

Chairman Stephens, in dissent, would have found that the employees had not shown a real need to go to the Board office at the particular time they went. He stated that the "real need" factor related to the functional requirements of agency proceedings (such as the need to attend a Board hearing as a witness), not to any emotional need of employees for advice. He would have also found that, by merely stating they were going to the Board and refusing to answer Rosenia's requests for an explanation, they did not demonstrate to management a need to go to the Board at the time of their request.

2. Striker Reinstatement Rights

In *Rose Printing Co.*,[36] the Board held that an employer's obligation to reinstate former economic strikers extends only to vacancies created by the departure of replacements from the strikers' former jobs and to vacancies in substantially equivalent jobs, but not to any other job which a former striker is or may be qualified to perform. Consequently, the Board reversed the administrative law judge and found that the employer did not violate Section 8(a)(3) by failing to offer three former economic strikers reinstatement to poststrike entry level jobs that paid less money and required less skill than their prestrike jobs.

Initially, the Board observed that Supreme Court precedent in *NLRB v. Fleetwood Trailer Co.*[37] concerned the *time* for determining rights to reinstatement and did not address the issue of whether strikers are entitled to any jobs for which they are qualified, or only reinstatement to their former or substantially equivalent jobs. The Board then explained that its decision in *Laidlaw Corp.*[38] indirectly assumed that economic strikers' reinstatement rights concern their former jobs or substantially equivalent positions and that post-*Laidlaw* Board cases applied these limitations when determining employers' obligations to reinstate economic strikers. Thus, the touchstone for determining such reinstatement rights is to ascertain whether the job is the same as, or substantially equivalent to, the prestrike job. Mere qualification to perform the job will not suffice.

The Board found that cases relied on by the General Counsel did not support a contrary result because this precedent did not turn on the concept that an employer must reinstate replaced economic strikers to nonsubstantially equivalent job vacancies for which they are qualified. In addition, the Board found that its holding confirms coextensive employer and employee obligations. Because economic strikers have no obligation under Board precedent to accept offers of reinstatement to positions which are not the same or substantially equivalent to their prestrike positions, it would be anomalous to impose on employers a statutory obligation to make reinstatement offers that strikers have no concomitant obligation to accept.

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[36] 304 NLRB 1076 (Chairman Stephens and Members Devaney and Raudabaugh).
[37] 389 U.S. 375 (1967).
[38] 171 NLRB 1366 (1968).

This case also presented a separate issue of whether an employer must offer former strikers reinstatement to their prestrike positions, following the departure of permanent replacements, if the former strikers have acquired employment elsewhere. The Board affirmed the judge's finding that the employer violated Section 8(a)(3) when it failed to offer reinstatement to two economic strikers after their replacements left, despite the contention that the strikers had obtained employment elsewhere.

The Board found that even if the strikers obtained regular and substantially equivalent employment, the employer failed to establish that the strikers did not want to regain prestrike jobs or that they abandoned employee status. It also found that the strikers' interim employment was not equivalent to their former jobs because the respondent's prestrike benefits, wages, and working conditions were better than those currently prevailing of interim employers. The Board rejected the respondent's argument that diminished poststrike wage and benefit levels provided the appropriate basis for comparison; they resulted from unlawful unilateral changes.

In *Solar Turbines*,[39] a panel majority of the Board held that an employer made a hiring commitment to hire 52 strike-replacement applicants prior to the time the union made an unconditional offer to return to work, even though the employer had not yet received the replacement applicants' test results from its required preemployment drug and alcohol screening. Accordingly, the majority concluded that the employer did not violate the Act by failing and refusing to reinstate the 52 economic strikers immediately on their offer to return to work.

The employer, a manufacturer of aircraft engines, required preemployment drug and alcohol testing for all individuals hired. On August 12, 1987, during the course of an economic strike by the union, over 50 strike-replacement applicants were offered and had accepted permanent employment. At that time they were assigned badge numbers, job classifications, and departments, and they agreed to submit to drug and alcohol testing. Three days later, on August 15, the union made an unconditional offer to return to work.

Of the 52 individuals who eventually filled permanent positions, 13 had taken the tests before the union's August 15 offer to return. Of the 13, the testing laboratory informed the employer prior to the union's offer that 7 had received acceptable results. The employer was not advised of the fact that the other 6 of these 13 had passed until after the union's offer to return. The remaining 39 individuals had not yet been tested by August 15.

The administrative law judge found that the 13 individuals who were tested before the union's offer to return were permanent replacements because they "effectively removed the contingencies attached to their hire." He further found that the remaining 39 individuals, who, like the 13, had accepted offers of permanent employment on August 12, but who had not yet been tested at the time of the union's

[39] 302 NLRB 14 (Chairman Stephens and Member Cracraft; Member Devaney dissenting).

offer, had not removed those contingencies. In the judge's view, the employer had not made a commitment to hire those 39, and thus they were not permanent replacements. Accordingly, the judge found that the employer violated Section 8(a)(3) and (1) by failing to reinstate the 39 economic strikers whose jobs were taken by those replacements.

The Board majority disagreed with the judge, finding instead that the employer's offers on August 12 were offers of permanent employment, notwithstanding the testing contingencies, and thus, the commitment to hire all 52 strike-replacement applicants was made when they accepted the offers of permanent employment for the strikers' jobs. In the majority's view, the replacements had been hired and "their commencement of work as permanent employees was subject merely to satisfying the Respondent's 'normal employment practices,' i.e., completion of the postinterview tests." In this regard, the majority stated that, "so long as the replacement workers and the Respondent intended that the workers' employment not terminate at the conclusion of the strike, the fact that the replacements had yet to complete these postinterview tests at the conclusion of the strike did not render them temporary workers subject to discharge." The majority also noted that the employer's assignment of job classifications, work departments, and employee badge numbers to the replacement applicants on their acceptance of the offers indicated a firm commitment to hire them. The majority therefore reversed the judge and found that the employer did not violate the Act by failing to reinstate the 52 strikers to their prestrike jobs.

Member Devaney disagreed with his colleagues and with the judge. In a dissenting opinion, he stated that he would find that the employer's offers of employment for all 52 positions were contingent on the applicant's successful completion of the screening procedure. Accordingly, Member Devaney would have found that the employer had replaced only 7 of the 52 strikers when the strike ended. As to those replacement applicants for the other 45 strikers who had not completed the test procedures or whose results had not been received by the employer when the union offered to return, he would have found that the employer's conditional offers of employment had not "ripened" into a definite commitment to hire when the strike ended and, thus, that the employer had not made a firm commitment to employ those replacements. In this regard, Member Devaney noted that, in his view, the conditional nature of the offers was reflected in the employer's own policy, expounded in the employee handbook and in the forms signed by the applicants, which essentially stated that employment depended on the successful completion of the tests.

In *Transport Service Co.*,[40] a panel majority of the Board held that the employer had made a permanent offer of employment to an applicant despite his failure to have completed a required physical, polygraph test, and motor vehicles records check. The majority, for the

[40] 302 NLRB 22 (Chairman Stephens and Member Cracraft; Member Devaney dissenting).

reasons stated in its decision in *Solar Turbines*,[41] found the "routine requirement of some posthire testing did not convert its commitment to [the new hire] into something less than an offer of permanent employment." Accordingly, the majority found the new hire to have been a permanent striker replacement as of the date the employer extended its initial offer.

Member Devaney, dissenting, cited his dissent in *Solar Turbines*, and would have found that the employer's offer of employment was conditioned on the successful completion of a screening procedure. Because the screening had not been completed, Member Devaney would find the conditions on the offer had not been removed and the applicant was not a permanent striker replacement at the time the strike ended.

In *Textron, Inc.*,[42] the Board, in unanimously reversing the administrative law judge, found that the General Counsel failed to prove a prima facie case of discrimination against the hiring of former strikers. Accordingly, the Board dismissed the complaint in its entirety.

Following an economic strike, the union and the respondent entered into a strike settlement agreement that limited the recall rights of strikers to a 1-year period. Pursuant to the terms of the agreement any striker not reinstated after the 1-year period would be terminated. During the 1-year recall period, the respondent did not hire any new employees, and recalled about 200 exstrikers. Following expiration of the 1-year recall period, and consistent with the strike settlement agreement, the respondent terminated the employment status of about 150 exstrikers that were not reinstated.

The respondent had used a referral service known as the Ohio Bureau of Employment Services (OBES) for about 10–12 years prior to the strike. However, in hiring replacements during the strike, the respondent could not use OBES because state law did not allow that agency to refer applicants to replace strikers.[43] Following the 1-year strike settlement recall period the respondent again used the services of OBES. According to testimony, the respondent had maintained a general informal policy of not hiring former employees due to employer dissatisfaction with the performance of those who had been rehired. It was subsequently decided that a strict policy would be adopted against the hiring of any former employees.

In deciding to adopt a formal policy the respondent recognized that (1) applications of former employees presented problems in identifying quickly the reasons that the former employees had previously been terminated, (2) newly transferred management had no familiarity with former employees, and (3) the need to quickly hire a large number of replacement employees. The OBES referred all applications to the respondent, even those of former employees. The respondent

[41] 302 NLRB 14 (Chairman Stephens and Member Cracraft; Member Devaney dissenting).

[42] 302 NLRB 660 (Members Cracraft, Devaney, and Oviatt).

[43] To support this, the respondent requested that the Board take judicial notice of an excerpt from the OBES security manual. Members Devaney and Oviatt agreed to take judicial notice. Member Cracraft would not take judicial notice. Member Cracraft would find that the respondent's failure to use OBES during the strike is irrelevant to the General Counsel's theory of unlawful discrimination. Member Cracraft noted that the General Counsel did not allege or litigate discriminatory intent in the respondent's use of OBES.

strictly adhered to its no former employee policy, with the exception that it did hire two former strikers that had been referred by OBES.

The Board found no evidence of any animus against either the union or the strikers. The Board noted the respondent's long collective-bargaining relationship with the union, its compliance with the parties' strike settlement agreement, and its hiring of 200 former strikers during the 1-year recall period. The Board found no discriminatory intent in the respondent's use of OBES because it had used OBES for 10–12 years prior to the strike, and would have continued to use its services were it not for OBES policy precluding the referral of applicants to replace strikers.

The Board found that the respondent had a legitimate business reason for maintaining a no former employee policy, and that there was no evidence either in the establishment of the policy or in its application of discriminatory intent. In disagreeing with the judge's rationale, the Board stated:

> A fundamental element of the judge's rationale for finding a violation of Section 8(a)(3) was his disbelief that the Respondent, needing to hire . . . large numbers of employees in a short period of time, would not first resort to an available source of experienced job applicants, that is, the group of terminated former strikers.

This rationale runs afoul of the principle that "an employer cannot . . . discriminate against former employees or experienced workers in its hiring practices[, but] it . . . has no [statutory] obligation to prefer them."

In *Mohawk Liqueur Co.*,[44] the Board concluded, contrary to the judge, that an employer did not violate Section 8(a)(1) by failing to reinstate and thereafter discharging a striking employee. At issue was whether the employee had engaged in misconduct that would forfeit the employee's right to reinstatement. In deciding this case, the Board looked to the standard enunciated in *Clear Pine Mouldings*.[45] There, in examining misconduct, the Board held that the test to be applied is whether the misconduct would reasonably tend to coerce or intimidate an individual faced with such misconduct. The Board emphasized that the test is an objective one.

In this case, the employee in issue, while on picket duty, threw stones or pebbles at a job applicant's car being driven through the picket line causing $131 in damage. Finding that this misconduct would reasonably tend to intimidate employees in the exercise of their protected rights, the Board concluded that the employee had forfeited her right to reinstatement.

In *Mohawk*, the Board also considered whether a strike that began as an unfair labor practice strike was later converted to an economic strike. When the strike commenced, it was caused, at least in part, by the employer's unlawful refusal to make an accrued cost-of-living (COLA) payment. Subsequently, the employer made the COLA pay-

[44] 300 NLRB 1075 (Chairman Stephens and Members Devaney and Oviatt).
[45] 268 NLRB 1044 (1984).

ment. The judge found, and the Board agreed, that the strike, after payment of the COLA, converted to an economic strike. The Board so found even though the employer had not remedied its earlier unlawful actions in a manner that met the standards for curing unfair labor practices set forth in *Passavant Memorial Hospital*.[46]

The Board agreed with the judge that it did not follow that because the employer failed to rectify its unfair labor practice as prescribed by Board precedent that its conduct continued to be an obstacle in negotiations or prolonged the strike. Also, the Board rejected a contention that the strike remained an unfair labor practice strike because the employer failed to restore the conditions existing prior to its unlawful implementation of its final offer. It held that the General Counsel failed to establish a nexus between the employer's continuing implementation of its final offer and the prolongation of the strike.

C. Employer Bargaining Obligation

1. Successor Employer

In *Nephi Rubber Products Corp.*,[47] the Board held that the respondent was a successor to Bastian Industries despite Bastian's bankruptcy and a 16-month hiatus between its closing and the respondent's start of operations. Thus, the Board concluded that the respondent violated Section 8(a)(5) and (1) by refusing to bargain with the union that had represented Bastian's employees.

Bastian closed its Nephi, Utah hose manufacturing plant in August 1984. With the bankruptcy court's approval, the respondent purchased the plant in October 1985, reopened it a month later, and began production in January 1986. When the union that had represented Bastian's employees requested recognition as the representative of the respondent's employees in April 1986, the respondent had a work force of 53 employees, 50 of whom were former Bastian employees.

The administrative law judge found:

> Respondent has substantially continued the same operations at the same plant. A large majority of its employees were doing the same jobs under the same supervisors as they did when Bastian owned the plant. Respondent was using the same machinery, equipment and methods of production and manufacturing the same products at the time of the Union's demand for recognition.[48]

Despite finding all the traditional criteria for successorship met, the judge nevertheless declined to find that the respondent was a successor to Bastian. Rather, he found that because of Bastian's bankruptcy and the 16-month hiatus in plant operation and representation by the union, there was a lack of continuity between Bastian and the respondent.

[46] 237 NLRB 138 (1978).
[47] 303 NLRB 151 (Chairman Stephens and Members Cracraft, Devaney, and Oviatt).
[48] Ibid.

Reviewing the principles governing successorship stated by the Supreme Court in *Fall River Dyeing Corp. v. NLRB*,[49] the Board reversed. Noting that the essential inquiry concerning substantial continuity between the predecessor and the alleged successor was whether the employees retained by the putative successor would understandably view their job situations as essentially unaltered, it found that the job situation of the former Bastian employees who were retained by the respondent was not so altered that it would have changed their attitudes about union representation. Rather, based on the judge's findings that virtually all the respondent's employees were former Bastian employees and were performing the same work on the same machinery under the same supervisors as before, the Board observed that it was striking how little the employees' job situation had changed.

Contrary to the judge, the Board found that the 16-month hiatus and Bastian's bankruptcy did not compel a finding of lack of continuity. It noted that nothing about the hiatus or bankruptcy indicated that the employees, once rehired, would no longer desire union representation and that, once the plant reopened and the employees were put back to work, they found their job situations basically the same as before.[50]

The Board further observed that the facts were quite analogous to those in *Fall River Dyeing*, in which the Supreme Court upheld a successorship finding despite a 7-month hiatus between the predecessor's demise and the successor's startup. Consequently, it concluded that the respondent's refusal to recognize the union violated Section 8(a)(5) and (1).

2. Mandatory Bargaining Subject

In *American Electric Power Co.*,[51] the Board majority found that the respondents violated Section 8(a)(5) and (1) by unilaterally issuing a corporate code of ethics and a revised corporate code of ethics without first giving the unions notice and an opportunity to bargain.

The majority applied the Board's decision in *Peerless Publications*,[52] which set forth a limited exception to the general rule that an employer must bargain about mandatory subjects. Pursuant to *Peerless Publications*, in order to overcome the initial presumption of mandatory bargainability, the subject matter sought to be addressed by the employer must go to the "protection of the core purposes of the enterprise." When that is the case, the rule on its face must 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 lim-

[49] 482 U.S. 27 (1987).

[50] Contrary to the judge, the Board found that there was continued union representation during the hiatus in plant operation.

[51] 302 NLRB 1021 (Members Cracraft, Devaney, and Oviatt; Chairman Stephens concurring).

[52] 283 NLRB 334 (1987), on remand from the D.C. Circuit sub nom. *Newspaper Guild Local 10 v. NLRB*, 636 F 2d 550 (1980).

ited in its applicability to affected employees to accomplish the necessarily limited objectives.

The majority found as a threshold matter that the provisions of the codes constituted terms and conditions of employment. Applying the first part of the *Peerless Publications* analysis, the majority found, however, that the respondents failed to demonstrate as a matter of proof that "integrity"—the subject matter of the codes—was necessary for the protection of the core purposes of the respondents' enterprise—the generation and transmission of electricity. Specifically, the majority found that the code was mainly a compilation of preexisting company documents rather that a response targeted to specific governmental regulations governing the production of electricity. The respondents, according to the majority, also did not demonstrate why the nature of their Government regulations required that all of the many categories of the unit employees be subject to the codes' provisions.

The majority next found that even if the respondents had overcome the initial presumption of mandatory bargainability, the provisions of the codes were deficient in other respects under *Peerless Publications* because they suffered variously from vagueness, ambiguity, and overbreadth, and were not appropriately limited to affected employees. The majority ordered that the codes be rescinded in their entirety.

In his concurring opinion, Chairman Stephens expressed his view that the Board's decision in *Peerless Publications* "reflected the special nature of the employer involved there—a newspaper—and that its rationale is not well suited to determining mandatory subjects of bargaining in other industries." In particular, he expressed discomfort "with such concepts as 'overbreadth' and 'vagueness,' which make it appear as if we are trying to determine whether an employer's rules would pass muster under the first amendment." Rather, Chairman Stephens indicated that he would treat codes of ethics no differently from other rules of conduct which are presumptively mandatory subjects of bargaining. Although concluding that "it is no interest of ours whether the Respondent wishes to embody broad or vague rules governing employee conduct in a Code of Ethics," Chairman Stephens reached the same result as the majority based on his view that to the extent the respondents planned to apply the codes to unit employees, it must negotiate with the union about them.

In *Dubuque Packing Co.*,[53] the Board held that the employer's decision to relocate part of its operations from Dubuque, Iowa, to Rochelle, Illinois, was a mandatory subject of bargaining, and that its failure to bargain about this decision violated Section 8(a)(5) and (1).

The Board held that in determining whether an employer's decision to relocate bargaining unit work is a mandatory subject of bargaining, the initial burden is on the General Counsel to make a prima facie showing that the employer's decision is a mandatory subject of bargaining, by establishing that the decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employ-

[53] 303 NLRB 386 (Chairman Stephens and Members Cracraft, Devaney, Oviatt, and Raudabaugh).

er's operation. The employer can then produce evidence rebutting the prima facie case by establishing either that the work performed at the new location varies significantly from the work performed at the former plant, that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or that the employer's decision involves a change in the scope or direction of the enterprise.

Alternatively, the employer may proffer a defense to the prima facie case by establishing either that labor costs (direct and/or indirect) are not a factor in the relocation decision, or that even if they are, the union cannot offer labor cost concessions that could change the employer's decision (e.g., if costs for modernization of equipment or environmental controls at the former plant are greater than any labor cost concessions the union can offer). On the other hand, the employer would have an obligation to bargain where the union could offer labor cost concessions that approximate, meet, or exceed the anticipated costs or benefits that prompted the relocation decision, because the decision then would be amenable to resolution through the bargaining process. The employer would have to show that any factors it raises in its defense to a prima facie showing of bargaining obligation were in fact relied on by the employer at the time it made the relocation decision.

In *Noblit Bros.*,[54] a Board majority found that the respondent's conversion to telemarketing from random order taking in its builders' hardware manufacturing and wholesale distributing operation constituted a change in the scope and direction of the employer's enterprise that the Supreme Court in *First National Maintenance v. NLRB*[55] held was not a mandatory subject of bargaining. The majority also analogized to those types of management decisions beyond the scope of Section 8(a)(5), discussed by Justice Stewart in *Fibreboard Corp. v. NLRB*[56] as recited in *First National Maintenance.* Specifically, this decision to change the way the respondent dealt with its customers by telephone was not unlike a "choice of advertising and promotion," and although it may have had a direct impact on employment, it was focused on matters "wholly apart from the employment relationship."

The majority noted that their decision was not inconsistent with *Dubuque Packing Co.*[57] in which the Board explained that it would engage in a presumption-rebutting analysis to determine whether relocating unit work is a mandatory subject of bargaining only after the General Counsel has made a threshold showing that the work has remained essentially the same. In this case, the work had been transformed because the respondent changed its form of business.

Member Raudabaugh, concurring in the result, adopted a different rationale. He applied the *Dubuque* test. He assumed that the General

[54] 305 NLRB 329 (Chairman Stephens and Members Devaney and Oviatt; Member Raudabaugh concurring).

[55] 452 U.S. 666 (1981).

[56] 379 U.S. 203 (1964).

[57] 303 NLRB 386 (Chairman Stephens and Members Cracraft, Devaney, Oviatt, and Raudabaugh).

Counsel met the initial burden of showing that the decision was not a basic change in the nature of the respondent's operation and that the respondent had not shown that the decision involved a change in the scope and direction of the enterprise. However, labor costs were not a factor in the decision, or even if they were, the union could not have offered labor cost concessions that could have changed the decision. The decision was made in order to market products more effectively, not to achieve a labor cost savings. Thus, by applying the *Dubuque* test, Member Raudabaugh joined the Board majority in finding that the respondent's decision to transfer telephone sales work from bargaining unit employees to telemarketers was not a mandatory subject of bargaining and that the 8(a)(5) allegation in the complaint with respect to this decision should be dismissed.

In *E. I. du Pont & Co.*,[58] the Board, reversing the administrative law judge, dismissed an allegation that the respondent employer violated Section 8(a)(5) by soliciting union-represented employees to appear during their working time in a videotape training film called "Principles of Progress" and then by using the employee volunteers in the film, all without giving the union notice and an opportunity to bargain. The dismissal was predicated on the Board's conclusion that, under all the circumstances, the employees' voluntary participation in the film was not mandatory subject of bargaining.

In reaching this conclusion, the Board relied on the following factors: (1) that participation was voluntary (hence not a condition of employment); (2) that it was a one-time event, not a regular part of employee worktime activities; and (3) that the training film was used as a means to disseminate the respondent's management principles. These factors considered together, the Board reasoned, made the production of the film closer to those matters "which lie at the core of entrepreneurial control" than to those which are "plainly germane to the working environment."[59]

The Board acknowledged that the employees' participation in the film involved their appearing before the camera to give their opinions on the employer's "management principles." The Board noted, however, that the case had not been litigated on the theory that the employer had engaged in direct dealing in derogation of the union's representative status.[60] It also noted that the questions put to the employees in the film did not amount to solicitation of grievances or inquiries into sentiments about the union.

In *Mental Health Services, Northwest*,[61] the Board held that a proposed management-rights clause that prohibited the union from interfering with the respondent's ability to obtain funding for its operations was a nonmandatory bargaining subject and that the respondent

[58] 301 NLRB 155 (Chairman Stephens and Members Devaney and Oviatt).

[59] *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979), quoting *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 222 (1964).

[60] Hence, the Board found that *Bob's Big Boy Restaurants*, 264 NLRB 432 (1982), a case involving surveys of employees concerning working conditions, was not apposite.

[61] 300 NLRB 926 (Members Cracraft and Oviatt; Chairman Stephens concurring).

violated Section 8(a)(5) by insisting to impasse on its inclusion in a collective-bargaining contract with the union.

The respondent provided mental health services for county employees and received the majority of its operating funds from the county via a real estate tax levy. The union was the certified collective-bargaining representative of the respondent's employees in two separate units. The parties engaged in approximately 12 negotiating sessions from July 1987 to May 1988 without reaching an agreement. In December 1987, the union told the county mental health board that its continued support for the tax levy might be jeopardized if the respondent did not bargain in good faith.

In February 1988, the respondent proposed a management-rights clause requiring the union to agree that neither it nor the employees will "interfere with the ability of the Employer to provide services by any attempt to restrain, coerce, or otherwise influence any actual or potential funding source for the [Employer] . . . or any actual or potential client." The union, protesting that this proposal prohibited it from opposing the respondent's funding, claimed that the proposal was a nonmandatory bargaining subject and restricted its members' exercise of their political rights. The parties engaged in several more negotiating sessions but continued to disagree as to whether the disputed language was a mandatory or nonmandatory bargaining subject. The respondent insisted that any contract contain a prohibition against political activity by the union. Negotiations broke off in June 1988.

Members Cracraft and Oviatt determined that the "proposal's prohibition against any attempt to influence the Respondent's funding sources seeks to govern employee activities which might occur *outside* the workplace and *outside* the employment relationship" and that the respondent, by insisting on this issue, sought to "determine the Union's position on a political issue." Because neither objective is directly related to employees' terms and conditions of employment, Members Cracraft and Oviatt concluded that the disputed provision is not a mandatory subject of bargaining. They further concluded that the respondent violated the Act by insisting to impasse on including the nonmandatory provision in any contract with the union.

Chairman Stephens, concurring, noted that some of the kinds of activity covered by the respondent's proposal "could be related to workplace interests and could therefore constitute protected activity which the Union might waive participating in, just as it can waive the right to strike." Chairman Stephens found it unnecessary in this case to decide whether a clause containing such a waiver would be a permissible subject of bargaining because "the clause proposed by the Respondent embraced any actions influencing funding sources that could interfere with the Respondent's revenues, i.e., there was no limit on the reasons for such actions or the form such actions might take." Chairman Stephens agreed with his colleagues on the majority that the provision at issue went beyond the employer-employee rela-

tionship and that the respondent's insistence on its inclusion violated the Act.[62]

In *W. I. Forest Products Co.*,[63] the Board, reversing the administrative law judge on these issues, held that bans on workplace smoking are mandatory subjects of bargaining and that the respondent company's unilaterally imposed ban was a substantial and material change in the existing plant smoking policy. The Board agreed, however, for reasons somewhat different from those relied on by the judge, that the union waived its statutory bargaining rights by failing to request bargaining after having been given notice and an opportunity to bargain prior to implementation of the ban. The Board accordingly dismissed the complaint, which alleged that the company had violated Section 8(a)(5) through its unilateral action.

In concluding that the smoking ban was a mandatory subject, the Board rejected the argument that, because the company's policy promoted the national health policy disfavoring smoking, it was analogous to journalistic codes of ethics that, as the Board had held in two earlier cases, were "core" purposes of news publications not subject to the bargaining obligation at least with respect to their substance.[64] The Board observed that, although health-promoting policies like the smoking ban are "laudable objectives for any employer," they are not core purposes of a lumber mill. The more pertinent case, the Board found, was *Ford Motor Co. v. NLRB*,[65] which defines mandatory subjects as those "germane to the working environment."[66] The Board reasoned that smoking, however unhealthy, was "nonetheless part of the working environment in which many smokers function."

After concluding, in disagreement with the judge, that the ban on smoking at any time in any place on the company's premises was a material change from the previous policy (which allowed smoking on breaks in designated areas of the plant), the Board addressed the questions (1) whether the company was required to maintain the status quo of the earlier smoking policy by virtue of a "closure of issues" provision in a strike settlement agreement and (2) if not, whether the company violated Section 8(a)(5) by implementing the ban without giving prior notice and an opportunity to bargain.

The Board concluded, in agreement with the judge, that the language of several clauses of the strike settlement agreement, read together, indicated that the smoking ban did not come within the "closure issues" provision. The company could therefore implement changes on this subject if it gave the union adequate notice and an opportunity to bargain.

The Board found such notice and opportunity. The Board acknowledged that several supervisors had made statements to a union steward suggesting that implementation of the ban was an inevitability;

[62] The respondent's withdrawal of recognition from the union violated the Act because it did not occur in a context free of unfair labor practices.

[63] 304 NLRB 957 (Chairman Stephens and Members Devaney and Raudabaugh).

[64] *Capital Times*, 223 NLRB 651 (1976). Accord: *Peerless Publications*, 283 NLRB 334 (1987), on remand from 636 F.2d 550 (D.C. Cir. 1980).

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

[66] Id. at 498.

but the Board found that this was outweighed by the company labor relations spokesman's earlier express written invitation to the union to bargain on the proposed ban. Because the union had never responded to that invitation, but merely filed a grievance based on its view that the ban was a violation of the collective-bargaining agreement, the Board found that the union had waived its right to bargain.

3. Meeting Sites

In *Burns Security Services*,[67] the Board found that the employer violated Section 8(a)(5) by refusing to meet with the union for collective bargaining at places reasonably near the locations of the bargaining units and by intransigently insisting on meeting sites which required equal travel distances for each party.

The employer provides guard services to nuclear powerplants. The union represents guard units at three rural locations, two in Illinois and one in Florida. The employer does not own or operate the plants in question and none of them has on-site meeting facilities available to the parties. The office of the employer's negotiator, the utilities division manager for labor relations, is in suburban Chicago, about 150–160 miles from the Illinois plants. The Florida plant is about 90 miles from the Orlando airport. The union's negotiator for each unit proposed meeting sites in towns within a few miles of the respective plants. The employer's negotiator, taking the position that any meeting site had to conform to an "equal travel distance" for each side, insisted on sites significantly further from each plant than the site proposed by the union.

The administrative law judge found that the employer acted in bad faith by insisting that the union travel further from each of the respective plants than the closest reasonable location proposed by the union as a site for collective bargaining. In determining that the employer had not met its 8(d) obligation to confer in good faith, the judge relied on the Board's historic policy of placing central emphasis on the locale of the represented employees. The judge emphasized *Tower Books*[68] which found an 8(a)(5) violation in which the company's "intransigent insistence" on meeting far from the affected union and employees was combined with a failure to provide an "overriding reason compelling negotiations" at that site.

The judge found an 8(a)(5) violation, however, only with respect to the Illinois unit where an actual delay resulted from the employer's bad-faith bargaining. He dismissed the allegation with respect to the two units in which the negotiations were not delayed beyond the date on which the parties had originally agreed to meet.

The Board agreed with the judge that the employer overall acted in bad faith but concluded that it had unlawfully thwarted the collective-bargaining process with respect to all *three* units. The Board found that the employer's insistence on "equal travel" was presented as its national policy, that the delay at the Illinois unit was known

[67] 300 NLRB 1143 (Chairman Stephens and Members Cracraft and Devaney).
[68] 273 NLRB 671, 672 (1984), enfd. mem. 772 F.2d 913 (9th Cir. 1985).

to the negotiators for the other two units when the employer sought to impose the equal travel condition on the union, and that negotiating sessions with the latter two units were not in fact held until after the union filed unfair labor practice charges. It agreed, however, with the company that the cease-and-desist order be restricted to the specific sites at issue here and not be extended, as recommended by the judge, to all of the employer's facilities nationwide.

4. Unilateral Change

In *Daily News of Los Angeles*,[69] the administrative law judge held that the respondent's annual evaluation of unit employees for merit increase purposes was an existing pattern and practice and that the respondent's unilateral discontinuance of the annual evaluations of its union-represented employees during the bargaining negotiations with the union violated Section 8(a)(5).

The majority of Members Cracraft and Devaney, citing the Supreme Court's decision in *NLRB v. Katz*,[70] affirmed the administrative law judge's finding that although the amount of the merit increase an employee would receive was discretionary, the timing of the merit increase was not discretionary, thus the merit wage program had become a term and condition of employment and the respondent's unilateral abandonment of the program violated Section 8(a)(5).

Member Oviatt, dissenting, concluded that because the "application" of the merit pay program was purely discretionary, the respondent's unilateral discontinuance of the program did not violate Section 8(a)(5).

In *United Technologies Corp.*,[71] a Board panel majority of Chairman Stephens and Member Cracraft held that the respondent's unilateral increase of its Saturday overtime shift from 5 hours to 8 did not violate Section 8(a)(5) and (1) as the management functions clause of the parties' collective-bargaining agreement waived the union's right to bargain over the change.

On April 20, 1987, the respondent informed the union's president that the Saturday overtime shift was being increased from 5 hours to 8 and that this change was not negotiable. The respondent implemented the change the following day. In 1984, when the Saturday overtime shift had been decreased from 8 hours to 5, the parties had bargained concerning this matter. Both the collective-bargaining agreement in effect in 1984 and the one in effect in 1987 contained a management functions clause that provided, in part, that the respondent has "the sole right and responsibility to direct the operations of [the respondent] and in this connection to determine . . . shift schedules and hours of work." Both agreements also contained a separate overtime article providing that employees be paid time-and-a-half for Saturday work and that overtime work be distributed equally.

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[69] 304 NLRB 511 (Members Cracraft and Devaney; Member Oviatt dissenting.)

[70] 369 U.S. 736 (1962).

[71] 300 NLRB 902 (Chairman Stephens and Member Cracraft; Member Devaney dissenting).

Noting that Saturday overtime was a regularly scheduled shift, the panel majority found that the management functions clause unambiguously waived the union's right to bargain over the change in Saturday overtime hours, as the clause plainly authorized the respondent to determine the hours of scheduled shifts. The majority found this reading of the management functions clause unaffected by the overtime article, as nothing in that article suggested that it was intended to address when shifts would begin or end.

The majority further found that the parties' bargaining in 1984 did not render the management functions clause ambiguous or show that the parties had not agreed that the respondent could not unilaterally change Saturday overtime hours. Rather, the majority found that the record did not establish that the 1984 bargaining was over the change in Saturday overtime hours but, rather, concerned ensuring compliance with the contractual requirement for equal distribution of overtime. In sum, the majority concluded that nothing in the parties' bargaining history or in other provisions of the collective-bargaining agreement suggested that the management functions clause meant other than what it plainly stated—that the respondent possessed the right to determine shift schedules and hours of work.

Member Devaney, dissenting, found that the management functions clause did not clearly and unmistakably waive the union's right to bargain over the respondent's change in Saturday overtime hours. Noting that the management functions clause made no mention of overtime and that the collective-bargaining agreement contained a separate article on overtime, Member Devaney found ambiguous whether the management functions clause's "shift schedules and hours of work" language was intended to encompass weekend overtime.

Further, contrary to his colleagues, Member Devaney found that the parties' 1984 bargaining was over changing Saturday overtime from 8 hours to 5 and that this bargaining history showed the parties' understanding that the union's right to bargain over Saturday overtime was not waived by the contract's management functions clause. Consequently, Member Devaney found that the respondent's 1987 unilateral change in Saturday overtime violated Section 8(a)(5) and (1).

5. Lawful Lockout

In *Redway Carriers*,[72] a panel majority adopted the administrative law judge's finding that a lockout continued to be lawful despite the respondent's subsequent bad-faith bargaining in which the respondent's owner mistakenly believed when he shut down operations and throughout the subsequent negotiations that the truckdrivers had struck and he reasonably feared the strike could endanger him and his family and could result in the destruction of property. In the unusual circumstances of this case, the majority found insufficient nexus with unlawful motivation to convert the lockout to an unlawful one.

[72] 301 NLRB 1113 (Chairman Stephens and Member Cracraft; Member Devaney dissenting).

Member Devaney, dissenting on this point, believed that the lockout, initially lawful, was converted to an unlawful one when respondent subsequently engaged in bad-faith bargaining by conditioning opening its doors on acceptance of concessions. Analogizing to the situation in which an economic strike is converted to an unfair labor practice strike when bad-faith bargaining demands result in prolonging the strike, Member Devaney would find that the lockout in this case converted to an unlawful one because it became an extension of the respondent's unlawful bargaining demands.

6. Duty to Furnish Information

In *Warner Press*,[73] a panel majority of the Board affirmed the administrative law judge's conclusion that the respondent employer did not violate Section 8(a)(5) and (1) by refusing, during collective-bargaining negotiations, to furnish information to the union regarding the cost of additional health benefits proposed by the union.

