

TWENTY-SIXTH
ANNUAL REPORT
OF THE
NATIONAL LABOR
RELATIONS BOARD

FOR THE FISCAL YEAR
ENDED JUNE 30

1961

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¹ Appointed Dec 1, 1961, to succeed William R Ringer

² Appointed Oct 15, 1961, to succeed Harold X Summers



LETTER OF TRANSMITTAL

NATIONAL LABOR RELATIONS BOARD,
Washington, D C , January 10, 1962

SIR As provided in section 3(c) of the Labor Management Relations Act, 1947, I submit herewith the Twenty-sixth Annual Report of the National Labor Relations Board for the fiscal year ended June 30, 1961, and, under separate cover, lists containing the cases heard and decided by the Board during this fiscal year, and the names, salaries, and duties of all employees and officers in the employ of under the supervision of the Board

Respectfully submitted

FRANK W McCULLOCH, *Chairman*

THE PRESIDENT OF THE UNITED STATES

THE PRESIDENT OF THE SENATE

THE SPEAKER OF THE HOUSE OF REPRESENTATIVES

Washington, D C



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I

Operations in Fiscal Year 1961

For 26 years the National Labor Relations Board has administered the National Labor Relations Act

The act has been amended, the agency has been altered, but the primary objective—to protect the public interest by sustaining stability of labor-management relations—has remained constant

Today the Board is a focal point for contending forces in the economic life of the Nation. There are 1,820 full-time Board employees, including some 1,150 in 28 regional offices. The number employed is noteworthy when compared to the 53 that made up the original Washington staff, and the 62 others in 21 field offices.

At the end of fiscal year 1961, the Board was composed of Chairman Frank W. McCulloch of Illinois and Members Philip Ray Rodgers of Maryland, Boyd Leedom of South Dakota, John H. Fanning of Rhode Island, and Gerald A. Brown of California. President John F. Kennedy filled two vacancies by appointing Mr. McCulloch and Mr. Brown, and at the same time designated Mr. McCulloch as Chairman. Mr. Stuart Rothman, of Minnesota, is the General Counsel.

1. Important Events

In fiscal 1961, the National Labor Relations Board delegated its decisional powers with respect to employee collective bargaining election cases to its 28 regional directors. This was a new procedural step—and one of the most important in Board history—made possible by the 1959 amendments to the act. The principal effect of this delegation was to permit regional directors to decide in their regions election cases that before the 1959 amendments had been ruled on only by the five-man Board in Washington.

This delegation includes decisions as to whether a question concerning representation exists, determination of appropriate bargaining unit, directions of elections to determine whether employees wish union representation for collective-bargaining purposes, and rulings on other matters such as challenged ballots and objections to elections.

Announcing the delegation, Chairman McCulloch said

This delegation of decision making and other powers by the Board to its regional directors promises to be one of the most far-reaching steps the Board has ever taken with respect to its election cases. It should provide a major speedup in NLRB case handling in line with the policy of President Kennedy for the independent regulatory agencies.

Actions taken by regional directors under the delegation are final, subject to discretionary review by the Board in Washington on restricted grounds. The Board's delegation covers not only employee petitions to select collective-bargaining representatives, but also employer petitions questioning representation, employee petitions to decertify unions, and petitions to rescind union-security authorizations.

In the delegation the Board provided that review of regional directors' decisions could be sought on these four grounds:

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

- 2 Where a regional director's decision on a substantial factual issue is clearly erroneous, and such error prejudicially affects the rights of a party

- 3 Where the conduct of the hearing in an election case or any ruling made in connection with the proceeding has resulted in prejudicial error

- 4 Where there are compelling reasons for reconsideration of an important Board rule or policy

The significance of this delegation was confirmed when the regional directors disposed of the first 52 cases in an average of 34 days from filing to direction of election. In the previous 6 months 1,055 cases were processed, from filing in the regions to decision by the Board in Washington, in an average of 113 days.

During fiscal 1961, the National Labor Relations Board moved its entire Washington staff into a new office building at 1717 Pennsylvania Avenue. Previously the staff was housed in two widely separated locations. The move to a single headquarters building was made to aid the agency in carrying out increased responsibilities brought about by a greater workload and the 1959 amendments to the act. To serve the public better, the Board also established a new regional office at Albuquerque, New Mexico, and raised the subregional office at Denver to the status of regional office.

In dealing with the major aspects of the 1959 amendments, the Board heard oral argument and rendered decisions in cases dealing with recognition and organizational picketing, "hot cargo" contracts,

and secondary boycotts. Additionally, the Board issued landmark decisions in cases in other significant areas.

One outstanding case of international interest arose out of a maritime controversy over the campaign by American sea unions to organize crews of domestically owned, foreign registry ships. The Board decided that the National Labor Relations Act applies to American-owned ships flying foreign flags manned by nonresident, alien crews, operating regularly from U.S. harbors. In this decision the Board majority relied upon a Supreme Court decision which set forth guidelines in determining the application of domestic statutes with general jurisdictional provisions to shipping operations having foreign aspects.

A noteworthy fiscal 1961 decision was issued in the United Auto Workers-Kohler Co. case. This was one of the longest and most extensively litigated cases in the history of the Board. Charges of unfair labor practices were filed by the union against the company following a strike by Local 833 of the UAW that began April 5, 1954.

The written record in this case, compiled in hearings conducted at intervals over 4 years, formed a stack of documents 16 feet high. The transcript consisted of more than 20,000 pages. There were 1,900 exhibits.

In its decision, the Board directed the Kohler Co. to bargain collectively with Local 833. The Board held that Kohler had failed to bargain in good faith with the UAW by a series of unfair labor practices after a 54-day shutdown of the company plant.

In this same decision the Board found that 77 employees had been legally discharged for unlawful activities on the picket lines and at the homes of nonstriking employees.

In a major fiscal 1961 decision, the Board unanimously declined to narrow the scope of the 1959 Landrum-Griffin amendments' ban on secondary boycotts. The Board held that secondary employers affected by boycott picketing of multiemployer construction sites are "in commerce" within the meaning of the 1959 amendments.

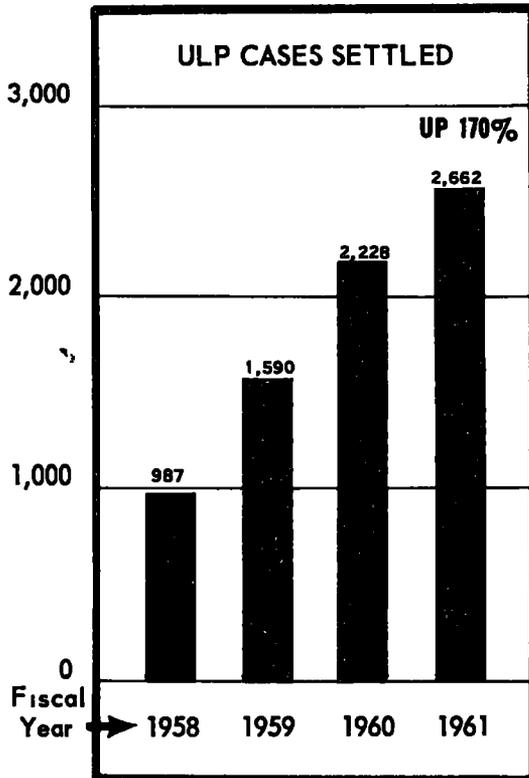
The Board made clear that it would not construe the 1959 amendments in a manner that would allow jurisdictional exclusions to legalize secondary boycotts against smaller concerns. Instead, it held it will decide future secondary boycott cases on a broad interpretation of the new statutory language of "industry affecting commerce" and "in commerce" to "fulfill the manifest congressional purpose to give the widest coverage to secondary boycott provisions."

Congress plainly, the Board said, intended to tighten its prohibition of boycott efforts directed against any employer not directly involved in a labor dispute to induce him to cease doing business with the employer in the primary labor dispute.

A Board record was established in the collection by the regional offices, under supervision of General Counsel Rothman, of backpay in the amount of \$1,508,900 for employees discharged or laid off because of their union activities. These fiscal 1961 collections were up 32 percent from the \$1,139,810 collected in the previous fiscal year and the number of employees offered reinstatement after illegal discharge was nearly doubled. The 1961 collection represents an increase of 98 percent over the \$761,933 collected in fiscal 1958 and an increase of almost 68 percent over the \$900,110 collected in fiscal 1959.

General Counsel Rothman reported that 2,662 unfair labor practice cases were closed in fiscal year 1961 through voluntary agreement of the parties involved. This was an increase of 170 percent since fiscal 1958 and was the greatest number of such settlements in NLRB history, except for one year, 1938.

Chart No 1



In commenting on this, Mr Rothman said "Voluntary and honorable settlement, uncoerced by anyone in any way, is an important part of the picture of relieving the administrative and judicial processes

of unnecessary litigation and giving it more time to do better the remaining part of the job”

After 26 years the Board continues to have pressing problems This was noted in a statement by Chairman McCulloch before the United States Senate Subcommittee on Administrative Practice and Procedure concerning S 1734 (to amend sections 7 and 8 of the Administrative Procedure Act) when the Chairman stated

The notorious and chronic problem of delay is the source of greatest aggravation to the Board It is by all odds the ground for most of the criticism and complaints against the Board

As a result of the inevitable delay resulting from the constantly increasing caseload (unfair labor practice case filings more than doubled in the last 5 years—from 5,506 in fiscal 1957 to 12,132 in fiscal 1961) it is not surprising that the backlog of contested cases at the Board has also mounted by leaps and bounds The figures for unfair labor practice cases at the Board level undecided at the end of the last 3 fiscal years make this point quite clearly

Unfair Labor Practice Cases on Hand End of Fiscal Year

<i>Year</i>	<i>Cases</i>
1959-----	196
1960-----	312
1961-----	443

In the latter part of fiscal 1961, Hon Roman C Pucinski, of Illinois, was named Chairman of the Ad Hoc Subcommittee, Committee on Education and Labor, House of Representatives, to study the operations, practices, and procedures of the National Labor Relations Board Hearings were conducted at intervals during a period of 8 weeks

On August 27, 1960, the National Labor Relations Board observed the 25th anniversary of its establishment An anniversary dinner was attended by more than 800 persons

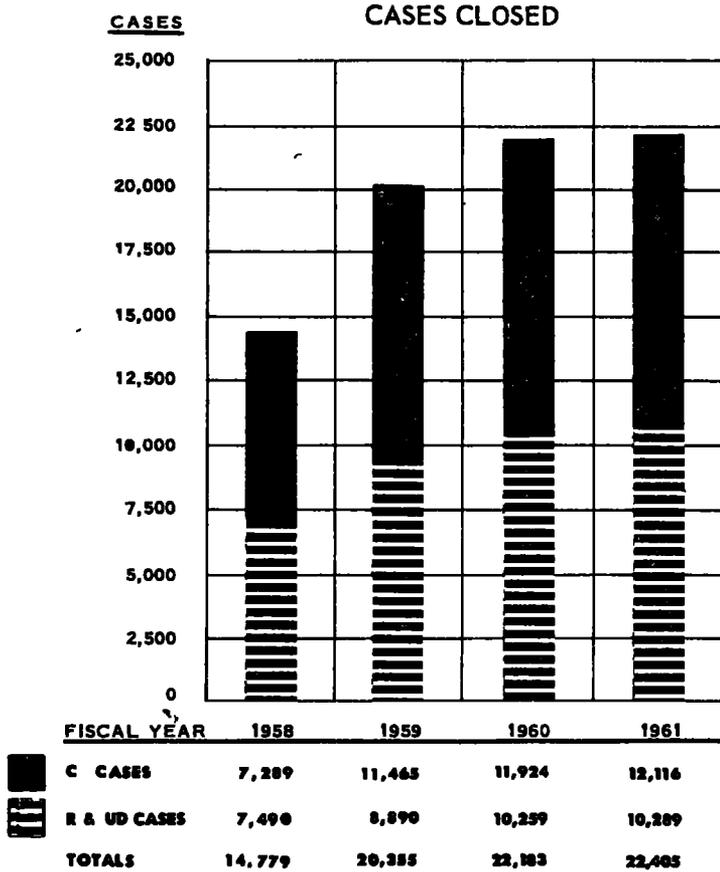
During 1961, President John F Kennedy submitted to Congress Reorganization Plan No 5, which had unanimous Board support The purpose of Plan No 5 was to provide speedier processing of unfair labor practice cases by delegating decisional functions to the Board's trial examiners, subject to the provisions of section 7(a) of the Administrative Procedure Act However, Plan No 5 reserved to the Board the right to review any such delegated action or decision upon the motion of two or more Board Members, either on their own initiative or in response to a request for review by a party or intervenor Plan No 5 was rejected by a House vote

2. Highlights of Agency Activities

Fiscal 1961 brought an expansion in NLRB activities in many areas of operation The agency was able to process a greater volume of cases on an accelerated schedule

The National Labor Relations Board increased the number of cases brought to a close at all stages during the year. In the past 12-month period, a record 22,405 cases were closed.

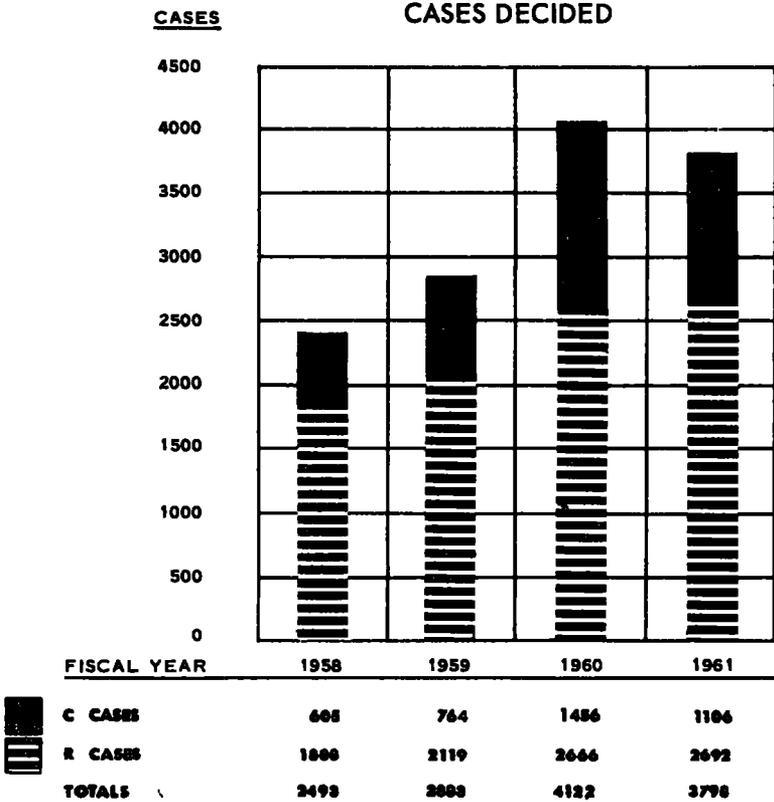
Chart No 2



The 22,691 new cases filed represented a 5-percent increase over the previous year. These new cases consisted of 12,132 charges of unfair labor practices filed, an increase of 7 percent, 10,559 representation election cases, an increase of 4 percent. The 51 requests to conduct union-shop deauthorization polls (UD cases) represented a 28-percent increase.

In fiscal 1961 a total of 3,746 cases of all types went to decision by the Board Members, 2,640 of these decisions were issued in representation cases, an alltime high. An additional 52 decisions were issued in representation cases by regional directors. A total of 1,106 unfair labor practice cases were brought to Board decision.

Chart No 3



The 3,798 cases that went to decision actually resulted in 3,103 decisions. This was an increase of 33 decisions over fiscal 1960. Of this number, the 1,106 unfair labor practice cases resulted in 636 such type decisions, or an increase of 10 over the number issued in fiscal 1960, the 2,692 representation cases going to decision resulted in 2,467 such type decisions or an increase of 23 decisions over the number issued in fiscal 1960. While the technical "case" figures showed a decline, the basic "decision" figures followed the pattern of a steadily rising workload.

The great bulk of cases filed with the NLRB are handled to conclusion in various stages without reaching Board Members for their consideration and decision.

Individuals filed almost half of the unfair labor practice charges in fiscal 1961. Individual filings accounted for 47 percent of the total, charges by unions 39 percent, and by employers 14 percent.

The year was an outstanding one in several aspects

A Largest number of new cases filed in the 26-year history of the NLRB—22,691

B Largest number of representation cases filed—10,559

C 12,132 unfair labor practice charges filed, covering a record number of case situations

D Decisions in 3,254 contested cases disputing the facts or the law, a new record

E Record total of 12,116 unfair labor practice cases handled to conclusion—by decision, settlement, withdrawal, or dismissal

F Hearings in all classes of cases numbered 3,983

G 22,405 cases closed, the largest number in NLRB history

H Trial examiner hearings conducted in 1,047 unfair labor practice cases, and findings and recommendations of remedies issued in 1,056 cases

I Formal complaints issued by the General Counsel in 1,621 unfair labor practice cases for a total of 1,161 complaints

J Record total of 256 petitions for injunctions—255 mandatory filings required under the act and 1 discretionary petition, compared with 219 and 5 in fiscal 1960

K More backpay—\$1,508,900—recovered for employees, a 32-percent increase over fiscal 1960

L 2,507 employees offered reinstatement, up 33 percent over the preceding fiscal year

M 2,662 unfair labor practice charges disposed of by settlement, 19 percent more than in fiscal 1960

To facilitate case processing and provide increased service to the public, two new regional offices of the NLRB were established during the fiscal year, and the legal staffs of the Board Members and the Office of the General Counsel were augmented. The Division of Trial Examiners reached its greatest strength.

Regional offices were created as follows: Denver, Colorado, on October 12, 1960, and Albuquerque, New Mexico, on March 28, 1961. Previously, these cities had been the location of subregional or resident offices. The NLRB at the close of fiscal 1961 had 28 regional offices and 2 subregional offices.

It is in the regional offices that unfair labor practice charges and representation petitions are filed. The regional office staffs, among other responsibilities, make case investigations and conduct representation elections. The heavy majority of these elections are for the purpose of determining whether employees in appropriate units shall have a collective-bargaining representative.

During fiscal 1961 NLRB agents supervised 6,595 representation elections and 15 union-shop deauthorization elections.

3 Management Improvement Program

The Office of the General Counsel during the preceding fiscal year, 1960, substantially reduced at all case-handling stages a record backlog of pending cases. At the same time the office undertook a comprehensive and sustained management drive as the best hope of constructive administrative improvement and a means of staying abreast of an increasing caseload. This brought the accomplishment of one of the major objectives of the administrative process—to do the work currently and well in the face of an ever-increasing workload.

In fiscal 1961, the Office of the General Counsel inaugurated Operation Challenge II. This program represents another step in the continuing search for improved methods of solving everyday problems and the expeditious handling of novel situations as they arise.

Chart No 4

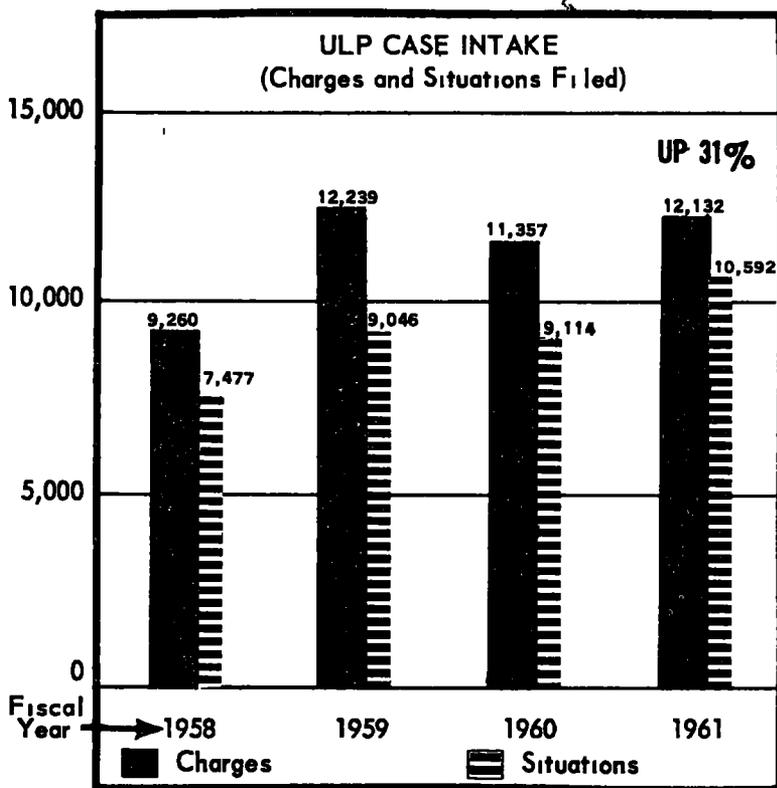
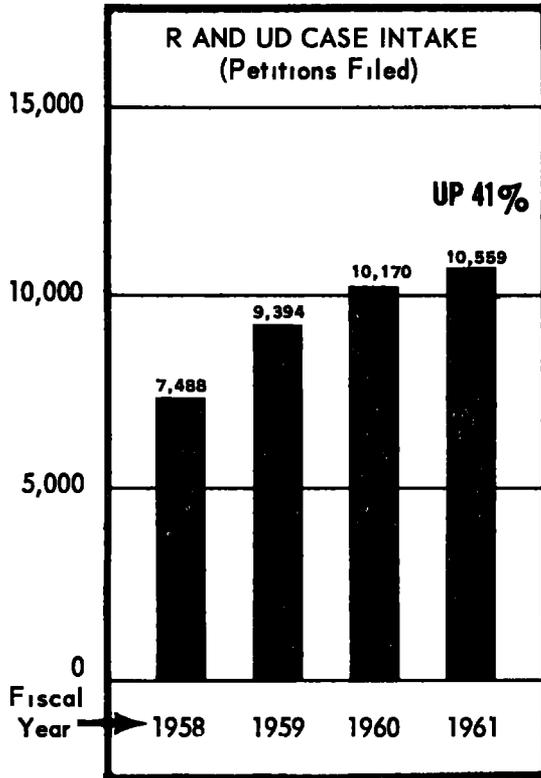


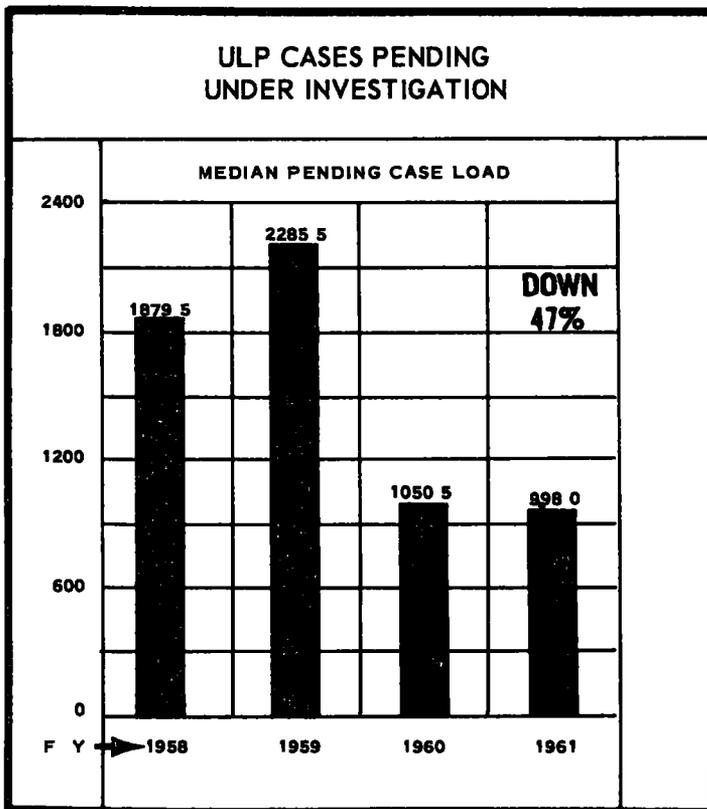
Chart No 5



The total caseload of the Board and the General Counsel's office in fiscal 1961 was the greatest in the agency's history 22,691 cases. Case intake (unfair labor practice charges and election petitions filed) has been steadily rising in recent years. Unfair labor practice charges rose from 9,260 in fiscal year 1958 to 12,132 in fiscal 1961, an increase of 31 percent. Petitions for election increased from 7,488 in fiscal 1958 to 10,559 in fiscal 1961, an increase of 41 percent.

The time required for regional investigation of unfair labor practice cases, reduced the previous year, continued at a reduced level in fiscal 1961. In both fiscal years 1960 and 1961, with but few exceptions, charges were investigated and determinations made within 30 days of filing as to whether complaints should issue.

Chart No 6

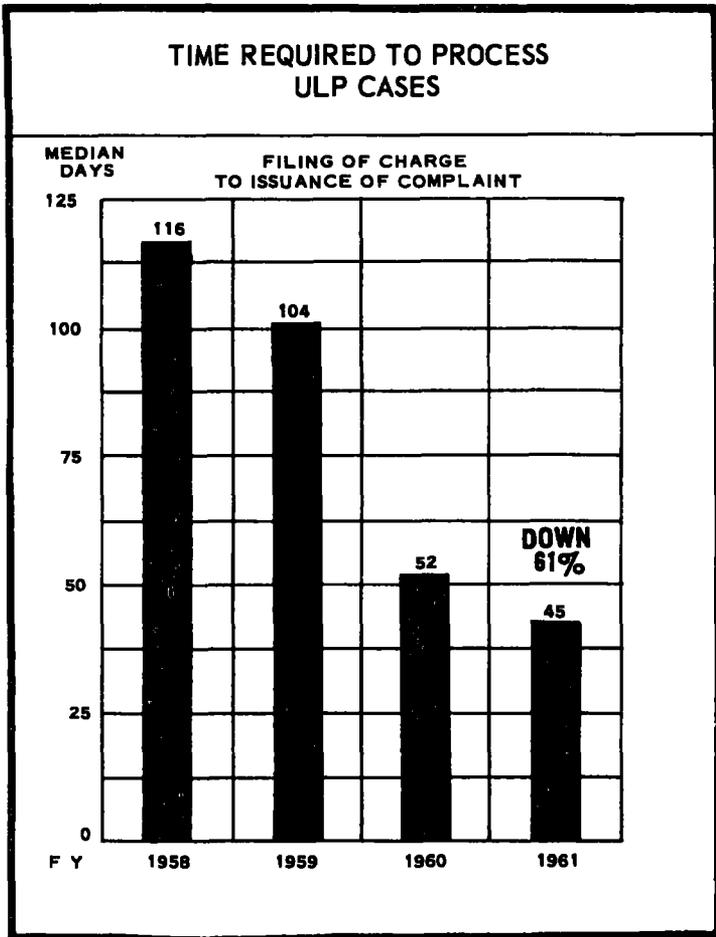


The average number of cases pending under investigation from month to month dropped from a high of 2,286 in fiscal 1959 to 998 in fiscal 1961. This reduction put case handling on a current basis since unfair labor practice case intake now averages a thousand per month.

In the past, with excessive backlogs, case investigations often did not start for 60 to 90 days. Today an investigation is begun in every instance within 7 days.

The average time required to proceed from filing of charge to issuance of a complaint in fiscal 1961 was 45 days. This represents a 61-percent reduction from fiscal 1958 when the average time required was 116 days. This time could be shortened, but a 15-day precomplaint period is included to give the contesting parties an opportunity to settle the case voluntarily without invoking formal processes.

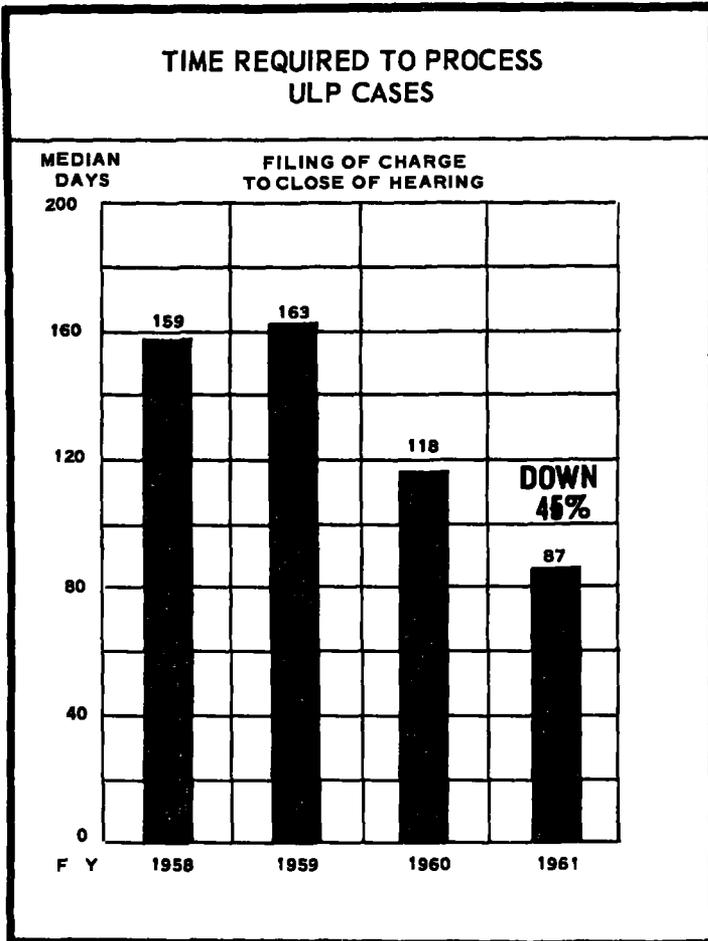
Chart No 7



The total time required to proceed from the filing of charge to close of hearing before a trial examiner in fiscal 1961 was an average of 87 days, a reduction of 45 percent from the 159 days required in fiscal 1958. The time goal for this phase of regional case handling is 90 days. Success in meeting this objective, in large part, depends upon the receipt of an early hearing date from the Division of Trial Examiners. With the trial examiner's cooperation, the spread in the calendar of hearing dates was reduced from 14 weeks to approximately 6 or 7 weeks.

In 1958 the average case submitted to Washington for advice did not return to the region for 30 days. In fiscal 1961, Washington

Chart No 8



advice action required an average of only 11 days. The time objective is 10 days. All cases with statutory priority were handled in a much shorter period than 10 days.

Appeals from regional directors' dismissals of charges also are processed in substantially less time today than in 1958. In that year, the average case was in Washington 75 days before final action was taken. In fiscal 1961, the average appeals case was processed in approximately 15 days.

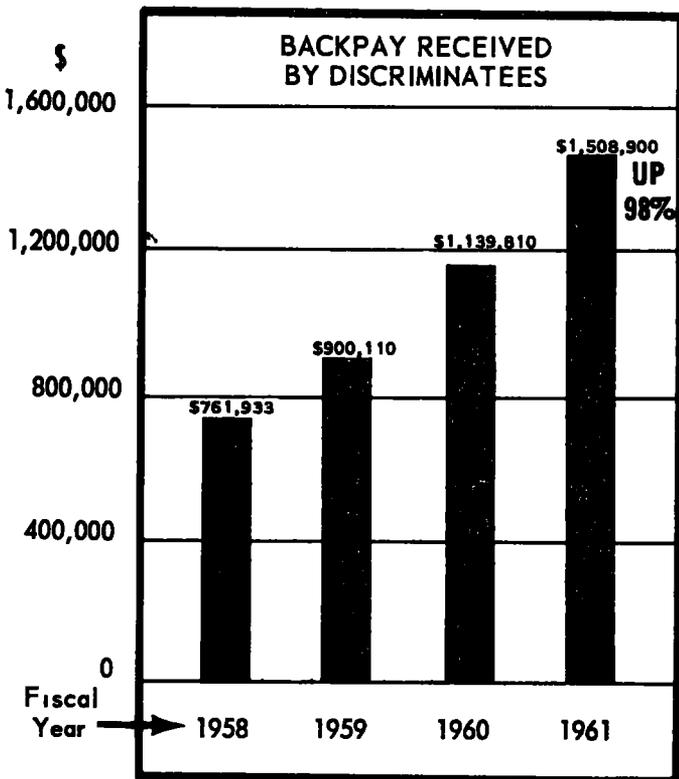
The time required to process representation cases has been reduced in recent years. In 1958, hearing closed in an average of 28 days after filing of the petition. In fiscal 1960 and again in fiscal 1961 the time required was 24 days.

Noteworthy in this connection has been the reduction in the time required to produce the regional director's report on objections and challenges to elections. From 63 days in fiscal 1958, the average time required to produce the regional director's report dropped over 50 percent to a low of 30 days in fiscal 1961. As of June 30, 1961, there were only three cases delayed beyond the time goal of 35 days.

In fiscal 1960 and 1961, emphasis was placed upon increasing prompt and voluntary compliance with decisions of the Board and the courts on a fair and reasonable basis. To achieve this end, the compliance function was decentralized to the regions. In each regional office a compliance officer was appointed and a compliance unit was established.

Reasonable and flexible operational schedules for the processing of compliance cases were established. This program was placed in operation in fiscal 1961, and within a few months showed improved performance in this field. In February 1961, 140 cases were reported "overage." In June 1961 the figure had declined to 42, a reduction of 70 percent in a space of 5 months.

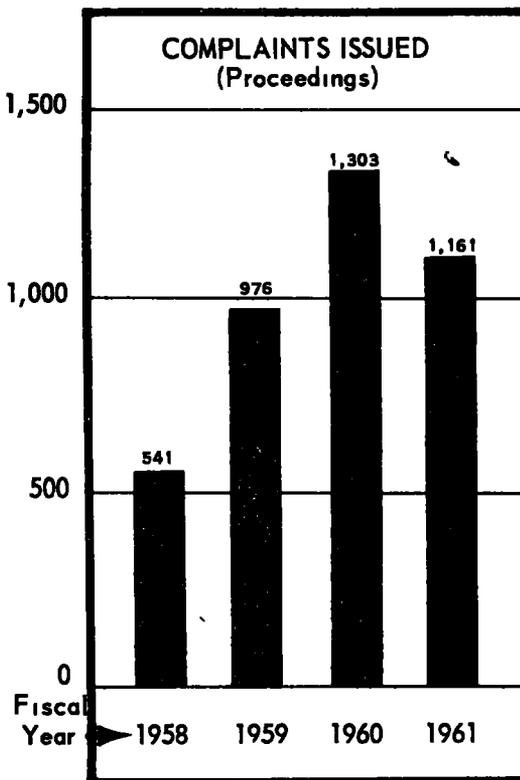
Chart No 9



Progress in compliance is best reflected in the amount of backpay paid by respondents and the number of discriminatees offered reinstatement. The total amount collected in fiscal 1961 was \$1,508,900, an increase of some \$369,000 over the 1960 high of \$1,139,810. The number of employees offered reinstatement in 1961 totaled 2,507, as opposed to 1,885 for fiscal 1960.

Over the past 4 years, the number of unfair labor practice cases disposed of by settlement agreement has more than doubled. The rise is significant in the light of an increased intake of 31 percent.

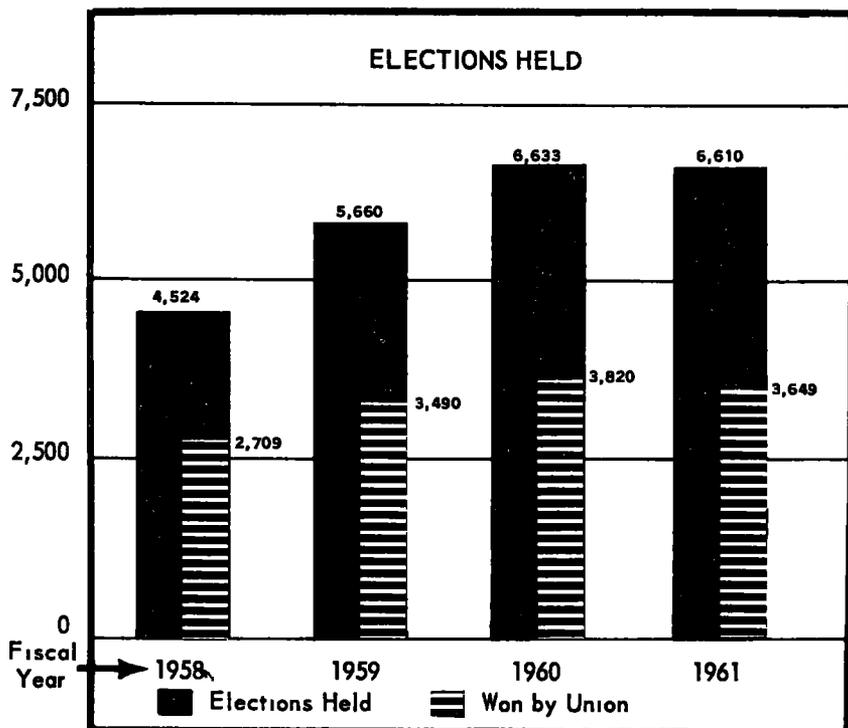
Chart No 10



In fiscal 1961, 1,161 complaints were issued, a 115-percent increase over fiscal 1958. Fiscal 1960 continues to be the peak complaint year, caused in part by meeting and reducing the then-existing case backlog. Importantly, in fiscal 1961, the significant rise in the number of voluntary settlements in the precomplaint period played a part in reducing the number of complaints issued.

The number of elections held in fiscal 1961, 6,610, nearly equaled the number held in the previous year—a 46-percent increase over fiscal 1958. Affiliated and unaffiliated unions won 55 percent of the elections in which they participated.

Chart No 11



The percentage of elections resulting from voluntary agreement of the parties to proceed to an immediate election has been quite stable in these past 4 years, fluctuating between 70 and 73 percent.

From month to month, the success of cases litigated before trial examiners and the Board runs approximately 77 percent, enforcement, in whole or in part, of Board cases reviewed by the circuit courts approximately 71 percent, and injunctions granted by the district courts in cases litigated to final order approximately 88 percent.

Fewer cases were won before the trial examiners, the Board, and the courts in fiscal 1961 than in fiscal 1960. Again, the success of the settlement programs is reflected here. Parties now show a greater willingness to settle cases in which little doubt exists as to the alleged violations, but still reserve for the Board and the courts cases involving novel or complex issues of fact and law.

With respect to 10(1) injunctions granted during the 1958-61 period, the Office of the General Counsel was sustained in whole or substantial part by the Board and the courts in approximately 94 percent of the decisions

a. Regional Advisory Conferences

During fiscal 1960 the Office of the General Counsel initiated its program of regional advisory conferences patterned after the Federal judicial conferences. Participating in these conferences were labor and management lawyers, labor-management specialists, industrial relations educators, and NLRB officials. These conferences were continued in fiscal 1961. This idea in improved communication and understanding at the regional level has been well received.

4. Decisional Activities of the Board

The Board Members issued decisions in 3,798 cases of all types. This number included the 52 decisions by regional directors. Of these cases, 3,254 were brought to the Board on contest over either the facts or the application of the law, 766 were unfair labor practice cases, and 2,488 were representation cases. The remaining 544 cases were uncontested, in these, the Board issued orders to which the parties had consented or made rulings as to conduct of elections held by agreement of the parties.

In the representation cases, the Board directed elections in 2,166 cases. Regional directors directed 52 elections and 270 petitions for elections were dismissed.

Of the 766 contested unfair labor practice cases, 543, or 71 percent, involved charges against employers, 223, or 29 percent, involved charges against unions. The Board found violations in 585 cases, or 76 percent.

The Board found violations by employers in 411, or 76 percent of the 543 cases against employers. In these cases, the Board ordered employers to reinstate a total of 968 employees and to pay backpay to a total of 1,183 employees. Illegal assistance or domination of labor organizations was found in 53 cases and ordered stopped. In 67 cases the employer was ordered to undertake collective bargaining.

The Board found violations by unions in 174 cases, or 78 percent of the 223 cases against unions. In 29 of these cases the Board found illegal secondary boycotts and ordered them halted. In 80 cases the Board ordered unions to cease requiring employers to extend illegal assistance. Nineteen other cases involved the illegal discharge of employees, and backpay was ordered for 82 employees. In the case of 41 of these employees found to be entitled to backpay, the employer,

who made the illegal discharge, and the union, which caused it, were held jointly liable

5. Activities of the General Counsel

The statute gives the General Counsel the sole and independent responsibility for investigating charges of unfair labor practices, issuing complaints and prosecuting cases where his investigators find evidence of violation of the act

Also, under an arrangement between the five-member Board and the General Counsel, members of the agency's field staff function under the General Counsel's supervision in the preliminary investigation of representation and union-shop deauthorization cases. In the latter capacity, the field staffs in the regional offices have authority to effect settlements or adjustments in representation and union-shop deauthorization cases and to conduct hearings on the issues involved in contested cases. However, most decisions in contested cases of all types are ultimately made by the five-member Board.

Dismissals by regional directors of charges in unfair labor practice cases may be appealed to the General Counsel in Washington. Regional directors' dismissals in representation cases may be appealed to the Board Members.

a Representation Cases

The field staff closed 7,738 representation cases during the 1961 fiscal year without necessity of formal decision by the Board Members. This comprised 76 percent of the 10,242 representation cases closed by the agency.

Of the representation cases closed in the field offices, consent of parties for holding elections was obtained in 4,706 cases. Petitions were dismissed by the regional directors in 594 cases. In 2,438 cases, the petitions were withdrawn by the filing parties.

b Unfair Labor Practice Cases

The General Counsel's staff in the field offices closed 10,082 unfair labor practice cases without formal action, and issued complaints in 1,621 cases.

Of the 10,082 unfair labor practice cases which the field staff closed without formal action, 1,651, or 16 percent, were adjusted by various types of settlements, 3,539, or 35 percent, were administratively dismissed after investigation. In the remaining 4,892 cases, or 49 percent of the cases closed without formal action, the charges were withdrawn, in many of these cases, the withdrawals actually reflected settlement of the matter at issue between the parties.

During fiscal 1961, the regional offices issued complaints in 457 cases against unions, and in 1,164 cases against employers.

c. Types of Unfair Labor Practices Charged

The most common charge against employers continued to be that of illegally discriminating against employees because of their union activities or because of their lack of union membership. Employers were charged with having engaged in such discrimination in 6,240 cases filed during the 1961 fiscal year. This was 77 percent of the 8,136 cases filed against employers.

The second most common charge against employers was refusal to bargain in good faith with representatives of their employees. This was alleged in 1,676 cases, or 21 percent of the cases filed against employers.

A major charge against unions was illegal restraint or coercion of employees in the exercise of their rights to engage in union activity or to refrain from it. This was alleged in 2,181 cases, or 55 percent of the 3,939 cases filed against unions.

Discrimination against employees because of their lack of union membership was also alleged in 1,958 cases against unions, or 50 percent. Other major charges against unions alleged secondary boycott violation in 815 cases, or 21 percent, and refusal to bargain in good faith in 217 cases, or 6 percent.

d Division of Litigation

The Division of Litigation, which is located in the Washington Office of the General Counsel, is responsible for the handling of all court litigation involving the agency—in the Supreme Court, in the courts of appeals, and in the district courts.

During fiscal 1961, the Supreme Court handed down decisions in 10 cases involving Board orders. Two Board orders were enforced in full, one enforced with modification, four were set aside, one remanded to the Board, and two were remanded to the court of appeals.

The courts of appeals reviewed 148 Board orders during fiscal 1961. Of these 148 orders, 65 were enforced in full and 35 with modification, 4 were partially enforced and partially remanded to the Board, 13 were remanded to the Board, 31 orders were set aside.

Petitions for injunction in the district court reached an alltime high for the fourth consecutive year. Of the 256 petitions filed during the year, 255 were filed under the mandatory provision, section 10(1), of the act. One petition was filed under the discretionary provision, section 10(j).

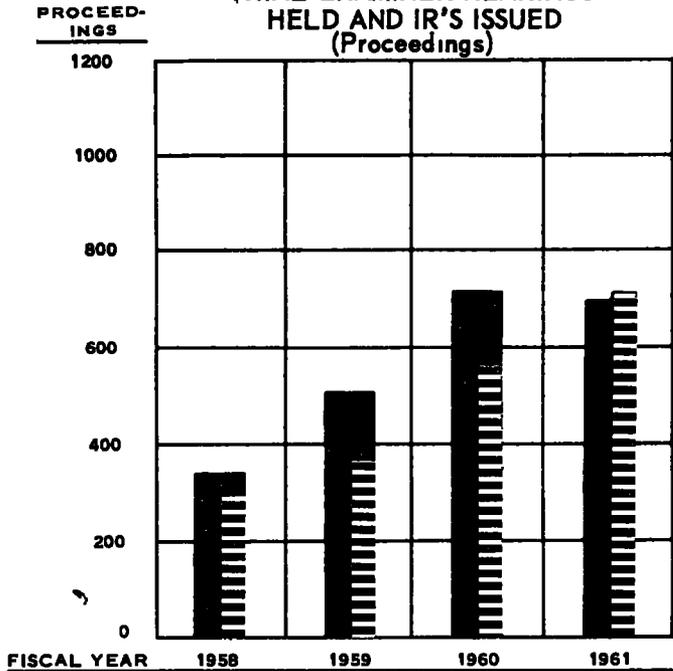
During the year, 71 petitions for injunctions were granted, 13 petitions were denied, 167 petitions were settled or placed on the courts' inactive docket, and 14 petitions were awaiting action at the end of the fiscal year.

6. Division of Trial Examiners

Trial examiners, who conduct hearings in unfair labor practice cases, held hearings in 1,047 cases during fiscal 1961, and issued intermediate reports and recommended orders in 1,056 cases. In fiscal 1961, the trial examiners issued 692 intermediate reports, a 21-percent increase from the 572 intermediate reports issued in fiscal 1960.

Chart No 12

TRIAL EXAMINER HEARINGS HELD AND IR'S ISSUED (Proceedings)



	HEARINGS HELD	383	513	758	690
	IR'S ISSUED	289	382	572	692

In 225 unfair labor practice cases which went to formal hearing, the trial examiners' findings and recommendations were not contested, these comprised 21 percent of the 1,056 cases in which trial examiners issued reports. In the preceding year, trial examiners' reports which were not contested numbered 233, or 19 percent of the 1,226 cases in which reports were issued.

7. Results of Representation Elections

The Board conducted a total of 6,595 representation elections during the 1961 fiscal year. This was a slight decrease from the 6,617 representation elections conducted in fiscal 1960.

Employees selected collective-bargaining agents in 3,643 of these elections. This figure represented 55 percent of the elections held. In fiscal 1960, employees selected collective-bargaining agents in 58 percent of elections.

In these representation elections, bargaining agents were chosen to represent units totaling 237,040 employees, or 51 percent of those eligible to vote. This compares with 59 percent in fiscal 1960, and 60 percent in fiscal 1959.

Of the 469,294 who were eligible to vote, 89 percent cast valid ballots.

Of the 419,914 employees actually casting valid ballots in Board representation elections during the year, 248,727, or 59 percent, voted in favor of representation.

Unions affiliated with the American Federation of Labor-Congress of Industrial Organizations won 2,229 of the 4,449 elections in which they took part. This was 50 percent of the elections in which they participated. In 1960, AFL-CIO-affiliated unions won 53 percent of the elections in which they participated. In 1959, the affiliated unions won 57 percent of the elections in which they participated.

Unaffiliated unions won 1,414 of 2,793 elections in which they participated. This was 51 percent of the elections in which the unaffiliated unions took part. This compared with 52 percent in 1960, and 54 percent in 1959.

8 Fiscal Statement

The obligations and expenditures of the National Labor Relations Board for fiscal year ended June 30, 1961, are as follows:

Personnel compensation.....	\$13, 690, 828
Personnel benefits.....	998, 453
Travel and transportation of persons.....	945, 564
Transportation of things.....	80, 979
Communication services.....	470, 045
Rents and utility services.....	575, 649
Printing and reproduction.....	333, 860
Other services.....	564, 973
Supplies and materials.....	216, 165
Equipment.....	135, 949
Total, obligations and expenditures.....	18, 012, 465

¹ Includes \$3,208 for reimbursable personal service costs

² Includes \$1,134 for reimbursable travel expense

These items of expense have always been included in the totals for the annual report. As a matter of reconciliation, the budget document presents the two types of expense separately, e.g., direct obligations and reimbursable obligations.

II

Jurisdiction of the Board

The Board's jurisdiction under the act, as to both representation proceedings and unfair labor practices, extends to all enterprises whose operations "affect" interstate or foreign commerce¹. However, Congress and the courts² have recognized the Board's discretion to limit the exercise of its broad statutory jurisdiction to enterprises whose effect on commerce is, in the Board's opinion, substantial—such discretion being subject only to the statutory limitation³ that jurisdiction may not be declined where it would be asserted under the Board's jurisdictional standards prevailing on August 1, 1959. The last general standards established by the Board prior to August 1, 1959, and prevailing on that date, were those announced on October 2, 1958⁴.

1. Statutory Jurisdiction and Jurisdictional Standards

Before the Board takes cognizance of a case, it must be shown first that the Board has legal or statutory jurisdiction, i.e., that the business operations involved "affect" commerce as required by the act. Secondly, it must also appear that the business operations meet the Board's applicable jurisdictional standards. During the past year, the Board reaffirmed its previous ruling⁵ that while a mere showing that the Board's gross dollar volume standards are met is insufficient to establish legal or statutory jurisdiction, no further proof

¹ See secs 9(c) and 10(a) of the act. Under sec 2(2), the term "employer" does not include the United States or any wholly owned Government corporation, any Federal Reserve Bank, any State or political subdivision, any nonprofit hospital, any person subject to the Railway Labor Act, or any labor organization other than when acting as an employer. A rider to the Board's appropriation also denies the use of its funds "to assist in organizing agricultural laborers" or in connection with "bargaining units of agricultural laborers" as defined in sec 3(f) of the Fair Labor Standards Act, including employees engaged in the maintenance and operation of "mutual nonprofit" water systems of which 95 percent of the water is used for farming.

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

³ Sec 14(c)(1) of the act.

⁴ Press Release (R-576) October 2, 1958. See also Twenty-third Annual Report (1958), p 8. For hotel and motel standards see also Press Release (R-586) January 11, 1959, and *Floridan Hotel of Tampa, Inc*, 124 NLRB 261 (July 30, 1959).

⁵ See Twenty-fifth Annual Report (1960), pp 19-20, and *Southwest Hotels, Inc*, 126 NLRB 1151 (1960).

of legal or statutory jurisdiction is necessary where it is shown that its "outflow-inflow" standards are met.⁶ The Board noted that an employer's operations could satisfy the gross dollar volume test, and yet be purely local in character. However, no such situation could arise under the "outflow-inflow" test, since in establishing this standard the Board had already concluded that when an employer's operations meet this standard "they substantially affect commerce within the meaning of the act."

2. Enterprises Subject to Board Jurisdiction

During fiscal 1961, the Board had occasion to determine its legal and discretionary jurisdiction over vessels of foreign registry, its legal jurisdiction over an enterprise engaged in servicing aircraft and charting flying service, the applicability of its jurisdictional standards for transit systems, communications systems, and office buildings to various enterprises, and whether it would assert jurisdiction over certain enterprises in the entertainment, real estate brokerage, and home building fields.

a Vessels of Foreign Registry

In *West India Fruit and Steamship Company, Inc.*,⁷ the Board was faced with the dual question as to (1) whether the act applies to an American owner's international seaborne operations of a cargo vessel under foreign registry, manned by nonresident foreign nationals, and operated regularly between the United States and a foreign port, and (2) whether the Board should exercise its jurisdiction over such operation, even if the act does apply.

The vessel, owned and operated by a United States corporation, was regularly and exclusively engaged as a cargo ferry transporting cargo in railroad boxcars between Belle Chasse, Louisiana, and Havana, Cuba, with a crew composed almost entirely of nonresident Cuban nationals hired in Havana. Although operating under Liberian registry, it had never been in Liberian waters, and had never carried cargo destined for, or originating in, Liberia. The Board, two Members dissenting,⁸ concluded that the act did apply to the shipping operations involved and that it could remedy the unfair labor practices committed against the crew on the high seas, in foreign territorial waters, and in a foreign port.

Rejecting the contention that the Board is without jurisdiction over these operations because of extraterritorial considerations, the Board majority observed that Congress has the power to regulate

⁶ *Southern Dolomite*, 129 NLRB 1342

⁷ 130 NLRB 343

⁸ Members Rodgers and Kimball

foreign-flag vessels engaged in the foreign commerce of this country, and if it chooses to do so, the general maritime law, including the flag-law doctrine, must give way to the extent it is in conflict with such a statute. Relying then on the guidelines enunciated by the Supreme Court in *Lauritzen v Larsen*⁹ for determining the applicability of domestic statutes to shipping operations having foreign aspects—by “ascertaining and valuing points of contact between the transactions and the governments whose competing laws are involved”—the majority found that the “substantial continuing foreign commerce and the American employer” constituted such “contacts” sufficiently substantial to warrant application of the act.

On the question of asserting jurisdiction as a matter of discretion, the majority rejected the contention that to apply the act to vessels of Panlibhon¹⁰ registry would adversely affect the defense policies of the United States by destroying the economic incentive of American shipowners to maintain and enlarge the “flag of convenience fleet.” It pointed out that to the extent the national defense was concerned it would be a factor warranting the exercise of jurisdiction, not one supporting the contrary view, in light of the expressed policy of Congress that the application of the act is beneficial and desirable to facilitate the free flow of commerce and to eliminate the cause of certain obstructions to commerce. It noted, moreover, that on the basis of two decisions issued by the Board prior to August 1, 1959,¹¹ which have never been overruled or modified, the Board would assert jurisdiction on August 1, 1959, over an employer operating foreign-flag vessels—assuming statutory jurisdiction—if its annual gross income from its interstate or foreign commerce was, as here, \$50,000 or more.¹² Accordingly, it held that under the proviso to section 14(c) (1) of the act limiting the Board’s discretion to decline its exercise of jurisdiction,¹³ it could not refuse to assert jurisdiction in this proceeding.¹⁴

Shortly after the close of the fiscal year, the Board decided two other cases involving its jurisdiction over foreign-flag vessels and contentions substantially identical to those raised in the *West India*

⁹ 345 U.S. 571 (1953).

¹⁰ This term is usually employed in referring to American owned or controlled vessels of Panamanian, Liberian, and Honduran registry which are variously called “flag of convenience,” or “flag of necessity,” or “run away flag” ships.

¹¹ *Peninsular & Occidental Steamship Co.*, 120 NLRB 1097 (1958), and *H P O Service, Inc.*, 122 NLRB 394, 395 (1958). See also Twenty-third Annual Report (1958), pp 10-11.

¹² The Board’s nonretail standard. See below, p 29.

¹³ See above, p 22.

¹⁴ Similarly, it was noted that if national defense is, as maintained, substantially involved, the Board could not decline jurisdiction, as on August 1, 1959, the Board would assert jurisdiction over “all enterprises whose operations exert a substantial impact on national defense.” *Ready Mixed Concrete & Materials, Inc.*, 122 NLRB 315 (1958).

case Both concerned the operation of Caribbean cruise ships under foreign registry with crews composed primarily of nonresident aliens These vessels operated regularly between Miami, Florida, where the passengers were taken aboard and returned, and various foreign ports, but never in the waters of the countries of their registry In one case,¹⁵ a ship under Liberian registry was owned by a Liberian corporation, chartered bareboat to another Liberian corporation, and operated under time subcharter by an American corporation which had organized, and still owned, both Liberian corporations The Board, one Member dissenting,¹⁶ found the situation substantially the same as that in *West Indra*, above, and asserted jurisdiction It noted that the American corporation had full control of the vessel, was its beneficial owner and the employer of the crew, and that "the foreign incorporation of the nominal owner and operator of a vessel [could not] bar the jurisdiction of the Act over an operation otherwise within the coverage of its provisions"

In the other case,¹⁷ a ship of Panamanian registry was owned and operated by a Panamanian corporation, which had contracted to have an American corporation act as its exclusive agent in the United States to handle matters concerning passengers and cargo, the sale of passenger tickets and sales promotion, repairs and provisioning of the ship, and related matters The Panamanian owner-operator still retained direct control over hiring and other dealings with shipboard personnel, and determined what voyages to make But the business of the vessel was handled mainly out of the office of the American corporation in Miami, Florida, where the vessel was primarily berthed and her voyages begun and terminated The vessel's gross annual earnings were about \$700,000, some 95 percent of its passengers and about 85 percent of its cargo originating in the United States Further, about 95 percent of its annual expenditures of about \$200,000 were made in the United States The Board majority¹⁸ found that both corporations were engaged in a single integrated enterprise which was essentially a domestic operation having a continuing and substantial impact on the domestic and foreign commerce of the United States, and asserted jurisdiction Although, unlike the *West Indra* situation, the shipowner and employer of the crew was a foreign corporation, the majority nevertheless found that this maritime operation possessed "those substantial United States contacts" which, under the *West Indra* decision, brought it within the act's jurisdiction and noted, "It is not necessary that all the signifi-

¹⁵ *Pennsular & Occidental Steamship Co.*, 132 NLRB No 1 (July 10, 1961)

¹⁶ Member Rodgers

¹⁷ *Eastern Shipping Corp.*, 132 NLRB No 72 (August 10, 1961)

¹⁸ Member Rodgers dissenting

cant contacts be American to warrant the application of a domestic law to a maritime operation having foreign attributes. Neither is some particular factor, aside from commerce of the United States, indispensable to the jurisdiction of the Labor Act.”

b Aircraft Servicing and Charting Enterprise

The act specifically excludes “any person subject to the Railway Labor Act” from the term “employer.”¹⁹ In *Bradley Flying Service, Inc.*,²⁰ the employer was engaged in maintaining, fueling, and storing aircraft, and in charting flying service, and held an air carrier operating certificate from the Civil Aeronautics Administration²¹ authorizing it to operate as an air taxi between continental United States, Mexico, and Canada. The employer contended that the Board had no jurisdiction over its operations because it was a “common carrier by air engaged in interstate commerce” within the meaning of the Railway Labor Act. Relying on the administrative advice of the National Mediation Board²² “based on the entire record,” that this employer did not meet the definition of a common carrier by air under the Railway Labor Act, the Board rejected the employer’s contention and asserted jurisdiction under its nonretail standards.²³

c Transit and Communications Systems

The Board’s standards require \$250,000 gross annual volume of business for transit systems,²⁴ and \$100,000 gross annual volume for communications systems.²⁵ In two cases during the past year, the Board declined to assert jurisdiction because the respective employers were not enterprises within the meaning of these standards, and satisfied no other standard.

In *Raybern Bus Service, Inc.*,²⁶ it held that an employer engaged primarily in the transportation of school children, whose services were not available to the general public along its routes nor performed under a franchise, was not a transit enterprise within the meaning of the transit standard, but an enterprise engaged primarily in aid of the State in the field of education and essentially local in character. Similarly, in *Warren Television Corporation*,²⁷ a Board

¹⁹ Sec 2(2)

²⁰ 131 NLRB No 62

²¹ Now named the Federal Aviation Agency

²² This is the agency primarily vested with jurisdiction, under the Railway Labor Act, over air carriers and has primary authority to determine its own jurisdiction

²³ See below, p 30

²⁴ See *Charleston Transit Co.*, 123 NLRB 1296 (1959)

²⁵ See *Raritan Valley Broadcasting Company, Inc.*, 122 NLRB 90 (1958)

²⁶ 128 NLRB 430 See also *Zanetti Riverton Bus Lines*, 128 NLRB 1389

²⁷ 128 NLRB 430

²⁸ 128 NLRB 1 But see *Perfect TV, Inc.*, 134 NLRB No 81, distinguishing the *Warren* case in a multiemployer situation where the operation included a microwave transmission system

majority²⁸ held that a community antenna television system, receiving television signals from out-of-State stations and transmitting them to local subscribers, was "an extension of the consumer's own television antenna" and not a communication system, nor an essential part thereof, within the meaning of that standard

d Office Buildings

The Board's standard for office buildings requires a gross annual revenue of at least \$100,000, of which \$25,000 or more is derived from organizations whose operations meet any of the Board's standards, exclusive of the indirect outflow and the indirect inflow standards²⁹ In *Canal Maracas Improvement Corporation*,³⁰ the Board asserted jurisdiction over an office building operation on the basis of an annual rental, exceeding \$100,000, from the Commodity Stabilization Service of US Department of Agriculture, a governmental agency not an "employer" within the meaning of the act It noted that this governmental agency is "an organization" within the office building standard and exerts "a substantial impact on the national defense and on the national health, safety, and welfare"³¹

e Entertainment and Amusement Enterprises

In the entertainment and amusement fields, the Board issued several advisory opinions³² stating that it would assert jurisdiction over a membership corporation of theater owners and producers in the Broadway legitimate theater, acting as bargaining agent for employer-members,³³ on the basis of their combined operations³⁴ which met the retail and nonretail standards,³⁵ but that it would not assert jurisdiction over the operations of racehorse owners³⁶ and public trainers of racehorses³⁷ as "they are essentially local in character" A panel majority³⁸ also asserted jurisdiction over an employer which

²⁸ Member Jenkins dissenting

²⁹ *Mistletoe Operating Co*, 122 NLRB 1534, 1536 (1959)

³⁰ 129 NLRB 1832

³¹ The national defense standard is set forth in *Ready Mixed Concrete & Materials, Inc*, 122 NLRB 318 (1958)

³² See Twenty-fifth Annual Report (1960), pp 18-19, for background of advisory opinion procedure

³³ *The League of New York Theatres, Inc*, 129 NLRB 1429

³⁴ See *Westside Market Owners Assn*, 126 NLRB 167 (1960), *Belleville Employing Printers*, 122 NLRB 350 (1958)

³⁵ Its previous declination of some enterprises in the amusement field was held not controlling It noted that jurisdiction has been asserted over various entertainment enterprises closely related to theatrical productions, such as motion picture theaters and producers, *Combined Century Theatres, Inc*, 120 NLRB 1379 (1958), and *Edward Small Productions, Inc*, 127 NLRB 283 (1960), and recently also over bowling alleys *Dale Mabry Lanes, Ltd*, Case No 12-RC-1010, issued October 14, 1960, not published in NLRB volumes See also *Ray, Davidson & Ray*, 131 NLRB No 54

³⁶ *Meadow Stud, Inc*, 130 NLRB 1202

³⁷ *William H Dixon*, 130 NLRB 1204

³⁸ Member Leedom dissenting

operated sightseeing tours and related enterprises year-round in Silver Springs, Florida, and spent substantial amounts outside the State for purchases and advertising,³⁹ on the basis of the retail standard⁴⁰ The majority declared that "the amusement or entertainment industry, although once regarded as being out of the main stream of commerce, is no longer a negligible factor in our national life"

f. Real Estate Brokerage and Home Building Enterprises

In two cases during the past year, involving a real estate brokerage firm and a home building enterprise, the Board was faced with the problem of asserting jurisdiction over enterprises for which specific standards had not been previously established

In *Seattle Real Estate Board*,⁴¹ the Board held that it had legal jurisdiction over the operations of a real estate brokerage firm which sold out-of-State real estate under arrangements with out-of-State companies, but declined to assert jurisdiction It pointed out that none of the existing jurisdictional standards contemplated real estate brokers, and that the establishment of a new standard was unwarranted, the services of the real estate broker being essentially local and only remotely related to interstate commerce

On the other hand, in *Atlas Roofing Co, Inc*,⁴² the Board asserted jurisdiction over a home building enterprise, engaged in the construction and sale of residential homes, which met the Board's retail standard⁴³ It noted, however, that it did so in the absence of any specific standard for this type of operation, and that it was "leaving open" the question of the finality of the application of existing standards in future cases in the area

3. Application of Jurisdictional Standards

During the past year, a number of cases presented questions as to the manner or method of applying the various jurisdictional standards In one case,⁴⁴ the Board reiterated the principle that it would not assert jurisdiction over an employer's business on the basis of its nonrecurring capital expenditures alone In another case,⁴⁵ jurisdiction was asserted over a local union, in its capacity as the employer

³⁹ *Ray, Davidson & Ray*, 131 NLRB No 54

⁴⁰ See below, p 30

⁴¹ 130 NLRB 608

⁴² *United State, Tile and Composition Roofers, Damp and Waterproof Workers Assn., AFL-CIO, Local Union No 57 (Atlas Roofing Co, Inc)*, 131 NLRB No 156

⁴³ See below p 30

⁴⁴ *Raybern Bus Service, Inc*, 128 NLRB 430

⁴⁵ *Laundry, Dry Cleaning and Dye House Workers' International Union Local 26, etc*, 129 NLRB 1446

of its clerical employees, as an integral part of its international and on the basis of the international's annual inflow in excess of \$100,000 from its affiliated locals in various States⁴⁶ And in several other cases, it dealt with the application of the indirect outflow standard, the application of standards to newly formed enterprises, and the selection of the applicable standard for an integrated nonretail-retail enterprise

a. Indirect Outflow Standard

Under the nonretail standard, the Board will assert jurisdiction over enterprises which have \$50,000 annual outflow or inflow, direct or indirect⁴⁷ Indirect outflow includes sales within the State to users meeting any standard, except solely an indirect inflow or indirect outflow standard

In one case,⁴⁸ the Board declared that in proceeding under this standard it is unnecessary to inquire into the nature of the goods or services furnished by the employer to its customers and as to whether they are utilized directly or indirectly in the goods or materials crossing State lines The standard "requires that the employer's product merely be *used in* the operations of the interstate enterprise"⁴⁹ Accordingly, it held in asserting jurisdiction in that case that it was immaterial whether or not dolomite limestone—mined, sold, and spread by the employer as a soil conditioner in the State of Florida—became an ingredient in fruits and produce shipped outside the State⁵⁰ In another case,⁵¹ a panel majority⁵² asserted jurisdiction over a respondent on the basis of its indirect outflow, and held that a credit arrangement of one of respondent's customers for the billing of purchases through another company within the State, to satisfy the credit requirements of the customer's out-of-State supplier, did not make the interstate shipments to the customer "indirect"

⁴⁶ See *Oregon Teamsters' Security Plan Office, etc.*, 119 NLRB 207 (1957), Twenty-third Annual Report (1958), pp 10 and 12

⁴⁷ See *Siemens Mailing Service*, 122 NLRB 81 (1958), and Twenty-third Annual Report, p 8

⁴⁸ *Southern Dolomite*, 129 NLRB 1342

⁴⁹ See also *Whitpany Motor Co., Inc.*, 115 NLRB 52 (1956), decided prior to the current standards

⁵⁰ The Board attached no significance to the fact that the employer's customers were engaged in commerce by virtue of their interstate shipment of fruits and produce While sec 2(3) excepts from the term "employee" any individual employed as an agricultural laborer, sec 2(8) does not except trade or traffic in agricultural products from its definition of "commerce"

⁵¹ *Trettenero Sand & Gravel Co.*, 129 NLRB 610

⁵² Member Rodgers dissenting

rather than "direct," and had no bearing on the amount of interstate commerce affected by the respondent ⁵⁴

b Newly Formed Enterprises

In applying the jurisdictional standards, the Board normally determines volume of business on the basis of the employer's past experience—usually the last calendar or fiscal year—rather than its future operations ⁵⁴ However, where an employer has been in business for a period less than a year, the Board will project the figures for this period over a 12-month period and determine whether to assert jurisdiction on the basis of the annual estimate ⁵⁵ In one case this year, ⁵⁶ the Board held that the controlling period for such estimate or projection did not commence on the date of the incorporation of a company engaged in the construction and sale of residential homes, but on the date it commenced "that phase of the operations involved in the standard being applied," which was the selling of homes In another case, ⁵⁷ the Board held that while the projecting of sales of all of a small retail shoestore chain's two newly opened stores over a 12-month period was proper, the figure obtained should not be added to the actual annual sales of its older stores, since one of them had been closed permanently and its sales would not be repeated

c. Integrated Nonretail-Retail Enterprises

The Board has established jurisdictional standards for clearly retail enterprises, requiring \$500,000 gross annual volume of business, ⁵⁸ and for enterprises other than retail, requiring \$50,000 annual outflow or inflow, direct or indirect ⁵⁹ It has also established a standard for combinations of both retail and nonretail ⁶⁰ However, in *Man Products, Inc*, ⁶¹ the Board was faced for the first time with the problem of defining its policy as to the applicability of any of these

⁵⁴ See also *C & P Coal Co*, 130 NLRB 910, where the Board asserted jurisdiction upon the basis of projected indirect outflow, where the employer sold coal to a company which, in turn, sold and shipped the coal outside the State through another firm performing the limited function of sales agent or broker

⁵⁵ *Teamsters, Chauffeurs Warehousemen & Helpers Union, Local 386 (Hobbs-Parsons Co)*, 128 NLRB 1031, 1032

⁵⁶ See Twenty-third Annual Report (1958), p 12

⁵⁷ *United State, Tile and Composition Roofers, Damp and Waterproof Workers Assn Local Union No 57 (Atlas Roofing Co, Inc)*, 131 NLRB No 156

⁵⁸ *District 76, Retail, Wholesale and Department Store Union, AFL-CIO (Morgan Shoe Co)*, 129 NLRB 1339

⁵⁹ See *Carolina Supplies and Cement Co*, 122 NLRB 88 (1958)

⁶⁰ See *supra*, p 29

⁶¹ It is the Board's established policy that in cases where an employer, constituting a single entity, operates a retail and a nonretail enterprise, and the nonretail aspect is clearly not *de minimis*, it will ordinarily apply nonretail standards in determining whether to assert jurisdiction where neither enterprise alone has sufficient commerce on which to assert jurisdiction See *Appliance Supply Co*, 127 NLRB 319, 320 (1960), and cases cited

⁶¹ 128 NLRB 546

standards to situations where an employer's operations do not fall into any given pattern of business activity, retail or nonretail. In that case, the employer's business was a completely integrated enterprise which manufactured its own products and sold them to the ultimate nonbusiness consumers without the intervention of a wholesaler. The Board noted that this enterprise contained aspects of retail as well as nonretail activity, and decided that in cases involving enterprises of this kind, which constitute a single integrated business, it would assert jurisdiction if the employer's operations meet either its retail or nonretail standards.⁶²

⁶² Similarly, see *Indiana Bottled Gas Co.*, 128 NLRB 1441, *The League of New York Theatres, Inc.*, 129 NLRB 1429.

III

Representation Cases

The act requires that an employer bargain with the representative selected by a majority of his employees in a unit appropriate for collective bargaining¹ But the act does not require that the representative be selected by any particular procedure as long as the representative is clearly the choice of a majority of the employees

As one method for employees to select a majority representative, the act authorizes the Board to conduct representation elections² The Board may conduct such an election after a petition has been filed by the employees, or any individual or labor organization acting in their behalf, or by an employer who has been confronted with a claim of representation from an individual or a labor organization

Once a petition has been properly filed, the Board has the statutory authority to determine the employees' choice of collective-bargaining representative in any business or industry affecting interstate commerce, with the major exceptions of agriculture, railroads, airlines, nonprofit hospitals, and governmental bodies³ It also has the power to determine the unit of employees appropriate for collective bargaining⁴

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

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

¹ Secs 8(a)(5) and 9(a)

- Sec 9(c)(1)

³ The Board does not exercise that power where the enterprises involved have relatively little impact upon interstate commerce See above, pp 22-31

⁴ Sec 9(b)

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

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

1 Showing of Employee Interest To Justify Election

The Board requires a petitioner, other than an employer, seeking an election under section 9(c)(1) to show that at least 30 percent of the employees favor an election.⁵ However, petitions filed under the circumstances described in the first proviso to section 8(b)(7)(C) are specifically exempted from this requirement.⁶

The showing of employee interest must relate to the appropriate bargaining unit in which the employees are to be represented.⁷ Where the unit found appropriate by the Board is larger than the proposed unit and the petitioner's interest in the larger unit is not clear, the Board will direct an election but instruct the regional director not to proceed without first ascertaining the adequacy of the petitioner's interest among the employees in the appropriate unit.⁸ In one case where the petitioner initially sought only a production and maintenance unit and then indicated its willingness to represent office clericals either separately or as part of the production and maintenance unit, the Board directed elections in two separate units but conditioned the office clerical election upon the regional director ascertaining the petitioner's interest in that unit.⁹ In cases where the petitioner evidenced an adequate showing of interest in the broader unit, and had not disclaimed interest therein, the Board directed an election but granted the petitioner permission to withdraw if it did not desire to participate in the election.¹⁰ On the other hand, the Board refused to direct self-determination elections among employees in residual or unrepresented groups, to determine their desire to be included in larger units,¹¹ where the petitioning unions failed to demonstrate an adequate showing of interest in such residual or unrepresented groups.¹²

⁵ See NLRB Statements of Procedure, sec 101.18(a).

⁶ See NLRB Statements of Procedure, sec 101.23.

⁷ See Twenty-fifth Annual Report (1980), p 22, and earlier reports.

⁸ *Bari's Jewelers*, 131 NLRB No 37, *Labatt Wholesale Grocery Co*, 130 NLRB 228, *Tyrec's, Inc*, 129 NLRB 1500.

⁹ *Jay Kay Metal Specialties Corp*, 129 NLRB 31.

¹⁰ *Don Kerr, Inc*, 129 NLRB 526, *Genesco, Inc*, 129 NLRB 1334. Cf *Aerojet General Corp*, 131 NLRB No 128.

¹¹ See below, p 64.

¹² *Avco Corp*, 131 NLRB No 114, *Disco Laboratories, Inc*, 129 NLRB 887, *Aerojet General Corp*, 129 NLRB 1492, *Members Fanning and Kimball dissenting*, and *Tongg Publishing Co, Ltd*, 131 NLRB No 31, *Member Fanning dissenting*.

Intervening parties are permitted to participate in representation elections upon a showing of a contractual or other representative interest¹³ Except in cases filed by employers, the intervenor's interest must have been acquired before the close of the hearing¹⁴ In one case, an intervening union was found to have a sufficient showing of interest where, prior to the filing of the petition, the Board sustained its unfair labor practice charges filed against the employer on behalf of employees in the unit found appropriate and ordered the reinstatement of a number of its supporters¹⁵ However, a union which was permitted to intervene in a proceeding "to protect its interest, if any, in the unit sought" on the basis of an agreement with the employer and its parent company, was denied a place on the ballot since its contract did not cover any of the employees in the requested unit and it had not made any other valid showing of interest among these employees¹⁶ In another case, the Board reiterated its long-established rule that an intervenor who seeks a unit other than that sought by the petitioner must make a 30-percent showing of interest¹⁷

a Sufficiency of Showing of Interest

The sufficiency of a party's showing of interest, including questions relating to the nature of authorization cards submitted, is determined administratively and may not be litigated at the representation hearing¹⁸ However, where a petitioner's showing is challenged on grounds which would warrant an investigation, such as forgery or fraud, the Board will conduct an investigation and dismiss the petition if it is found that the interest showing is inadequate¹⁹ Accordingly, the Board dismissed a petition where upon an administrative investigation it determined that a supervisor participated in obtaining the signatures of all the employees whose cards were submitted to establish interest²⁰ In another case the Board rejected an employer's contention that a 50-percent showing of interest should be required, rather than the usual 30 percent, where the union lost three elections over a 10-year period²¹

¹³ *W Horace Williams Co*, 130 NLRB 223 See also Twenty-fourth Annual Report (1959), p 14, and Twenty-fifth Annual Report (1960), pp 22-23

¹⁴ *Arian's Department Store of Michigan, Inc*, 131 NLRB No 88 See Twenty fifth Annual Report (1960), pp 22-23

¹⁵ *Schott Metal Products Co*, 129 NLRB 1233, footnote 2

¹⁶ *Alpha Corp of Texas*, 130 NLRB 1292 See also *Colorator Mfg Corp*, 129 NLRB 704, where an intervenor was denied a place on the ballot in a decertification election because its intervention was based solely on a current contract covering employees outside the appropriate unit involved

¹⁷ *Great Atlantic & Pacific Tea Co*, 130 NLRB 226

¹⁸ *Barber-Colman Co*, 130 NLRB 478, *Schott Metal Products Co*, 129 NLRB 1233, *Watchmanstors, Inc*, 128 NLRB 903

¹⁹ Twenty-fifth Annual Report (1960), p 23 See also Twenty fourth Annual Report (1959), pp 14-15, and Twenty-third Annual Report (1958), pp 14-15

²⁰ *Southeastern Newspapers, Inc*, 129 NLRB 311

²¹ *Barber Colman Company*, above

2. Existence of Question of Representation

Section 9(c) (1) empowers the Board to direct an election and certify the results thereof, provided the record of the hearing before the Board²² shows that a question of representation exists. However, petitions filed under the circumstances described in the first proviso to section 8(b) (7) (C) are specifically exempted from this requirement²³

a Certification Petitions

Petitions for certification of representatives filed by representatives under section 9(c) (1) (A) (i) or by employers under section 9(c) (1) (B) will be held to raise a question of representation if they are based on the representative's demand for recognition and the employer's denial thereof, whether before or during the hearing²⁴. The demand for recognition need not be made in any particular form and may consist merely of conduct²⁵. The filing of a petition by a representative is itself considered a demand for recognition²⁶. A petition is, therefore, not invalid because it fails to allege that the petitioner had requested recognition,²⁷ or that the employer had denied such request²⁸. Moreover, the Board does not ordinarily look behind a petition to the good faith of an employer's refusal to grant continued recognition to a union as the bargaining representative of employees covered by the petition, and will process the petition if the formal requirements for filing are met²⁹. However, the Board dismissed petitions where the parties merely sought clarification of an existing certification³⁰ or advice as to the appropriateness of existing uncertified units³¹.

b. Decertification Petitions

A question of representation may also be raised by a petition under section 9(c) (1) (A) (ii) which challenges the representative status of a bargaining agent previously certified or currently recognized by the employer. Such decertification petition may be filed "by an

²² A hearing must be conducted "if [the Board] has reasonable cause to believe that a question of representation exists."

²³ See also NLRB Statements of Procedure, sec 101.23

²⁴ *Warner-Lambert Pharmaceutical Co, Inc*, 131 NLRB No 171. *Florida Tile Industries, Inc*, 130 NLRB 897. *Victory Grocery Co*, 129 NLRB 1415

²⁵ See Twenty-fifth Annual Report (1960), p 23, Twenty-fourth Annual Report (1959), pp 15-16

²⁶ *Florida Tile Industries*, above, *Tyree's, Inc*, 129 NLRB 1500

²⁷ *Garton Mfg Co, Inc*, 129 NLRB 656, *Alamo-Braun Beef Co*, 128 NLRB 32

²⁸ See Twenty-fourth Annual Report (1959), p 15

²⁹ *Westinghouse Electric Corp*, 129 NLRB 846

³⁰ But the Board did grant the petitioner's request to clarify the certification. *Westinghouse Electric Corp (Mansfield Div)*, 128 NLRB 31

³¹ The Board noted that it was not empowered to give advisory opinions on matters of this type which would not be binding either on the parties or the Board. *American Stores Co*, 130 NLRB 878

employee or group of employees or any individual or labor organization acting in their behalf” This has been held to include an attorney acting on behalf of a substantial number of employees³² In such case, it is not necessary that the petition be filed by any sponsoring employee or committee of employees³³ Nor is the fact that a petitioner is fronting for an intervening or other union an impediment to the filing of a decertification petition³⁴

c Disclaimer of Interest

A petition will be dismissed for lack of a question of representation if interest in the employees involved has been effectively disclaimed, be it by the petitioning representative itself, by the representative named in an employer petition, or by the incumbent which is sought to be decertified³⁵ But a union’s disclaimer of representation must be clear and unequivocal, and not inconsistent with its other acts or conduct³⁶ Thus, a union’s disclaimer—after it had engaged in bargaining with the employer, had struck the plant, and its refusal to bargain charge against the employer had been dismissed by the regional director—was held ineffectual, where the union continued picketing with signs addressed to the public that the employer had no contract with the union, and such picketing was limited to an employee-service entrance on a side street in back of the plant while the public or customer entrance on a main thoroughfare remained unpatrolled³⁷ It was noted that this conduct indicated a continuation of the union’s interest in representing the employees as well as a demand for a contract, and amounted to a present demand for recognition inconsistent with its disclaimer

However, in a case decided shortly after the close of the fiscal year,³⁸ a Board majority³⁹ held that notwithstanding a union’s picketing of an employer with signs addressed to the public that the employer did not have a contract with the union, the union had effectively disclaimed its interest in representing the employees which it had previously represented, both prior to the commencement of the picketing and at the hearing In that case, for some time after the expiration of the employer’s contract with the union signs continued to hang in

³² *Abbott Laboratories*, 131 NLRB No 76

³³ *Ibid*

³⁴ *Mission Appliance Corp*, 129 NLRB 1417, *Fisherman’s Cooperative Assn*, 128 NLRB 62

³⁵ See *Nachman Corporation*, 181 NLRB No 126, Twenty fourth Annual Report (1959), pp 16-17

³⁶ Twenty-fourth Annual Report (1959), p 17, Twenty-third Annual Report (1958), pp 16-17

³⁷ *Normandin Bros Co*, 131 NLRB No 150 Although agreeing with the majority that the disclaimer was equivocal, Member Fanning dissented on other grounds

³⁸ *Maratti’s Inc*, 132 NLRB No 48 (Aug 2, 1961) See also *Andes Candies, Inc*, 133 NLRB No 65 (Oct 4, 1961)

³⁹ Members Rodgers and Leedom dissenting

the employer's stores to the effect that the employer had a contract with the union. Before the picketing began, the union informed the employer that members of other unions believed that the employer had a union contract, that the union felt obligated to advertise the fact that the employer did not have a union contract, but that the union was not asking for a contract or claiming to represent the employees "in any shape, way or form." The majority pointed out that "in any inquiry into the effectiveness of a disclaimer it is the Union's contemporaneous and subsequent conduct which ought to receive particular attention," and that in this case the union "once having disclaimed in unmistakable terms, engaged in no action inconsistent therewith," the picketing being "accounted for by uncontradicted testimony which show[ed] that it had no recognitional object."

3 Qualification of Representative

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

It is the Board's policy to direct an election and issue a certification unless the proposed bargaining representative fails to qualify as a bona fide representative of the employees. In this connection, the Board is not concerned with internal union matters which do not affect its capacity to act as a bargaining representative.⁴⁰ And it has long held that two or more labor organizations may act jointly in representing employees in an appropriate unit.⁴¹

a Statutory Qualifications

The Board's power to certify a labor organization as bargaining representative is limited by section 9(b) (3) which prohibits certification of a union as the representative of a unit of guards if the union "admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."⁴²

However, compliance with the requirements of the Labor-Management Reporting and Disclosure Act of 1959 is not a condition precedent to the filing of a representation petition by a labor organization.⁴³

⁴⁰ *Inyo Lumber Co of California*, 129 NLRB 79. See Twenty-fifth Annual Report (1960), p 25.

⁴¹ *Florida Tile Industries, Inc.*, 130 NLRB 897.

⁴² See *Watchmantors, Inc.*, 128 NLRB 903, where employees who spent 16 to 90 percent of their time performing guard duties for their employer's customers, and general maintenance duties the rest of their time, were found to be guards within the meaning of this section. The contract bar and unit aspects of this case are discussed below at pp 41 and 54, respectively.

⁴³ *Inyo Lumber Co of California*, 129 NLRB 79. See also *The Wright Line, Inc.*, 127 NLRB 849, and Twenty fifth Annual Report (1960), p 26.

As in a case of the previous year,⁴⁴ the Board rejected the contention that a petitioner governed by a trusteeship was disqualified from acting as a statutory bargaining representative under section 304(c) of Title III of the Labor-Management Reporting and Disclosure Act of 1959—which provides that for the purposes there such a trusteeship is presumed invalid after the expiration of 18 months—and held that the Board was not a proper forum for the litigation of issues arising under that section.⁴⁵ Similarly, it rejected contentions that such a petitioner was disqualified because the trusteeship was not created pursuant to any authority in the constitution and bylaws of its international union as required by section 302 of Title III of the Labor-Management Reporting and Disclosure Act of 1959, and because the petitioner had never held an election of officers as required by section 401(b) of Title IV of that act.⁴⁶ The Board noted that section 603(b) of the Labor-Management Reporting and Disclosure Act of 1959 provides in effect that these provisions should not be controlling in determining whether a petitioner is a qualified labor organization for the purposes of a representation proceeding.

b Craft Representatives

The Board has continued to require that a union seeking to sever a craft or craftlike departmental group from a broader unit must show that it “has traditionally devoted itself to serving the special interests of the [particular] employees,”⁴⁷ or that it was organized for the exclusive purpose of representing members of the particular craft.⁴⁸ Thus, a panel majority⁴⁹ dismissed a petition and held that the mere fact that the petitioner represented employees in the same classification as those sought to be severed did not maintain the petitioner’s burden of showing that it “has traditionally devoted itself to serve the special interests of the employees sought and has historically represented them in separate unit.” However, in another case, the petitioning union was deemed qualified to seek severance of a craft where one of its locals was specifically organized to represent the craft in the area, this local presently represented a large number of such employees, and the petitioner itself currently represented such employees.⁵⁰

⁴⁴ *Terminal System, Inc.*, 127 NLRB 979 (1960)

⁴⁵ *Inyo Lumber Co of California*, above *Jat Transportation Corp.*, 128 NLRB 780. See also *Terminal System, Inc.*, above, and Twenty-fifth Annual Report (1960), p. 26

⁴⁶ *Jat Transportation Corp.*, above (1954)

⁴⁷ *American Potash & Chemical Corp.*, 107 NLRB 1418 (1954). See *F N Burt Co., Inc.*, 130 NLRB 1115

⁴⁸ *Friden Calculating Machine Co., Inc.*, 110 NLRB 1618 (1954), *Puerto Rico Glass Corp.*, 126 NLRB 102 (1960)

⁴⁹ *Nissen Baking Corp.*, 131 NLRB No. 90, Member Rodgers dissenting

⁵⁰ *May Department Stores Co.*, 129 NLRB 21, 25, Member Rodgers dissenting in other respects

The "traditional representative" qualification does not apply where severance is not sought, that is, where the craft group involved has no bargaining history on a broader basis⁵¹ It has also been held inapplicable where the craft or departmental unit has once been severed from a production and maintenance unit and has, since then, developed its own bargaining history⁵²

A union cannot in the same proceeding seek to sever a craft group,⁵³ or a departmental group,⁵⁴ from an overall production and maintenance unit, and simultaneously seek to represent the overall unit excluding such craft or department Such dual position, it was observed, "is repugnant to the reasons underlying the craft severance principle, and is inimical to the interests of the employees"⁵⁵ Accordingly, in such cases, the petitioner is required to elect between the units sought and to participate in only one election

4 Contract as Bar to Election

The Board has adhered to the policy not to direct an election among employees presently covered by a valid collective-bargaining agreement except under certain circumstances The question whether a present election is barred by an outstanding contract is determined according to the Board's "contract bar" rules⁵⁶ Generally, these rules require that a contract asserted as a bar be in writing⁵⁷ and properly executed and binding on the parties; that the contract be of no more than "reasonable" duration; and that the contract contain substantive terms and conditions of employment which are consistent with the policies of the act⁵⁸ The more important applications of these rules during fiscal 1961 are discussed below⁵⁹

a. Execution and Ratification of Contract

To be a bar, a contract must have been signed by all the parties—and ratified, if ratification is required by express contractual provision—

⁵¹ *Warner-Lambert Pharmaceutical Co, Inc*, 131 NLRB No 171, and cases cited therein

⁵² *Industrial Rayon Corp*, 128 NLRB 514, 518-519, set aside in 291 F 2d 809 (CA 4)

⁵³ *F N Burt Co, Inc*, 130 NLRB 1115, Members Fanning and Kimball dissenting

⁵⁴ *Schick, Inc*, 130 NLRB 1501

⁵⁵ *F N Burt Co, Inc*, above

⁵⁶ These rules are designed to deal with situations involving questions concerning representation and are not applicable to motions for clarification or amendment of outstanding certifications *Phillips Petroleum Co*, 129 NLRB 813

⁵⁷ No contract bar was found where the party which contended that certain alleged contracts were a bar did not introduce, or seek to introduce, the alleged contracts into evidence *Fisherman's Cooperative Assn*, 128 NLRB 62, 64, footnote 12 *Cf City Cab, Inc*, 128 NLRB 493, 494

⁵⁸ See Twenty fourth Annual Report (1959), pp 19-34, and Twenty fifth Annual Report (1960), pp 27-35

⁵⁹ A contention that the Board's present contract-bar rules should not apply to contracts executed before such rules were put into effect was held without merit *May Department Stores Co*, 129 NLRB 21

before the filing of the petition⁶⁰ Where the signing requirement has been complied with, the contract will be recognized as a bar even though it is not embodied in a formal document Thus, an agreement evidenced by the exchange of a written proposal and a written acceptance, both signed, may be sufficient However, where not signed by both parties,⁶¹ or by persons authorized to sign on their behalf,⁶² it will not be deemed a bar

(1) Date of Execution

Because a contract, to be a bar, must have been executed prior to the filing of the petition,⁶³ a question is frequently raised as to the date a contract is deemed to have been executed⁶⁴ The Board has held that a signed agreement, which was not to become binding until countersigned by a duly authorized officer of the international union, was executed as of the date it was countersigned, not before⁶⁵ It has also held contracts no bar where executed by an employer a month after a petition was filed,⁶⁶ where made retroactively effective, and a petition was filed 1 day following the effective date but before the execution date,⁶⁷ and where dated 1 day prior to the filing of a petition but not executed until 1 week later⁶⁸

Parol evidence as to the date of execution cannot vary the express terms of the contract⁶⁹ But where a contract is made effective as of a date subsequent to its execution, the effective date rather than the execution date is controlling for contract-bar purposes⁷⁰

b Coverage of Contract

To bar a petition an asserted contract must clearly cover the employees sought in the petition⁷¹ and embrace an appropriate unit⁷² Thus, a contract between a union and a food store chain covering its retail establishments was held inapplicable to a food department managed by the chain for another company, under an agreement for a percentage of the gross receipts, and found no bar to a petition for a

⁶⁰ *Appalachian Shale Products Co*, 121 NLRB 1160 (1958), *Yellow Cab, Inc*, 131 NLRB No 41

⁶¹ *Yellow Cab, Inc*, above

⁶² *Wickly, Inc*, 131 NLRB No 65

⁶³ See *Appalachian Shale Products Co*, above

⁶⁴ For the converse question as to the timeliness of a petition, see the discussion, below, p 50

⁶⁵ *Charles Leonard, Inc*, 131 NLRB No 137

⁶⁶ *W Horace Williams Co*, 130 NLRB 223

⁶⁷ *Nissen Baking Corp*, 131 NLRB No 90

⁶⁸ *Printing Industry of Delaware*, 131 NLRB No 135

⁶⁹ *Lion Brand, Inc*, 131 NLRB No 32

⁷⁰ *Buy Low Supermarket, Inc*, 131 NLRB No 4

⁷¹ *Yellow Cab, Inc*, 131 NLRB No 41, *Bell Aerosystems Co*, 131 NLRB No 26

⁷² See Twenty fourth Annual Report (1950), p 21, for discussion of *Appalachian Shale Products Co*, 121 NLRB 1160 (1958)

unit which included the food department employees⁷³ Similarly, a contract covering an employer's meat-canning plant was held no bar to a petition for the employer's can-manufacturing plant, where the employer had rejected a proposal that the contract expressly cover both plants and there was nothing to indicate that the contract was applied to the can-manufacturing plant⁷⁴

Although the contract in one case contained language susceptible of the interpretation that it covered certain employees, the contract was held no bar to the inclusion of these employees in a requested unit since the contracting union had in fact not bargained for such employees, and the employer had unilaterally established wage rates and working conditions for them without protest from the union⁷⁵ And in another case, the Board held a contract not a bar to an election in a guard unit where, contrary to the provisions of section 9(b)(3), the contract unit included employees other than guards, and the contracting union admitted to membership employees other than guards⁷⁶

(1) Change of Circumstances During Contract Term

The Board's rules as to the effectiveness of a contract as a bar where changes in the employer's operations and personnel complement have occurred during the contract term were reappraised and restated in the *General Extrusion* case,⁷⁷ during fiscal 1959

Applying these rules during the past year, the Board held contracts no bar where at the time the parties sought to include future employees of a new plant, and amended their contract, the new plant was incomplete and without an employee complement,⁷⁸ where at the time the contract was executed the new plant was not in operation with a substantial and representative force,⁷⁹ and where new operations were not mere normal accretions to the units covered by the contracts⁸⁰ However, the permanent transfer of employees from one warehouse to another covered by a contract was held not to remove the contract as a bar since the current operations of the warehouse covered by the contract were substantially the same as its operations at the time the contract was executed, and there had been no substantial increase in its personnel⁸¹ Similarly, a contract covering employees at plants then in operation as well as at a future contemplated location to which all employees were later transferred, without change in the character of

⁷³ *Bargain City, U S A, Inc*, 131 NLRB No 104

⁷⁴ *Libby, McNeill & Libby*, 130 NLRB 267

⁷⁵ *Tongg Publishing Co, Ltd*, 131 NLRB No 31

⁷⁶ *Watchmanitors, Inc*, 128 NLRB 903 See also above, p 37, and below, p 54

⁷⁷ *General Extrusion Co, Inc*, 121 NLRB 1165 (1958) See Twenty-fourth Annual Report (1959), pp 21-22, Twenty fifth Annual Report (1960), pp 28-29

⁷⁸ *Bzura Chemical Co, Inc*, 129 NLRB 929

⁷⁹ *Libby, McNeill & Libby*, 130 NLRB 267

⁸⁰ See, e.g., *Morgan Transfer & Storage Co, Inc*, 131 NLRB No 173, *Buy Low Supermarket, Inc*, 131 NLRB No 4, *Houck Transport Co*, 130 NLRB 270

⁸¹ *Jones & Laughlin Steel Corp*, 130 NLRB 259

their jobs or functions, was held a bar to a petition for the employees at the new location ⁸²

(a) Prehire contracts and section 8(f)

It is the Board's established rule that a contract executed before any employees were hired is not a bar ⁸³ During the past year, the Board had occasion to consider for the first time the effect upon this rule of that portion of recently enacted section 8(f) ⁸⁴ which provides that it shall not be an unfair labor practice for an employer engaged primarily in the building and construction industry to make a prehire contract under certain circumstances ⁸⁵ Noting that section 8(f) itself provides that any such agreement shall not be a bar to a petition filed pursuant to section 9(c), it held such a prehire contract no bar to a petition ⁸⁶

(b) Execution of new contract after increase in personnel

A contract executed before a substantial increase in personnel is a bar only if at least 30 percent of the work force employed at the time of the hearing was employed at the time the contract was executed, and 50 percent of the job classifications in existence at the time of the hearing were in existence at the time the contract was executed ⁸⁷ However, after a contract is removed as a bar because of changes in the employer's operations, an amendment thereto, or a new agreement, embracing the changed operation will, subject to the rules relating to premature extension, ⁸⁸ serve as a bar to a petition filed after its execution ⁸⁹ Thus, in one case, ⁹⁰ a new contract executed during the term of a prior contract was held a bar where the prior contract would not have been a bar under the Board's rules because of an expanded unit—less than 30 percent of the complement employed at the time the new contract was executed was employed at the time the old contract was executed ⁹¹ The Board pointed out that in announcing its rule in *General Extrusion* ⁹² that a contract will not bar an election if executed prior to a substantial increase in personnel, it intended to permit contracting parties to correct their existing contracts by ap-

⁸² *Foremost Appliance Corp*, 128 NLRB 1033

⁸³ *General Extrusion Co, Inc*, above

⁸⁴ Sec 8(f) was added by the Labor-Management Reporting and Disclosure Act of 1959, enacted Sept 14, 1959, and became effective 60 days thereafter

⁸⁵ See also below, p 100

⁸⁶ *S S Burford, Inc*, 130 NLRB 1641

⁸⁷ *General Extrusion Co, Inc*, above

⁸⁸ See below, p 51

⁸⁹ *General Extrusion Co, Inc*, 121 NLRB 1165

⁹⁰ *Foremost Appliance Corp*, 128 NLRB 1033

⁹¹ For premature extension aspect of case, see discussion below, p 52

⁹² 121 NLRB 1165, 1167

appropriately rewriting those defective as a bar under its rules,⁹³ and that such a corrected contract would operate as a bar for a reasonable term. It also observed that while the *General Extrusion* rule⁹⁴ speaks in terms of the percentage of expansion as of "the time of the hearing" it would apply the expanding unit formula to the situation in this case "as of the time the new contract was executed."

(c) Changed ownership

The assumption of the operations by a purchaser in good faith who has not bound himself to assume the bargaining agreement of the prior owner of the establishment removes the contract as a bar.⁹⁵ To be a bar, the assumption of the prior contract by the new employer must be express, and in writing.⁹⁶ Thus, a contract was held no bar, notwithstanding a successorship clause that it would be binding upon the parties, "their successors, administrators, executors and assigns," where the new employer did not agree to assume it.⁹⁷ However, where a new owner entered into an agreement with a union to retain the existing work force, and to adopt "all of the terms, conditions, and obligations" embodied in a contract between its predecessor and the same union, the Board held that the current employer had entered into a new contract which incorporated by reference all applicable terms and conditions of the predecessor's contract, including termination date, and barred a petition filed more than 150 days before the terminal date of the new agreement.⁹⁸

c Duration of Contract

Under the Board's present practice, a valid collective-bargaining agreement is held to bar a determination of representatives "for as much of its term as does not exceed 2 years."⁹⁹ A contract with a fixed term of more than 2 years will be treated as for a fixed term of 2 years.¹ Where the execution date and the effective date of a contract differ, the 2-year period during which the contract is operative as a bar is determined from the effective date rather than from the execution date.² But a contract of indefinite duration is considered ineffective as a bar for any period.³

⁹³ See *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1001-1002 (1958).

⁹⁴ See above, p. 42.

⁹⁵ *General Extrusion Co., Inc.*, above.

⁹⁶ *American Concrete Pipe of Hawaii, Inc.*, 128 NLRB 720. See cases cited therein.

⁹⁷ *Maybee Stone Co.*, 129 NLRB 487.

⁹⁸ *Mid Continent Carton Corp.*, 131 NLRB No. 60.

⁹⁹ *Pacific Coast Assn. of Pulp and Paper Manufacturers*, 121 NLRB 990 (1958), Twenty-fourth Annual Report (1959), p. 23.

¹ *Morgan Transfer & Storage Co.*, 131 NLRB No. 173, *Arian's Department Store of Michigan, Inc.*, 131 NLRB No. 88, *Western Farmers Assn.*, 128 NLRB 338.

² *May Department Stores Co.*, 129 NLRB 21. See also Twenty-fifth Annual Report (1960), p. 29.

³ *W. Horace Williams Co.*, 130 NLRB 223.

During the past year, the Board rejected contentions that it should not apply its 2-year rule to contracts entered into prior to the announcement of its new contract-bar rules in September 1958⁴. Similarly, it rejected a contention that the 2-year rule should not be applied to a seasonal industry, and that contracts in such industry should be considered a bar for two full operating seasons⁵. The Board noted that to adopt this latter suggestion would add an element of uncertainty in the area of contract-bar law concerning the timeliness of petitions—an uncertainty which the Board expressly attempted to eliminate in its most recent revision of its contract-bar rules⁶.

d Terms of Contract

To bar a petition, an asserted contract must contain substantial terms and conditions of employment sufficient to stabilize the bargaining relationship of the parties⁷. In the Board's view, "real stability in industrial relations can only be achieved where the contract undertakes to chart with adequate precision the course of the bargaining relationship, and the parties can look to the actual terms and conditions of their contract for guidance in their day-to-day problems"⁸. Thus, contracts limited only to the recognition of a union,⁹ "to wages only, or to one or several provisions not deemed substantial"¹⁰ will not constitute a bar. Likewise, supplementary agreements which are merely ancillary to and dependent upon a master agreement will not bar a petition¹¹.