During negotiations for a successive collective-bargaining agreement, the union proposed that the employer participate in the union's health and welfare fund (the Fund). The union informed the employer that its contribution would not be less than $267.65 per employee per month. The employer rejected the union's insurance proposal, stating that it was not interested in the Fund and that the cost was too high. The employer then submitted its own insurance proposal. The union demanded that the employer find out from its insurance carrier what it would cost to provide a dental plan, a vision plan, a dollar prescription card, and "PPO" benefits ("preferred provider option")—benefits that were included in the Fund but not in the employer's proposal. The employer declined to provide the information requested by the union.

When the parties met again to continue contract negotiations, the employer again refused the union's request to procure the costs for benefits of the union's proposal from the employer's insurance carrier. The employer's attorney told the union that the employer was not interested in these four benefits, that the employer would give cost information only about its own proposals, and that the employer did not have to supply cost information about matters which were not even proposals. The employer then submitted another proposed plan for group health insurance coverage that provided a PPO benefit with a $5 prescription card, and provided the union with the cost for that proposal.

The panel majority agreed with the judge's finding that the employer's refusal to furnish the information requested by the union did not violate the Act. It was found that the employer never rejected these four benefits because of their cost, nor had the union proposed that these four benefits be added to the employer's proposal. Rather, the posture of the negotiations was that the union had proposed that the employer become a member of the Fund, which provided, inter alia, the four benefits at issue in this case, and the employer had in-

[73] 301 NLRB 1161 (Members Cracraft and Oviatt; Member Devaney dissenting).

formed the union that it was not interested in becoming a member of the Fund and that the cost was too expensive. Under, these circumstances, and in light of the employer's lack of interest in these four benefits, it was concluded that the employer's potential cost for the four benefits was not needed by the union "for the proper performance of its duties as the employees' bargaining representative" nor "to enable [it] to understand and intelligently discuss the issues raised in bargaining." In this regard, the judge concluded that "[i]f an employer, such as Respondent, merely states that it is not interested in providing certain benefits, their cost has not been placed at issue; and the employer may legally refuse to produce the information." It was found that the General Counsel made no showing that the requested information existed or that the employer possessed that kind of information. The majority panel agreed further with the judge's finding that the union was asking the employer to consult a third party, its insurance carrier, for the information, and that the Board does not require a party to produce information that is outside its control.

In dissent, Member Devaney, would have required the employer to furnish the requested information because the information was "relevant to the Union in formulating its bargaining position" and was "a logical response to the Respondent's rejection of its Health and Welfare Fund proposal." He reasons that if the employer had furnished the requested information, the union may have modified or abandoned its proposal. He also points out that because the judge dismissed the complaint at the close of the General Counsel's case in chief, and prior to the presentation of the employer's case thereby foreclosing any rebuttal evidence by the General Counsel, the record is insufficient to determine whether the requested information existed and if it was in the possession of the employer. In these circumstances, he would reverse the judge, and remand the case for a further hearing.

In *Pennsylvania Power Co.*,[74] the Board held that an employer violated Section 8(a)(5) and (1) by refusing to provide the union with a summary of the information it relied on to order drug testing of 16 of its employees, but that it did not violate the Act by refusing to provide the union with the names and addresses of informants or any statements (oral or written) made by them which led to the employer's investigation.

The employer implemented a drug and alcohol policy which prohibits, inter alia, the use, sale, or possession of drugs by employees on company property. Pursuant to this policy, an employee may be sent for blood and urine testing if there is a "suspicion" that he is under the influence of drugs.

In October 1985, the union discovered that 16 employees had been tested pursuant to this policy. Six employees tested negative. Of the 10 employees who tested positive, 5 were suspended and 5 were discharged. The union filed grievances on behalf of each employee who

[74] 301 NLRB 1104 (Chairman Stephens and Members Devaney and Oviatt)

was tested and one overall grievance challenging the validity of the testing procedure. All the grievances were denied, and the union demanded arbitration pursuant to the provisions contained in the parties' collective-bargaining agreement.

When the union became aware that the employer had obtained information by use of one or more informants, it made several oral and written requests for, inter alia, the informants' names as well as any information they had provided. The employer supplied much of the information the union requested, but continued to refuse to disclose the identity of the informants, any statements made by them, or the minutes of interviews.

The judge found that the employer had violated Section 8(a)(5) and (1) by refusing to supply the union with the names and addresses of the informants, but did not violate the Act by refusing to provide the union with the informants' statements, minutes of investigative meetings with them, or summaries thereof.

The Board reversed the findings of the administrative law judge after carefully balancing the employer's confidentiality interest and the union's need for information. It found that with regard to the identity of the informants, the employer's confidentiality interest was "entitled to unusually great weight." The Board distinguished the facts from *Transport of New Jersey*,[75] in which it found that an employer was required to disclose to the union the names and addresses of bus passengers who had witnessed an accident.

The Board was not persuaded, however, that the employer's confidentiality and other interests outweighed the union's need for *any* information with respect to the context of what the informants said. It adhered to its ruling in *Anheuser-Busch*,[76] and found that the employer did not violate Section 8(a)(5) and (1) by refusing to supply the informants' statements. But it held that the employer did violate the Act by refusing to provide a summary of the informants' statements. The Board found this holding consistent with prior Board rulings.

In *Anheuser-Busch*, the Board held that witness' statements did not have to be disclosed, but noted that there the union already possessed the substance of the affidavits as well as the identity of most of the affiants. And in *Columbus Products Co.*,[77] it did not require disclosure of the names of employees who had allegedly been instructed to disobey orders, but acknowledged that the union had already been informed of the substance of the statements pertaining to the conduct which was the subject of the grievance.

The Board concluded here that the employer is required to provide the union with a summary of the informants' statements, including the information on which it relied to meet the threshold "suspicion" standard for performing the drug tests, but that the summary need not

[75] 233 NLRB 694 (1977).
[76] 237 NLRB 982 (1978).
[77] 259 NLRB 220 (1981).

contain any information from which the identity of the informants could be ascertained.

In *Mobil Oil Corp.*,[78] the Board considered whether the respondent unlawfully refused to disclose to the union the name of the person who reported drug use by three employees and whether the respondent violated Section 8(a)(5) by failing to provide the union with a summary of the informants' report.

The respondent had established an alcohol and drug policy that included mandatory physical testing of employees suspected of drug use, even off-premises. An individual came to management and claimed knowledge about drug use by three of the respondent's employees. After securing from management a pledge of confidentiality, the informant provided detailed information regarding the alleged drug use. The substance of this report was then relayed to upper management who then relied on the report as the "reasonable cause" for insisting that three unit employees submit to drug screening.

The union filed a grievance over the matter and requested that the respondent divulge the source and the substance of the report that precipitated the screening demand. The respondent refused to supply the requested information, asserting that it was confidential.

The Board, relying on *Pennsylvania Power Co.*,[79] balanced the respondent's legitimate confidentiality interest in withholding the identity of the informant and the evidence it relied on to mandate the drug tests against the union's legitimate need to know about the information which created the suspicion supporting the demand for testing. It concluded that the confidentiality pledge given furtherance of its drug control policy is entitled to "unusually great weight."

The Board found an obvious relationship between the drug informant confidentiality pledge and the prevention of personal injury and environmental disaster that could result from an oil pipeline accident caused by a drug-impaired employee. Consequently, it concluded that the respondent's confidentiality interest with respect to the identity of the informant outweighed the union's interests.

The Board further found, however, that the respondent was obligated to supply the union with a summary of the informant's report (as opposed to providing a copy of the informant's actual statement), inasmuch as the union's need to know what evidence the respondent relied on to mandate drug testing outweighed the respondent's confidentiality concerns.

7. Duty to Arbitrate Grievances

In *Arizona Portland Cement Co.*,[80] a panel majority of the Board held that an employer was not obligated to arbitrate grievances that were filed after contract expiration because a new union had replaced the employees' previous bargaining representative.

[78] 303 NLRB 780 (Chairman Stephens and Members Devaney and Oviatt).
[79] 301 NLRB 1104 (1991) (Chairman Stephens and Members Devaney and Oviatt).
[80] 302 NLRB 36 (Chairman Stephens and Member Cracraft; Member Devaney dissenting in part).

Between 1984 and February 1987, the employer recognized the Boilermakers Union as the employees' representative, and the employer agreed to arbitrate certain grievances (but not all) filed by the Boilermakers even though there was no contract between the parties in effect. On February 2, 1987, the Boilermakers Union was supplanted by a different union, the Independent Workers of North America (IWNA), which on that date was certified by the Board as the employees' exclusive representative. The employer refused to arbitrate any grievances after the IWNA's certification on February 2, 1987, including those that the employer had agreed to arbitrate with the Boilermakers Union.

The majority of Chairman Stephens and Member Cracraft stated that under *Indiana & Michigan Electric Co.*,[81] and its progeny, the Board is not legally empowered to direct an employer or arbitrate an employee grievance in the absence of employer agreement thereto. In *Arizona Portland Cement*, the majority found that the evidence did not establish that the employer had expressed a consent to arbitrate grievances with IWNA, the new bargaining representative. The majority pointed out that if the employees had merely repudiated the Boilermakers without also selecting a new bargaining representative, the employer may well have been obligated to arbitrate grievances filed by the Boilermakers at a time when the employer still had an obligation to recognize that representative. The majority noted, however, that the IWNA, not the Boilermakers, had filed the charges in this case, and the majority refused to require the employer to deal with the IWNA in the processing and arbitration of past grievances that arose when the Boilermakers represented the employees.

In dissent, Member Devaney found that the employer by its conduct had demonstrated its agreement to adhere to its longstanding practice of arbitrating grievances through the employees' designated bargaining representative, the local union, even if the employees changed their representative. Member Devaney asserted that the certification of IWNA in February 1987 provided no legitimate basis for the employer's abandonment of its agreement to process grievances through the arbitration step. He observed that the employees actually changed the affiliation of their local union in October 1986 by voting to disaffiliate from the Boilermakers and affiliate with IWNA, but that the employer did not repudiate its agreement to arbitrate grievances until some 4 months later, when IWNA was certified pursuant to a Board-conducted election.

Member Devaney noted that the IWNA has replaced the Boilermakers as the employees' bargaining representative, but the "identity, status, and role of the persons who process grievances for the local Union has remained the same." Accordingly, Member Devaney would have adopted the administrative law judge's finding that the employer violated Section 8(a)(5) and (1) by refusing to arbitrate grievances after IWNA's certification.

[81] 284 NLRB 53 (1987).

8. Affirmative Defenses

In *Chicago Tribune Co.*,[82] the Board reversed the administrative law judge's ruling striking the employer's three affirmative defenses to numerous 8(a)(5), (3), and (1) complaint allegations concerning lengthy contract negotiations and an attendant strike. The Board remanded the case for further supplemental findings and conclusions addressing the merits of each affirmative defense and the alleged permanent status of striker replacements.

The judge found merit to amended consolidated complaint allegations alleging that the respondent: violated Section 8(a)(5) by insisting to impasse over a permissive subject of bargaining, thereby converting an economic strike to an unfair labor practice strike; violated Section 8(a)(3) by refusing to reinstate unfair labor practice strikers on receipt of an unconditional offer for all strikers to return to work; violated Section 8(a)(3) by failing to reinstate former economic strikers, who the respondent claims were permanently replaced, when work thereafter became available; and violated Section 8(a)(5) by posting new conditions of employment without having bargained to lawful impasse.

The respondent's answer raised three affirmative defenses. It claimed that during the course of 59 bargaining sessions the union unlawfully engaged in coordinated bargaining, unlawfully engaged in surface bargaining, and unlawfully insisted to impasse on the permissive subject of including supervisors in the bargaining unit, thereby excusing it from any statutory bargaining obligation and removing statutory protection from employees who struck. Section 8(b)(3) unfair labor practice charges containing similar allegations had been dismissed or withdrawn.

The judge concluded that the respondent was not entitled to litigate its affirmative defenses in this case because (1) the respondent "would be improperly circumventing the statutory enforcement scheme" if it were permitted to accuse the union of unfair labor practices, and (2) the unfair labor practices alleged did not present a valid legal defense to any necessary element of the General Counsel's prima facie case.

The Board reversed. It found that a party is privileged to present and the judge is bound to hear, receive, and consider a party's defense, if such defense could affect unfair labor practice findings, notwithstanding the fact that the General Counsel had previously considered the same evidence in refusing to issue a complaint. This due-process requirement does not interfere with the General Counsel's nonreviewable discretion to issue complaints because even if the Board's finding of merit in an affirmative defense entails finding that an uncharged party has committed an unfair labor practice, the Board has no authority to issue an order directly against that party or to order the General Counsel to reconsider prior disposition of a charge against that party.

[82] 304 NLRB 259 (Members Cracraft, Devaney, and Oviatt).

Citing precedent, the Board found that each of the respondent's affirmative defenses could warrant dismissal of one or more of the 8(a)(5) and (3) complaint allegations. The union's alleged surface bargaining may remove the possibility of negotiation and preclude testing the employer's own good faith. Similarly, in certain circumstances a union's insistence to impasse on bargaining demands about permissive bargaining subjects suspends an employer's statutory bargaining obligation, and a strike in support of such demands is not only unprotected but unlawful.

The Board also remanded the issue of the alleged permanent status of striker replacements to permit the judge to articulate his basis for finding that replacements hired after the first month of the strike were permanent rather than temporary. This issue was closely related to a timely filed charge and was fully litigated. Absent definitive factual findings with respect to testimonial and documentary evidence adduced by the employer, the Board had an insufficient basis for determining whether the respondent satisfied its legal burden of proving the "mutual understanding" necessary to establish permanent replacement status.

9. Refusal to Execute Agreement

In *Beatrice/Hunt-Wesson*,[83] the Board found that the employer did not violate Section 8(a)(5) by refusing to execute a collective-bargaining agreement on the grounds that the agreement had not been ratified by the bargaining unit members.

The majority of Members Cracraft and Raudabaugh found that the parties had discussed and agreed during negotiations for the contract "to submit their 'tentative agreement' containing a controversial wage proposal for ratification by the bargaining unit members." The majority concluded "rather than the Union imposing the limitation of ratification on itself, both parties in the instant case agreed to require ratification by the bargaining unit members to make their 'tentative agreement' binding." Rejecting the General Counsel's argument that the respondent did not have standing to challenge the union's method of ratification, the majority held that ratification was not an internal union procedure within the union's exclusive domain because the parties had clearly defined ratification by agreeing that ratification was a precondition to the contract and by discussing the ratification process.

Chairman Stephens, concurring, underscored the significance of this decision, apparently the first instance in which the Board has excused an employer's refusal to execute a bargaining agreement on the ground that the agreement was not properly ratified by the affected employees.

[83] 302 NLRB 224 (Members Cracraft and Raudabaugh, Chairman Stephens concurring).

10. Subcontracting Restriction

In *St. Joseph Equipment Corp.*,[84] the Board considered whether a subcontracting restriction was enforceable pursuant to the construction industry proviso of Section 8(e). The Board, relying on the Supreme Court's decision in *Connel Construction Co. v. Plumbers Local 100*,[85] held that the restriction was unenforceable as it was not arrived at in the context of a collective-bargaining relationship.

The union requested the employer to supply it with information assertedly necessary for the union to determine whether the employer, via an alter ego, was violating the subcontracting restriction. The employer had been the general contractor on a construction project where the union represented individuals employed by a subcontractor. The union and the employer entered into a collective-bargaining agreement—which included the subcontracting restriction—in order to guarantee that the employer would make fringe benefit payments owed the union by the subcontractor. Thereafter, the union observed nonunion subcontractors at work on a project of the asserted alter ego of the employer, and requested information from the employer to determine whether the asserted alter ego was in violation of the subcontracting provision.

The Board concluded that the subcontracting restriction was unenforceable because it was not reached in the context of a collective-bargaining relationship, in view of the limited purpose which gave rise to the agreement—merely to guarantee payment by the employer of certain fringe benefit payments—and the fact that neither the employer nor its asserted alter ego ever employed employees represented by the union. As the Board found the subcontracting provision to be unenforceable under *Connel*, the Board held that the information sought by the union to determine whether that provision had been violated was not relevant to the administration or enforcement of the agreement.

Chairman Stephens concurred in the result but would have found that no general bargaining obligation existed between the parties in view of the fact that the parties signed the "collective-bargaining agreement" for purposes totally unrelated to a collective-bargaining relationship with the union.

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

[84] 302 NLRB 47 (Members Cracraft and Oviatt, Chairman Stephens concurring in the result).
[85] 421 U.S. 616 (1975).

prescribe its own rules for the acquisition and retention of membership.

The Board faces a continuing problem of reconciling the prohibitions of Section 8(b)(1)(A) with the proviso to that section. It is well settled that a union may enforce a properly adopted rule reflecting a legitimate interest if it does not impair any congressional policy imbedded in the labor laws. However, a union may not, through fine or expulsion, enforce a rule that "invades or frustrates an overriding policy of the labor law."[86] 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. Revocation of Dues-Checkoff Authorization

In *Electrical Workers IBEW Local 2088 (Lockheed Space Operations)*,[87] a unanimous four-member Board found that a union violated Section 8(b)(1)(A) by receiving, accepting, and retaining membership dues payments derived from an employee's checkoff authorization after that employee had terminated his membership in the union and sought to revoke his authorization. Departing from the judicially criticized dues for membership "quid pro quo" analysis of *Machinists Local 2045 (Eagle Signal)*,[88] the Board determined that the policies of the Act as enunciated in *Pattern Makers League v. NLRB*,[89] warrant a rebuttable presumption that a dues-checkoff authorization will not bind an employee to continued dues deductions following his resignation from union membership.

The employer and the union were parties to a collective-bargaining agreement which contained no union-security clause (in a right-to-work jurisdiction). An employee, who had executed a voluntary dues-checkoff authorization in September 1985, resigned his union membership in January 1988. The checkoff stated that the employer was to deduct "regular membership dues" and that the authorization was "irrevocable for a period of one year [from the date of execution] or until the expiration of the present collective bargaining agreement" and "for successive yearly periods and may only be revoked by . . . written notice . . . during the 10 day period prior to the end of any such applicable yearly period." Although the employee notified the employer to stop deducting his dues and so advised the union, the union continued to receive and retain dues via the checkoff.

The General Counsel argued that the language of the checkoff restricting revocation notwithstanding, the union's continued enforcement of the dues deduction violated the Act. Because the employee had clearly expressed his intent to resign, his resignation alone "will, by operation of law, revoke a checkoff authorization, even absent a revocation request, where the authorization itself makes payment of dues a quid pro quo for union membership . . . whether or not the

[86] *Scofield v. NLRB*, 394 U.S. 423, 429 (1969); *NLRB v. Shipbuilders*, 391 U.S. 418 (1968).
[87] 302 NLRB 322 (Chairman Stephens and Members Cracraft, Devaney, and Oviatt).
[88] 268 NLRB 635 (1984).
[89] 473 U.S. 95 (1985).

resignation is made during the period for revocation set forth in the authorization."[90] The General Counsel argued that the union's continued acceptance and retention of dues amounted to an unlawful restriction on resignation under *Machinists Local 1414 (Neufeld Porsche-Audi)*,[91] and impairs the policy of voluntary unionism recognized in *Pattern Makers*, supra.

The union countered that inasmuch as there was no requirement of membership or prescribed method of dues payment, an employee could have chosen to pay dues by means other than checkoff and thereby automatically relinquish union membership at any time by ceasing to pay dues. By voluntarily signing a checkoff authorization however, the employee elected to forgo the right to choose the time to stop dues payments, thereby waiving the right to resign except in the manner and at the time specified in the checkoff. Because the employee did not comply with the terms of the checkoff, there was no effective resignation. Moreover, the union noted that the *Eagle Signal* rationale fails to take into account Section 302(c)(4) of the Act which specifically permits the use of checkoff authorizations so long as they "shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective bargaining agreement." Because the checkoff complies with these parameters, no finding of violation is warranted.

After reviewing the language of the statute, the legislative history, Board and judicial precedent, principles of contract law and waiver, as well as the policies of the Act, the Board constructed an analysis built essentially around the ideas of voluntary unionism set forth in *Pattern Makers*. It recognized that although there is a difference between membership in a union and financial contributions to a union, both are forms of union activity or support." The policy of voluntary unionism will require an assurance that the extraction of money from an employee's wages, i.e., union support, if not authorized by a lawful union-security clause, comports with the employee's voluntary agreement.

Accordingly, the Board will construe language regarding a checkoff's irrevocability as pertaining only to the *method* by which dues payments will be made *so long as* dues payments are properly owing. It will not be read, by itself, as a promise to pay dues beyond the term for which an employee is obligated to pay dues. Therefore, following an employee's resignation from union membership, the only way in which a checkoff may properly be given effect is if the employee has agreed through explicit language within the terms of the checkoff clearly setting forth an obligation to continue to pay dues beyond the period of union membership. Absent such clear expression of intent to be obligated, the checkoff will not be enforceable after an employee has terminated his membership and no longer owes membership dues. The language of Section 302(c)(4) simply places

[90] *Eagle Signal*, supra at 637.
[91] 270 NLRB 1330 (1984).

an outer limit on a checkoff's irrevocabililty and does not materially affect the Board's *Pattern Makers* analysis.

In *Southwestern Bell Telephone Co.*,[92] the Board held that an employer violated Section 8(a)(1), (2), and (3) by refusing to discontinue dues deductions of an employee after she ceased being a union member and requested cancellation of her dues-checkoff authorization; and that a union violated Section 8(b)(1)(A) by refusing to honor the revocation of dues-checkoff authorization.

The panel of Chairman Stephens and Members Cracraft and Devaney found that the terms of the employee's voluntarily executed checkoff authorization did not clearly and explicitly impose any postresignation dues obligation. Applying *Electrical Workers IBEW Local 2088 (Lockheed Space Operations)*,[93] the panel found that all that the employee clearly authorized was the deduction of an amount equal to the portion of her "regular monthly union dues" and that she did not clearly authorize the continuation of this deduction after she had submitted her resignation from union membership. Accordingly, the employee's wage assignment was conditioned on her union membership and was revoked when her union membership ceased.

In *Postal Service*[94] (a companion case to *Electrical Workers IBEW Local 2088 (Lockheed Space Operations)*),[95] a case remanded from the Ninth Circuit Court of Appeals, the Board unanimously determined that section 1205 of the Postal Reorganization Act, unlike Section 302(c)(4) of the Act, requires the Postal Service to honor a checkoff authorization's irrevocability period if it is not more than a year, notwithstanding an authorization signer's resignation from union membership.

In its original Decision and Order[96] the Board applied the *Eagle Signal* "quid pro quo" doctrine and found that the Postal Service violated Section 8(a)(1) and (2) by refusing to honor an employee's revocation of dues checkoff after the employee had resigned from union membership. In so doing the Board noted that while the language of section 1205 of the Postal Reorganization Act (the section of the PRA dealing with checkoffs) differs somewhat from its NLRA counterpart, Section 302(c)(4) of the Act, the wording did not materially affect the meaning.

Therefore, the Board applied the same standard to postal employees as that used in the private sector under the Act, i.e., the quid pro quo test. Thus, because the postal employee's checkoff authorization specified that his "regular and periodic dues" were to be deducted, once the employee severed his union membership and the accompanying obligation to pay dues, the Postal Service was required to honor the employee's checkoff revocation irrespective of the checkoff's stated restrictions concerning the time periods during which revocations were allowed.

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[92] 303 NLRB 87 (Chairman Stephens and Members Cracraft and Devaney).
[93] 302 NLRB 322 (Chairman Stephens and Members Cracraft, Devaney, and Oviatt).
[94] 302 NLRB 332.
[95] 302 NLRB 322 (Chairman Stephens and Members Cracraft, Devaney, and Oviatt).
[96] 279 NLRB 40 (1986).

The Ninth Circuit denied enforcement of the Board's order and remanded the case.[97] While describing the Board's construction of section 1205 of the PRA as parallel to the Act as "reasonably defensible," the court criticized the Board's *Eagle Signal* test as lacking a "reasoned basis."

The Board took the remand as an opportunity to reassess its frequently criticized interpretation of PRA section 1205 and, in so doing, reversed its conclusion that it should be given the same reading as Section 302 of the Act. Up to this time the Board had found that the words in Section 302 that "a written assignment which shall not be irrevocable for a period of more than one year" has the same meaning as those in Section 1205 that it "shall be irrevocable for a period of not more than one year." Giving the words of the statute their plain meaning (rather than the more strained reading through the filter of NLRA experience) and after a thorough review of the legislative history to the PRA as well as an examination of other differences between the postal and private employment sectors, the Board concluded that a period of mandatory irrevocablity of checkoffs for postal employees is what the PRA intends. Thus, under the PRA, that a checkoff "shall be irrevocable" except during defined, specified periods means that it will not be able to be revoked even if an employee terminates his membership in the union.

2. Nonexclusive Hiring Hall

In *Carpenters Local 537 (E. I. du Pont)*,[98] the Board held that, in operating a nonexclusive hiring hall, an employer neither violated Section 8(b)(2) by denying a member referrals for unfair, invidious, and arbitrary reasons, nor violated Section 8(b)(1)(A) by discriminating against him in job referrals based on his protected activity.

The Board reversed a judge's finding that an exclusive practice was proved and that the contractual hiring procedure did not plainly permit the employer to hire directly. The Board found that the nonexclusivity of the hiring procedure was firmly secured in the contract and that the General Counsel had not established an exclusive hiring arrangement by practice and operation. Because, in the absence of an exclusive hiring arrangement, the union lacks the power to put jobs out of the reach of workers, the Board found no breach of the Union's duty of fair representation, and, because the General Counsel advanced no other theory on which to predicate 8(b) liability, it found no merit in that allegation of the complaint.

The majority of Members Devaney and Oviatt also found no merit to the allegations of 8(b)(1)(A) discrimination because the charging party who was denied job referrals by the union was not a member of the union at anytime relevant to the proceeding. The majority found that only union members are capable of having their Section 7 rights interfered with. Accordingly, the majority reversed the judge

[97] 827 F.2d 548 (1987).

[98] 303 NLRB 419 (Members Devaney and Oviatt, Member Cracraft dissenting in part).

and found that the employer's failure to service the charging party through its hiring hall did not violate Section 8(b)(1)(A).

Member Cracraft dissented on the dismissal of the 8(b)(1)(A) violation. Member Cracraft noted that the union allowed the nonmember charging party to register for referrals with it on several occasions and therefore may have created an expectation that he would be referred for employment. Member Cracraft would therefore have remanded the case to the judge to make that determination rather than dismiss the complaint.

3. Coercive Conduct

In *Teamsters Local 856 (Holiday Inn)*,[99] the Board held that the union's exclusion of employee-opponents from its organizing meeting together with the public use of epithets did not constitute restraint or coercion proscribed by Section 8(b)(1)(A).

The union invited unit employees to a meeting to discuss the hearing officer's report on the employer's objections to the conduct of the recent election which the union had won and to discuss what further action the union should take in its effort to become the exclusive collective-bargaining representative of the unit employees. Two employees who had testified on behalf of the employer at the representation hearing attempted to attend the union meeting. The union representative demanded that the two employees leave the meeting, calling them "liars" and the "lowest scum on earth."

The Board concluded that the rule of *Beaunit Corp.*,[100] permitting an employer to exclude known union adherents from its election campaign meetings, also applies to unions. The Board found, therefore, that "a union is under no statutory obligation to permit employee-opponents of the union to attend its organizing meetings and thus the union may lawfully bar known or suspected opponents from such meetings."

Applying this rule to the facts of the case, the Board found that the union excluded the employees because it reasonably believed that they were opponents of the union and that its action, accordingly, was not unlawful. In so finding, the Board concluded that although the union decided that the employees were opponents by evaluating their testimony at a Board hearing, this fact did not establish that the union acted in retaliation for their having testified. The Board also noted that the only other conduct at issue was the union's public use of epithets which have been found commonplace in labor struggles. In these circumstances, the Board held that the union's conduct did not violate Section 8(b)(1)(A).

4. Unlawful Grievance Filing

In *Teamsters Local 952 (Pepsi Cola Bottling)*,[101] the Board held that a union's filing, maintaining, processing, and insisting on arbitra-

[99] 302 NLRB 572 (Chairman Stephens and Members Devaney and Raudabaugh).
[100] 185 NLRB 100 (1970).
[101] 305 NLRB 268 (Chairman Stephens and Members Devaney and Oviatt).

tion of certain grievances violated Section 8(b)(1)(A), (2), and (3). In its grievances, the union sought, in effect, to merge three separate units and to apply the contract covering one unit to all three units.

In finding a violation, Chairman Stephens and Member Oviatt concluded that the union was attempting to undermine the Board's prior decisions in two representation cases. Thus, in their view, the teachings of *Bill Johnson's Restaurants v. NLRB*[102] were not applicable. That is, *Bill Johnson's* did not apply where, as here, the grievances had objectives that were illegal as a matter of Federal law. Also, to the extent that the grievances sought a determination of whether the union was the collective-bargaining representative of certain employees, the grievances intruded on matters within the exclusive jurisdiction of the Board.

In agreeing in the result, Member Devaney emphasized that the grievances were filed in retaliation for the employees' decision to decertify the union. Member Devaney noted that he did not believe that an unsuccessful grievance presenting a colorable contract claim which had representational consequences would invariably intrude on the Board's exclusive jurisdiction or that it would necessarily be unlawful.

5. Internal Union Discipline

In *Graphic Communications Local 388M (Georgia Pacific)*,[103] the Board recognized the right of a union to discipline a member for giving perjured testimony at an arbitration proceeding where perjury has been established by a forum other than the internal union procedure.

The employer's termination of an employee for allegedly physically assaulting another employee was submitted to binding arbitration at which three employees testified on behalf of the employer. All the employees involved were union members. Thereafter, internal union charges were filed against the three employees for giving false testimony at the arbitration hearing. The three were found guilty at the union trial and assessed monetary fines.

The Board found that it is essential to the integrity of grievance and arbitration procedures that "witnesses feel free to testify before an arbitrator without fear of reprisal from either the employer or the union." The Board cautioned that that right would be precarious if a union were free to determine unilaterally whether the testimony was false and to impose discipline, particularly when the testimony at arbitration was adverse to the union's position. Accordingly, it held that a standard requiring objective evidence of perjury to support internal union discipline will fully ensure that employees will freely participate in arbitration proceedings without fear of unsubstantiated disciplinary measures.

Absent a finding of perjury by a forum other than the internal union procedure regarding the testimony in this case, the Board found that the union violated Section 8(b)(1)(A) by processing internal

[102] 461 U.S. 731 (1983).

[103] 300 NLRB 1071 (Chairman Stephens and Members Cracraft and Oviatt).

union charges against the three employees/union members alleging that they gave false testimony, finding them guilty, and fining them.

E. Employer and Union Interference

In *United Parcel Service*,[104] the Board unanimously held that the employer and union violated Section 8(a)(1), (2), and (3) and Section 8(b)(1)(A) and (2), respectively, by entering into a collective-bargaining agreement which extended an existing nationwide bargaining unit to include a group of employees who had historically been excluded from the union and the majority of whom did not support the union.

The facts were undisputed that before 1979 a nationwide group of operations clerks at certain UPS facilities were historically excluded from single-facility units, and that from 1979 to 1987 continued to be excluded from a nationwide multifacility unit under two successive collective-bargaining agreements. Also undisputed is that the functions of the operations clerks excluded from the unit until 1987 performed the same functions as clerks that had been included in the unit.

In 1987, when the parties executed a new 3-year national agreement, it recognized the bargaining unit status of all United Parcel Service clerks, including all clerks that had traditionally been excluded. Consequently, those clerks traditionally excluded were obligated to comply with the contract's union-security clause. There was no evidence of majority support for the union among the traditionally excluded operations clerks.

The administrative law judge found that historical exclusion of operations clerks does not preclude their accretion to the existing unit. The Board reversed. In concluding that the previously unrepresented operations clerks did not constitute an accretion to the nationwide bargaining unit, the Board found that "no such accommodation of the collective-bargaining process is required or warranted, however, where the parties to a bargaining relationship have historically failed to include an existing group of employees from a bargaining unit. . . . If a group of employees comes into existence during the term of a contract for an existing unit, then the parties must timely address the unit status of those employees prior to executing a successor agreement. Should they fail to do so, the parties have only themselves to blame for any instability resulting from the existence of a group of employees having interests in common with unit employees but excluded from representation in the unit."

The Board noted that the limitations on accretion as set forth in *Laconia Shoe Co.*[105] do not require union acquiescence or that the excluded group have a common job-related characteristic distinct from unit employees. Rather, the Board emphasized, "It is the fact of historical exclusion that is determinative."

[104] 303 NLRB 326 (Members Devaney, Oviatt, and Raudabaugh).
[105] 215 NLRB 573 (1974).

F. Union Bargaining Obligation

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

In *Firemen & Oilers Local 288 (Diversy Wyandotte)*,[106] the Board considered whether the union violated Section 8(b)(3) by refusing to furnish the employer with information that is necessary and relevant to the processing of a grievance filed by the respondent on behalf of an employee it represents.

The employer discharged Charles Gibson for insubordination when he failed to work mandatory overtime. The respondent filed a grievance on Gibson's behalf, claiming that Gibson should not have been discharged because he was ill on the day that this overtime was assigned. To substantiate this claim, at a third-stage grievance meeting Gibson produced a doctor's bill containing a medical diagnosis. The employer asked for further documentation of Gibson's condition in the form of Gibson's doctor's records and hospital records that were in the possession of the respondent's attorney. The respondent failed to furnish this information and the employer filed an unfair labor practice charge. After the charge was filed, the respondent's attorney permitted the employer's attorney to view Gibson's hospital records.

The Board found that the medical records sought by the employer were presumptively relevant because they were "essential" to the employer's "follow up" of Gibson's medical disability claim. Although there was no showing that the respondent had actual possession of the doctor's records, the Board found that in the context of a grievance resolution process, the union had a duty, similar to that of the employer, to furnish, or at least attempt to obtain, relevant, requested information that is not in its possession or control but to which it has access. The Board found that the respondent had an obligation to at least attempt to obtain from Gibson his doctor's records by requesting that he sign a medical release. By failing to give Gibson that choice of signing a release, "the Respondent acted in derogation of its collective-bargaining responsibilities and thereby violated Section 8(a)(3)."

As for the hospital records, they were in the possession of the respondent's attorney, their relevancy was established, and notwithstanding the respondent's assertion of the doctor-patient privilege under Georgia state law, the respondent did not come forward with any valid reason as to why they should not be turned over to the employer. Accordingly, the respondent's failure to supply the hospital records likewise violated the Act.

[106] 302 NLRB 1008 (Chairman Stephens and Members Devaney and Oviatt).

In *Electrical Workers IBEW Local 46 (Puget Sound)*,[107] a panel majority agreed with the administrative law judge's findings that the union violated Section 8(b)(1)(B) and (3) by refusing to bargain with the chosen representatives of a group of independent employers (the Sundt group) who had timely withdrawn from multiemployer bargaining; by subsequently submitting unresolved bargaining issues to interest arbitration; and by attempting to enforce the resulting arbitration award.

The panel also agreed with the judge that the union did not violate Section 8(b)(3) by insisting to impasse on imposing a single areawide contract (the NECA multiemployer agreement) on the Sundt group employers. The judge based his conclusion on the finding that the Sundt group employers were also seeking an areawide agreement—one with identical terms for themselves and NECA—so the union could not be faulted for having a similar objective.

Chairman Stephens and Member Cracraft found that the union's refusals to meet with the Sundt delegates on and after April 16, 1984, were not privileged. The union did not meet its *General Electric Co.*[108] burden of showing that the Sundt group tactics—the identical composition of the Sundt and NECA bargaining committees at the *outset* of separate bargaining sessions and the committee members' maintaining their official positions with NECA after withdrawing bargaining authority from it—were "so tainted with conflict or so patently obnoxious as to negate the possibility of good-faith bargaining."