(1) Union-Security Clauses

Under established Board rules,¹² a contract will not be held a bar if the contracting union lacks statutory qualifications to make a union-security agreement, or if the terms of the agreement exceed the limitations of the union-security proviso to section 8(a)(3)¹³.

⁴ *Jay Kay Metal Specialties Corp*, 129 NLRB 31, *May Department Stores Co*, above

⁵ *Pickering Lumber Corp*, 128 NLRB 1443. The Board also rejected contention that these contracts should be held a bar because they effectuated no changes in working conditions until about 8 months after their execution, within 2 years of the petition. It nevertheless held the execution date determinative in these circumstances.

⁶ *Pacific Coast Assn of Pulp and Paper Manufacturers*, 121 NLRB 990, 993 (1958).

⁷ See *Appalachian Shale Products Co*, 121 NLRB 1160 (1958), Twenty-fourth Annual Report (1959), p 24.

⁸ *Ibid*.

⁹ *Central Coat, Apron & Linen Service, Inc*, 126 NLRB 958 (1960).

¹⁰ *Appalachian Shale Products Co*, above. Cf *Jat Transportation Corp*, 128 NLRB 780, 783.

¹¹ See Twenty-fifth Annual Report (1960), p 30.

¹² See *Paragon Products Corp*, 134 NLRB No 86, decided after the fiscal year, overruling to the extent inconsistent *Keystone Coat, Apron & Towel Supply Co*, 121 NLRB 880 (1958), and Twenty-fourth Annual Report (1959), pp 24-26.

¹³ Once the contract-bar issue has been raised, it is the Board's policy to examine the contract's union security provision on its own motion.

(a) Qualification of contracting union

A union can validly enter into a union-security agreement only if it is the majority representative of the employees in an appropriate unit, and if its authority to make such an agreement has not been revoked by the employees during the preceding year in a section 9(e) election. Before the repeal of section 9(f), (g), and (h), effective September 14, 1959,¹⁴ the contracting union was also required to be in compliance with the filing requirements of that section. In one case decided this fiscal year, the Board recognized a union-security contract as a bar to a petition filed after the repeal of the section, although the contract was executed while it was still in effect by a union which was not in compliance with its filing requirements.¹⁵

(b) Terms of union-security clause

During this fiscal year, the Board continued to adhere to the *Keystone* rule¹⁶ that it would find no contract bar where the asserted contract contained a union-security clause which—

- (1) did not on its face conform to the requirements of the act, or
- (2) had been found unlawful in an unfair labor practice proceeding.¹⁷

Where the clause did not on its face conform to the statutory requirements, no extrinsic or external evidence was deemed admissible to establish its validity for contract-bar purposes.¹⁸ And an accompanying "savings" clause, to take effect if the union-security clause was found unlawful,¹⁹ or a deferral clause²⁰ was held not to cure it for such purposes.^{20a}

During this fiscal year, union-security clauses found to be invalid on their face included clauses not expressly granting old nonunion employees 30 days to join the union,²¹ and a clause requiring membership "on or before the thirtieth day," rather than "on the thirtieth day," following the beginning of employment.²² But the Board found that a clause requiring new employees to join the union "on

¹⁴ Labor-Management Reporting and Disclosure Act of 1959 sec 201(d)

¹⁵ *Clayton & Lambert Mfg Co*, 128 NLRB 200. The Board noted, however, that it was not passing on any possible effect in unfair labor proceedings of noncompliance by the contracting union at the time the contract is executed. Compare with cases cited in Twenty-fifth Annual Report (1960), p 31, footnote 64, where the contracts were executed and petitions filed before the repeal of sec 9(f), (g), and (h).

¹⁶ See footnote 12, above.

¹⁷ See *In Paragon*, above, footnote 12, a Board majority, Members Rodgers and Leedom dissenting, held "that only those contracts containing a union security provision which is clearly unlawful on its face, or which has been found unlawful in an unfair labor practice proceeding, may not bar a representation petition."

¹⁸ *Aurora Gasoline Co*, 128 NLRB 37.

¹⁹ See *Pilgrim Furniture Co*, 128 NLRB 910, discussed below, p 47.

²⁰ *C & P Coal Co*, 130 NLRB 910. See also *Keystone Coat, Apron & Towel Supply Co*, 121 NLRB 880, 884 (1958).

^{20a} But see *Paragon Products Co*, above.

²¹ *Aurora Gasoline Co*, above, *Zanetti Riverton Bus Lines*, 128 NLRB 1389.

²² *Atlas Shower Door Co*, 131 NLRB No 2.

or after" the 30th day following their employment, and nonunion incumbent employees to join "on or after" the 30th day following the contract's execution, did not remove the contract as a bar, although the model clause in the *Keystone* case, above, did not contain the "on or after" language²³ In the latter case, the Board also found provisions that the shop steward and shop committee shall be elected by union members in the plant, that only the shop steward may participate in the discussion of grievances during working hours, and that "no member of the Union shall be required to work under any condition which may be or tend to be unsafe or injurious to his health," were not discriminatory against nonmembers, and did not exceed permissible limits

On the other hand, although a union-security clause in one case was, on its face, consistent with the requirements established in the *Keystone* case, above, the Board held the contract no bar upon the basis of the contracting parties' admission that it was actually executed on October 11, 1960, rather than on September 27, 1960, the effective and execution date indicated in the contract²⁴ In view of this admission, the Board found that the clause, though valid on its face, did not in fact grant old nonunion employees and employees hired between September 27 and October 11, 1960, the requisite 30-day grace period in which to decide whether to join the union and, therefore, exceeded the permissive limits of the statute

(2) Checkoff Clauses

Section 302(c)(4) of the act permits the deduction of union dues from the wages of employees provided "the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner" Under the Board's rules a contract is not a bar if it contains a checkoff clause which does not on its face conform to section 302 of the act²⁵ Last year, a Board majority held that a checkoff clause which requires an employee to give written notice to both the employer and the union to effectuate the revocation of a checkoff assignment does not constitute such an impediment to an employee's freedom of revocation as to defeat a contract as a bar²⁶

²³ *Charles Leonard, Inc*, 131 NLRB No 137, footnote 3 The Board noted, however, that it did not pass upon the clause's "efficacy as a union-security provision"

²⁴ *Hoechst Chemical Corp*, 131 NLRB No 21

²⁵ *Keystone Coat, Apron & Towel Supply Co*, 121 NLRB 880, 885 (1958), Twenty-fourth Annual Report (1959), p 26

²⁶ *Boston Gas Co*, 130 NLRB 1230, modifying upon reconsideration a panel decision in 129 NLRB 369 Member Fanning, concurring in the result, concluded that the application of the *Keystone* rule to checkoff provisions does not effectuate the policies of the act Member Jenkins, also concurring in the result, found *Felter v Southern Pacific Co*, 359 U S 326 (1959), upon which the panel had relied, inapplicable Member Kimball dissented

(3) "Hot Cargo" Clauses

Section 8(e) of the act, which became effective November 13, 1959,²⁷ makes it an unfair labor practice for any union and employer, except in certain aspects of the construction and the apparel and garment industries,²⁸ to enter into a "hot cargo" agreement—an agreement whereby the employer agrees to cease or refrain from handling the products of any other employer, or to cease doing business with any other person.²⁹ It also provides that any contract "entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void." In three cases during this fiscal year,³⁰ the Board had occasion to consider for the first time the effect of a "hot cargo" clause upon a contract as a bar to a petition not involving the construction or garment industries. In each of these cases, the "hot cargo" clause involved was held to remove the contract as a bar, although in one case the contract was executed before the enactment of section 8(e)³¹ and in two cases the contracts contained "savings" clauses.³²

In the first of these cases, *Pilgrim Furniture Co, Inc*,³³ a Board majority³⁴ held that a contract containing a "hot cargo" clause—providing that upon notice from the union the employer would not purchase materials from any company which has a bona fide labor dispute with the union—was no bar to a petition, although it was executed before the enactment of section 8(e) and contained a "savings" clause.³⁵ The majority reasoned that to hold such a contract a bar would be "giving force and effect to such clauses despite the express statutory language that they are unenforceable and void." In rejecting the contention that since 8(e) invalidates a contract only to the extent it contains a "hot cargo" clause its remaining provisions should be deemed a bar, the majority pointed out that such an argument would be equally applicable to contracts containing invalid union-security provisions, but that the Board has consistently held such invalid union-security agreements no bar since its decision in the *Hager Hinge* case,³⁶ and expressly rejected this argument in the

²⁷ Sec 8(e) was added by the Labor-Management Reporting and Disclosure Act of 1959, enacted Sept 14, 1959, and became effective 60 days thereafter.

²⁸ These exceptions are contained in the provisos to the section.

²⁹ For the unfair labor practice aspects, see the discussion, below, pp 140 and 142.

³⁰ *Pilgrim Furniture Co, Inc*, 128 NLRB 910, *American Feed Co*, 129 NLRB 321, *Calorator Mfg Corp*, 129 NLRB 704.

³¹ *Pilgrim Furniture Co, Inc*, above.

³² *Pilgrim Furniture Co, Inc*, above, *American Feed Co*, above. But see *Food Haulers, Inc*, 136 NLRB No 46, which reversed the *Pilgrim* case after the fiscal year.

³³ Above.

³⁴ Former Chairman Leedom and Member Fanning dissenting.

³⁵ The clause provided that in the event any Federal or State law or regulation or final decision of any court or board having jurisdiction affects any provision or practice of the contract, the contract shall be amended to comply therewith, otherwise the contract shall continue in full force and effect.

³⁶ *C Hager & Sons Hinge Mfg Co*, 80 NLRB 163 (1948).

recent *Keystone* case³⁷ In this respect, as well as in respect to savings clauses which are not recognized as curing for bar purposes otherwise invalid union-security provisions,³⁸ the majority perceived no reason to apply a different rule when a proscribed "hot cargo" clause is involved³⁹ As to the fact that the contract was executed before the enactment of section 8(e), the majority noted that it was not dealing with a possible retroactive application of the section to the execution of the clause, but rather with the present effect to be given that clause after it has been rendered unenforceable and void by the enactment of section 8(e)

Similarly, in another of these cases,⁴⁰ a Board panel held that a clause which excluded from the employees' "job duties, course of employment or work" any work "on goods, products or materials coming from or going to the premises of an Employer where there is any controversy with a Union" was a "hot cargo" clause violative of section 8(e), and removed the contract as a bar, despite a savings clause And in the third case,⁴¹ a panel held a contract provision that "[i]n the event the Employer discontinues any of his manufacturing processes and sub-lets this work to another firm the work will be performed by a firm under contract with an International Union, if available and comparable in quality," was also a "hot cargo" clause violative of section 8(e), and removed the contract as a bar to an election

e Changes in Identity of Contracting Party—Schism—Defunctness

The basic rules as to whether a contract will be denied as a bar because of a schism in the ranks of the contracting union, or because the union is defunct, were stated in the *Hershey Chocolate* case⁴² during fiscal 1959 Applying these rules during this past year, the Board held that a schism did not exist in the circumstances of one case, and that the contract was a bar, notwithstanding "disaffiliation action" at a duly constituted meeting of the contracting union held for the purpose of disaffiliating therefrom and affiliating with the petitioner^{42a} The Board observed that after such "disaffiliation action,"

³⁷ 121 NLRB 880, 884-885 (1958)

³⁸ See *The Schnadig Corp*, 123 NLRB 1934 (1959)

³⁹ Member Fanning was of the opinion that the provision here did not restrain or coerce the employees in their selection or refraining from selecting a bargaining representative and, therefore, did not raise a conflict between the policies set forth in sec 1 of the act—between stability of the collective bargaining relationship and the freedom of employees to select a bargaining representative—to justify setting aside the contract and the contract-bar rule Former Chairman Leedom dissented solely on the basis of the fact that the contract was executed before the enactment of sec 8(e)

⁴⁰ *American Feed Co*, 129 NLRB 321

⁴¹ *Calorator Mfg Corp*, 129 NLRB 704

⁴² *Hershey Chocolate Corp*, 121 NLRB 901 (1958), Twenty-fourth Annual Report (1959), p 27 See also Twenty-fifth Annual Report (1960), p 32

^{42a} *Clayton & Lambert Mfg Co*, 128 NLRB 209

new officers were appointed in the contracting union, meetings of that union were held, and the union continued to administer the contract. It noted, moreover, that the record did not show "that there exists in the international union a basic intraunion conflict over policy resulting in a disruption of existing intraunion relationships," as required to constitute a schism.

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

Under the Board's rules, as revised in the *Deluxe Metal Furniture* decision⁴³ during fiscal 1959, an asserted contract may not bar a present election in certain situations because of a timely rival claim or petition, or the parties' conduct regarding their contract.

(1) Substantial Representation Claims

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

Generally, to constitute a substantial claim, the claim of a nonincumbent union must be supported by a petition filed at an appropriate time,⁴⁴ unless the nonincumbent union has refrained from filing a petition in reliance upon the employer's conduct indicating that recognition had been granted or that a contract would be obtained without an election.⁴⁵ In one case, however, the Board held that a nonincumbent union made a "substantial claim," and that a contract executed after such claim but before its petition was no bar, where (1) a week before the execution of the contract with a previously incumbent union, the employer entered into an agreement with the petitioner admitting that the petitioner represented a majority of the employees, and agreeing that in order to avoid any jurisdictional disputes the petitioner would ask for an election before a specified date and the employer would recognize whichever union won the election, and (2) the nonincumbent's petition was filed before the date specified in this agreement.⁴⁶ The Board noted that although the petitioner was neither promised nor led to believe that it could obtain recognition without an election, the employer had "lulled Petitioner into a sense of security leading it to believe that it had a commitment that recognition would not be granted and a contract would not be executed with any union until after the results of a Board election, provided the Petitioner would request such election before" the date specified

⁴³ *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958), Twenty-fourth Annual Report (1959), pp. 28-34.

⁴⁴ See *City Cab, Inc.*, 128 NLRB 493.

⁴⁵ *Deluxe Metal Furniture Co.*, above, at 998-999 (1958), Twenty-fourth Annual Report (1959), pp. 28-29.

⁴⁶ *Greenpoint Sleep Products*, 128 NLRB 548.

It pointed out that the "avoidance of practices such as that engaged in here was the very purpose for which the substantial claims rule was devised"

(2) Timeliness of Rival Petitions

To defeat a contract as a bar, a rival petition must be filed timely, in accordance with the Board's rules⁴⁷ Generally, a petition will be held untimely if (1) filed on the same day a contract is executed, or (2) filed prematurely, *viz*, more than 150 days before the terminal date of an outstanding contract,⁴⁸ or (3) filed during the 60-day "insulated" period immediately preceding that date

In the case of a favorable ruling upon a petitioner's appeal from a regional director's dismissal of a petition, the filing date of the original petition is controlling, not the date the Board reinstates the petition⁴⁹ And in the case of a petition amended at the hearing to exclude categories of "laborers" and "janitors" from the unit, the Board rejected the contention that the amendment substantially altered the unit originally claimed and was therefore untimely, because the petitioner acted, in part, upon assurances from the employer and intervenor that there was no "laborer" classification and that "janitors" were always excluded from the unit as a matter of practice, and the amendment did not substantially enlarge the character or size of the unit⁵⁰

(a) Sixty-day insulated period

The *Deluxe Metal* rule, barring petitions during the 60-day period immediately preceding and including the expiration date of an existing contract, was adopted to promote industrial stability by affording parties to an expiring contract an opportunity to negotiate a new agreement without the disrupting effect of rival petitions⁵¹

In determining the outer limits of the 60-day insulated period in a particular case, the Board held that a contract for a term from March 19, 1959, to March 19, 1961, expired on March 18, 1961, and a petition filed on January 18, 1961, was untimely filed during the insulated period⁵² The Board noted that, in conformity with the general rule of construction, a contract in effect "until" a day certain is to be construed as not including the date named after the word "until," absent a specific expression to the contrary, and the word "to" is synonymous with the word "until"

⁴⁷ See Twenty-fourth Annual Report (1959), pp 29-31

⁴⁸ See, e.g., *Mid-Continent Gas Co.*, 131 NLRB No 60

⁴⁹ *Phillips Petroleum Co.*, 130 NLRB 895

⁵⁰ *The Marley Co.*, 131 NLRB No 103 See also Twenty-fifth Annual Report (1960), p 34

⁵¹ See Twenty-fifth Annual Report (1960), p 34, Twenty-fourth Annual Report (1959), pp 30-31

⁵² *Hemisphere Steel Products, Inc.*, 131 NLRB No 13

The Board has also held that a claim by a nonincumbent union prior to the insulated period unsupported by a timely petition cannot forestall the operation of the insulated period ⁵³

(3) Termination of Contract

A contract ceases to be a bar to a rival petition upon its termination. However, termination of a contract during the 60-day insulated period does not render timely a petition filed during the 60-day period ⁵⁴

A contract will be deemed terminated for contract-bar purposes if terminated by mutual assent, or pursuant to its terms,⁵⁵ or if a notice of termination or cancellation is given because of breach of a basic contract provision ⁵⁶

(a) Automatically renewable contracts

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

Under present rules, automatic renewal for contract-bar purposes is forestalled by—

Any notice of a desire to negotiate changes in a contract received by the other party thereto immediately preceding the automatic renewal date provided for in the contract despite provision or agreement for its continuation during negotiations, and regardless of the form of the notice ⁵⁷

The Board held that a 2-year automatically renewable contract which the parties agreed to extend "pending the termination of [a representation] proceeding" was no bar to a petition timely filed more than 60 days but not over 150 days prior to the original expiration of the contract ⁵⁸

(4) Premature Extension of Contract

The Board adheres to the general rule that a prematurely extended contract will not bar a petition which is timely in relation to the original contract's terminal date. However, in view of the *Deluxe Metal* requirements, a petition to be timely must be filed over 60 days, but not more than 150 days, before the original contract's terminal date. If so filed, the petition is timely in relation to the extended contract ⁵⁹

⁵³ *City Cab, Inc.*, 128 NLRB 493

⁵⁴ See *Deluxe Metal Furniture Co.*, 121 NLRB 905 Twenty-fourth Annual Report (1959), p. 33

⁵⁵ See *G O Murphy Co.*, 128 NLRB 908

⁵⁶ See Twenty-fourth Annual Report (1959) p. 33

⁵⁷ *Deluxe Metal Furniture Co.*, above. For the effect of belated notice and of notice under modification clauses see Twenty-fourth Annual Report (1959), pp. 32-33

⁵⁸ *Jat Transportation Corp.*, 128 NLRB 780 783

⁵⁹ See Twenty-fifth Annual Report (1960), p. 35

A contract will be considered prematurely extended if during its term the contracting parties execute an amendment thereto or a new contract which contains a later terminal date⁶⁰ But the extension will not be held premature when made (1) during the 60-day insulated period preceding the terminal date of the old contract, (2) after the terminal date of the old contract, if notice by one of the parties forestalled its automatic renewal or it contained no renewal provision, or (3) at a time when the existing contract would not have barred an election because of other contract-bar rules⁶¹

Consistent with these rules, the Board held in one case that a new contract executed by the parties midterm a previous contract was not subject to its premature-extension rules, where at the time the new contract was executed the old contract could not operate as a bar under the Board's expanded unit formula⁶² The Board noted that it intended to permit contracting parties to correct their existing contracts by appropriately rewriting those defective as a bar because of contract-bar rules, and that such a corrected contract would operate as a bar for its reasonable term⁶³

5 Impact of Prior Determination

To promote the statutory objective of stability in labor relations, representation petitions under section 9 are barred during specific periods following a prior Board determination of representatives Thus, according to longstanding judicially approved Board practice, the certification of a representative ordinarily will be held binding for at least a year⁶⁴ In addition, section 9(c)(3) specifically prohibits the Board from holding an election during the 12-month period following a valid election in the same group

a One-Year Certification Rule

Under the Board's 1-year rule, a certification is a bar for 1 year to a petition for employees in the certified unit,⁶⁵ and a petition filed before the end of the certification year will be dismissed,⁶⁶ except where the certified incumbent and the employer have executed a new contract during the certification year⁶⁷ In that situation, the certifica-

⁶⁰ *Deluxe Metal Furniture Co*, above, at 1001-1002

⁶¹ *Ibid*

⁶² *Foremost Appliance Corp*, 128 NLRB 1033 For a discussion of the expanded unit aspect of this case, see above, pp 41-42

⁶³ Cf *Wood Conversion Co*, 125 NLRB 785 (1959)

⁶⁴ See *Ray Brooks v NLRB*, 348 U S 98 (1954)

⁶⁵ *Kimberly Clark Corp*, 61 NLRB 90 (1945)

⁶⁶ *Centr-O-Cast & Engineering Co*, 100 NLRB 1507 (1952)

⁶⁷ *Ludlow Typograph Co*, 108 NLRB 1463 (1954), Nineteenth Annual Report (1954) p 35, Twenty first Annual Report (1956), p 49-50 See also *The Great Atlantic & Pacific Tea Co*, 125 NLRB 252, footnote 5 (1959), Twenty-fifth Annual Report (1960) p 36

tion year is held to merge with the contract, the contract becoming controlling with respect to the timeliness of a rival petition

Absent unusual circumstances, a Board certification is binding on a "successor" employer, without the requirement of express adoption.⁶⁸ However, where following a Board certification a small portion of the certified unit was splintered from the larger part of the unit and put in independent operation under a different company, the Board held the certification no bar to a petition for this relatively small segment of employees, as they had been effectively separated for unit purposes from the other employees covered by the certification.⁶⁹

b Twelve-Month Limitation

Section 9(c) (3) prohibits the holding of an election *in any bargaining unit or any subdivision* in which a valid election was held during the preceding 12-month period. The Board gives the same effect to elections conducted by responsible State agencies as to Board-conducted elections, where they afford the employees involved an opportunity to express their true desires as to a collective-bargaining agent and are not attended by irregularities.⁷⁰ Under this policy, a Board majority sustained a regional director's dismissal of a petition because of a recent election held under the auspices of the Virgin Islands Commissioner of Agriculture and Labor in the proposed bargaining unit.⁷¹ In giving the Virgin Islands election the same effect as an election under section 9, the majority noted that although the challenge procedures of the Virgin Islands did not conform to the Board's, the parties voluntarily participated in the election and the election was conducted without substantial deviation from due process requirements.

It has been the Board's view that section 9(c) (3) only prohibits the holding of an election during the proscribed period, but does not require the Board to dismiss any petition filed during the 12-month period as untimely. However, recognizing the desirability of establishing specific periods for the timely filing of petitions, the Board has adopted the policy that petitions filed more than 60 days before the expiration of the statutory 12-month period will be dismissed forthwith.⁷²

⁶⁸ See, e.g., *Ray Brooks v NLRB*, 348 U.S. at 97-98 (1954)

⁶⁹ *American Concrete Pipe of Hawaii, Inc.*, 128 NLRB 720

⁷⁰ See *Bluefield Products & Provision Co.*, 117 NLRB 1660, 1663 (1957), *Olun Mathieson Chemical Corp.*, 115 NLRB 1501 (1956)

⁷¹ *West Indian Co.*, 129 NLRB 1203, Member Kimball dissenting

⁷² See *Vickers, Inc.*, 124 NLRB 1051, 1052-1053 (1959), *Twenty-fifth Annual Report* (1960), pp 36-37

6. Unit of Employees Appropriate for Bargaining

Section 9(b) requires the Board to decide in each representation case whether, "in order to assure to employees the fullest freedom in exercising the rights guaranteed by this act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof" ⁷³

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

Section 9(b)(1) prohibits the Board from deciding that a unit including both professional and nonprofessional employees is appropriate unless a majority of the professional employees vote for inclusion in such a mixed unit ⁷⁴

Section 9(b)(2) prohibits the Board from deciding that a proposed craft unit is inappropriate because of the prior establishment by the Board of a broader unit, unless a majority of the employees in the proposed craft unit vote against separate representation ⁷⁵

Section 9(b)(3) prohibits the Board from establishing units including both plant guards and other employees or from certifying a labor organization as representative of a guard unit, if the labor organization admits to membership, or is affiliated, directly or indirectly, with an organization which admits, nonguard employees ⁷⁶

Section 9(c)(5) prohibits the Board from establishing a bargaining unit solely on the basis of extent of organization ⁷⁷

The Board adheres to the practice of declining to certify a unit composed of a single employee ⁷⁸

The following sections discuss the more important cases decided during fiscal 1961 which deal with factors generally considered in unit determinations, particular types of units, and treatment of particular categories of employees or employee groups

⁷³ Unit determinations also have to be made in refusal-to-bargain cases, as no violation of the relevant section of 8 (a) or (b) can be found unless the bargaining representative involved had a majority status in an appropriate bargaining unit at the time of the alleged refusal to bargain

⁷⁴ See *Longs Stores, Inc*, 129 NLRB 1495, *Westinghouse Electric Corp*, 129 NLRB 846, where the Board directed a separate election for the professional employees even though they had, on a prior occasion, been afforded the opportunity to vote for inclusion in a mixed unit

⁷⁵ For the application of rules governing the establishment of craft units, see below, pp 55-57

⁷⁶ See *Watchmanitors, Inc*, 128 NLRB 903

⁷⁷ See *Hot Shoppes, Inc*, 130 NLRB 144, Member Fanning dissenting

⁷⁸ See *Foreign Car Center, Inc*, 129 NLRB 319, where the Board dismissed a refusal-to-bargain complaint because bargaining would have been with a representative for a one-man unit. In *Al & Dick's Steak House, Inc*, 129 NLRB 1207, the Board dismissed a petition for an expedited election under sec 8(b)(7)(C) because the unit was comprised of only one employee

a General Considerations

The appropriateness of a bargaining unit is primarily determined on the basis of the common employment interests of the group involved. In making unit determinations, the Board also has continued to give particular weight to any substantial bargaining history of the group.⁷⁹

Extent of organization may be a factor but, under section 9(c) (5), it cannot be given controlling weight.

The Board has consistently held that jurisdictional or other limitation concerning classifications of employees in no way restricts the Board in its determination of the appropriateness of a bargaining unit.⁸⁰

It is the Board's practice to approve consent-election agreements unless they contain provisions which contravene the statute or established Board policy, even though the Board might not have found the unit stipulated therein appropriate had the case been contested before it on its merits. However, such consent agreements cannot destroy a unit previously found appropriate.⁸¹

b Craft and Quasi-Craft Units

The Board has continued to apply the *American Potash* rules⁸² in passing on petitions for the establishment of craft units, or the severance of craft or craftlike groups from existing larger units. Under these rules (1) A craft unit must be composed of true craft employees having "a kind and degree of skill which is normally acquired only by undergoing a substantial period of apprenticeship or comparable training"; (2) a noncraft group, sought to be severed, must be functionally distinct and must consist of employees who, "though lacking the hallmark of craft skill," are "identified with traditional trades or occupations distinct from that of other employees . . . which have by tradition and practice acquired craftlike characteristics", and (3) a representative which seeks to sever a craft or quasi-craft group from a broader existing unit must have traditionally devoted itself to serving the special interests of the type of employees involved.

⁷⁹ See, e.g., *Republic Steel Corp*, 131 NLRB No 107, *Grand Rapids General Motors*, 131 NLRB No 63, where the Board dismissed the request for a single-plant unit because of the controlling multiplant bargaining history, although three intervening consent elections for a single-plant unit were held.

⁸⁰ *Maybe Stone Co*, 129 NLRB 487, *Minnesota Mining & Mfg Co*, 129 NLRB 789.

⁸¹ *Grand Rapids General Motors*, above, where the Board held that intervening single-plant consent elections did not destroy the previously established multiplant unit.

⁸² *American Potash & Chemical Corp*, 107 NLRB 1418 (1954), Nineteenth Annual Report (1954), pp 38-41.

(1) Craft Status

Craft status and the consequent right to separate representation was recognized in one case⁸³ involving both welders and experimental mechanics who were highly skilled welders, because they were engaged in the same industry as the welders found to be craftsmen in *Hughes Aircraft*⁸⁴ and exercised duties and skills similar to those of the welders in that case. Pointing out that the smaller group of experimental mechanics, who were employed in a previously unrepresented department, may not be merged with the larger unit of welders, who were previously represented in the existing production and maintenance unit, without a self-determination election, a Board majority dismissed the petition, since a unit of welders excluding the experimental mechanics would include only a segment of the employer's welders, and the petitioner's showing of interest did not cover experimental mechanics⁸⁵.

In another case, cabinetmakers at a department store were held by a majority of the Board to constitute a craft group appropriate for separate representation because they exercised the skills generally attributed to cabinetmakers—an occupation broadly recognized in industry as entailing a high form of skill—and they utilized in their work the traditional tools of the carpentry craft⁸⁶. However, finishers, furniture road servicemen, and benchmen were held in the same case to have no craft status. In none of the latter classifications were the employees required to serve any apprenticeship or formal training. Although they had long employment in their jobs, the Board majority was not convinced that upon attainment of job proficiency they possessed and exercised the high degree of manual dexterity and judgment necessary to qualify as true craftsmen. Nor were they held to be a functionally distinct department severable within the narrowly confined criteria of *American Potash*.

The Board dismissed a petition for severance of papercutters in a setup paper box department because the papercutters were held to have no craft status⁸⁷. They did not exhibit the range of skills, the long period of training, or the high degree of judgment and manual dexterity required for severance on a craft basis.

(2) Craft and Departmental Severance

As heretofore, severance of true craft groups, or functionally distinct and homogeneous traditional departmental groups, from

⁸³ *Aerojet General Corp.*, 129 NLRB 1492, Members Fanning and Kimball dissenting

⁸⁴ *Hughes Aircraft Co.*, 117 NLRB 98 (1957)

⁸⁵ For discussion of showing of interest aspect, see above, p. 33

⁸⁶ *May Department Stores Co.*, 129 NLRB 21, Member Rodgers dissenting

⁸⁷ *F. N. Burt Co.*, 130 NLRB 1115, Members Fanning and Kimball dissenting in other respects

existing larger groups was permitted where the *American Potash* requirements were met, including the requirement that the severance petitioner qualify as the "traditional representative" of the group.⁸⁸

In one case, a majority of the Board held that a union cannot, in the same proceeding, seek to sever a craft group from a production and maintenance unit and, simultaneously, seek to represent the production and maintenance employees.⁸⁹ Similarly, in another case, the Board held that a union seeking to represent a functionally distinct and homogeneous departmental group cannot, in the same proceeding, simultaneously request representation for a production and maintenance group.⁹⁰

Regarding the "traditional representative" requirement in severance cases,⁹¹ a panel majority dismissed a union's petition for severance of garage mechanics from an existing production and maintenance unit of bakery employees because the petitioner failed to sustain its burden of showing that it was a traditional representative of garage mechanics as required by the *American Potash* rule.⁹² Although recognizing the fact that the union represented untold numbers of garage mechanics, the majority noted that "the fact that a union may represent many employees in the same classification as those sought to be severed as a craft is not proof in itself that the union has devoted itself to serving the special interests of such employees."⁹³

Adhering to the policy stated in the *American Potash* case,⁹⁴ the Board has continued to permit severance where otherwise proper, irrespective of any degree of integration of the employer's operations.⁹⁵

⁸⁸ Severance must be coextensive with the existing bargaining unit. Thus, severance of tool and die employees on a single-plant basis from an existing multiplant unit was held inappropriate. *Grand Rapids General Motors*, 131 NLRB No 63.

⁸⁹ *F N Burt Co*, 130 NLRB 1115, Members Fanning and Kimball dissenting. The majority required the union to elect between the craftsmen and the other employees, and permitted the union to engage in only one election.

⁹⁰ *Schick Inc*, 130 NLRB 1501, citing *F N Burt Co*.

⁹¹ The "traditional representative" test applies only where severance of a craft or traditional department from an existing broader unit is requested. Thus, the Board held that this test is not applicable where a craft or departmental unit has once been severed from a production and maintenance unit and has, since then, developed its own bargaining history. *Industrial Rayon Corp*, 128 NLRB 514, set aside in 291 F 2d 809 (C A 4).

⁹² *Nissen Baking Corp*, 131 NLRB No 90. Member Rodgers dissenting.

⁹³ For further discussion of the qualifications of craft representatives, see above, pp 38-39.

⁹⁴ Above, footnote 82.

⁹⁵ See, e.g., *Lord Baltimore Press, Inc*, 128 NLRB 334, *Mallinckrodt Chemical Works, Uranium Div*, 129 NLRB 312. In both cases the Board acknowledged, but expressed disagreement with, the decision of the court of appeals in *NLRB v Pittsburgh Plate Glass Co*, 270 F 2d 167 (C A 4). Member Fanning, who did not participate in the *Lord Baltimore* case, concurred in the *Mallinckrodt* case but found it unnecessary to pass upon the question whether in a highly integrated plant he would adhere to the Board's holding in *American Potash*, and further expressed his opinion that in light of the decision of the court in the *Pittsburgh Plate Glass* case, a thorough reexamination of the *American Potash* case is required.

c Multiemployer Units

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

The Board had occasion during the past year to restate the principle that a single-employer unit is presumptively appropriate, and that to establish a contested claim for a broader unit, a controlling history of collective bargaining on a broader basis must be shown.⁹⁶ It was again pointed out that an essential element for a multiemployer unit is an unequivocal manifestation by the individual employers of a desire to be bound in future collective bargaining by group rather than individual action.⁹⁷

Heretofore, in a number of cases where a multiemployer bargaining history with respect to one category of employees was not controlling as to other employee categories, as to which there was no bargaining history, a single-employer unit of the latter employees was found appropriate.⁹⁸ But in these cases, the single-employer units consisted of employee categories which had internal homogeneity and cohesiveness and could, therefore, stand alone as appropriate units. However, in two cases during the year, the Board found that the employees sought were "a miscellaneous grouping of unrepresented employees lacking any internal homogeneity or cohesiveness," and that separate residual units of such employees were therefore inappropriate.⁹⁹ The Board pointed out that in order for the proposed units to be residual they would have had to be coextensive with the multi-employer unit since, otherwise, they would constitute only a segment of the residual group.

An employer may withdraw from multiemployer bargaining and thereby reestablish his employees in separate appropriate units. A single-employer unit will be deemed appropriate in such circumstances when "the employer, at an appropriate time, manifests an intention to withdraw from group bargaining and to pursue an in-

⁹⁶ *John Breuner Co*, 129 NLRB 304, *Greater St. Louis Automotive Trimmers & Upholsterers Assn*, 131 NLRB No. 11.

⁹⁷ *Morgan Linen Service, Inc*, 131 NLRB No. 58, *Northern Nevada Chapter, National Electrical Contractors Assn*, 131 NLRB No. 74, where nonmembers of an employer association were excluded from a multiemployer unit because their signed letter of assent agreeing only to be bound by the association's contract did not contain a clear, express grant of authority to the association to represent the signers of the letter in collective bargaining.

⁹⁸ See, e.g., *Joseph E. Seagram & Sons, Inc*, 101 NLRB 101 (1952), *Continental Baking Co*, 109 NLRB 33 (1954).

⁹⁹ *The Los Angeles Statler Hilton Hotel*, 129 NLRB 1349, *Holiday Hotel*, 131 NLRB No. 20.

dividual course of action with respect to its labor relations”¹ Applying this test, the Board found separate single-employer units appropriate where, following a breakdown in associationwide negotiations, individual employers abandoned group bargaining, did not pay dues or assessments to the association—resulting in automatic termination of membership under the association’s bylaws—and indicated their desire to pursue an individual course of action by executing contracts on a single-employer basis²

In another case, the Board held that employers had not timely or effectively withdrawn their authority from an employer association to represent them, because their attempted withdrawal occurred either after the commencement of multiemployer negotiations for an agreement or after the signing of the agreement, and their adoption of this agreement showed that they did not intend to embark on a course of independent bargaining³

d Production and Maintenance Units

In the past, the Board has followed the policy of permitting the separate representation of maintenance employees in the absence of a bargaining history for production and maintenance employees⁴ During this fiscal year, a Board majority in the *American Cyanamid* case⁵ vacated an earlier decision in the same case⁶ which held that where one union seeks all the production and maintenance employees involved and another unit seeks only a maintenance unit, the broader unit alone is appropriate, notwithstanding the absence of a bargaining history on the broader basis Upon reconsideration, the Board majority found nothing in the record here to show that “the Employer’s operation is so integrated that maintenance has lost its identity as a function separate from production, and that maintenance employees are not separately identifiable,” and directed self-determination elections in (1) a maintenance voting group, and (2) a production voting group The majority pointed out, however, that the absence of a more comprehensive bargaining history would not necessarily establish the appropriateness of a maintenance unit, and that the Board will “continue to examine on a case-by-case basis the appropriateness of separate maintenance department units, fully cognizant that homogeneity, cohesiveness, and other factors of sepa-

¹ *Cooks, Waiters & Waitresses Union, Local 327 (Greater Peoria Restaurant Assn)*, 131 NLRB No 33

² *Ibid*

³ *Northern Nevada Chapter, National Electrical Contractors Assn*, 131 NLRB No 74

⁴ See *Armstrong Cork Co*, 80 NLRB 1328, *Allied Chemical & Dye Corp*, 120 NLRB 63, 67, and cases cited therein

⁵ *American Cyanamid Co*, 131 NLRB No 125, Member Rodgers dissenting

⁶ *American Cyanamid Co*, 130 NLRB 1 former Chairman Leedom and Member Fanning dissenting

rate identity are being affected by automation and technological changes and other forms of industrial advancement" ^{6a}

Heretofore, it was the Board's policy to reject party stipulations for units confined to production employees in all industries except the garment industry ⁷ During the past year, the Board reversed its past practice of giving effect to such stipulations in the garment industry where there was no history of bargaining ⁸ It held that there are no special circumstances peculiar to that industry to warrant this exception, and found a unit of production and maintenance employees alone appropriate

e Dual Function Employees

With respect to the unit placement of an employee who performs dual functions for an employer, a Board majority announced a new test for all cases, namely, "whether an employee sought to be included in a proposed unit is primarily engaged in, and spends the major portion of his time, i.e., more than 50 percent of his time, performing tasks or duties alike or similar to the ones performed by the other employees in the requested unit" ⁹ Under this rule, only employees engaged more than 50 percent of their time in such like tasks or duties will be included in the requested unit and eligible to vote in an election conducted in such unit ¹⁰

f Individuals Excluded From Bargaining Unit by the Act

A bargaining unit may include only individuals who are "employees" within the meaning of section 2(3) of the act The major categories expressly excluded from the term "employee" are agricultural laborers, independent contractors, and supervisors In addition, the statutory definition excludes domestic servants, or anyone employed by his parent or spouse, or persons employed by an employer subject to the Railway Labor Act or by any person who is not an employer within the definition of section 2(2) ¹¹

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

^{6a} See also *Warner-Lambert Pharmaceutical Co, Inc*, 131 NLRB No 171

⁷ See *Dove Mfg Co*, 128 NLRB 778, and cases cited therein

⁸ *Ibid*

⁹ *Denver Colorado Springs-Pueblo Motor Way*, 129 NLRB 1184, Member Finning dissenting *The Ocala Star Banner*, 97 NLRB 384 (1951) and other cases permitting unit inclusion of employees spending less than a major portion of their time in such tasks were specifically overruled

¹⁰ As to voting eligibility see below, p 68

¹¹ See above, p 22, footnote 1 See also, e.g. *Geronimo Service Co*, 129 NLRB 366, where the Board had occasion to determine whether a particular company was an "employer" in view of the authority of an Army contracting officer to effect the dismissal of employees, and *Laundry, Dry Cleaning & Dye House Workers' Intl Union Local 26*, 129 NLRB 1446, where the Board found office clericals for a local union's welfare and pension trusts to be employees of the local union under the circumstances of the cases

(1) Agricultural Laborers

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

In applying the statutory terms, it is the Board's policy "to follow whenever possible" the interpretation of section 3(f) by the Department of Labor¹² Thus, employees engaged in the raising, butchering, packing, freezing, and distribution of rainbow trout were held not agricultural laboreis but "employees" in view of the ruling of the Department of Labor that employees engaged in "fish farming" of the type involved here are not employed in agriculture within the meaning of section 3(f)¹³

Employees at a dairy farming and milk processing operation who are regularly employed full time in processing, bottling, and delivering milk and other dairy products were held not agricultural laborers¹⁴ On the other hand, individuals who tend cattle, raise poultry, and handle milk and eggs on a dairy and poultry farm were held agricultural laborers under section 2(3)¹⁵

(2) Independent Contractors

In determining whether an individual is an independent contractor rather than an employee, and therefore must be excluded from a proposed bargaining unit, the Board has consistently applied the "right-of-control" test¹⁶ This test is based on whether the person for whom the individual performs services has retained control not only over the result to be achieved but also over the manner in which the work is to be performed The resolution of this question depends on the facts of each case, and no one factor is determinative¹⁷

In one case the Board held that newspaper distributors were employees rather than independent contractors because the employee reserved the right to control, when and as it saw fit, the manner and means, as well as the result, of the distributors' work¹⁸ Here, the fact that social security and withholding taxes were not deducted and that the distributors owned their own trucks and hired helpers if needed, was

¹² *Snake River Trout Co*, 129 NLRB 41 See also Twenty fifth Annual Report, p 43

¹³ *Snake River Trout Co*, above

¹⁴ *Shoenberg Farms*, 129 NLRB 906 citing *H A Rider & Sons*, 117 NLRB 517 (1957)

¹⁵ *Pine State Creamery Co*, 130 NLRB 892

¹⁶ The test applies equally in determining whether the particular individuals may properly be included in a bargaining unit under sec 9 of the act, and where their employee status for the purposes of the unfair labor practice provisions of sec 8 is in issue

¹⁷ *Buffalo Courier Express, Inc*, 129 NLRB 932, *Lindsay Newspapers, Inc*, 130 NLRB 680, *Mohican Trucking Co*, 131 NLRB No 148

¹⁸ *Buffalo Courier Express, Inc*, above, distinguishing *P G Publishing Co*, 114 NLRB 60 (1955)

not deemed controlling. However, the employer's selection and control of the scope of a distributor's district, its provision of trucking allowances and liability insurance, its establishment of the price at which papers were to be sold, its assistance in collections and solicitation of new outlets and subscribers, its requirement of reports on distributors' expenses and other reports, the advancement of credit, the acceptance of "returns," the replacement without cost of Sunday color sections lost, stolen, or destroyed, and the terminability of the contract on 1 day's notice, were found to demonstrate a substantial measure of control over the means as well as the results of the distributors' work. Moreover, such factors indicated that the distributors' compensation was not controlled primarily by the distributors' industry or efficiency in performing the work required under the contract, but was in substantial part affected by decisions and actions of the employer. Similarly, in two other newspaper cases, route dealers and motor route carriers were found to be employees and not independent contractors.¹⁹

Truckdrivers who had previously been employees of a trucking service were held not to have become independent contractors by virtue of individual lease agreements under which the drivers leased their trucks and equipment from the employer.²⁰ The Board held that the leasing arrangement amounted to little more than a paper or book-keeping procedure for the convenience of the employer and, in material respects, the employer retained the right to control the manner and means by which the work of the drivers was to be accomplished. In another case, individual distributorship contracts entered into by a carbonated beverage manufacturer with its driver-salesmen were held not to have altered the employee status of these drivers or converted them into independent contractors.²¹

A news photographer was held to be essentially a small entrepreneur rather than a wage earner, and, therefore, an independent contractor, not an employee of a newspaper.²² Here, the photographer's income represented the difference between what he received for pictures he was able to sell and the cost of materials. Although the newspaper

¹⁹ *San Antonio Light Div., Hearst Consolidated Publications, Inc.*, 130 NLRB 619, *Land say Newspapers, Inc.*, above, both cases citing *Buffalo Courier Express, Inc.*, above.

²⁰ *Mohican Trucking Co.*, above.

²¹ *Squirt Nesbit Bottling Corp.*, 130 NLRB 24.

²² *La Prensa, Inc.*, 131 NLRB No. 73. Here, the Board noted the legislative history of the 1947 amendments to the act showing the intention of Congress that the Board recognize as employees those who "work for wages or salaries under direct supervision," and as independent contractors those who "undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits." 80th Cong., 1st Sess., H. R. Rep. No. 245, April 11, 1947, p. 18. *Legislative History of the Labor Management Relations Act, 1947*, vol. 1, p. 809.

assigned him to subjects which were to be photographed, it did not control the manner or means by which he was to perform his work. This photographer functioned substantially, and received the same pay, as other photographers who were admittedly "free lancers."

In another case, "bosses" engaged by seafood processing companies to do drag-boat fishing in company-owned and -equipped boats were found to be independent contractors, and their fishermen crews to be their employees rather than the employees of the companies on the basis of oral agreements or arrangements between the "bosses" and the companies which were bilateral in nature, i.e., arrived at by negotiation.²³

(3) Supervisors

The supervisory status of an individual under the act depends on whether he possesses authority to act in the interest of his employer in the matters and the manner specified in section 2(11), which defines the term "supervisor."²⁴ An employee will be found to have supervisory status if he has any of the authorities enumerated in section 2(11).²⁵

The fact that a rank-and-file employee exercises supervisory authority irregularly and sporadically is not alone sufficient to constitute him a supervisor.²⁶ Conversely, the mere fact that a supervisor fails to exercise his supervisory authority does not change his employment status from that of a supervisor to that of a rank-and-file employee. He still has the power regardless of its nonexercise.²⁷

g Employees Excluded From Unit by Board Policy

It is the Board's policy to exclude from bargaining units employees who act in a confidential capacity to officials who formulate, determine, and effectuate the employer's labor relations policies,²⁸ as well

²³ *Frank Awoto Fish Co and Boat Seaworthy*, 129 NLRB 27. The Board found that the bosses here operate under conditions more akin to those in *Alaska Salmon Industry, Inc*, 110 NLRB 900 (1954), than in *Southern Shellfish Co*, 95 NLRB 957 (1951).

²⁴ Sec 2(11) reads "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

²⁵ See Twenty fifth Annual Report (1960), p 45.

²⁶ *V I P Radio, Inc*, 128 NLRB 113.

²⁷ *Leonard Niederwiter Co*, 130 NLRB 113.

²⁸ See, e.g., Twenty third Annual Report (1958), pp 41-42, and *Laundry, Dry Cleaning & Dye House Workers' Intl Union Local 26*, 129 NLRB 1446, which involved a local union as an employer, and where an employee who was a member of the employer's executive committee which formulated labor relations policies was excluded from the unit as a confidential employee. Compare with *Cooking Biscuiting Co*, 131 NLRB No 64, where a personnel assistant was held not a confidential employee because his status and duties had not changed since he first assumed the duties of personnel clerk which were all of a clerical nature, and at no time did he negotiate concerning labor relations policies or rep

as managerial employees, i e, employees in executive positions with authority to formulate and effectuate management policies²⁹

Access to confidential file material has been held insufficient, in itself, to confer confidential status³⁰ Nor does the fact that employees may be entrusted with business information to be withheld from the employer's competitors, or that their work involves cost determinations which may affect employees' pay scales, render them managerial or confidential employees³¹

In one case the Board rejected the contention of an international union that its business agents were managerial employees and therefore should be excluded from the unit sought by the petitioner³²

h Employees' Wishes in Unit Determinations

The wishes of the employees concerned, as ascertained in self-determination elections, are taken into consideration where (1) specifically required by the act,³³ or (2) in the Board's view, representation of an employee group in a separate unit or a larger unit is equally appropriate,³⁴ or (3) the question of a group's inclusion in an existing unit rather than continued nonrepresentation is involved³⁵

Prior to its decision in *The Warwick Baltimore Hotel* case³⁶ during the preceding fiscal year, whenever the Board directed elections among voting groups of previously represented and previously unrepresented employees, whom the incumbent union sought to combine, the practice was to pool the votes³⁷—but only if the voting groups of previously represented employees rejected the union, and the voting group of previously unrepresented employees voted for the union, was there occasion for such pooling³⁸ In the *Warwick* case, a Board majority held that it would no longer pool the votes in such cases, and that if

resent the employer in any formal grievance procedures, and *Swift & Co*, 129 NLRB 1301 where a garage stenographer was found not a confidential employee, although she substituted for the plant superintendent's confidential secretary about 10 percent of her time, because she spent only a fraction of that time in work considered confidential

²⁹ See Twenty third Annual Report (1958), pp 42-43 See also *Yellow Cab, Inc*, 131 NLRB No 41, where taxicab dispatchers were held not to have managerial functions

³⁰ *G C Murphy Co*, 128 NLRB 908

³¹ *Swift & Co*, above

³² *International Ladies' Garment Workers' Union*, 131 NLRB No 25, citing *American Federation of Labor*, 120 NLRB 969 (1958) The duties and authorities of the business agents are substantially the same as those of the organizers in the *American Federation of Labor* case who were held to be nonmanagerial employees

³³ See above, p 54

³⁴ *Sec American Cyanamid Co*, 131 NLRB No 125, p 59, Member Rodgers dissenting, *Aerojet General Corp*, 129 NLRB 1492, Members Finning and Kimball dissenting See also *The Zia Co* 108 NLRB 1134 (1954) Nineteenth Annual Report (1954) pp 42-43

³⁵ See, e g, *Polk Bros, Inc*, 128 NLRB 330, *J R Simplot Co*, 130 NLRB 272 and 1283 But see *D V Displays, et al*, 134 NLRB No 55 decided after the close of the fiscal year, which modified *The Zia Co*, 109 NLRB 312 (1954)

³⁶ 127 NLRB 82 (1960), Member Finning dissenting

³⁷ For a description of the pooling technique, see *American Potash & Chemical Corp*, 107 NLRB 1418, 1427 (1954), Nineteenth Annual Report (1954), p 43

³⁸ See *The Zia Co*, above, Twentieth Annual Report (1955), pp 38-39

the previously represented voting group rejected the union, the previously unrepresented group would not constitute an appropriate unit and remain unrepresented, notwithstanding its selection of the union.³⁹ However, in one case during this fiscal year, where the unrepresented group sought to be added to the represented group was "by far the more numerous one," a Board majority held the *Washiki* case inapplicable, and found that the unrepresented group here could comprise a separate appropriate unit "on a residual basis," and could, therefore, select its own representative, even if the previously represented group chose another representative or rejected representation.⁴⁰

1 Units for Decertification Purposes

The Board has continued to require that the unit in which the decertification election is to be held must be coextensive with the existing certified or recognized unit.⁴¹ In the case of a certified multi-employer unit, it held that the fact that some individual employers had dropped out of the unit and others had joined it did not render inappropriate the certified multiemployer unit of all the employers presently participating in joint bargaining.⁴²

During the past year, in two cases involving a history of bargaining in a unit broader than the certified unit, the certified unit rather than the historical broader unit was held appropriate. In one of these cases, the last certified unit was broadened by the contract of the parties after the certification. A Board majority noted that to have held the broader contract unit controlling in that case would have denied the employees an opportunity to vote out a union for which they had not voted in the previous election and which had been imposed upon them as a bargaining representative.⁴³ In the other case, a Board majority held that a contract which merged a certified chemist unit with another certified unit was not sufficient to obliterate the separate certification of the chemists in view of the particular facts and equities in the case.⁴⁴

³⁹ See also *Cook Paint & Varnish Co.*, 127 NLRB 1098 (1960) and *Star Union Products Co.* 127 NLRB 1173 (1960). But see *Felco Half & Brother, Inc.*, 132 NLRB No 135 decided after the close of the fiscal year, which overruled the *Washiki* and *Cook Paint* cases.