In finding the violations, the majority held that the circumstances here were more akin to those in *Walt's Broiler*[109] than they were to those in *Dependable Tile Co.*[110] In both cases, the majority said, the Board sought to determine whether "employer conduct was inconsistent with a stated intent to abandon group bargaining." The employer conduct here, as in *Walt's Broiler*, was not deemed to be inconsistent with such intent.

In agreeing with the judge's findings that the union violated Section 8(b)(1)(B) and (3) by submitting negotiating issues to the industry's dispute resolution body and attempting to enforce the resulting interest arbitration award, Chairman Stephens and Member Cracraft took account of the Board's intervening decision in *Electrical Workers IBEW Local 113 (Collier Electric).*[111] They relied on that portion of *Collier* which imposed a threshold test of good-faith bargaining that must be met before the Board reaches the issue concerning the applicability of an interest-arbitration clause. Since here the union had already unlawfully refused to meet with the Sundt group's chosen negotiating committee, the subsequent violations follow automatically.

In dissent, Member Devaney said that the union's conduct in refusing to meet and negotiate with the Sundt group committee members

[107] 302 NLRB 271 (Chairman Stephens and Member Cracraft; Member Devaney dissenting).
[108] 173 NLRB 253 (1968).
[109] 270 NLRB 556 (1984).
[110] 268 NLRB 1147 (1984).
[111] 296 NLRB 1095 (1989).

was justified under the rationale of *Dependable Tile*. "I do not think that this Board should force a union to conduct two separate sets of negotiations when the employers with whom it is negotiating are participating in both sets of negotiations and need not be bound to the results of either set of negotiations," explained Member Devaney. "The majority's ruling allows employers to compel a union to submit to their blatant search for the best of several worlds of bargaining. I would not place the imprimatur of the Board on such conduct," he added.

G. Illegal Secondary Activity

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

In *Electrical Workers IBEW Local 46 (Puget Sound NECA)*,[112] the Board dismissed a complaint alleging that the respondent union acted unlawfully in pursuing a contract grievance aimed at forcing a multiemployer association to cease operating a hiring hall that dispatched workers to construction jobs of association members that were not parties to the collective-bargaining agreement with the union. Specifically, the complaint charges (and the administrative law judge found) that the union violated Sections 8(e), 8(b)4)(ii)(A), and 8(b)(2) by pursuing the grievance.

The multiemployer association provided both a referral service for journeymen electricians and an apprenticeship training program to its nonunion employer members. The union, which operated its own hiring hall and apprenticeship programs, objected to the associations operations as being in violation of the parties' contract. After the association denied the union's grievance, the union pursued it to the Council on Industrial Relations (CIR) for arbitration. The CIR ruled that the association violated the "spirit and intent" of the contract by operating the rival nonunion services, and ordered the association to cease and desist from such operation. The association complied with this order. It then filed suit in U.S. district court under Section 301 of the Act seeking vacation of the CIR award and damages. The suit was stayed by the court pending a ruling by the Board.

The Board found, contrary to the judge, that the union's pursuit of the grievance did not violate Section 8(e) (nor the other sections of the Act alleged to be violated, the resolution of which was dependent

[112] 303 NLRB 48 (Chairman Stephens and Members Cracraft, Devaney, and Oviatt).

on the resolution of the 8(e) issue). The Board, while noting that the parties' agreement as interpreted by the CIR fell within the literal terms of Section 8(e) in that it required the association to cease offering certain services to its nonunion members, did not end the inquiry there. Although the Board did not agree with the union's claim that its object was work preservation, it did agree that under the circumstances a carefully delineated exception should be recognized without doing violence to the congressional intent embodied in Section 8(e).

The Board briefly reviewed the legislative history of Section 8(e), and concluded that what was at issue in the instant case was not truly analogous to what Congress sought to address. The concern which motivated the union was protection of the contractually established hiring hall and apprenticeship system which it believed were threatened by the competing programs being run by the association. The association was not a "neutral" with respect to that concern, and the Board determined that the union could reasonably expect the association not to take action directly undermining the programs established by the collective-bargaining agreement to which it had agreed to be bound. The Board declined to read Section 8(e) as precluding the actions taken by the union when those expectations were frustrated.

The Board found that the union's grievance was sufficiently related to legitimate concerns about the effects of direct actions of the association on lawful union interest protected by the agreement that it could not be condemned under Section 8(e) as an effort "tactically calculated to satisfy union objectives elsewhere."[113] The grievance focused on maintaining the availability of an adequate skilled labor supply to meet the needs of the employers who were bound by the collective-bargaining agreement. The grievance did not focus on the labor relations between the association's nonunion employer members and their employees. The Board thus concluded that the union's actions in pursuing its grievance had the legitimate aim of safeguarding the stability of the employment arrangement provided for in the parties' agreement.

The Board noted its reluctance to find that the union's efforts to protect its hiring hall arrangements violated Section 8(e) in view of the unique statutory treatment afforded such arrangements in Section 8(f). That section specifically approves the use of hiring halls in the building and construction industry.

In *Sheet Metal Workers Local 80 (Limbach Co.)*,[114] the Board held that the respondent unions violated Section 8(b)(4)(i) and (ii)(B) by disclaiming interest in representing the employer's employees and by inducing and encouraging employees not to work for the employer, because an object of both actions was to force the employer to cease doing business with an employer, Harper Mechanical Corporation, with whom the unions had a primary dispute.

[113] *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 644 (1967).

[114] 305 NLRB 312 (Chairman Stephens and Members Devaney and Oviatt).

The unions and the employer had an 8(f) relationship for many years. In 1983, the employer's parent company bought Harper, a nonunion company. The union contacted Walter Limbach, the chairman of the board of the employer, and the president of the parent company, and indicated that they thought Harper should recognize the unions as the representative for its employees. When Limbach stated he had no control over Harper's labor policies, the union stated that they would repudiate their bargaining relationship with the employer at the end of the current contract and disclaim interest in representing the employees of the employer. In 1988, the unions took the threatened actions, and the employer filed 8(b)(4)(i) and (ii)(B) charges with the Board.

The judge determined that Limbach was ultimately in control of both companies, and that the unions' primary dispute was with the employer. The Board found, however, that something more than common ownership must be shown to establish that the employer and Harper were a single integrated enterprise, and that, therefore, the unions' primary dispute was with Harper. Thus, the Board concluded that any actions on the part of the unions directed to the employer with an object of influencing the employer's relationship with Harper was unlawful secondary activity.

The Board recognized that "*in the absence of an unlawful objective*, a union without a collective-bargaining agreement can lawfully disclaim interest in representing a group of employees," but found that here, the disclaimer was motivated, at least in part, by a desire to force Harper to recognize the unions as the representative of its employees. The Board stated that it was this secondary object—to enmesh the employer in the unions' dispute with Harper, with the aim of compelling Harper to recognize the unions—that renders the unions' disclaimers unlawful.

The Board further found that the unions violated the Act by telling their members that as of the effective date of the disclaimer, the employer was considered to be a nonunion employer, and that any member working for the employer after that date would be in violation of the unions' constitution and bylaws. The Board reasoned that although the unions' rule against working for a nonunion employer may be valid, "its use to induce employees to withhold service from the Employer for a proscribed secondary reason was unlawful."

H. Recognitional Picketing

Section 8(b)(7) of the Act makes it an unfair labor practice for a labor organization which is not the certified employee representative to picket or threaten to picket for an object of recognition or organization in the situations delineated in subparagraphs (A), (B), and (C). Such picketing is prohibited: (A) when another union is lawfully recognized by the employer and a question concerning representation may not be appropriately raised under Section 9(c); (B) when a valid election has been held within the preceding 12 months; or (C) when no petition for a Board election has been filed "within a reasonable

period of time not to exceed thirty days from the commencement of such picketing."

In *Mine Workers District 17 (Hatfield Dock)*,[115] the Board majority reversed the administrative law judge and found that the respondent union did not violate Section 8(b)(7)(C) when it threatened to picket the employer for recognition.

Shortly after the employer began operating a coal storage and equipment facility, the union twice asked the employer to recognize it as its employees' bargaining representative. When the employer did not recognize it, the union said that it had done all it could to keep pickets from shutting down the employer, and that picketing would begin the following Monday. No picketing occurred.

Relying on *Service Employees Local 73 (A-1 Security)*,[116] the administrative law judge found that the union's threat to picket for recognition, even though unaccompanied by actual picketing, violated Section 8(b)(7)(C) because it was not formally retracted "within a reasonable period of time not to exceed thirty days." In *A-1 Security*, the Board had found a similar unretracted threat to picket for recognition unlawful in circumstances where the threatening union could not have been certified.

In reversing the judge, the Board majority noted that the issue of whether a certifiable union violates Section 8(b)(7)(C) by making an "unretracted and unrealized single threat to picket for recognition" was one of first impression. Examining the statute, the majority interpreted Section 8(b)(7)(C) to provide that organizational and recognitional picketing and the threat by a certifiable union to engage in such picketing was unlawful once the criteria of Section 8(b)(7)(C) had been met. Thus, held the majority, "once picketing for recognition or organizational purposes by a certifiable union has continued for a reasonable period, not to exceed 30 days, without a petition being filed, any additional picketing or picketing threats" violate the Act.

In reaching this interpretation of the Act, the majority examined, and found inconclusive, Section 8(b)(7)(C)'s legislative history. Although Congress clearly had sought to "limit 'top down' and 'blackmail' organizing tactics through which unions used economic weapons to force themselves on employees, regardless of employee wishes," and additionally was concerned about "the coercive impact of threats apart from picketing," the majority found no evidence in the legislative history that Congress sought to "limit the use of threats to a greater extent than actual picketing." Because Congress was willing to permit picketing for "a reasonable period of time not to exceed thirty days," the majority found it reasonable to infer that "Congress must also have been willing to permit a warning that such picketing could or would happen."

Member Cracraft, dissenting, agreed with the judge's analysis and found that the union's unrevoked picketing threat violated Section

[115] 302 NLRB 441 (Chairman Stephens and Members Devaney and Oviatt; Member Cracraft dissenting).
[116] 224 NLRB 434 (1976), enfd. 578 F.2d 361 (D.C. 1987),

8(b)(7)(C). Member Cracraft noted that in *A-1 Security* the Board interpreted "such picketing" in Section 8(b)(7)(C) to proscribe threats to picket to the same extent as actual picketing. Further, the court reviewing the Board's *A-1 Security* decision agreed with this interpretation, finding it "the most reasonable reading of the statute." In Member Cracraft's view, as no compelling reason was offered for departing from this interpretation of Section 8(b)(7)(C), she would adhere to Board precedent and find that the union's unretracted picketing threat violated the Act.

I. Deferral to Grievance/Arbitration Procedure

The jurisdiction of the Board over unfair labor practices is exclusive under Section 10(a) of the Act and is not "affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise." However consistent with the congressional policy to encourage utilization of agreements to arbitrate grievance disputes, the Board, in the exercise of its discretion, will under appropriate circumstances withhold its processes in deference to an arbitration procedure.

The Board has long held that when an issue presented in an unfair labor practice proceeding has previously been decided in an arbitration proceeding, the Board will defer to the arbitration award if the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act.[117]

1. Substance Abuse Policy

In *Bath Iron Works Corp.*,[118] the Board held that an arbitrator's decision upholding the unilateral implementation of a substance abuse policy, which included provisions for drug and alcohol testing, was not repugnant to the purposes and policies of the Act under the *Spielberg/Olin* standard,[119] and that accordingly, deferral was appropriate.

The arbitrator found that the substance abuse policy was no more than a "methodological," procedural elaboration of two plant rules which addressed both possession of and being "under the influence" of drugs or alcohol on company property. The "under the influence" rule authorized testing to make the necessary determinations, and both rules established disciplinary sanctions for violations. The rules had been in effect since at least 8 years prior to the events in the case and had not been opposed by the union. The arbitrator found that the 1986 implementation of the policy did not constitute a significant, substantial change from the status quo, concluding that it did not raise a bargaining obligation under the Act or violate the parties' collective-bargaining agreement.

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[117] *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).

[118] 302 NLRB 898 (Chairman Stephens and Members Cracraft and Raudabaugh).

[119] *Spielberg*, supra, *Olin Corp.*, 268 NLRB 573 (1984).

The administrative law judge, however, found that the arbitrator's decision was "wholly inconsistent" with Board law, and thus palpably wrong and clearly repugnant to the Act. The Board, in disagreement with the judge, found that the arbitrator's decision, for the most part, was susceptible to an interpretation consistent with the Act and thus to that extent was not palpably wrong. It made a threshold finding that the union indisputably acquiesced in, and therefore validated, the previous implementation of the two plant rules. It then demonstrated that the arbitrator's view of the substance abuse policy as a nonbargainable, procedural elaboration of the two plant rules was consistent with Board precedent establishing no duty to bargain where unilateral changes do not constitute "material, substantial, and significant" changes in the employer's legitimate rules or practice, especially with regard to employee disciplinary measures.

The Board also found that two aspects of the substance abuse policy—the addition of "drug paraphernalia" possession as a ground for discharge, and new rules establishing disciplinary measures for employees convicted of drug or alcohol related crimes—were clearly outside the scope of the two rules and constituted entirely new conditions of employment. Accordingly, the Board agreed with the judge that deferral to the arbitrator's decision was inappropriate to this extent, and concluded that the unilateral implementation of these two changes violated Section 8(a)(5) and (1).

2. Prearbitration Settlement

In *Catalytic, Inc.*,[120] the Board determined it would exercise its discretion to defer to a contractual grievance settlement prior to arbitration between the employer and the collective-bargaining representative, even though such settlement was opposed by the grievant and his local union, which was not the bargaining representative or a party to the contract.

In August 1985, the Philadelphia Electric Company (PECO) assigned some repair work at its Peach Bottom nuclear plant in Delta, Pennsylvania, to the respondent company. PECO retained some of the work, which it then assigned to a different contractor. Plumbers and Pipefitters Local 520 protested and argued that all the work should be assigned to Local 520. The grievant, Berry, Local 520's steward, assisted the respondent's foreman with assigning the work. However, after conferring with Local 520's business manager, Berry then countermanded respondent's orders and gave alternative directions to the workers on the project. The respondent then consulted the bargaining representative, United Association,[121] which countermanded the local union's directions. The company then met with both the bargaining representative and Local 520 Business Manager Hartinger. Subsequent to this meeting, Berry was discharged for insubordination. Local 520 filed a grievance, and the grievance procedure led to a gen-

[120] 301 NLRB 380 (Members Devaney and Oviatt, Member Cracraft dissenting).

[121] United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada.

eral president's committee (GPC) decision that Berry should be made eligible for rehire without backpay. The company and the United Association both accepted the GPC's decision as binding. Local 520 protested and contended that Berry should be reinstated with compensation for lost wages.

Reversing the administrative law judge, Members Devaney and Oviatt determined that the agreement by the company and the bargaining representative to the GPC decision was enough to warrant the Board's deferral to that resolution without the consent of the grievant and the local union.[122] In doing so, the Board cited to the rationale in *Postal Service*,[123] referring to the Ninth Circuit's approval of the Board's decision in *Alpha Beta Co.*,[124] under the implicit theory that an "employee's collective-bargaining agent was empowered to bind him, even without his consent."

The majority concluded that the settlement involved a compromise which, while it might not provide all that the grievant wanted, was grounded in a "fair and regular" grievance procedure to which all parties agreed to be bound, and the resolution was not repugnant to the purposes and policies of the Act.

Finally, the Board concluded that the last deferral criterion of *Olin Corp.*[125] was met because the settlement reached prior to the arbitration involved contractual issues which were factually parallel to the unfair labor practice issue presented, and the parties were aware of these issues.

Member Cracraft, dissenting, contended that the case did not involve a grievance settlement, but merely a union's decision not to appeal a grievance to arbitration. In Member Cracraft's view, the GPC decision did not constitute a "negotiated settlement" of Berry's grievance. Moreover, the International Association's decision not to take the decision to arbitration was not a settlement.

Member Cracraft distinguished this case from *Alpha Beta* and *Postal Service* because those instances involved direct employer-union discussions, concessions, and subsequent agreements. In this instance there was no negotiation, but rather a decision of the International Association not to pursue the grievance to arbitration. Member Cracraft cited the Board's decision in *Spann Maintenance Co.*,[126] in concluding that a union's decision not to pursue a grievance was not equivalent to a settlement. Similarly, in this case, the parties did not negotiate a "mutually satisfactory resolution of the grievance"—thereby, distinguishing the decision not to appeal the grievance to arbitration from a settlement of the grievance.

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[122] In view of the decision to defer, the majority found it unnecessary to pass on the merits of the ULP case.

[123] 300 NLRB 197.

[124] 273 NLRB 1546 (1985).

[125] 268 NLRB 573 (1984)

[126] 275 NLRB 971, remanded sub nom. *Lewis v. NLRB*, 800 F.2d 818 (8th Cir. 1986), supplemental decision 284 NLRB 470 (1987), second supplemental decision 289 NLRB 915 (1988).

3. Unilateral Job Reclassification

In *Haddon-Craftsmen*,[127] the Board majority declined to defer to an arbitrator's ruling and held that the respondent had violated Sections 8(a)(5) and 8(d) by reclassifying semiskilled bookbinders as unskilled without affording the union notice and an opportunity to bargain over the decision and in repudiation of the parties' collective-bargaining agreement. Instead, the union had waived its rights to bargain over the decision through inaction. Member Cracraft, concurring, would have deferred to the arbitrator's ruling.

The respondent, a bookbinder, had traditionally classified employees into four classes: A (skilled), B and C (semiskilled), and D (unskilled). Over the year, demands for work in the B and C skill ranges has declined. The respondent has reclassified some B and C employees as D's three times since 1976, each time with advance notice to the union and employees.

On June 3, 1986, the respondent reclassified all B and C employees as D's. In mid-April Plant Manager Ephault notified Union President Hennigan of the proposed change. Although Hennigan and plant management met three more times before June 3, Hennigan never demanded bargaining over the decision to reclassify the employees. On June 6, Hennigan filed a grievance, which was denied, with the arbitrator noting that the parties had not placed before him the question of the respondent's compliance with the contract's provision that an employee's pay was to be adjusted on permanent reassignment to a lower rated job, with the foreman and the steward to decide when such assignments were permanent. After the arbitration award issued, the union's 8(a)(5) and 8(d) charges were processed.

The Board reversed the judge's finding that the respondent had presented Hennigan with a fait accompli so that any request or demand for bargaining would have been futile, noting that the respondent notified the union 5–11 days before it posted a notice to employees and more than 5 weeks before the change actually occurred, which provided a meaningful opportunity to bargain. Further, the Board found that the "positive language of the notice to employees did not render a request for bargaining futile.[128]

The Board agreed with the judge that deferral to the arbitrator's award was inappropriate, as the arbitrator, in finding that the respondent had not violated the agreement, had stressed that no evidence concerning key provisions of the contract were before him. Further, the Board found that the complaint alleged violations under two separate theories: first, that the unilateral changes violated the parties' contract, and second, that the respondent had violated its statutory duty by failing to provide notice and an opportunity to bargain over changes in terms and conditions of employment. The Board noted that, as the ar-

[127] 300 NLRB 789 (Chairman Stephens and Member Devaney; Member Cracraft, concurring).

[128] The Board also reversed the judge's finding that the respondent had repudiated its contractual obligation to the union. In essence, the Board found that the contract required, at most, that the parties bargain over demotions, and that the union had never asserted that the provisions in question governed the decision or sought bargaining with the respondent under the provisions in question

bitrator failed to consider whether the union waived its statutory right to bargain over unilateral changes, the finding that nothing in the contract prohibits the unilateral action was not conclusive of the statutory issue.

Member Cracraft, concurring, would have found that "the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice issue." She noted that the judge had found that the arbitration proceeding was fair and regular, the award was not repugnant to the Act, and the contractual issue was factually parallel to the unfair labor practice issues, so that, under *Spielberg Mfg. Co.*,[129] deferral to the award would have been appropriate.

4. Deferring to Grievance Panel

In *Motor Convoy*,[130] a majority of the Board held that the complaint should be dismissed by deferring to a grievance panel arbitration award. The complaint alleged that the employer and the union permitted the shop steward to use superseniority for purposes of job bidding. At a prior arbitration on this issue, the union contended that the steward needed superseniority to obtain a particular job that would make him more available to perform his steward duties. The arbitration panel, in denying the grievance contesting the steward's superseniority, found simply that the steward "did not use the right to bid for monetary gain."

The majority stated deferral is appropriate where the proceedings appear fair and regular, all parties agree to be bound, and the award in not clearly repugnant to the purposes and policies of the Act. The majority found there was no evidence presented that the proceedings were not fair and regular, the General Counsel did not raise the fairness issue, and the employer supported the grievants' position in arbitration. The majority further found that the arbitral award is not clearly repugnant to the Act because it is susceptible to an interpretation consistent with the Act, i.e., that the steward needed superseniority to perform his duties. Accordingly, the majority held that deferral was appropriate in this case.

Chairman Stephens and Member Oviatt, dissenting, believed that deferral was inappropriate in this case. They stated the issue of superseniority is not suitable for deferral because the validity of the grant of superseniority is beyond the authority and competence of an arbitral panel. They further stated that the arbitral award is repugnant to the Act because it addresses the steward's motive in using his superseniority, rather than the statutory requirement governing its use. Lastly, the dissent stated the arbitration proceedings were not fair and regular because the union opposed the employee grievants in that proceeding.

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[129] 112 NLRB 1080, 1082 (1955).

[130] 303 NLRB 135 (Members Cracraft, Devaney, and Raudabaugh; Chairman Stephens and Member Oviatt dissenting).

J. Remedial Order Provisions

1. Bargaining Order

In *Daniel Finley Allen & Co.*,[131] a panel majority adopted the findings of the administrative law judge and refused to grant a bargaining order because of the incidents of misconduct committed by both the employer and the union.

The Board found that the employer's misconduct—including threatening to discharge employees or to sell the business if the employees chose representation, threatening to assault or kill striking employees and their families, threatening to damage their property, challenging employees to fights, driving recklessly at employees, promising benefits if the strike was abandoned, and discriminatorily refusing to reinstate the strikers—standing alone, could have reasonably warranted a bargaining order.

The Board found, however, that the employer's misconduct did not occur in a vacuum and that the union incidents of misconduct warranted withholding a bargaining order. The Board noted the judge's finding that since the inception of the strike, the union followed a deliberate plan of using cars driven by union business agents and filled with strikers to follow replacement employees and threaten and intimidate them into ceasing work for the employer. The Board found this intimidation to be conduct that belied a good-faith pursuit of legal remedies with the Board and denied the bargaining order. See also *Laura Modes Co.*[132] and *Allou Distributors.*[133]

Member Devaney dissented. While not condoning the conduct of the union, he found the union's conduct was of a limited timespan and did not include the acts of physical violence attributed to the employer. He found the employer's conduct made the holding of a fair election impossible and would have granted the bargaining order.

2. Cease-and-Desist Order

In *Boise Cascade Corp.*,[134] the Board majority held that a cease-and-desist order is an appropriate remedy for the respondent's unilateral grant and subsequent withdrawal of a free weekend certificate (valued at $450) to each of 9 nonstriking, but not to striking employees, rather than requiring the benefit for all (approximately 184) unit employees. The Board unanimously found that both the grant and withdrawal of the weekend benefit violated Section 8(a)(5) and (1), and that it also tends to interfere with employees' future exercise of the right to engage in protected concerted activities, in violation of Section 8(a)(1).

Chairman Stephens also found that the employer's disparate treatment of strikers violated Section 8(a)(3) as well as 8(a)(1), while

[131] 303 NLRB 846 (Members Devaney, Oviatt, and Raudabaugh).
[132] 144 NLRB 1592 (1963).
[133] 201 NLRB 47 (1973).
[134] 304 NLRB 94 (Chairman Stephens and Member Devaney; Member Cracraft dissenting).

Members Cracraft and Devaney found it unnecessary to pass on the 8(a)(3) complaint allegation.

A sympathy strike that began on or about June 20, 1988, converted to a primary economic strike on August 1, on the expiration of the collective-bargaining agreement, and ended on about August 20. All but nine employees, called crossovers, honored the picket line. The respondent announced in August at informational meetings with crossover employees that they and their spouses would be given a free weekend vacation but to keep it quiet. The respondent awarded the weekend certificates in early October without notifying the union, but the union soon learned of it and filed unfair labor practice charges. The respondent met with the union, apologized for having "screwed up," and offered suggestions for resolving the charges, but no resolution was reached at that meeting. However, the respondent retrieved each unused certificate, or its value, from the crossovers prior to the complaint, and thereafter notified the union that it had done so.

The majority declined to order the benefit to both striking and nonstriking employees because it found the instant case distinguishable from *Aero-Motive Mfg. Co.*,[135] where the Board rejected requiring the rescission of unlawful bonus payments on the ground that it would be impractical and would also create greater discord among the employees then that currently existing as a result of the employer's wrongful action. Contrary to *Aero-Motive*, supra, and *Swedish Hospital Medical Center*,[136] the majority noted that there is a practical alternative here because the respondent (unilaterally) rescinded the benefit prior to the complaint and thereby mitigated the impact of any unlawful interference with the strikers' Section 7 rights. The majority also found this case distinguishable from *Bellingham Frozen Foods*,[137] in which the Board, in the circumstances of unilateral grants to all employees, allowed the union the option whether to leave things as they are or to reopen the subject and bargain over the grant.

In dissent, Member Cracraft found *Aero-Motive* applicable, and that the statutory standard of equality of treatment between employees requires the respondent to provide all unit employees with the $450 certificate of its equivalent. Member Cracraft argued that by withholding the *Aero-Motive* remedy, the majority was permitting the respondent to profit by its illegal rescission of the benefit, enabling it to deprive employees of a benefit as a consequence of the union's having invoked the Board's processes, alienating further the crossovers from the union, and encouraging similar unlawful conduct by allowing a respondent who is caught rewarding crossovers to avoid sanctions by simply unilaterally rescinding the reward.

In *Iron Workers Local 378 (N.E. Carlson Construction)*,[138] the Board held that a broad remedial order is properly issued against a

[135] 195 NLRB 790, 793 (1972), enfd. 475 F.2d 27 (6th Cir. 1973).
[136] 232 NLRB 16 (1977), supp. decision 238 NLRB 1087 (1978), enfd. 619 F.2d 33 (9th Cir. 1980).
[137] 237 NLRB 1450 (1978).
[138] 302 NLRB 200 (Chairman Stephens and Members Devaney amd Raudabaugh).

union for repeated secondary boycott activity proscribed by Section 8(b)(4)(B).

The Board found, inter alia, that the union, in furtherance of its labor dispute with a jobsite subcontractor, violated Section 8(b)(4)(i) and (ii)(B) by unlawfully picketing a gate reserved for neutral employers, and independently violated Section 8(b)(4)(B) by threatening to picket all gates, including the reserved gate, and by inducing an employee of a neutral employer to refrain from crossing the union's picket line.

In granting broad remedial relief, the Board emphasized that approximately 1 year earlier, the union unlawfully sought to enmesh neutral employees and employers in a primary dispute by picketing at gates reserved for use by neutrals, or by picketing at times when the primary employer was not present at the jobsite. In addition, the union's business agent, who directed the unlawful picketing in the earlier case, was again the central figure responsible for directing the unlawful picketing and uttering the aforementioned threats in the instant case.

The Board concluded that the repeated unlawful conduct at yet another site involving more employer targets, considered against the background of similar events directed 1 year earlier by the same business agent, was so egregious as to manifest a general disregard for the rights of neutral employees and employers. Accordingly, a broad remedial order was appropriate to sufficiently deter further misconduct against other neutrals.

3. Backpay Matters

In *F. E. Hazard, Ltd.*,[139] the Board held that a discriminatee did not incur a willful loss of earnings by maintaining self-employment while refusing three more lucrative job referrals from Local 42 of the Electrical Workers.

On February 26, 1990, the Board affirmed a judge's finding that Kenneth Moffitt did not act unreasonably by refusing the job referrals. On October 26, 1990, the Second Circuit remanded the case to the Board for specific factual findings as to Moffitt's rejection of the second and third referrals, noting that "at some point a refusal to accept substantially equivalent employment that is offered terminates the former employer's back-pay obligation."[140]

On remand, the Board held that the tolling principle to which the court referred applies only when the applicant's rejection is of an offer of the same job from the discriminating employer. Because the offers Moffitt rejected were not from the discriminating employer, the Board held that the only question remaining for it to decide was whether Moffitt was engaged in legitimate interim employment. The Board then determined that at the time of the second and third referrals, Moffitt was still self-employed and continued to engage in legitimate interim employment.

[139] 303 NLRB 209 (Chairman Stephens and Members Cracraft and Devaney).
[140] *F. E. Hazard, Ltd. v. NLRB*, 917 F.2d 736.

The Board also held that Moffitt had outstanding work commitments when he received the second and third referrals, which he would have been unable to meet because he would have had to accept the referrals on short notice. Finally, the Board held that Moffitt's self-employment was still a fledgling business and it was not unreasonable for him to reject the referrals even though his business was not yet profitable.

In *Wind-Chester Roofing Products*,[141] the Board held that the remedy for an employer's failure to provide contractually required health care coverage extends to the initial date coverage was not provided, even though the unfair labor practice charge was not filed until almost 9 months later.

The administrative law judge found the employer failed to provide health insurance from the date it assumed the union contract on December 14, 1988. Because the unfair labor practice charge was not filed until September 11, 1989, however, the judge found Section 10(b) bars finding a violation or providing a remedy more than 6 months before the charge was filed.

The Board, in reversing the judge on this point, noted that the union opened the contract for modifications and that the parties discussed the health care coverage. The parties agreed at the first bargaining session that the union would permit the employer to provide an "equivalent" health care plan which could be obtained at lesser cost. The employer never provided health care coverage, but continued to assure the union such coverage would be obtained and would be retroactive to December 14, 1988.

On July 5, 1989, the employer for the first time stated that it might never provide health care coverage due to its financial condition. The Board concluded "that the unfair labor practice in violation of Section 8(a)(5) initially occurred on July 5 when the Respondent first indicated that it considered itself free to renege on the understanding to" provide the agreed-upon health care coverage. Dating the unfair labor practice from July 5, 1989, the Board noted the September 11 filing of the unfair labor practice charge was within the 10(b) period and found the appropriate remedy is to pay all qualified medical bills dating back to December 14, 1988.

4. Postdischarge Misconduct

In *Precision Window Mfg.*,[142] a panel majority of the Board held that an employee, unlawfully discharged for his protected concerted activity, did not forfeit his right to reinstatement and backpay because of his postdischarge misconduct of cursing a supervisor and calling him obscene names, and threatening to beat up and kill the supervisor and to return later that afternoon to carry out his threats.

The majority found that the employee's conduct was "an immediate response to the Respondent's act of discriminatorily discharging him" and "did not rise to the level of conduct so flagrant as to re-

[141] 302 NLRB 878 (Chairman Stephens and Members Cracraft and Oviatt).

[142] 303 NLRB 946 (Chairman Stephens and Member Devaney, Member Raudabaugh dissenting in part).

quire forfeiture of reinstatement and backpay." The majority noted in particular that even the supervisor's account of the employee's outburst "indicates that it was a rambling, semicoherent mix of insult and threat," and that the employee did not repeat any of his statements when he returned at quitting time to pick up his carpool riders.

Member Raudabaugh, dissenting, would find that the employee forfeited his remedial aid under the Act by making a threat to kill and to return that afternoon to carry out the threat and then returning consistent with his threat. He acknowledged that an employer may not provoke an employee to engage in misconduct and then rely on this misconduct to terminate the employee, but added "a provoked employee does not have an unlimited right to engage in misconduct without losing his remedial rights." He "would deny these remedies where an employee has engaged in misconduct as serious as a threat to kill," especially as here where the employee took "overt steps consistent with the threat," by returning consistent with his threat.

K. Equal Access to Justice Act

In *Quality C.A.T.V.*,[143] the Board majority held that the General Counsel was substantially justified in pursuing the complaint before and after the Seventh Circuit remanded the case and therefore the respondent was not entitled to attorney's fees and expenses under the Equal Access to Justice Act.

In the underlying unfair labor practice case, an administrative law judge found that two employees in fact did not refuse to work because they were concerned about their safety (the safety theory) but the judge inferred that the respondent unlawfully discharged them for refusing to work to protest what they perceived to be their supervisor's lack of concern for their comfort (the discomfort theory). The Board adopted the judge's decision.

The Seventh Circuit found that the discomfort theory was not encompassed within the complaint and therefore disagreed with the Board's holding. But, the court remanded for the Board to decide the case under the safety theory.

The Board unanimously held that the General Counsel was justified in pursuing the complaint before the court's remand. Although the judge held that safety was not the reason for refusing to work, the Board found that the evidence was subject to different interpretation. Had the judge drawn alternative inferences, he could have concluded that the employees were motivated by safety concerns. Therefore, the General Counsel was substantially justified in pursuing the safety theory in the exceptions stage of the proceeding. The Board majority of Chairman Stephens and Member Cracraft found that the General Counsel was substantially justified in continuing the case after the court remand. Observing that the court remanded rather than ordering the complaint dismissed, the majority reasoned that the court recognized there were different but reasonable inferences that could be

[143] 302 NLRB 449 (Chairman Stephens and Member Cracraft; Member Devaney dissenting).

drawn from the record. Thus, even though the Board chose not to make those inferences on remand, the General Counsel's failure to prevail did not mean that the General Counsel was not substantially justified in pursuing the complaint on remand.

Member Devaney would have granted attorney's fees and expenses incurred after the remand. He reasoned that the court's rejection of the discomfort theory on procedural grounds and the Board's adopting of the judge's findings about the employees' motivation in the underlying case should have put the General Counsel on notice that he could not have had a basis for believing he would prevail on remand.

VI

Supreme Court Litigation

During fiscal year 1991, the Supreme Court decided two cases in which the Board was a party.

A. The Board's Use of Its Rulemaking Power to Define Bargaining Units for Acute Care Hospitals

In *American Hospital Assn.*,[1] the Supreme Court upheld the Board's authority to use its rulemaking power to promulgate a rule providing that, except in "extraordinary circumstances," eight defined employee bargaining units are the appropriate units for collective bargaining in acute care hospitals. The case arose out of a suit brought by petitioner, American Hospital Association, challenging the facial validity of the Board's acute care hospital unit rule on the grounds that (1) Section 9(b) of the National Labor Relations Act (NLRA) requires the Board to make a separate bargaining unit determination "in each case" and, therefore, prohibits the Board from using general rules to define bargaining units; (2) the rule violates a congressional admonition to the Board to avoid the undue proliferation of bargaining units in the health care industry; and (3) the rule is arbitrary and capricious. The district court agreed with petitioner's second argument and enjoined the rule's enforcement, but the court of appeals found no merit in any of the three arguments and reversed. The Supreme Court unanimously upheld the court of appeals.

First, the Supreme Court found that the Board's broad rulemaking powers under Section 6 of the NLRA authorize the rule and are not limited by Section 9(b)'s mandate that the Board decide the appropriate bargaining unit "in each case." In the Court's view, the clear and more natural meaning of the "in each case" requirement is simply to indicate that, whenever there is a disagreement between employers and employees about the appropriateness of a bargaining unit, the Board shall resolve the dispute. In doing so, the Board is entitled to rely on rules that it has developed to circumscribe and to guide its discretion either in the process of case-by-case adjudication or by the exercise of its rulemaking authority.

This interpretation of the "in each case" requirement, the Court found, is reinforced by the NLRA's structure and policy. Thus, if Congress had intended to curtail in a particular area the broad rule-

[1] *American Hospital Assn. v. NLRB*, 499 U.S. 606.

making authority granted in Section 6, "we would have expected it to do so in language expressly describing an exception from that section or at least referring specifically to the section." And the Act's underlying policy "of facilitating the organization and recognition of unions is certainly served by rules that define in advance the portions of the work force in which bargaining efforts may properly be conducted." Nor is petitioner aided by Section 9(b)'s sparse legislative history, which reveals that the phrase "in each case" was one of a group of "small amendments" suggested "for the sake of clarity." Id. at 613. Finally, even if any ambiguity could be found in Section 9(b) after application of the traditional tools of statutory construction, the Court stated that it would still defer to the Board's reasonable interpretation of the statutory text.

Second, the Court found that the rule is not rendered invalid by the admonition, contained in congressional reports accompanying the 1974 extension of NLRA coverage to acute care hospitals, that the Board should give "[d]ue consideration . . . to preventing proliferation of bargaining units in the health care industry." The Court found the argument that the admonition—when coupled with Congress' 1973 rejection of a bill that would have placed a general limit of five on the number of hospital bargaining units—evinces an intent to emphasize the importance of Section 9(b)'s "in each case" requirement to be no more persuasive than petitioner's reliance on Section 9(b) itself. Moreover, even assuming that the admonition is an authoritative statement of what Congress intended by the 1974 legislation, the Court found that the admonition could be read only to express the desire that the Board consider the special problems that proliferation might create in acute care hospitals. And an examination of the rulemaking record reveals that the Board gave extensive consideration to this very issue.

Finally, the Court rejected petitioner's contention that the rule was arbitrary and capricious because it allegedly ignores critical differences among the many acute care hospitals in the country. Rather, the Court found that the Board's conclusion that, absent extraordinary circumstances, such hospitals do not differ in substantial, significant ways relating to the appropriateness of units was based on a "reasoned analysis" of an extensive rulemaking record and on the Board's years of experience in the adjudication of health care cases.

B. The Board's Test for Determining the Arbitrability of Grievances Arising After the Expiration of a Collective-Bargaining Agreement

In *Litton Business Systems*,[2] the Supreme Court upheld the Board's test for determining when employee grievances which arise after the expiration of a collective-bargaining agreement may be deemed to "arise under" the contract within the meaning of the Court's decision

[2] *Litton Business Systems v. NLRB*, 111 S.Ct. 2215

in *Nolde Bros. v. Bakery Workers Local 358*, 430 U.S. 243 (1977),[3] and are thus arbitrable.

Litton and the Union had a collective-bargaining agreement covering the production employees at Litton's printing plant. That agreement broadly required that all differences as to contract construction or violations be determined by arbitration, specified that grievances which could not be resolved under a two-step grievance procedure should be submitted for binding arbitration, and provided that, in case of layoffs, length of continuous service would be the determining factor "if other things such as aptitude and ability [were] equal." The agreement expired in October 1979. A new agreement had not been negotiated when, in August and September 1980 and without any notice to the Union, Litton laid off 10 of the workers at its plant, including 6 of the most senior employees, pursuant to its decision to close down its cold-type printing operation. The Union filed grievances on behalf of the laid-off employees, claiming a violation of the agreement, but Litton refused to submit the grievances to the contractual grievance and arbitration procedure, to negotiate over its layoff decision, or to arbitrate under any circumstances.

Based on its precedents dealing with unilateral postexpiration abandonment of contractual grievance procedures and postexpiration arbitrability, the Board held that Litton's actions violated Section 8(a)(5) and (1) of the NLRA. However, although it ordered Litton, inter alia, to process the grievances through the two-step grievance procedure and to bargain with the Union over the layoffs, the Board refused to order arbitration of the particular layoff disputes. The Board followed its decision in *Indiana & Michigan Electric Co.*, 284 NLRB 53 (1987), which had interpreted *Nolde* as requiring arbitration of only those postexpiration grievances concerning "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" (id. at 60). Applying that principle here, the Board concluded that the asserted contractual right—the right to lay off by seniority if other factors such as aptitude and ability were equal—was not a "right worked for or accumulated over time," and there was no evidence that the parties contemplated that such right "could ripen or remain enforceable even after the contract expired" (286 NLRB 817, 821–822 (1987)). The court of appeals enforced the Board's order, with the exception of that portion holding the layoff grievance not arbitrable. It held that the layoff grievances did arise under the expired agreement within the meaning of *Nolde*.

The Supreme Court first rejected the Union's argument that this case was controlled by the unilateral change doctrine of *NLRB v. Katz*, 369 U.S. 736 (1962), whereby an employer violates the NLRA if, without bargaining to impasse, it effects a unilateral change of an

[3] In *Nolde*, which was an action under Sec. 301 of the Labor Management Relations Act, 29 U.S.C. § 185, the Court held that termination of a collective-bargaining agreement does not automatically extinguish a party's duty to arbitrate grievances "arising under" the contract. Accordingly, the Court ordered arbitration of a dispute over whether employees terminated after expiration of a collective-bargaining agreement were entitled to severance pay under a severance-pay clause of the expired contract.

existing term or condition of employment. The Court noted that the Board has consistently ruled that an arbitration clause does not, by operation of the NLRA as interpreted in *Katz*, continue in effect after expiration of a collective-bargaining agreement. The Court found that the Board's rule is both rational and consistent with the NLRA, and thus is entitled to substantial deference. The rule "is grounded in the strong statutory principle . . . of consensual rather than compulsory arbitration" (111 S.Ct. at 2222), and conforms with the Court's statements that arbitration will not be imposed beyond the scope of the parties' agreement (see, e.g., *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 374 (1974)).

With respect to the Board's decision not to order arbitration of the layoff grievances in this case, the Court found that this ruling did not rest on statutory considerations, but rather upon the Board's interpretation of the agreement and the Federal common law of collective bargaining. Noting that arbitrators and courts, rather than the Board, are the principal sources of contact interpretation under Section 301 of the Labor Management Relations Act, the Court concluded that deferring to the Board in its interpretation of contracts would risk the development of conflicting principles.

Nevertheless, the Court agreed with the approach of the Board and those courts which have interpreted *Nolde* to apply only where a postexpiration dispute has its real source in the contract. Thus, the Court held that, absent an explicit agreement that certain benefits continue past expiration, "[a] postexpiration grievance can be said to arise under the contract only where it involves facts and occurrences that arise before expiration, where a postexpiration action infringes a right that accrued or vested under the agreement, or where, under the normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement." 111 S.Ct. at 2225.

Applying these principles, the Court agreed with the Board that the layoff grievances at issue did not arise under the agreement and thus were not arbitrable.[4] The order of layoffs under the agreement, the Court explained, was to be determined primarily with reference to "other [factors] such as aptitude and ability," which do not remain constant, but either improve or atrophy over time, and which vary in importance with the requirements of the employer's business at any given moment. Accordingly, any arbitration proceeding would of necessity focus upon whether such factors were equal as of the date of the layoff decision and the date of the decision to close down the cold-type operations, and, thus, an intent to freeze any particular order of layoff or vest any contractual right as of the agreement's expiration could not be inferred. 111 S.Ct. at 2227.

[4] Justices Marshall, Blackmun, Stevens, and Scalia dissented from the Court's holding that the grievances were not arbitrable. 111 S.Ct. at 2228–2232.

VII

Enforcement Litigation

A. Constitutionality of the Act

Two cases decided by the courts during the year considered Board actions challenged under the religion clauses of the first amendment. Section 19 of the Act (29 U.S.C. § 169) provides that an "employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to . . . labor organizations shall not be required to join or financially support any labor organization as a condition of employment . . . ." In *Transit Union Local 836 (Grand Rapids Coach)*,[1] the Board dismissed complaint allegations that a union violated Section 8(b)(2) (29 U.S.C. § 158(b)(2)) by filing a grievance to compel the discharge of an employee, Wilson, for failure to pay dues and initiation fees. Wilson had refused to pay on religious grounds, but the General Counsel admitted that Wilson did not meet Section 19's qualification of belonging to "a bona fide religion, body, or sect." The Board therefore dismissed the complaint. Wilson appealed.

On appeal, the Sixth Circuit found Section 19 unconstitutional and therefore denied the petition for review on that ground.[2] The court observed that under *Larson v. Valente*,[3] "laws discriminating *among* religions are subject to strict scrutiny . . . ."[4] The court held that Section 19 "creates a denominational preference" unjustified by any "compelling governmental interest," and, therefore, that it is unconstitutional. In so holding, the court contrasted Section 19 with Section 701(j) of title VII (42 U.S.C. § 2000e(j)), which, the court stated, promotes the "governmental interest of protecting religious freedom in the workplace . . . without regard to membership in a particular religious organization."[5] The court also noted that by requiring the Government to determine whether a religion met the statutory qualifications, Section 19 would result in "excessive entanglement of government with religion,"[6] and on that basis alone would violate the estab-

[1] 293 NLRB 581 (1989).
[2] *Wilson v. NLRB*, 920 F.2d 1282.
[3] 456 U.S. 228 (1982).
[4] 920 F.2d at 1286–1287, quoting *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987).
[5] 920 F.2d at 1287.
[6] Id. at 1288.

lishment clause under the test of *Lemon v. Kurtzman*.[7] The court rejected Wilson's contention that, in order to avoid the constitutional problems, Section 19 should be construed to apply to all employees having religious objections to union membership, finding such an interpretation not "fairly possible."[8] The court also rejected Wilson's alternative argument that the court invalidate only that part of Section 19 distinguishing among religions. The court found that the savings provision of the Act, Section 16 (29 U.S.C. § 166), did not authorize the preservation of a portion of a provision where the remainder is invalidated.[9] Finally, the court rejected Wilson's argument that Section 19 violated the free exercise clause of the first amendment, finding that the section "does not burden" the practice of religion.[10]

In the other case, *NLRB v. Hanna Boys Center*,[11] the Center, a residential school owned by the Roman Catholic Church, challenged the Board's assertion of jurisdiction over the Center in the context of a refusal-to-bargain test of certification. The Board, following an election, had certified, as appropriate for purposes of collective bargaining, a unit of lay, nonteaching employees: child-care workers, recreation assistants, cooks, and maintenance workers.

The Center contended that the Board lacked statutory jurisdiction over it under *NLRB v. Catholic Bishop of Chicago*,[12] and, in the alternative, that if the Act authorized jurisdiction, its exercise violated the religion clauses. The court agreed with the Board's legal conclusion that *Catholic Bishop*, which limits the Board's jurisdiction over church-operated schools, applies only to teachers. The court also affirmed the Board's factual finding that none of the employees in the bargaining unit in this case, including the child-care workers, were the functional equivalent of teachers. The court therefore upheld the Board's assertion of statutory jurisdiction.[13]

The court also rejected the Center's arguments that the Board's exercise of jurisdiction over it contravened the establishment and free exercise clauses of the first amendment. Applying the test enunciated in *Lemon v. Kurtzman*,[14] the court held that the Board's bargaining order had a secular purpose and effect and that it did not excessively entangle the Government and religion, and, therefore, that the Board's action did not violate the establishment clause. Finding in addition that the Board's assertion of jurisdiction would not interfere with the free exercise of religious beliefs, and that it served a "compelling governmental interest," the court concluded that the Board's action did not violate the free exercise clause as well.[15]

[7] 403 U.S 602 (1971).
[8] 920 F.2d at 1288–1289, quoting *Communications Workers v. Beck*, 487 U.S. 735 (1988).
[9] 920 F.2d at 1288–1289.
[10] Id. at 1289–1290.
[11] 940 F.2d 1295 (9th Cir.).
[12] 440 U.S. 490 (1979).
[13] 940 F.2d at 1300–1303.
[14] 403 U.S. 602 (1971).
[15] 940 F.2d at 1303–1306.

B. Subjects for Bargaining

In *American National Insurance Co.*,[16] the Supreme Court held that an employer may insist as a condition of any agreement that the union agree to a "management rights" clause allowing the employer to take unilateral action with regard to certain employment terms and conditions—including the right to discipline for cause and to determine employees' work schedules. In *Colorado-Ute Electric Assn.*,[17] the Board held that an employer may lawfully insist to impasse on a proposal for unilateral control over grants of merit wage increases. However, addressing a question not directly presented in *American National Insurance*, the Board further held that the employer may not, on reaching a bargaining impasse, implement such a proposal by unilaterally granting individual merit increases. The Board explained that the union has a right to be consulted over the timing and amounts of merit increases before they are granted and, accordingly, a proposal for unilateral employer control impermissibly seeks a waiver of that union right. Where the parties reach a bargaining impasse, the employer has failed to secure the union's consent and therefore is not free to grant increases without consulting with the union about the timing and amount of the proposed increases. Both of the Board's holdings in *Colorado-Ute* were the subjects of court review this year.

In *Cincinnati Newspaper Guild Local 9 v. NLRB*,[18] the D.C. Circuit upheld the Board's finding that an employer's insistence on unilateral control over merit-based wage increases did not constitute a violation of the employer's duty to bargain. In bargaining negotiations, the employer had proposed to eliminate the wage scales and classifications contained in the parties' expiring agreement, and to substitute a system of increases based exclusively on merit. The court agreed with the Board that the employer was insisting not on the power unilaterally to determine all wages, but only on unilateral control of wage increases. The court further concluded that insistence on that proposal was not a refusal to bargain because it was not, as had been alleged, a per se refusal to bargain.[19]

However, in *Colorado-Ute Electric Assn. v. NLRB*,[20] the Tenth Circuit held that an employer did not violate its duty to bargain by unilaterally granting individual merit increases after reaching a bargaining impasse with the union over the employer's discretionary merit pay proposal. In that case, during midterm wage negotiations under the collective-bargaining agreement's wage reopener provision, the employer insisted that employees be eligible for increases on the basis of merit, that merit be defined as "individual performance" and "contribution on the job," and that merit increases be granted at times and in amounts determined solely by management. After 10 bargaining sessions, the parties reached impasse, following which the

[16] 343 U.S. 395 (1952).
[17] 295 NLRB 607 (1989).
[18] 938 F.2d 284
[19] Id. at 288–290.
[20] 939 F.2d 1392.

employer began implementing its proposed merit pay system. The court found that the employer had bargained vigorously over the subject of wage increases and the methodology by which merit increases would be granted, and therefore had a right to implement its final merit increase offer at impasse. The court rejected the Board's view that an explicit waiver by the union of its right to bargain over the frequency and amounts of merit increases is required. Rather, the court concluded that "by vigorously bargaining over how a discretionary wage clause would be implemented, an employer *vindicates* the union's right to bargain."[21] The court further stated that the Board's prohibition of implementation at impasse gave the union an impermissible unilateral veto over the employer's wage proposal. Finally, the court concluded that the Board erred in trying to safeguard the right to bargain by limiting the employer's right to implement its final offer based on the substantive content of the wage proposal, and that the Board should instead use good-faith bargaining requirements as the means to ensure that an employer does not achieve its discretionary wage terms in bad faith.[22]

C. Deferral to Arbitration

Section 10(a) of the Act provides that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. . . ." However, the Act's purpose, as expressed in Section 1, is to encourage collective-bargaining as a means of resolving industrial disputes, and Section 203(d) provides that binding arbitration is "the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." Accordingly, the Board has long exercised its discretion to defer to the arbitral process in appropriate cases.

United Technologies Corp.[23] sets forth the Board's discretionary standards for "pre-arbitration" deferral of employment discrimination claims. During the report year, that deferral policy was comprehensively examined by the District of Columbia Circuit, sitting in banc.[24] The full court, by a vote of 11 to 1, upheld the Board's policy, and overturned a 2 to 1 panel decision[25] that had held that individual employees were entitled to de novo Board consideration of their statutory discrimination claims and could not be required to exhaust their contractual remedies against discrimination.

Initially, the full court concluded that the language and legislative history of Section 10(a) did not support the panel majority's finding that Congress intended to deny the Board authority to defer consideration of discrimination cases that might be satisfactorily resolved pur-

[21] Id. at 1403.
[22] Id. at 1404–1405.
[23] 268 NLRB 557 (1984).
[24] *Hammontree v. NLRB*, 925 F.2d 1486.
[25] 894 F.2d 438 (D.C. Cir.).

suant to a private agreement. The court next rejected the individual's argument that Section 203(d) did not authorize deferral of discrimination claims because such claims were statutory, not contractual, and thus did "arise over" the interpretation of a collective-bargaining agreement. The court found that since the contract before it contained a no-discrimination clause, the dispute arose under both the Act and the agreement. It found that the Act's preference for private dispute resolution would be frustrated if an individual employee could defeat the use of a bargained-for dispute resolution procedure merely by filing an unfair labor practice charge with the Board. Finally, the court found that because the Board's *United Technologies* deferral policy was reasonably calculated to expedite the resolution of discrimination claims as a class, that policy was consistent with Section 10(m) of the Act, which defines the priority that the Board must give to discrimination claims.[26]

Having thus concluded that the Board's *United Technologies* policy was not inconsistent with Congress' unequivocal intent, the court proceeded to examine whether the Board's prearbitral deferral policy was a reasonable exercise of its discretion. Citing *Alexander v. Gardner-Denver Co.*,[27] and its progeny, the court acknowledged that there were some statutory schemes in which an exhaustion of contract remedies requirement would be inappropriate. In view of the Act's expressed preference for private dispute resolution, however, the court concluded that the Board could permissibly adopt a different course. The court approvingly noted that the Board's discretionary standard was avowedly based on a balancing of conflicting interests and that deferral to arbitration was not required where conflict of interests or other factors made it unlikely that an employee's union discrimination claims would be fairly heard in arbitration. The court, accordingly, found that the Board's policy constituted a reasonable accommodation of its multiple statutory obligations.[28]

D. Remedies

A successor employer, although not obligated to hire the employees of its predecessor, may not refuse to hire the predecessor's employees to avoid incurring a bargaining obligation with the union. In addition, although a successor employer is ordinarily free to set initial terms and conditions of employment, the Supreme Court has held that the employer must consult with the incumbent union before altering the terms where it is "perfectly clear" that the new employer plans to retain all or substantially all of the employees in the unit.[29] A successor employer who engages in discriminatory hiring practices is held to forfeit its right to impose initial terms and conditions unilaterally

[26] 925 F.2d at 1491–1496.
[27] 415 U.S. 36 (1974).
[28] 925 F.2d at 1496–1499.
[29] *NLRB v. Burns Security Services*, 406 U.S. 272, 294–295 (1972).

and must consult the incumbent union before altering the predecessor's terms and conditions of employment.

In *U.S. Marine Corp. v. NLRB*,[30] the Seventh Circuit, sitting in banc, applied these principles in enforcing a Board Order requiring a successor employer not only to reinstate employees who were discriminatorily rejected for employment, but to rescind, on request, any departures from the predecessor employer's terms and conditions of employment; to restore retroactively those preexisting terms and conditions of employment; and to make the employees whole for losses resulting from the unilateral changes from those terms. In this case, the court unanimously found that the successor employer had fabricated an estimate of its full employee complement and then, although hiring 223 of the predecessor's employees, had unlawfully refused to hire 34 former employees in order to claim that former employees did not constitute a majority of its projected new work force and that it therefore had no obligation to recognize the union.[31] The court, by a vote of 6 to 5, further concluded that the Board had properly ordered the employer to reinstate the conditions of employment in effect under the predecessor "in order to restore the situation to what it would have been absent" the successor's unlawful conduct. The court explained that the Board was entitled to infer that, but for its unlawful purpose to avoid triggering its duty to bargain as a successor employer, the employer would have hired substantially all the predecessor's employees and therefore would have been obligated to consult with the union before setting the terms and conditions of employment.[32]

Judge Easterbrook, writing for the five dissenting judges, agreed that the employer engaged in discriminatory hiring practices to evade its obligation to bargain, but concluded that the status quo ante remedy was punitive. Judge Easterbrook stated that because the successor employer would have set its own initial terms even if it had set out to hire all the predecessor's employees, the Board could not impose a remedy that denied the employer that right, merely on a finding that the employer had discriminated against certain employees to avoid incurring a later bargaining obligation.[33]

[30] 944 F.2d 1305.
[31] Id. at 1315–1319.
[32] Id. at 1319–1324.
[33] Id. at 1327–1331.

VIII

Injunction Litigation

A. Injunction 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.[1] In fiscal 1991, the Board filed a total of 32 petitions for temporary relief under the discretionary provisions of Section 10(j): 29 against employers and 3 against labor organizations. Five cases authorized in the prior year were also pending at the beginning of the year. Of these cases, 11 were either settled or adjusted prior to court action. Injunctions were granted in 12 cases and denied in 4 cases; 10 cases remained pending further proceedings at the end of the fiscal year.

Injunctions were granted against employers in 11 cases, and against labor organizations in 1 case. The cases against employers involved a variety of violations, including interference with nascent organizational campaigns, undermining an incumbent union, a successor employer's refusal to recognize and bargain with an incumbent union, and several instances where an employer's cessation of operations necessitated an injunction to sequester assets to protect an eventual Board backpay remedy. The cases against labor organizations involved serious picket line misconduct and bargaining on matters outside of the historical bargaining unit.

One case, *Blyer v. Domsey Trading Corp.*,[2] involved allegations of massive unlawful interference and discrimination against a union's organizational campaign. The violations caused an unfair labor practice strike of over 200 employees. After the employees made an unconditional offer to return to work, the Employer denied them reinstatement. The district court found reasonable cause to believe that serious violations had been committed and that the strikers were entitled to immediate recall. The court stated that "[a]ny further delay in reinstatement will likely cause the employees to seek employment elsewhere, rendering ineffective any final relief ordered by the Board." 139 LRRM at 2291. The court's interim reinstatement order covered over 200 strikers.

[1] See, e.g., *Pascarell v. Vibra Screw*, 904 F.2d 874 (3d Cir. 1990); *Asseo v. Centro Medico del Turabo* 900 F.2d 445 (1st Cir. 1990).

[2] 139 LRRM 2289 (E.D.N.Y.), appeal pending No. 91-6203 (2d Cir.)

Several cases involved allegations that an employer's serious unfair labor practices against a union's organizational campaign had undermined the support for the union reflected in authorization cards signed by a majority of employees in an appropriate unit and precluded a fair Board election. The Board sought interim "*Gissel*"[3] bargaining orders, consistent with well-established 10(j) precedent in the circuit courts.[4] Two such cases were litigated in district courts in the Ninth and Fourth Circuits,[5] which have not yet passed on the propriety of interim *Gissel* bargaining orders in 10(j) proceedings. In each case, the courts concluded that the employer committed serious violations which precluded a fair election, and which made the union's card majority a reliable enough indication of majority support to warrant a remedial order to bargain with the union. The district court granted 10(j) relief in the *Harvey's Grove* case even though the employer came under the protection of chapter 11 of the Bankruptcy Code during the 10(j) proceeding.[6]

Two district court decisions in this year dealt with an employer's refusal to recognize and bargain with an incumbent union. In the first case, *Garner v. Barbary Coast Hotel*,[7] the court found reasonable cause to believe that the employer had unilaterally implemented changes in unit employees' working conditions by abrogating the parties' current grievance system and its past practice of allowing union representatives access to the facility to attend grievance meetings. The court concluded that, absent 10(j) relief restoring the status quo, "bargaining unit employees will gradually lose their ardor for collective bargaining and their support for the Union due to the Union's inability to effectively represent them, particularly through the vital function of representation in grievance proceedings."[8]

The second case, *D'Amico v. Lee's Contracting Services*,[9] concerned a janitorial service contractor at a U.S. Navy base which was alleged to be a *Burns*[10] successor to the predecessor service contractor. The employer had refused to recognize and bargain with the union that represented the predecessor's employees. The court found reasonable cause to believe that the employer's failure to recognize the union was unlawful under *Burns* and that its unilateral implementation of its initial working conditions without bargaining with the union was also unlawful because the evidence supported the Regional Director's contention that it was "perfectly clear" that the Employer

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

[4] See, e.g., *Seeler v. Trading Port*, 517 F.2d 33 (2d Cir. 1975); *Levine v. C & W Mining Co.*, 610 F.2d 432 (6th Cir. 1979); *Asseo v. Pan American Grain Co.*, 805 F.2d 23 (1st Cir. 1986).

[5] *Garner v. Charles A. Dimick*, CV-S-91-432-HDM-LRL (D.Nev.); *D'Amico v. Harvey's Grove*, Civil No. H-91-1274 (D.Md.).

[6] As to the authority of the Board to obtain relief against a bankrupt entity under its governmental regulatory authority, see, e.g., *Ahrens Aircraft v. NLRB*, 703 F.2d 23, 24 (1st Cir. 1983); *NLRB v. Evans Plumbing Co.*, 639 F.2d 291, 293 (5th Cir. 1981). Cf. *Brock v. Arlmont Services*, 67 B.R. 111 (D.Mass. 1986).

[7] CV-S-90-772-PMP (RJJ) (D.Nev.).

[8] The court cited *Asseo v. Centro Medico del Turabo*, 133 LRRM 2722, 2729 (D.P.R. 1989), affd. 900 F.2d 445 (1st Cir. 1990), and *Sheeran v. American Commercial Lines*, 683 F.2d 970, 975–977 (6th Cir. 1982). See also *Ahearn v. Dunkirk Ice Cream Co.*, 133 LRRM 2088 (W.D.N.Y. 1989).

[9] 141 LRRM 2851 (E.D.Va.).

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

had "planned to retain all" of the predecessor employees.[11] The court granted interim relief where "this unlawful and continued activity seriously jeopardises the right of Lee's employees to bargain collectively." 141 LRRM at 2855.

One 10(j) case decided during the year involved a sequestration of assets proceeding initiated against an employer that was not the original respondent in the unfair labor practice proceeding. *Pascarell v. Metropolitan Teletronics Corp.*[12] was based on a Board Decision and Order directing Respondent Capitol Electronics, inter alia, to pay backpay. Capitol had not complied with the Order and transferred its assets to an alleged alter ego, Metropolitan Teletronics. The Region had issued a backpay specification alleging that Metropolitan, as the alter ego of Capitol, was derivatively liable for the backpay owed by Capitol under the Board's Order. The court concluded that the testimony of the owner of both businesses was "evasive" when he stated he could not produce company books or identify his accountants. The district court granted 10(j) relief, ordering the Respondents to sequester over $1 million of the business assets of Metropolitan and Capitol and the personal assets of the owner and to preserve the books and records of both Capitol and Metropolitan.[13]

Finally, one case decided during the year[14] arose out of proceedings for civil contempt of a 10(j) injunction that had proscribed union picket line violence and other misconduct.[15] The district court had found the union in contempt of the 10(j) decree and imposed $280,000 in fines. The union moved for reconsideration of the contempt adjudication and to vacate the fines for two reasons: it asserted (1) the fines were criminal in nature and imposed without affording the union criminal due process, and (2) the fines were moot. The court rejected the union's first argument, ruling that the fines were prospective and coercive and, therefore, civil contempt remedies and were not punitive criminal sanctions.[16] It then decided that such fines were not rendered criminal because they had been imposed in proceedings initiated by the court on its own motion. Thus, the court ruled that it had the obligation and the resultant power in civil contempt to protect the persons the injunction was designed to shield from improper union conduct.[17] The court further ruled that the fines had not become moot and uncollectible merely because, after the fines were imposed, the contemptuous conduct ceased and the underlying dispute that had engendered the original injunction was resolved.[18] The court reasoned that adoption of the union's mootness

[11] See *Burns Security*, supra at 294–295; *Starco Family Market*, 237 NLRB 373 (1978).

[12] C.A. No. 90-4837(HAA) (D.N.J.).

[13] See generally *Kobell v. Menard Fiberglass Products*, 678 F.Supp. 1155, 1166–1167 (M.D.Pa. 1988).

[14] *Clark v. Mine Workers*, 752 F.Supp. 1291 (W.D.Va.).

[15] The original 10(j) decree is reported at 714 F.Supp. 791 (W.D.Va. 1989).

[16] 752 F.Supp. at 1296–1298.

[17] 752 F.Supp. at 1298–1300. The court cited *S.E.C. v. American Board of Trade*, 830 F.2d 431 (2d Cir. 1987), cert. denied 485 U.S. 938 (1988).

[18] 752 F.Supp. at 1300–1301. The court relied on *Firemen & Oilers v. Bangor & Aroostock R.R. Co.*, 380 F.2d 570, 578–579 (D.C. Cir.), cert. denied 389 U.S. 970 (1967), and *U.S. v. Work Wear Corp.*, 602 F.2d 110, 114–115 (6th Cir. 1979).

argument would undermine the efficacy of civil contempt sanctions, since a respondent facing coercive civil contempt fines would know that it only had to postpone actual collection until the settlement of the underlying dispute to avoid payment. The court concluded, "[n]o decision of this court will allow such unanswered contempt toward the rule of law."[19]

B. Injunction 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 a violation of Section 8(b)(4)(A), (B), and (C),[20] or Section 8(b)(7),[21] and against an employer or union charged with a violation of Section 8(e),[22] 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.[23] In addition, under Section 10(l) a temporary restraining order pending the hearing on the petition for an injunction may be obtained, without notice to the respondent, upon a showing that "substantial and irreparable injury to the charging party will be unavoidable" unless immediate injunctive relief is granted. Such ex parte relief, however, may not extend beyond 5 days.

In this report period, the Board filed 23 petitions for injunctions under Section 10(l). Of the total caseload, comprised of this number together with 8 cases pending at the beginning of the period, 3 cases were settled, 2 were dismissed, 7 continued in an inactive status, 3 were withdrawn, and 7 were pending court action at the close of the report year. During this period, 9 petitions went to final order, the courts granting injunctions in 9 cases and denying none. Injunctions were issued in 5 cases involving secondary boycott action proscribed by Section 8(b)(4)(B), as well as in instances involving a violation

[19] 752 F.Supp. at 1301.

[20] Sec. 8(b)(4)(A), (B), and (C), as enacted by the Labor Management Relations Act of 1947, prohibited certain types of secondary strikes and boycotts, strikes to compel employers or self-employed persons to join labor or employer organizations, and strikes against Board certifications of bargaining representatives. These provisions were enlarged by the 1959 amendments of the Act (Title VII of Labor-Management Reporting and Disclosure Act) to prohibit not only strikes and the inducement of work stoppages for these objects but also to proscribe threats, coercion, and restraint addressed to employers for these objects, and to prohibit conduct of this nature where an object was to compel an employer to enter into a hot cargo agreement declared unlawful in another Section of the Act (Sec. 8(e)).

[21] Sec. 8(b)(7), incorporated in the Act by the 1959 amendments, makes organizational or recognitional picketing under certain circumstances an unfair labor practice.

[22] 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.

[23] Sec. 8(b)(4)(D) was enacted as part of the Labor Management Relations Act of 1947.

of Section 8(b)(4)(A), which proscribes certain conduct to obtain hot cargo agreements barred by Section 8(e). No injunctions were granted in cases involving jurisdictional disputes in violation of Section 8(b)(4)(D). Injunctions were also issued in 4 cases to proscribe alleged recognitional or organizational picketing in violations of Section 8(b)(7).

Three 10(l) cases decided during the fiscal year were of particular interest.

Dowd v. Longshoremen ILA,[24] involved the geographical jurisdiction of the Act. The respondent union had primary labor disputes with two Florida stevedoring companies that were used by importers and exporters involved in shipping citrus fruit from Florida to Japan. In furtherance of its dispute, the union requested Japanese unions to threaten to refuse to unload in Japan any citrus fruit that had been loaded in Florida by the targeted stevedoring companies. The Japanese unions complied and notified shipping companies and Japanese importers that they faced a boycott of their ships and produce if they continued to do business with the Florida stevedoring companies. These messages were also conveyed to the American exporting companies. As a result, the loading of citrus fruit was diverted from the primary stevedoring companies to other Florida ports with stevedoring companies under contract with the union. The Regional Director alleged that the importers, exporters, and shipping companies were all neutral to the union's dispute with the stevedoring companies, that the union was responsible for the Japanese unions' threats to boycott if these companies continued to do business with the targeted stevedoring companies, and that the union thereby violated Section 8(b)(4)(ii)(B). The district court accepted as "substantial and not frivolous" the Regional Director's theory that the Board had jurisdiction over the union's conduct even though the threatened boycott would have occurred in Japan. The court rejected the union's contention that the line of cases limiting the territorial juridiction of the Act[25] precluded assertion of jurisdiction here. The court concluded that asserting jurisdiction over the American union's conduct would not threaten to interfere with the internal affairs of any foreign country. It further found it appropriate to assert jurisdiction because the pressured shippers, importers and exporters were all neutral "persons in commerce," entitled to the protection of Section 8(b)(4)(B) to prevent the union from enmeshing them in a labor dispute between an American union and American stevedoring companies. Accordingly, the court directed the union, pending the Board's decision in the unfair labor practice case to repudiate, in writing, its request to the Japanese unions to threaten the neutral companies with a boycott if they continued to do business with the primaries.

[24] 781 F.Supp. 1565 (M.D.Fla.), appeal pending No. 91-3908 (11th Cir.)

[25] See, e.g., *Benz v. Compania Naviera Hidalgo*, 325 U.S. 138 (1957); *American Radio Assn. v. Mobile Steamship Assn.*, 419 U.S. 215 (1974).

Also during the year, the Sixth Circuit issued its second decision in the 10(l) litigation in *Gottfried v. Sheet Metal Workers Local 80.*[26] As detailed in the 1988 and 1989 Annual Reports, this case involved a union, party to an 8(f) contract with a construction industry contractor, which disclaimed interest in representing the employer's employees at the end of the contract and urged its members not to work for the employer. The Regional Director asserted that the union thereby violated Section 8(b)(4)(B) because the union acted in furtherance of its primary dispute with a separate company, affiliated with the employer, with an object of forcing the employer either to compel the affilate to recognize the union or to cease doing business with the affiliate. In the first appeal,[27] the Sixth Circuit had concluded that the Regional Director's theory of violation met the "reasonable cause" test and it remanded the case to the district court to determine whether the Regional Director could adduce sufficient evidence to establish reasonable cause to believe that the union acted with the forbidden object. On remand, the district court, relying on testimony favorable to the union and noting that the administrative law judge had dismissed the unfair labor practice complaint, found that the Regional Director had not demonstrated "probable cause" to believe the union acted with an unlawful object. The circuit court reversed, concluding that because "the regional director did produce 'some evidence' in support of his petition . . . we believe that the district court was required to find the existence of reasonable cause, as that term is used in the relevant caselaw."[28] The court also found it appropriate to direct the issuance of an injunction, without further remand to the district court. "Otherwise," the court concluded, "the time that passes while a given case is pending on remand 'more than likely will greatly diminish the curative effect of the relief.'"[29] Finally, the court considered the Regional Director's request that the union be directed to treat the employer as a party to the multiemployer agreement that had been entered into by the time the matter was litigated on remand. The court granted the relief requested, over the union's objection that it would require the union to be bound to contract terms with the employer to which it had never agreed. The court reasoned that the employer would have been party to the multiemployer agreement if the union had not insisted that it be excluded from negotiations. The best way to restore status quo, therefore, was to require the union to treat the employer as party to the new agreement, pending the Board's final adjudication of the matter.[30]

Finally, *Hoeber v. Roofers Local 30*,[31] involved a union's effort to enforce an arbitration award for time-in-lieu damages after the Board issued a 10(k) determination, awarding the work to a second union. The Regional Director issued a complaint alleging that the union's

[26] 927 F.2d 926.

[27] *Gottfried v. Sheet Metal Workers Local 80*, 876 F.2d 1245 (6th Cir. 1989).

[28] 927 F.2d at 928.

[29] 927 F.2d at 928, quoting *Maram v. Universidad Interamericana de Puerto Rico*, 722 F.2d 953, 960 (1st Cir. 1983).

[30] 927 F.2d at 929.