⁴⁰ *J. R. Simplot Co.*, 130 NLRB 1283, modifying 130 NLRB 272, Member Fanning dissenting (there were 23 employees in the previously represented group and 973 employees in the unrepresented group).

⁴¹ *Arlan's Department Store of Michigan, Inc.*, 131 NLRB No 88, *Calorator Mfg. Corp.*, 129 NLRB 704. See also *Westinghouse Electric Corp.*, 129 NLRB 846, as to decertification of a professional unit.

⁴² *Fisherman's Cooperative Assn.*, 128 NLRB 62.

⁴³ *Mission Appliance Corp.*, 129 NLRB 1417, Members Fanning and Kimball concurring, in the result only.

⁴⁴ *Goodyear Tire & Rubber Co.*, 130 NLRB 889, Member Fanning dissenting. *San Juan Mercantile Corp.*, 117 NLRB 8 (1957), discussed in Twenty-second Annual Report (1952) p 47, overruled to the extent inconsistent.

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

In situations involving recognition or organization picketing, whenever a section 9(c) petition is timely filed—within a reasonable period of time not to exceed 30 days from the commencement of such picketing—in accordance with the first proviso to recently enacted section 8(b)(7)(C),⁴⁵ and the Board's Rules and Regulations pertaining thereto,⁴⁶ the Board must direct an election "forthwith" in such unit as it finds appropriate

During the past year, the Board had occasion for the first time to pass upon questions concerning the processing of petitions under section 8(b)(7)(C) in *Woodco Corporation*.⁴⁷ In that case, a majority of the Board stated as follows

[T]his statutory scheme contemplates that a violation of this section [8(b)(7)(C)] may be avoided where an expedited election is held in an appropriate unit encompassing the employees for whom the labor organization seeks recognition or whom it seeks to organize by means of the picketing. Thus, the unit for an 8(b)(7)(C) expedited election is not necessarily the unit alleged in the petition because it must as a minimum include the employees who are involved in the picketing. This requires a determination first as to which employees are in fact involved in the picketing, and then a finding as to the smallest unit encompassing such employees which would be appropriate under familiar Board principles. Depending upon the circumstances of the case, the appropriate unit may comprise the categories of employees involved in the picketing or it may be broader in scope.

In the instant case, the majority found that the regional director had apparently not made an investigation as to which employees were involved in the picketing, "a necessary predicate for a determination of the appropriate unit for an expedited election," and remanded the case to the regional director to determine in the first instance the unit appropriate for an expedited election upon the basis of an investigation of all the facts. It noted that the investigation should include such matters contained in the employer's offer of proof rejected at the hearing which indicated the group of employees involved in the picketing.⁴⁸

In another case, involving a restaurant's sole doorman, the employer's only unrepresented employee, the Board held that it saw no reason to modify its longheld policy in section 9(c)(1) cases, of not directing

⁴⁵ This section was added by the Labor-Management Reporting and Disclosure Act of 1959, enacted Sept. 14, 1959, and became effective 60 days thereafter.

⁴⁶ See the Board's Rules and Regulations, Series 8, as amended, secs. 102.75-102.77.

⁴⁷ 129 NLRB 1188, Members Fanning and Kimball dissenting.

⁴⁸ The hearing officer rejected the employer's offer of proof with respect to evidence that (1) the petitioner had demanded that the employer sign a recognition agreement for a unit of all its employees and instituted picketing the next day to compel such recognition (2) the picketing had inflicted serious and irreparable injury upon the employer's business and (3) the picketing had already continued for an unreasonable period of time when the instant petition was filed, on the ground that such evidence raised issues germane only to pending unfair labor practice charges.

elections in one-man units, for expedited elections under sections 8(b) (7) (C) and 9(c) ⁴⁹ It pointed out that as the picketing union cannot, under Board policy, be certified, because the unit involved is inappropriate, no election can be held, and the petition cannot serve to block further processing of 8(b) (7) charges ⁵⁰

8. Conduct of Representation Elections

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

a Voting Eligibility

An employee's voting eligibility depends generally on his status on the eligibility payroll date and on the date of the election. To be entitled to vote, an employee must have worked in the voting unit during the eligibility period and on the date of the election. However, as specified in the Board's usual direction of election, this does not apply in the case of employees who are ill or on vacation or temporarily laid off, or employees in the military service who appear in person at the polls. Other exceptions pertain to striker replacements and irregular and intermittent employees discussed below.

Laid-off employees are permitted to vote only if they have a reasonable expectancy of reemployment at the time of the election. Retention of seniority rights following layoff, with no expectancy of employment in the near future, is insufficient to establish eligibility ⁵¹

(1) Economic Strikers and Replacements

During fiscal 1961, the Board adhered to the principles it enunciated in the preceding year with respect to the voting eligibility of economic strikers and permanent replacements for such strikers ⁵² Generally, the status of an economic striker for voting purposes is forfeited where the striker obtains permanent employment elsewhere before the election ⁵³ In one case, the Board decided that "self-employment during an economic strike, standing alone, does not establish that the striker has abandoned his job with the struck employer" ⁵⁴

⁴⁹ *Al & Dick's Steak House, Inc.*, 129 NLRB 1207

⁵⁰ For discussion of 8(b) (7) unfair labor practices, see below, pp 148-151

⁵¹ *The Harley Co.*, 131 NLRB No 103

⁵² See Twenty-fifth Annual Report (1960), pp 46-47

⁵³ See *H & M Knitting Mills, Inc.*, 128 NLRB 361, citing *W Wilton Wood, Inc.*, 127 NLRB 1675 (1960)

⁵⁴ *H & M Knitting Mills, Inc.*, above. However a majority of the Board found that under the circumstances here the self employment of the economic striker constituted an abandonment of his employment, Member Jenkins dissenting in this respect

In another case, the Board restated its finding in last year's *Wilton Wood*⁵⁵ case that permanent replacements for economic strikers are eligible voters if employed on the eligibility and election dates⁵⁶ However, in a case where the strike occurred after the direction of the election and the established eligibility date, the Board viewed the economic strike amendment to section 9(c)(3)⁵⁷ as requiring that replacements be permitted to vote irrespective of the eligibility period established for other employees, and accordingly held that "permanent replacements for strikers, who in no event may exceed the number of strikers, are eligible to vote if employed on the date of the election"⁵⁸

(2) Irregular and Intermittent Employees

As heretofore, voting eligibility in industries where employment is intermittent or irregular has been adjusted by the use of formulas designed to enfranchise all employees with a substantial continuing interest in their employment conditions and to insure a representative vote To this end, voting eligibility was extended to laborers of a crating and packing firm who worked 50 hours or more at any time during the preceding year, provided the employees' names appeared on at least one daily payroll during the current year preceding the issuance of the direction of election⁵⁹ And stevedores were held eligible to vote if their names appeared on eight or more payrolls during the 8-month period immediately preceding the date of the direction of election⁶⁰

(3) Dual Function Employees

With respect to employees who perform dual functions for an employer, a Board majority announced a new test applicable to their voting eligibility as well as to unit placement Under this test, only employees engaged more than 50 percent of their time in tasks or duties similar to those performed by the employees in the requested unit will be eligible to vote in an election conducted in such unit⁶¹

(4) Stipulations and Eligibility Lists

In the interest of expeditious handling of representation cases in general, the Board will honor the stipulations of the parties which are not inconsistent with the act or with Board policy In one case

⁵⁵ *W Wilton Wood, Inc*, above

⁵⁶ *H & M Knitting Mills, Inc*, above

⁵⁷ Sec 702, Labor-Management Reporting and Disclosure Act of 1959, Title VII—Amendments to the Labor Management Relations Act, 1947, as amended

⁵⁸ *Tampa Sand & Material Co*, 129 NLRB 1273

⁵⁹ *Tol-Pac, Inc*, 128 NLRB 1430

⁶⁰ *Hamilton Bros, Inc*, 130 NLRB 233

⁶¹ *Denver Colorado Springs-Pueblo Motor Way*, 129 NLRB 1184, Member Fanning dissenting With respect to unit placement see above, p 60

during the year, *Cruis Along Boats, Inc*,⁶² the Board had directed an election on the basis of a stipulation, entered into by the parties at the hearing, to include certain individuals in the unit. On the day of the election, the petitioner questioned the stipulation for the first time, contending that these individuals were supervisors, and challenged their ballots. Notwithstanding the regional director's report on challenges sustaining this contention as to most of these individuals, a Board majority held the parties bound by the stipulation and overruled the challenges. It noted that to permit repudiation of a stipulation under these circumstances "would give encouragement to unwarranted and dilatory claims and would result in a lack of finality to Board proceedings and decisions."⁶³

It is also the Board's rule, established in the *Norris-Thermador* case⁶⁴ during fiscal 1958, that parties to a consent-election agreement are bound by an eligibility list attached to and incorporated in a written and signed agreement if it specifically states that all eligibility issues resolved are final, unless the inclusion or exclusion of certain employees contravenes the act or established policy. In accord with this rule the Board held that an employer was not precluded from challenging the ballot of an individual on the ground that he was a supervisor, although his name appeared on the eligibility list.⁶⁵ The Board noted that the *Cruis Along* policy described above was not applicable here since "that policy was intended to apply to stipulations as to unit placement made at representation hearings and was not intended to modify the policy applicable to agreements as to eligibility made in consent election cases."

b Timing of Election

Ordinarily, the Board directs that elections be held within 30 days from the date of the direction of election. But where an immediate election would occur at a time when there is no representative number of employees in the voting unit—because of such circumstances as a seasonal fluctuation in employment or a change in operations—a different date will be selected in order to accommodate voting to the peak or normal work force.

In seasonal industries, it is customary to time the election so as to occur at or near the first peak season following the direction of election.⁶⁶ In the case of an expanding unit, the election date will be

⁶² 128 NLRB 1019, *Members Jenkins and Fanning* dissenting.

⁶³ The majority noted that its refusal to investigate the matter at this stage of the proceedings was based on procedural grounds and did not necessarily mean that the individuals in question are appropriately in the unit.

⁶⁴ *Norris Thermador Corp*, 119 NLRB 1301 (1958), *Twenty-third Annual Report* (1958) pp 44-45.

⁶⁵ *Lake Huron Broadcasting Corp*, 130 NLRB 908.

⁶⁶ See, e.g., *J R Simplot Food Processing Div*, 128 NLRB 1391.

made to coincide with the time when a representative number of the contemplated enlarged work force is employed ⁶⁷

The Board declined to dismiss a petition which sought a unit of employees at a construction company's fabrication yard although no substantial and representative employee complement was presently employed at the yard because of the completion of contracts after the filing of the petition ⁶⁸ However, in view of the expected increase in yard personnel as new contemplated contracts are obtained, the Board treated the yard operations here as analogous to seasonal operations and directed the regional director to conduct an election "in the foreseeable future when, in the opinion of the regional director, a substantial and representative complement is employed" at the employer's yard ⁶⁹

c Standards of Election Conduct

Board elections are conducted in accordance with strict standards designed to assure that the participating employees have an opportunity to register a free and untrammelled choice in selecting a bargaining representative Any party to an election who believes that the standards were not met may, within 5 days, file objections to the election with the regional director under whose supervision it was held The regional director then may either make a report on the objections, or may issue a decision disposing of the issues raised by the objections which is subject to a limited review by the Board ⁷⁰ In the event the regional director issues a report, any party may file exceptions to this report with the Board The issues raised by the objections, and exceptions if any, are then finally determined by the Board ⁷¹

(1) Mechanics of Election

Election details, such as the time, place, and notice of an election, are left largely to the regional director ⁷² The Board does not inter-

⁶⁷ *J R Simplot Co*, 130 NLRB 272 See also *National Gypsum Co*, 128 NLRB 315. *Bsura Chemical Co* 129 NLRB 929, and *Kolker Chemical Corp*, 130 NLRB 1394, where unit expansion was held not to justify postponement because it was shown that a substantial and representative segment of the employee complement would be employed at the normal election date

⁶⁸ *W Horace Williams Co*, 130 NLRB 223

⁶⁹ See also *Ernest Renda Contracting Co*, 130 NLRB 1515, where the Board postponed the election because construction work on a sanitary sewer project may be intermittent on account of adverse climatic conditions.

⁷⁰ This procedure applies only to directed elections, not consent or stipulated elections For the latter procedures, see Board's Rules and Regulations, Series 8, secs 102 62 and 102 69(c)

⁷¹ The procedures for filing objections and exceptions and for their disposition are set out in sec 102 69 of the Board's Rules and Regulations, Series 8, as amended, effective with respect to any petition filed under sec 9 (c) or (e) of the act on or after May 15, 1961

Under the old sec 102 69, in force during the greater part of fiscal 1961, the procedures provided that if any party to an election should timely file objections, the regional director could then only make a report on the objections

⁷² See, e g, *Jat Transportation Corp*, 131 NLRB No 39, Member Fanning dissenting in other respects, where the Board rejected the contention that the free choice of the em-

fere with the regional director's broad discretion in making arrangements for the conduct of elections except where the discretion has been abused⁷³ The test is whether the employees in fact had an adequate opportunity to cast a secret ballot Once a ballot has been cast in an election, the voter loses control over its disposition and may not as a matter of right have it withdrawn⁷⁴

In one case, the Board held that the regional director did not abuse his discretion in making election arrangements where a small percentage of employees was inadvertently omitted from the eligibility lists obtained from the employer, and "hack licenses" and social security cards were used as a method of identifying employees⁷⁵

In another case, the Board rejected the contention of an alleged employee that opportunity to vote was impaired by an agreement of the employer and union improperly to exclude her and two other employees from the bargaining unit⁷⁶ Noting that the posted notices of election listed as eligible to vote "all employees" and that the alleged employees involved made no attempt to vote, the Board observed that "if they had been sufficiently interested in voting, they could have appeared at the polls, where they would have been permitted to vote challenged ballots, and a determination of the propriety of their exclusion or inclusion would then have been made by the Board"

The use of observers at a Board-ordered election is a privilege and not a right The presence of observers other than Board agents is not required by the act However, the Board permits the parties to use employee election observers, but does not usually permit outside observers⁷⁷ Thus, the Board held in one case that the regional director acted within his discretion in refusing to permit the union to use non-employee outside election observers in the absence of agreement by the employer⁷⁸

While during the count of ballots utmost care must be taken to preserve each ballot, an election will not be set aside because certain ballots are destroyed by Board agents after the parties have agreed

ployees was interfered with because the election sites were selected by the regional director and were on the employer's premises

⁷³ See, e.g., *Jat Transportation Corp.*, above, Member Fanning dissenting in other respects, where the Board held that the regional director did not act arbitrarily or capriciously in the preparation and conduct of the election because he prepared for the election in accordance with the standard regional office procedures

⁷⁴ *Great Eastern Color Lithographic Corp.*, 131 NLRB No 138, Member Fanning dissenting in other respects In this case, the request of five individuals, who were alleged to have been unlawfully discharged in a pending unfair labor practice proceeding and whose ballots had been challenged, to withdraw their votes was refused Such withdrawals would have resulted in the petitioner winning the election without awaiting the outcome of the unfair labor practice proceeding

⁷⁵ *Jat Transportation Corp.*, above, Member Fanning dissenting in other respects

⁷⁶ *Houston Chronicle Publishing Co.*, 131 NLRB No 93

⁷⁷ *Jat Transportation Corp.*, above, Member Fanning dissenting in other respects

⁷⁸ *Ibid.*

that the voters are ineligible, and have failed to object to the agent's announcement that the ballots would be destroyed ⁷⁹

(2) Interference With Election

An election will be set aside if it was accompanied by conduct which, in the Board's view, created an atmosphere of confusion or fear of reprisals and thus interfered with the employees' free and untrammelled choice of a representative guaranteed by the act ⁸⁰ In determining whether specific conduct amounted to such interference, the Board does not attempt to assess its actual effect on the employees but concerns itself with whether it is reasonable to conclude that the conduct tended to prevent a free expression of the employees' choice

An election will be set aside because of prejudicial conduct whether or not the conduct is attributable to one of the parties The determinative factor is that conduct has occurred which created a general atmosphere in which a free choice of a bargaining representative was impossible ⁸¹

(a) Preelection speeches—the 24-hour rule

In order to insure an atmosphere conducive to a free election, the Board has prohibited participating parties from making preelection speeches on company time and property to massed assemblies of employees within 24 hours before the time scheduled for an election Violation of this rule, known as the *Peerless* rule, ⁸² results in the election being set aside

In one case, a Christmas party held in one of the employer's restaurants on the day before the election was deemed not violative of the *Peerless* rule ⁸³ The date of the party had been selected before the preelection conference established the date for the election, the employees attended voluntarily and on their own time, and the only supervisor in attendance, who was the supervisor for that particular restaurant, made no speech nor led any discussion concerning the election or the union In reaching its decision in this case, the Board also considered again the effect of the employer's speeches to employees during the time mail balloting was in progress ⁸⁴ It held that the

⁷⁹ *Interstate Hosts, Inc.*, 131 NLRB No 153

⁸⁰ In order to prevent confusion and turmoil at the time of the election, the Board has specifically prohibited electioneering speeches on company time during the 24 hour period just before the election, *Peerless Plywood Co.*, 107 NLRB 427 (1953), as well as electioneering near the polling place during the election

⁸¹ See *James Lees and Sons Co.*, 130 NLRB 290, former Chairman Leedom and Member Rodgers dissenting, where a majority of the Board set aside an election because the statements and conduct by responsible groups and individuals in the community reasonably conveyed the view to the employees that in the event of unionization the employer would shut down its plant and other employers would not locate in the community

⁸² *Peerless Plywood Co.*, above, footnote 80

⁸³ *Interstate Hosts, Inc.*, above

⁸⁴ See *Oregon Washington Telephone Co.*, 123 NLRB 339 (1959)

speeches here did not violate the *Peerless* rule because written notice of the date the ballots were mailed to employees was not given to the employer

(b) Election propaganda

In order to safeguard the right of employees to select or reject collective-bargaining representatives in an atmosphere which is conducive to the free expression of the employees' wishes, the Board will set aside elections which were accompanied by propaganda prejudicial to such expression. However, the Board has frequently had occasion to make clear that it will not police or censure the parties' election propaganda absent coercion or fraud. As stated again by the Board, exaggerations, inaccuracies, partial truths, name-calling, and falsehoods in campaign propaganda, while not condoned, will not warrant setting aside an election unless they are so misleading as to impair the employees' free choice.⁸⁵ However, "when one of the parties deliberately misstates material facts which are within its special knowledge, under such circumstances that the other party or parties cannot learn about them in time to point out the misstatements, and the employees themselves lack the independent knowledge to make possible a proper evaluation of the misstatements, the Board will find that the bounds of legitimate campaign propaganda have been exceeded and will set aside an election."⁸⁶

The employer's acceleration of the regular pay period and distribution of pay envelopes immediately prior to an election, with an enclosure illustrating to the employees the amount of union dues that would be deducted if they failed to vote against the petitioner, was held not to warrant setting aside the election in one case.⁸⁷

(c) Other campaign tactics

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

⁸⁵ *United States Gypsum Co.*, 130 NLRB 901, former Chairman Leedom and Member Rodgers dissenting.

⁸⁶ *United States Gypsum Co.*, above. Here a majority of the Board set aside an election where the employer on the two days before the election distributed discussed and posted two telegrams which contained misstatements and deliberate misrepresentations concerning the employer's bargaining relationship with the petitioner at another plant belonging to the employer. See also *The Cleveland Trencher Co.*, 130 NLRB 800, where the petitioner distributed a leaflet containing misstatements as to some of the economic benefits of a fringe nature it had obtained in contracts for employees of other employers in the area. But see *Weil-McLain Co.*, 130 NLRB 19 where the employer's misstatements were held not to have exceeded the bounds of permissible campaign propaganda because the facts stated were not peculiarly within the party's knowledge, could be refuted by the opponent, and could be evaluated by the employees themselves, and *Jat Transportation Corp.*, 131 NLRB No. 39, where the employees themselves were able to determine the truth or falsity of the propaganda.

⁸⁷ *The Moulter Safe Co.*, 129 NLRB 747.

In one case, the Board held that the payment of \$2 by an employer as "lunch" money to employees who attended preelection meetings did not warrant setting aside the election.⁸⁸ The Board noted the absence of a showing that the meetings were held within the 24-hour preelection period or that the payments were conditioned upon how the employees voted.

(i) Employee interviews

The Board has consistently set aside elections where the employer resorted to the technique of calling upon all or a majority of the employees in the unit individually, in the employer's office or at their homes, to urge them to vote against a proposed bargaining representative, regardless of whether the employer's remarks to the employees were coercive in character. In setting aside the election in one case, a majority of the Board held that office and home interviews of a substantial number of employees for the purpose of encouraging rejection of the union, together with the employer's interrogation of six employees in the plant during the critical period, evidenced a systematic technique of interviewing, the cumulative effect of which interfered with a free election.⁸⁹

(ii) Preelection threats and promises

Preelection threats or promises which tend to influence the employees' vote are grounds for setting aside an election. But statements regarding the effects of union organization or severance from an existing broader unit will not be held to have interfered with an election if they are mere expressions of opinion or the party's legal position.⁹⁰

(3) Effect of Alleged Unfair Labor Practices

The Board will set aside elections because of substantial interference therewith arising from conduct which, in an unfair labor practice proceeding, would also be held violative of the act. But, in such cases, the interference with the election is found to exist without regard to whether the interfering conduct would be deemed an unfair labor practice in a complaint case. This is because the effect of preelection conduct on an election is not tested by the same criteria as conduct alleged by a complaint to be violative of the act.

On the other hand, where the conduct alleged to have interfered with the election could only be held to be such interference upon an initial finding that an unfair labor practice was committed, it is Board

⁸⁸ *Jat Transportation Corp*, above, Member Fanning dissenting in other respects.

⁸⁹ *The Hurley Co*, 130 NLRB 282, Members Rodgers and Kimball dissenting.

⁹⁰ See *Weil-McLain Co*, 130 NLRB 19, where the Board viewed the employer's statements as an expression of opinion rather than as threats of economic reprisal either express or implied.

policy not to inquire into such matters in the guise of considering objections to an election. In such cases, the election process may be protected by the timely filing of charges with respect to the conduct in question. Thus, in one case, a Board majority held that in the absence of unfair labor practice charges an alleged discriminatory layoff had to be presumed not unlawfully motivated and could not be considered a basis for setting aside the election.⁹¹ On the other hand, in another case, a Board majority declined to determine challenges to the ballots of individuals alleged to be unfair labor practice dischargees in a pending unfair labor practice proceeding until it had ruled on their status in the unfair labor practice case.⁹²

⁹¹ *Texas Meat Packers, Inc*, 130 NLRB 233, Member Fanning dissenting

⁹² *Great Eastern Color Lithographic Corp*, 131 NLRB No. 138 Member Fanning dissenting

IV

Unfair Labor Practices

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

This chapter deals with decisions issued by the Board during the 1961 fiscal year, emphasis being given to decisions which involve novel questions or set new precedents

A. Unfair Labor Practices of Employers

1. Interference With Section 7 Rights

Section 8(a) (1) of the act forbids an employer "to interfere with, restrain, or coerce" employees in the exercise of their rights to engage in, or refrain from, collective bargaining and self-organizational activities as guaranteed by section 7 Violations of this general prohibition may take the form of (1) any of the types of conduct specifically identified in subsections (2) through (5) of section 8(a),¹ or (2) any other employer conduct which independently tends to interfere with, restrain, or coerce employees in exercising their statutory rights Violations of the latter type are discussed in this section

Generally, the test which the Board applies in this type of case is "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act"² To support a violation, it is not necessary to show that the employer was motivated by a desire to interfere with such

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

² *American Freightways Co., Inc.*, 124 NLRB 146, 147 (1959), Twenty-fifth Annual Report (1960), pp 56-57

rights It is well established that section 8(a) (1) coercion "does not turn on the employer's motive or on whether the coercion succeeded or failed" ³

The cases of independent 8(a) (1) violations during the past year continued to present the usual pattern of employer conduct designed to prevent union organization, to discourage union adherence, or to impede other concerted activities protected by section 7 of the act For the most part, they involved such clearly coercive conduct as reprisals, and express or implied threats of reprisals, for participating in union or other protected concerted activities,⁴ and promises or grants of economic advantages to discourage such activities ⁵

Specific reprisals or threats of reprisal found violative of section 8(a) (1) included the eviction of strikers from company living quarters,⁶ the discharge of an employee for presenting a grievance on behalf of herself and fellow employees,⁷ threats of plant shutdown and discharge,⁸ threats of loss of overtime and reduced work,⁹ threats of "drastic measures,"¹⁰ statements attributing discharges, layoffs, and refusals to promote and recall employees to union activities,¹¹ and threats that wage increases,¹² advancement,¹³ job security,¹⁴ job benefits,¹⁵ or continued operation of the plant or business ¹⁶ depended upon the employees' rejection of the union in a Board election

Also found violative of this section were employer threats to break and get rid of the union,¹⁷ to discontinue business if the union became the collective bargaining representative,¹⁸ to decline to bargain with the union,¹⁹ to delay negotiations unnecessarily,²⁰ to shut down before the employer would sign a collective-bargaining

³ *Ibid*

⁴ See, e.g., *Stewart Hog Ring Co, Inc*, 131 NLRB No 49, *West India Fruit & Steamship Co, Inc*, 130 NLRB 343 (Members Rodgers and Kimball dissenting on jurisdictional grounds), *Winn Dixie Stores, Inc*, 128 NLRB 574, *Layton Oil Co*, 128 NLRB 252

⁵ See, e.g., *West India Fruit & Steamship Co, Inc*, above, *Kickert Brothers Ford, Inc*, 129 NLRB 1316, *Sherry Mfg Co, Inc*, 128 NLRB 739, *Murray Ohio Mfg Co*, 128 NLRB 184

⁶ *Kohler Co*, 128 NLRB 1062, 1092-1093, 1188-1189 A sec 8(a) (3) violation was not found because the occupancy of such living quarters was not a "condition of employment"

⁷ *Sherry Mfg Co, Inc*, 128 NLRB 739 A sec 8(a) (3) violation was not found because the action was not related to union activities

⁸ *Liberty Coach Co*, 128 NLRB 160

⁹ *Stewart Hog Ring Co, Inc*, 131 NLRB No 49

¹⁰ *West India Fruit & Steamship Co, Inc*, 130 NLRB 343 (Members Rodgers and Kimball dissenting on jurisdictional grounds)

¹¹ *Borg Warner Controls, etc*, 128 NLRB 1035

¹² *General Engineering, Inc*, 131 NLRB No 87

¹³ *The Pulaski Rubber Co*, 131 NLRB No 51

¹⁴ *Ibid*

¹⁵ *General Engineering, Inc*, above

¹⁶ *The Pulaski Rubber Co*, above, *Minnotte Mfg Corp*, 131 NLRB No 85 (also payment of money involved)

¹⁷ *Borg-Warner Controls*, above (employer also advocated formation of a dominated union)

¹⁸ *Kickert Brothers Ford, Inc*, 129 NLRB 1316

¹⁹ *General Engineering, Inc*, 131 NLRB No 87

²⁰ *Ibid*

agreement with the union,²¹ or that there would never be a union in the employer's establishment²²

Unlawful interference within the meaning of section 8(a) (1) was also found where employers announced a wage increase and adopted a hospitalization plan,²³ rescinded a proposed wage cut,²⁴ promised to take care of complaints,²⁵ promised that discharged employees might return to work if they forgot the union,²⁶ offered to negotiate an individual wage increase with an employee,²⁷ or stated that problems could be resolved without union representation²⁸

Section 8(a) (1) was likewise held violated where employers solicited or aided employees to resign from the union,²⁹ or, accompanied by threats of reprisal or promises of benefit, solicited employees to abandon a current strike³⁰

a Interrogation

The Board has continued to adhere to the test enunciated in *Blue Flash Express, Inc.*,³¹ that the legality of an employer's interrogation of employees as to their union allegiance and activities depends upon "whether under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act"³² If "the surrounding circumstances together with the nature of the interrogation itself" render the interrogation coercive, it need not "be accompanied by other unfair labor practices before it can violate the Act" However, when such interrogation viewed in the context in which it occurred "falls short of interference or coercion, [it] is not unlawful"³³

Thus, the Board found no violation where single instances of interrogation occurred, in circumstances devoid of other unfair labor

²¹ *G & S Electric Co.*, 130 NLRB 961

²² *Edwards Trucking Co.*, 129 NLRB 385 See also Twenty-fifth Annual Report (1960), p 56

²³ *Sherry Mfg Co., Inc.*, 128 NLRB 739 (unilateral action also found a sec 8(a) (5) violation)

²⁴ *Kichert Brothers Ford, Inc.*, 129 NLRB 1316 (no violation of sec 8(a) (5) found since wage cut had never been put into effect)

²⁵ *West India Fruit & Steamship Co., Inc.*, 130 NLRB 343 (Members Rodgers and Kimball dissenting on jurisdictional grounds)

²⁶ *Edwards Trucking Co.*, above

²⁷ *Murray Ohio Mfg Co.*, 128 NLRB 184

²⁸ *Barney's Supercenter, Inc.*, 128 NLRB 1325

²⁹ *Edwards Trucking Co.*, 129 NLRB 885, *Winn-Dixie Stores, Inc.*, 128 NLRB 574, *West India Fruit & Steamship Co., Inc.*, above

³⁰ *G & S Electric Co.*, 130 NLRB 961 (strikers threatened with loss of jobs, vacation, and bonuses if they failed to return by a certain day), *Kohler Co.*, 128 NLRB 1062, 1088-1090 (promises of benefits if striker returned)

³¹ 109 NLRB 591, 593 (1954)

³² *Amsworth Mfg Co.*, 131 NLRB No 48

³³ See Twentieth Annual Report (1955), pp 67-69, Twenty-third Annual Report (1958), p 57, *Anderson Air Activities, Inc.*, 128 NLRB 698, 699

practices,³⁴ where the interrogation concerned matters into which the employer had a legitimate cause to inquire,³⁵ and where the interrogation in itself lacked any coercive quality³⁶

Conversely, in *Edwards Trucking Co.*,³⁷ the Board, in sustaining a section 8(a)(1) violation based on interrogation, noted that the interrogation occurred in the context of the employer's coercive threats and subsequent discrimination against employees because of their union activities. Similarly, interrogation of many employees about their own and other employees' activities and sympathies for the union, and about union meetings and their attendance, was found part of a general coercive pattern, and in violation of section 8(a)(1), where accompanying events included voiced hostility to union organization, promises of benefits and threats of discharge, and discriminatory discharges³⁸

In one case, an employer's questioning of an employee whether he had heard anything about the union was held not coercive where the employer stated at the same time that "if the boys wanted, a union, why, let them have it"³⁹. Also held not coercive, because it was "ambiguous at best," was the employer's questioning of another employee as to whether she had "company". However, in the context of other unfair labor practices, the foreman's questioning of employees regarding attendance at union meetings, the presence of other employees at meetings, and how employees "felt about the union" was held to have independently violated the section⁴⁰

Other interrogation found coercive, in a context of expressed union hostility⁴¹ or other unfair labor practices, included questioning an employee upon hiring him as to whether he had ever worked for a union,⁴² interrogation of employees regarding union membership, ac-

³⁴ *Lenox Plastics of P R, Inc.*, 128 NLRB 42, *Gibbs Automatic Div., Pierce Industries*, 129 NLRB 196

³⁵ *Kohler Co.*, 128 NLRB 1062 (interviews for purpose of determining identity of persons engaged in illegal strike conduct), *Anderson Air Activities*, above (interviews to ascertain reasons for dissension which forced foreman to resign voluntarily because he had lost control of his crew, Member Jenkins, dissenting, found interrogation exceeded permissive bounds), *Midstate Hauling Co., Inc.*, 129 NLRB 1150 (interrogation as to picketing activity at another company's plant for purpose of determining whether employer's trucks could cross picket line)

³⁶ *Murray Ohio Mfg Co.*, 128 NLRB 184 (questioning employee as to why he was wearing union button and whether he had subsequently thrown it in trash)

³⁷ 129 NLRB 385

³⁸ *Trettenero Sand & Gravel Co.*, 129 NLRB 610 (The Board reversed the trial examiner's finding that such questioning constituted unlawful surveillance, in the absence of evidence that the employer attempted to infiltrate employee meetings, employed spy techniques or clandestinely watched employee union activities, or attempted to give employees an impression of surveillance. For a discussion of surveillance, see below, p 83)

³⁹ *Acme Boot Co., Inc.*, 181 NLRB No 169

⁴⁰ See also *Passmore Supply Co.*, 128 NLRB 50 (interrogation directly related to discriminatory discharge), *Atneworth Mfg Co.*, 181 NLRB No 48, *West India Fruit & Steamship Co.*, 180 NLRB 848

⁴¹ See *Murray Envelope Corp., eto.*, 180 NLRB 1574

⁴² *Liberty Coach Co.*, 128 NLRB 160

tivities, and desires, ⁴³ polling employees concerning their union sympathies, ⁴⁴ interrogation of a known union adherent as to whether he had signed a union card; ⁴⁵ and counsel's extensive interrogation of employees under oath going far beyond an asserted purpose of establishing supervisory taint in the showing of interest submitted by a union in support of a representation petition ⁴⁶

The Board did not agree with a trial examiner's view that interrogation is "presumptively unlawful," insofar as the trial examiner implied that once the fact of interrogation was established the employer had the burden to establish that it was not unlawful ⁴⁷

b Prohibitions Against Union Activities

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

With respect to the promulgation of plant rules against union solicitation, the Board continued to follow the principles set forth in *Walton Mfg Co* ⁴⁸ and *Star-Brite Industries, Inc*, ⁴⁹ during the previous fiscal year ⁵⁰ Thus, an employer's broad rule forbidding solicitation on company property "to join or not to join any organization"—without reference to working or nonworking time—was held "presumptively an unreasonable impediment to self-organization" in one case, and therefore unlawful, in the absence of evidence that special circumstances made the rule necessary to maintain production or discipline ⁵¹

In this case, the Board rejected the employer's contention that the rule was necessary to prevent employees on work breaks from soliciting others still at work and thereby interfering with production The Board noted that the prohibitory rule was not limited to the solicitation of employees still at work, but was equally applicable to situations where both the solicited and the solicitor were on work breaks Likewise, the fact that a strike 7 or 8 years ago was accompanied by violence and friction among the employees was not

⁴³ *Answorth Mfg Co*, above, *Joseph Bag Co*, 128 NLRB 211, 217-218

⁴⁴ *Stewart Hog Ring Co, Inc*, 131 NLRB No 49

⁴⁵ *Southeastern Galvanizing Corp*, 130 NLRB 123

⁴⁶ *Lindsay Newspapers*, 130 NLRB 680 But the Board did not adopt the trial examiner's opinion that the concept underlying the kind of inquiry held privileged in *Joy Silk Mills*, 85 NLRB 1263, 1288 (1949), enforced 185 F 2d 732 (CA DC, 1950), certiorari denied, 341 U S 814, is inapplicable to representation proceedings However, in view of its conclusion as to the employer's purpose in conducting the inquiry it found it unnecessary to decide the extent and nature of privileged inquiry in the representation case situation as presented here

⁴⁷ *Answorth Mfg Co*, above, footnote 3

⁴⁸ 126 NLRB 697 (1960), enforced 289 F 2d 177 (CA 5), Mar 17, 1961

⁴⁹ 127 NLRB 1008 (1960)

⁵⁰ See Twenty-fifth Annual Report (1960), pp 57-59

⁵¹ *Texas Aluminum Co*, 131 NLRB No 69

deemed to justify "a blanket prohibition on solicitation" within the plant⁵²

On the other hand, a panel majority held that a no-solicitation rule prohibiting nonsupervisory "work leaders," as well as supervisors, from taking part in an election campaign between two rival unions "was not discriminatory, nor unfairly applied, nor an unreasonable impediment to employee activity," where it was promulgated by the employer during the campaign to maintain its neutrality between the rival unions, notwithstanding the fact that the rule applied to only a small number of the total nonsupervisory force⁵³ Citing *Walton Mfg Co*, above, the majority noted that an employer's rule banning solicitations on company premises during "working time" is presumptively valid in the absence of evidence that the rule was adopted for a discriminatory purpose or that it was being unfairly applied. It also observed, citing *Star-Brute Industries, Inc*, above, that the promulgation of such a rule when the union begins its campaign is not in itself evidence of a discriminatory purpose. The fact that the rule here was limited to less than all the nonsupervisory employees was not deemed, in the circumstances, an unfair application or an unreasonable restriction of employee activity as it was intended to be applied only to those employees—that is, "work leaders"—whose expression of opinion at the plant could, justifiably, be attributed to the employer⁵⁴

In another case, the legality of a rule prohibiting union talk or discussion on "company time" was presented⁵⁵ There, although the employer maintained a general rule for many years prohibiting talking on "company time" unless such conversations pertained to the job, the employees openly and freely engaged in various types of conversations and solicitations during working time. Upon the advent of union organization, the employer notified all its employees that they would be subject to disciplinary action if they discussed union matters on "company time." After the union was certified as the bargaining representative, the union's attorney raised the question at a bargaining

⁵² Since the Board found the broad no-solicitation rule invalid, the layoff of three employees for breach of the rule, during the work breaks or nonworking time of both the solicitor and the solicited, was held to violate sec 8(a)(3) and (1) of the act. See also *New Orleans Furniture Mfg Co*, 129 NLRB 244, 251, where the discharge of a union adherent purportedly for violation of a no-solicitation rule during "working time" was held violative of sec 8(a)(3) and (1) since the evidence failed to establish that the employer in fact had a bona fide no-solicitation rule of any kind, and, even if the rule existed, it was discriminatorily enforced to restrain union activity.

⁵³ *Laub Baking Co*, 131 NLRB No 106, Member Fanning dissenting.

⁵⁴ The panel majority also held that the demotion of a nonsupervisory "work leader" because he had violated the rule by campaigning during working hours did not violate the act. As to the sec 8(a)(2) aspects of this case, involving the granting of plant access to the incumbent contracting union while denying same to the outside union see below p 88.

⁵⁵ *Midwestern Instruments, Inc* 131 NLRB No 127

session whether this rule was applicable to paid nonworking coffee breaks, asserting that it should be applied only to actual "working time." The employer's attorney disagreed, but as neither was certain of the law on the subject, the matter was dropped. The employer never notified its employees that its rule was being or might be extended to cover coffee breaks, nor did it ever attempt to enforce such a rule. However, the union's attorney informed members of the union that the employer's officers had interpreted its rules as covering coffee breaks and warned them to be careful.

To these facts, a majority again applied the "presumption of validity" expressed in *Star-Brite Industries*, above, and held that the rule was not invalid merely because its adoption coincided with the advent of the union, or because it failed to prohibit other types of outside activity. It also observed that, in accord with the *Star-Brite* decision, "to require an employer to establish that such rules are necessary for production and discipline would render the presumption of validity worthless." As for the applicability of a no-solicitation rule to coffee breaks and other paid nonworking time, the majority noted that the Board and the courts have long recognized that the curtailment of employees' rights to engage in concerted activities during nonworking time is not justified by the fact that they are paid for such time.⁵⁶ It held, however, that the employer's possibly erroneous interpretation, that the phrase "company time" is "paid" rather than "working" time, was not the proper basis for finding a violation in the circumstances of this case, particularly as this aspect of the employer's no-talking rule was only incidentally discussed once at a bargaining meeting, was never announced by the employer to the employees, and no attempt was ever made to enforce such a "paid" time rule.⁵⁷

A contrary decision was reached where an employer's rule prohibited employees from engaging in organizational activity during their "nonworking time" as distinguished from "company" or "working" time.⁵⁸ And an employer's promulgation of a rule prohibiting employees of a hotel from wearing "badges of any kind," including union insignia, "so that they may be seen by any customer or guest," allegedly because it tended to lower the dignity of the hotel, was likewise held unlawful by a panel majority, where the employer threatened employees having no contact with the public with discharge or other consequences for a violation of the rule.⁵⁹ In that case the

⁵⁶ See *I F Sales Co*, 82 NLRB 137 (1949), and other cases cited in the instant case.

⁵⁷ Member Fanning, in agreement with the trial examiner, dissented on the ground that the rule applied to nonworking time, i.e., coffee breaks, as well as to working time, was adopted for a discriminatory purpose and that the *Star-Brite* decision was therefore inapplicable.

⁵⁸ *Ford Motor Company (Sterling Plant, Okassie Parts Div)*, 131 NLRB No 174. See also *The Bendix Corp., Research Laboratories Div*, 131 NLRB No 89.

⁵⁹ *Floridan Hotel of Tampa*, 130 NLRB 1105, Member Kimball dissenting in part.

majority noted that the rule was broader than the employer's claimed or stated purpose in that it prohibited all employees from wearing union buttons or insignia while at work in the hotel, regardless of their contacts with customers or guests, and was thus applicable in instances which lacked the special circumstances claimed by the employer as making the rule necessary⁶⁰

In another case,⁶¹ the Board had occasion to consider the validity of an employer's prohibition of the use of plant equipment for the printing of union stickers. There, employees had previously been permitted to use company equipment for reproduction of personal papers and pictures of all types during their spare time, without any prior request or approval. Upon learning that employees were using the equipment to print union stickers, the employer's superintendent announced that no personal work could be done on company equipment without prior approval by a supervisor. The Board, reversing the trial examiner's finding of a section 8(a)(1) violation, found that the employer did not withdraw the employees' privilege of using the equipment for personal work but only prohibited its use to produce union material, and required advance approval to insure compliance with this prohibition. It pointed out that it was not unlawful for an employer to refuse to permit his equipment to be used for the production of union literature.

c. Surveillance

During fiscal 1961, the Board reiterated that an employer independently interferes with employees' rights under section 7, in violation of section 8(a)(1), by creating an impression of surveillance⁶² as well as by actual acts of surveillance⁶³

The most extensive surveillance found violative of section 8(a)(1) during the year occurred in *Kohler Co*⁶⁴. There, the employer in the course of a strike hired detectives to conduct investigations, and received and paid for many detective reports concerning matters which the Board found "plainly outside the scope of lawful inquiry." More specifically, this consisted of detective reports concerning (1)

⁶⁰ The majority found it unnecessary to decide here whether a different rule which would cover only those employees who are in continuous and daily contact with the public would also be violative of sec 8(a)(1). Member Kimball dissented in part from the breadth of the majority's order as he would have found lawful that portion of the employer's rule which prohibited the wearing of union buttons by employees who were in continuous and daily contact with the public.

⁶¹ *The Bendix Corp, Research Laboratories Div*, above.

⁶² *Star Cooler Corp*, 129 NLRB 1075, *Ainsworth Mfg Co*, 181 NLRB No 48. Cf *Pan O-Ramic Package Co*, 130 NLRB 1174, where an employer's urging employees to attend a union meeting was held insufficient to create an impression of surveillance.

⁶³ *Layton Oil Co*, 128 NLRB 252. *Lee Rawan Mfg Co*, 129 NLRB 980. *F G & W Co*, 129 NLRB 1105.

⁶⁴ 128 NLRB 1062, 1099-1100.

the beliefs, sentiments, and attitudes among the strikers themselves on the issues involved in the strike, as to whether the strike was broken or lost, and the likelihood that the union was ready to settle for less than currently indicated, (2) investigations into the private lives of the union's chief negotiator and other union officials, including mail checks and telephone covers, and (3) checks and reports on the coming and going of union officials at union headquarters and elsewhere, and reports showing that constant surveillance was maintained at various strike headquarters and like places in the area of the strike. However, plans and reports for further use of detective investigations, surveillance, and strike breaking were not found violative of the section because there was no evidence that they were carried out.

Other action of the employer which the Board condemned in the *Kohler* case, although not found violative of section 8(a)(1) or warranting prosecution under section 12 of the act,⁶⁵ was Kohler's acceptance of reports of private detectives it had hired to investigate and report on counsel for the General Counsel and his activities, including investigation of his parents and inquiries of his wife. The Board also condemned the plans revealed in such reports for future "bugging" of the hotel at which the General Counsel's trial staff was quartered.⁶⁶

d Discharges for Concerted Activities

The discharge of employees for engaging in protected concerted activities not sponsored by a *union*, or not reflecting activity for or on behalf of a *union*, is violative of section 8(a)(1)⁶⁷. During the past year, it was pointed out that in order to sustain a section 8(a)(1) violation based on such discharges, "it is necessary to establish that at the time of the discharge the employer had knowledge of the concerted nature of the activity for which the employee was discharged."⁶⁸

In one case, an employee was discharged for sending a letter, approved but not signed by two other employees, complaining to the State health department about alleged unsanitary plant conditions.⁶⁹ Prior to the discharge, the employer had knowledge only of the letter which was signed by the dischargee alone, and believed that she was acting solely for herself in writing this letter. Although the Board

⁶⁵ Sec 12 of the act provides that "Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than one year, or both."