[31] 759 F Supp. 212 (E.D.Pa.), affd. 939 F.2d 118 (3d Cir.).

claim was inconsistent with the 10(k) award and, therefore, its continued pursuit of the claim after the award issued violated Section 8(b)(4)(D).[32] He sought a 10(l) injunction to stay the lawsuit pending the Board's unfair labor practice decision. In reasoning affirmed by the Third Circuit, the district court rejected the Regional Director's contention that there was reasonable cause to believe the union's time-in-lieu claim was inconsistent with the 10(k) award.[33] It adopted the analysis of *Bill Johnson's Restaurants v. NLRB*[34] and considered whether the union acted with unlawful motivation in filing the suit to enforce the arbitration award and whether the suit lacked a reasonable basis in fact or law.[35] Both courts noted that the union had disclaimed any demand to *perform* the work and therefore concluded that the union's suit for damages was a valid contract action brought without improper motivation to force the employer to reassign the disputed work to it.[36] The courts rejected the Board's contention that the threat, inherent in the union's action for damages, of being forced to pay twice for the same work was tantamount to a claim for the work. Rather, the courts reasoned, any such pressure was the result of the employer's decision to enter into two conflicting collective-bargaining agreements covering the same work.[37] Finally, the courts noted that Section 10(l) is generally used to enjoin strikes and picketing and concluded that, in light of *Bill Johnson's*, a 10(l) violation, an injunction to stay the action to enforce the arbitration award was not appropriate.[38]

[32] See, e.g., *Longshoremen ILWU Local 32 (Weyerhaeuser Co.)*, 271 NLRB 759 (1984), enfd. sub nom. *Longshoremen ILWU Local 32 v. Pacific Maritime Assn.*, 773 F.2d 1012 (9th Cir. 1985), cert denied 476 U.S. 1158 (1986); *Longshoremen ILWU Local 13 (Sea-Land) v. NLRB*, 884 F.2d 1407 (D.C. Cir. 1989), enfg. 290 NLRB 616 (1988), *Longshoremen ILWU Local 7 (Georgia-Pacific)*, 291 NLRB 89 (1988), review denied 892 F.2d 130 (D.C. Cir. 1989).

[33] 759 F.Supp. at 217–218; 939 F.2d at 124–125.

[34] 461 U.S. 731 (1983).

[35] 759 F.Supp. at 216; 939 F.2d at 124 fn. 9.

[36] 759 F.Supp. at 217; 939 F.2d at 124.

[37] 759 F.Supp. at 218 fn. 7; 939 F.2d at 124–125.

[38] 759 F.Supp. at 219; 939 F.2d at 125–127.

IX

Contempt Litigation

In fiscal year 1991, 77 cases were referred to the Contempt Litigation Branch for consideration for contempt or other appropriate action to achieve compliance with court decrees, compared to 137 cases in fiscal year 1990. Voluntary compliance was achieved in 14 cases during the fiscal year, without the necessity of filing a contempt petition, while in 32 others, it was determined that contempt was not warranted.

During the same period, 21 civil contempt proceedings were instituted as compared to 29 civil proceedings in fiscal year 1990. These included five motions for the assessment of fines and writ of body attachment. In addition, two criminal contempt proceedings were initiated during the year. Twenty-six civil contempt or equivalent adjudications were awarded in favor of the Board, including four where the court ordered civil arrest and assessment of fines.

During the fiscal year, the Contempt Litigation Branch collected $89,844 in fines and $644,644 in backpay, while recouping $95,965 in court costs and attorneys' fees incurred in contempt litigation.

A number of proceedings during the fiscal year were noteworthy. The settlement of one hard-fought case,[1] over the objections of the charging party, raised a question concerning the General Counsel's relationship to the Board in contempt proceedings, once the Board has authorized such proceedings and the General Counsel has commenced litigation. The case involved numerous allegations of picket line and related misconduct during an extended economic strike by the respondent union. The contempt petition sought to have the union and certain of its agents held in contempt of prior court judgments and an earlier contempt adjudication.

Following extensive discovery, the General Counsel and the respondents reached agreement on the terms of a settlement to be submitted for the court's approval.[2] Among the terms agreed to were the assessment of a civil contempt fine of $110,000 against the union, $40,000 of which would be suspended and ultimately forgiven if the union remained violation-free for 3 years; the assessment of a $3000 fine against a union official, $2500 of which would be suspended for 3 years; partial reimbursement by the union of the Board for its litigation costs; reimbursement of the employer for certain property damage caused by the union; an increase in the prospective fine schedule

[1] *NLRB v. Teamsters Local 695*, Nos. 78-1391, 78-1681 (7th Cir.)

[2] At this point, the case was pending before a United States district judge, sitting as Special Master.

for future violations; and provisions calling for the posting, mailing, and reading of a contempt notice. In addition, a formal contempt adjudication would be entered against the union and two of its officials.

Earlier in the proceeding, the employer, as charging party, had requested permission from the court to "participate" in the litigation, which the court denied.[3] After settlement had been reached, counsel for the employer filed directly with the Board a motion asking it to withhold or rescind its approval of the settlement until the employer could be heard by the Board regarding the adequacy of the settlement. The Board, however, declined to entertain the employer's motion because, in contempt cases, the General Counsel is the Board's attorney,[4] and any communication to the Board in such cases should be made through the General Counsel.[5]

In another case,[6] the Board authorized contempt proceedings against an employer who refused to comply with a court-enforced bargaining order on grounds that the union in whose favor the bargaining order ran had merged with another union and ceased to exist. Thus, shortly after the court issued its judgment enforcing the Board's order, which required the employer to bargain with Local 18-B of the IUE Furniture Workers Division as the certified bargaining representative, that union merged with IUE Local 1199. When Local 1199 then sought to assert bargaining rights under the judgment, the employer replied that the judgment required it to bargain only with Local 18-B, and that before Local 1199 could be deemed to have succeeded to Local 18-B's bargaining rights the Board would first have to determine, in an administrative proceeding, whether the merger raised a "question concerning representation" under Section 9 of the Act.[7]

In the subject case, contempt proceedings appeared warranted because the Region's compliance investigation had revealed substantial evidence of continuity between premerger Local 18-B and postmerger Local 1199. In such circumstances, an employer's refusal to comply with a court-enforced bargaining order only serves to delay bargaining and frustrate effectuation of the court's judgment. In this instance, shortly after the Board's contempt petition was filed alleging a violation of the outstanding judgment, the employer agreed to entry of a consent order which specifically required it to bargain with the merged entity, Local 1199.

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[3] Private parties lack standing to intervene in NLRB contempt proceedings. See *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 270 (1940); *United Auto Workers v. Scofield*, 382 U.S. 205, 220–221 (1965); *Stewart Die Casting Corp. v. NLRB*, 132 F.2d 801, 803–804 (7th Cir. 1942). The employer was, however, granted leave to appear as amicus curiae.

[4] The Board's General Counsel "is authorized and has responsibility, on behalf of the Board, to seek and effect compliance with the Board's orders . . . : *Provided, however*, That the General Counsel will initiate and conduct . . . contempt proceedings pertaining to the enforcement of or compliance with any order of the Board only upon approval of the Board . . . ." *Board Memorandum Describing the Authority and Assigned Responsibilities of the General Counsel of the National Labor Relations Board (Effective Apr. 1, 1955)*, 20 F.R. 2175 (see pp. 248–249 of the Board's Rules and Regulations).

[5] The employer had the opportunity to present its objections to the special master, who rejected them and approved the settlement, as did the court of appeals.

[6] *NLRB v. Precise Castings*, 915 F.2d 1160 (7th Cir.).

[7] *NLRB v. Financial Institution Employees*, 475 U.S. 192 (1986); *May Department Stores Co. v. NLRB*, 897 F.2d 221, 231 (7th Cir. 1990).

In one matter decided during the year, a court of appeals imposed an interlocutory "asset freeze" order on the corporate parent and principal operating officer of a respondent corporation that was subject to an unsatisfied backpay judgment, pending a contempt proceeding to hold the corporate parent and the individual derivatively liable for the unpaid backpay.[8] Prior to the initiation of contempt proceedings, the named respondent (Ricks) had attempted to show that it was incapable of complying with the judgment, which required payment of backpay and interest totaling approximately $450,000.[9] That showing included tax returns which reported payments of "management fees" to Ricks' corporate parent, Van; in years coinciding with significant stages of the Board litigation against Ricks, those payments were unusually large. After the Board levied execution on Ricks' bank accounts, which yielded only a fraction of the payments due, Ricks' and Van's owner and principal operating officer submitted a financial disclosure form to the Board stating that Ricks was no longer active.

On the basis of the suspicious insider payments and the financial disclosure form, the Board initiated proceedings to have Ricks, Van, and their principal officer held jointly and severally liable in contempt for the unpaid backpay. In support of that effort, the Board sought an "asset freeze" order against all three respondents, for the purpose of restraining dissipation of assets pendente lite. The Ninth Circuit granted the Board's motion in an unpublished order. Included in the order was a provision requiring any third parties with notice of the order, who were holding funds for the benefit of any of the respondents, to refrain from distributing such funds to them. As a result of that order, the Board was able to "freeze" substantial funds in a brokerage account belonging to Van. The restraint on those funds facilitated an ultimate settlement of the underlying contempt proceeding.

Finally, in *P. Alexander & Son Construction Corp.*,[10] a criminal contempt proceeding brought by the Board against the president of a small construction company, the court approved an innovative criminal sentencing arrangement pursuant to which the company president was required to serve, as punishment for his willful refusal to cause the company to comply with the Board's enforced order, 100 hours of community service in lieu of incarceration. The community service was performed with Habitat for Humanity in New York City, and involved repairing dwellings for the homeless.

[8] *NLRB v. Ricks Construction Co.*, Nos. 82-7088, 87-7244 (9th Cir.).

[9] See *Ricks Construction Co.*, 281 NLRB 344 (1986).

[10] Nos. 87-4107, 89-4037 (2d Cir.).

X

Special Litigation

A. Litigation Under the Freedom of Information Act

In *Reed v. NLRB*,[1] the United States Court of Appeals for the District of Columbia affirmed the district court's conclusion that the Board was entitled to withhold the requested "copies of *Excelsior* lists in cases closed from January 1, 1984 to the present" under FOIA Exemption 6. *Excelsior*[2] lists are Board-required employer-compiled lists of employees eligible to vote in scheduled Board elections. Initially, the court of appeals found that the requested *Excelsior* lists meet the Exemption 6 threshold requirement of "personnel, medical or similar" files. The court of appeals relied on the Supreme Court's broad interpretation of Exemption 6 (*Department of State v. Washington Post Co.*)[3], plus established in-circuit law, to find the names and addresses of individuals contained in the *Excelsior* lists to be "similar files." Further, the circuit court held that employees possess a legitimate privacy interest in their names and addresses. The court of appeals rejected Reed's claim that the the employees' privacy interest was undermined by virtue of the NLRB's disclosure of these lists to labor organizations during the election proceedings, or by the NLRB's failure to place any restrictions on the labor organizations' use of the lists. The circuit court stated that the Supreme Court in *Reporters Committee*[4] rejected such a cramped notion of personal privacy and affirmed the privacy interest inherent in the nondisclosure of certain information even where the information may have been public at one time.

Moreover, the court of appeals held that *Reporters Committee* controlled the analysis of the countervailing public interest in disclosure of *Excelsior* lists. Thus, because the *Excelsior* lists were found to contain exclusively private information and would reveal nothing about the Board's conduct of representation proceedings or its performance of any other statutory duty, disclosure would not promote any cognizable public purpose of the FOIA. Further, the court of appeals found no merit in Reed's assertion of public interest based on his plans to utilize the *Excelsior* lists to correct alleged Board misrepresentations concerning compulsory union membership and dues

[1] 927 F.2d 1249.

[2] *Excelsior Underwear*, 156 NLRB 1236 (1966).

[3] 456 U.S. 595, 601–602 (1982).

[4] *Department of Justice v. Reporters Committee*, 489 U.S. 749, 767 (1989).

requirements. The court noted the Supreme Court's unequivocal declaration in *Reporters Committee* that the identity and purpose of the requesting party are irrelevant under FOIA. Finally, the court of appeals held that Exemption 6 protects *Excelsior* lists as a "category," and not just the individual lists specifically at issue.

In *Buck Green v. NLRB*,[5] the district court concluded that the FOIA Exemption 5 protections for attorney work-product materials covered the requested memoranda which had been prepared by a Board agent investigating unfair labor charges filed by the plaintiff. The court held that such predecisional documents fall within Exemption 5 because they represent internal documents prepared in preparation for an agency decision as to whether to proceed with or dismiss unfair labor practice cases. The court also denied the plaintiff's request for an in camera review of the requested documents, finding that the Board's Vaughn index provided an ample description of the documents.

In another FOIA case, *Bentson Contracting Co. v. NLRB*,[6] the District Court for the District of Arizona held that a report prepared by a Board hearing officer in a representation proceeding was protected from compelled disclosure under Exemptions 5 and 7(A). The court found that while the document did not contain any explicit policy or legal recommendations, such recommendations were not critial to finding deliberative processes protection of Exemption 5. The court found it sufficient that the document was used to characterize the issues and factual framework, and that it contained the hearing officer's evaluation of what issues were most important to each side. Because the document was a part of the deliberations by which the Board makes decisions regarding union representation, it was sufficient to fall within Exemption 5. The court also held that the document was exempt from disclosure under Exemption 7(A), which protects documents compiled for law enforcement purposes, the disclosure of which could reasonably be expected to interfere with enforcement proceedings. Having found that the document was part of the decision-making process and thus potentially exposing arguments for challenging the representation decision, the court found that disclosure could harm the Board's position in pending unfair labor practice proceedings arising out of the representation proceedings.

B. Litigation Involving the Board's Jurisdiction

In *Whitehouse v. Painters Local 118*,[7] the Board became involved in a district court dispute as to which of two unions should be entitled to represent certain employees of Irvin Whitehouse. For nearly one-half century, Whitehouse had recognized the defendant union as the bargaining agent of its employees. The collective-bargaining agreement established the scope of work within the jurisdiction of the Painters and required that disputes arising under the agreement be

[5] No. 90-936-C(2) (E.D.Mo. Jan. 11, 1991), affd. No. 91-1177 (8th Cir. Aug. 27, 1991).
[6] No. 90-451 PHX EHC (D.Az.).
[7] No. C-90-0143-L(J) (W.D.Ky.).

presented to the Joint Trade Board for resolution. At the time of the original collective-bargaining agreement, Whitehouse had only one paint shop employee. As the number of employees in the paint shop grew, none paid union dues, voted, or participated with the Painters. General Drivers Local Union No. 89, affiliated with the Teamsters, filed a petition for representation with the Board seeking to represent the paint shop employees. After receiving the Teamsters' petition, Whitehouse filed a petition with the Board seeking to determine whether the employees should be included in the existing bargaining unit of the Painters. At the same time the issue was pending before the Board, the Painters filed a grievance with the Joint Trade Board. The Joint Trade Board found that the employees were members of the Painters unit and covered by its collective-bargaining agreement. Whitehouse then sought enforcement of the Joint Trade Board decision in district court. Judgment was entered, but set aside when the Teamsters was allowed to intervene. On the same day that judgment was entered, the Board found that the work performed by the employees was work ordinarily performed by employees represented by the Teamsters and ordered an election. The Teamsters won the election and was certified by the Board as bargaining agent. The court found that the Board was entitled to intervene because it had a protectable interest in the action that was not adequately represented. On motion by the Board, the court went on to dismiss the action because it found that the breach of contract action was primarily a representational dispute. Moreover, the court found that it must defer to the Board even though the representational dispute had been characterized as a breach of contract action. Because the authority of the Board had been invoked, the Board's decision was found to take precedence over the decision of the Joint Trade Board.

In *NLRB v. California Horse Racing Board*,[8] the Court of Appeals for the Ninth Circuit affirmed the district court's preliminary injunction entered at the request of the Board barring enforcement of a California Horse Racing Board (CHRB) order which had required United Tote Company to negotiate a collective-bargaining agreement with the International Brotherhood of Electrical Workers. The Board had concluded that United Tote was an employer falling under its jurisdiction, relying on its earlier decision in *American Totalisator Co.*[9] The district court accordingly concluded that the CHRB and the Union were attempting to regulate conduct preempted by the NLRA. The circuit court held that the district court properly concluded that it lacked power to inquire into the merits of the Board's assertion of jurisdiction over United Tote. The court considered the issue of the proper scope of district court review of the Board's action under *NLRB v. Nash-Finch Co.*[10] It concluded that the source of *Nash-Finch* jurisdiction is the NLRA, and its purpose is to protect NLRA jurisdiction. The circuit court found that such *Nash-Finch* jurisdiction

[8] 940 F.2d 536.
[9] 264 NLRB 1100 (1982).
[10] 404 U.S. 138 (1971).

should not operate in a way that does violence to that Act's express provisions for exclusive review by courts of appeals of final orders of the Board.

Further, the court of appeals held that the district court necessarily had jurisdiction to determine whether CHRB regulation of United Tote was preempted. Once it found that United Tote fell within the Board's statutory jurisdiction, the district court was required to reach the conclusion that the CHRB's ruling was preempted because, to rule on the propriety of the Board's action in this case would have exceeded the district court's *Nash-Finch* jurisdiction. Finally, the Ninth Circuit noted that the Union and CHRB may be frustrated in their ability to obtain prompt judicial review of the Board's assertion of jurisdiction if the Board does not issue a final order from which the parties may appeal. Nonetheless, the circuit court determined that absence of such judicial review would not change the instant result because Congress has considered this circumstance, and rejected attempts to provide review in such cases.

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, 1099 14th Street, NW., Washington, D.C. 20570.

Table 1.—Total Cases Received, Closed, and Pending, Fiscal Year 1991[1]

	Total	Identification of filing party					
		AFL–CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
	All cases						
Pending October 1, 1990	*26,058	10,734	2,408	1,004	1,257	8,169	2,486
Received fiscal 1991	38,923	14,971	4,018	961	1,321	15,037	2,615
On docket fiscal 1991	64,981	25,705	6,426	1,965	2,578	23,206	5,101
Closed fiscal 1991	38,249	14,536	3,906	959	1,321	14,736	2,791
Pending September 30, 1991	26,732	11,169	2,520	1,006	1,257	8,470	2,310
	Unfair labor practice cases[2]						
Pending October 1, 1990	*22,852	9,142	1,880	917	1,039	7,660	2,214
Received fiscal 1991	32,271	11,832	2,580	760	992	13,843	2,264
On docket fiscal 1991	55,123	20,974	4,460	1,677	2,031	21,503	4,478
Closed fiscal 1991	31,593	11,398	2,515	774	994	13,517	2,395
Pending September 30, 1991	23,530	9,576	1,945	903	1,037	7,986	2,083
	Representation cases[3]						
Pending October 1, 1990	*2,954	1,537	517	84	201	443	172
Received fiscal 1991	6,223	3,010	1,410	193	289	1,061	260
On docket fiscal 1991	9,177	4,547	1,927	277	490	1,504	432
Closed fiscal 1991	6,235	3,003	1,361	177	293	1,097	304
Pending September 30, 1991	2,942	1,544	566	100	197	407	128
	Union-shop deauthorization cases						
Pending October 1, 1990	*66	—	—	—	—	66	—
Received fiscal 1991	133	—	—	—	—	133	—
On docket fiscal 1991	199	—	—	—	—	199	—
Closed fiscal 1991	122	—	—	—	—	122	—
Pending September 30, 1991	77	—	—	—	—	77	—
	Amendment of certification cases						
Pending October 1, 1990	*12	2	1	0	4	0	5
Received fiscal 1991	22	5	4	2	6	0	5
On docket fiscal 1991	34	7	5	2	10	0	10
Closed fiscal 1991	25	4	4	2	6	0	9
Pending September 30, 1991	*9	3	1	0	4	0	1
	Unit clarification cases						
Pending October 1, 1990	*174	53	10	3	13	0	95
Received fiscal 1991	274	124	24	6	34	0	86
On docket fiscal 1991	448	177	34	9	47	0	181
Closed fiscal 1991	274	131	26	6	28	0	83
Pending September 30, 1991	174	46	8	3	19	0	98

[1] See Glossary of terms for definitions. Advisory Opinion (AO) cases not included. See Table 22.
[2] See Table 1A for totals by types of cases.
[3] See Table 1B for totals by types of cases.
* Revised, reflects higher figures than reported pending September 30, 1990, in last year's annual report. Revised totals result from post-report adjustments to last year's "on docket" and/or "closed" figures.

Table 1A.—Unfair Labor Practice Cases Received, Closed, and Pending, Fiscal Year 1991[1]

	Total	Identification of filing party					
		AFL–CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
	CA cases						
Pending October 1, 1990	*17,565	9,074	1,868	909	1,006	4,708	0
Received fiscal 1991	23,005	11,765	2,557	745	946	6,992	0
On docket fiscal 1991	40,570	20,839	4,425	1,654	1,952	11,700	0
Closed fiscal 1991	22,484	11,330	2,500	755	955	6,944	0
Pending September 30, 1991	18,086	9,509	1,925	899	997	4,756	0
	CB cases						
Pending October 1, 1990	*4,043	62	10	5	22	2,952	992
Received fiscal 1991	7,921	51	17	9	35	6,848	961
On docket fiscal 1991	11,964	113	27	14	57	9,800	1,953
Closed fiscal 1991	7,787	54	9	10	29	6,573	1,112
Pending September 30, 1991	4,177	59	18	4	28	3,227	841
	CC cases						
Pending October 1, 1990	*948	0	1	2	6	0	939
Received fiscal 1991	731	4	4	3	6	0	714
On docket fiscal 1991	1,679	4	5	5	12	0	1,653
Closed fiscal 1991	778	1	4	5	5	0	763
Pending September 30, 1991	901	3	1	0	7	0	890
	CD cases						
Pending October 1, 1990	*133	3	0	1	1	0	128
Received fiscal 1991	236	8	0	0	1	0	227
On docket fiscal 1991	369	11	0	1	2	0	355
Closed fiscal 1991	241	8	0	1	1	0	231
Pending September 30, 1991	128	3	0	0	1	0	124
	CE cases						
Pending October 1, 1990	*42	2	0	0	2	0	38
Received fiscal 1991	148	0	0	0	3	3	142
On docket fiscal 1991	190	2	0	0	5	3	180
Closed fiscal 1991	49	1	0	0	1	0	47
Pending September 30, 1991	141	1	0	0	4	3	133
	CG cases						
Pending October 1, 1990	*19	0	0	0	0	0	19
Received fiscal 1991	19	0	0	0	0	0	19
On docket fiscal 1991	38	0	0	0	0	0	38
Closed fiscal 1991	16	0	0	0	0	0	16
Pending September 30, 1991	22	0	0	0	0	0	22
	CP cases						
Pending October 1, 1990	*102	1	1	0	2	0	98
Received fiscal 1991	211	4	2	3	1	0	201
On docket fiscal 1991	313	5	3	3	3	0	299
Closed fiscal 1991	238	4	2	3	3	0	226
Pending September 30, 1991	75	1	1	0	0	0	73

[1] See Glossary of terms for definitions.

*Revised, reflects higher figures than reported pending September 30, 1990, in last year's annual report. Revised totals result from post-report adjustments to last year's "on docket" and/or "closed" figures.

Table 1B.—Representation Cases Received, Closed, and Pending, Fiscal Year 1991[1]

	Total	Identification of filing party					
		AFL–CIO unions	Teamsters	Other national unions	Other local unions	Individuals	Employers
	RC cases						
Pending October 1, 1990	*2,335	1,535	517	83	199	1	—
Received fiscal 1991	4,902	3,010	1,410	193	289	0	—
On docket fiscal 1991	7,237	4,545	1,927	276	488	1	—
Closed fiscal 1991	4,834	3,003	1,361	177	293	0	—
Pending September 30, 1991	2,403	1,542	566	99	195	1	—
	RM cases						
Pending October 1, 1990	*172	—	—	—	—	—	172
Received fiscal 1991	260	—	—	—	—	—	260
On docket fiscal 1991	432	—	—	—	—	—	432
Closed fiscal 1991	304	—	—	—	—	—	304
Pending September 30, 1991	128	—	—	—	—	—	128
	RD cases						
Pending October 1, 1990	*447	2	0	1	2	442	—
Received fiscal 1991	1,061	0	0	0	0	1,061	—
On docket fiscal 1991	1,508	2	0	1	2	1,503	—
Closed fiscal 1991	1,097	0	0	0	0	1,097	—
Pending September 30, 1991	411	2	0	1	2	406	—

[1] See Glossary of terms for definitions.

*Revised, reflects higher figures than reported pending September 30, 1990, in last year's annual report. Revised totals result from post-report adjustments to last year's "on docket" and/or "closed" figures.

Table 2.—Types of Unfair Labor Practices Alleged, Fiscal Year 1991

	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	23,005	100.0
8(a)(1)	3,805	16.5
8(a)(1)(2)	244	1.1
8(a)(1)(3)	8,189	35.6
8(a)(1)(4)	165	0.7
8(a)(1)(5)	7,398	32.2
8(a)(1)(2)(3)	176	0.8
8(a)(1)(2)(4)	6	0.0
8(a)(1)(2)(5)	99	0.4
8(a)(1)(3)(4)	567	2.5
8(a)(1)(3)(5)	2,076	9.0
8(a)(1)(4)(5)	22	0.1
8(a)(1)(2)(3)(4)	19	0.1
8(a)(1)(2)(3)(5)	110	0.5
8(a)(1)(2)(4)(5)	1	0.0
8(a)(1)(3)(4)(5)	101	0.4
8(a)(1)(2)(3)(4)(5)	27	0 1
Recapitulation[1]		
8(a)(1)[2]	23,005	100.0
8(a)(2)	682	3.0
8(a)(3)	11,265	49.0
8(a)(4)	908	3.9
8(a)(5)	9,834	42.7
B. Charges filed against unions under Sec. 8(b)		
Subsections of Sec. 8(b).		
Total cases	9,099	100.0
8(b)(1)	6,137	67.4
8(b)(2)	61	0.7
8(b)(3)	174	1.9
8(b)(4)	967	10.6
8(b)(5)	7	0.1
8(b)(6)	11	0.1
8(b)(7)	211	2.3
8(b)(1)(2)	1,060	11.6
8(b)(1)(3)	377	4.1
8(b)(1)(5)	17	0.2
8(b)(1)(6)	9	0.1
8(b)(2)(3)	3	0.0
8(b)(2)(5)	1	0.0
8(b)(2)(6)	1	0.0
8(b)(3)(6)	1	0.0
8(b)(1)(2)(3)	50	0.5
8(b)(1)(2)(5)	3	0.0
8(b)(1)(2)(6)	3	0.0
8(b)(1)(3)(5)	3	0.0
8(b)(1)(3)(6)	1	0.0
8(b)(1)(2)(5)(6)	2	0.0

Table 2.—Types of Unfair Labor Practices Alleged, Fiscal Year 1991—Continued

	Number of cases showing specific allegations	Percent of total cases
Recapitulation[1]		
8(b)(1)	7,662	84.2
8(b)(2)	1,184	13.0
8(b)(3)	609	6.7
8(b)(4)	967	10.6
8(b)(5)	33	0.4
8(b)(6)	28	0.3
8(b)(7)	211	2.3
B1. Analysis of 8(b)(4)		
Total cases 8(b)(4)	967	100.0
8(b)(4)(A)	76	7.9
8(b)(4)(B)	602	62.3
8(b)(4)(C)	9	0.9
8(b)(4)(D)	236	24.4
8(b)(4)(A)(B)	35	3.6
8(b)(4)(A)(C)	5	0.5
8(b)(4)(B)(C)	2	0.2
8(b)(4)(A)(B)(C)	2	0.2
Recapitulation[1]		
8(b)(4)(A)	118	12.2
8(b)(4)(B)	641	66.3
8(b)(4)(C)	18	1.9
8(b)(4)(D)	236	24.4
B2. Analysis of 8(b)(7)		
Total cases 8(b)(7)	211	100.0
8(b)(7)(A)	55	26.1
8(b)(7)(B)	20	9.5
8(b)(7)(C)	122	57.8
8(b)(7)(A)(B)	4	1.9
8(b)(7)(A)(C)	6	2.8
8(b)(7)(B)(C)	3	1.4
8(b)(7)(A)(B)(C)	1	0.5
Recapitulation[1]		
8(b)(7)(A)	66	31.3
8(b)(7)(B)	28	13.3
8(b)(7)(C)	132	62.6
C. Charges filed under Sec. 8(e)		
Total cases 8(e)	148	100.0
Against unions alone	71	48.0
Against employers alone	77	52.0
D. Charges filed under Sec. 8(g)		
Total cases 8(g)	19	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 1991[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	47	338	—	—	—	38	—	—	—	—	—	—	—
Complaints issued	4,871	3,884	3,225	498	72	—	6	9	0	15	4	0	55
Backpay specifications issued	125	68	68	0	0	—	0	0	0	0	0	0	0
Hearings completed, total	1,013	672	559	62	5	13	2	1	1	1	4	0	11
Initial ULP hearings	962	641	542	55	4	13	2	1	1	1	4	0	11
Backpay hearings	30	19	7	5	1	—	0	0	0	0	0	0	0
Other hearings	21	12	10	2	0	—	0	0	0	0	0	0	0
Decisions by administrative law judges, total	967	636	565	44	7	—	2	2	1	1	7	5	8
Initial ULP decisions	868	589	522	40	7	—	2	2	1	1	7	5	8
Backpay decisions	60	26	26	0	0	—	0	0	0	0	0	0	0
Supplemental decisions	39	21	17	4	0	—	0	0	0	0	0	0	0
Decisions and orders by the Board, total	1,960	1,050	817	85	27	31	2	1	0	5	30	46	6
Upon consent of parties:													
Initial decisions	114	46	19	7	13	—	0	0	0	3	1	0	3
Supplemental decisions	6	2	2	0	0	—	0	0	0	0	0	0	0
Adopting administrative law judges' decisions (no exceptions filed):													
Initial ULP decisions	315	217	171	22	2	—	1	0	0	1	6	13	1
Backpay decisions	27	11	11	0	0	—	0	0	0	0	0	0	0
Contested:													
Initial ULP decisions	1,262	655	518	44	10	31	0	1	0	1	19	29	2
Decisions based on stipulated record	29	22	14	6	0	—	0	0	0	0	2	0	0
Supplemental ULP decisions	120	43	32	3	2	—	1	0	0	0	2	3	0
Backpay decisions	87	54	50	3	0	—	0	0	0	0	0	1	0

[1] See Glossary of terms for definitions.

Table 3B.—Formal Actions Taken in Representation and Union Deauthorization Cases, Fiscal Year 1991[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	893	874	763	30	81	4
Initial hearings	745	731	633	27	71	4
Hearings on objections and/or challenges	148	143	130	3	10	0
Decisions issued, total	769	746	651	26	64	5
By Regional Directors	696	676	589	23	59	5
Elections directed	613	602	525	15	58	4
Dismissals on record	83	74	64	8	1	1
By Board	73	70	62	3	5	0
Transferred by Regional Directors for initial decision	6	6	5	0	1	0
Elections directed	2	2	2	0	0	0
Dismissals on record	4	4	3	0	1	0
Review of Regional Directors' decisions:						
Requests for review received	325	313	276	13	24	0
Withdrawn before request ruled upon	15	14	13	0	1	0
Board action on request ruled upon, total	299	288	251	10	27	0
Granted	44	44	37	4	3	0
Denied	239	229	201	6	22	0
Remanded	16	15	13	0	2	0
Withdrawn after request granted, before Board review	2	2	2	0	0	0
Board decision after review, total	67	64	57	3	4	0
Regional Directors' decisions						
Affirmed	17	17	15	1	1	0
Modified	26	24	23	0	1	0
Reversed	23	23	19	2	2	0
Outcome.						
Election directed	59	56	50	2	4	0
Dismissals on record	8	8	7	1	0	0

Table 3B.—Formal Actions Taken in Representation and Union Deauthorization Cases, Fiscal Year 1991[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	591	576	493	13	66	4
By Regional Directors	79	75	61	6	8	1
By Board	512	500	432	7	58	3
In stipulated elections	475 D467	402	7	56	2	
No exceptions to Regional Directors' reports	287	284	239	5	39	1
Exceptions to Regional Directors' reports	188	183	163	2	17 D1	
In directed elections (after transfer by Regional Director)	30	28	25	0	2	1
Review of Regional Directors' supplemental decisions:						
Request for review received	40	38	32	3	1	2
Withdrawn before request ruled upon	1	1	0	0	1	0
Board action on request ruled upon, total	48	47	42	3	1	1
Granted	3	3	3	0	0	0
Denied	40	39	34	3	1	1
Remanded	5	5	5	0	0	0
Withdrawn after request granted, before Board review	0	0	0	0	0	0
Board decision after review, total	7	5	5	0	0	0
Regional Directors' decisions:						
Affirmed	3	2	2	0	0	0
Modified	0	0	0	0	0	0
Reversed	4	3	3	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 1991[1]

Types of formal actions taken	Cases in which formal actions taken	Formal actions taken by type of case	
		AC	UC
Hearings completed	59	4	53
Decisions issued after hearing	68	4	61
By Regional Directors	62	4	57
By Board	6	0	4
Transferred by Regional Directors for initial decision	0	0	0
Review of Regional Directors' decisions:			
Requests for review received	47	2	45
Withdrawn before request ruled upon	0	0	0
Board action on requests ruled upon, total	36	2	32
Granted	9	0	7
Denied	27	2	25
Remanded	0	0	0
Withdrawn after request granted, before Board review	0	0	0
Board decision after review, total	6	0	4
Regional Directors' decisions.			
Affirmed	4	0	2
Modified	0	0	0
Reversed	2	0	2

[1] See Glossary of terms for definitions

Table 4.—Remedial Actions Taken in Unfair Labor Practice Cases Closed, Fiscal Year 1991[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]10,715	—	—	—	—	—	—	—	—	—	—	—	—
Notice posted	3,083	2,363	1,781	82	7	350	143	720	580	44	1	73	22
Recognition or other assistance withdrawn	19	19	17	0	0	2	0	—	—	—	—	—	—
Employer-dominated union disestablished	3	3	3	0	0	0	0	—	—	—	—	—	—
Employees offered reinstatement	2,558	2,558	2,121	53	19	238	127	—	—	—	—	—	—
Employees placed on preferential hiring list	1,104	1,104	951	16	6	86	45	—	—	—	—	—	—
Hiring hall rights restored	169	—	—	—	—	—	—	169	123	19	0	22	5
Objections to employment withdrawn	167	—	—	—	—	—	—	167	121	19	0	22	5
Picketing ended	55	—	—	—	—	—	—	55	42	2	0	10	1
Work stoppage ended	10	—	—	—	—	—	—	10	9	0	0	0	1
Collective bargaining begun	3,014	2,860	2,599	51	11	139	60	154	146	0	0	8	0
Backpay distributed	4,779	3,921	3,479	63	17	245	117	858	767	32	2	49	8
Reimbursement of fees, dues, and fines	2,884	2,163	1,953	27	10	117	56	721	659	19	2	36	5
Other conditions of employment improved	1	0	0	0	0	0	0	1	1	0	0	0	0
Other remedies	0	0	0	0	0	0	0	0	0	0	0	0	0

Table 4.—Remedial Actions Taken in Unfair Labor Practice Cases Closed, Fiscal Year 1991[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
B. By number of employees affected:.													
Employees offered reinstatement, total	3,023	3,023	2,306	270	91	181	175	—	—	—	—	—	—
Accepted	2,454	2,454	1,944	229	91	84	106	—	—	—	—	—	—
Declined	569	569	362	41	0	97	69	—	—	—	—	—	—
Employees placed on preferential hiring list	656	656	631	4	0	20	1	0	0	0	0	0	0
Hiring hall rights restored	67	—	—	—	—	—	—	67	66	0	0	1	0
Objections to employment withdrawn	21	—	—	—	—	—	—	21	20	0	0	1	0
Employees receiving backpay:													
From either employer or union	18,242	17,661	12,302	693	80	2,258	2,328	581	143	368	0	65	5
From both employer and union	142	63	52	0	0	11	0	79	72	0	0	7	0
Employees reimbursed for fees, dues, and fines:													
From either employer or union	2,042	1,640	764	9	0	867	0	402	390	0	0	12	0
From both employer and union	259	149	149	0	0	0	0	110	110	0	0	0	0