⁶⁶ *Kohler Co*, above, at 1100-1102

⁶⁷ Discharges which encourage or discourage union membership are specifically prohibited by sec 8(a)(3), and are discussed below, pp 91-106

⁶⁸ *Walls Mfg Co, Inc*, 128 NLRB 487 *Indiana Gas & Chemical Corp*, 130 NLRB 1488 Member Fanning dissenting

⁶⁹ *Walls Mfg Co, Inc*, above

panel found that the employee's action was in fact concerted activity, it held that the alleged violation of section 8(a)(1) could not be sustained since no evidence attributed knowledge to the employer that the dischargee acted on behalf of other employees as well as herself

However, the discharge of an employee because of the employer's mistaken belief that he had joined other employees in filing unfair labor practice charges against the employer was held to have violated section 8(a)(1), although this employee had not done so prior to his discharge ⁷⁰

e Supervisory Instructions and Discharges

The Board, reaffirming its decision in *Florida Builders, Inc.*,⁷¹ adhered to the view that an employer's unexecuted instructions to a supervisor to discriminate against employees who are unaware of the instructions do not have any impact upon the employees and, therefore, do not violate section 8(a)(1) of the act ⁷²

In the same case, however, a Board majority ⁷³ held that the employer had violated the section by terminating a supervisor because of his refusal to support as true the employer's pretext for the discriminatory discharge of a rank-and-file employee. It is well settled that the discharge of a supervisor for refusing to engage in the unfair labor practice of thwarting employees' union activities violates section 8(a)(1), as the net effect thereof is to cause employees to fear that the employer would take similar action against them if they continued to support the union ⁷⁴. In view of the "overwhelming evidence" of the employer's antiunion motivation in this case—numerous unlawful antiunion threats and promises of benefit, and the discriminatory discharge of union adherents—and the fact that the supervisor was discharged on the same pretext as that used for the discriminatory discharge of the rank-and-file employee, the majority held that it was reasonable to infer that the employees would become aware of the true reason for the supervisor's discharge

However, in another case, the discharge of a nonsupervisory employee for union activities previously engaged in while a supervisor was held not violative of the section, since the former supervisor's

⁷⁰ *Gibbs Corp.*, 131 NLRB No 118, footnote 1. However, the sec 8(a)(3) and (4) allegations as to this discharge were dismissed. See discussion below, p 92

⁷¹ 111 NLRB 786, 787 (1955)

⁷² *General Engineering, Inc.*, 131 NLRB No 87

⁷³ Member Rodgers dissenting

⁷⁴ *Talladega Cotton Factory, Inc.*, 106 NLRB 295 (1953), enforced 213 F 2d 208 (CA 5, 1954)

unprotected conduct did not become protected because he was a rank-and-file employee when discharged ⁷⁵

f. Interference With Board Proceedings

During fiscal 1961, the Board continued to hold that an employer's intimidating or coercive conduct to dissuade employees from participating in a Board proceeding constitutes unlawful interference with employees' rights under the act ⁷⁶ Thus, the Board held that an employer's veiled threats that employees would be penalized in some manner if they honored Board subpoenas in a representation proceeding violated section 8(a) (1) as such conduct tended not only to obstruct the Board in its investigation but also "to deprive employees of vindication by the Board of their statutory rights" ⁷⁷

2 Employer Domination or Support of Employee Organization

Section 8(a) (2) makes it unlawful for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it" The section provides, however, that an employer may permit employees to confer with him during working hours without loss of pay.⁷⁸

a Domination of Labor Organization

A labor organization is considered dominated within the meaning of section 8(a) (2)⁷⁹ if the employer has interfered with its formation or has assisted or supported its administration to such an extent that the organization must be regarded as the employer's creation rather than the true bargaining representative of the employees This, according to the Board, was the case where a joint shop council, which represented employees concerning grievances, wages, hours, and working conditions, operated under bylaws into which company domination was written to such a degree that the council "as constituted" was

⁷⁵ *Gibbs Automatic Div, Pierce Industries, Inc*, 129 NLRB 196 See also *Leonard Niederriter Co, Inc*, 130 NLRB 118

⁷⁶ *Winn-Dixie Stores, Inc*, 128 NLRB 574 See also Twenty-fifth Annual Report (1960), p 59, Twenty-fourth Annual Report (1959), pp 58-59

⁷⁷ *Ibid* See also *Kohler Co*, 128 NLRB 1062, 1100-1102, discussed above, p 84, where the Board condemned although it did not find it violative of sec 8(a)(1) or warranting prosecution under sec 12 of the act, the employer's acceptance of reports of private detectives it had hired to investigate and report on counsel for the General Counsel and his activities

⁷⁸ Reimbursement of employees for time spent on union business, however, is considered unlawful financial assistance to the union See *Hotpoint Div, General Electric Co*, 128 NLRB 788 Similarly, payment of wages for time spent by employee members of a "committee" in conferences with management "after regular working hours" is unlawful assistance See *Holland Mfg Co*, 129 NLRB 776, 785

⁷⁹ The distinction between domination and lesser forms of employer interference with labor organizations is of importance for remedial purposes See, e.g., Twenty-fourth Annual Report (1959), pp 61-62

not "capable of standing on an independent footing and performing the function of a bargaining representative in fact"⁸⁰

Illustrative of the "convincing internal evidence" of the employer's dominating role in this council were (1) the very form and structure of the council, with its specific provisions, among others, for the foreman's advance knowledge before an employee could take a matter up with a council representative, (2) management representatives' participation in the vote before a matter could be established as a council item for presentation to management, and their participation in discussing and determining the merit of such item, (3) limitation of the council's authority to merely making recommendations to management with final determination and execution vested in management, and (4) the company's power to cause councilmen elected by the employees to lose their elected status by reorganization or transfer⁸¹. Considered as background particularizing the existing situation was testimony indicating the considerable degree to which council members in fact submitted to management domination, although they preferred to label it as matters of courtesy and cooperation. In addition, the record also showed that the council had no funds, treasury, or income, and the employer furnished it printing, duplicating, and typing service, office space, office furniture, and telephone service, and paid employees their regular rate while engaged in council business. The Board, in holding the council dominated as well as unlawfully assisted and supported by the employer, stated as follows

The objective of Section 8(a) (2) is to vouchsafe to the employees that in the bargaining relationship those purporting to act for them not be rendered so subject to employer control or dependent upon employer favor as to tend to deprive them of the will and the capacity to give their devotion to the interest of the group they represent

Other cases where domination was found principally involved situations where the proposal and impetus for the formation of an "inside" union or "committee" came from the employer, who determined the form, structure, and nature thereof, and the resulting union or "committee" did not have the characteristics of an existence independent of the employer, e.g., discernible resources, dues, membership requirements, constitution, and bylaws⁸²

⁸⁰ *Hotpoint Div, General Electric Co*, above

⁸¹ However, in *Federal Tool Corp*, 130 NLRB 210, and *Holland Mfg Co*, 129 NLRB 776, the Board did not "rely" upon the trial examiner's conclusion that the employer's power to unseat a selected committee member by terminating his employment necessarily constituted evidence of domination and interference

⁸² See, e.g., *Clegg Machine Works*, 129 NLRB 1243, *Lee Rowan Mfg Co*, 129 NLRB 980, 990-991, and *Holland Mfg Co*, above, at 785, where the Board adopted the trial examiner's finding of domination based, in part, upon the employer's enabling the "committee" to function on its property and to use its facilities, and its payment of wages for time spent by the committee after regular working hours in conferences with management

b Assistance and Support

Section 8(a)(2) violations short of domination involved such conduct as employer assistance to unions by soliciting employees to join or sign checkoff cards for a favored union,⁸³ or other action favoring one union over another,⁸⁴ and employer support of unions by exclusive recognition of a union when it did not represent a majority of the employees in the appropriate unit,⁸⁵ or by financial assistance.⁸⁶

In one case, an employer was held to have unlawfully assisted a union by participating in, adopting, and ratifying a union agent's activities, where the union agent simultaneously solicited employees for hire on the employer's behalf and for the execution of membership cards for the union, thereby indicating that the execution of such cards was a condition of employment.⁸⁷

However, in a case involving a representation campaign by two rival unions, a panel majority found that the employer did not violate the act by permitting the incumbent-contracting union access to the plant while denying equal access to the outside union, where the employer sought to curtail the incumbent union's electioneering at the plant whenever it was brought to its attention.⁸⁸ The majority noting that while an employer who is not impartial as between competing unions in a representation campaign may thereby violate section 8(a)(2), observed that when one of the competing unions is the incumbent employee representative, the employer must continue to honor the incumbent's right to service its contract and to grant it access to the plant if the contract so provides. In this case, the majority found that if the incumbent union abused its rights under the contract, it was not done with the employer's connivance but,

⁸³ *Lykes Bros Inc of Georgia*, 128 NLRB 606, *Accurate Forming Corp*, 128 NLRB 657; *Cadillac Wire Corp*, 128 NLRB 1002, enforced 290 F 2d 261 (CA 2)

⁸⁴ *Lenscraft Optical Corp*, 128 NLRB 807 (promising employees a party and a half-day holiday if the favored union won a Board election), *Cadillac Wire Corp* 128 NLRB 1002 enforced 290 F 2d 261 (CA 2) (informing newly hired employees of union-shop provisions, explaining to them the employer's regular practice of wage deductions, furnishing them with union membership dues checkoff authorization cards, and then sending them to a union representative for further discussion of "union obligations," all as a routine part of the hiring process, where "all the participants of the hiring process, particularly the applicants, understood that the substantially immediate execution of a union card was one of the conditions of employment"), *Checker Taw Co, Inc*, 131 NLRB No 96 (among other things, directing employees to favored union's offices and permitting favored union to solicit signature for its "loyalty petitions" on company premises, while denying similar privilege to rival union)

⁸⁵ *Lenscraft Optical Corp*, above, *Accurate Forming Corp*, above

⁸⁶ *Hotpoint Div, General Electric Co*, 128 NLRB 788 (furnishing printing, duplicating, and typing service, office space, furniture, and telephone service and paying employees their regular rate while engaged in "Council" business), *Lee Rowan Mfg Co*, 129 NLRB 980 (paying employee members of "Shop Committee" full wages for services on committee, and paying all of committee's expenses)

⁸⁷ *Tennessee Consolidated Coal Co*, 131 NLRB No 80

⁸⁸ *Laub Baking Co*, 131 NLRB No 106, Member Fanning dissenting

rather, despite the employer's reasonable effort to limit the incumbent's campaigning at the plant

Interference, as distinguished from domination, assistance, or support, was found in one case where supervisors, who were union members and formerly included in the bargaining unit, participated in union meetings to the extent of nominating and seconding nominations for union officers, and voting in the election of union officers, after they were specifically excluded from the bargaining unit by a new contract.⁸⁹ In accord with prior decisions,⁹⁰ such participation in intraunion affairs by supervisors who are union members, but not in the bargaining unit, was held to constitute interference in the internal administration of the union in violation of section 8(a) (2) and (1) of the act

(1) Assistance Through Contract

The Board has adhered to the rule, first enunciated in *Midwest Piping*⁹¹ and reaffirmed in *Shea Chemical*,⁹² that an employer renders unlawful assistance within the meaning of section 8(a) (2) by recognizing and entering into a contract with a union while the majority claim of another union raises a real question of representation

Thus, in *Swift and Company*,⁹³ the employer was held to have violated section 8(a) (2) and (1) by extending its expiring contract with the incumbent union, entering into a supplemental agreement granting wage increases and improved working conditions retroactive to the expiration date of the original master contract, and executing a new master contract with the incumbent union, at a time when a rival union's claim was pending before the Board and a real question concerning representation existed. The employer's contention that *Shea Chemical* was not controlling because no real question concerning representation existed when the employer committed the acts in question, since practically every employee had continued his dues check-off authorizations, was rejected on the ground that the timely filing of a petition by a rival union, supported by an administratively determined showing of interest, *in fact* raises a real question concerning representation

However, where the absence of a real question concerning representation was conceded, the Board rejected the contention that an

⁸⁹ *Geisch Tanning Co.*, 128 NLRB 501, upon remand in *Amalgamated Meat Cutters & Butcher Workmen v NLRB*, 276 F.2d 84 (C.A. 1, 1960)

⁹⁰ See *Nassau & Suffolk Contractors' Assn., Inc.*, 118 NLRB 174, 184 (1957), and other cases cited. See also Twenty-fifth Annual Report (1960), pp. 62-63

⁹¹ *Midwest Piping & Supply Co.*, 63 NLRB 1060 (1945)

⁹² *Shea Chemical Corp.*, 121 NLRB 1027 (1958). See Twenty-fourth Annual Report (1959), p. 60

⁹³ *Swift & Co.*, 128 NLRB 732

employer's action in prematurely reopening its contract with the incumbent majority representative of the employees, and in offering and granting contract benefits during a minority union's organizational campaign, was violative of section 8(a)(2) and (1) because of the employer's *intent* to forestall the rival union's success⁹⁴ According to the Board, in such situations,

[T]he element of intent or motive is immaterial The employer's conduct is illegal only if the recognition and contract were accorded a minority union or accorded the union at a time when a real question concerning representation existed Absent a question concerning representation or an effective challenge of the status of the contracting union as a bona fide representative of the majority of the employees in the unit, the reciprocal concessions reflected in the contract must be taken as the result of proper collective bargaining⁹⁵

In another case, the Board found that an employer had not violated section 8(a)(2) and (1) by executing a new contract with the incumbent union following a claim by an outside union, where the outside union failed to file a timely petition prior to the *Deluxe Metal*⁹⁶ 60-day insulated period of the existing contract⁹⁷ The Board held that the *Midwest Piping* doctrine is inapplicable to conduct occurring during the insulated period unless a petition raising a real question concerning representation is on file at the beginning of the period⁹⁸

Illegal assistance was found, however, where an employer and a union maintained and enforced an illegal union-security agreement which not only failed to grant new employees the statutory 30-day grace period before being required to join the union, but also required union membership and payment of dues as a condition of employment⁹⁹ The parties' conduct in subsequently entering into a new contract containing union-security provisions lawful on their face,

⁹⁴ *B M Reeves Co*, 128 NLRB 320, 341, *William Penn Broadcasting Co*, 93 NLRB 1104 (1954) followed

⁹⁵ The employer was also held not to have violated sec 8(a)(2) by permitting the incumbent union to use company property and time in soliciting employees' signatures approving contract benefits, since there was no real question concerning representation and no dispute as to the bona fide character of the incumbent union as the free representative of the employees See also *Essex Wire Corp*, 130 NLRB 450, where the certified union's claim to representation of employees at the employer's new warehouse was found not an accretion to the preexisting unit, was held not to have raised a real question concerning representation because of lack of showing of interest, and recognition of a rival union was, therefore, not held violative of sec 8(a)(2)

⁹⁶ See *Deluxe Metal Furniture Co*, 121 NLRB 995 (1958) and discussion, above, pp 50-51

⁹⁷ *City Cab, Inc*, 128 NLRB 493 See also *Stant Lithograph, Inc*, 131 NLRB No 3 where the doctrine was held inapplicable to excuse an employer's refusal to bargain for a reasonable time under the terms of a settlement agreement

⁹⁸ See however, *Burke Oldsmobile, Inc*, 128 NLRB 79, 85-86 enforced in part 288 F 2d 14 (CA 2, 1961), where the Board adopted the trial examiner's finding that an employer, faced with conflicting claims by two rival unions, violated sec 8(a)(2) and (1) by recognizing one of them as the representative of its employees in the absence of a Board conducted election, although no petition for representation had been filed In that case, no *Deluxe Metal* issue was involved

⁹⁹ *Checker Taxi Co, Inc*, 131 NLRB No 96 See also *Osherwitz & Sons*, 130 NLRB 1078, where the parol modification of an illegal union-security agreement was held no defense

while the coercive effects of the old contract were still operative, and in enforcing such new contract, was also held violative of the section. The Board reasoned that at the time the new contract was executed the union's majority status was "tainted by past illegal support," and no basis existed for concluding that the union "in fact represented an uncoerced majority of the employees" at that time. It pointed out that, while the union-security provisions of the new contract were valid on their face and did not become effective until 2 weeks after the old contract expired, the employees' "failure to reject the Union during the 2 weeks they were free of compulsive contractual provisions requiring membership cannot be construed as demonstrating that the Union enjoyed a proper, uncoerced majority status."

3. Discrimination Against Employees

Section 8(a)(3) prohibits an employer from discriminating against employees "in regard to hire or tenure of employment or any term or condition of employment" for the purpose of encouraging or discouraging membership in any labor organization. However, the union-security provisions of section 8(a)(3) and 8(f) permit an employer to make an agreement with a labor organization requiring union membership as a condition of employment subject to certain limitations¹

a Encouragement or Discouragement of Union Membership

To violate section 8(a)(3), discrimination in employment must have been intended to encourage or discourage membership in a labor organization. Such an intention will be presumed where the discrimination inherently has that effect, as where it is based on union membership or lack thereof². Conversely, where discrimination does not inherently encourage or discourage union membership, the employer's unlawful motivation must be shown by independent evidence³.

In *Arnoldware, Inc.*,⁴ the Board found that an employer unlawfully discontinued an entire night shift, in violation of section 8(a)(3), in order to punish certain employees for their union activities and to thwart the union. It held it immaterial that, in carrying out the illegal objective, some victims may not have been union members or that the employer lacked knowledge of their union membership and activities, since "[d]iscrimination in regard to hire or tenure of employment of a group of employees, including nonunion employees of

¹ See below, pp 99-104

² See, e.g. *Stein-Way Clothing Co, Inc*, 131 NLRB No 27, and Twenty-fifth Annual Report (1960), p 65

³ See, e.g. *Brunswick Corp*, 131 NLRB No 167 and Twenty-fifth Annual Report (1960), p 65

⁴ 129 NLRB 228

the group of union members not known by the employer to be union members, tends to discourage union membership and activities no less than discrimination against known union members alone”

But, in *Gibbs Corporation*,⁵ the Board found violations of section 8(a) (1) and (4), and not of 8(a) (3), where the employer discharged employees who formed a committee solely for the purpose of filing unfair labor practice charges with the Board, since the discharges in the particular case did not discourage membership in the incumbent union and the committee was not a labor organization within the meaning of the act⁶

b Discrimination for Protected Activities

Discrimination against employees in their employment because of activities protected by section 7 of the act⁷ is violative of section 8(a) (3), provided, as noted above, it tends to encourage or discourage membership in a labor organization⁸ Accordingly, the question is frequently presented whether the employees' activities involved come within the statutory protection⁹

During the past year, the Board considered the issue of protected activities in a number of cases and found violations of section 8(a) (3) where employers discriminated against employees because of such employee conduct as a strike in protest against the lawful discharge of a fellow employee,¹⁰ the circulation of a petition among employees for a special union meeting to learn the progress of bargaining negotiations,¹¹ union solicitation of fellow employee during nonworking time in violation of an invalid no-solicitation rule,¹² or during working

⁵ 131 NLRB No 118

⁶ In the case of one of these employees, the Board found a violation of sec 8(a)(1) because the employer discharged him upon the mistaken belief that he had joined in filing these unfair labor practice charges, although he had in fact not done so prior to his discharge. See also *Sherry Mfg Co*, 128 NLRB 739, where an employee's discharge for presenting a grievance concerning working conditions on behalf of herself and another employee was found violative of sec 8(a) (1) only because the employee's conduct was not related to union activities

⁷ Sec 7 provides that "Employees shall have the right to self-organization, to form join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a) (3) "

⁸ Discrimination in employment for such activities which does not tend to encourage or discourage union membership is nevertheless violative of the prohibition of sec 8(a) (1) against employer interference with employees' sec 7 rights. The remedy for both types of discrimination in employment is the same. (See, e.g., *Sherry Mfg Co*, 128 NLRB 739, *Gibbs Corp*, 131 NLRB No 118 cf *Kohler Co*, 128 NLRB 1062-1093 footnote 53)

⁹ See Twenty-fifth Annual Report (1960), p 66

¹⁰ *The National Automatic Products Co*, 128 NLRB 672, 678-680. See also *Kohler Co* 128 NLRB 1062, 1084, where the employer discharged 53 striking shell department employees for the sole reason that they were on strike and *Community Shops Inc* 130 NLRB 1522

¹¹ *Aurora City Lines, Inc*, 130 NLRB 1187

¹² *Texas Aluminum Co, Inc*, 131 NLRB No 69

time absent a no-solicitation rule,¹³ a protest to the union's "monitor board" concerning the manner in which the union was representing its members,¹⁴ and leading a meeting on company property during a lunch period for the purpose of discussing a grievance matter with the certified bargaining representative¹⁵

No violation was found where employees were discharged for engaging in a slowdown to pressure the employer into recognizing the union,¹⁶ or where a union shop steward was responsible for an unauthorized work stoppage in violation of a valid no-strike clause¹⁷ But in *Ford Motor Co*¹⁸ a Board majority, relying on *Mastro Plastics*,¹⁹ held that the employer violated section 8(a) (3) and (1) by discharging employees for "giving leadership to" and "instigating" an unauthorized work stoppage, notwithstanding a no-strike clause in the employer's contract with the incumbent union, because the stoppage was in protest against the employer's discriminatory suspension of an employee, and the contract contained no language waiving the right of employees to engage in a strike caused by the employer's unfair labor practices²⁰ However, in another case,²¹ no violation was found where an employee, formerly a supervisor, was discharged for organization activity on behalf of a union while he was a supervisor The Board noted that since the employer would have been justified in discharging him for such conduct when he was a supervisor, this prior unprotected conduct did not become protected because he was an employee when he was discharged

(1) Strike Misconduct

At times, cases of alleged discrimination turn on the issue whether the employees involved are entitled to the statutory protection because of circumstances attending their otherwise protected activities Thus,

¹³ *New Orleans Furniture Mfg Co*, 129 NLRB 244, 251 For a discussion of no solicitation rules, see above, pp 80-82

¹⁴ *Falstaff Brewing Corp*, 128 NLRB 294, 305

¹⁵ *Ford Motor Co (Sterling Plant)*, 131 NLRB No 174, Member Leedom dissenting in part See also *Gibbs Corp*, 131 NLRB No 118, discussed above, where the Board found violations of sec 8(a) (1) and (4), but not 8(a) (3)

¹⁶ *Lenacraft Optical Corp*, 128 NLRB 807

¹⁷ *University Overland Express, Inc*, 120 NLRB 82, 92 Compare with *R L Ziegler, Inc*, 129 NLRB 1211, 1220, where a union steward's activities in talking about the union during work breaks, which did not violate any rule or general practice at the plant, was held protected

¹⁸ *Ford Motor Co (Sterling Plant)*, above, Member Leedom dissenting in part on other grounds

¹⁹ *Mastro Plastics Corp v NLRB*, 350 US 270 (1956)

²⁰ For the Board's most recent application of the *Mastro Plastics* doctrine see *Arlan's Department Store of Michigan, Inc*, 133 NLRB No 56, decided Oct 10 1961, after the close of the fiscal year, where a majority held that only strikes in protest against "serious" unfair labor practices should be deemed immune from general no strike clauses

²¹ *Gibbs Automatic Div, Pierce Industries, Inc*, 129 NLRB 196 See also *Leonard Niederrister Co, Inc*, 130 NLRB 113

in *Stewart Hog Ring Co., Inc.*,²² the Board held that strikers who engaged in shoulder-to-shoulder mass picketing for only 30 to 40 minutes when the picket line was first being organized were entitled to reinstatement, where the strikers dispersed when ordered to do so by a deputy sheriff, thereafter picketed in an orderly manner, and the picketing never prevented plant ingress or egress. In this case, the Board also held that while the cutting of a fence was misconduct of sufficient seriousness to warrant a refusal to reinstate those responsible for it, it was not a sufficient basis for the refusal to reinstate three strikers absent "identification of the culprits."²³

However, in the *Kohler* case,²⁴ a unanimous Board agreed that the employer lawfully discharged the members of the union's strike committee who directed and controlled the strike during a period of mass picketing which included incidents of blocking, shoving, and barring nonstrikers and others from plant ingress and egress, and the enforcement of the union's "pass" system conditioning entrance to the employer's premises upon procurement of a union pass. A Board majority also held that the employer did not violate section 8(a)(3) by discharging a selected number of strikers who participated in the aforesaid mass picketing merely by being present on the picket line, although there was no evidence that they had engaged in any of the overt acts of misconduct described above.²⁵ In the majority's view, the record clearly showed that a purpose for the picketing during this period was the barring of all ingress to and egress from the plant, and that all those participating in this picketing "must have been aware of this object of the picketing, and did, by their participation, in whatever capacity, actually deny admittance to non-strikers and others every bit as much as those pickets who were shown to have actually physically engaged in the blocking of those persons attempting to enter the plant."²⁶ It found further that "by the very nature of their picketing, it is also plain that each of the pickets, wherever located, was actually enforcing the union pass system."²⁷

Similarly, the majority held that *Kohler* had lawfully discharged strikers who assembled in groups along the sidewalk in front of the company's employment office and on occasion, when job appli-

²² 131 NLRB No 49

²³ In this case, the Board also held that while strikers' remarks to nonstrikers "Don't you go in there or I will get you" and "I would like to take you back behind the building," were improper and not to be condoned, these remarks, when viewed in the context in which they were uttered, were not so flagrant as to justify removal of these strikers from the act's protection.

²⁴ *Kohler Co.*, 128 NLRB 1062, 1102-1103, 1105, remanded in part by the Court of Appeals for the District of Columbia Circuit on Jan 26, 1962 (49 LRRM 2485)

²⁵ *Id.*, at pp 1102-1105, 1108. Members Bean and Fanning, agreeing with the trial examiner, dissented on the ground that the employer "did condone and waive as a ground for discharge mere participation in the mass picketing." *Id.*, at p 1104

²⁶ *Id.*, at pp 1104-1105

²⁷ *Id.*

cants approached to enter the office, blocked and otherwise impeded their entrance, even as to those discharges who were merely present in the group during such episodes and did not personally assault or otherwise impede the applicants' entrance into the office, since they "were engaged in a type of picketing designed and intended to prevent free access to the employment office" ²⁸

In *Kohler*, the majority ²⁹ also found that the employer did not violate the act by discharging strikers who were present in crowds of "mob proportions" consisting of strikers and others at "home demonstrations" against nonstrikers returning home from work, where various persons in the assembled crowds shouted vile names, insults, derisive epithets, and even threats at the nonstrikers as they entered their homes. It held that it was not only those who actively engaged in hurling abuse who intimidated and coerced the nonstrikers returning home, but also those who by their presence swelled the assemblage to mob proportions, even though they did not join in the yelling and shouting, since by their presence they lent tacit approval to the entire scene and contributed to the coercive effect ³⁰

(2) Condonation

The issue also arose in the *Kohler Co* ³¹ case as to whether the employer had condoned or waived the strikers' mass picketing as a ground for their discharge. A Board majority, ³² noting that under the circumstances there condonation "may not be lightly presumed," held that it could not be inferred that the employer had condoned and waived the misconduct of all the participants merely because it had reinstated many strikers who were known to have engaged in the unprotected activity and may have offered to hire still others ³³. It pointed out, moreover, that the employer's indications prior to the discharge that some strikers would not be taken back because of their misconduct did not reveal "an attitude of forgiveness" on the part of the employer, nor was there "any other evidence showing express forgiveness" by the employer ³⁴

²⁸ *Id.*, at pp 1107-1108

²⁹ Members Bean and Fanning dissenting

³⁰ *Id.*, at pp 1106-1107

³¹ 128 NLRB 1062

³² Former Chairman Leedom and Members Rodgers and Jenkins

³³ *Id.*, at pp 1104-1105. Members Bean and Fanning, agreeing with the trial examiner dissented

³⁴ Former Chairman Leedom and Member Rodgers pointed out that they did not mean to suggest that such an expression of forgiveness is indispensable to a finding of condonation. However, Member Jenkins deemed two factors, (1) forgiveness and (2) restoration of the offending party to that position he would have occupied but for the offense, essential to condonation. *Id.*, at p 1105, footnote 67. See also *Plasti-Lite, Inc., et al.*, 128 NLRB 1471, 1474 (1959), and *Plasti-Lite, Inc. v NLRB*, 278 F 2d 482 (CA 6, 1960). As to one employee, Member Jenkins found a violation on the basis of estoppel rather than condonation. *Kohler Co*, above, 128 NLRB at p 1108, footnote 70. See also Twenty-fifth Annual Report (1960), p 67, footnote 78

c. Forms of Discrimination

Section 8(a)(3), except for its union-security proviso, forbids an employer to encourage or discourage union membership by any discrimination in employment³⁵ As heretofore, cases under section 8(a)(3) involved, for the most part, such forms of discrimination as unlawful discharges, layoffs, transfers, or refusals to hire, and presented questions as to the sufficiency of the credible evidence to support the allegations of discrimination contained in the complaint. The cases involving special problems arising in connection with particular forms of discrimination, or pertaining to the type of order best suited to afford appropriate relief in a particular situation, are discussed below.

(1) Lockout in Anticipation of Strike

In *Beets Cadillac*,³⁶ during fiscal 1952, the Board adopted the following statement of the trial examiner:

An employer is not prohibited from taking reasonable measures, including closing down his plant, where such measures are, under the circumstances, necessary for the avoidance of economic loss or business disruption attendant upon a strike. This right may, under some circumstances, embrace the curtailment of operations before the precise moment the strike has occurred. The nature of the measures taken, the objective, the timing, the reality of the strike threat, the nature and extent of the anticipated disruption, and the degree of resultant restriction on the effectiveness of the concerted activity, are all matters to be weighed in determining the reasonableness under the circumstances, and the ultimate legality, of the employer's action.³⁷

The question of the legality of a lockout because of a threatened strike arose again during the past year in *Packard Bell Electronics Corporation*.³⁸ There, a manufacturer of television and radio receivers subcontracted its service work and laid off or terminated its service employees, upon learning after a bargaining impasse that the employees had "voted for a strike" that would take place "within the next 48 hours," although up to that time no strike had been called or taken place. The issue presented was whether the lockout was discriminatorily motivated, as found by the trial examiner, or justified and motivated by special economic considerations of the type set forth

³⁵ In *Kohler Co.*, 128 NLRB 1062, 1002-1093, 1188-1189, the Board held that the employer violated sec 8(a)(1), but not sec 8(a)(3), by serving eviction notices upon, or physically evicting, striking tenants from a company-owned hotel and company-owned dwellings and garden plots since the occupancy of these company premises was not a condition of employment, in the absence of a free or nominal rental constituting a part of wages or a company rule or force of circumstances compelling occupancy as an incident to employment. Compare with cases cited in Twenty-fifth Annual Report (1960), p 67 footnote 81.

³⁶ *Beets Cadillac Olds, Inc.*, 96 NLRB 268 (1951), Seventeenth Annual Report (1952), p 155, footnote 20.

³⁷ 96 NLRB 268, at p 286.

³⁸ 130 NLRB 1122.

in *Betts Cadillac*, as contended by the employer. Notwithstanding some section 8(a)(1) conduct by two supervisors, and the employer's refusal to agree to a contract with a union-security clause, the Board held that the record did not support a finding that the shutdown was motivated by an unlawful design to weaken the union, but, on the contrary, that it met the *Betts Cadillac* "test of reasonableness" and was therefore lawful. It noted that in these circumstances the employer "had a legitimate interest" in taking the steps it did to make sure that its customers' television sets would not be tied up during the strike, that if it had waited until the authorized strike was actually in progress the movement of its customers' partially dismantled sets to other shops would have presented an extreme hardship, and that it had no assurance that other shops could, or would, take its work after a full-scale strike was in progress.

(2) Discontinuance of Operations

An employer who causes his employees to be discharged or laid off by closing the plant, or discontinuing the operation in which the employees are engaged, violates section 8(a)(3) if the action is not taken solely for economic reasons,³⁹ but, as shown in several cases during the past year, because of the employees' organizational activities.⁴⁰

Thus, in one case,⁴¹ a Board majority held that the employer violated section 8(a)(3) by closing its plant, and thereby discharging its employees, where the plant closing and cessation of operations were the direct result of the employees' selection of the charging union as their bargaining representative, not, as claimed by the employer, for economic reasons.⁴² In this case, the employer, upon being informed by the charging union that it represented a majority of the employees and desired recognition, interrogated and threatened employees for joining the union, warned them that if they still chose the charging union he could not remain in business because of the rates it would demand—although the union assured him that it had no fixed rates and that it was willing to negotiate—but that he could continue the business if they chose a rival union, then terminated all the employees when they advised that they had determined to remain

³⁹ See, e.g., *Jays Foods, Inc.*, 120 NLRB 690, footnote 2. Cf. *Dayton Rubber Co.*, 140 NLRB 1322.

⁴⁰ See, e.g., *Winchester Electronics*, 128 NLRB 1292, footnote 4, *Stewart Hog King Co., Inc.*, 131 NLRB No. 49.

⁴¹ *Yosoph Bag Co.*, 128 NLRB 211, Member Rodgers, dissenting, would find no violation whenever an employer chooses to go out of business "regardless of the reasons therefor." See *Barbers Iron Foundry*, 126 NLRB 30 (1960).

⁴² Cf. *Fibreboard Paper Products Corp.*, 130 NLRB 1558, where the Board found that the employer contracted out its maintenance work for economic rather than discriminatory motives. See footnote 43 below, see also below, p. 111, for discussion of sec. 8(a)(5) aspects.

with the charging union, and sold the business. The Board majority, in finding the violation, stated as follows

The mere coincidence of union organization of a plant with the shutting down thereof is not conclusive evidence of a discriminatory motive in shutting down that plant, although the coincidence itself is evidence bearing upon discriminatory intent [Footnote omitted]. However, here there is a substantial additional showing of union animus, and when we consider all the circumstances referred to above, we think the evidence of unlawful motivation is conclusive.

(a) Remedies for unlawful discontinuance of operations ⁴³

In remedying discrimination resulting from the discontinuance of business operations for purposes prohibited by section 8(a)(3), it is the Board's policy to assess the reinstatement and backpay rights of the affected employees in the light of the particular situation presented in each case ⁴⁴

Reinstatement has been directed where the employer could reasonably be required to resume the discontinued operation ⁴⁵. Thus, where an employer abolished its automotive service department farmed out the work, and terminated the employees in this department, the Board directed that the department be reopened, and that the terminated employees be reinstated to their former positions and be made whole for any losses suffered because of the employer's action ⁴⁶. Similarly, an employer who discriminatorily discontinued his trucking service, discharged his own drivers, and began using motor vehicles and drivers of alleged independent contractors, was ordered to resume his trucking operations with his own employees and reinstate the discharged employees with backpay, since the operation involved was "still required and being performed" and was not abandoned ⁴⁷.

But where an employer violated section 8(a)(3) by discontinuing its long-distance trucking operation and discharging its two truckdrivers for discriminatory reasons, and the two employees had spent a considerable portion of their time doing work for the employer other than driving trucks, the Board directed the employer to offer them reinstatement to their former or substantially equivalent positions with backpay, without requiring the employer to resume its

⁴³ At the close of the fiscal year, the entire issue of remedies in this area, as well as issues relating to the scope of the bargaining obligation, were pending before the Board on motion for reconsideration in *Fibreboard Paper Products Corp.*, above.

⁴⁴ See Twenty-fifth Annual Report (1960) pp 70-72.

⁴⁵ See *The R O Mahon Co.*, 118 NLRB 1537 (1957), enforcement denied, 269 F 2d 44 (CA 6, 1959) where the Board directed the employer to reopen the closed department of *Bonnie Lass Knitting Mills, Inc.*, 126 NLRB 1396 (1960), where the Board refused to direct the resumption of the employer's discontinued manufacturing operation, since the employer could not "by mere administrative action" effect resumption of this operation which was unwanted and not essential to the conduct of the remaining business, but ordered backpay until such time as the employees obtained other substantially equivalent employment. See Twenty-fifth Annual Report (1960), p 71.

⁴⁶ *Jays Foods, Inc.*, 129 NLRB 690.

⁴⁷ *Hugh Major Trucking Service*, 129 NLRB 322.

long-distance trucking operation unless necessary—and then only to the extent necessary—to afford these employees the reinstatement to which they were entitled⁴⁸

On the other hand, where an employer permanently discontinued his operations for antiunion reasons—thereby discharging his employees—and sold his business, a Board majority did not direct the resumption of operations but ordered the employer to establish a preferential hiring list and to notify the discharged employees of their reinstatement rights in the event he resumed his former operations⁴⁹ While the majority awarded backpay to the discriminatees for the period from the date they were terminated to the date the business was sold or the employer in fact ceased functioning, whichever was later, two of the majority members⁵⁰ would have expanded the order by awarding backpay from the date of the discrimination “until such time as [the discriminatees] obtained substantially equivalent employment with other employers”⁵¹

(3) Union-Security Agreements

The act permits an employee to enter into an agreement with a labor organization requiring membership therein as a condition of employment, subject to certain limitations set out in the union-security proviso to section 8(a)(3) and section 8(f) The Board has consistently held that a union-security agreement to be valid must set forth terms which conform to these statutory requirements⁵²

Under the section 8(a)(3) proviso, a union-security agreement is valid (1) if made with the majority representative of the employees in an appropriate unit, whose authority to make such agreement has not been revoked in an election pursuant to section 9(e), and (2) if the agreement affords the employees 30 days' grace within which to acquire union membership “following the beginning of [their] employment, or the effective date of [the] agreement, whichever is later” Furthermore, prior to September 14, 1959, the contracting union also had to be in compliance with the non-Communist

⁴⁸ *Stewart Hog Ring Co*, 131 NLRB No 49 See also *Winchester Electronics, Inc*, 128 NLRB 1292, 1295, where the Board ordered the employer to reinstate employees to their former or substantially equivalent positions at two of its plants, and to transfer operations from a third plant to these two plants, to the extent necessary, if such reinstatement could not be made without such transfer

⁴⁹ *Yoseph Bag Co*, 128 NLRB 211, Member Rodgers dissenting See also *St Cloud Foundry & Machine Co, Inc*, 130 NLRB 911, where the employer permanently ceased operations of the foundry portion of its business and purchased castings, formerly manufactured in the foundry, from outside sources for use in its machine shop which is housed in the same building as the foundry

⁵⁰ Members Fanning and Jenkins

⁵¹ Member Rodgers found no violation and would have issued no remedial order See above, p 97, footnote 41 See also Twenty-fifth Annual Report (1960), pp 71-72, as to backpay for the period following the permanent cessation of business

⁵² See Twenty fifth Annual Report (1960), p 72, and previous annual reports

affidavit and filing requirements of now-repealed section 9 (f), (g), and (h) ⁵³ at the time of entering into such an agreement

Section 8(f) makes specific provision for contracts in the construction industry, permitting, *inter alia*, contracts with unions whose majority status has not been established and union-security clauses requiring membership "after the seventh day following [rather than on or after the thirtieth day following] the beginning of such employment or the effective date of such agreement, whichever is later."

(a) Union's status

During the past year, violations of section 8(a) (3) were found in a number of cases where the employer executed, maintained, or enforced a union-security agreement with a union which was not the majority representative of the employees at the time of its execution ⁵⁴ In one case, *Checker Taxi Co, Inc*, ⁵⁵ the employer's conduct in entering into and enforcing a new contract containing union-security provisions lawful on their face was found unlawful, where it was executed while the coercive effects of an old contract which contained illegal union-security provisions were still operative, because at the time the new contract was executed the union's majority status was "tainted by past illegal support" and no basis existed for concluding that the union "in fact represented an uncoerced majority of the employees" at that time. However, in another case, the Board, in accord with the Supreme Court's decision in *Bryan Mfg Co*, ⁵⁶ held that where the union-security provision is valid on its face, enforcement and maintenance of such a contract cannot be found unlawful because of circumstances connected with its execution which occurred more than 6 months prior to the filing of the charge, and thus predated the limitation period of section 10(b) ⁵⁷

On the other hand, in *Industrial Rayon Corporation*, ⁵⁸ a panel majority ⁵⁹ held that an employer violated section 8(a) (3) by entering

⁵³ This section was repealed by title II, sec 201 (d) and (e) of the Labor-Management Reporting and Disclosure Act of 1959, Public Law 86-257, 73 Stat 519. See discussion below, pp 100-101, as to issues relating to the continuing effect of these requirements.

⁵⁴ See e.g., *Reliance Fuel Oil Corp*, 129 NLRB 1166, 1179. See also *Burke Oldsmobile, Inc*, 128 NLRB 79, 85-86, enforced in part, 238 F 2d 14 (CA 2, 1961), where the Board adopted the trial examiner's finding that an employer, faced with conflicting claims by two rival nonincumbent unions, violated sec 8(a) (2) and (3) by recognizing one of them as the representative of its employees, in the absence of a Board conducted election, and executing a union security agreement with the recognized union. Cf *Lugood Trucking Service*, 130 NLRB 740, involving a multiemployer union-security agreement where no violation was found.

⁵⁵ 131 NLRB No 96

⁵⁶ *Local Lodge No 1424, IAM, AFL-CIO, etc v NLRB*, 362 US 411 (1960)

⁵⁷ See *Oee Window Co*, 128 NLRB 156. For similar rulings with respect to union's noncompliance with sec 9 (f), (g), and (h) at time of contract's execution, see *Hooker Chemical Corp*, 128 NLRB 1394, and *Checker Taxi Co*, 131 NLRB No 96 footnote 9.

⁵⁸ 130 NLRB 427

⁵⁹ Members Rodgers and Kimball.

into and giving effect to a union-security agreement executed on September 4, 1959, with a union which was not in compliance with section 9 (f), (g), and (h) at the time of execution, although the compliance requirement was thereafter repealed⁶⁰ prior to the discharge of an employee pursuant to this union-security provision and the filing of the charge.⁶¹ And in *Hooker Chemical Corp.*,⁶² the Board found a union violation for entering into an oral union-security agreement at a time when it was not in compliance with former section 9 (f), (g), and (h),⁶³ but dismissed the complaint against the employer on the basis for the Supreme Court's *Bryan decision*⁶⁴ because of the untimely service of the charge against the employer.⁶⁵

(b) Terms of agreement

The proviso to section 8(a)(3) sanctions only agreements which provide for union security within the prescribed limits. Employees may not be compelled to acquire union membership until after 30 days "following the beginning of [their] employment, or the effective date of [the] agreement, whichever is later."

Thus, the Board found violations of section 8(a)(3) where the employer entered into or gave effect to union-security provisions which established closed-shop or preferential hiring conditions,⁶⁶ failed to grant old nonunion employees,⁶⁷ or new employees,⁶⁸ the statutory 30-day grace period, provided a 30-day grace period retroactive to the contract's "effective" date, which was 21 days prior to the execution of the contract,⁶⁹ or required the deduction of initiation fees from nonmembers' wages in installments commencing the first day of

⁶⁰ See footnote 53, above, p 100

⁶¹ Former Chairman Leedom found a violation solely on the basis that the union security provision did not provide a full 30-day grace period, and deemed it unnecessary to decide the noncompliance aspect. Member Rodgers also found a violation on the basis of an inadequate grace period, but Member Kimball did not agree. Compare with *Hooker Chemical Corp.*, 128 NLRB 1394, and *Checker Taxi Co.*, 131 NLRB No 96

⁶² 128 NLRB 1394

⁶³ Member Rodgers dissented with respect to the majority's failure to order a reimbursement remedy. He was also of the opinion that the union security agreement was also unlawful because it was oral, and because it conditioned continued employment on both joining the union and signing a checkoff authorization card. *Id.*, at pp 1398-1399

⁶⁴ See above footnote 56, p 100

⁶⁵ See also *Checker Taxi Co.*, 131 NLRB No 96, footnote 9, as to the sec 10(b) aspect

⁶⁶ See, e.g., *Union Taxi Corp.*, 130 NLRB 814, *American Advertising Distributors*, 129 NLRB 640 650 654, *Oscherwitz & Sons*, 130 NLRB 1078 (oral adoption and modification of original written unlawful union security agreement, parol modification, even if substantiated, held not to cure illegal clause even if not enforced). See also *Booth & Flinn Co.*, 129 NLRB 867 881 (unlawful union-security conditions found on basis of contractual provisions and union's bylaws which employer orally agreed to follow), compare with *McGraw Construction Co., Inc.*, 131 NLRB No 111, where no violation was found

⁶⁷ See, e.g., *Shear's Pharmacy, Inc.*, 128 NLRB 1417

⁶⁸ See, e.g., *Checker Taxi Co., Inc.*, 131 NLRB No 96, *Oscherwitz & Sons*, 130 NLRB 1078

⁶⁹ *Burke Oldsmobile, Inc.*, 128 NLRB 79, 86, enforced in part, 288 F 2d 14 (C A 2)

employment, notwithstanding employee protest or the absence of employee written authorization ⁷⁰

However, a contract clause requiring "all newly-hired help" to obtain a "referral" card from the union was held not "of itself" unlawful, where the clause explicitly required the union to furnish such a card to newly hired help without regard to union membership, and did not, by its terms, "place the employment status of employees already hired by the Company under the control of the Union" ⁷¹

(i) "Agency shop"

In *General Motors Corporation*,⁷² the Board had occasion to consider for the first time the legality of an "agency shop" proposal—under which employees would be required to pay to the union, the collective-bargaining representative, the equivalent of initiation fees and monthly dues regularly required of union members, as a condition of employment after 30 days following the date of the agreement or initial employment, whichever was later—for a plant located in a "right-to-work" State which prohibits arrangements requiring union membership but not "agency shops" After the close of the fiscal year, a Board majority ⁷³ vacated an earlier majority decision in the same case ⁷⁴ which held the "agency shop" arrangement unlawful, and—without having to reach the issue as to the withdrawal of the Federal act under section 14(b), or the "right-to-work" statute of the particular State or any other State—held this form of union security lawful under the proviso to section 8(a)(3) absent any "suggestion" that union membership was not available to any nonmember employe who wished to join The majority stated,

we are unable to distinguish, so far as its legality is concerned, the instant agency shop proposal from any other union-security proposal which predicates a right of discharge *only* upon an employee's failure to tender the equivalent of regular union dues and initiation fees The Union sought to bargain concerning a clause which would leave the final decision as to membership or nonmembership with each individual employee, *at his option*, but nevertheless, to condition employment upon the payment of sums of money which would constitute each employee's share of financial support In our opinion, such a proposal fully comports with the congressional intention in Section 8(a)(3) for the allowance of union-security contracts ⁷⁵

⁷⁰ *American Advertising Distributors*, 129 NLRB 640 648 654 See also *Hooker Chemical Corp* 128 NLRB 1394 particularly dissent of Member Rodgers

⁷¹ *Cudillat Wire Corp*, 128 NLRB 1002, 1005

⁷² 130 NLRB 481

⁷³ Chairman McCulloch and Members Rodgers, Fanning, and Brown—Member Leedom dissenting—in 133 NLRB No 21 (Sept 29, 1961)

⁷⁴ Former Chairman Leedom and Members Jenkins and Kimball—Members Rodgers and Fanning dissenting—in 130 NLRB 481

⁷⁵ The 8(a)(5) aspect of the case is discussed below, p 112

(c) Illegal enforcement of union-security agreement

Under the proviso to section 8(a)(3), no employee may be discharged under the terms of a union-security agreement for reasons other than the failure "to tender periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership" Moreover, "the only obligation an employee has under the compulsion of the proviso to Section 8(a)(3) of the act [to pay dues], is to pay dues for the period of employment with the employer who is a party to the contract and during the term of the contract"⁷⁶ In one case, a panel majority⁷⁷ affirmed a trial examiner's finding that an employer violated section 8(a)(3) by threatening employees with discharge if they did not pay strike assessments levied by the union, and by checking off such assessments as a condition of their continued employment, and noted that the proviso to section 8(a)(3) does not include such assessments⁷⁸

During the past year, the Board again had occasion to determine in a number of cases whether employees had been unlawfully discharged under union-security agreements for reasons other than the failure "to tender periodic dues and initiation fees" In *F J Burns Draying, Inc*,⁷⁹ the Board held that an employee had been unlawfully discharged for "some reason" other than nonpayment of required dues and initiation fees where the union requested his discharge after it had accepted the employee's tender of delinquent dues and initiation fees and notified him of his reinstatement, and the employer had knowledge of the fact that the employee had tendered the required dues and initiation fees Similarly, in *General Motors Corp, Frigidaire Division*,⁸⁰ the discharge of an employee who had previously withdrawn from the union, but was required to rejoin under a new contract, was found unlawful where the union requested his discharge after he had tendered a money order sufficient to cover both the reinstatement fee required and current dues—although he did not specify that it was in payment of both—and the union had simply returned the tender without explanation, "as the [employer] had reasonable grounds for believing that membership was denied [him] for reasons other

⁷⁶ *Montgomery Ward & Co*, 121 NLRB 1552 (1958). Twenty fourth Annual Report (1959), p 70 See also *IUE, AFL-CIO, Frigidaire Local 801 (General Motors Corp, Frigidaire Div)*, 129 NLRB 1379, 1380, 1381

⁷⁷ *Members Rodgers and Fanning*

⁷⁸ *Florence Brooks*, 131 NLRB No 97, footnote 2 Member Leedom dissenting with respect to those employees who had executed checkoff authorizations specifically authorizing deductions of "any assessments" Compare with *Wm Wolf Bakery, Inc*, 122 NLRB 630 (1958)

⁷⁹ 129 NLRB 252

⁸⁰ *IUE, AFL-CIO, Frigidaire Local 801 (General Motors Corp, Frigidaire Div)*, 129 NLRB 1379

than his failure "to tender the periodic dues and the initiation fees" required as a condition of attaining membership"

The Board has also held that under a "maintenance of membership" clause, members of one union may not lawfully be required to maintain membership in another union⁸¹ Thus, the terms of a "maintenance-of-membership" agreement were held to have been unlawfully applied where the contracting union was a newly chartered local, which had changed its affiliation after its international's expulsion from the AFL-CIO, and the employees affected had not become members of the contracting union but remained members of the old organization⁸² And, in another case,⁸³ notwithstanding the existence of lawful union-security and hiring-hall provisions in the contract, a violation was found where the employer and the union jointly engaged in a hiring arrangement which required new employees to execute combined union membership application and dues checkoff authorization cards prior to the 30-day statutory grace period provided in the contract

(4) Discriminatory Hiring Practices

Violations under section 8(a)(3) were again found in situations where individual employees were denied employment because they were unacceptable to the union,⁸⁴ or where employers were parties to discriminatory hiring arrangements⁸⁵ However, in deference to the Supreme Court's decision in *Local 357, Teamsters*⁸⁶ of April 17, 1961, holding that an exclusive hiring hall arrangement without safeguards is not *per se* unlawful under the act, the Board ceased adhering to its *Mountain Pacific* rule⁸⁷ which required specific safeguards as a condition for establishing the validity of such arrangements⁸⁸

⁸¹ *Hershey Chocolate Corp*, 129 NLRB 1052, enforcement denied, 49 LRRM 2173 (CA 3, Dec 1, 1961) See also Twenty fourth Annual Report (1959), p 71

⁸² *Hershey Chocolate Corp*, above

⁸³ *Cadillac Wire Corp*, 128 NLRB 1002, enforced 290 F 2d 261 (CA 2)

⁸⁴ See, e.g., *Southern Electrical & Pipefitting Corp*, 131 NLRB No 12, particularly in light of Member Fanning's partial dissent

⁸⁵ See e.g. *Central Rigging & Contracting Corp*, 129 NLRB 342, 354 (oral arrangement to hire only from union which operated hall "for members of organization who pay dues"), *Petersen Construction Corp*, 128 NLRB 969, 973-974 (exclusive hiring agreement, where union membership was required as a condition of referral, case modified in other respects after the fiscal year, 134 NLRB No 152) *Satchwell Electric Construction Co, Inc*, 128 NLRB 1265, 1267 (oral closed shop or preferential hiring arrangement, where referral or clearance was based on union membership in good standing)

⁸⁶ *Local 357, International Brotherhood of Teamsters v NLRB (Los Angeles-Seattle Motor Express Lines)*, 365 US 667 See section on Supreme Court Rulings, below, p 153, for a full discussion of this case

⁸⁷ *Mountain Pacific Chapter of the Associated General Contractors, Inc*, 119 NLRB 883 (1957) Twenty-third Annual Report (1958), pp 85-86

⁸⁸ See, e.g., *G A Rafel & Co*, 131 NLRB No 154, footnote 1, *Sterling Precision Corp, Instrument Div*, 131 NLRB No 155, footnote 2

(5) Other Forms of Discrimination

Violations of section 8(a)(3) were also found where employers entered into or maintained collective-bargaining agreements which accorded union members preferential wages or other benefits⁸⁰ And a Board majority found the section violated on the basis of "the attendant circumstances," rather than on a *per se* theory, where a seasonal employer, after a lawful economic strike, adopted a new hiring formula for the following season which failed to credit strikers for the time they had engaged in the strike, and thereby diminished their employment opportunities⁸⁰

During the past year the Board also found that an employer violated the section by discharging an employee from a job as a result of union pressure because of the employee's "failure to perform obligations imposed by the Respondent Union on its members and work permit holders"⁸¹ The "pressures" were brought here by the union steward because the employee took exception to the steward's remarks during a lecture to the employees on quitting and starting times, which lecture was delivered by the steward at the direction of the union's business agent

d Special Remedial Problems

Since the Supreme Court's decision in *Local 60, Carpenters*,⁸² on April 17, 1961, holding that a refund of dues and fees was beyond the Board's remedial authority "[w]here no membership in the union was shown to be influenced or compelled by reason of any unfair labor practice," the Board directed reimbursement remedies in only two cases during the fiscal year⁸³ In one case,⁸⁴ a panel majority held that a reimbursement order was proper under the Supreme Court's decision where the employer and the union illegally exacted strike assessments from employees as a condition of continued employment

⁸⁰ See, e.g. *Indiana Gas & Chemical Corp.*, 140 NLRB 1488 (health insurance and pension benefits limited to union members), *American Advertising Distributors*, 129 NLRB 640, 654 (union employees paid 2½ cents per hour more than nonunion employees)

⁸⁰ *Community Shops, Inc.*, 130 NLRB 1522, Member Rodgers dissenting

⁸¹ *Brunswick-Balks Callender Co.*, 131 NLRB No. 30, and the proposed supplemental decision and order issued in this case after the close of the fiscal year, 135 NLRB No. 59

⁸² *Local 60, United Brotherhood of Carpenters v NLRB*, 365 U.S. 651 See Supreme Court Rulings below p. 156 for a full discussion of this decision

⁸³ For prior cases during the fiscal year in which reimbursement was directed see *Hershey Chocolate Corp.*, 129 NLRB 1052 (coercion to pay dues), *Reliance Fuel Oil Corp.*, 129 NLRB 1166 (based on *Virginia Lumber & Paper Co. v NLRB*, 319 U.S. 522, rather than *Brown-Olds*, 115 NLRB 504), *Cadillac Wire Corp.*, 128 NLRB 1002 (new employees required to join union within 30 days), *Lykes Bros. Inc. of Georgia*, 128 NLRB 606 (refund only to those employees who were individually coerced into signing dues checkoff cards) See also *Osherwitz & Sons*, 130 NLRB 1078, *Booth & Flinn Co.*, 129 NLRB 867, and *Hooker Chemical Corp.*, 128 NLRB 1304, where reimbursement was deemed unwarranted

⁸⁴ *Florence Brooks*, 131 NLRB No. 97, Member Leedom dissenting in part

by threats of discharge. In the other,⁹⁵ the Board directed the reimbursement of dues and other moneys illegally exacted as a condition of employment from employees specifically found to have been coerced into joining the union pursuant to unlawful union-security provisions of the contract, but not as to other employees⁹⁶

In fixing the amount of backpay due economic strikers whose request for reinstatement had been discriminatorily denied, a Board panel held in one case that the strikers were entitled to backpay from the time they would have been recalled in accordance with seniority and the availability of work, rather than from the time they requested reinstatement, since work was unavailable at the time of their request due to reduced business activity⁹⁷. In the same case, a truckdriver's lack of a chauffeur's license during the backpay period was held not to disqualify him from backpay,⁹⁸ but the gross backpay of one discriminatee with an unexplained high absence record was reduced by the same percentage as his annual absence rate, and no backpay was awarded to another discriminatee who was shown to have made illegal liquor sales during part of the backpay period but failed to disclose his earnings from such sales⁹⁹.

And in another case, in remedying an unlawful agreement which granted union employees 2½ cents more per hour than nonunion employees, the Board ordered the employer and the union to make nonunion employees whole for their loss of pay resulting from the discriminatory pay scale.¹

4 Discrimination for Filing Charges or Testifying

Section 8(a) (4) makes it an unfair labor practice for an employer to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under the act.

During the past fiscal year, violations of section 8(a) (4) were found in situations where employees were discharged,² refused employment,³

⁹⁵ *Checker Taxi Co.*, 131 NLRB No. 96

⁹⁶ See also *Hershey Chocolate Corp.*, 129 NLRB 1052, decided before the Supreme Court's decision in *Local 60*, above, where the Board directed reimbursement only against the union because the employer actively resisted the union's efforts to compel the employees to maintain membership, and capitulated only pursuant to an arbitrator's direction and in the belief that its contractual obligation required it to do so.

⁹⁷ *Robinson Freight Lines*, 129 NLRB 1040

⁹⁸ Member Rodgers dissenting on this point.

⁹⁹ See also *Accurate Forming Corp.*, 128 NLRB 653, where backpay was denied an employee who gave false testimony at the Board hearing.

¹ *American Advertising Distributors*, 129 NLRB 640

² *Gibbs Corp.*, 131 NLRB No. 118, *Lindsay Newspapers, Inc.*, 130 NLRB 680 (violation of 8(a) (3) also found), *Harptone Mfg Corp.*, 128 NLRB 230, 235

³ *Brunswick-Balke Collender Co.* 131 NLRB No. 40 (8(a) (1) and (3) violations also found), *Central Rigging & Contracting Corp.*, 129 NLRB 342, 355

or otherwise discriminated against⁴ for filing charges under the act,⁵ for refusing to withdraw charges against a union,⁶ for testimony before the Board in a representation⁷ or unfair labor practice proceeding,⁸ or for merely appearing at an unfair labor practice hearing pursuant to a Board subpoena without testifying⁹

In one case, the Board adopted the trial examiner's finding that the discharge of a supervisor for giving testimony in a Board proceeding violated section 8(a)(1), and that it was unnecessary to consider whether this discharge also violated section 8(a)(4) since the remedy was the same¹⁰ In another case, the Board held that an employer violated 8(a)(1), but not 8(a)(4), by discharging an employee because of the belief that he had signed a letter supporting charges filed against the employer, and had joined in filing such charges, when in fact he had not done so prior to his discharge¹¹

In a number of other cases, section 8(a)(4) allegations were dismissed because they were not supported by credible evidence¹²

5 Refusal To Bargain in Good Faith

Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain in good faith about wages, hours, and other conditions of employment with the representative¹³ selected by a majority of the employees in an appropriate unit¹⁴

The employer's duty to bargain arises when the employees' majority representative requests the employer to recognize it and to negotiate about matters which are subject to bargaining under the act¹⁵ As

⁴ *Dal-Tex Optical Co*, 131 NLRB No 94 (discharge, demotion, transfer to less desirable job, and issuance of "violation notice" which could result in disciplinary action under company's rules)

⁵ *Gibbs Corp*, above, *Central Rigging & Contracting Corp*, above, *Harptone Mfg Co*, above

⁶ *Brunswick Balke Collender Co*, above

⁷ *Lindsay Newspapers, Inc*, above

⁸ *Dal-Tex Optical Co*, above

⁹ *Ibid*

¹⁰ *Dal Tex Optical Co*, above, citing *Better Monkey Grip Co*, 115 NLRB 1170 (1956)

¹¹ *Gibbs Corp*, 131 NLRB No 118, footnote 1

¹² See *Stockbridge Vegetable Producers, Inc*, 131 NLRB No 162, *Tampa Coca-Cola Bottling Co*, 130 NLRB 1505, *Overnite Transportation Co*, 129 NLRB 261, 283, *Charlton Press, Inc*, 129 NLRB 1352, 1355-1357

¹³ "The term 'representatives' includes any individual or labor organization" See 2(4) of the act The term "labor organization," as defined in sec 2(5), includes any organization in which employees participate and which exists, at least in part, for the purpose of bargaining collectively with employers on behalf of employees

¹⁴ Sec 9(a) makes the majority representatives the "exclusive representatives of all the employees" in the appropriate unit "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment"

¹⁵ See, however, *The Texas Pipe Line Co*, 129 NLRB 705, 708, where the trial examiner held that a union's request for bargaining was not a prerequisite since the employer had advised that it would not bargain For other cases dealing with the issue of what constitutes an effective bargaining request, see *Rural Electric Co*, 130 NLRB 799, *Bitton Insulation, Inc*, 129 NLRB 1296, *Barney's Supercenter, Inc*, 128 NLRB 1325, *Laabs, Inc*, 128 NLRB 874

defined by section 8(d), the statutory duty to bargain includes the duty of the respective parties ¹⁶ "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party." However, "such obligation does not compel either party to agree to a proposal or require the making of a concession."

a Duty To Honor Certification of Representative

The Board, with Supreme Court approval,¹⁷ requires an employer to bargain with the certified representative of his employees for a reasonable period, ordinarily a year, in the absence of unusual circumstances.¹⁸

In one case, the Board held that an employer unlawfully refused to bargain by not honoring a regional director's certifications which were issued pursuant to consent elections.¹⁹ Rejecting the employer's contention that the regional director's conduct in certifying the elections was arbitrary and capricious, the Board reiterated its longstanding policy that the regional director's determination in such consent elections is to be final in the absence of fraud, misconduct, or such gross mistakes as imply bad faith by the regional director, even though the Board might have reached a different conclusion. And in another case, the certification did not become invalid simply because some employees failed to vote in the election, where such failure was attributed to the employees' lack of interest.²⁰

b Appropriateness of Unit

Section 8(a)(5) requires an employer to bargain only concerning employees in an appropriate unit.²¹ Thus, the Board found in the *Foreign Car Center* case,²² that the employer was not obligated to bargain for a one-man unit.²³ It was pointed out that the reasons for which the Board considers itself without power to certify a one-

¹⁶ The union's duty to bargain is discussed below, pp 127-130

¹⁷ *Ray Brooks v NLRB*, 348 US 96 (1954). See Twentieth Annual Report (1955), pp 121-122

¹⁸ It is also well settled that after an employer enters into a settlement agreement requiring it to bargain in good faith with a union, the employer is under an obligation to honor that agreement for a reasonable time after its execution. Thus, a real question concerning representation cannot be raised during such period. *Stant Lithograph, Inc*, 131 NLRB No 8

¹⁹ *Sumner Sand & Gravel Co*, 128 NLRB 1363

²⁰ *Houston Chronicle Publishing Co*, 131 NLRB No 93

²¹ For full discussion of appropriate unit, see above pp 54-67

²² *Foreign Car Center, Inc*, 129 NLRB 319

²³ However, a Board majority (Members Jenkins and Bean dissenting) has held that the act does not preclude bargaining with a union on behalf of a single employee, if an employer is willing. *Louis Rosenberg, Inc*, 122 NLRB 1450, 1453 (1959)

man unit also preclude it from directing an employer to bargain with respect to such a unit. It noted further that there was no presumption that the contract unit, which the employer disavowed in midterm, was appropriate because the parties contemplated that additional employees would be hired during the term of the contract, since there was but one employee in the unit at the time of the execution of the contract.

In one case, the Board reiterated its policy of excluding plant clericals from office clerical units when any party objects²⁴. It held that an employer did not unlawfully refuse to bargain with the union for timekeepers, who were plant clericals, where the only bargaining demand which the union made with respect to timekeepers was that they be bargained for as part of the office clerical unit. And, in another case, a panel majority found that an employer was obligated to bargain with the union notwithstanding the Board's minor modification of the unit proposed by the union²⁵. The majority held that the variance between the requested unit which excluded certain employees and the appropriate unit including such employees was too unsubstantial to excuse the employer from its statutory duty to bargain with the union. It noted, moreover, that the inclusion or exclusion of the omitted category was not an issue between the parties at the time the bargaining request was made.

Another employer violated section 8(a)(5) by refusing to bargain with the certified union on the ground that the union did not qualify under the *American Potash*²⁶ doctrine, i.e., the union was not the "traditional representative" of a previously severed and now separately represented departmental unit²⁷. The Board held that the "traditional representative" test of *American Potash* is limited to severance cases and is not applicable where a craft or departmental unit has once been severed from a production and maintenance unit and has, since then, developed its own bargaining history.

c Subjects for Bargaining

The statutory duty to bargain extends to all matters pertaining to "rates of pay, hours of employment, or other conditions of employment"²⁸. Regarding such matters, the employer, as well as the employees' representative, must bargain in good faith, although the statute does not require "either party to agree to a proposal or require

²⁴ *Ainsworth Mfg Co*, 131 NLRB No 48

²⁵ *Ash Market & Gasoline*, 130 NLRB 641. Member Rodgers, dissenting, believed that the unit was in fact inappropriate and that the employer did not violate its obligation to bargain.

²⁶ *American Potash & Chemical Corp*, 107 NLRB 1418 (1954). Nineteenth Annual Report (1954), pp 38-41.

²⁷ *Industrial Rayon Corp*, 128 NLRB 514, set aside in 291 F 2d 809 (CA 4).

²⁸ Secs 8(d) and 9 of the act.

the making of a concession”²⁹ On the other hand, in nonmandatory matters, i.e., lawful matters unrelated to “wages, hours, and other conditions of employment,” the parties are free to bargain or not to bargain, and to agree or not to agree³⁰ However, insistence by one party that the other accept a proposal involving a nonmandatory subject as a condition of bargaining on mandatory subjects is inconsistent with the good-faith performance of the statutory bargaining duty³¹

(1) Waiver

A refusal by an employer to bargain during the term of a contract as to a particular subject matter may be violative of section 8(a)(5) if the employees’ representative has not waived its right to bargain with respect thereto

The waiver question arose during the past year in a case where the employer, during the contract term, unilaterally established piecework rates and work production quotas, which matters were not specifically covered by the contract³² The union, at the outset of precontract negotiations, had proposed a contract clause providing for a certain increase on piecework rates during the contract term, without alteration of piecework quotas or work per unit The proposed contract also provided that when because of changes in the industry it became necessary to revise piecework quotas or the work per unit, such revision would be conducted only by means of a study conducted by two representatives of the employer and two representatives of the union Although the parties reached an agreement on minimum wage and management rights clauses which were incorporated into the contract, the remainder of the union’s proposal, that production quotas and piecework rates could be revised only after joint employer-union study, was never discussed Rejecting the employer’s contention that the union had waived its rights and that the employer had acted lawfully under its management rights clause, the Board held that the employer violated section 8(a)(5) by acting unilaterally on a matter which had not been fully explored during negotiations Citing the *Press Company* case,³³ the Board stated

The Board’s rule, applicable to negotiations during the contract term with respect to a subject which has been discussed in precontract negotiations but which has not been specifically covered in the resulting contract, is that the

²⁹ Sec 8(d)

³⁰ See *NLRB v Wooster Division of Borg-Warner Corp*, 356 U S 342 (1958), Twenty fourth Annual Report (1959), pp 78-79 See also Twenty fifth Annual Report (1960), pp 96-101

³¹ *Ibid*

³² *Proctor Mfg Corp*, 131 NLRB No 142

³³ *The Press Co, Inc*, 121 NLRB 976 (1958)

employer violates Section 8(a) (5) if, during the contract term, he refuses to bargain or takes unilateral action with respect to the particular subject, unless it can be said from an evaluation of the prior negotiations that the matter was "fully discussed" or "consciously explored" and that the Union "consciously yielded" or clearly and unmistakably waived its interest in the matter

The Board pointed out that acceptance of the employer's contention that the wage article and the management rights clause represent the full and final agreement of the parties relating to other wage determinations would be to disregard "the familiar concept of collective bargaining as a continuing and developing process by which the relationship between an employer and the representative of his employees is to be molded" ⁵⁴

(2) Decision To Subcontract Work

In the *Fibreboard* case,⁵⁵ the Board had occasion to decide the question whether an employer was under a statutory duty to bargain with the union about its "decision to contract out" maintenance work. A majority of the Board ⁵⁶ rejected the contention that a management decision to cease one phase of its operations solely for economic reasons is in and of itself a mandatory subject for bargaining. The majority noted that such a broad proposition was contrary to existing precedent, since the Board has held that the establishment of an appropriate bargaining unit does not preclude an employer who acts in good faith from making changes in his business structure—such as entering into subcontracting arrangements—without first consulting the representative of the affected employees ⁵⁷. It was pointed out by the majority that, although the statutory obligation to bargain is broad, it is not so broad and all-inclusive as to warrant an inference that Congress intended to compel bargaining concerning basic management decisions, such as whether and to what extent to risk capital and managerial effort. According to the majority, the *Timken*, *Shamrock*, and *Railroad Telegraphers* cases,⁵⁸ relied upon by the dissent, did not support the proposition that a union which will not represent any of the employer's employees is entitled to compel the employer to bargain about matters which will have an impact only when it ceases to be a representative

⁵⁴ *Ibid*. The Board distinguished *Spindel Corp*, 120 NLRB 733 (1958), *NLRB v Nash-Finch Co*, 211 F 2d 622 (CA 8, 1954), and *The Berkline Corp*, 123 NLRB 685 (1959), where effective waivers by the unions were found.

⁵⁵ *Fibreboard Paper Products Corp*, 130 NLRB 1558, but see above, footnote 43, p 98.

⁵⁶ Member Fanning, dissenting believed that sec 8(d) under existing Board and Supreme Court decisions imposes on an employer the duty to bargain about its decision to subcontract work performed by employees represented in a collective bargaining unit.

⁵⁷ See *Mahoning Mining Co*, 61 NLRB 792 (1945), and *Walter Holm & Co*, 87 NLRB 1169 (1949).

⁵⁸ *The Timken Roller Bearing Co*, 70 NLRB 500 (1946), *Shamrock Datry, Inc*, 124 NLRB 494 (1959), *The Order of Railroad Telegraphers, et al v Chicago and North Western Railroad Co*, 362 US 830 (1959).

(3) "Agency Shop"

The question arose during the past fiscal year whether an employer's refusal to bargain on a union's "agency shop" proposal—under which employees would be required to pay to the union the equivalent of initiation fees and monthly dues regularly required of union members, as a condition of employment after 30 days following the date of the agreement or initial employment, whichever was later—for a plant located in a "right-to-work" State which prohibits arrangements requiring union membership but not such "agency shops," constituted a refusal to bargain.³⁹ After the close of the fiscal year, a Board majority in the *General Motors* case⁴⁰ vacated an earlier majority decision in the same case dismissing the complaint,⁴¹ and held this "agency shop" proposal lawful union security under the act, absent any "suggestion" that union membership was not available to any nonmember employee who wished to join,⁴² hence a mandatory bargaining subject

d Violation of Bargaining Duty

An employer violates section 8(a)(5) not only by an outright refusal to bargain with the majority representative of his employees,⁴³ but also by bargaining only ostensibly and not with a good-faith intent to reach agreement,⁴⁴ or by conduct which interferes with the bargaining process or undermines the bargaining representative.⁴⁵ During fiscal 1961, a number of cases turned on the question whether the employer unlawfully interfered with the bargaining process by such conduct as the refusal to furnish information requested by the bargaining representative, the unilateral change in terms of employment, and other acts inconsistent with the bargaining requirement

(1) Refusal To Furnish Information

The statutory duty of an employer to bargain in good faith includes the duty to comply with the bargaining representative's request for "wage and other employment information essential to the intelligent representation of the employees"⁴⁶ Moreover, "while an employer

³⁹ *General Motors Corp*, 130 NLRB 481

⁴⁰ 133 NLRB No 21 (Sept 29, 1961), Chairman McCulloch and Members Rodgers, Fanning, and Brown, Member Leedom dissenting

⁴¹ 130 NLRB 481, former Chairman Leedom and Members Jenkins and Kimball—Members Rodgers and Fanning dissenting

⁴² See discussion above, p 102

⁴³ See, e.g., *Benevento Sand & Gravel Co*, 131 NLRB No 45, *Rural Electric Co*, 130 NLRB 799, *Bennett Mfg Co*, 129 NLRB 506

⁴⁴ See, e.g., *Borg Warner Controls*, 128 NLRB 1035, 1050-1051, *Kohler Co*, 128 NLRB 1062, 1068 *"M" System, Inc*, 129 NLRB 527, 547-553 (totality of employer's conduct), *Oakifornia Girl, Inc*, 129 NLRB 209, footnote 3 (totality of employer's course of conduct)

⁴⁵ See, e.g., *Kohler Co*, above, pp 1079-1080, *Bilton Insulation, Inc*, 129 NLRB 1296

⁴⁶ *Kohler Co*, 128 NLRB 1062, 1073 See also *NLRB v Truitt Mfg Co*, 351 U.S. 149 (1956), Twenty first Annual Report (1956), p 128

is not required to furnish such information at the exact time or in the exact manner requested, it must be made available in a manner not so burdensome or time consuming as to impede the process of bargaining”⁴⁷

In *Peyton Packing*,⁴⁸ the employer was found to have violated section 8(a)(5) by delaying 3 months in honoring the union’s request for the dates of hire, wage scales, and job classifications of employees in the bargaining unit, and the only justification advanced was that no job classification existed. This was held no excuse for the employer’s failure to furnish promptly “whatever data was obtainable, especially data pertaining to the departments in which the employees worked and the job functions which they performed”⁴⁹. Similarly, in the *Kohler* case,⁵⁰ unnecessary and unreasonable delay in furnishing information concerning “incentive earnings” essential for bargaining on wage inequities was found violative of section 8(a)(5).

However, in *American Cyanamid*,⁵¹ the Board found that the employer’s refusal to comply with the union’s demand for an unrestricted right to have and use exact copies of job evaluation and job description records for study and analysis outside the plant did not violate section 8(a)(5) under the particular circumstances. The Board noted that here the employer had a legitimate economic interest in not publicizing other information contained in these records concerning unique manufacturing techniques and processes, that the employer openly explained its position to the union, and that the union by its adamant insistence on its right to have these records on its own terms precluded a test of the employer’s willingness to give the union access to the information on mutually satisfactory terms⁵². It observed further that the problem of establishing conditions under which these records might be afforded the union in a manner satisfying the interests of both was “a matter more properly to be resolved at the bargaining table rather than through the Board processes”.

(a) Information as to inability to grant wage increase

When an employer claims financial inability to pay a demanded wage increase, “his failure to furnish on request substantiating fi-

⁴⁷ *Ibid*

⁴⁸ *Peyton Packing Co., Inc.*, 129 NLRB 1358

⁴⁹ This employer was also held to have violated the section by its failure to furnish the union with data on bonus payments, which the Board found to be an “integral part of the Respondent’s wage structure” rather than a discretionary gratuity as contended by the employer.

⁵⁰ Above, footnote 46

⁵¹ *American Cyanamid Co. (Marsetta Plant)*, 129 NLRB 688

⁵² Cf. *Times Publishing Co.*, 72 NLRB 670, 688 (1947), where the Board noted that a union’s attitude during bargaining may be such as to “remove the possibility of negotiation and thus preclude the existence of a situation in which the employer’s good faith can be tested. If it cannot be tested, its absence can hardly be found”.

nancial information may constitute a violation of Section 8(a) (5) depending on the facts of the particular case, the ultimate inquiry being 'whether or not under the circumstances of the particular case, the statutory obligation to bargain in good faith has been met' " 53

In one case during the past year, the Board found that an employer did not refuse or fail to substantiate its claim of inability to pay by refusing to permit the union to make a general inspection of its books and records 54 It noted that the employer's offer of its most recent balance sheet to permit "verification" of such balance sheet by a "licensed accountant or C P A," and its offer to submit its records to a full audit in its office by a "Licensed Public Accountant or a C P A" designated by the union, provided the union paid the cost of the audit, were reasonable and not unduly burdensome or restrictive on the union Finding that this employer had satisfied his obligation to bargain and furnish information as enunciated by the Supreme Court in the *Truitt* case, 55 the Board pointed out that "the obligation to furnish substantiating evidence does not 'automatically' follow a claim of inability to pay, nor is the employer obligated to substantiate the claim, it is enough if the employer in good faith attempts to substantiate it "

(b) Waiver

Although a bargaining representative may waive its right to requested information, evidence of such waiver must meet the Board's "clear and unequivocal" waiver test 56 Thus, a panel majority held that a union had not waived its right to receive a requested seniority list of employees in the bargaining unit—for the purpose of properly administering the seniority provisions of its contract—merely because it had executed a contract that incorporated the employer's seniority proposal which lacked any expressed provision for the employer to furnish such a list, rather than its own initial proposal which would have specifically provided for such a list 57 The majority relied particularly on the fact that the furnishing of a seniority list, *per se*, was not a bone of contention in the bargaining negotiations preceding the execution of the contract, and that there was no provision in the contract itself that no such list need be furnished 58

⁵³ *Yakima Frozen Foods*, 180 NLRB 1269, citing and quoting from *NLRB v Truitt Mfg Co*, 351 U S 149, 153-154 (1956)

⁵⁴ *Yakima Frozen Foods*, above The Board rejected the trial examiner's statement that an employer is obligated "to bare his books" to a union, or to any other employee representative

⁵⁵ Above, footnote 53

⁵⁶ *Gulf Atlantic Warehouse Co*, 129 NLRB 42 See also *The Item Co*, 108 NLRB 1634 1640 (1954), enforced 220 F 2d 956 (C A 5, 1955), certiorari denied 350 U S 836 (1955) rehearing denied 350 U S 905 (1955)

⁵⁷ *Gulf Atlantic Warehouse Co*, above Member Rodgers dissenting

⁵⁸ See also *American Sugar Refining Co*, 130 NLRB 634, where an employer was required to furnish the union with existing job descriptions of the job classifications in the

(2) Unilateral and Other Derogatory Action

The duty of an employer to bargain with the statutory representative of his employees includes the duty to refrain from taking unilateral action with respect to matters as to which he is required to bargain, and from making changes in terms and conditions of employment, without first giving the statutory representative an opportunity to negotiate concerning the contemplated action or change⁵⁹

During the past year, the unilateral grant of wage increases during a strike, without notice to or negotiation with the bargaining representative, was held violative of section 8(a)(5) in several cases⁶⁰ In the leading case in this category, *Kohler Co*,⁶¹ two such unilateral wage increases during a strike were held violative of the section As to the first increase, the Board distinguished the case from *Bradley Washfountain*,⁶² and rejected the contention that the wage increase did not disparage the union or the collective-bargaining process because the employer continued to negotiate with the union after the wage increase was granted It noted that, unlike the situation in *Bradley Washfountain*, this employer did not first offer to discuss with the union the wage proposal it put into effect, nor did it suggest to the employees that it had discussed this matter with the union or that the union had rejected it On the contrary, this employer placed the increase in effect without notice and without discussion or negotiation with the union, frequently proclaimed that it would not reward the union for having struck, and did not treat the increase as an allowance of the union's demands, but steadfastly refused to offer the union the same wage proposal⁶³ As to the other wage increase, a Board majority held that the employer violated the section by granting it unilaterally in the absence of an impasse on wages or other contract issues⁶⁴

Other conduct deemed derogatory of the statutory representative, and therefore violative of the section, included the unilateral putting into effect of a hospitalization plan,⁶⁵ the unilateral grant of an

appropriate unit, although the union had entered into a contract which made no provision that job descriptions would be furnished, upon the oral assurance that they would be furnished

⁵⁹ See *Kohler Co*, 128 NLRB 1062, 1078-1079, citing *NLRB v Orompton Highland Mills, Inc*, 337 US 217 (1949), and *May Department Stores v NLRB*, 326 US 376 (1945)

⁶⁰ See, e.g., *Kohler Co*, above, *Sherry Mfg Co*, 128 NLRB 739, *Peyton Packing Co, Inc*, 129 NLRB 1358, 1361-1362 (contention that wage raises were merit increases rejected) See also *Dichten & Masch Mfg Co*, 129 NLRB 112, 123-124, where a unilateral wage decrease during a strike was found unlawful

⁶¹ 128 NLRB 1062, 1077-1084, 1088, 1179-1180

⁶² *NLRB v Bradley Washfountain Co*, 192 F 2d 144 (CA 7, 1951)

⁶³ 128 at pp 1079-1080

⁶⁴ 128 NLRB at pp 1088, 1179-1180, Member Rodgers dissenting on the ground that an impasse had been reached

⁶⁵ *Sherry Mfg Co Inc*, 128 NLRB 739

additional half-day holiday;⁶⁶ the unilateral reduction of wage rates,⁶⁷ the entering into, and requiring employees to enter into, employee agreements changing terms and conditions of employment, without consulting the certified representative,⁶⁸ and the discussion of grievances, pay raises, vacations, and other working conditions with an employee committee, in derogation of the exclusive bargaining representative's authority⁶⁹

e Suspension of Bargaining Obligation

Although the duty to bargain and to recognize a union which is the statutory representative of the employees is a continuing one, certain aspects of the employer's bargaining obligation may be temporarily suspended while the union is engaged in unlawful activity.⁷⁰ Accordingly, in the *Kohler* case, above, the Board held that the employer was justified in breaking off bargaining negotiations during those periods in which the union, through its representatives, endorsed illegal strike conduct, including violence and vandalism, and encouraged "mob" demonstrations at the homes of nonstriking employees.⁷¹

B. Union Unfair Labor Practices

The several subsections of section 8(b) of the act specifically prescribe as unfair labor practices seven separate types of conduct by labor organizations or their agents. In addition, section 8(e), added by the 1959 amendments, prohibits employers and labor organizations alike from entering into "hot cargo" type contracts.

Cases decided by the Board during fiscal 1961 under subsections (1), (2), (3), (4), and (7) of section 8(b) as well as under section 8(e) are discussed below. No cases were brought to the Board for decision involving subsection (5) which forbids excessive and discriminatory union fees, or subsection (6) which prohibits so-called featherbedding practices.

⁶⁶ *Borg Warner Controls, etc.*, 128 NLRB 1035

⁶⁷ *Dickten & Masch Mfg Co.*, 129 NLRB 112, 124

⁶⁸ *Lucas County Farm Bureau Co-operative Assn*, 128 NLRB 458, 472. See also *Squirr-Nesbitt Bottling Corp.*, 130 NLRB 24

⁶⁹ *Bilton Insulation, Inc.*, 129 NLRB 1296

⁷⁰ See *Kohler Co.*, 128 NLRB 1062, 1087-1088, 1170-1172, 1175-1176. See also *Valley City Furniture Co.*, 110 NLRB 1589 (1954), *Marathon Electric Mfg Corp.*, 106 NLRB 1171 (1952); *Phelps-Dodge Copper Products Corp.*, 101 NLRB 360 (1952), Eighteenth Annual Report (1958), pp 44-45. However, the obligation to bargain may again become operative upon correction of the wrongful action. See *Dorsey Trailers, Inc.*, 80 NLRB 478, 486 (1948)

⁷¹ For a further discussion of the illegal strike conduct in this case see above, pp 94-95

1. Restraint and Coercion of Employees

Section 8(b)(1)(A) makes it an unfair labor practice for a labor organization or its agents "to restrain or coerce employees" in the exercise of their right to engage in or refrain from concerted activities directed toward self-organization and collective bargaining

While section 8(b)(1)(A) also provides that it "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein," the Board has consistently held that this proviso does not permit a labor organization to enforce its internal rules so as to affect the hire or tenure of employees, and thereby to coerce them in the exercise of their statutory rights⁷²

a Forms of Restraint and Coercion

Section 8(b)(1)(A) is violated by conduct which independently restrains or coerces employees in their statutory rights without regard to whether the conduct also violates other subsections of 8(b). While employer violations of subsections (2) to (5) of section 8(a) have been held to constitute derivative violations of subsection (1)—which prohibits interference with, restraint, and coercion of employees in their section 7 rights—the Board has adhered to the view that there is no like relation between subsection (1) and other subsections of 8(b)⁷³. Thus, the Board in one case⁷⁴ held that peaceful picketing by a minority union for a union-security clause—which picketing was found violative of section 8(b)(2)—did not constitute a derivative violation of section 8(b)(1)(A). The Board observed that the Supreme Court's decision in the *Curtis Bros* case⁷⁵ made it clear that peaceful picketing for any purpose does not restrain and coerce employees within the meaning of section 8(b)(1)(A).⁷⁶

(1) Threats and Violence, Other Coercive Conduct

As heretofore, some of the cases under section 8(b)(1)(A) involved conduct intended to compel strike participation or observance

⁷² See Twenty fourth Annual Report (1959), p 85

⁷³ *Ibid*

⁷⁴ *Local Joint Executive Board of Hotel & Restaurant Employees, etc (Crown Cafeteria)*, 130 NLRB 1551

⁷⁵ *NLRB v Drivers, Chauffeurs & Helpers, Local Union No 619, etc*, 362 US 274 (1960), Twenty fifth Annual Report (1960), pp 121-122

⁷⁶ See also *Local 705, IBT (Cartage & Terminal Management Corp)*, 130 NLRB 558, where the Board affirmed the trial examiner's finding of a sec 8(b)(7)(C) violation, but dismissed the 8(b)(1)(A) allegation

of picket lines by employees. As again pointed out during the past year, such conduct is unlawful regardless of whether it succeeds in restraining nonstriking employees from exercising their right to work.⁷⁷

Strike activities which were found violative of section 8(b)(1)(A) included mass picketing, the blocking of ingress to and egress from struck plants, and actual and threatened physical violence—including damage to vehicles—directed toward employees, supervisory and managerial personnel, workers of other employers, and various other persons.⁷⁸ In one case, the actions of pickets in surrounding and breaking the window of a truck belonging to a neutral employer, thereby causing the driver to collide with another vehicle while attempting to leave the employer's yard, was held violative of section 8(b)(1)(A), since this conduct was but another link in a pattern of unlawful conduct in which the union was engaging.⁷⁹ In another case, a union's attempts by forcible means and threats of violence to obstruct the lawful organizing activities of nonemployee agents and officers of a rival union were held to constitute unlawful restraint and coercion of employees.⁸⁰ This conduct, the Board held, not only impeded employees in their right to obtain information concerning, and to indicate support for, the rival union, but also demonstrated to the many employees present at the time that they too could reasonably expect to be subject to such violent and abusive actions if they participated in rival union activities. The Board observed that even those employees who were not present were likely to learn of the respondent union's "open and notorious" conduct. And picketing of a non-striker's home was held unlawful in one instance.⁸¹

Union utterances addressed to employees have been held violative of section 8(b)(1)(A) where they contained express or implied threats of loss of employment or employment opportunities because of employees' exercise of statutory rights.⁸² In one case, a union was held to have violated section 8(b)(1)(A), as well as section 8(b)(2), where it attempted to cause the employer to discharge employees for having exercised their lawful right to apply directly to the company for employment, rather than the union's hiring hall in conformity with the union's requirement that members seeking employment

⁷⁷ *Local No 3887, Steelworkers (Stephenson Brick & Tile)*, 129 NLRB 6

⁷⁸ *United Mine Workers, District 31 (Blue Ridge Coal Corp)*, 129 NLRB 146, *Highway Truckdrivers, Local 107 (Riss & Co)*, 130 NLRB 943, *Brotherhood of Locomotive Firemen & Enginemen (Phelps Dodge Corp)*, 130 NLRB 1147

⁷⁹ *Local No 3887, Steelworkers (Stephenson Brick & Tile)*, above. See also *Checker Taxi Co*, 131 NLRB No 96

⁸⁰ *Checker Taxi Co*, above

⁸¹ *United Mine Workers, District 31 (Blue Ridge Coal Corp)*, above

⁸² *Local 511, St Louis Offset Printing Union*, 130 NLRB 324

use the hiring hall⁸³ In another case, the Board found one violation of section 8(b)(1)(A) where the union attempted to have a leading organizer for a rival union discharged for distributing literature and "agitating" for the rival union, and a separate violation of the same section where a fight with this employee was deliberately provoked for the purpose of forcing the employee to violate the employer's rule and fixed policy that the one who strikes the first blow is subject to discharge⁸⁴

During the past year an employer and a union were held to have violated section 8(a)(1) and 8(b)(1)(A), respectively, by interrogating certain workers about their participation in circulating a petition protesting representation by this union, which had been recognized by the employer for a group of employees although it did not then enjoy majority status⁸⁵ These employees were summoned to the plant office and interrogated by a union official in the presence of other union representatives and employer officials

The Board continued to adhere to the view that by the failure of union officials, present when serious acts of violence occur, to halt or repudiate the coercive conduct of its union members, the union ratifies such acts and is liable for their commission⁸⁶ In one instance, the union was held responsible for the conduct of a rank-and-file member who acted as an agent in securing signed authorization cards for organizational purposes, whether or not the specific conduct had been authorized or ratified⁸⁷

(2) Illegal Union-Security and Employment Practices

The Board has consistently held that the execution, maintenance, or enforcement of illegal union-security and employment agreements, which condition employment on union membership, is not only violative of section 8(b)(2),⁸⁸ but is also violative of section 8(b)(1)(A) in that such action inevitably restrains and coerces employees in their section 7 right to acquire and maintain, or refrain from acquiring or maintaining, union membership⁸⁹

⁸³ *Subordinate Lodge No 169, Boilermakers (A E Anderson Construction Co)*, 129 NLRB 1003, Member Fanning concurring and dissenting in part

⁸⁴ *Local 212, International Union, United Automobile, Aircraft & Agricultural Implement Workers (Chrysler Corp)*, 128 NLRB 952

⁸⁵ *Stokley-Bordo*, 130 NLRB 869

⁸⁶ *Local 6881, UMW (Grundy Mining Co)*, 130 NLRB 1181

⁸⁷ *International Woodworkers of America (Central Venice)*, 131 NLRB No 29, Member Fanning dissenting Although the Board majority found that an unfair labor practice had been committed, it held that, under the circumstances, a remedial order was not warranted

⁸⁸ See below, pp 123-127

⁸⁹ See *International Union, UAW, AFL-CIO, etc (John I Paulding, Inc)*, 130 NLRB 1035, which involved the unlawful application of a lawful maintenance of membership clause

The numerous interrelated 8(b)(1)(A)-8(b)(2) cases decided during fiscal 1961⁹⁰ again involved union-security agreements which did not conform to statutory limitations,⁹¹ unlawful hiring arrangements,⁹² and agreements giving preference to union members in terms of employment⁹³

Other cases in this category were concerned with coercion resulting from unlawful union requests for the discharge of, or refusal of employment to, individuals for nonmembership or nonobservance of union rules⁹⁴

2. Restraint and Coercion of Employers

Section 8(b)(1)(B) makes it an unfair labor practice for a labor organization or its agents to restrain or coerce an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances

Only one case involving section 8(b)(1)(B) was decided by the Board in the past year.⁹⁵ Here, the respondent unions met for about 5 months with an employer association representing a number of companies but having authority to make "recommendations only" After an impasse had been reached, the unions submitted contract proposals directly to an individual company with the ultimatum that if the employer did not sign, a strike would ensue The unions refused the employer's request for time in order to consult with the employer association, and a strike was called immediately It was conceded that the employees of this individual company constituted a separate appropriate unit The Board majority found that the strike was not called because of objections to dealing with the agent as the employer's representative, but rather because of disagreement over terms

⁹⁰ These cases are more fully discussed in the chapter dealing specifically with 8(b)(2) violations, below, pp 121-127

⁹¹ See e.g. *Cheiko Taxi Co*, 131 NLRB No 96

⁹² See, e.g. *Southeastern Plate Glass Co*, 129 NLRB 412, *Union Taxi Corp*, 130 NLRB 814 *Satchwell Electric Construction Co, Inc*, 128 NLRB 1265, 1267

⁹³ See e.g. *Indiana Gas & Chemical Corp*, 130 NLRB 1488 (health insurance and pension benefits limited to union members), *American Advertising Distributors*, 129 NLRB 640, 654 (union employees paid 2½ cents per hour more than nonunion employees)

⁹⁴ See, e.g. *Brunswick-Balke-Collender Co*, 131 NLRB No 30 (taking exception to union steward's remarks concerning starting and quitting of work), *International Union, UAW, AFL-CIO, etc (John I Paulding, Inc)*, 130 NLRB 1085 (failure to follow union procedures for resignation of members prior to execution of maintenance of membership contract), *Miami Valley Carpenters District Council of Dayton Ohio (B G Davis Co)*, 129 NLRB 517 (nonpayment of fine), *Subordinate Lodge No 169, International Brotherhood of Boilermakers, etc (A E Anderson Construction Co)*, 129 NLRB 1008 (failure to comply with union's requirement that members seeking employment use its hiring hall), *IUE, AFL-CIO, Frigidare Local 801 (General Motors Corp)*, 129 NLRB 1379 (failure to observe mechanics of reinstatement)

⁹⁵ *Lumber & Sawmill Workers, Local 2647 (Cheney California Lumber Co)*, 130 NLRB 235, Member Rodgers dissenting The Board also dismissed the allegation that the strike violated sec 8(b)(3) See below, p 127

of a contract, and thus did not violate section 8(b)(1)(B). According to the Board majority, the fact that the employer may have felt that it needed more time than the unions were prepared to allow for consulting with its bargaining agent did not, in the light of the entire bargaining history herein, establish that the unions sought to restrain the employer in the selection of its bargaining representatives within the meaning of the section.

3. Causing or Attempting To Cause Discrimination

Section 8(b)(2) prohibits labor organizations from causing, or attempting to cause, employers to discriminate against employees within the meaning of section 8(a)(3). That section outlaws discrimination in employment which encourages or discourages union membership, except insofar as it permits the making of union-security agreements on certain specified conditions. By virtue of section 8(f), union-security agreements covering employees "in the building and construction industry" are permitted on less restrictive conditions.

The cases arising under section 8(b)(2) during fiscal 1961 were concerned, for the most part, with illegal union-security requirements, and unlawful hiring arrangements and practices, which resulted in closed-shop conditions, or otherwise conditioned employment opportunities on union membership or other union requirements.⁹⁶

a Forms of Violations

The cases under section 8(b)(2) continued to present both individual instances of union conduct tantamount to a request for discrimination against employees because of the lack of union membership or failure to observe union rules,⁹⁷ as well as agreements or arrangements with employers unlawfully conditioning employment on union membership or the performance of union obligations.⁹⁸

To establish a violation of section 8(b)(2), the respondent union must be shown to have caused, or attempted to cause, an employer to discriminate against employees in violation of section 8(a)(3). Thus, a number of cases decided during the year turned on issues as to (1)

⁹⁶ For illegal employer participation in such practices, see chapter on sec 8(a)(3) violations, pp 99-105, above

⁹⁷ See, e.g., *International Union, UAW, AFL-CIO (John I Paulding, Inc)*, 130 NLRB 1035 (failure to follow union procedures for resignation of members prior to execution of maintenance of membership contract), *Miami Valley Carpenters District Council of Dayton Ohio (B G Dams Co)*, 129 NLRB 517 (nonpayment of fine), *Subordinate Lodge No 169, International Brotherhood of Boilermakers, etc (A E Anderson Construction Co)*, 129 NLRB 1003 (failure to comply with union's requirement that members seeking employment use its hiring hall), *IUE, AFL-CIO, Frigidare Local 801 (General Motors Corp)*, 129 NLRB 1379 (failure to observe mechanics of reinstatement)

⁹⁸ See, e.g., *Chester Taxi Co*, 131 NLRB No 96, *Southeastern Plate Glass Co*, 129 NLRB 412

what constitutes "cause" or "attempt to cause," and (2) whether the employer would have violated section 8(a)(3) by granting the union's request

In *Continental Baking Co.*,⁹⁹ which involved both these issues, the Board held that a union's attempt to cause the discharge of an employee, because he had worked during a strike and expressed contempt toward the union, violated section 8(b)(2). In finding an unlawful "attempt to cause" here, the Board relied upon the union business agent's statements to the employee's supervisor that he "would have to discharge" him and "I am asking you again to fire this boy," and the union's letter to the employer stating that it intended "to take whatever lawful steps that will be necessary to force the Company" to cease violating its contract by retaining this employee, but not on the fact that the union instituted an action in a State court to enjoin the company from continuing to employ this employee. Noting that the union's request for this employee's discharge was not an "expression of views, arguments, or opinions," the Board rejected the trial examiner's finding that this conduct was protected by section 8(c),¹ and overruled the *Henry Shore* case² to the extent it was inconsistent.³

In *Brunswick-Balke-Collender Co.*,⁴ the Board found that a union caused the discharge of an employee in violation of section 8(b)(2) by the "direct pressures" of its union steward "acting within the scope of his delegated authority to police the job" because of the employee's failure to perform obligations imposed by the respondent union on its members and work permit holders. The "pressures" were brought here by the union steward because the employee took exception to the steward's remarks during a lecture to the employees on quitting and starting times, which lecture was delivered by the steward at the direction of the union's business agent.

And in *Southeastern Plate Glass Co.*,⁵ a Board majority found a constructive request for a nonunion employee's discharge violative of the section, even though there was no evidence of any direct request

⁹⁹ *American Bakery & Confectionery Workers (Continental Baking Co., Inc.)*, 128 NLRB 937, Member Fanning concurring, former Chairman Leedom and Member Jenkins concurring in part and dissenting in part.

¹ Sec 8(c) reads "The expressing of any views, argument, or opinion, or the dissemination thereof whether in written, printed, graphic, or visual form shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

² *Denver Building & Construction Trades Council, et al (Henry Shore)*, 90 NLRB 1768 (1950), enforced with respect to other issues, 192 F 2d 577 (CA 10, 1951).

³ Member Fanning found a request for discharge under a union-security contract necessarily an "attempt to discharge," and distinguished the *Henry Shore* case.

⁴ 131 NLRB No 30 and proposed supplemental decision and order issued in this case after the close of the fiscal year, 135 NLRB No 59.

⁵ 129 NLRB 412, Member Jenkins dissenting.

by the union for his discharge. In this case, the union steward warned the employer that it would not be safe for union members to work with this nonunion employee on union jobs as they might be subject to union fine. In the majority's opinion, this warning clearly implied that the union men might refuse to work if this nonunion employee was used on union jobs.

The Board also had occasion to reiterate that peaceful picketing for a union-security clause at a time when the union did not represent a majority of employees in an appropriate unit constitutes an unlawful "attempt to cause" discrimination within section 8(b)(2).⁶ And a work stoppage to induce an employer to discharge union employees who had exercised their lawful right to apply directly to the employer for jobs—rather than through the union's hiring hall—was likewise held to be an unlawful "attempt to cause" discrimination,⁷ as was a union's threats of economic pressures if a nonunion employee was not discharged.⁸

In *Spiegelberg Lumber & Building Co.*,⁹ a Board majority held that, under the particular circumstances, a union unlawfully caused the discharge of an employee for accepting the employer's offer of substantially better working conditions than were contained in the union's contract with the employer. The union's action, according to the majority, foreseeably tended to encourage membership in and fealty to the union. It pointed out, however, that its holding here did not mean that a union is powerless to protect its bargaining position when confronted with dissident employees seeking different working conditions outside of collective bargaining, but, rather, that the union cannot protect that position by causing dissident workers to be discharged for that reason.

(1) Illegal Employment Agreements and Practices

The Board has consistently held that a union violates section 8 (b) (2) by entering into or maintaining an agreement which requires in effect that preference in hiring be given to the contracting union's members,¹⁰ or otherwise establishes hiring practices that result in

⁶ *Local Joint Executive Board of Hotel & Restaurant Employees etc (Crown Cafeteria)*, 130 NLRB 1551.

⁷ *Subordinate Lodge No 169, Boilermakers (A E Anderson Construction Co)*, 129 NLRB 1003, Member Fanning dissenting on another point.

⁸ *Local 49, Operating Engineers (AGC of Minnesota)*, 129 NLRB 399. Compare *Ford Motor Co (Sterling Plant)*, 131 NLRB No 174.

⁹ *International Association of Bridge, Structural & Ornamental Iron Workers, Local 494 (Spiegelberg Lumber & Building Co)*, 128 NLRB 1379, Members Rodgers and Fanning dissenting.

¹⁰ See, e.g., *Union Taxi Corp*, 130 NLRB 814, *Southwestern Plate Glass Co*, 129 NLRB 412, Member Jenkins dissenting in part, *American Advertising Distributors*, 129 NLRB 640.

closed-shop conditions¹¹ The maintenance of such agreements, regardless of whether specific discrimination occurs, has been held to have the inevitable effect of unlawfully encouraging membership in the contracting union¹²

A Board majority stated in one case¹³ that a union must be deemed a party to an implied or tacit unlawful exclusive hiring arrangement where it knowingly acquiesces in an employer's discriminatory procedures In this case, the majority charged the union with knowledge of the employer's discriminatory procedures on the basis of a "long-term continuing relationship" between the union and the employer, which rendered it "distinctly improbable" that the employer's hiring procedures could have continued without the union's "knowledge, understanding, and cooperation" Where, on the other hand, nothing in the language of a union's agreement with an employer obligated the latter to observe the union's bylaws and rules—which required job foremen, all union members, to see that jobs were "strictly union in every detail"—and the employer was free to, and actually did, recruit employees outside the union, no violation of the act was found.¹⁴

Prior to the decision of the Supreme Court in *Local 357, Teamsters*¹⁵ of April 17, 1961, the Board found¹⁶ violations of section 8(b)(2) in situations where exclusive hiring hall arrangements were operated without the safeguards specified in the Board's *Mountain Pacific* rule¹⁷ However, in deference to the Court's decision, the Board ceased adhering to this rule.¹⁸

In one case involving a seniority issue the Board reaffirmed a prior decision¹⁹ that a union violated the act by maintaining and enforcing a contractual provision providing for the retention and accumulation of seniority by employees transferred out of the contract unit only if they applied for withdrawal cards from the union²⁰ On the basis

¹¹ See e.g., *Local 84, Iron Workers (South Texas Building Co)*, 129 NLRB 971

¹² *Osherwitz & Sons*, 130 NLRB 1078, Member Kimball dissenting on another point.