Table 4.—Remedial Actions Taken in Unfair Labor Practice Cases Closed, Fiscal Year 1991[1]—Continued

Action taken	Total all	Remedial action taken by—											
		Employer						Union					
			Pursuant to—						Pursuant to—				
		Total	Agreement of parties		Recommendation of administrative law judge	Order of—		Total	Agreement of parties		Recommendation of administrative law judge	Order of—	
			Informal settlement	Formal settlement		Board	Court		Informal settlement	Formal settlement		Board	Court
C. By amounts of monetary recovery, total	$54,927,978	$52,784,781	$27,844,317	$3,694,125	$421,339	$8,988,808	$11,836,192	$2,143,197	$714,602	$900,000	0	$365,575	$163,020
Backpay (includes all monetary payments except fees, dues, and fines)	53,880,884	52,060,022	27,442,894	3,658,649	418,339	8,703,948	11,836,192	1,820,862	395,994	900,000	0	361,848	163,020
Reimbursement of fees, dues, and fines	1,047,094	724,759	401,423	35,476	3,000	284,860	0	322,335	318,608	0	0	3,727	0

[1] See Glossary of terms for definitions. Data in this table are based on unfair labor practice cases that were closed during fiscal year 1991 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 1991[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	1,471	1,189	884	294	9	0	0	0	2	264	208	8	48	2	2	14
Tobacco manufacturers	6	5	5	0	0	0	0	0	0	1	1	0	0	0	0	0
Textile mill products	206	187	151	34	2	0	0	0	0	18	13	0	5	0	0	1
Apparel and other finished products made from fabric and similar materials	268	229	182	39	5	0	0	0	3	38	30	0	8	1	0	0
Lumber and wood products (except furniture)	421	326	250	74	1	0	0	0	1	90	62	3	25	3	0	2
Furniture and fixtures	386	332	266	63	3	0	0	0	0	49	45	0	4	1	0	4
Paper and allied products	443	384	308	73	2	0	0	0	1	57	46	1	10	0	0	2
Printing, publishing, and allied products	964	820	556	232	26	4	1	0	1	125	91	10	24	3	0	16
Chemicals and allied products	663	544	412	120	9	3	0	0	0	111	72	7	32	4	1	3
Petroleum refining and related industries	212	169	109	47	7	0	2	0	4	39	23	0	16	1	1	2
Rubber and miscellaneous plastic products	548	450	379	71	0	0	0	0	0	93	73	5	15	2	0	3
Leather and leather products	82	67	55	12	0	0	0	0	0	14	10	0	4	1	0	0
Stone, clay, glass, and concrete products	674	547	404	121	12	4	2	0	4	115	83	5	27	3	2	7
Primary metal industries	1,063	940	631	292	14	2	0	0	1	115	86	6	23	2	0	6
Fabricated metal products (except machinery and transportation equipment)	1,269	1,073	784	267	9	6	1	0	6	188	133	8	47	6	0	2
Machinery (except electrical)	1,097	871	666	193	4	1	1	0	6	219	170	8	41	2	1	4
Electrical and electronic machinery, equipment, and supplies	689	599	436	159	2	2	0	0	0	82	59	5	18	4	1	3
Aircraft and parts	356	333	172	161	0	0	0	0	0	22	20	0	2	1	0	0
Ship and boat building and repairing	130	117	59	57	0	0	0	0	1	12	10	0	2	0	0	1
Automotive and other transportation equipment	928	821	486	332	3	0	0	0	0	104	83	2	19	3	0	0

Table 5.—Industrial Distribution of Cases Received, Fiscal Year 1991[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
Measuring, analyzing, and controlling instruments; photographic, medical, and optical goods, watches and clocks	175	153	122	30	1	0	0	0	0	18	12	1	5	0	1	3
Miscellaneous manufacturing industries	373	315	229	78	6	0	2	0	0	57	43	1	13	1	0	0
Manufacturing	12,424	10,471	7,546	2,749	115	22	9	0	30	1,831	1,373	70	388	40	9	73
Metal mining	49	39	33	6	0	0	0	0	0	10	8	0	2	0	0	0
Coal mining	391	368	297	50	17	1	0	0	3	22	15	6	1	0	0	1
Oil and gas extraction	65	49	38	8	1	1	0	0	1	15	14	0	1	0	0	1
Mining and quarrying of nonmetallic minerals (except fuels)	106	93	67	20	3	2	1	0	0	11	8	0	3	1	0	1
Mining	611	549	435	84	21	4	1	0	4	58	45	6	7	1	0	3
Construction	4,642	3,926	2,348	858	376	152	109	0	83	697	601	45	51	3	2	14
Wholesale trade	2,082	1,550	1,176	337	21	8	2	0	6	508	417	15	76	4	1	19
Retail trade	3,083	2,490	1,857	553	39	0	1	0	40	557	380	34	143	17	3	16
Finance, insurance, and real estate	618	475	363	87	15	6	2	0	2	131	106	2	23	0	0	12
U.S. Postal Service	2,382	2,378	1,664	709	2	0	3	0	0	4	4	0	0	0	0	0
Local and suburban transit and interurban highway passenger transportation	580	444	345	95	3	0	0	0	1	123	105	3	15	11	0	2
Motor freight transportation and warehousing	2,131	1,713	1,279	397	26	4	1	0	6	409	344	15	50	5	2	2
Water transportation	188	176	74	90	8	2	2	0	0	11	10	0	1	0	0	1
Other transportation	321	251	168	78	4	1	0	0	0	68	56	3	9	0	0	2
Communication	976	852	599	251	2	0	0	0	0	107	66	5	36	4	0	13
Electric, gas, and sanitary services	907	717	544	156	4	11	1	0	1	170	144	7	19	2	0	18
Transportation, communication, and other utilities	5,103	4,153	3,009	1,067	47	18	4	0	8	888	725	33	130	22	2	38
Hotels, rooming houses, camps, and other lodging places	909	785	560	198	14	1	2	0	10	121	89	14	18	0	0	3
Personal services	299	217	158	55	3	0	1	0	0	80	46	1	33	2	0	0
Automotive repair, services, and garages	391	252	184	62	2	1	0	0	3	133	108	1	24	4	0	2
Motion pictures	199	159	98	56	2	0	0	0	3	38	29	4	5	1	1	0
Amusement and recreation services (except motion pictures)	361	292	183	97	7	4	0	0	1	64	52	1	11	2	0	3
Health services	2,551	1,959	1,648	281	7	2	0	19	2	520	438	7	75	17	2	53
Educational services	218	174	141	26	5	1	1	0	0	36	34	1	1	0	1	7
Membership organizations	526	459	249	201	5	2	0	0	2	47	39	4	4	3	0	17
Business services	1,816	1,461	999	401	30	13	3	0	15	332	275	16	41	15	1	7

Table 5.—Industrial Distribution of Cases Received, Fiscal Year 1991[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
Miscellaneous repair services	157	127	93	26	5	1	1	0	1	29	22	2	5	1	0	0
Legal services	51	40	35	5	0	0	0	0	0	11	8	1	2	0	0	0
Museums, art galleries, and botanical and zoological gardens	11	9	8	1	0	0	0	0	0	2	2	0	0	0	0	0
Social services	258	182	151	29	1	1	0	0	0	69	56	0	13	1	0	6
Miscellaneous services	106	73	38	15	11	0	9	0	0	32	28	2	2	0	0	1
Services	7,853	6,189	4,545	1,453	92	26	17	19	37	1,514	1,226	54	234	46	5	99
Public administration	125	90	62	24	3	0	0	0	1	35	25	1	9	0	0	0
Total, all industrial groups	38,923	32,271	23,005	7,921	731	236	148	19	211	6,223	4,902	260	1,061	133	22	274

[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 1991[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	100	72	56	16	0	0	0	0	0	25	21	0	4	0	0	3
New Hampshire	78	57	48	9	0	0	0	0	0	21	17	2	2	0	0	0
Vermont	43	36	28	8	0	0	0	0	0	7	4	0	3	0	0	0
Massachusetts	1,412	1,170	896	218	31	17	1	0	7	224	201	2	21	4	1	13
Rhode Island	191	168	122	44	2	0	0	0	0	17	14	0	3	0	0	6
Connecticut	804	720	534	170	11	2	1	0	2	79	65	2	12	1	0	4
New England	2,628	2,223	1,684	465	44	19	2	0	9	373	322	6	45	5	1	26
New York	3,922	3,358	2,184	1,029	74	28	13	9	21	522	434	21	67	9	0	33
New Jersey	1,824	1,542	1,006	417	66	36	3	1	13	255	217	16	22	18	1	8
Pennsylvania	2,552	2,120	1,594	420	58	20	13	1	14	394	333	18	43	15	6	17
Middle Atlantic	8,298	7,020	4,784	1,866	198	84	29	11	48	1,171	984	55	132	42	7	58
Ohio	2,312	1,889	1,403	432	36	8	0	0	10	409	340	6	63	4	0	10
Indiana	1,488	1,276	840	290	41	2	93	0	10	201	158	8	35	6	0	5
Illinois	2,338	1,920	1,225	539	101	23	5	0	27	390	302	17	71	9	3	16
Michigan	2,446	2,022	1,493	485	30	7	0	1	6	394	298	12	84	5	1	24
Wisconsin	795	570	434	118	9	8	0	0	1	216	162	3	51	3	0	6
East North Central	9,379	7,677	5,395	1,864	217	48	98	1	54	1,610	1,260	46	304	27	4	61
Iowa	243	161	122	34	4	1	0	0	0	80	64	5	11	0	0	2
Minnesota	641	438	321	80	21	4	0	0	12	184	139	5	40	7	0	12
Missouri	1,236	1,062	745	258	35	13	3	0	8	163	111	6	46	1	0	10
North Dakota	46	29	25	4	0	0	0	0	0	16	10	1	5	0	1	0
South Dakota	43	27	25	0	1	0	0	0	1	16	15	0	1	0	0	0
Nebraska	119	86	66	17	1	1	0	0	1	28	23	2	3	0	0	5
Kansas	243	188	141	46	1	0	0	0	0	53	40	2	11	0	0	2
West North Central	2,571	1,991	1,445	439	63	19	3	0	22	540	402	21	117	8	1	31
Delaware	64	54	44	10	0	0	0	0	0	9	7	0	2	0	0	1
Maryland	655	565	364	192	7	1	0	0	1	87	72	1	14	0	0	3
District of Columbia	187	167	117	42	7	0	0	0	1	17	14	1	2	0	0	3
Virginia	511	443	351	88	2	1	1	0	0	66	57	2	7	0	0	2

Table 6A.—Geographic Distribution of Cases Received, Fiscal Year 1991[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
West Virginia	623	570	414	126	17	3	0	0	10	51	33	7	11	0	0	2
North Carolina	424	375	307	68	0	0	0	0	0	47	41	1	5	0	0	2
South Carolina	127	113	86	27	0	0	0	0	0	13	11	0	2	0	0	1
Georgia	593	517	373	133	1	1	0	0	9	76	65	1	10	0	0	0
Florida	851	724	598	120	3	0	2	0	1	117	105	0	12	0	4	6
South Atlantic	4,035	3,528	2,654	806	37	6	3	0	22	483	405	13	65	0	4	20
Kentucky	702	610	473	129	5	2	0	1	0	86	71	2	13	2	1	3
Tennessee	677	589	466	117	5	1	0	0	0	84	66	0	18	0	0	4
Alabama	361	290	224	62	2	0	2	0	0	69	49	3	17	0	0	2
Mississippi	328	289	256	31	0	1	0	0	1	35	30	0	5	0	0	4
East South Central	2,068	1,778	1,419	339	12	4	2	1	1	274	216	5	53	2	1	13
Arkansas	193	150	126	23	0	1	0	0	0	41	31	1	9	0	0	2
Louisiana	233	178	145	33	0	0	0	0	0	50	37	3	10	0	0	5
Oklahoma	241	197	152	44	1	0	0	0	0	41	30	1	10	0	0	3
Texas	1,005	841	577	255	5	3	0	0	1	159	120	13	26	1	1	3
West South Central	1,672	1,366	1,000	355	6	4	0	0	1	291	218	18	55	1	1	13
Montana	176	106	91	13	1	0	0	0	1	68	47	5	16	2	0	0
Idaho	90	69	65	4	0	0	0	0	0	20	13	1	6	1	0	0
Wyoming	48	35	29	6	0	0	0	0	0	12	8	0	4	0	0	1
Colorado	451	379	274	104	1	0	0	0	0	62	42	1	19	5	1	4
New Mexico	134	120	92	28	0	0	0	0	0	14	10	1	3	0	0	0
Arizona	307	250	187	59	2	2	0	0	0	53	47	2	4	0	0	4
Utah	108	79	58	20	0	1	0	0	0	27	25	0	2	0	0	2
Nevada	578	526	356	140	16	4	2	0	8	50	29	6	15	0	0	2
Mountain	1,892	1,564	1,152	374	20	7	2	0	9	306	221	16	69	8	1	13

Table 6A.—Geographic Distribution of Cases Received, Fiscal Year 1991[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	874	676	473	191	9	0	0	0	3	184	124	7	53	8	0	6
Oregon	433	302	195	75	22	6	1	0	3	123	83	7	33	6	0	2
California	4,363	3,613	2,430	1,025	88	32	3	1	34	700	521	60	119	25	0	25
Alaska	140	102	63	31	3	0	2	1	2	37	33	2	2	0	0	1
Hawaii	260	217	135	60	10	6	3	0	3	42	33	2	7	0	1	0
Guam	5	4	4	0	0	0	0	0	0	1	1	0	0	0	0	0
Pacific	6,075	4,914	3,300	1,382	132	44	9	2	45	1,087	795	78	214	39	1	34
Puerto Rico	286	200	162	31	2	1	0	4	0	79	73	1	5	1	1	5
Virgin Islands	19	10	10	0	0	0	0	0	0	9	6	1	2	0	0	0
Outlying areas	305	210	172	31	2	1	0	4	0	88	79	2	7	1	1	5
Total, all States and areas	38,923	32,271	23,005	7,921	731	236	148	19	211	6,223	4,902	260	1,061	133	22	274

[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 1991[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	804	720	534	170	11	2	1	0	2	79	65	2	12	1	0	4
Maine	100	72	56	16	0	0	0	0	0	25	21	0	4	0	0	3
Massachusetts	1,412	1,170	896	218	31	17	1	0	7	224	201	2	21	4	1	13
New Hampshire	78	57	48	9	0	0	0	0	0	21	17	2	2	0	0	0
Rhode Island	191	168	122	44	2	0	0	0	0	17	14	0	3	0	0	6
Vermont	43	36	28	8	0	0	0	0	0	7	4	0	3	0	0	0
Region I	2,628	2,223	1,684	465	44	19	2	0	9	373	322	6	45	5	1	26
Delaware	64	54	44	10	0	0	0	0	0	9	7	0	2	0	0	1
New Jersey	1,824	1,542	1,006	417	66	36	3	1	13	255	217	16	22	18	1	8
New York	3,922	3,358	2,184	1,029	74	28	13	9	21	522	434	21	67	9	0	33
Puerto Rico	286	200	162	31	2	1	0	4	0	79	73	1	5	1	1	5
Virgin Islands	19	10	10	0	0	0	0	0	0	9	6	1	2	0	0	0
Region II	6,115	5,164	3,406	1,487	142	65	16	14	34	874	737	39	98	28	2	47
District of Columbia	187	167	117	42	7	0	0	0	1	17	14	1	2	0	0	3
Maryland	655	565	364	192	7	1	0	0	1	87	72	1	14	0	0	3
Pennsylvania	2,552	2,120	1,594	420	58	20	13	1	14	394	333	18	43	15	6	17
Virginia	511	443	351	88	2	1	1	0	0	66	57	2	7	0	0	2
West Virginia	623	570	414	126	17	3	0	0	10	51	33	7	11	0	0	2
Region III	4,528	3,865	2,840	868	91	25	14	1	26	615	509	29	77	15	6	27
Alabama	361	290	224	62	2	0	2	0	0	69	49	3	17	0	0	2
Florida	851	724	598	120	3	0	2	0	1	117	105	0	12	0	4	6
Georgia	593	517	373	133	1	1	0	0	9	76	65	1	10	0	0	0
Kentucky	702	610	473	129	5	2	0	1	0	86	71	2	13	2	1	3
Mississippi	328	289	256	31	0	1	0	0	1	35	30	0	5	0	0	4
North Carolina	424	375	307	68	0	0	0	0	0	47	41	1	5	0	0	2

Table 6B.—Standard Federal Administrative Regional Distribution of Cases Received, Fiscal Year 1991[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	127	113	86	27	0	0	0	0	0	13	11	0	2	0	0	1
Tennessee	677	589	466	117	5	1	0	0	0	84	66	0	18	0	0	4
Region IV	4,063	3,507	2,783	687	16	5	4	1	11	527	438	7	82	2	5	22
Illinois	2,338	1,920	1,225	539	101	23	5	0	27	390	302	17	71	9	3	16
Indiana	1,488	1,276	840	290	41	2	93	0	10	201	158	8	35	6	0	5
Michigan	2,446	2,022	1,493	485	30	7	0	1	6	394	298	12	84	5	1	24
Minnesota	641	438	321	80	21	4	0	0	12	184	139	5	40	7	0	12
Ohio	2,312	1,889	1,403	432	36	8	0	0	10	409	340	6	63	4	0	10
Wisconsin	795	570	434	118	9	8	0	0	1	216	162	3	51	3	0	6
Region V	10,020	8,115	5,716	1,944	238	52	98	1	66	1,794	1,399	51	344	34	4	73
Arkansas	193	150	126	23	0	1	0	0	0	41	31	1	9	0	0	2
Louisiana	233	178	145	33	0	0	0	0	0	50	37	3	10	0	0	5
New Mexico	134	120	92	28	0	0	0	0	0	14	10	1	3	0	0	0
Oklahoma	241	197	152	44	1	0	0	0	0	41	30	1	10	0	0	3
Texas	1,005	841	577	255	5	3	0	0	1	159	120	13	26	1	1	3
Region VI	1,806	1,486	1,092	383	6	4	0	0	1	305	228	19	58	1	1	13
Iowa	243	161	122	34	4	1	0	0	0	80	64	5	11	0	0	2
Kansas	243	188	141	46	1	0	0	0	0	53	40	2	11	0	0	2
Missouri	1,236	1,062	745	258	35	13	3	0	8	163	111	6	46	1	0	10
Nebraska	119	86	66	17	1	1	0	0	1	28	23	2	3	0	0	5
Region VII	1,841	1,497	1,074	355	41	15	3	0	9	324	238	15	71	1	0	19
Colorado	451	379	274	104	1	0	0	0	0	62	42	1	19	5	1	4
Montana	176	106	91	13	1	0	0	0	1	68	47	5	16	2	0	0
North Dakota	46	29	25	4	0	0	0	0	0	16	10	1	5	0	1	0
South Dakota	43	27	25	0	1	0	0	0	1	16	15	0	1	0	0	0
Utah	108	79	58	20	0	1	0	0	0	27	25	0	2	0	0	2
Wyoming	48	35	29	6	0	0	0	0	0	12	8	0	4	0	0	1
Region VIII	872	655	502	147	3	1	0	0	2	201	147	7	47	7	2	7

Table 6B.—Standard Federal Administrative Regional Distribution of Cases Received, Fiscal Year 1991[1]—Continued

Standard Federal Regions[2]	All cases	Unfair labor practice cases								Representation cases				Union deauthorization cases	Amendment of certification cases	Unit clarification cases
		All C cases	CA	CB	CC	CD	CE	CG	CP	All R cases	RC	RM	RD	UD	AC	UC
Arizona	307	250	187	59	2	2	0	0	0	53	47	2	4	0	0	4
California	4,363	3,613	2,430	1,025	88	32	3	1	34	700	521	60	119	25	0	25
Hawaii	260	217	135	60	10	6	3	0	3	42	33	2	7	0	1	0
Guam	5	4	4	0	0	0	0	0	0	1	1	0	0	0	0	0
Nevada	578	526	356	140	16	4	2	0	8	50	29	6	15	0	0	2
Region IX	5,513	4,610	3,112	1,284	116	44	8	1	45	846	631	70	145	25	1	31
Alaska	140	102	63	31	3	0	2	1	2	37	33	2	2	0	0	1
Idaho	90	69	65	4	0	0	0	0	0	20	13	1	6	1	0	0
Oregon	433	302	195	75	22	6	1	0	3	123	83	7	33	6	0	2
Washington	874	676	473	191	9	0	0	0	3	184	124	7	53	8	0	6
Region X	1,537	1,149	796	301	34	6	3	1	8	364	253	17	94	15	0	9
Total, all States and areas	38,923	32,271	23,005	7,921	731	236	148	19	211	6,223	4,902	260	1,061	133	22	274

[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 1991[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	31,593	100.0	0.0	22,484	100.0	7,787	100.0	778	100.0	241	100.0	49	100.0	16	100.0	238	100.0
Agreement of the parties	9,809	31.0	100.0	7,881	35.0	1,471	18.8	351	45.1	1	0.4	15	30.6	5	31.2	85	35.7
Informal settlement	9,691	30.7	98.8	7,796	34.6	1,446	18.5	345	44.3	1	0.4	15	30.6	5	31.2	83	34.8
Before issuance of complaint	6,830	21.6	69.6	5,385	23.9	1,105	14.1	268	34.4	[2]	—	4	8.1	5	31.2	63	26.4
After issuance of complaint, before opening of hearing	2,813	8.9	28.7	2,365	10.5	339	4.3	77	9.8	1	0.4	11	22.4	0	—	20	8.4
After hearing opened, before issuance of administrative law judge's decision	48	0.2	0.5	46	0.2	2	0.0	0	—	0	—	0	—	0	—	0	—
Formal settlement	118	0.4	1.2	85	0.3	25	0.3	6	0.7	0	—	0	—	0	—	2	0.8
After issuance of complaint, before opening of hearing	70	0.2	0.7	38	0.1	24	0.3	6	0.7	0	—	0	—	0	—	2	0.8
Stipulated decision	13	0.0	0.1	6	0.0	5	0.0	2	0.2	0	—	0	—	0	—	0	—
Consent decree	57	0.2	0.6	32	0.1	19	0.2	4	0.5	0	—	0	—	0	—	2	0.8
After hearing opened	48	0.2	0.5	47	0.2	1	0.0	0	—	0	—	0	—	0	—	0	—
Stipulated decision	8	0.0	0.1	8	0.0	0	—	0	—	0	—	0	—	0	—	0	—
Consent decree	40	0.1	0.4	36	0.1	1	0.0	0	—	0	—	0	—	0	—	0	—
Compliance with	710	2.2	100.0	609	2.7	73	0.9	19	2.4	0	—	3	6.1	0	—	6	2.5

Table 7.—Analysis of Methods of Disposition of Unfair Labor Practice Cases Closed, Fiscal Year 1991[1]—Continued

Method and stage of disposition	All C cases			CA cases		CB cases		CC cases		CD cases		CE cases		CG cases		CP cases	
	Number	Percent of total closed	Percent of total method	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed	Number	Percent of total closed
Administrative law judge's decision	28	0.1	3.9	25	0.1	3	0.0	0	—	0	—	0	—	0	—	0	—
Board decision	493	1.6	69.4	417	1.8	57	0 7	13	1.6	0	—	0	—	0	—	6	2 5
Adopting administrative law judge's decision (no exceptions filed)	224	0.7	31.5	202	0.8	20	0.2	2	0.2	0	—	0	—	0	—	0	—
Contested	269	0.9	37.9	215	0.9	37	0.4	11	1.4	0	—	0	—	0	—	6	2.5
Circuit court of appeals decree	186	0.6	26.2	165	0.7	12	0.1	6	0.7	0	—	3	6 1	0	—	0	—
Supreme Court action	3	0.0	0.4	2	0.0	1	0.0	0	—	0	—	0	—	0	—	0	—
Withdrawal	10,052	31 8	100.0	7,433	33.0	2,234	28.6	266	34.1	1	0.4	19	38.7	9	56 2	90	37.8
Before issuance of complaint	9,669	30.6	96.2	7,104	31.6	2,189	28 1	262	33.6	[2]	—	18	36.7	8	50.0	88	36.9
After issuance of complaint, before opening of hearing	343	1.1	3.5	299	1.3	36	0 4	3	0.3	1	0.4	1	2.0	1	6.2	2	0.8
After hearing opened, before administrative law judge's decision	33	0 1	0.3	24	0.1	8	0.1	1	0.1	0	—	0	—	0	—	0	—
After administrative law judge's decision, before Board decision	7	0.0	0.1	6	0 0	1	0.0	0	—	0	—	0	—	0	—	0	—
After Board or court decision	0	—	0.0	0	—	0	—	0	—	0	—	0	—	0	—	0	—
Dismissal	10,685	33 8	100.0	6,470	28.7	4,005	51.4	142	18.2	0	—	12	24.4	2	12.5	54	22.6
Before issuance of complaint	10,475	33.2	98.0	6,287	28.0	3,983	51.1	138	17.7	[2]	—	11	22.4	2	12.5	54	22 6
After issuance of complaint, before opening of hearing	70	0.2	0.7	60	0.2	8	0.1	2	0.2	0	—	0	—	0	—	0	—
After hearing opened, before administrative law judge's decision	3	0.0	0 0	2	0.0	1	0.0	0	—	0	—	0	—	0	—	0	—
By administrative law judge's decision	2	0.0	0 0	2	0.0	0	—	0	—	0	—	0	—	0	—	0	—
By Board decision	129	0.4	0.7	103	0.4	23	0.2	2	0.2	0	—	1	2 0	0	—	0	—
Adopting administrative law judge's decision (no exceptions filed)	56	0 1	0.0	46	0 2	10	0 1	0	—	0	—	0	—	0	—	0	—
Contested	73	0.2	0.7	57	0.2	13	0 1	2	0.2	0	—	1	2.0	0	—	0	—

Table 7.—Analysis of Methods of Disposition of Unfair Labor Practice Cases Closed, Fiscal Year 1991[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
By circuit court of appeals decree	6	0.0	0.1	6	0.0	0	—	0	—	0	—	0	—	0	—	0	—
By Supreme Court action	0	—	0.0	0	—	0	—	0	—	0	—	0	—	0	—	0	—
10(k) actuons (see Table 7A for details of dispositons)	239	0.8	0.0	0	—	0	—	0	—	239	99.1	0	—	0	—	0	—
Otherwise (compliance with order of administrative law judge or Board not achieved—firm went out of business)	98	0.3	0.0	91	0 4	4	0.0	0	—	0	—	0	—	0	—	3	1.2

[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 1991[1]

Method and stage of disposition	Number of cases	Percent of total closed
Total number of cases closed before issuance of complaint	239	100.0
Agreement of the parties—informal settlement	90	37.7
Before 10(k) notice	61	25.5
After 10(k) notice, before opening of 10(k) hearing	26	10.9
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	3	1 3
Compliance with Board decision and determination of dispute	8	3 3
Withdrawal	101	42.3
Before 10(k) notice	88	36.8
After 10(k) notice, before opening of 10(k) hearing	6	2.5
After opening of 10(k) hearing, before issuance of Board decision and determination of dispute	7	2.9
After Board decision and determination of dispute	0	0 0
Dismissal	40	16.7
Before 10(k) notice	35	14.6
After 10(k) notice, before opening of 10(k) hearing	2	0.8
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	3	1.3

[1] See Glossary of terms for definitions.

Table 8.—Disposition by Stage of Unfair Labor Practice Cases Closed, Fiscal Year 1991[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	31,593	100.0	22,484	100.0	7,787	100.0	778	100.0	241	100 0	49	100.0	16	100.0	238	100.0
Before issuance of complaint	27,272	86.4	18,834	83.9	7,278	93.5	668	85.9	239	99.2	33	67.4	15	93 7	205	86.3
After issuance of complaint, before opening of hearing	3,296	10.5	2,762	12.4	407	5.2	88	11.3	2	0.8	12	24.5	1	6.3	24	10.2
After hearing opened, before issuance of administrative law judge's decision	132	0 4	119	0.6	12	0.2	1	0.1	0	—	0	—	0	—	0	—
After administrative law judge's decision, before issuance of Board decision	30	0 2	27	0 2	3	0 0	0	—	0	—	0	—	0	—	0	—
After Board order adopting administrative law judge's decision in absence of exceptions	228	0.7	206	0.9	20	0.3	2	0.3	0	—	0	—	0	—	0	—
After Board decision, before circuit court decree	342	1.2	272	1.2	50	0.6	13	1.7	0	—	1	2 0	0	—	6	3.5
After circuit court decree, before Supreme Court action	192	0.6	171	0.8	12	0 2	6	0.8	0	—	3	6.1	0	—	0	—
After Supreme Court action	3	0.0	2	0.0	1	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 1991[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	6,235	100.0	4,834	100.0	304	100.0	1,097	100.0	122	100.0
Before issuance of notice of hearing	2,284	36.6	1,518	31.5	161	53.0	605	55.2	99	81.1
After issuance of notice, before close of hearing	3,156	50.6	2,632	54.4	111	36.5	413	37.6	7	5.7
After hearing closed, before issuance of decision	74	1.3	61	1.3	5	1.6	8	0.7	0	—
After issuance of Regional Director's decision	718	11.5	621	12.8	27	8.9	70	6.4	16	13 1
After issuance of Board decision	3	0.0	2	0.0	0	—	1	0.1	0	—

[1] See Glossary of terms for definitions.

Table 10.—Analysis of Methods of Disposition of Representation and Union Deauthorization Cases Closed, Fiscal Year 1991[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	6,235	100.0	4,834	100.0	304	100.0	1,097	100.0	122	100.0
Certification issued, total	3,812	61.1	3,105	64.2	102	33.6	605	55.2	66	54.1
After:										
Consent election	41	0.7	28	0.6	5	1.6	8	0.7	6	4.9
Before notice of hearing	16	0.3	10	0.2	4	1.3	2	0.2	6	4.9
After notice of hearing, before hearing closed	25	0.4	18	0.4	1	0.3	6	0.5	0	—
After hearing closed, before decision	0	—	0	—	0	—	0	—	0	—
Stipulated election	3,260	52.3	2,632	54.4	78	25.7	550	50.1	44	36.1
Before notice of hearing	1,256	20.1	922	19.1	36	11.8	298	27.2	41	33.6
After notice of hearing, before hearing closed	1,990	31.9	1,697	35.1	42	13.8	251	22.9	3	2.5
After hearing closed, before decision	14	0.2	13	0.3	0	—	1	0.1	0	—
Expedited election	4	0.1	0	—	4	1.3	0	—	0	—
Regional Director-directed election	466	7.7	410	8.5	15	4.9	41	3.7	16	13.1
Board-directed election	41	0.6	35	0.7	0	—	6	0.5	0	—
By withdrawal, total	1,999	32.1	1,542	31.9	131	43.1	326	29.7	42	34.4
Before notice of hearing	800	12.8	535	11.1	74	24.3	191	17.4	39	32.0
After notice of hearing, before hearing closed	1,046	16.8	874	18.1	49	16.1	123	11.2	3	2.5
After hearing closed, before decision	55	0.9	44	0.9	4	1.3	7	0.6	0	—
After Regional Director's decision and direction of election	98	1.6	89	1 8	4	1.3	5	0.5	0	—
After Board decision and direction of election	0	—	0	—	0	—	0	—	0	—
By dismissal, total	424	6.8	187	3.9	71	23.4	166	15.1	14	11.5
Before notice of hearing	208	3.3	51	1.1	43	14.1	114	10.4	13	10.7
After notice of hearing, before hearing closed	95	1.5	43	0.9	19	6.3	33	3.0	1	0.8
After hearing closed, before decision	5	0.1	4	0.1	1	0.3	0	—	0	—
By Regional Director's decision	113	1 8	87	1.8	8	2.6	18	1.6	0	—
By Board decision	3	0.0	2	0.0	0	—	1	0.1	0	—

[1] See Glossary of terms for definitions.

Table 10A.—Analysis of Methods of Disposition of Amendment of Certification and Unit Clarification Cases Closed, Fiscal Year 1991

	AC	UC
Total, all	25	274
Certification amended or unit clarified	15	35
Before hearing	0	0
By Regional Director's decision	0	0
By Board decision	0	0
After hearing	15	35
By Regional Director's decision	15	35
By Board decision	0	0
Dismissed	4	69
Before hearing	2	15
By Regional Director's decision	2	15
By Board decision	0	0
After hearing	2	54
By Regional Director's decision	2	54
By Board decision	0	0
Withdrawn	6	170
Before hearing	6	163
After hearing	0	7

Table 11.—Types of Elections Resulting in Certification in Cases Closed, Fiscal Year 1991[1]

Type of case	Type of election					
	Total	Consent	Stipulated	Board-directed	Regional Director-directed	Expedited elections under 8(b)(7)(C)
All types, total:						
Elections	3,815	44	3,206	11	550	4
Eligible voters	230,147	1,748	190,544	1,503	36,269	83
Valid votes	198,996	1,401	164,536	1,373	31,622	64
RC cases:						
Elections	3,089	25	2,574	8	482	0
Eligible voters	192,257	386	158,805	1,449	31,617	0
Valid votes	167,246	339	137,713	1,327	27,867	0
RM cases:						
Elections	90	6	66	0	14	4
Eligible voters	2,768	806	1,400	0	479	83
Valid votes	2,290	620	1,216	0	390	64
RD cases:						
Elections	573	8	521	3	41	0
Eligible voters	30,817	414	26,819	54	3,530	0
Valid votes	26,340	312	23,171	46	2,811	0
UD cases:						
Elections	63	5	45	0	13	—
Eligible voters	4,305	142	3,520	0	643	—
Valid votes	3,120	130	2,436	0	554	—

[1] See Glossary of terms for definitions.

Table 11A.—Analysis of Elections Conducted in Representation Cases Closed, Fiscal Year 1991

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	3,975	112	111	3,752	3,294	107	98	3,089	95	1	4	90	586	4	9	573
Rerun required	—	—	80	—	—	—	73	—	—	—	1	—	—	—	6	—
Runoff required	—	—	31	—	—	—	25	—	—	—	3	—	—	—	3	—
Consent elections	42	3	0	39	28	3	0	25	6	0	0	6	8	0	0	8
Rerun required	—	—	0	—	—	—	0	—	—	—	0	—	—	—	0	—
Runoff required	—	—	0	—	—	—	0	—	—	—	0	—	—	—	0	—
Stipulated elections	3,337	90	86	3,161	2,739	86	79	2,574	67	1	0	66	531	3	7	521
Rerun required	—	—	67	—	—	—	62	—	—	—	0	—	—	—	5	—
Runoff required	—	—	19	—	—	—	17	—	—	—	0	—	—	—	2	—
Regional Director-directed	581	19	25	537	519	18	19	482	18	0	4	14	44	1	2	41
Rerun required	—	—	13	—	—	—	11	—	—	—	1	—	—	—	1	—
Runoff required	—	—	12	—	—	—	8	—	—	—	3	—	—	—	1	—
Board-directed	11	0	0	11	8	0	0	8	0	0	0	0	3	0	0	3
Rerun required	—	—	0	—	—	—	0	—	—	—	0	—	—	—	0	—
Runoff required	—	—	0	—	—	—	0	—	—	—	0	—	—	—	0	—
Expedited—Sec. 8(b)(7)(C)	4	0	0	4	0	0	0	0	4	0	0	4	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 1991

	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	3,975	143	3.6	85	2.1	34	0.9	177	4.5	119	3.0
By type of case:											
In RC cases	3,294	115	3.5	78	2.4	32	1.0	147	4.5	110	3.3
In RM cases	95	4	4.2	2	2.1	1	1.1	5	5.3	3	3.2
In RD cases	586	24	4.1	5	0.9	1	0.2	25	4.3	6	1.0
By type of election:											
Consent elections	42	1	2.4	1	2.4	0	—	1	2.4	1	2.4
Stipulated elections	3,337	108	3.2	62	1.9	22	0.7	130	3.9	84	2.5
Expedited elections	4	2	50.0	0	—	0	—	2	50.0	0	—
Regional Director-directed elections	581	32	5.5	22	3.8	12	2.1	44	7.6	34	5.9
Board-directed elections	11	0	—	0	—	0	—	0	—	0	—

[1] Number of elections in which objections were ruled on, regardless of number of allegations in each election.
[2] Number of elections in which challenges were ruled on, regardless of individual ballots challenged in each election.