¹³ *Pipe Fitters Local 392, etc (Alco Products, Inc)*, 130 NLRB 663, Member Fanning and former Chairman Leedom dissenting, reversed in 136 NLRB No 46 after the fiscal year

¹⁴ *Ohio Valley Carpenters, etc (McGraw Construction Co)*, 131 NLRB No 111

¹⁵ *Local 357, International Brotherhood of Teamsters v NLRB (Los Angeles-Seattle Motor Express)*, 365 U.S. 667 See section on Supreme Court Rulings below p 153 for a full discussion of this case

¹⁶ See, e.g., *Petersen Construction Corp*, 128 NLRB 969

¹⁷ *Mountain Pacific Chapter of the Associated General Contractors Inc* 119 NLRB 883 (1957), Twenty-third Annual Report (1958), pp 85-86

¹⁸ See, e.g., *Local 106, Carpenters (Otis Elevator)*, 132 NLRB No 118, *G A Rafel & Co*, 131 NLRB No 154, footnote 1 After the close of the fiscal year, the Board reversed one prior holding that the execution and enforcement of a hiring hall contract was unlawful, *Petersen Construction Corp*, 134 NLRB No 152, modifying 128 NLRB 969, and another with respect to hiring hall arrangements, *Bullings Local 1172, Carpenters (Refinery Engineering Co)*, 133 NLRB No 44, modifying 130 NLRB 307 See also *Laborers & Hod Carriers (Hood-River-Neil)*, 135 NLRB No 7

¹⁹ *Local 1417, Machinists (The Electric Auto Lite Co)*, 123 NLRB 1099 (1959)

²⁰ *Local 1417, Machinists (The Electric Auto-Lite Co)*, 129 NLRB 1072

of the Supreme Court's *Radio Officers* decision,²¹ the Board was of the opinion that since the withdrawal cards could be issued only to members in good standing, i e, employees who had paid fines and assessments as well as periodic dues and initiation fees, the foreseeable consequence of the seniority provision was encouragement of union membership

(2) Illegal Union-Security Agreements and Practices

The act's limitations on the right of labor organizations and employers to make and enforce agreements conditioning employment on union membership are—as stated earlier in this report²²—contained in the so-called union-security proviso to section 8(a)(3), as supplemented by section 8(f) relating to the building and construction industry

Union-security agreements which fail to conform to any one of the statutory requirements have been held to subject the affected employees to unlawful discrimination. A union which seeks to compel an employer to enter into such an agreement,²³ or executes or maintains such an agreement, thereby violates section 8(b)(2) which prohibits unions from attempting to cause, as well as causing, unlawful discrimination.²⁴ Cases where violations of this type were found during fiscal 1961 involved maintenance of union-security agreements which were unlawful because the contracting union did not have majority status among the employee,²⁵ or, having received unlawful employer assistance, was not their bona fide representative,²⁶ as well as agreements which exceeded the statutory limitations.²⁷

Section 8(b)(2) violations were also found where the respondent union enforced valid union-security clauses in a manner not permitted by the act. Thus, the Board held in one case²⁸ that a union violated the act by demanding the discharge of an employee under the terms of its union-security contract, even though the union had accepted the employee's tender of delinquent initiation fees and dues and had notified him of his reinstatement.

Another union's request to the employer to discharge an employee for alleged dues delinquency was held to be violative of the act since

²¹ 347 U.S. 17 (1954)

²² See p 99, above

²³ See *Local Joint Executive Board of Hotel & Restaurant Employees etc (Crown Cafeteria)*, 130 NLRB 1551, discussed above, pp 117 and 123

²⁴ *Industrial Rayon Corp*, 130 NLRB 427

²⁵ *Chester Taxi Co, Inc*, 131 NLRB No 96

²⁶ *American Advertising Distributors*, 129 NLRB 640

²⁷ *Chester Taxi Co*, above. See also p 100 above

²⁸ *F J Burns Draying, Inc*, 129 NLRB 252. See also *International Union of Electrical, Radio & Machine Workers Frigidaire Local 801 (General Motors Corp)*, 129 NLRB 1379

the union's conduct was actually motivated by the fact that the employee continued to work during the union's strike and by his contemptuous attitude toward the union.²⁹ The Board also held that, regardless of the union's motivation, the union's demand was unlawful because it was made before the expiration of the 30-day grace period for joining the union, and the employee had made a full tender of dues and fees on the 30th day of his employment. In this connection, the Board pointed out that the first day of a period within which an act is to be performed is excluded from the computation of the period.

In another case,³⁰ a panel majority affirmed a trial examiner's finding that a union violated section 8(b) (2) by causing an employer to threaten employees with discharge if they did not pay strike assessments levied by the union, and to check off such assessments as a condition of their continued employment. The majority noted that the proviso to section 8(a) (3) does not include such assessments.³¹

In the *Bradley Plumbing* case,³² a panel majority held that a union, at the time of an employee's discharge, attempted to cause and did cause such discharge for discriminatory reasons—and thereby violated section 8(b) (2)—even though the chain of events leading to the discharge started prior to the so-called 10(b) period.³³ The majority stated:

In terms of the frame of reference supplied us by the Supreme Court's *Bryan* [footnote omitted] decision, we may look to events outside the limitation period for the purpose of shedding light upon the true character of occurrences within the period only when such occurrences, as a substantive matter, may constitute an unfair labor practice. Thus, within the pertinent 6-month period preceding November 24, 1959, we have the discharge of Hall by Bradley for what could be a discriminatory reason, namely, that Hall had failed to join the Union at a time when he was not obligated to do so. There is also the fact that Bradley was faced with disciplinary action because he had been working with Hall, and the fact that the Respondent refused to refer any union members to Bradley until it had held a hearing on its charges. We are satisfied that the above occurrences within the 6-month limitation period tend to establish that the Respondent, at the time of the discharge, was attempting to cause and did cause Hall's discharge for discriminatory reasons. Therefore, Kraiss' earlier remarks,

²⁹ *American Bakery & Confectionery Workers, Local 173 (Continental Baking Co)*, 128 NLRB 937, Chairman Leedom and Member Jenkins dissenting on another point. See also *Miami Valley Carpenters' District Council (B & Davis Co)*, 129 NLRB 617.

³⁰ *Florence Brooks*, 131 NLRB No. 97, Member Leedom dissenting with respect to those employees who had executed checkoff authorizations specifically authorizing deductions of "any assessments."

³¹ The majority also held that an order directing reimbursement of these exactions was proper in view of the actual coercion of the employees involved. See above, pp 105-106, on remedial orders as to reimbursement.

³² *Plumbers & Pipe Fitters Local 214 (D L Bradley Plumbing & Heating Co)*, 131 NLRB No. 122. Members Rodgers and Fanning signed the majority opinion, Member Leedom dissented.

³³ Sec 10(b) precludes a complaint based on an unfair labor practice occurring more than 6 months prior to the filing and service of the charge. Here, the discharge took place the day after the 6-month period began. Compare with *Local Lodge No 1424, I A M v NLRB (Bryan Mfg Co)*, 362 US 411 (1960).

which we now consider, to the effect that Hall should be discharged for his nonmembership in Local 214, and that there would be no referrals until Hall was discharged, merely serve to illuminate and explain why Bradley discharged Hall [Footnote omitted]

4. Refusal To Bargain in Good Faith

Section 8(b) (3) prohibits a labor organization from refusing "to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a) "

Under section 8(d), the union and the employer³⁴ have a mutual obligation to bargain collectively by meeting at reasonable times and conferring in good faith "with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party " However, "such obligation does not compel either party to agree to a proposal or require the making of a concession."

In one case³⁵ a majority of the Board held that the respondent unions did not refuse to bargain in good faith by giving the employer an "ultimatum," backed by a strike threat, to sign certain contract proposals immediately without any further opportunity to consult with its bargaining agent The ultimatum was the culminating action in the course of bargaining which had extended over a period of about 5 months and resulted in an impasse, and the employer's agent had previously rejected the unions' proposals The Board majority, observing that a strike prior to the ultimatum would not have been violative of section 8(b) (3), concluded that a strike preceded by a final offer even on a "take it or face a strike" basis after breakdown in good-faith negotiations, was not a violation of a union's bargaining obligation

a. Bargaining Demands

The statutory representative of an appropriate employee unit—as in the case of the employer of the employees³⁶—must bargain as to all matters pertaining to "wages, hours, and other terms and conditions of employment " In other matters which are lawful, bargaining is permissible though not mandatory But insistence on inclusion in a contract of clauses dealing with matters outside the category of bargaining subjects specified in the act, as a condition of bargaining on mandatory matters, constitutes an unlawful refusal to bargain³⁷

³⁴ See above, pp 107-116

³⁵ *Lumber & Sawmill Workers, Local 2647, et al (Okeney California Lumber Co)*, 130 NLRB 235, Member Rodgers dissenting

³⁶ See above, pp 109-112

³⁷ *NLRB v Wooster Division of Borg Warner Corp*, 356 US 342 (1958), Twenty-third Annual Report (1959), pp 104-106

In one case, where two unions insisted upon a common expiration date in their contracts, covering the employees in two of the employer's plants represented by them, and in a third of the employer's plants represented by another labor organization, the Board, finding no violation of section 8(b)(3), held that contract duration is a bargainable issue and that the insistence of the unions on specific expiration dates was not evidence of bad-faith bargaining.³⁸

In another case, where the union allegedly refused to bargain with an employer association by executing individual contracts with two employers, the Board dismissed the section 8(b)(3) complaint on the ground that these employers had in fact abandoned group bargaining and were not association members at the time they signed the individual contracts with the union.³⁹ The Board reiterated the well-established rule that "a single-employer unit becomes appropriate when the employer, at an appropriate time, manifests an intention to withdraw from group bargaining and to pursue an individual course of action with respect to its labor relations"⁴⁰

(1) Strike for Illegal Demands

The Board held in two related cases that the unions' conduct not only in striking, but also in refusing to work overtime to force the inclusion of unlawful provisions⁴¹ in a collective-bargaining contract, constituted a failure to bargain in good faith and was, therefore, violative of section 8(b)(3).⁴² With regard to the Supreme Court's decision in the *Insurance Agents* case,⁴² which held that certain union harassing tactics accompanying bargaining negotiations were not evidence of bad faith, the Board pointed out that since a strike to compel the inclusion of illegal provisions in a contract is a violation of section 8(b)(3), *a fortiori*, a partial strike—in this case the refusal to work overtime—to accomplish the same objective is equally unlawful.

However, in the *Cheney California Lumber* case,⁴³ which involved a strike for a new contract to replace a contract with a no-strike clause, a majority of the Board found that on the basis of the *Insurance Agents* decision, the strike did not in itself violate section 8(b)(3), even assuming that it was in violation of the no-strike clause

³⁸ *United Steelworkers, Local 2140 (US Pipe & Foundry)*, 129 NLRB 357

³⁹ *Cooks, Waiters & Waitresses Union, Local 327 (Greater Peoria Restaurant Assn.)*, 131 NLRB No 33

⁴⁰ These provisions were found to be "hot cargo" clauses unlawful under sec 8(e) See below, pp 142-145

⁴¹ *Amalgamated Lithographers, Local 17 (Employing Lithographers)*, 130 NLRB 935, *Amalgamated Lithographers, Local 78 (Miami Post Co)*, 130 NLRB 968

⁴² *NLRB v Insurance Agents' International Union, AFL-CIO (Prudential Insurance Co)*, 361 US 477 (1960), Twenty-fifth Annual Report (1960), pp 122-123

⁴³ *Lumber & Sawmill Workers, Local No 2647, et al (Cheney California Lumber Co)*, 130 NLRB 235 Member Rodgers, dissenting as to other holdings, did not consider that the issue of whether violation of a no strike clause is of itself an 8(b)(3) violation was presented

In the same case, the trial examiner held that the union's proposal for a health and welfare trust was violative of section 302 of the act,⁴⁴ and that the unions' insistence thereon as a condition to entering into an agreement was therefore a violation of section 8(b)(3). The Board majority reversed this holding, noting that section 302, a criminal statute which should be "strictly construed," is intended to deal with actual trust agreements and not with proposals to create a trust in the future, which was the situation in this case. In the absence of a determination by an agency charged with enforcing section 302 that this proposal was unlawful, the majority stated that it was not prepared to hold that the insistence on such a proposal is a refusal to bargain in good faith.

b Section 8(d) Requirements

Neither party may terminate or modify a collective-bargaining contract without first giving proper notice to the other party and to Federal and State conciliation services, as required by subsections (1) and (3) of section 8(d), or without observing the provisions of subsections (2) and (4) which require the parties to offer to negotiate a new contract, and to continue the existing contract in effect without resorting to a strike or lockout during a specified 60-day period.

During the past year, the Board had to decide the novel question whether a second set of strike notices was required after the breakdown of negotiations which followed the extension of the parties' original contract. In this case,⁴⁵ the contracting unions had served all required notices of their dispute, and the parties to the contract then agreed to extend it for 1 year, leaving open for continued negotiations the very subjects covered by the original requests for reopening. The strike which the unions called some months later was, in the opinion of a Board majority, precipitated not by a dispute over the duration of a new agreement, which the majority viewed to be a nonopen subject, but rather over health and welfare proposals, which had been mentioned in the original notices to the mediation services. The Board majority held that under these circumstances the unions were not required to send a second set of notices.

In another case, a section 8(b)(3) violation was found where the unions failed to notify the proper State authorities before striking, notwithstanding the unions' contention that it would have been an idle

⁴⁴ Sec. 302, a criminal statute, forbids employers "to pay, lend or deliver or agree to pay, lend, or deliver any money or thing of value to any representative of any of his employees" except under certain conditions which include "trust funds" for the benefit of employees under specified conditions.

⁴⁵ *Lumber & Sawmill Workers, Local No. 2647, et al (Cheney California Lumber Co.)*, 130 NLRB 235.

gesture to notify its State agency which does not do, nor have the funds to carry out, any conciliation or mediation work ⁴⁶

5. Prohibited Strikes and Boycotts

The act's prohibitions against strikes and boycotts are contained in section 8(b) (4) Clause (1) of this section forbids unions to strike or to induce or encourage strikes or work stoppages by any *individual employed by any person* engaged in commerce or in an industry affecting commerce, while clause (11) makes it unlawful for a union to threaten, coerce, or restrain *any such person*, in either case for any of the purposes proscribed in subsection (A), (B), (C), or (D)

During the past fiscal year, the Board construed for the first time the statutory term "person engaged in commerce or in an industry affecting commerce" in the *Kisner* case⁴⁷ The Board stated here that in deciding secondary boycott cases, it would construe this statutory phrase broadly "in order to fulfill the manifest congressional purpose to give the widest coverage to secondary boycott provisions" Specifically, in this case, which involved a dispute in the building and construction industry and a primary employer whose business did affect commerce, the Board reversed a trial examiner who had dismissed a complaint because the evidence failed to show that the particular secondary employers involved were themselves engaged in commerce or in an industry affecting commerce According to the Board, the trial examiner's rationale would plainly thwart the congressional intent in amending section 8(b) (4) to close various loopholes in the Taft-Hartley ban on secondary boycotts The Board took "administrative notice" of the fact that the building and construction industry causes the flow of large quantities of goods across State lines, and therefore found that it is an "industry affecting commerce," and that the particular secondary employers involved were engaged in such an industry It was also noted that these secondary employers were engaged in an "activity," i e, a construction job, in which a labor dispute would burden or obstruct or tend to burden commerce within the meaning of section 8(b) (4) as further defined by section 501(1) of the Labor Management Relations Act because the primary employer was engaged in commerce

During the year, the Board also had occasion to rule that a hospital is a "person" entitled to the protection of section 8(b) (4), even though as an "employer" it is exempt from the act as a nonprofit institution ⁴⁸

⁴⁶ *Brotherhood of Locomotive Firemen & Enginemen (Phelps Dodge Corp)*, 130 NLRB 1147

⁴⁷ *Sheet Metal Workers, Local 299 (S M Kisner & Sons)*, 131 NLRB No 147

⁴⁸ *Local 3, IBEW (Picker X-Ray Corp)*, 128 NLRB 566, decided under the provisions of sec 8(b) (4) (A) before the 1959 amendments

It also decided that a partnership of independent contractors having no employees is not an "employer" within the meaning of that portion of section 8(b)(4)(B) which "relates to an object of requiring 'any other employer' to recognize or bargain with" a union.⁴⁹

a Inducement and Encouragement of Work Stoppage

(1) Individual Employed by Any Person

The 1959 amendments prohibit inducement or encouragement of strike action by "any individual employed by any person," rather than merely by "employees of any employer" as under the old section 8(b)(4). In the *Carolina Lumber* case,⁵⁰ the Board for the first time had occasion to consider the extent of the coverage of this new language. Observing that this language did not answer the question of how much broader a category of employed persons are protected from unlawful inducement, the Board examined the pertinent legislative history and concluded

As indicated by the legislative history, the term "individual employed by any person" in 8(b)(4)(1) refers to supervisors who in interest are more nearly related to "rank and-file employees" than to "management," as the term is generally understood. On the other hand, the term "person" as used in 8(b)(4)(11) would seem to refer to individuals more nearly related to the managerial level. So construed, 8(b)(4)(1) would outlaw attempts to induce or encourage employees and some supervisors, to achieve the objectives proscribed by 8(b)(4). Similar attempts to induce or encourage others more nearly related to the managerial level for the same objectives would be lawful. However, if in the latter case the labor organization went beyond persuasion and attempted to coerce such managerial officials to accomplish the proscribed objectives, it would violate 8(b)(4)(11).

This leaves for determination whether in a given case inducement was directed at a supervisor who is an "individual employed by any person" within the meaning of 8(b)(4)(1). No single across-the-board line on an organization chart can be drawn to determine in every case whether a supervisor is an "individual employed by any person." The authority and position of supervisors vary from company to company. It will therefore be necessary in each case in determining this question to examine such factors as the organization setup of the company, the authority, responsibility, and background of the supervisors, and their working conditions, duties, and functions on the job involved in this dispute, salary, earnings, perquisites, and benefits. No single factor will be determinative.

In accordance with this formula, the Board concluded in the same case that a project superintendent for a construction subcontractor was a top managerial representative on the job who was free to exercise authority, including requisitioning and purchasing supplies, with-

⁴⁹ *Local 1921, Carpenters (Spar Builders)*, 131 NLRB No. 116

⁵⁰ *Local 505, Teamsters (Carolina Lumber Co.)*, 130 NLRB 1438, Member Rodgers concurring in the result

out reference to anyone else in the "managerial hierarchy"—thus establishing that he was more nearly related to the managerial level than to rank-and-file employees and was therefore not an "individual employed by any person" within the meaning of 8(b)(4)(1). On the other hand, the Board found, in the same case, that a working foreman who had no authority beyond supervising a small group of laborers was a low level supervisor and hence was such an "individual."

The criteria established in *Carolina Lumber* were applied in several subsequent cases. Thus, an employee who at the time of the alleged inducement was substituting for—and acting with the same authority as—a superintendent, who was a top management representative with authority to make independent decisions without immediate on-the-job supervision, was found not to be an "individual employed by any person"⁵¹. But in a case where there was no evidence to show the organizational setup of the company, the authority, background, duties, or functions of the supervisors, nor any other factors which the Board requires to make a determination of a supervisor's status as an "individual employed by any person," the Board dismissed the complaint⁵².

(2) Inducement and Encouragement To Strike

Even before the 1959 amendments, the term "induce or encourage," which is now found in section 8(b)(4)(1), was construed as "broad enough to include in them every form of influence and persuasion"⁵³. Whether a union's conduct actually amounts to unlawful inducement or encouragement of a cessation of work continues to depend on the factual situation each case⁵⁴.

In one instance,⁵⁵ a general work stoppage on a predominantly unionized construction job took place the day after a union representative talked with one employee on the job and warned him that he and his employing subcontractor would have to leave the job because they were not "union." The Board adopted the trial examiner's finding that the stoppage was casually related to the conversation of the day before and that, in any event, the union later adopted and sanctioned the stoppage. Rejected was the union's contention that the stoppage was merely a spontaneous manifestation of solidarity inspired by union members' traditional aversion to working on the same job with nonmembers.

⁵¹ *Local 324, Operating Engineers (Brewer's City Coal Dock)*, 131 NLRB No 36. See also *Sheet Metal Workers Local 299 (S M Kiser & Sons)*, 131 NLRB No 147.

⁵² *Amalgamated Meat Cutters & Butcher Workmen of North America (Peyton Packing Co)*, 131 NLRB No 57. See also *Local 294, Teamsters (Van Transport Lines)*, 131 NLRB No 42.

⁵³ *International Brotherhood of Electrical Workers, Local 501 v NLRB (Langer)*, 341 U S 694, 701-702 (1951).

⁵⁴ The Board has reiterated that inducement or encouragement need not be successful in order to violate the act. *Local 505, Teamsters (Carolina Lumber Co)*, 130 NLRB 1438.

⁵⁵ *Local 325, Operating Engineers (Carleton Bros Co)*, 131 NLRB No 67.

In another case involving a disputed construction job, despite the absence of any *direct* evidence that a union was responsible for a work stoppage by secondary employees, the Board held that *circumstantial evidence* pointed "in that direction," and found that the union did induce and encourage the stoppage.⁵⁶ The circumstantial evidence in this case included the union agent's numerous threats to pull other union men of neutral employers off the job unless its demands were met, the presence, and silent acquiescence, of the representatives of the other unions when these threats were made, the well-known close cooperation among unions and unionized employees in the building trades, the absence of any evidence that any neutral employees had grievances against their own employers, the fact of a sudden and simultaneous walkout by different craftsmen employed by different employers, and the employees' return to work after the union reached an accord with the general contractor and picketing ceased.

In a not too dissimilar situation,⁵⁷ the respondent union was found to have engaged in unlawful inducement and encouragement by sending representatives to a construction job on a missile base to inspect the installation of certain cables which had been fabricated elsewhere by another union, and then making it known that the respondent union claimed jurisdiction over the fabrication work. As a result of this conduct, members of this union refused to install the cable, thereby violating section 8(b) (4). Subsequently, the union polled its members at a hiring hall, and they individually declined to be referred to replace workers who had been discharged for refusing to install the cable. But in polling the members, the union representative made statements which, the Board found, clearly indicated that they should not accept referral and constituted unlawful inducement and encouragement.⁵⁸

In another case,⁵⁹ the union's unlawful inducement and encouragement took the form of a request made of employees and supervisors of neutral employers to "cooperate" with it in its strike with the primary employer. Where the person approached was uncertain how he could cooperate, the union representative explained that he could use another employer's services or refuse to load the struck employer's trucks.

⁵⁶ *Plumbers Union of Nassau County (Bomat Plumbing & Heating)*, 131 NLRB No 151

⁵⁷ *Local 756, IBEW (Martin Co)*, 131 NLRB No 120. See also *Local 598, Plumbers & Steamfitters (MacDonald-Scott & Associates)*, 131 NLRB No 100

⁵⁸ Such conduct was also held to constitute a refusal to refer applicants for employment as provided by the union's agreement with secondary employers, and a violation of sec 8(b) (4) (ii) (B). See below, p 136

⁵⁹ *Local 224, Teamsters (Van Transport Lines)*, 131 NLRB No 42

(a) Primary picketing

In the *McJunkin* case,⁶⁰ a majority of the Board relied on union's "total pattern of conduct" to find a violation of section 8(b)(4)(A) as to three incidents of inducement and encouragement at the primary employer's place of business, which the trial examiner considered to be protected primary activity. More specifically, the Board majority ruled that the three incidents, which induced refusals to make deliveries or pickups at the primary employer's premises, were but a part of the union's total effort to bring about a cessation of business between the primary employer and other employers by means proscribed by the act. In making this finding, the majority pointed out that at the outset of the primary dispute, the union—by letters to other employers—had announced its intention to embargo the primary employer's goods and to carry out that objective through its members, that the picketing of the primary premises was carried on with an "immediate, principal purpose" to induce outside employees to refuse pickups or deliveries, and that the union engaged in one incident of unlawful inducement at a secondary employer's premises. The majority concluded that where a union "sets out on a concerted effort to keep neutral employers from doing business with the primary employer by encouraging and inducing the employees of those neutral employers, 'it would be manifestly unrealistic not to take into consideration the total pattern of conduct' engaged in by the union when passing upon particular incidents of inducement." It noted further that if "the totality of the union's effort is intended to accomplish a proscribed objective by inducements of secondary employees, then each particular inducement, being a component part of the total effort, must be adjudged as unlawful."

Subsequently, the Board had occasion to pass on the legality of picketing at two of an employer's three warehouses in support of a dispute at the third warehouse.⁶¹ Drawing an analogy with its "ally" doctrine,⁶² the Board held that the picketing of the two warehouses and the union's oral appeals to secondary employees to observe the picket line were lawful inasmuch as they were not directed solely toward the secondary employees. The picketing itself constituted an act of inducement or encouragement of primary employees to engage in a concerted refusal to perform services for their employer, and the oral appeals—aimed as they were at inducing observance of a picket line at premises occupied solely by the primary employer—

⁶⁰ *Chauffeurs, Teamsters & Helpers Local 175, IBT (McJunkin Corp)*, 128 NLRB 522, modified in 204 F.2d 261 (C.A.D.C.), *Members Fanning and Bean* dissenting in part. This case was decided under sec. 8(b)(4)(A) as it stood prior to the 1959 amendments.

⁶¹ *International Brotherhood of Teamsters, etc & Local 179 (Alexander Warehouse & Sales Co)*, 128 NLRB 916.

⁶² See discussion below, pp. 137-139.

constituted a permissible form of primary activity. In this case, the Board held that the union's secondary activity elsewhere did not render unlawful the otherwise lawful primary picket-line conduct since, unlike the primary activity, it sought cessation of business relations at neutral premises.

(b) Consumer picketing

The legality of so-called consumer picketing under clause (1) of section 8(b)(4), which proscribes inducement or encouragement of employees to engage in a strike or refusal to perform services, was considered by the Board during the fiscal year and then reexamined shortly after the close of the year.

During the fiscal year, in *Perfection Mattress*,⁶³ a Board majority reaffirmed its position in a prior case⁶⁴ that picketing of a retail store at entrances used in common by store employees and the consuming public violated section 8(b)(4)(1). It was the opinion of this Board majority that such picketing—carried on with signs addressed to the consuming public not to buy products made by the nonunion primary employer—had the natural or probable result of inducing a strike by store employees. However, shortly after the close of the year, another Board majority decided in the *Minneapolis House Furnishing* case⁶⁵ that similar consumer picketing did not violate clause (1) of section 8(b)(4),⁶⁶ where the picketing union announced in advance that there would be no strikes or suspension of deliveries or pickups at stores, the picketing was carried on at the public entrances to two retail stores with signs appealing to customers to buy locally and union-made furniture, and no work stoppages occurred at any time. Holding that such picketing is not *per se* “inducement or encouragement,” the majority concluded that in this particular case the picketing appeal was addressed to the consuming public alone and no inducement of store employees to stop work was either intended or likely to result in consequence of the picketing. Thus, no violation of clause (1) was found, and the *Perfection Mattress* doctrine was overruled to the extent it was inconsistent with the instant decision.

⁶³ *United Wholesale & Warehouse Employees, Local 261 (Perfection Mattress & Spring Co)*, 129 NLRB 1014, Member Fanning dissenting on this point. The majority opinion was signed by then Chairman Leedom and Members Rodgers and Jenkins.

⁶⁴ *United Wholesale & Warehouse Employees, Local 261 (Perfection Mattress & Spring Co)*, 125 NLRB 520 (1959).

⁶⁵ *Upholsterers Frame & Bedding Workers (Minneapolis House Furnishing Co)*, 132 NLRB No 2. Chairman McCulloch and Members Fanning and Brown formed the majority with Members Rodgers and Leedom dissenting on this point. See also supplemental decision in *Perfection Mattress & Spring Co*, 134 NLRB No 99, issued after close of fiscal year.

⁶⁶ The Board unanimously adhered to the interpretation that such picketing does violate clause (1) of this section. See below, p 137.

b Threats, Coercion, and Restraint

Section 8(b)(4)(ii) makes it unlawful for a union to "threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce" for the proscribed purposes. The legislative history of the 1959 amendments clearly indicates, as the Board has stated,⁶⁷ that the purpose of section 8(b)(4)(ii)(B) was to eliminate the loophole in the existing law whereby unions could coerce secondary employers (as distinguished from employees) directly by threats to strike, picketing, and other forms of pressure and retaliation.

During the past fiscal year, the Board found such types of union pressure violative of clause (ii) as the following: Threats to secondary employers that the union would take measures of reprisal and engage in picketing if these employers handled neutral employers' vessels;⁶⁸ picketing of a home-building project, even after the picketing had been limited to weekends with signs addressed to the public only;⁶⁹ threats, addressed directly to or in the presence of neutral employers, that a construction job would be stopped unless nonunion workers were removed;⁷⁰ unhitching a primary employer's tractor-trailer as it was being picked up at a railroad yard by a secondary employer's driver, and warning this driver to leave the premises, thereby making it impossible for the secondary employer to carry on its business with the primary employer;⁷¹ and refusing to refer applicants for employment to secondary employers, contrary to an area agreement.⁷²

Some instances of unlawful restraint and coercion under clause (ii) of section 8(b)(4) have also been found to be unlawful inducement or encouragement within clause (i).⁷³ However, in one case,⁷⁴ the Board made it clear that unlawful inducement or encouragement of a secondary employee under clause (i) is not necessarily restraint or coercion of his employer under clause (ii). In this case, however, it ruled that the presence of the secondary employee, who was himself induced and encouraged under clause (i) at the time the act of restraint or coercion occurred, did not preclude a finding of violation of (ii) where the union's seizure of his employer's equipment made it impossible for the secondary employer to carry on its business with

⁶⁷ *Highway Truckdrivers & Helpers, Local 107, IBT (Riss & Co)*, 130 NLRB 943.

⁶⁸ *United Marine Division of NMU, Local 333 (D M Picton & Co)*, 131 NLRB No 91. See also *Sheet Metal Workers, Local 299 (S M Kiser & Sons)*, 131 NLRB No 147.

⁶⁹ *Local 1921 Carpenters (Spar Builders)*, 131 NLRB No 116.

⁷⁰ *Plumbers Union of Nassau County, Local 457 (Bomat Plumbing & Heating)*, 131 NLRB No 151.

⁷¹ *Highway Truck Drivers & Helpers Local 107, IBT (Riss & Co)*, 130 NLRB 943.

⁷² *Local 756, IBEW (Martin Co)*, 131 NLRB No 120, discussed above, p 133.

⁷³ See, e.g., *Highway Truck Drivers & Helpers Local 107, IBT (Riss & Co)*, above, *United Wholesale & Warehouse Employees, Local 261 (Perfection Mattress & Spring Co)*, 129 NLRB 1014.

⁷⁴ *Highway Truck Drivers & Helpers Local 107, IBT (Riss & Co)*, above.

the primary employer, and was therefore "directly coercive" as to the secondary employer

In the *Perfection Mattress* case,⁷⁶ previously discussed under section 8(b)(4)(1), the Board unanimously reiterated its position that consumer picketing of retail stores to persuade the public not to buy certain products constitutes "restraint and coercion" of the store employers within clause (1) of the amended section 8(b)(4). Such picketing, as the Board again pointed out shortly after the close of the fiscal year,⁷⁶ is in the nature of "economic retaliation" against the employer who fails to comply with the union's demands that it cease or curtail doing business with the manufacturer of the products involved

c Secondary Strikes and Boycotts

The secondary boycott provisions of the act, contained in section 8(b)(4)(B), prohibit pressure on "any person" to cease doing business with "any other person." The Board had occasion to hold in a recent case⁷⁷ that this section does not require evidence that a union's conduct complained of was aimed at a particular person. There, the Board majority rejected the unions' contention that proof was necessary that they had requested or sought to have an employer or employers discontinue the handling of *certain* products or the doing business with *certain* other persons. The Board could "perceive no basis for differentiating between a strike, the effect of which would be to cause an employer to cease doing business with employer A and a strike which would cause a cessation of business with unnamed employers who are members of a particular class."

Some of the cases during the fiscal year required a determination as to whether employers complaining of secondary action were in fact neutrals, or had so allied themselves with the primary employer with whom the union had a dispute as to be outside the statutory protection. Other cases turned on the question whether pressure against the primary employer at a "common situs" shared with neutral employers was carried out in a manner which justified the conclusion that inducement of work stoppages by employees of neutral employers was intended

(1) The "Ally" Doctrine

The prohibition against secondary boycotts is intended to protect neutral employers from being drawn into a dispute between a union

⁷⁶ *United Wholesale & Warehouse Employees, Local 261 (Perfection Mattress & Spring Co)*, 129 NLRB 1014

⁷⁷ *Upholsters Frame & Bedding Workers (Minneapolis House Furnishing Co)*, 132 NLRB No. 2

⁷⁷ *Amalgamated Lithographers, etc & Local 17 (The Employing Lithographers)*, 130 NLRB 985, Member Fanning dissenting on this point

and another employer. Where it is shown that the employer to whom the union extended its primary action is an "ally" of the primary employer, rather than a neutral, no violation will be found.⁷⁸ "The Board has held that where alleged primary and secondary employers, although separate legal entities, are commonly owned or controlled or are engaged in closely integrated operations, they may be regarded as a single employer, or where the conduct of the alleged neutral employer is inconsistent with his professed neutrality in the dispute, such as performing 'farmed out' struck work [footnote omitted], the alleged neutral may be regarded as an 'ally'."⁷⁹

In a number of cases during fiscal 1961, the Board had occasion to consider whether an "ally" relationship protected a union's otherwise proscribed secondary conduct. But in each of these cases, no "ally" relationship was found to exist. In one case, the Board disagreed with a trial examiner's finding that a general contractor was an "ally" of its subcontractor because it entered into an agreement with the subcontractor which required the latter to hire only nonunion employees, and thereby gave rise to the union's dispute with the subcontractor.⁸⁰ The Board pointed out that the general contractor in this case did not undertake to assist the subcontractor in doing the "disputed" work, but actively cooperated with the union in reaching a settlement of the dispute contrary to the subcontractor's wishes. In another case, the Board rejected an "ally" contention where there was no evidence that the primary and secondary employers were commonly owned or controlled, and the secondary was not performing work which, but for the union's strike against the primary, the union would have performed—as the primary's contract with the secondary employer to perform work previously done by the primary's employees preceded the strike, and appeared to be the cause of the dispute, not its consequence.⁸¹ And in a third case, the mere fact that the primary employer had guaranteed payment of a bank loan for the secondary

⁷⁸ See *International Brotherhood of Teamsters, etc & Local 179 (Alexander Warehouse & Sales Co)*, 128 NLRB 916, 918-919, where the Board, in finding that a union could lawfully picket two of an employer's three warehouses in support of its dispute at the third warehouse, reasoned by analogy to the "ally" doctrine. Case discussed above, p 134.

⁷⁹ *General Drivers, Chauffeurs, etc, Local 886 (Ada Transit Mfg)*, 130 NLRB 788, citing *United Steelworkers of America (Tennessee Coal)*, 127 NLRB 823, 824-825 (1960), enforced 294 F 2d 256 (C A D C). See also Twenty-fifth Annual Report (1960), pp 105-107.

⁸⁰ *Plumbers Union of Nassau County, Local 457 (Bomat Plumbing & Heating)*, 131 NLRB No 151, footnote 12.

⁸¹ *Highway Truck Drivers & Helpers Local 107, IBT (Riss & Co)*, 130 NLRB 943. See also *Local 810, Steel, Metals, etc, IBT (Fein Can Corp)*, 131 NLRB No 10, where the Board adopted the trial examiner's finding that a trucking company performing services for a struck employer was not in any way "allied" with the latter, either by reason of alleged common ownership or control, or close integration of operations, or by reason of alleged common affiliation with other companies doing the same line of work, or by reason of allegedly performing "struck" work.

employer was found no evidence, in and of itself, of common ownership or control sufficient to destroy the secondary's neutrality⁸²

(2) Ambulatory and Common Situs Picketing

In situations involving picketing at locations where business was carried on by both the primary employer—the employer with whom the union had a dispute—and neutral employers, the Board has continued to determine whether the picketing was primary and protected, or secondary and therefore prohibited, on the basis of the evidentiary tests established in the *Moore Dry Dock* case⁸³ As heretofore, these situations chiefly involved picketing of common construction sites or ambulatory trucking sites

In the *Gonzales* case,⁸⁴ involving a construction dispute, a majority of the Board found—contrary to the trial examiner—that a “common situs” situation was involved, and took occasion to reconsider and reiterate the *Moore Dry Dock* tests In this case, the secondary employer, a construction company hired by the primary employer to perform construction work on its plant in Puerto Rico, had no regular place of business in Puerto Rico, but opened an office at the plant site and engaged in work for a relatively extended period of time, about 8 months The union struck the primary employer and picketed the plant's only gate This gate was used by both plant employees and construction workers, although at different times and in separate groups, the plant employees wearing white safety helmets and the construction workers wearing green safety helmets, all of which was known by the union In the course of this picketing, the union carried no picket signs at all on one day, most of its signs either referred to a claim to represent a majority of the primary employer's workers or made no mention of any employer, and it orally appealed directly to known employees of the construction firm not to enter the plant Expressing the conviction that such a neutral employer should enjoy the protection of the act's secondary boycott provisions on an equal

⁸² *General Drivers, Chauffeurs, etc., Local 886 (Ada Transit Msa)*, 130 NLRB 788

⁸³ *Sailors' Union of the Pacific, AFL (Moore Dry Dock Co)*, 92 NLRB 547 (1950), in which the Board, in order to accommodate lawful primary picketing while shielding secondary employers and their employees from pressure in controversies not their own, laid down certain tests to establish common situs picketing as primary (1) The picketing must be strictly limited to times when the situs of the dispute is located on the secondary employer's premises, (2) at the time of the picketing the primary employer must be engaged in its normal business at the situs, (3) the picketing must be limited to places reasonably close to the location of the situs, and (4) the picketing must clearly disclose that the dispute is with the primary employer

⁸⁴ *Union de Trabajadores de la Gonzales Chemical Industries, et al (Gonzales Chemical Industries)*, 128 NLRB 1352, Members Fanning and Bean dissenting, set aside 293 F 2d 881 (CA DC) This case was decided under sec 8(b)(4)(A) as it stood prior to the 1959 amendments

footing with an employer having a permanent business site, the Board majority held that the picketing union had not satisfied the *Moore Dry Dock* requirement that the picketing clearly disclose the dispute to be with the primary employer, the plant employer here ⁸⁵

Illustrative of trucking disputes involving the common situs question was the *Ross* case ⁸⁶ Although the pickets in this case carried signs identifying the employer involved in the primary dispute, as required by *Moore Dry Dock*, a violation was nevertheless found since the picketing union did not meet its obligation "under *Moore Dry Dock* to take particular measures not to enmesh employees" of secondary tenants of a trucking terminal in its primary dispute with another tenant. Instead, the picketing union threatened employees of these secondary tenants with meathooks, physically obstructed their trucks, and otherwise made it impossible for them to carry on their employers' business at their home station, the trucking terminal, insofar as such business pertained to the primary employer. The Board took occasion to point out as follows

Since *Moore Dry Dock*, the Board has been presented with a number of cases in which labor organizations, although in seeming compliance with *Moore Dry Dock*, for example as to the wording of their picket signs, have at the same time inconsistently made direct appeals to employees of secondary common situs tenants. Such appeals have induced and encouraged these employees to cease work, with an object of causing their employers to cease doing business with primary employers. These cases have involved, for example, common construction sites [footnote omitted] and ambulatory trucking sites [Footnote omitted]. In such cases the Board has held that the direct appeals to secondary employees of the other regular common situs tenants have in effect negated the conditions required in *Moore Dry Dock* to justify the picketing, and have therefore exceeded the limits of permissible "primary" activity and constituted violations of the secondary boycott provisions of the Act ⁸⁷

d Compelling Agreement Prohibited by Section 8(e)

Under the amended subsection (A), unions are prohibited from resorting to 8(b)(4) (1) and (11) conduct in order to force an employer to include in a collective-bargaining agreement "hot cargo" provisions of a type which are forbidden under section 8(e). On three occasions during the past fiscal year,⁸⁸ the Board had to deter-

⁸⁵ See also *Sheet Metal Workers, etc., Local 299 (S M Kiser & Sons)*, 131 NLRB No 147, *Plumbers Union of Nassau County (Bomat Plumbing & Heating)*, 131 NLRB No 151

⁸⁶ *Highway Truck Drivers & Helpers, Local 107, IBT (Riss & Co)*, 130 NLRB 948

⁸⁷ To like effect see also *International Brotherhood of Teamsters and Local 71 (Overnite Transportation Co)*, 130 NLRB 1007, *Local 810, Steel, Metals, etc Fabricators & Warehousemen, IBT (Fein Can Corp)*, 131 NLRB No 10

⁸⁸ *Amalgamated Lithographers and Local 17 (The Employing Lithographers)*, 130 NLRB 985, *Amalgamated Lithographers and Local 78 (Miami Post Co)*, 130 NLRB 968, *Members Rodgers and Jenkins dissenting in part, Highway Truck Drivers & Helpers, Local 107 IBT (E A Gallagher & Sons)*, 131 NLRB No 117

mine whether or not a union's strike or other conduct had as an object the compelling of an employer to enter into a proscribed type of agreement. In each of these cases, the Board found that certain contract clauses sought were unlawful under section 8(e),⁸⁹ and therefore the union's conduct was forbidden by section 8(b)(4)(1) and (11)(A).

e. Strikes for Recognition Against Certification

Under subsection (C) of section 8(b)(4), a labor organization is forbidden to exert the proscribed types of pressure for the purpose of forcing "any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees."

(1) "Area Standards" Picketing

After the end of fiscal 1961, a majority of the Board, on reconsideration of a prior decision⁹⁰ which found so-called "area standard" picketing violative of section 8(b)(4)(C), held that such picketing was lawful under the particular circumstances involved.⁹¹ In the later decision, a union's admitted objective to require the employer and his employer association to conform to standards of employment prevailing in the area was held not to be tantamount to, nor having the objective of, recognition or bargaining. The majority stated as follows:

A union may legitimately be concerned that a particular employer is undermining area standards of employment by maintaining lower standards. It may be willing to forego recognition and bargaining provided subnormal working conditions are eliminated from area considerations. We are of the opinion that Section 8(b)(4)(C) does not forbid such an objective.

It may be argued—with some justification—that picketing by an outside union when another union has newly won Board certification is an unwarranted harassment of the picketed employer. But this is an argument that must be addressed to Congress. Section 8(b)(4)(C), as we read it, does not contain a broad proscription against all types of picketing. It forbids only picketing with the objective of obtaining "recognition and bargaining." On the record before us, Respondent clearly disclaimed such an objective and sought only to eliminate subnormal working conditions from area considerations. As this objective could be achieved without the Employer either bargaining with or recognizing Respondent, we cannot reasonably conclude that Respondent's objective in picketing [the Employer] was to obtain "recognition or bargaining." [Footnote omitted.]

In the only other section 8(b)(4)(C) case decided during the past fiscal year, the Board adopted the trial examiner's finding that the re-

⁸⁹ This phase of the cases is discussed below, pp 142-145.

⁹⁰ *International Hod Carriers, etc, Local 41 (Calumet Contractors Association)*, 130 NLRB 78.

⁹¹ 133 NLRB No 57 (Oct 2, 1961), Members Rodgers and Leedom dissenting.

spondent union—by picketing, appeals, and directions—violated this section ⁹²

6. "Hot Cargo" Agreements

Prior to the 1959 amendments, an employer could lawfully agree with a union not to do business with "any other person," although a union could not lawfully attempt to enforce such an agreement by strike action ⁹³ New section 8(e) ⁹⁴ now makes it an unfair labor practice for an employer and a union merely to enter into such an agreement, commonly referred to as a "hot cargo" agreement Exempted by its provisos, however, are agreements between unions and employers in the "construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work," and certain agreements in the "apparel and clothing industry"

During the past fiscal year, the Board issued its first interpretations of the new "hot cargo" ban in two cases ⁹⁵ involving different locals of the Lithographers Union ⁹⁶ Each of the respective locals involved had proposed—and engaged in strike and other conduct to secure—a set of contractual clauses which covered the same subject matter, but were not identical in language The Board found some of these clauses lawful, but others unlawful

In these cases, both unions had proposed a "trade shop" clause ⁹⁷ containing what the Board construed to be an "implied" agreement not to handle nonunion products, while another clause implemented the "trade shop" provision (as well as another provision found to be lawful) by stating that the employer would not discharge or discipline an employee for refusing to handle work from a nonunion shop

⁹² *Amalgamated Union, Local 5, UAW (Dynamic Mfg Corp)*, 131 NLRB No 43

⁹³ See *Local 1976 Carpenters v NLRB (Sand Door & Plywood Co)*, 357 US 93 (1958), Twenty-third Annual Report, pp 107-110 There the Supreme Court upheld the Board's position as stated in the *Sand Door* case, 113 NLRB 1210 (1955)

⁹⁴ Sec 8(e) provides "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void "

⁹⁵ *Amalgamated Lithographers and Local 17 (The Employing Lithographers)*, 130 NLRB 985, *Amalgamated Lithographers and Local 78 (Miami Post Co)*, 130 NLRB 968, Members Rodgers and Jenkins dissenting in part

⁹⁶ The cases in which the Board ruled that contracts containing provisions proscribed by sec 8(e) are not a bar to a representation election are discussed above, pp 47-48

⁹⁷ The clause recites that the contract has been negotiated "on the assumption that all lithographic production work will be done under approved union wages and conditions" It further states that if the employer requests any employee to handle lithographic work made in any shop not under contract with a local of the International and authorized to use the union label, the union may reopen the contract in whole or in part and terminate it in the event of failure to agree Other sections of this clause deal with affixing of the union label to work done in union shops

With regard to the "trade shop" clause, the Board in both cases rejected the unions' contention that it contained neither an express nor an implied agreement not to use the products of another employer. In *Local 78*, the Board stated:

It is all the circumstances which determine whether, notwithstanding the attempted disguise of language, an agreement has in fact been made. When a clause reads that contract terms have been negotiated on the assumption that all work will be done under union conditions, and that in the event an employer requests an employee to handle work done in a nonunion shop, the Union will have the right to reopen and terminate the contract, and further contains regulations as to the use of the union label on all products, the effect is precisely the same as if the employer had agreed in so many words that he would not handle nonunion products, which is prohibited by Section 8(e). Realistically no employer would undertake to handle such work if to do so would confront him with the possibility that his entire contract would be reopened for renegotiations. So far as the employer is concerned he would be subjected to the same sanction whether he expressly "agreed" not to handle nonunion work, or whether he submitted to the language in the proposed "trade shop" clause. If, on the happening of a certain event, precisely the same legal consequences occur, it is reasonable to infer that it is because of the violation of the same or a similar contractual undertaking. Moreover, Congress was intent upon outlawing "hot cargo" clauses no matter how disguised. Probably no language can be explicit enough to reach in advance every possible subterfuge of resourceful parties. Nevertheless, we believe that in using the term "implied" in Section 8(e) Congress meant to reach every device which, fairly considered, is tantamount to an agreement that the contracting employer will not handle the products of another employer or cease doing business with another person. [Footnotes omitted.]⁸⁸

The Board also found unlawful the similar "trade shop" and "refusal to handle" clauses in the *Local 17* case.

In *Local 78*, the union had proposed a "struck work" clause which combined (1) a general statement that the contracting company will not render production assistance to any employer struck by a Lithographers local, and (2) an implementation clause providing that, in carrying out the above policy, employees shall not be required to handle work "farmed out" by such employer, other than work which the contracting employer has customarily performed for the struck employer. Taken together, these phrases were found lawful by a majority of the Board on the ground that they merely embodied the "ally" doctrine sanctioned by the Board, courts, and Congress. But it was noted that the general statement, standing alone, would have been unlawful because it embodied more than the "ally" doctrine. Thus, in *Local 17*, where the proposed "struck work" clause

⁸⁸ To like effect is language in the *Local 17* case cited above, and in *Highway Truck Drivers & Helpers (Gallagher)*, 131 NLRB No 117. In the latter case the Board stated that "by proscribing contracts 'express or implied,' Congress obviously intended that the thrust of Section 8(e) extend not only to contracts which clearly on their face cause a cessation of business, but also to those contracts which by their intended effect or operation achieve the same result. No other interpretation appears open or reasonable, else the efficacy of this section would be nullified."

merely provided that the employer will not render assistance to any struck lithographic employer and accordingly will not request any employee to handle any of such employer's work, a unanimous Board held that the clause went beyond the "ally" doctrine since it precluded the employer from doing work customarily performed by the contracting employer for the struck employer, and was therefore unlawful.

The "chain shop" clauses proposed by the respective unions also differed. The one involved in *Local 78* in essence recognized the right of employees to strike if employees in another lithographic plant under common control and ownership went on strike or were locked out. This clause was deemed merely to embody the union's statutory right to extend primary strike action to another establishment which would be considered part of a "single employer" within the meaning of the act, and hence legal. But *Local 17's* proposed clause not only permitted a sympathy strike in plants of the employer other than the one struck, but also permitted a strike in the plant of the principal company in the case of a strike at a subsidiary, or vice versa, even though the principal and the subsidiary did not constitute a "single employer." For this reason, the Board considered the effect of this clause to be exactly like that of the "struck work" clause, at least as far as separate employers are concerned, and hence illegal.

Clauses giving the union the "right to terminate" the contract were also involved in the two cases. *Local 78* wanted this right if the employer requested an employee to handle struck work, and since the Board majority had found this union's "struck work" clause to be lawful, it upheld the validity of the termination clause since it was intended merely to give the union a remedy for the breach of a lawful clause. But *Local 17* proposed a termination clause which the Board interpreted as a sanction intended to insure that the employer would not handle certain "hot goods" and, since it was "a component part of the implied agreement to achieve an illegal objective," it was found equally unlawful.

Shortly after these two decisions were issued, the Board held⁹⁹ that a disputed contract provision specifying that trucks arriving in a certain area from over-the-road must be brought to the employer's terminal before making any local deliveries was unlawful, when considered in conjunction with other contract articles which defined local area operations as those performed within a 40-mile radius of a certain point in the area, and limited the performance of such operations to employees represented by the union. According to the Board, the illegality of the disputed provision stemmed from the fact that

⁹⁹ *Highway Truck Drivers & Helpers, Local 107 (E. A. Gallagher & Sons)*, 181 NLRB No. 117.

nonunion owner-operators of trucks utilized by the employer could not deliver goods to consignees in the area, but would have to bring their trucks directly to the employer's terminal in order to effectuate local delivery, and either the truck-borne goods would then have to be transferred to other trucks manned by union members, or the independent operators would have to hire union members to drive the trucks. In either event, according to the Board, the contract would require a partial cessation of business between the owner-operators and the employer. Furthermore, the employer would have to cease using independents for local deliveries if, as was reasonably inferable, the independents were not disposed to hire union drivers or to take the time to have their goods reloaded at the employer's terminal.