Table 11C.—Objections Filed in Representation Cases Closed, by Party Filing, Fiscal Year 1991[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	264	100.0	83	31.4	175	66.3	6	2.3
By type of case:								
RC cases	220	100.0	74	33.6	142	64.6	4	1 8
RM cases	5	100.0	2	40.0	2	40.0	1	20.0
RD cases	39	100.0	7	17.9	31	79.5	1	2.6
By type of election								
Consent elections	3	100.0	1	33.3	2	66.7	0	—
Stipulated elections	202	100.0	60	29.7	138	68.3	4	2.0
Expedited elections	2	100.0	1	50.0	1	50.0	0	—
Regional Director-directed elections	57	100.0	21	36.8	34	59.7	2	3.5
Board-directed elections	0	—	0	—	0	—	0	—

[1] See Glossary of terms for definitions.
[2] Objections filed by more than one party in the same cases are counted as one.

Table 11D.—Disposition of Objections in Representation Cases Closed, Fiscal Year 1991[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	264	87	177	127	71.8	50	28.2
By type of case							
RC cases	220	73	147	101	68.7	46	31.3
RM cases	5	0	5	5	100.0	0	—
RD cases	39	14	25	21	84.0	4	16.0
By type of election:							
Consent elections	3	2	1	1	100.0	0	—
Stipulated elections	202	72	130	92	70.8	38	29.2
Expedited elections	2	0	2	2	100.0	0	—
Regional Director-directed elections	57	13	44	32	72.7	12	27.3
Board-directed elections	0	0	0	0	—	0	—

[1] See Glossary of terms for definitions.
[2] See Table 11E for rerun elections held after objections were sustained. In 8 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 1991[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	72	100.0	23	31.9	49	68.1	20	27.8
By type of case.								
RC cases	66	100.0	23	34.8	43	65.2	18	27.3
RM cases	5	100.0	0	—	5	100.0	2	40.0
RD cases	1	100.0	0	—	1	100.0	0	—
By type of election:								
Consent elections	0	—	0	—	0	—	0	—
Stipulated elections	59	100.0	19	32.2	40	67.8	16	27.1
Expedited elections	0	—	0	—	0	—	0	—
Regional Director-directed elections	13	100.0	4	30.8	9	69.2	4	30.8
Board-directed elections	0	—	0	—	0	—	0	—

[1] See Glossary of terms for definitions.
[2] More than 1 rerun election was conducted in 8 cases; however, only the final election is included in this table.

Table 12.—Results of Union-Shop Deauthorization Polls in Cases Closed, Fiscal Year 1991

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	63	26	41.3	37	58.7	4,305	1,425	33.1	2,880	66.9	3,120	72.5	1,299	30.2
AFL–CIO unions	54	22	40.7	32	59.3	3,644	1,242	34.1	2,402	65.9	2,619	71.9	1,140	31.3
Teamsters	3	2	66.7	1	33.3	188	132	70.2	56	29.8	163	86.7	113	60 1
Other national unions	4	1	25.0	3	75.0	180	39	21.7	141	78.3	157	87.2	36	20.0
Other local unions	2	1	50.0	1	50.0	293	12	4 1	281	95.9	181	61.8	10	3.4

[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 1991[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	2,234	44.4	993	993	—	—	—	1,241	147,363	56,336	56,336	—	—	—	91,027
Teamsters	1,105	37.7	417	—	417	—	—	688	44,629	13,499	—	13,499	—	—	31,130
Other national unions	96	50.0	48	—	—	48	—	48	5,860	3,013	—	—	3,013	—	2,847
Other local unions	160	46.9	75	—	—	—	75	85	11,925	4,058	—	—	—	4,058	7,867
1-union elections	3,595	42.6	1,533	993	417	48	75	2,062	209,777	76,906	56,336	13,499	3,013	4,058	132,871
AFL–CIO v. AFL–CIO	39	71.8	28	28	—	—	—	11	4,863	3,400	3,400	—	—	—	1,463
AFL–CIO v. Teamsters	28	78.6	22	13	9	—	—	6	2,379	1,426	1,008	418	—	—	953
AFL–CIO v. National	17	82.4	14	5	—	9	—	3	730	658	75	—	583	—	72
AFL–CIO v. Local	44	90.9	40	21	—	—	19	4	5,084	4,937	2,761	—	—	2,176	147
Teamsters v. National	3	66.7	2	—	1	1	—	1	46	10	—	7	3	—	36
Teamsters v. Local	8	100.0	8	—	4	—	4	0	504	504	—	224	—	280	0
Teamsters v. Teamsters	4	75.0	3	—	3	—	—	1	76	21	—	21	—	—	55
National v. Local	3	66.7	2	—	—	1	1	1	282	88	—	—	79	9	194
Local v. Local	6	100.0	6	—	—	—	6	0	1,546	1,546	—	—	—	1,546	0
2-union elections	152	82.2	125	67	17	11	30	27	15,510	12,590	7,244	670	665	4,011	2,920
AFL–CIO v. AFL–CIO v. AFL–CIO	2	100.0	2	2	—	—	—	0	75	75	75	—	—	—	0
AFL–CIO v. AFL–CIO v. Teamsters	1	100.0	1	1	0	—	—	0	167	167	167	0	—	—	0
AFL–CIO v. AFL–CIO v. Local	2	100.0	2	1	—	—	1	0	313	313	189	—	—	124	0
3 (or more)-union elections	5	100.0	5	4	0	0	1	0	555	555	431	0	0	124	0
Total representation elections	3,752	44.3	1,663	1,064	434	59	106	2,089	225,842	90,051	64,011	14,169	3,678	8,193	135,791

Table 13.—Final Outcome of Representation Elections in Cases Closed, Fiscal Year 1991[1]—Continued

Participating unions	Total elections[2]	Elections won by unions: Percent won	Total won	AFL–CIO unions	Teamsters	Other national unions	Other local unions	Elections in which no representative chosen	Employees eligible to vote: Total	In elections won	In units won by: AFL–CIO unions	Teamsters	Other national unions	Other local unions	In elections where no representative chosen
B. Elections in RC cases															
AFL–CIO	1,819	47.4	862	862	—	—	—	957	123,824	46,222	46,222	—	—	—	77,602
Teamsters	907	41.1	373	—	373	—	—	534	38,362	10,550	—	10,550	—	—	27,812
Other national unions	88	53.4	47	—	—	47	—	41	5,700	3,009	—	—	3,009	—	2,691
Other local unions	134	49.3	66	—	—	—	66	68	9,817	2,709	—	—	—	2,709	7,108
1-union elections	2,948	45.7	1,348	862	373	47	66	1,600	177,703	62,490	46,222	10,550	3,009	2,709	115,213
AFL–CIO v. AFL–CIO	36	72.2	26	26	—	—	—	10	4,807	3,381	3,381	—	—	—	1,426
AFL–CIO v. Teamsters	22	72.7	16	8	8	—	—	6	1,614	661	257	404	—	—	953
AFL–CIO v. National	16	87.5	14	5	—	9	—	2	706	658	75	—	583	—	48
AFL–CIO v. Local	39	92.3	36	18	—	—	18	3	4,677	4,574	2,425	—	—	2,149	103
Teamsters v. National	3	66.7	2	—	1	1	—	1	46	10	—	7	3	—	36
Teamsters v. Local	8	100.0	8	—	4	—	4	0	504	504	—	224	—	280	0
Teamsters v. Teamsters	4	75.0	3	—	3	—	—	1	76	21	—	21	—	—	55
National v. Local	3	66.7	2	—	—	1	1	1	282	88	—	—	79	9	194
Local v. Local	5	100.0	5	—	—	—	5	0	1,287	1,287	—	—	—	1,287	0
2-union elections	136	82.4	112	57	16	11	28	24	13,999	11,184	6,138	656	665	3,725	2,815
AFL–CIO v. AFL–CIO v. AFL–CIO	2	100.0	2	2	—	—	—	0	75	75	75	—	—	—	0
AFL–CIO v. AFL–CIO v. Teamsters	1	100.0	1	1	0	—	—	0	167	167	167	0	—	—	0
AFL–CIO v. AFL–CIO v. Local	2	100.0	2	1	—	—	1	0	313	313	189	—	—	124	0
3 (or more)-union elections	5	100.0	5	4	0	0	1	0	555	555	431	0	0	124	0
Total RC elections	3,089	47.4	1,465	923	389	58	95	1,624	192,257	74,229	52,791	11,206	3,674	6,558	118,028
C. Elections in RM cases															
AFL–CIO	52	26.9	14	14	—	—	—	38	1,115	577	577	—	—	—	538
Teamsters	22	9.1	2	—	2	—	—	20	634	288	—	288	—	—	346
Other national unions	3	33.3	1	—	—	1	—	2	31	4	—	—	4	—	27
Other local unions	5	20.0	1	—	—	—	1	4	417	232	—	—	—	232	185
1-union elections	82	22.0	18	14	2	1	1	64	2,197	1,101	577	288	4	232	1,096

Table 13.—Final Outcome of Representation Elections in Cases Closed, Fiscal Year 1991[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	
AFL–CIO v. AFL–CIO	2	100.0	2	2	—	—	—	0	19	19	19	—	—	—	0
AFL–CIO v. Teamsters	1	100.0	1	1	0	—	—	0	164	164	164	0	—	—	0
AFL–CIO v. National	1	0.0	0	0	—	0	—	1	24	0	0	—	0	—	24
AFL–CIO v. Local	3	100.0	3	2	—	—	1	0	105	105	78	—	—	27	0
Local v. Local	1	100.0	1	—	—	—	1	0	259	259	—	—	—	259	0
2-union elections	8	87.5	7	5	0	0	2	1	571	547	261	0	0	286	24
Total RM elections	90	27.8	25	19	2	1	3	65	2,768	1,648	838	288	4	518	1,120
	D Elections in RD cases														
AFL–CIO	363	32.2	117	117	—	—	—	246	22,424	9,537	9,537	—	—	—	12,887
Teamsters	176	23.9	42	—	42	—	—	134	5,633	2,661	—	2,661	—	—	2,972
Other national unions	5	0.0	0	—	—	0	—	5	129	0	—	—	0	—	129
Other local unions	21	38.1	8	—	—	—	8	13	1,691	1,117	—	—	—	1,117	574
1-union elections	565	29.6	167	117	42	0	8	398	29,877	13,315	9,537	2,661	0	1,117	16,562
AFL–CIO v. AFL–CIO	1	0.0	0	0	—	—	—	1	37	0	0	—	—	—	37
AFL–CIO v. Teamsters	5	100.0	5	4	1	—	—	0	601	601	587	14	—	—	0
AFL–CIO v. Local	2	50.0	1	1	—	—	0	1	302	258	258	—	—	0	44
2-union elections	8	75.0	6	5	1	0	0	2	940	859	845	14	0	0	81
Total RD elections	573	30.2	173	122	43	0	8	400	30,817	14,174	10,382	2,675	0	1,117	16,643

[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 1991[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	128,072	31,428	31,428	—	—	—	14,950	27,970	27,970	—	—	—	53,724
Teamsters	39,648	8,083	—	8,083	—	—	3,706	8,416	—	8,416	—	—	19,443
Other national unions	5,134	1,877	—	—	1,877	—	733	889	—	—	889	—	1,635
Other local unions	10,058	2,257	—	—	—	2,257	1,008	2,151	—	—	—	2,151	4,642
1-union elections	182,912	43,645	31,428	8,083	1,877	2,257	20,397	39,426	27,970	8,416	889	2,151	79,444
AFL–CIO v. AFL–CIO	4,067	2,447	2,447	—	—	—	266	403	403	—	—	—	951
AFL–CIO v. Teamsters	1,927	1,009	605	404	—	—	115	298	149	149	—	—	505
AFL–CIO v National	620	491	156	—	335	—	69	21	13	—	8	—	39
AFL–CIO v. Local	4,025	3,761	2,034	—	—	1,727	131	58	44	—	—	14	75
Teamsters v. National	42	9	—	7	2	—	0	12	—	9	3	—	21
Teamsters v. Local	459	452	—	210	—	242	7	0	—	0	—	0	0
Teamsters v Teamsters	69	19	—	19	—	—	0	21	—	21	—	—	29
National v. Local	266	54	—	—	46	8	30	41	—	—	24	17	141
Local v. Local	994	954	—	—	—	954	40	0	—	—	—	0	0
2-union elections	12,469	9,196	5,242	640	383	2,931	658	854	609	179	35	31	1,761
AFL–CIO v. AFL–CIO v. AFL–CIO	72	61	61	—	—	—	11	0	0	—	—	—	0
AFL–CIO v AFL–CIO v. Teamsters	157	148	110	38	—	—	9	0	0	0	—	—	0
AFL–CIO v AFL–CIO v. Local	266	263	122	—	—	141	3	0	0	—	—	0	0
3 (or more)-union elections	495	472	293	38	0	141	23	0	0	0	0	0	0
Total representation elections	195,876	53,313	36,963	8,761	2,260	5,329	21,078	40,280	28,579	8,595	924	2,182	81,205

Table 14.—Valid Votes Cast in Representation Elections, by Final Results of Election, in Cases Closed, Fiscal Year 1991[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	107,874	25,765	25,765	—	—	—	11,776	24,435	24,435	—	—	—	45,898
Teamsters	34,205	6,311	—	6,311	—	—	2,860	7,654	—	7,654	—	—	17,380
Other national unions	5,016	1,874	—	—	1,874	—	732	854	—	—	854	—	1,556
Other local unions	8,362	1,619	—	—	—	1,619	563	1,965	—	—	—	1,965	4,215
1-union elections	155,457	35,569	25,765	6,311	1,874	1,619	15,931	34,908	24,435	7,654	854	1,965	69,049
AFL–CIO v. AFL–CIO	4,019	2,433	2,433	—	—	—	266	401	401	—	—	—	919
AFL–CIO v. Teamsters	1,417	548	248	300	—	—	66	298	149	149	—	—	505
AFL–CIO v. National	606	491	156	—	335	—	69	19	11	—	8	—	27
AFL–CIO v. Local	3,652	3,437	1,782	—	—	1,655	124	38	24	—	—	14	53
Teamsters v. National	42	9	—	7	2	—	0	12	—	9	3	—	21
Teamsters v. Local	459	452	—	210	—	242	7	0	—	0	—	0	0
Teamsters v. Teamsters	69	19	—	19	—	—	0	21	—	21	—	—	29
National v. Local	266	54	—	—	46	8	30	41	—	—	24	17	141
Local v. Local	764	735	—	—	—	735	29	0	—	—	—	0	0
2-union elections	11,294	8,178	4,619	536	383	2,640	591	830	585	179	35	31	1,695
AFL–CIO v. AFL–CIO v. AFL–CIO	72	61	61	—	—	—	11	0	0	—	—	—	0
AFL–CIO v. AFL–CIO v. Teamsters	157	148	110	38	—	—	9	0	0	0	—	—	0
AFL–CIO v. AFL–CIO v. Local	266	263	122	—	—	141	3	0	0	—	—	0	0
3 (or more)-union elections	495	472	293	38	0	141	23	0	0	0	0	0	0
Total RC elections	167,246	44,219	30,677	6,885	2,257	4,400	16,545	35,738	25,020	7,833	889	1,996	70,744
	C. Elections in RM cases												
AFL–CIO	988	322	322	—	—	—	194	92	92	—	—	—	380
Teamsters	536	148	—	148	—	—	76	91	—	91	—	—	221
Other national unions	27	3	—	—	3	—	1	9	—	—	9	—	14
Other local unions	264	102	—	—	—	102	9	45	—	—	—	45	108
1-union elections	1,815	575	322	148	3	102	280	237	92	91	9	45	723

Table 14.—Valid Votes Cast in Representation Elections, by Final Results of Election, in Cases Closed, Fiscal Year 1991[1]—Continued

Participating unions	Total valid votes cast	Valid votes cast in elections won						Valid votes cast in elections lost					
		Votes for unions					Total votes for no union	Votes for unions					Total votes for no union
		Total	AFL–CIO unions	Teamsters	Other national unions	Other local unions		Total	AFL–CIO unions	Teamsters	Other national unions	Other local unions	
AFL–CIO v. AFL–CIO	14	14	14	—	—	—	0	0	0	—	—	—	0
AFL–CIO v. Teamsters	132	131	79	52	—	—	1	0	0	0	—	—	0
AFL–CIO v. National	14	0	0	—	0	—	0	2	2	—	0	—	12
AFL–CIO v. Local	85	79	53	—	—	26	6	0	0	—	—	0	0
Local v. Local	230	219	—	—	—	219	11	0	—	—	—	0	0
2-union elections	475	443	146	52	0	245	18	2	2	0	0	0	12
Total RM elections	2,290	1,018	468	200	3	347	298	239	94	91	9	45	735
	D. Elections in RD cases												
AFL–CIO	19,210	5,341	5,341	—	—	—	2,980	3,443	3,443	—	—	—	7,446
Teamsters	4,907	1,624	—	1,624	—	—	770	671	—	671	—	—	1,842
Other national unions	91	0	—	—	0	—	0	26	—	—	26	—	65
Other local unions	1,432	536	—	—	—	536	436	141	—	—	—	141	319
1-union elections	25,640	7,501	5,341	1,624	0	536	4,186	4,281	3,443	671	26	141	9,672
AFL–CIO v. AFL–CIO	34	0	—	—	—	—	0	2	2	—	—	—	32
AFL–CIO v. Teamsters	378	330	278	52	—	—	48	0	0	0	—	—	0
AFL–CIO v. Local	288	245	199	—	—	46	1	20	20	—	—	0	22
2-union elections	700	575	477	52	0	46	49	22	22	0	0	0	54
Total RD elections	26,340	8,076	5,818	1,676	0	582	4,235	4,303	3,465	671	26	141	9,726

[1] See Glossary of terms for definitions.

Table 15A.—Geographic Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1991

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	15	7	7	0	0	0	8	7,841	3,774	3,195	3,068	59	0	68	579	7,186
New Hampshire	7	3	3	0	0	0	4	692	642	230	125	105	0	0	412	28
Vermont	3	1	0	0	1	0	2	219	204	120	16	0	91	13	84	138
Massachusetts	60	29	17	10	1	1	31	2,839	2,524	1,223	820	254	30	119	1,301	1,539
Rhode Island	6	2	2	0	0	0	4	143	136	43	43	0	0	0	93	30
Connecticut	41	20	13	5	2	0	21	1,689	1,505	736	455	221	60	0	769	609
New England	132	62	42	15	4	1	70	13,423	8,785	5,547	4,527	639	181	200	3,238	9,530
New York	290	140	86	38	5	11	150	15,042	12,508	6,195	4,129	1,132	161	773	6,313	6,606
New Jersey	147	68	36	17	1	14	79	7,174	6,035	3,037	1,602	562	90	783	2,998	2,760
Pennsylvania	280	116	69	31	9	7	164	15,477	13,801	5,890	4,135	1,173	179	403	7,911	4,700
Middle Atlantic	717	324	191	86	15	32	393	37,693	32,344	15,122	9,866	2,867	430	1,959	17,222	14,066
Ohio	239	107	72	31	2	2	132	12,363	10,996	4,988	3,737	1,053	58	140	6,008	4,606
Indiana	141	59	34	19	5	1	82	9,363	8,962	3,811	2,927	608	206	70	5,151	1,910
Illinois	230	107	66	28	6	7	123	10,666	9,507	4,538	2,755	1,028	343	412	4,969	4,458
Michigan	257	109	58	37	6	8	148	15,537	13,802	6,530	4,517	1,267	250	496	7,272	5,294
Wisconsin	125	48	34	12	0	2	77	9,013	7,966	3,553	2,715	822	3	13	4,413	2,228
East North Central	992	430	264	127	19	20	562	56,942	51,233	23,420	16,651	4,778	860	1,131	27,813	18,496
Iowa	55	26	11	14	0	1	29	3,735	3,219	1,576	833	715	0	28	1,643	1,343
Minnesota	114	55	41	12	1	1	59	4,623	3,896	2,116	1,489	576	22	29	1,780	2,803
Missouri	114	45	26	17	2	0	69	4,144	3,651	1,645	1,105	518	14	8	2,006	1,401
North Dakota	14	5	3	2	0	0	9	616	477	193	147	46	0	0	284	72
South Dakota	15	9	5	2	0	2	6	560	498	213	132	66	0	15	285	101
Nebraska	18	9	7	1	0	1	9	511	382	192	139	45	0	8	190	265
Kansas	31	9	7	2	0	0	22	4,014	3,637	1,735	1,658	77	0	0	1,902	2,272
West North Central	361	158	100	50	3	5	203	18,203	15,760	7,670	5,503	2,043	36	88	8,090	8,257

Table 15A.—Geographic Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1991—Continued

Division and State[1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL–CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL–CIO unions	Teamsters	Other national unions	Other local unions		
Delaware	8	5	1	3	0	1	3	615	547	323	78	175	0	70	224	419
Maryland	50	20	15	4	0	1	30	2,455	2,152	1,047	738	231	0	78	1,105	913
District of Columbia	14	7	6	1	0	0	7	740	597	374	337	28	0	9	223	451
Virginia	54	25	12	6	2	5	29	4,575	3,722	2,171	702	315	155	999	1,551	2,175
West Virginia	32	11	7	2	2	0	21	2,054	1,921	800	558	103	52	87	1,121	385
North Carolina	29	6	5	0	0	1	23	2,778	2,545	928	826	79	0	23	1,617	279
South Carolina	11	6	5	1	0	0	5	830	754	324	296	28	0	0	430	349
Georgia	56	26	23	3	0	0	30	4,284	3,779	2,261	1,508	480	13	260	1,518	2,437
Florida	64	29	23	5	0	1	35	3,578	3,468	1,246	839	337	28	42	2,222	1,005
South Atlantic	318	135	97	25	4	9	183	21,909	19,485	9,474	5,882	1,776	248	1,568	10,011	8,413
Kentucky	64	21	13	7	1	0	43	6,328	5,954	2,813	1,486	382	945	0	3,141	1,817
Tennessee	58	19	13	4	2	0	39	6,791	6,474	2,806	2,428	321	57	0	3,668	1,984
Alabama	50	23	20	1	1	1	27	2,950	2,738	1,405	1,214	39	25	127	1,333	1,574
Mississippi	27	15	12	2	0	1	12	3,061	2,614	1,266	1,176	70	0	20	1,348	1,293
East South Central	199	78	58	14	4	2	121	19,130	17,780	8,290	6,304	812	1,027	147	9,490	6,668
Arkansas	17	10	9	1	0	0	7	945	882	446	402	44	0	0	436	426
Louisiana	29	13	11	1	0	1	16	2,206	1,910	906	688	94	0	124	1,004	1,146
Oklahoma	29	11	5	5	1	0	18	2,032	1,795	716	539	156	16	5	1,079	747
Texas	92	37	27	8	0	2	55	7,695	7,036	3,595	2,250	877	0	468	3,441	3,139
West South Central	167	71	52	15	1	3	96	12,878	11,623	5,663	3,879	1,171	16	597	5,960	5,458
Montana	22	12	8	4	0	0	10	366	332	157	115	33	0	9	175	132
Idaho	10	6	6	0	0	0	4	437	393	150	145	5	0	0	243	119
Wyoming	7	2	2	0	0	0	5	321	290	96	96	0	0	0	194	26
Colorado	50	22	14	8	0	0	28	1,904	1,712	776	584	189	0	3	936	730
New Mexico	11	5	4	1	0	0	6	438	392	172	161	11	0	0	220	161
Arizona	30	14	8	5	1	0	16	1,630	1,437	672	426	231	15	0	765	639
Utah	13	5	2	0	2	1	8	699	625	211	142	34	29	6	414	84
Nevada	25	7	2	4	1	0	18	985	880	396	272	121	3	0	484	501
Mountain	168	73	46	22	4	1	95	6,780	6,061	2,630	1,941	624	47	18	3,431	2,392

Table 15A.—Geographic Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1991—Continued

Division and State[1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL–CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL–CIO unions	Teamsters	Other national unions	Other local unions		
Washington	119	67	48	16	0	3	52	8,170	6,676	3,472	2,813	304	0	355	3,204	3,346
Oregon	71	37	24	8	1	4	34	2,468	2,151	944	673	148	44	79	1,207	1,238
California	415	181	112	55	4	10	234	22,042	18,883	8,812	6,127	1,856	271	558	10,071	9,603
Alaska	20	8	8	0	0	0	12	773	635	250	165	44	24	17	385	146
Hawaii	25	11	11	0	0	0	14	1,563	1,192	724	639	85	0	0	468	880
Guam	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Pacific	650	304	203	79	5	17	346	35,016	29,537	14,202	10,417	2,437	339	1,009	15,335	15,213
Puerto Rico	44	27	10	1	0	16	17	3,772	3,189	1,547	557	209	0	781	1,642	1,542
Virgin Islands	4	1	1	0	0	0	3	96	79	28	15	0	0	13	51	16
Outlying Areas	48	28	11	1	0	16	20	3,868	3,268	1,575	572	209	0	794	1,693	1,558
Total, all States and areas	3,752	1,663	1,064	434	59	106	2,089	225,842	195,876	93,593	65,542	17,356	3,184	7,511	102,283	90,051

[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 1991

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 ME	11	5	5	0	0	0	6	7,593	3,560	3,084	2,961	55	0	68	476	7,060
New Hampshire	6	3	3	0	0	0	3	676	637	230	125	105	0	0	407	28
Vermont	3	1	0	0	1	0	2	219	204	120	16	0	91	13	84	138
Massachusetts	50	26	15	9	1	1	24	2,351	2,197	1,124	744	231	30	119	1,073	1,429
Rhode Island	5	1	1	0	0	0	4	115	110	27	27	0	0	0	83	2
Connecticut	35	19	12	5	2	0	16	1,593	1,415	712	443	209	60	0	703	591
New England	110	55	36	14	4	1	55	12,547	8,123	5,297	4,316	600	181	200	2,826	9,248
New York	259	134	81	37	5	11	125	13,883	11,530	5,727	3,729	1,074	161	763	5,803	6,020
New Jersey	135	66	35	16	1	14	69	6,755	5,692	2,904	1,523	524	90	767	2,788	2,687
Pennsylvania	259	108	62	30	9	7	151	14,104	12,601	5,182	3,519	1,139	177	347	7,419	3,825
Middle Atlantic	653	308	178	83	15	32	345	34,742	29,823	13,813	8,771	2,737	428	1,877	16,010	12,532
Ohio	202	98	66	28	2	2	104	10,662	9,514	4,383	3,207	978	58	140	5,131	3,831
Indiana	124	55	30	19	5	1	69	8,651	8,274	3,544	2,722	546	206	70	4,730	1,807
Illinois	201	96	58	26	6	6	105	8,579	7,685	3,682	1,954	985	343	400	4,003	3,476
Michigan	214	93	47	33	6	7	121	13,843	12,354	5,781	4,013	1,108	250	410	6,573	4,402
Wisconsin	93	38	26	10	0	2	55	7,638	6,960	3,084	2,344	724	3	13	3,876	1,550
East North Central	834	380	227	116	19	18	454	49,373	44,787	20,474	14,240	4,341	860	1,033	24,313	15,066
Iowa	50	25	11	13	0	1	25	3,659	3,153	1,546	823	699	0	24	1,607	1,322
Minnesota	94	49	37	10	1	1	45	3,386	2,827	1,456	879	532	16	29	1,371	1,837
Missouri	83	39	23	14	2	0	44	3,124	2,790	1,326	888	416	14	8	1,464	1,228
North Dakota	12	5	3	2	0	0	7	439	369	154	108	46	0	0	215	72
South Dakota	15	9	5	2	0	2	6	560	498	213	132	66	0	15	285	101
Nebraska	16	8	7	1	0	0	8	475	355	181	136	45	0	0	174	250
Kansas	27	8	6	2	0	0	19	3,647	3,282	1,553	1,476	77	0	0	1,729	1,985
West North Central	297	143	92	44	3	4	154	15,290	13,274	6,429	4,442	1,881	30	76	6,845	6,795

Table 15B.—Geographic Distribution of Collective-Bargaining Elections Held in Cases Closed, Fiscal Year 1991—Continued

Division and State[1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL–CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL–CIO unions	Teamsters	Other national unions	Other local unions		
Delaware	7	4	1	2	0	1	3	573	507	297	78	149	0	70	210	377
DMaryland	46	19	14	4	0	1	27	2,352	2,058	1,004	708	218	0	78	1,054	858
District of Columbia	14	7	6	1	0	0	7	740	597	374	337	28	0	9	223	451
Virginia	49	23	11	5	2	5	26	4,257	3,421	1,978	580	244	155	999	1,443	2,009
West Virginia	28	9	5	2	2	0	19	1,967	1,843	768	532	97	52	87	1,075	350
North Carolina	27	6	5	0	0	1	21	2,620	2,393	887	785	79	0	23	1,506	279
South Carolina	8	5	4	1	0	0	3	742	676	291	263	28	0	0	385	310
Georgia	47	24	21	3	0	0	23	3,946	3,458	2,108	1,366	469	13	260	1,350	2,299
Florida	58	27	21	5	0	1	31	3,426	3,320	1,169	774	325	28	42	2,151	921
South Atlantic	284	124	88	23	4	9	160	20,623	18,273	8,876	5,423	1,637	248	1,568	9,397	7,854
Kentucky	57	19	12	6	1	0	38	6,011	5,665	2,648	1,361	342	945	0	3,017	1,624
Tennessee	48	16	12	2	2	0	32	5,961	5,680	2,380	2,194	129	57	0	3,300	1,553
Alabama	35	20	18	0	1	1	15	2,492	2,363	1,278	1,123	12	16	127	1,085	1,476
Mississippi	23	12	9	2	0	1	11	2,098	1,757	764	674	70	0	20	993	437
East South Central	163	67	51	10	4	2	96	16,562	15,465	7,070	5,352	553	1,018	147	8,395	5,090
Arkansas	16	10	9	1	0	0	6	849	792	401	357	44	0	0	391	426
Louisiana	25	12	11	0	0	1	13	1,941	1,657	807	680	3	0	124	850	971
Oklahoma	23	10	4	5	1	0	13	1,424	1,283	411	243	147	16	5	872	307
Texas	75	29	24	5	0	0	46	5,319	4,877	2,277	2,083	187	0	7	2,600	1,206
West South Central	139	61	48	11	1	1	78	9,533	8,609	3,896	3,363	381	16	136	4,713	2,910
Montana	21	12	8	4	0	0	9	330	304	148	115	33	0	0	156	132
Idaho	8	4	4	0	0	0	4	368	343	116	111	5	0	0	227	50
Wyoming	5	2	2	0	0	0	3	271	244	85	85	0	0	0	159	26
Colorado	37	19	13	6	0	0	18	1,589	1,435	669	524	142	0	3	766	654
New Mexico	7	3	2	1	0	0	4	179	172	97	86	11	0	0	75	77
Arizona	26	13	8	4	1	0	13	1,489	1,304	629	409	205	15	0	675	589
Utah	12	5	2	0	2	1	7	618	552	196	127	34	29	6	356	84
Nevada	18	7	2	4	1	0	11	784	698	346	265	78	3	0	352	501
Mountain	134	65	41	19	4	1	69	5,628	5,052	2,286	1,722	508	47	9	2,766	2,113

Table 15B.—Geographic Distribution of Collective-Bargaining Elections Held in Cases Closed, Fiscal Year 1991—Continued

Division and State[1]	Total elections	Number of elections in which representation rights were won by unions					Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for unions					Total votes for no union	Eligible employees in units choosing representation
		Total	AFL–CIO unions	Teamsters	Other national unions	Other local unions				Total	AFL–CIO unions	Teamsters	Other national unions	Other local unions		
Washington	95	57	42	13	0	2	38	4,720	3,949	2,501	1,907	265	0	329	1,448	2,968
Oregon	56	30	18	7	1	4	26	1,512	1,295	669	420	126	44	79	626	893
California	331	158	96	50	4	8	173	19,035	16,288	7,693	5,235	1,673	262	523	8,595	8,454
Alaska	18	6	6	0	0	0	12	688	580	201	117	43	24	17	379	61
Hawaii	22	10	10	0	0	0	12	1,107	919	515	460	55	0	0	404	462
Guam	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Pacific	522	261	172	70	5	14	261	27,062	23,031	11,579	8,139	2,162	330	948	11,452	12,838
Puerto Rico	40	25	8	1	0	16	15	3,589	3,038	1,466	476	209	0	781	1,572	1,415
Virgin Islands	3	1	1	0	0	0	2	76	61	28	15	0	0	13	33	16
Outlying Areas	43	26	9	1	0	16	17	3,665	3,099	1,494	491	209	0	794	1,605	1,431
Total, all States and area	3,179	1,490	942	391	59	98	1,689	195,025	169,536	81,214	56,259	15,009	3,158	6,788	88,322	75,877

[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 1991

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	4	2	2	0	0	0	2	248	214	111	107	4	0	0	103	126
New Hampshire	1	0	0	0	0	0	1	16	5	0	0	0	0	0	5	0
Vermont	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Massachusetts	10	3	2	1	0	0	7	488	327	99	76	23	0	0	228	110
Rhode Island	1	1	1	0	0	0	0	28	26	16	16	0	0	0	10	28
Connecticut	6	1	1	0	0	0	5	96	90	24	12	12	0	0	66	18
New England	22	7	6	1	0	0	15	876	662	250	211	39	0	0	412	282
New York	31	6	5	1	0	0	25	1,159	978	468	400	58	0	10	510	586
New Jersey	12	2	1	1	0	0	10	419	343	133	79	38	0	16	210	73
Pennsylvania	21	8	7	1	0	0	13	1,373	1,200	708	616	34	2	56	492	875
Middle Atlantic	64	16	13	3	0	0	48	2,951	2,521	1,309	1,095	130	2	82	1,212	1,534
Ohio	37	9	6	3	0	0	28	1,701	1,482	605	530	75	0	0	877	775
Indiana	17	4	4	0	0	0	13	712	688	267	205	62	0	0	421	103
Illinois	29	11	8	2	0	1	18	2,087	1,822	856	801	43	0	12	966	982
Michigan	43	16	11	4	0	1	27	1,694	1,448	749	504	159	0	86	699	892
Wisconsin	32	10	8	2	0	0	22	1,375	1,006	469	371	98	0	0	537	678
East North Central	158	50	37	11	0	2	108	7,569	6,446	2,946	2,411	437	0	98	3,500	3,430
Iowa	5	1	0	1	0	0	4	76	66	30	10	16	0	4	36	21
Minnesota	20	6	4	2	0	0	14	1,237	1,069	660	610	44	6	0	409	966
Missouri	31	6	3	3	0	0	25	1,020	861	319	217	102	0	0	542	173
North Dakota	2	0	0	0	0	0	2	177	108	39	39	0	0	0	69	0

Table 15C.—Geographic Distribution of Decertification Elections Held in Cases Closed, Fiscal Year 1991—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		
South Dakota	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Nebraska	2	1	0	0	0	1	1	36	27	11	3	0	0	8	16	15
Kansas	4	1	1	0	0	0	3	367	355	182	182	0	0	0	173	287
West North Central	64	15	8	6	0	1	49	2,913	2,486	1,241	1,061	162	6	12	1,245	1,462
Delaware	1	1	0	1	0	0	0	42	40	26	0	26	0	0	14	42
Maryland	4	1	1	0	0	0	3	103	94	43	30	13	0	0	51	55
District of Columbia	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Virginia	5	2	1	1	0	0	3	318	301	193	122	71	0	0	108	166
West Virginia	4	2	2	0	0	0	2	87	78	32	26	6	0	0	46	35
North Carolina	2	0	0	0	0	0	2	158	152	41	41	0	0	0	111	0
South Carolina	3	1	1	0	0	0	2	88	78	33	33	0	0	0	45	39
Georgia	9	2	2	0	0	0	7	338	321	153	142	11	0	0	168	138
Florida	6	2	2	0	0	0	4	152	148	77	65	12	0	0	71	84
South Atlantic	34	11	9	2	0	0	23	1,286	1,212	598	459	139	0	0	614	559
Kentucky	7	2	1	1	0	0	5	317	289	165	125	40	0	0	124	193
Tennessee	10	3	1	2	0	0	7	830	794	426	234	192	0	0	368	431
Alabama	15	3	2	1	0	0	12	458	375	127	91	27	9	0	248	98
Mississippi	4	3	3	0	0	0	1	963	857	502	502	0	0	0	355	856
East South Central	36	11	7	4	0	0	25	2,568	2,315	1,220	952	259	9	0	1,095	1,578
Arkansas	1	0	0	0	0	0	1	96	90	45	45	0	0	0	45	0
Louisiana	4	1	0	1	0	0	3	265	253	99	8	91	0	0	154	175
Oklahoma	6	1	1	0	0	0	5	608	512	305	296	9	0	0	207	440
Texas	17	8	3	3	0	2	9	2,376	2,159	1,318	167	690	0	461	841	1,933
West South Central	28	10	4	4	0	2	18	3,345	3,014	1,767	516	790	0	461	1,247	2,548
Montana	1	0	0	0	0	0	1	36	28	9	0	0	0	9	19	0
Idaho	2	2	2	0	0	0	0	69	50	34	34	0	0	0	16	69
Wyoming	2	0	0	0	0	0	2	50	46	11	11	0	0	0	35	0
Colorado	13	3	1	2	0	0	10	315	277	107	60	47	0	0	170	76
New Mexico	4	2	2	0	0	0	2	259	220	75	75	0	0	0	145	84

Table 15C.—Geographic Distribution of Decertification Elections Held in Cases Closed, Fiscal Year 1991—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		
Arizona	4	1	0	1	0	0	3	141	133	43	17	26	0	0	90	50
Utah	1	0	0	0	0	0	1	81	73	15	15	0	0	0	58	0
Nevada	7	0	0	0	0	0	7	201	182	50	7	43	0	0	132	0
Mountain	34	8	5	3	0	0	26	1,152	1,009	344	219	116	0	9	665	279
Washington	24	10	6	3	0	1	14	3,450	2,727	971	906	39	0	26	1,756	378
Oregon	15	7	6	1	0	0	8	956	856	275	253	22	0	0	581	345
California	84	23	16	5	0	2	61	3,007	2,595	1,119	892	183	9	35	1,476	1,149
Alaska	2	2	2	0	0	0	0	85	55	49	48	1	0	0	6	85
Hawaii	3	1	1	0	0	0	2	456	273	209	179	30	0	0	64	418
Guam	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Pacific	128	43	31	9	0	3	85	7,954	6,506	2,623	2,278	275	9	61	3,883	2,375
Puerto Rico	4	2	2	0	0	0	2	183	151	81	81	0	0	0	70	127
Virgin Islands	1	0	0	0	0	0	1	20	18	0	0	0	0	0	18	0
Outlying Areas	5	2	2	0	0	0	3	203	169	81	81	0	0	0	88	127
Total, all States and areas	573	173	122	43	0	8	400	30,817	26,340	12,379	9,283	2,347	26	723	13,961	14,174

[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 1991

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	169	73	37	29	0	7	96	18,049	15,445	7,649	4,475	1,822	0	1,352	7,796	7,988
Textile mill products	15	5	5	0	0	0	10	1,827	1,622	1,059	710	82	13	254	563	971
Apparel and other finished products made from fabric and similar materials	21	11	7	3	0	1	10	2,437	2,019	949	629	241	0	79	1,070	1,127
Lumber and wood products (except furniture)	55	22	16	5	0	1	33	5,125	4,691	1,998	1,820	164	0	14	2,693	966
Furniture and fixtures	28	15	11	4	0	0	13	3,333	3,003	1,264	924	318	0	22	1,739	1,336
Paper and allied products	58	22	16	4	0	2	36	4,169	3,854	1,569	1,313	164	0	92	2,285	1,367
Printing, publishing, and allied products	88	34	21	5	3	5	54	5,210	4,869	2,284	1,647	271	149	217	2,585	1,788
Chemicals and allied products	72	26	14	8	1	3	46	2,900	2,608	1,185	672	276	51	186	1,423	1,118
Petroleum refining and related industries	26	13	7	4	0	2	13	845	620	299	133	115	0	51	321	312
Rubber and miscellaneous plastic products	68	27	18	6	2	1	41	6,304	5,793	2,552	2,099	343	82	28	3,241	2,207
Leather and leather products	11	8	6	2	0	0	3	1,056	991	551	529	22	0	0	440	920
Stone, clay, glass, and concrete products	75	35	25	8	0	2	40	4,422	4,078	1,937	1,158	681	0	98	2,141	1,459
Primary metal industries	83	33	27	4	0	2	50	8,663	8,114	3,779	3,248	234	0	297	4,335	2,031
Fabricated metal products (except machinery and transportation equipment)	122	43	32	7	1	3	79	8,322	7,687	3,143	2,573	423	22	125	4,544	1,747
Machinery (except electrical)	117	50	41	6	2	1	67	6,302	5,782	2,480	2,143	271	39	27	3,302	1,937
Electrical and electronic machinery, equipment, and supplies	53	20	13	6	0	1	33	4,516	4,108	1,850	1,513	316	0	21	2,258	1,290
Aircraft and parts	76	22	14	3	1	4	54	11,093	10,409	4,275	3,461	455	52	307	6,134	1,787
Ship and boat building and repairing	5	1	0	1	0	0	4	170	155	65	52	13	0	0	90	25
Automotive and other transportation equipment	9	5	5	0	0	0	4	287	269	144	143	1	0	0	125	155
Measuring, analyzing, and controlling instruments; photographic, medical, and optical goods; watches and clocks	10	5	4	0	1	0	5	363	342	185	161	10	14	0	157	265
Miscellaneous manufacturing industries	39	15	11	2	2	0	24	2,688	2,459	968	780	139	43	6	1,491	610
Manufacturing	1,200	485	330	107	13	35	715	98,081	88,918	40,185	30,183	6,361	465	3,176	48,733	31,406
Metal mining	6	3	2	1	0	0	3	400	354	125	61	19	24	21	229	88
Coal mining	11	4	0	0	4	0	7	2,025	1,895	1,076	15	0	1,061	0	819	845
Oil and gas extraction	13	5	3	1	0	1	8	1,347	1,178	577	149	17	6	405	601	963
Mining and quarrying of nonmetallic minerals (except fuels)	13	3	2	0	1	0	10	626	575	246	184	1	61	0	329	245

Table 16.—Industrial Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1991—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	43	15	7	2	5	1	28	4,398	4,002	2,024	409	37	1,152	426	1,978	2,141
Construction	279	131	109	12	3	7	148	7,280	5,932	3,072	2,335	434	34	269	2,860	3,574
Wholesale trade	240	95	46	46	2	1	145	10,924	9,858	4,699	2,634	1,884	45	136	5,159	3,719
Retail trade	337	121	85	29	3	4	216	16,079	13,781	5,788	4,161	1,240	71	316	7,993	5,216
Finance, insurance, and real estate	71	36	31	3	0	2	35	2,788	2,415	1,014	845	151	0	18	1,401	558
U.S. Postal Service	2	1	0	1	0	0	1	63	62	38	0	38	0	0	24	18
Local and suburban transit and interurban highway passenger transportation	81	42	17	20	1	4	39	4,495	3,801	1,867	880	911	4	72	1,934	1,919
Motor freight transportation and warehousing	308	139	25	111	2	1	169	9,558	8,443	4,147	997	2,936	145	69	4,296	4,320
Water transportation	4	1	0	1	0	0	3	51	48	17	13	4	0	0	31	6
Other transportation	43	17	7	10	0	0	26	2,039	1,871	983	709	272	0	2	888	1,000
Communication	77	35	31	2	0	2	42	3,514	3,269	1,384	1,250	92	0	42	1,885	1,373
Electric, gas, and sanitary services	116	40	25	13	2	0	76	4,472	4,170	1,706	1,180	414	35	77	2,464	1,065
Transportation, communication, and other utilities	629	274	105	157	5	7	355	24,129	21,602	10,104	5,029	4,629	184	262	11,498	9,683
Hotels, rooming houses, camps, and other lodging places	68	27	21	4	0	2	41	3,316	2,735	1,290	1,046	97	4	143	1,445	1,418
Personal services	62	31	18	11	2	0	31	2,247	1,981	1,079	553	324	151	51	902	1,355
Automotive repair, services, and garages	72	35	16	19	0	0	37	1,938	1,763	857	352	505	0	0	906	861
Motion pictures	6	3	3	0	0	0	3	504	317	232	213	19	0	0	85	439
Amusement and recreation services (except motion pictures)	42	22	16	4	1	1	20	1,639	1,207	582	478	54	5	45	625	899
Health services	342	179	137	12	7	23	163	29,833	25,313	12,590	9,703	850	486	1,551	12,723	13,288
Educational services	26	13	5	2	4	2	13	1,310	1,161	670	167	134	76	293	491	645
Membership organizations	24	17	8	1	0	8	7	8,055	3,905	3,577	3,271	16	0	290	328	7,820
Business services	222	119	77	18	14	10	103	9,993	8,158	4,137	2,711	432	502	492	4,021	5,090
Miscellaneous repair services	13	8	6	2	0	0	5	397	366	186	135	51	0	0	180	149
Museums, art galleries, botanical and zoological gardens	1	1	1	0	0	0	0	107	98	80	80	0	0	0	18	107

Table 16.—Industrial Distribution of Representation Elections Held in Cases Closed, Fiscal Year 1991—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		
Legal services	8	8	8	0	0	0	0	441	414	292	292	0	0	0	122	441
Social services	41	26	22	2	0	2	15	1,736	1,376	773	707	39	0	27	603	857
Miscellaneous services	13	9	8	0	0	1	4	141	132	84	72	2	0	10	48	117
Services	940	498	346	75	28	49	442	61,657	48,926	26,429	19,780	2,523	1,224	2,902	22,497	33,486
Public administration	11	7	5	2	0	0	4	443	380	240	166	59	9	6	140	250
Total, all industrial groups	3,752	1,663	1,064	434	59	106	2,089	225,842	195,876	93,593	65,542	17,356	3,184	7,511	102,283	90,051

[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 1991[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	195,025	3,179	100.0	—	942	100.0	391	100.0	59	100.0	98	100.0	1,689	100.0
Under 10	3,888	676	21.3	21.3	228	24.2	133	34.0	10	16.9	20	20.4	285	16.9
10 to 19	9,251	659	20.7	42.0	208	22.1	98	25.0	9	15.2	16	16.3	328	19.4
20 to 29	9,515	397	12.5	54.5	112	11.9	47	12.0	11	18.6	14	14.4	213	12.6
30 to 39	9,741	286	9.0	63.5	90	9.6	35	9.0	4	6.8	9	9.2	148	8.8
40 to 49	9,188	208	6.5	70.0	56	6.0	22	5.6	5	8.5	5	5.1	120	7.1
50 to 59	8,280	153	4.8	74.8	49	5.2	11	2.8	2	3.4	4	4.1	87	5.2
60 to 69	7,209	112	3.5	78.3	33	3.5	9	2.3	1	1.7	3	3.1	66	3.9
70 to 79	6,260	83	2.6	80.9	25	2.7	7	1.8	4	6.8	4	4.1	43	2.5
80 to 89	7,098	84	2.6	83.5	16	1.7	0	—	3	5.1	5	5.1	60	3.6
90 to 99	5,549	59	1.9	85.4	19	2.0	4	1.0	1	1.7	1	1.0	34	2.0
100 to 109	4,876	47	1.5	86.9	11	1.2	4	1.0	1	1.7	2	2.0	29	1.7
110 to 119	4,226	37	1.2	88.1	14	1.5	3	0.8	2	3.4	0	—	18	1.1
120 to 129	5,852	47	1.5	89.6	11	1.2	2	0.5	0	—	3	3.1	31	1.8
130 to 139	3,611	27	0.8	90.4	5	0.5	1	0.3	1	1.7	0	—	20	1.2
140 to 149	4,598	32	1.0	91.4	9	1.0	2	0.5	1	1.7	0	—	20	1.2
150 to 159	3,732	24	0.8	92.2	3	0.3	0	—	0	—	2	2.0	19	1.1
160 to 169	3,602	22	0.7	92.9	6	0.6	2	0.5	0	—	1	1.0	13	0.8
170 to 179	3,857	22	0.7	93.6	7	0.7	4	1.0	1	1.7	0	—	10	0.6
180 to 189	2,216	12	0.4	94.0	5	0.5	1	0.3	0	—	0	—	6	0.4
190 to 199	4,069	21	0.7	94.7	6	0.6	3	0.8	0	—	0	—	12	0.7
200 to 299	19,567	82	2.6	97.3	11	1.2	3	0.8	2	3.4	5	5.1	61	3.6
300 to 399	11,636	34	1.1	98.4	5	0.5	0	—	0	—	2	2.0	27	1.6
400 to 499	4,900	11	0.3	98.7	2	0.2	0	—	0	—	0	—	9	0.5
500 to 599	7,150	13	0.4	99.1	3	0.3	0	—	0	—	1	1.0	9	0.5
600 to 799	10,069	14	0.4	99.5	4	0.4	0	—	1	1.7	0	—	9	0.5
800 to 999	5,281	6	0.2	99.7	1	0.1	0	—	0	—	0	—	5	0.3
1,000 to 1,999	12,804	10	0.3	100.0	2	0.2	0	—	0	—	1	1.0	7	0.4
2,000 to 2,999	7,000	1	0.0	100.0	1	0.1	0	—	0	—	0	—	0	—

Table 17.—Size of Units in Representation Elections in Cases Closed, Fiscal Year 1991[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	30,817	573	100.0	—	122	100.0	43	100.0	0	—	8	100 0	400	100.0
Under 10	595	105	18.3	18.3	4	3.3	5	11.5	0	—	1	12.5	95	23.8
10 to 19	1,904	136	23.7	42.0	22	18.0	6	14.0	0	—	3	37.5	105	26.3
20 to 29	2,037	83	14.5	56.5	14	11.5	6	14.0	0	—	1	12.5	62	15.5
30 to 39	1,602	46	8.0	64.5	14	11.5	6	14 0	0	—	0	—	26	6.5
40 to 49	1,849	42	7.3	71.8	8	6 6	4	9.3	0	—	0	—	30	7.5
50 to 59	1,511	28	4.9	76.7	9	7 4	4	9 3	0	—	0	—	15	3.8
60 to 69	1,159	18	3.1	79.8	7	5.6	2	4.7	0	—	1	12 5	8	2.0
70 to 79	1,261	17	3.0	82.8	6	4.9	1	2.3	0	—	0	—	10	2.5
80 to 89	1,072	13	2.3	85.1	6	4.9	1	2.3	0	—	0	—	6	1.5
90 to 99	1,594	17	3.0	88.1	2	1 6	4	9.3	0	—	1	12.5	10	2 5
100 to 109	940	9	1.6	89.7	3	2 5	0	—	0	—	0	—	6	1.5
110 to 119	581	5	0.9	90.6	2	1.6	0	—	0	—	0	—	3	0 8
120 to 129	493	4	0.7	91.3	3	2.5	0	—	0	—	0	—	1	0.2
130 to 139	400	3	0.5	91.8	1	0.8	1	2.3	0	—	0	—	1	0 2
140 to 149	429	3	0.5	92 3	1	0.8	0	—	0	—	0	—	2	0.5
150 to 159	1,075	7	1.2	93.5	3	2.5	0	—	0	—	0	—	4	1.0
160 to 169	493	3	0.5	94.0	1	0.8	0	—	0	—	0	—	2	0 5
170 to 199	2,508	14	2.4	96.4	3	2.5	2	4.7	0	—	0	—	9	2 3
200 to 299	2,149	9	1.6	98 0	8	6.6	0	—	0	—	0	—	1	0.2
300 to 499	1,873	5	0.9	98 9	3	2.5	0	—	0	—	0	—	2	0.5
500 to 799	2,530	4	0.7	99.6	2	1.6	1	2.3	0	—	0	—	1	0.2
800 and over	2,762	2	0.4	100.0	0	—	0	—	0	—	1	12.5	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 1991[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
Totals	[2]29,197	100.0	——	20,614	100.0	6,555	100.0	607	100.0	213	100.0	40	100.0	19	100.0	192	100.0	923	100.0	34	100.0
Under 10	7,475	25.6	25.6	4,952	24.0	1,928	29.4	235	38.7	84	39.4	20	50.0	5	26.3	55	28.6	189	20.5	7	20.6
10–19	2,283	7.8	33.4	1,788	8.7	323	4.9	59	9.7	26	12.2	2	5.0	0	——	33	17.2	42	4.6	10	29.4
20–29	1,855	6.4	39.8	1,458	7.1	262	4.0	48	7.9	15	7.0	3	7.5	0	——	27	14.1	39	4.2	3	8.8
30–39	1,388	4.8	44.6	1,070	5.2	229	3.5	29	4.8	13	6.1	1	2.5	0	——	9	4.7	33	3.6	4	11.8
40–49	1,052	3.6	48.2	821	4.0	162	2.5	26	4.3	3	1.4	0	——	0	——	20	10.4	19	2.1	1	2.9
50–59	1,188	4.1	52.3	888	4.3	228	3.5	26	4.3	12	5.6	1	2.5	0	——	4	2.1	28	3.0	1	2.9
60–69	818	2.8	55.1	629	3.1	149	2.3	14	2.3	5	2.3	3	7.5	0	——	6	3.1	12	1.3	0	——
70–79	637	2.2	57.3	479	2.3	115	1.8	13	2.1	5	2.3	0	——	0	——	6	3.1	19	2.1	0	——
80–89	555	1.9	59.2	452	2.2	80	1.2	4	0.7	2	0.9	0	——	0	——	0	——	16	1.7	1	2.9
90–99	365	1.3	60.5	307	1.5	41	0.6	5	0.8	0	——	0	——	0	——	1	0.5	10	1.1	1	2.9
100–109	1,546	5.3	65.8	1,038	5.0	408	6.2	23	3 8	19	8.9	0	——	0	——	8	4.2	48	5.2	2	5.9
110–119	217	0.7	66.5	182	0.9	29	0.4	2	0.3	2	0.9	0	——	0	——	1	0.5	1	0.1	0	——
120–129	421	1.4	67.9	331	1.6	63	1.0	8	1.3	3	1.4	0	——	0	——	3	1.6	13	1.4	0	——
130–139	185	0.6	68.5	143	0.7	38	0.6	0	——	0	——	0	——	0	——	0	——	4	0.4	0	——
140–149	118	0.4	68.9	103	0.5	15	0.2	0	——	0	——	0	——	0	——	0	——	0	——	0	——
150–159	560	1.9	70.8	389	1.9	133	2.0	15	2.5	1	0.5	1	2.5	1	5.3	1	0.5	19	2.1	0	——
160–169	150	0.5	71.3	125	0.6	13	0.2	2	0.3	0	——	0	——	0	——	2	1.0	8	0.9	0	——
170–179	172	0.6	71.9	140	0.7	27	0.4	0	——	0	——	0	——	0	——	0	——	5	0.5	0	——
180–189	153	0.5	72.4	122	0.6	19	0.3	4	0.7	0	——	0	——	0	——	1	0.5	6	0.7	1	2.9
190–199	50	0.2	72.6	38	0.2	4	0.1	3	0.5	0	——	0	——	0	——	1	0.5	4	0.4	0	——
200–299	1,663	5.7	78.3	1,168	5.7	404	6.2	16	2.6	7	3.3	1	2.5	5	26.3	3	1.6	59	6.4	0	——
300–399	1,101	3.8	82.1	747	3.6	258	3 9	16	2.6	4	1.9	2	5.0	0	——	4	2.1	70	7.6	0	——
400–499	588	2.0	84.1	398	1.9	139	2.1	11	1.8	5	2.3	1	2.5	1	5.3	1	0.5	30	3.3	2	5.9
500–599	733	2.5	86.6	482	2.3	214	3.3	2	0.3	0	——	1	2.5	1	5.3	2	1.0	31	3.4	0	——
600–699	351	1.2	87.8	229	1.1	99	1.5	3	0.5	1	0.5	0	——	1	5.3	0	——	17	1.8	1	2.9
700–799	223	0.8	88.6	162	0.8	50	0.8	1	0.2	1	0.5	0	——	0	——	0	——	9	1.0	0	——

Table 18.—Distribution of Unfair Labor Practice Situations Received, by Number of Employees in Establishments, Fiscal Year 1991—Continued

Size of establishment (number of employees)	Total number of situations	Total		Type of situations																	
		Percent of all situations	Cumulative percent of all situations	CA		CB		CC		CD		CE		CG		CP		CA–CB combinations		Other C combinations	
				Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class	Number of situations	Percent by size class
800–899	233	0.8	89.4	151	0.7	66	1.0	4	0.7	0	—	0	—	0	—	0	—	12	1.3	0	—
900–999	122	0.4	89.8	79	0.4	30	0.5	0	—	0	—	0	—	1	5.3	3	1.6	9	1.0	0	—
1,000–1,999	1,203	4.1	93.9	746	3.6	378	5.8	10	1.6	1	0.5	1	2.5	1	5.3	0	—	66	7.2	0	—
2,000–2,999	606	2.1	96.0	335	1.6	212	3.2	21	3.5	2	0.9	0	—	0	—	1	0.5	35	3.8	0	—
3,000–3,999	297	1.0	97.0	156	0.8	119	1.8	1	0.2	1	0.5	0	—	2	10.5	0	—	18	2.0	0	—
4,000–4,999	154	0.4	97.4	62	0.3	75	1.1	4	0.7	0	—	2	5.0	0	—	0	—	11	1.2	0	—
5,000–9,999	366	1.3	98.7	213	1.0	127	1.9	2	0.3	1	0.5	0	—	1	5.3	0	—	22	2.4	0	—
Over 9,999	369	1.3	100.0	231	1.1	118	1.8	0	—	0	—	1	2.5	0	—	0	—	19	2.1	0	—

[1] See Glossary of terms for definitions.

[2] Based on revised situation count which absorbs companion cases, cross-filing, and multiple filings as compared to situations shown in charts 1 and 2 of Chapter 1, which are based on single and multiple filings of same type of case.

Table 19.—Litigation for Enforcement and/or Review of Board Orders, Fiscal Year 1991; and Cumulative Totals, Fiscal Years 1935 Through 1991

	Fiscal Year 1991									July 5, 1935–Sept. 30, 1991	
	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	208	184	23	0	1	—	—	—	—	—	—
On petitions for review and/or enforcement	178	161	16	0	1	100 0	100 0	—	100.0	10,177	100.0
Board orders affirmed in full	136	121	14	0	1	75.1	87.4	—	100.0	6,676	65.6
Board orders affirmed with modification	12	12	0	0	0	7.5	0.0	—	0.0	1,403	13.8
Remanded to Board	10	9	1	0	0	5 6	6.3	—	0.0	500	4.9
Board orders partially affirmed and partially remanded	6	6	0	0	0	3.7	0.0	—	0.0	201	2.0
Board orders set aside	14	13	1	0	0	8 1	6.3	—	0.0	1,397	13.7
On petitions for contempt	30	23	7	0	—	100.0	100.0	—	—	—	—
Compliance after filing of petition, before court order	3	3	0	0	—	13.0	0.0	—	—	—	—
Court orders holding respondent in contempt	15	13	2	0	—	57.0	29.0	—	—	—	—
Court orders denying petition	0	0	0	0	—	0.0	0 0	—	—	—	—
Court orders directing compliance without contempt adjudication	11	6	5	0	—	26.0	71.0	—	—	—	—
Contempt petitions withdrawn without compliance	1	1	0	0	—	4.0	0.0	—	—	—	—
Proceedings decided by U S Supreme Court[3]	2	1	0	0	1	100.0	—	—	100.0	250	100.0
Board orders affirmed in full	2	1	0	0	1	100 0	—	—	100.0	151	60.4
Board orders affirmed with modification	0	0	0	0	0	—	—	—	—	18	7.2
Board orders set aside	0	0	0	0	0	—	—	—	—	43	17.2
Remanded to Board	0	0	0	0	0	—	—	—	—	19	7.6
Remanded to court of appeals	0	0	0	0	0	—	—	—	—	16	6 4
Board's request for remand or modification of enforcement order denied	0	0	0	0	0	—	—	—	—	1	0.4
Contempt cases remanded to court of appeals	0	0	0	0	0	—	—	—	—	1	0.4
Contempt cases enforced	0	0	0	0	0	—	—	—	—	1	0 4

[1] "Proceedings" are comparable to "cases" reported in annual reports prior to fiscal 1964. This term more accurately describes the data inasmuch as a single "proceeding" often includes more than one "case." See Glossary of terms for definitions.

[2] A proceeding in which the Board had entered an order dismissing the complaint and the charging party appealed such dismissal in the courts of appeals.

[3] The Board appeared as "amicus curiae" in one case.

Table 19A.—Proceedings Decided by Circuit Courts of Appeals on Petitions for Enforcement and/or Review of Board Orders, Fiscal Year 1991, Compared With 5-Year Cumulative Totals, Fiscal Years 1986 Through 1990[1]

Circuit courts of appeals (headquarters)	Total fiscal year 1991	Total fiscal years 1986–1990	Affirmed in full				Modified				Remanded in full				Affirmed in part and remanded in part				Set aside			
			Fiscal year 1991		Cumulative fiscal years 1986–1990		Fiscal Year 1991		Cumulative fiscal years 1986–1990		Fiscal Year 1991		Cumulative fiscal years 1986–1990		Fiscal Year 1991		Cumulative fiscal years 1986–1990		Fiscal Year 1991		Cumulative fiscal years 1986–1990	
			Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total all circuits	178	903	136	76.4	696	77.1	12	6.7	48	5.3	10	5.6	52	5.8	6	3.4	30	3.3	14	7.9	77	8.5
1. Boston, MA	4	27	2	50.0	22	81.5	1	25 0	0	——	0	——	1	3.7	0	——	0	——	1	25.0	4	14.8
2. New York, NY	16	112	11	68 7	91	81.2	2	12.5	5	4.5	3	18.8	5	4.5	0	——	1	0 9	0	——	10	8.9
3. Phila., PA	15	103	14	93.3	96	93.2	1	6.7	1	1.0	0	——	3	2.9	0	——	2	1 9	0	——	1	1.0
4. Richmond, VA	15	63	7	46.7	47	74.6	2	13.3	5	7.9	3	20.0	1	1.6	0	——	1	1.6	3	20.0	9	14.3
5. New Orleans, LA	11	46	8	72.7	35	76.1	1	9.1	3	6.5	1	9 1	2	4.4	1	9.1	3	6.5	0	——	3	6.5
6. Cincinnati, OH	34	147	26	76.5	104	70.7	2	5.9	12	8.2	1	2.9	5	3.4	2	5.9	6	4.1	3	8 8	20	13.6
7. Chicago, IL	21	85	18	85 7	66	77.6	2	9.5	2	2.4	0	——	8	9.4	0	——	2	2 4	1	4.8	7	8.2
8. St. Louis, MO	10	43	6	60.0	31	72.1	0	——	6	14.0	0	——	0	——	0	——	1	2 3	4	40.0	5	11.6
9. San Francisco, CA	22	141	19	86 4	114	80.8	0	——	5	3.6	1	4.5	13	9.2	2	9.1	5	3 6	0	——	4	2.8
10. Denver, CO	5	22	4	80.0	16	72.7	0	——	2	9.1	0	——	1	4.6	0	——	0	——	1	20.0	3	13.6
11 Atlanta, GA	5	35	5	100.0	29	82.8	0	——	1	2.9	0	——	1	2.9	0	——	0	——	0	——	4	11.4
Washington, DC	20	79	16	80.0	45	56.9	1	5.0	6	7.6	1	5.0	12	15.2	1	5.0	9	11 4	1	5.0	7	8.9

[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 1991

	Total proceedings	Injunction proceedings		Total dispositions	Disposition of injunctions						Pending in district court Sept. 30, 1991
		Pending in district court Oct. 1, 1990	Filed in district court fiscal year 1991		Granted	Denied	Settled	Withdrawn	Dismissed	Inactive	
Under Sec. 10(e) total	[1]0	0	0	0	0	0	0	0	0	0	0
Under Sec. 10(j) total	37	5	32	27	12	4	11	0	0	0	10
8(a)(1)	3	1	2	2	0	0	2	0	0	0	1
8(a)(1)(3)	8	1	7	5	3	1	1	0	0	0	3
8(a)(1)(5)	7	1	6	6	4	0	2	0	0	0	1
8(a)(1)(2)(3)	1	1	0	0	0	0	0	0	0	0	1
8(a)(1)(2)(5)	3	0	3	0	0	0	0	0	0	0	3
8(a)(1)(3)(4)	1	0	1	1	0	0	1	0	0	0	0
8(a)(1)(3)(5)	5	0	5	5	2	1	2	0	0	0	0
8(a)(1)(3)(4)(5)	5	0	5	4	2	0	2	0	0	0	1
8(b)(1)(A)	2	1	1	2	1	1	0	0	0	0	0
8(b)(1)(2)	1	0	1	1	0	0	1	0	0	0	0
8(b)(3)	1	0	1	1	0	1	0	0	0	0	0
Under Sec. 10(l) total	31	8	23	24	9	0	3	3	2	7	7
8(b)(4)(A)	4	2	2	3	0	0	0	0	1	2	1
8(b)(4)(B)	16	4	12	12	5	0	0	3	0	4	4
8(b)(4)(D)	4	0	4	3	0	0	3	0	0	0	1
8(b)(7)(B)	3	0	3	3	3	0	0	0	0	0	0
8(b)(7)(C)	3	1	2	3	1	0	0	0	1	1	0
8(e)	1	1	0	0	0	0	0	0	0	0	1

[1] In courts of appeals.

Table 21.—Special Litigation Involving NLRB; Outcome of Proceedings in Which Court Decisions Issued in Fiscal Year 1991

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	23	23	0	9	9	0	13	13	0	1	1	0
NLRB-initiated actions or interventions	1	1	0	0	0	0	0	0	0	1	1	0
To enforce subpoena	0	0	0	0	0	0	0	0	0	0	0	0
To defend Board's jurisdiction	1	1	0	0	0	0	0	0	0	1	1	0
To prevent conflict between NLRA and other statutes	0	0	0	0	0	0	0	0	0	0	0	0
To stay collateral action	0	0	0	0	0	0	0	0	0	0	0	0
Action by other parties	22	22	0	9	9	0	13	13	0	0	0	0
To review settlement agreements	0	0	0	0	0	0	0	0	0	0	0	0
To review nonfinal orders	0	0	0	0	0	0	0	0	0	0	0	0
To restrain NLRB from	0	0	0	0	0	0	0	0	0	0	0	0
Proceeding with 10(e) application	0	0	0	0	0	0	0	0	0	0	0	0
Proceeding in R case	0	0	0	0	0	0	0	0	0	0	0	0
Proceeding in unfair labor practice case	0	0	0	0	0	0	0	0	0	0	0	0
Enforcing subpoena	0	0	0	0	0	0	0	0	0	0	0	0
Other application of Rule	0	0	0	0	0	0	0	0	0	0	0	0
To compel NLRB to	18	18	0	6	6	0	12	12	0	0	0	0
Take action in C case	0	0	0	0	0	0	0	0	0	0	0	0
Issue complaint or prosecute complaint	11	11	0	4	4	0	7	7	0	0	0	0
Take action in R case	0	0	0	0	0	0	0	0	0	0	0	0
Comply with Freedom of Information Act (FOIA)[1]	5	5	0	2	2	0	3	3	0	0	0	0
Other—Testify in D.C. Ct. action	0	0	0	0	0	0	0	0	0	0	0	0
Other—Provide evidence in priv. lawsuit	2	2	0	0	0	0	2	2	0	0	0	0
Comply with subpoena	0	0	0	0	0	0	0	0	0	0	0	0

Table 21.—Special Litigation Involving NLRB; Outcome of Proceedings in Which Court Decisions Issued in Fiscal Year 1991—Continued

Type of litigation	Number of proceedings											
	Total—all courts			In courts of appeals			In district courts			In bankruptcy courts		
	Number decided	Court determination		Number decided	Court determination		Number decided	Court determination		Number decided	Court determination	
		Upholding Board position	Contrary to Board position		Upholding Board position	Contrary to Board position		Upholding Board position	Contrary to Board position		Upholding Board position	Contrary to Board position
Other	4	4	0	3	3	0	1	1	0	0	0	0
Application for EAJA fees	2	2	0	2	2	0	0	0	0	0	0	0
Nash Finch complaint	1	1	0	1	1	0	0	0	0	0	0	0
Rule making court approval	0	0	0	0	0	0	0	0	0	0	0	0
Contempt of discovery in FOIA	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 1991[1]

	Total	Number of cases			
		Identification of petitioner			
		Employer	Union	Courts	State boards
Pending October 1, 1990	2	2	0	0	0
Received fiscal 1991	8	6	2	0	0
On docket fiscal 1991	10	8	2	0	0
Closed fiscal 1991	10	8	2	0	0
Pending September 30, 1991	0	0	0	0	0

[1] See Glossary of terms for definitions.

Table 22A.—Disposition of Advisory Opinion Cases, Fiscal Year 1991[1]

Action taken	Total cases closed
	10
Board would assert jurisdiction	6
Board would not assert jurisdiction	0
Unresolved because of insufficient evidence submitted	0
Dismissed	1
Withdrawn	1
Denied	2

[1] See Glossary of terms for definitions.

Table 23.—Time Elapsed for Major Case Processing Stages Completed, Fiscal Year 1991; and Age of Cases Pending Decision, September 30, 1991

Stage	Median days
I. Unfair labor practice cases:	
A. Major stages completed—	
1. Filing of charge to issuance of complaint	52
2. Complaint to close of hearing	163
3. Close of hearing to issuance of administrative law judge's decision	185
4. Administrative law judge's decision to issuance of Board decision	266
5. Filing of charge to issuance of Board decision	586
B. Age[1] of cases pending administrative law judge's decision, September 30, 1991	289
C. Age[1] of cases pending Board decision, September 30, 1991	712
II. Representation cases:	
A. Major stages completed—	
1. Filing of petition of notice of hearing issued	8
2. Notice of hearing to close of hearing	14
3. Close of hearing to—	
Board decision issued	247
Regional Director's decision issued	23
4. Filing of petition to—	
Board decision issued	307
Regional Director's decision issued	45
B. Age[2] of cases pending Board decision, September 30, 1991	152
C. Age[2] of cases pending Regional Director's decision, September 30, 1991	124

[1] From filing of charge.
[2] From filing of petition.

Table 24.—NLRB Activity Under the Equal Access to Justice Act, Fiscal Year 1991

I Applications for fees and expenses before the NLRB·	
A. Filed with Board	12
B. Hearings held	0
C. Awards ruled on.	
1. By administrative law judges:	
Granting	1
Denying	5
2. By Board:	
Granting	0
Denying	5
D. Amount of fees and expenses in cases ruled on by Board:	
Claimed	$561,522.06
Recovered	$28,400.00
II. Applications for fees and expenses before the circuit courts of appeals·	
A. Awards ruled on.	
Granting	1
Denying	1
Settling	1
B. Amounts of fees and expenses recovered pursuant to court award	$32,532.15
III. Applications for fees and expenses before the district courts·	
A. Awards ruled on:	
Granting	0
Denying	0
Settling	0
B. Amounts of fees and expenses recovered pursuant to court award	0