In the same case,¹ the Board outlawed a contract clause specifying that an employer, prior to hiring or leasing equipment from other employers, "shall give first preference to employers having a contract with a local" of the contracting union's international. This article, the Board pointed out, would force an employer who uses independent owner-operators to cease dealing with independents until he had attempted to lease the equipment from every other employer in the area having a contract with the international, and in the event the equipment and driver were available, not use independents at all.

Only one case involving either of the industry exemptions in section 8(e) was decided during fiscal 1961.² In that case, the construction industry proviso was held to apply to work performed by a subcontractor's land survey crews at a construction site which did not involve work on any actual structure or buildings to be erected above ground level. The Board adopted the trial examiner's finding that the 8(e) proviso was not intended to exclude construction below or at ground level.

7. Jurisdictional Disputes

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

An unfair labor practice charge under this section, however, must be handled differently from charges alleging any other type of unfair

¹ *Ibid*

² *International Union of Operating Engineers, Local 12 (Vandenberg Development Corp)*, 131 NLRB No 75

labor practice Section 10(k) requires that parties to a jurisdictional dispute be given 10 days, after notice of the filing of the charges with the Board, to adjust their dispute. If at the end of that time they are unable to "submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute," the Board is empowered to hear and determine the dispute.³

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

a Proceedings Under Section 10(k)

In order for the Board to proceed with a determination under section 10(k), the record made at the hearing must show that a work assignment dispute within the meaning of sections 8(b) (4) (D) and 10(k) exists; that there is reasonable cause to believe that the respondent union has resorted to conduct which is prohibited by section 8(b) (4) in furtherance of its dispute, and that the parties have not adjusted their dispute or agreed upon methods for its voluntary adjustment.

(1) Disputes Subject to Determination

A dispute to be subject to determination under section 10(k) must concern the assignment of particular work to one group of employees rather than to members of another group.

In one case, an electricians union, whose members were employed on a hospital construction job, attempted to compel a manufacturer of X-ray equipment—being delivered to the hospital for installation—to transfer the installation work from its own employees to electricians, threatening to shut down the entire job if its demand was not met.⁴ Such dispute, the Board concluded, was properly before it for determination under section 10(k).

In *Safeway Stores*,⁵ during the fiscal year, a majority of the Board

³ The Supreme Court during the past fiscal year held that the Board must make affirmative determinations in such disputes. *NLRB v Radio & Television Broadcast Engineers Union Local 1212, IBEW (Columbia Broadcasting System)*, 364 US 573 (1961), discussed below, pp 152-153. The Board did not have occasion to interpret this decision during the fiscal year.

⁴ *Local 3, Electrical Workers (Picker X Ray Corp)*, 128 NLRB 561.

⁵ *Highway Truck Drivers & Helpers, Local 107 (Safeway Stores)*, 129 NLRB 1. Member Fanning dissenting.

rejected the picketing union's contention that it struck and picketed merely to protest the employer's termination of its bargaining relationship with the union and its refusal to sign a new agreement. The picketing in this case followed the employer's termination of the one trucking operation covered by this union's contract, the discharge of the drivers covered thereby, and the transfer of their functions to other operations whose employees were represented by other unions.⁶

On the other hand, the Board quashed the notices of hearing in one case where the employer at all times desired to employ members of the respondent union, rather than members of sister locals, but could not do so because of the respondent union's persistent refusal to refer workmen.⁷ Under the circumstances, the Board concluded there was no dispute over the assignment of work within the meaning of section 8(b)(4)(D).

One union moved to dismiss 10(k) proceedings on the ground that the disputed work was covered by provisions of its contract with the employer, and further contended that the arbitration provisions of its contract with the employer provided a method for the adjustment of the dispute.⁸ Holding that the assignment of the disputed work to other unions was not in derogation of the Board's certification to the respondent union, the Board found that the contract provisions and even past practices thereunder did not lend any support to the union's position.^{8a} With respect to the alleged applicability of the arbitration clauses the union sought to enforce, the Board pointed out that any award issued thereunder would not be binding on the other unions.

b Violation of Section 8(b)(4)(D)

Violations of section 8(b)(4)(D) were found in three cases during the past year.⁹ In each case, the Board held that the respondents had refused to comply with the decision in the antecedent 10(k) proceeding determining the underlying work assignment claims adverse to the respondents. The union's defenses in each case turned largely on matters which had been determined in the earlier 10(k) proceeding and were not subject to relitigation.

⁶ After the fiscal year, another Board majority held that the conduct here did not give rise to a "jurisdictional dispute" because there was no "real competition between unions or groups of employees for the work," the real dispute being wholly between the picketing union and the employer on the retrieval of jobs. 134 NLRB No 130 (Dec 15, 1961), Members Rodgers and Leedom dissenting.

⁷ *Local 9 Electrical Workers (G A Rafel and Co)*, 128 NLRB 899

⁸ *Local 4, Electrical Workers (Pulitzer Publishing Co)*, 129 NLRB 958

^{8a} But see *Tacoma Printing Pressmen's Union No 44 (Valley Publishing Co)*, 131 NLRB No 133 where the Board relied upon a contract in determining a dispute.

⁹ *ILWU Local 8 (General Ore)* 128 NLRB 351, *Des Moines Electrotypers' Union No 84 (Meredith Publishing Co)*, 128 NLRB 801, *International Union of Operating Engineers Local 926 (Tip Top Roofers)*, 128 NLRB 1057

8. Recognition and Organization Picketing by Noncertified Union

Section 8(b) (7) of the act makes it an unfair labor practice for a labor organization, in specified situations, to picket or threaten to picket an employer for the purpose of obtaining recognition or bargaining from the employer, or acceptance from his employees as bargaining representative, unless the labor organization has been certified as such representative. Such recognition or organization picketing is prohibited under the three subsections of 8(b) (7) as follows: (A) Where another union is lawfully recognized by the employer, and a question concerning representation may not be appropriately raised under section 9(c), (B) where a valid election has been held within the preceding 12 months; or (C) where no petition for a Board election has been filed "within a reasonable period of time not to exceed 30 days from the commencement of such picketing." Subsection (C) provides further that if a timely petition is filed, the representation proceeding shall be conducted on an expedited basis.¹⁰ However, picketing for informational purposes stated in the second proviso to subsection (C) is exempted from the prohibition of subsection (C), unless it has the effect of inducing work stoppages by employees of persons doing business with the picketed employer.

During the past fiscal year the Board decided eight cases under section 8(b) (7). Six of these arose under subsection (C), one under subsection (A), and one under subsection (B). In one of the (C) cases, the Board dismissed the allegation because the firm picketed was in fact a partnership of self-employed subcontractors rather than an "employer" within the meaning of the section.¹¹ The case arising under subsection (B)¹² was dismissed because the employer's volume of business did not meet any of the Board's jurisdictional standards.¹³

a Scope of Section 8(b)(7)¹⁴

The unions in the *Stork Restaurant* and *Blinne* cases¹⁵ contended that section 8(b) (7) was intended to outlaw minority but not majority picketing. However, the Board held that the section contains no such limitation on the scope of its operations, and buttressed its con-

¹⁰ Issues affecting such representation proceedings are discussed above, pp 33, 35, and 66

¹¹ *Local 1926 Carpenters (Spar Builders)*, 131 NLRB No 116

¹² *District 76, Retail Store Union (Morgan Shoe Co)*, 129 NLRB 1339

¹³ For a discussion of the Board's standards see above, pp 22-31

¹⁴ The lead cases in the sec 8(b)(7)(C) area are *Crown*, *Blinne*, *Stork*, and *Charlton*, hereinafter discussed. *Crown* is pending before the Board on motions for reconsideration and clarification, *Blinne*, *Stork*, and *Charlton* on motion for reconsideration

¹⁵ *Chefs, Cooks, etc, Local 89 (Stork Restaurant)*, 130 NLRB 543, *International Hod Carriers, Local 840 (Blinne Construction Co)*, 130 NLRB 587, Member Fanning dissenting. See footnote 14, above

clusion in *Stork* by the following quotation from a district court ruling¹⁶ in another 8(b)(7) proceeding

While the main thrust of this new amendment to the Labor Management Relations Act was to prevent recognition picketing by a union representing a minority of employees or none at all, 8(b)(7)(C) simply sets up a procedure whereby the factual qualifications of a union to act as the representative of a group of employees is to be determined by the NLRB. Congress plainly felt that it was in the public interest to have the question of majority or minority representation determined at an early stage by a speedy election. The burden of going through the proceedings falls upon those who are in fact right as well as those who are in fact wrong—something which is common to nearly all parties who appear before fact-finding tribunals.

In these cases,¹⁷ a majority of the Board also rejected the unions' argument that section 8(b)(7) should not be interpreted to make organization and recognition picketing in the face of employer unfair labor practices unlawful. In *Blanne*, the picketing union had actually filed charges against the employer, some of which were dismissed, while others were made the subject of a Board-approved settlement agreement. The Board majority pointed out that Congress had rejected a proposal which would have had the effect of establishing as a defense to an 8(b)(7) charge the fact that an 8(a) complaint had been issued to show that an unfair labor practice had been committed by the employer. Furthermore, the act as passed provides only that an 8(a)(2) charge shall preclude an application for a court restraining order under 8(b)(7). In *Stork*, the same conclusion was reached where no charges had been filed against the employer. And in *Charlton Press*, the Board majority stated that "an employer's unfair labor practices—whether actual or only alleged—are no defense to an 8(b)(7) allegation."

(1) "Informational" Picketing

The second proviso to section 8(b)(7)(C) provides an exemption for picketing "for the purpose of truthfully advising the public" that an employer does not employ members of, or have a contract with, a union—unless such picketing has the effect of inducing "any individual employed by any other person in the course of his employment, not to pick up, deliver, or transport any goods or not to perform any services."

During fiscal 1961, the Board, in *Crown Cafeteria*,¹⁸ considered the

¹⁶ *Greene v International Typographical Union (Charlton Press)*, 182 F Supp 788 (DC Conn.)

¹⁷ See also *International Typographical Union (Charlton Press)*, 130 NLRB 727, Member Fanning dissenting, and footnote 14, above.

¹⁸ *Local Joint Executive Board of Hotel & Restaurant Employees (Crown Cafeteria)*, 130 NLRB 570, Members Jenkins and Fanning dissenting.

scope and meaning of this proviso relating to so-called informational picketing. In this case, the union picketed a new cafeteria which had refused to hire through the union hiring hall or to sign a contract. The picket signs were addressed to "members of organized labor and their friends," stated that the cafeteria was "nonunion," and asked them not to patronize it. No stoppage of deliveries or services took place. A majority of the Board held that this picketing was for recognition purposes and was not protected by the proviso. The proviso, in the majority's view, was added only to make clear that purely informational picketing—i.e., picketing which publicizes the lack of a union contract or the lack of union organization, and which has no present object of recognition—should not be curtailed where no stoppages occur. But here, the majority noted, the union was in fact demanding present recognition from the picketed employer. Congress' intention to outlaw recognition and organization picketing, stated the majority, "is best effectuated by confining the second proviso of 8(b)(7)(C) to picketing where the sole object is dissemination of information divorced from a present object of recognition."¹⁹

In *Stork Restaurant*,²⁰ the Board held that—assuming the union's picketing after a certain date²¹ was informational—certain stoppages were not "so isolated or minor" as to afford the union the protection of the second proviso, "even assuming *arguendo* that 'isolated' interferences with deliveries do not make informational picketing unlawful." The stoppages here took the form of five refusals by drivers to cross the picket line in a 7-day period. Furthermore, as pointed out by the Board, the conduct of the drivers was shown to be "illustrative" rather than "isolated," the employer having been picketed continuously for about 3 years with resultant serious interference with deliveries.

b. Legality of Objective

A majority of the Board held in the *Cartage* case²² that a union violated section 8(b)(7)(C) by picketing a trucking employer with an object of forcing the latter to employ certain union members, who had been employed by a predecessor company, and to discharge the new employees whom this employer had hired to perform the same work. The union argued that no recognition dispute was involved inasmuch as the employer had offered to recognize the union for the

¹⁹ The dissenting Members were of the opinion, however, that by the proviso Congress intended "to exclude from the ban picketing which while it embraced the proscribed object of recognition or organization" met the "two specific conditions" of the proviso. See footnote 14, above.

²⁰ 130 NLRB 543.

²¹ The Board held that the picketing for 2 months prior to this date was clearly violative of sec. 8(b)(7)(C), and that a remedial order was thereby warranted, regardless of the status of the picketing thereafter.

²² *Local 705 Teamsters (Cartage & Terminal Management Corp)*, 180 NLRB 558, Member Kimball dissenting on the ground that the dispute fell within sec. 8(b)(4)(D) rather than 8(b)(7)(C).

predecessor's employees, and that the only dispute was over terms and conditions of their employment. In the majority's opinion, this constituted an *admission* of the alleged violation since the statute prohibits picketing to force *bargaining* as well as recognition. In any event, the majority considered an object of the picketing to be to force the reinstatement of certain discharged employees and therefore to secure recognition.²³ The majority rejected its dissenting colleague's contention that because this conduct might be deemed to violate section 8(b)(4)(D) it could not be an 8(b)(7)(C) violation.

In the only 8(b)(7)(A) case to come before the Board during the past year, the Board adopted the trial examiner's findings that the union violated this section by picketing at a time when no question concerning representation could be raised.²⁴ In this case, the employer had a contract with another union covering an entire production and maintenance unit, which had been recently renewed during the so-called *DeLuca* "insulated period."²⁵ And the picketing union, seeking only a segment of the unit, picketed after the contract had been effectively renewed.

²³ On this point, also see *Stork Restaurant*, cited above.

²⁴ *Local 182 Teamsters (Sitru, Inc)*, 129 NLRB 1459.

²⁵ For a discussion of this "insulated period," see above, pp 50-51.

V

Supreme Court Rulings

During fiscal 1961, the Supreme Court decided eight cases involving questions concerning the administration of the National Labor Relations Act. One case raised the question of whether section 10(k) requires the Board to decide jurisdictional disputes on their merits. Four other cases presented the validity of the Board's rules for exclusive hiring halls; of its views concerning the effect of "general laws" and "foreman" clauses in collective-bargaining contracts; and of its dues reimbursement remedy in closed-shop and illegal hiring situations. The other three cases involved the Board's "separate gate" doctrine in section 8(b)(4) cases, the legality of a contract which accords exclusive recognition to a minority union, and the scope of the reviewing power of the Federal courts of appeals over representation election matters. The Board was upheld on the merits in two cases, its position was sustained with some modification in one case, and it was reversed on the merits in five cases.

1. Board Determinations Under Section 10(k)

In the *CBS* case,¹ the Supreme Court held, contrary to the position taken by the Board,² that section 10(k) requires the Board to decide jurisdictional disputes under section 8(b)(4)(D) on their merits. The Board's view was that it could discharge its function under section 10(k) merely by determining whether the striking union was entitled to the work under a preexisting Board order or certification, or a contract. If the Board found that the striking union was not so entitled, the employer's assignment of the work was regarded as decisive. The Supreme Court, affirming the decision of the Second Circuit,³ and in agreement with the Third and Seventh Circuits,⁴

¹ *NLRB v Radio & Television Broadcast Engineers Union Local 1212, IBEW (Columbia Broadcasting System)*, 304 U.S. 573.

² 121 NLRB 1207. Twenty-fourth Annual Report, p. 112.

³ 272 F.2d 713. Twenty-fifth Annual Report, p. 141.

⁴ *NLRB v United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry, Locals 420 and 428 (Hake)*, 242 F.2d 722 (C.A. 3), *NLRB v United Brotherhood of Carpenters & Joiners of America (Wendnagel)*, 261 F.2d 166 (C.A. 7). See Twenty-second Annual Report pp. 135-136.

rejected the Board's view. The language of section 10(k), said the Court, "indicates a congressional purpose to have the Board do something more than merely look at prior Board orders and certifications or a collective bargaining contract to determine whether one or the other union has a clearly defined statutory or contractual right to have the employees it represents perform certain work tasks. For, in the vast majority of cases, such a narrow determination would leave the broader problem of work assignments in the hands of the employer, exactly where it was before the enactment of § 10(k)—with the same old basic jurisdictional dispute likely continuing to vex him, and the rival unions, short of striking, would still be free to adopt other forms of pressure upon the employer." The Court held that, in a jurisdictional strike situation, the Board must make a determination as to which union or group is entitled to the work on the basis of such criteria as custom, tradition, and the like "generally used by arbitrators, unions, employers, joint boards, and others in wrestling with [the] problem" of jurisdictional disputes.

2 Exclusive Hiring Halls—Contract Clauses—Reimbursement Remedy

In a series of four cases, decided on the same day, the Supreme Court rejected the Board's *Mountain Pacific* doctrine respecting exclusive hiring halls, its view that certain contract clauses were discriminatory *per se*; and the *Brown-Olds* reimbursement remedy.⁵

a Exclusive Hiring Halls

In the *Local 357 (Los Angeles-Seattle)* case,⁶ the union and a group of employers had, by contract, provided that casual employees would obtain employment only by referral through a union-operated hiring hall, the contract further provided that referral would be on the basis of seniority and without regard to an employee's union membership. The Board found⁷ that the hiring arrangement was unlawful because it did not contain the *Mountain Pacific* safeguards, and that the discharge of an employee for having obtained a job without going

⁵ *Local 357, International Brotherhood of Teamsters, etc v NLRB (Los Angeles-Seattle Motor Express)*, 365 US 667, *NLRB v News Syndicate Co*, 365 US 695, *International Typographical Union v NLRB (Haverhill Gazette)*, 365 US 705, *Local 60, United Brotherhood of Carpenters v NLRB (Mechanical Handling Systems)*, 365 US 651.

In each case, the opinion for the Court was written by Justice Douglas, and Justice Harlan wrote a concurring opinion, in which Justice Stewart joined. Justice Whittaker dissented in all four cases and was joined by Justice Clark on all but the dues reimbursement issue. Justice Frankfurter did not participate in any of the cases.

⁶ *Local 357, International Brotherhood of Teamsters, etc v NLRB*, 365 US 667.

⁷ 121 NLRB 1629.

through the hiring hall was thus likewise unlawful.⁸ In its prior *Mountain Pacific* decision,⁹ the Board had concluded that a hiring arrangement which vested exclusive authority in a union to clear or designate applicants for employment constituted "discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization," in violation of section 8(a) (3) and (1) and 8(b) (2) and (1)(A) of the act unless it explicitly provided that (1) Selection of applicants for referral to jobs shall be without regard to union membership requirements, (2) the employer shall retain the right to reject any applicant referred by the union, and (3) the parties shall post for the employees' inspection all provisions relating to hiring, including the foregoing provisions

The Supreme Court held that an exclusive hiring hall arrangement, without safeguards, is not *per se* unlawful under the act. For, although the very existence of such a hall may encourage union membership, it does not constitute discrimination within the meaning of section 8(a) (3). Thus, the Court stated "It is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test. Some conduct may by its very nature contain the implications of the required intent, the natural foreseeable consequences of certain action may warrant the inference. But surely discrimination cannot be inferred from the face of the instrument when the instrument specifically provides that there will be no discrimination against 'casual employees' because of the presence or absence of union membership. The only complaint in the case was by Slater, a union member, who sought to circumvent the hiring hall agreement. When an employer and the union enforce the agreement against union members, we cannot say without more that either indulges in the kind of discrimination to which the Act is addressed."¹⁰

Justice Clark, in dissent, was of the view that an exclusive hiring hall is discriminatory, even apart from a showing that it is operated so as to prefer union members. For it denies employment to a job applicant unless he first clears through the hall and obtains a referral card. Moreover, since encouragement of union membership is a foreseeable consequence of requiring employees to resort to a union hiring procedure, the Board could properly conclude that the mere exist-

⁸ The Board's finding was affirmed by the District of Columbia Circuit, 275 F. 2d 646. The court, however, rejected the dues reimbursement provisions of the Board's order, discussed below. Twenty-fifth Annual Report, pp 132-133.

⁹ *Mountain Pacific Chapter, Associated General Contractors*, 119 NLRB 883, 897. Twenty third Annual Report, pp 85-86.

¹⁰ The Court, with Justice Whitaker dissenting, also rejected the *Brown-Olds* remedy which the Board had imposed for the illegal hiring arrangement, for the reasons set forth in the *Local 60* case, discussed below.

ence of an exclusive hiring hall was violative of section 8(a)(3) of the act, absent safeguards to assure employees that the union's power would be exercised without regard to union membership considerations.

b "General Laws" and "Foreman" Contract Clauses

In the *News Syndicate* and *Haverhill Gazette* cases,¹¹ the Board had found that "closed shop" conditions were imposed by (1) a clause incorporating the union's general laws "not in conflict with law", and (2) a clause vesting control over hiring in the foreman, who was required to be a union member.¹² The Board's theory was that the general savings language of the laws clause was not sufficient to apprise the employees that the provisions of the union's laws requiring union membership as a condition of employment were not incorporated in the contract, and that they would thus view the contract as if it had specifically contained that requirement. Similarly, they would so view a contract provision which delegated exclusive hiring authority to a foreman who was required to be a union member and abide by union rules requiring that preference be given to union members. The Supreme Court, in agreement with the Second Circuit in *News Syndicate*,¹³ and in disagreement with the First Circuit in *Haverhill Gazette*,¹⁴ set aside the Board's findings with respect to both of these clauses.¹⁵

Respecting the Board's finding that the laws clause in effect incorporated the illegal provisions of the union's rules into the contract, the Court held that such clause "has in it the condition that only those General Laws of the union are incorporated which are 'not in conflict with this contract or with federal or state law' Any rule or regulation of the union which permitted or required discrimination in favor of union employees would, therefore, be excluded from incorporation in the contract since it would be at war with the Act." Respecting the problem of employee uncertainty, the Court added "We can say . . . that while the words 'not in conflict with federal law' might in some circumstances be puzzling or uncertain as to meaning, 'there could hardly be any uncertainty respecting a closed-

¹¹ *NLRB v News Syndicate Co*, 365 US 695, *International Typographical Union v NLRB*, 365 US 705

¹² *News Syndicate Co, Inc*, 122 NLRB 818, *International Typographical Union (Haverhill Gazette)* 123 NLRB 806 See Twenty-fourth Annual Report, pp 71-74 97-98

¹³ 279 F 2d 323 Twenty-fifth Annual Report, p 134

¹⁴ 278 F 2d 6

¹⁵ In *Haverhill*, the issue arose in the context of a strike to obtain the clauses, for, unlike in *News Syndicate*, the employer had resisted the union's demands. The Board found that, in addition to its infirmity under sec 8(b)(2), a strike to obtain a clause requiring that the foreman be a union member violated sec 8(b)(1)(B) in that it restrained the employer in the selection of a representative for grievance purposes. The Supreme Court, being equally divided on this question, affirmed the First Circuit's judgment sustaining the Board's holding on the 8(b)(1)(B) violation.

shop clause' For the command of § 8 is clear and explicit and the only exception is plainly spelled out in the provisos to § 8(a)(3) "

The Court rejected the Board's finding as to the foreman clause on three grounds. First, although the contract limited employment to journeymen and apprentices, it did not require them to be union members. Second, the foreman was in fact required to exercise his hiring authority as agent for the employer, in view of a contract provision barring the union from disciplining the foreman "for carrying out the instructions of the publisher in accordance with this agreement." Third, "as we said in [*Local 357*], decided this day we will not assume that unions and employers will violate the federal law, [prohibiting] discrimination in favor of union members against the clear command of this Act of Congress. As stated by the Court of Appeals, 'In the absence of provisions calling explicitly for illegal conduct, the contract cannot be held illegal because it failed affirmatively to disclaim all illegal objectives.' "

¹⁶

c Reimbursement of Union Dues and Fees

In the *Local 60*¹⁷ case, the Board, having found that the employer and the union had maintained an illegal preferential hiring arrangement, ordered the parties not only to cease giving effect to the illegal arrangement, but also to refund to the employees dues and other fees paid to the union under the arrangement.¹⁸ This remedy was first announced in the *Brown-Olds* case,¹⁹ where the Board concluded that the policies of the act would best be served by requiring a reimbursement of the dues and fees paid to the union under an illegal closed-shop arrangement, since these moneys were "the price these employees paid in order to retain their jobs." Thereafter, in the *Local 357 (Los Angeles-Seattle)* case,²⁰ discussed above, the Board extended the same remedy to exclusive hiring arrangements which failed to contain the *Mountain Pacific* safeguards.

The Supreme Court, reversing the Seventh Circuit,²¹ held that a refund of dues and fees was beyond the Board's remedial authority in these circumstances. The Court stated "All of the employees affected

¹⁶ Subsequent to this decision, the Supreme Court granted the union's petition for certiorari in *Local 553, International Brotherhood of Teamsters v NLRB (Miranda Fuel Co)*, 466 US 763, and directed that the case be remanded to the Board for reconsideration in the light of *Local 357*. In *Local 553*, the Board had found that a reduction in employee seniority was discriminatory where it flowed from a contract provision which delegated exclusive control over seniority to the union (125 NLRB 454).

¹⁷ *NLRB v Local 60, United Brotherhood of Carpenters*, 365 US 651.

¹⁸ *Mechanical Handling Systems, Inc*, 122 NLRB 396.

¹⁹ *United Association of Journeymen, etc (Brown-Olds Plumbing and Heating Corp)*, 115 NLRB 594.

²⁰ 121 NLRB 1629 at 1631-32.

²¹ 273 F 2d 699.

by the present order were union members when employed on the job in question. So far as we know they may have been members for years on end. No evidence was offered to show that even a single person joined the union with the view of obtaining work on this project. Nor was there any evidence that any who had voluntarily joined was kept from resigning for fear of retaliatory measures against him." The Court concluded, "Where no membership in the union was shown to be influenced or compelled by reason of any unfair labor practice, no 'consequences of violation' are removed by the order compelling the union to return all dues and fees collected from the members, and no 'dissipation' of the effects of the prohibited action is achieved. The order in those circumstances becomes punitive and beyond the power of the Board."

3. Common Situs Picketing—"Separate Gate"

In the *General Electric* case,²² the union picketed the premises of General Electric, with whom it was engaged in a labor dispute, at gates used by the primary employees and also at a gate reserved exclusively for independent contractors and their employees, who were regularly working on those premises. The Board found that the picketing and related appeals at the contractors' gate exceeded the bounds of legitimate primary activity and violated section 8(b)(4)(A),²³ and its finding was upheld by the District of Columbia Circuit.²⁴ In an opinion written by Justice Frankfurter, the Supreme Court sustained the Board's "separate gate" doctrine, with certain qualifications, and remanded the case to the Board for further proceedings.

The Court observed that the "distinction between legitimate 'primary activity' and banned 'secondary activity,'"—which is essential to the application of section 8(b)(4)(A)—"does not present a glaringly bright line," and thus the Board and the courts have been required to devise reasonable criteria for distinguishing between the two types of activity. The Court pointed out that, in cases where the primary situs was ambulatory or the primary and neutral employers were at work on common premises, the Board had determined that "there must be a balance between the union's right to picket and the interest of the secondary employer in being free from picketing." It had formulated "four standards for picketing in such situations which would be presumptive of valid primary activity," known as the

²² *Local 761, International Union of Electrical Workers v NLRB*, 366 U.S. 667

²³ 123 NLRB 1547. Twenty-fourth Annual Report, pp. 105-106.

²⁴ 278 F.2d 282. Twenty-fifth Annual Report, p. 140.

Moore Dry Dock criteria.²⁵ These criteria were later applied by the Board to common situs situations which occurred on the primary employer's own premises.²⁶ In the Court's view a similar accommodation was required in the situation presented here, and the "key to the problem [is] found in the type of work that is being performed by those who use the separate gate." That is, if the independent contractors "were performing tasks unconnected to the normal operations of the struck employer," the Board could properly regard the picketing at the separate gate as secondary. "On the other hand, if a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations." In sum, adopting the test enunciated by the Second Circuit in *Phelps Dodge*,²⁷ the Court stated the governing criteria to be as follows: "There must be a separate gate, marked and set apart from other gates, the work done by the men who use the gate must be unrelated to the normal operations of the employer, and the work must be of a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations."

Since neither the Board nor the lower court took into account the extent to which the separate gate was used by employees of independent contractors who performed conventional maintenance work necessary to the normal operations of General Electric, the Court remanded the case for Board determination of this issue.

4. Exclusive Recognition of a Minority Union

In the *Bernhard-Altman* case,²⁸ the Supreme Court, affirming the decision of the District of Columbia Circuit,²⁹ sustained the Board's conclusion that an employer violated section 8(a) (2) and (1), and a union section 8(b) (1) (A), by entering into a contract which accords exclusive recognition to the union at a time when the union represents only a minority of the employees in the bargaining unit.³⁰ The Court

²⁵ *Sailors' Union of the Pacific (Moore Dry Dock Co)*, 92 NLRB 547, 549. Under the rules announced in this case picketing may be regarded as lawful if (a) The picketing is strictly limited to times when the situs of the dispute is located on the secondary employer's premises, (b) at the time of the picketing the primary employer is engaged in its normal business at the situs, (c) the picketing is limited to places reasonably close to the location of the situs, and (d) the picketing discloses clearly that the dispute is with the primary employer.

²⁶ *Professional and Business Men's Life Insurance Co*, 108 NLRB 363, *Crystal Palace Market*, 116 NLRB 858.

²⁷ *United Steelworkers of America v NLRB*, 289 F. 2d 591, enfg. *Phelps Dodge Refining Corp*, 126 NLRB 1867.

²⁸ *International Ladies' Garment Workers' Union v NLRB*, 366 U.S. 731.

²⁹ 280 F. 2d 616. Twenty-fifth Annual Report, pp. 129-130.

³⁰ 122 NLRB 1289. Twenty-fourth Annual Report, pp. 86-87.

pointed out that the act guarantees employees freedom of choice and majority rule in their selection of a bargaining agent, placing "a non-consenting minority under the bargaining responsibility of an agency selected by a majority of the workers" But here, said the Court, the reverse was the case, for the employer granted exclusive bargaining status to a minority union, "thereby impressing that agent upon the nonconsenting majority There could be no clearer abridgement of § 7 of the act" Similarly, "A grant of exclusive recognition to a minority union constitutes unlawful support . . . because the union so favored is given 'a marked advantage over any other in securing the adherence of employees'" The Court rejected the contention that the parties' good-faith belief in the union's majority status afforded them a defense "To countenance such an excuse would place in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives We find nothing in the statutory language prescribing *scienter* as an element of the unfair labor practices here involved . . . even if mistakenly, the employees' rights have been invaded"

As to the Board's remedy, a majority of the Court sustained the propriety of an order requiring the parties to cease giving effect to the contract, and barring the union from representing any of the employer's employees—even its members only—until after the conduct of a Board election The Court agreed with the Board that "the agreement must fail in its entirety It was obtained under the erroneous claim of majority representation . . . Quite apart from other conceivable situations, the unlawful genesis of this agreement precludes its partial validity"³¹

5. Review of Representation Elections

In *Mattison Machine Works*,³² the Supreme Court, in a *per curiam* decision, held that the Seventh Circuit erred in setting aside a representation election because the name of the employer ("Mattison Machine Works") appeared on the election notice and ballots as "Mattison Machine Manufacturing Company"³³ The Board had found that there was no contention and no evidence in the record that this error in nomenclature confused either the employer or the employees involved or was in any respect prejudicial³⁴ Reversing the judgment

³¹ Justices Douglas and Black, dissenting as to the remedy, would have merely required the parties to delete the exclusive recognition clause of the contract, and permitted the union to continue representing its members only

³² *NLRB v Mattison Machine Works*, 365 U S 123

³³ 274 F 2d 347

³⁴ 120 NLRB 58

of the Seventh Circuit, the Court stated, "The refusal of the Court of Appeals to enforce that order because the Board's notices of election contained a minor and unconfusing mistake in the employer's corporate name, was plain error. It was well within the Board's province to find, as it did, upon the record before it that this occurrence had not affected the fairness of the representation election, particularly in the absence of any contrary showing by the employer, upon whom the burden of proof rested in this respect. That finding should have been accepted by the Court of Appeals. In the absence of proof by the employer that there has been prejudice to the fairness of the election such trivial irregularities of administrative procedure do not afford a basis for denying enforcement to an otherwise valid Board order."

In the companion *Celanese* case,³⁵ the Seventh Circuit had set aside a representation election³⁶ because the prevailing union had made a misstatement of fact during the election campaign, where the Board had found that the employees could adequately evaluate the error, if any, and thus were not misled.³⁷ After rendering its decision in *Mattison*, the Supreme Court granted the Board's petition for certiorari in *Celanese*, vacated the judgment below, and remanded the case to the Seventh Circuit "for consideration in the light of" *Mattison*.³⁸

³⁵ *NLRB v Celanese Corporation of America*, 365 U S 297

³⁶ 279 F 2d 204 Twenty-fifth Annual Report, pp 142-143

³⁷ 121 NLRB 303

³⁸ On remand, the Seventh Circuit adhered to its original decision and declined to enforce the Board's order. See 291 F 2d 224. The Board's second petition for certiorari was denied Dec 4, 1961, 368 U S 925.

VI

Enforcement Litigation

Board orders in unfair labor practice proceedings were reviewed by the courts of appeals in 148 enforcement cases during fiscal 1961.¹ Some of the more important issues decided by the respective courts are discussed in this chapter

1. Employees Protected by the Act—The Agricultural Exclusion

The definition of "employee" in section 2(3) expressly excludes, among others, "any individual employed as an agricultural laborer." And a longstanding rider to the Board's annual appropriations act has the effect of writing into this provision the definition of "agriculture" set forth in section 3(f) of the Fair Labor Standards Act. As there defined, "agriculture" consists of "farming in all its branches and any practices performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market."

In enforcing the Board's order in one case,² the Tenth Circuit held that these provisions did not exclude from the statutory term "employee," truckdrivers working for a cooperative milk marketing association, even though the membership of the cooperative was limited to farmers. Citing a 1949 Supreme Court decision,³ the court pointed out that the employer "entity" here was the cooperative, not its individual members, and, as it was not itself engaged in farming, its delivery drivers were not engaged in "practices performed by a farmer." In another case involving similar facts,⁴ the Sixth Circuit likewise rejected a claim that the employees of a farmers' cooperative association were "agricultural laborers" outside the protection of the act. In addition, the court noted that such cooperatives are not entitled to exemption on the ground that they are nonprofit organizations.

¹ Results of enforcement litigation are summarized in table 19 of Appendix A

² *NLRB v Central Oklahoma Milk Producers Assn*, 285 F 2d 495

³ *Farmers Reservoir & Irrigation Co v McComb*, 337 U S 755 (1949)

⁴ *Lucas County Farm Bureau Cooperative Assn v NLRB*, 289 F 2d 844

2. Employer Unfair Labor Practices

Apart from evidentiary issues, the cases arising under section 8(a) which are discussed below had to do with the scope of employees' section 7 right to engage in "concerted activity" for "mutual aid or protection", an employer's obligation to refrain from recognizing one of two unions seeking to represent the same employees, and to prevent his supervisors from participating in union affairs, and the kind of conduct prohibited by section 8(a)(3) of the act, which forbids employer "discrimination to encourage or discourage" union membership. Cases dealing with employer bargaining obligations under section 8(a)(5) and 8(d) of the act are discussed separately.

a Concerted Employee Activity Protected by the Statute

In the *Washington Aluminum* case,⁵ which came before the Fourth Circuit, the employer discharged a group of employees because they walked out in a body, instead of going to work at the starting time, when they found the shop unheated and extremely uncomfortable on a cold midwinter morning. Finding that the walkout constituted a concerted protest against unsatisfactory working conditions, and that it was protected, as such, under section 7 of the act, the Board held that the employer's disciplinary action violated section 8(a)(1). However, the court, the chief judge dissenting, set aside the Board's order on the ground that the employees here forfeited the protection of section 7 by failing to make any "demand or request" for alleviation of the cold before they left the shop. Had they taken the matter up with the employer, the court emphasized, some mutually satisfactory adjustment would doubtless have been achieved without "such disruptive protest," for the plant electrician had already repaired and started the furnace a few minutes before the men walked out. In the court's view, while employees are not required "to effect some sort of formal organization of a grievance committee . . . to submit their claims to management prior to a concerted protest" movement, they are required to give the employer some sort of notice and an opportunity to correct the objectionable condition.⁶

⁵ *NLRB v Washington Aluminum Co., Inc.*, 291 F. 2d 869.

⁶ The Board has requested the Supreme Court to review this holding. Certiorari was granted on Dec 4 1961.

b Assistance or Support of Labor Organizations or Interference With Their Administration—Section 8(a)(2)

(1) Support or Assistance of One Union as Against Another

In enforcing the Board's order in one case,⁷ the Seventh Circuit observed, "When two unions are vying for majority support of his employees, an employer must refrain from any action which tends to give either an advantage over its rival. Recognition of one competitor as bargaining agent during this contest period, absent proof of majority support, is a proscribed act"⁸ The employer here, in the process of renegotiating its contract with the "incumbent" union at one of its several plants, continued bargaining and executed a new interim contract with this union, despite the fact that the Board, in a proceeding under section 9(c) of the act instituted by a rival labor organization, had formally determined that a "question of representation" existed, and had ordered an election to ascertain which union, if any, the employees preferred. In holding that the employer's action, in these circumstances, breached the duty of neutrality imposed by section 8(a)(2), the court gave qualified approval to the Board's *Midwest Piping* doctrine.⁹ Once the Board has ordered an election in the section 9(c) proceeding, the court stated, "a real question of representation must be said to exist . . . absent a clear showing of majority representation by evidence of substantial nature" The court rejected the contention that the incumbent union had made such a "clear showing of majority representation" in that almost all of the employees in the bargaining unit were paying dues to it under checkoff authorizations executed some time before.

In another case,¹⁰ the Seventh Circuit again upheld the Board's conclusion that the employer had illegally "assisted" one of two competing unions by conduct which was also illegal under section 8(a)(1) and (3), i e, directing various acts of reprisal against the employees because they repudiated their incumbent bargaining representa-

⁷ *St. Louis Independent Packing Co. (Swift) v NLRB*, 291 F 2d 700

⁸ The quoted passage first appeared in the same court's opinion in *NLRB v Indianapolis Newspapers*, 210 F 2d 501 (1954)

⁹ See *Midwest Piping & Supply Co., Inc.* 63 NLRB 1060 (1945), and *William Penn Broadcasting Co.*, 93 NLRB 1104 (1951), also Twenty-third Annual Report (1958), pp 60-61, and Twenty-fourth Annual Report (1959), p 60. But compare the judicial decision discussed in Nineteenth Annual Report (1954), pp 124-125, also, *District 50, United Mine Workers v NLRB*, 234 F 2d 565 (CA 4) (1956), remanding 114 NLRB 193. *Cleaver Brooks Mfg Corp v NLRB*, 264 F 2d 637 (CA 7) (1959), setting aside 120 NLRB 1185, certiorari denied 361 US 817 (1959), *NLRB v Wheland Co.*, 271 F 2d 122 (CA 6) (1959), setting aside 120 NLRB 814 and *NLRB v Swift & Co.*, 294 F 2d 285 (CA 3), setting aside 128 NLRB 732

¹⁰ *NLRB v Kieckhefer Corp.*, 291 F 2d 700

tive, a certified union which the employer favored, and transferred their allegiance to another union ¹¹

(2) Participation by Supervisors in the Administration of a Union's Internal Affairs

In the *Detroit Plumbing Contractors* case,¹² the District of Columbia Circuit upheld the Board's conclusion that a group of employers in the construction industry had violated the section 8(a) (2) proscription of "interference" when they failed to prevent certain of their supervisory officials, who occupied comparatively high-ranking positions in the management hierarchy, from holding office, voting in elections, and otherwise taking any active part in the internal administration of the union which represented the rank-and-file employees. Although these supervisors were all union members and acted "in what they considered in complete good faith to be the best interests of the union," they were excluded from the bargaining unit set up in the union's standard contracts with their employers. In these circumstances, the court held, citing with approval what it termed the "case-to-case" approach adopted by the Board in its 1957 *Nassau-Suffolk* decision,¹³ the active participation of these employer officials in the conduct of the union's affairs plainly jeopardized the rank-and-file employees' freedom of speech and action in the same sphere. It observed that "some of the members [might well be] afraid to oppose policies in union affairs advocated by the supervisors for fear of losing their jobs the very next day when the supervisor resumes his role in the company and takes up the task of hiring and firing." The court also noted that, whatever rights of union membership are "guaranteed" to supervisors in section 14(a) of the act and the "Bill of Rights" provisions of the Labor-Management Reporting and Disclosure Act of 1959, such rights are "clearly ancillary" to the rights guaranteed employees in section 7 of the act. In this connection, the court stated that the Board's order, while interdicting further active participation by the supervisors in union affairs, accommodated their legitimate interest under section 14(a) by permitting them to remain "nominal" members of the union. Finally, the court expressed approval of the Board's *Nassau-Suffolk* view that *minor* supervisors

¹¹ However, because the employer assisted union had been certified by the Board less than a year before the shift the court declined to enforce a provision of the order directing the employer to stop recognizing and maintaining any contracts with that union unless and until it should obtain a new certification. In the *St. Louis Independent Packing* case, above where the assisted union did not have a fresh certification, the court granted enforcement of this standard type of order, citing the Supreme Court's decision in *NLRB v. District 60, United Mine Workers (Bowman)*, 355 U.S. 453.

¹² *Local 636, United Assn. of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry v. NLRB*, 287 F.2d 854.

¹³ *Nassau & Suffolk Contractors' Assn., Inc.*, 118 NLRB 174 (1957). See Twenty-second Annual Report (1957), pp. 67-68.

in the construction industry, where a man is often "hired as a foreman on one job and as a journeyman on the next," are not automatically "barred from active participation" in union affairs, at least where they are "properly" included in the same bargaining unit with the rank-and-file employees

In a similar decision, citing and following *Detroit Plumbing Contractors*, the Third Circuit held that the employers in another construction industry case had violated section 8(a) (2) by allowing certain of their supervisory and managerial officials, who were members of the rank-and-file employees' union, to vote in an election of union officers¹⁴ The Ninth Circuit also followed the same principles in upholding the Board's decision in *Anchorage Businessmen's Association*,¹⁵ where an association of employers in the retail drug business allowed their store managers and assistant managers, including one who was also a part owner of the store he worked in, to take an active part in the formation and administration of a professional pharmacists' union

c Discrimination To Encourage or Discourage Union Membership— Section 8(a)(3)

(1) Discrimination Generally

In several cases decided during the fiscal year, the courts rejected Board determinations that particular employer conduct constituted the kind of "discrimination to encourage or discourage union membership" proscribed by section 8(a) (3)

In the *Rives* case,¹⁶ which arose in the context of a work dispute between rival unions, the Fifth Circuit held that the respondent employer, while negotiating with the certified union, did not violate section 8(a) (3) by subcontracting certain work normally performed by its employees to another employer, whose employees were represented by the rival union The purpose of such subcontracting was to fulfill a contractual commitment to a construction contractor to supply pipe bearing the label or approval of the rival union, and to assure the installation of such pipe by members of the rival union The court found that here nothing was done or intended which in any way discriminated against the employees singly or as a group, since they continued to work with no reduction in hours or pay Nor was the subcontract intended to, nor did it have the effect of, encouraging or discouraging membership in any union in the circumstances

¹⁴ *NLRB v Employing Bricklayers Assn*, 292 F 2d 627

¹⁵ *NLRB v Anchorage Businessmen's Assn, Drugstore Unit, et al*, 289 F 2d 619

¹⁶ *NLRB v W L Rives Co*, 288 F 2d 511, see also *NLRB v Brown-Dunkin Co*, 287 F 2d 17 (C A 10), and *NLRB v Lassing*, 284 F 2d 781 (C A 6), certiorari denied 366 U S 909, discussed below at p 167

of this case, as the employer's action was prompted by a desire to assure compliance with its contractual commitment to the construction contractor.¹⁷

In another case,¹⁸ the same court disagreed with the Board's finding that the employers violated section 8(a) (3) by unilaterally canceling, without notice to their employees' statutory representative, their previously announced plan to raise Negro employees' vacation benefits to the level of those enjoyed by white employees. The Board had found that the Negro employees had reasonable cause to believe, as a result of the employer's unilateral action, that their vacation rights were denied not for racial reasons but because the union had been certified as the employees' representative. According to the court, the Board could not infer that the discrimination against the Negro employees was designed to encourage or discourage union membership since there was no showing that the employer had any knowledge as to the status of the Negro or white employees with regard to union membership.¹⁹

In a case which came before the Ninth Circuit,²⁰ an employer gave Christmas bonuses to all of its employees except those in a single-plant unit whose collective-bargaining representative had struck during the preceding year. Rejecting the Board's finding that the employer thereby violated the statute, the court said that except in cases where the employer's discrimination is based solely on union activity, a showing of intent to encourage or discourage union membership is essential to a finding that such discrimination violates section 8(a) (1) or (3). The case before it did not fall within the exception to this rule, the court said, because the employer had denied the bonus on the basis of the plant's low productivity and poor continuity of work effort, even though such poor showing was due to the employees' participation in a protected economic strike. The employer had also taken into consideration poor business prospects attributable in part to the fact that the union contract was to be reopened for negotiations the following year. Nor, according to the court, did the record show that the denial of the bonus was designed to penalize the employees for striking.

¹⁷ The court also held that the subcontracting of the work here involved did not violate sec 8(a) (1) or (5).

¹⁸ *N L R B v Intracoastal Terminal, Inc*, 286 F 2d 954

¹⁹ The court found, however, that this unilateral change in policy violated sec 8(a) (1) because it was not within the area of negotiations during the bargaining sessions.

²⁰ *Pittsburgh-Des Moines Steel Co v N L R B*, 284 F 2d 74

(2) Subcontracting of Work as Unlawful Discrimination

Two other cases²¹ decided during the year put in issue a Board finding that an employer violated section 8(a) (3) and (1) by discontinuing the performance of certain work by his own employees, and subcontracting it to an independent contractor, because his own employees had chosen union representation

In one of these cases,²² the Tenth Circuit agreed with the Board that a department store violated section 8(a) (3) and (1) by discontinuing the performance of maintenance work by its own employees, adding this work to the subcontract of an operating-management firm, and transferring its maintenance employees to this firm, because these employees had chosen a union to represent them. The court likewise approved the Board's order requiring the department store to offer reinstatement to those employees who chose not to remain in the employ of the management firm, which paid higher wages but may have provided less job security

However, in the other case²³ the Sixth Circuit set aside the Board's finding that the employer violated section 8(a) (1) and (3) by accelerating, because its truckdrivers had joined a union, the implementation of a previously reached decision to adopt a common-carrier delivery system within 4 months or sooner if anything occurred which would increase costs. Although the union had made no demand for increased pay, the court found that "the evidence fully justified [the employer's] contention that such demands would be made and could not be met." A change so made, because of "reasonably anticipated increased costs," does not violate the act, the court said, "regardless of whether this increased cost was caused by the advent of the Union or by some other factor . . ."

(3) Loss of Seniority and Layoff After Craft Severance

As noted above, section 8(a) (3) forbids certain kinds of employer discrimination, and section 8(b) (2) forbids unions to cause such discrimination. The *Standard Oil* case²⁴ presented the question as to whether an employer and a union violated these proscriptions where employees were denied requests for job transfers and were

²¹ In addition see *NLRB v W L Rives Co*, 288 F 2d 511 (CA 5), discussed above at p 165

²² *NLRB v Brown-Dunkin Co*, 287 F 2d 17

²³ *NLRB v Lasing*, 284 F 2d 781, certiorari denied, 366 US 909

²⁴ *Local 488, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers of America, AFL-CIO v NLRB*, 288 F 2d 166 (CA DC)

subsequently laid off allegedly because of discriminatory conduct on the part of the employer and the union

In this case, the employer and the union, which represented the employer's operating and maintenance employees, executed a new contract prescribing seniority rules governing job transfer requests and layoffs, and specifically excluded boilermakers who were involved in a pending representation proceeding in which a craft union was seeking to sever them from the existing unit. While this proceeding was pending, certain boilermakers temporarily assigned to the operating and maintenance unit were denied job transfer requests to other departments and, following the election which resulted in the severance of the boilermakers unit, all such temporarily assigned boilermakers were laid off in accordance with seniority provisions of the contract covering the operating and maintenance unit.

The Board held that the exclusion of the boilermakers from the contract which led to the denial of job transfer requests was proper under the *Midwest Piping* rule requiring neutrality of an employer during the existence of rival representation claims²⁵. Similarly, the Board ruled that the boilermakers had only such seniority rights as were obtained for them in the newly created craft unit and, as a result of the severance action, the boilermakers involved here had no seniority rights in the contract unit, even though they were temporarily assigned to it. Under these circumstances, the Board concluded that the layoffs were not unlawful. The court agreed with the Board's conclusions and found "reasonable," and reflecting a "proper accommodation of the interests which the Act seeks to serve," the Board's resolution of a difficult situation in which craft severance required readjustment of a "highly complex seniority system."

(4) Union-Security Agreement With an Individual Acting as Representative

In one case,²⁶ the District of Columbia Circuit, one judge dissenting, held that the employer violated section 8(a)(3) by entering into a union-security agreement with an individual whom the Board had certified as an employee representative. Contrary to the Board, the court took the position that an individual is not a "labor organization" within the meaning of section 8(a)(3). Consequently, the court held that the union-security clause in the contract with the individual was not justified by the proviso to section 8(a)(3) permitting union-security agreements with labor organizations. The court concluded that the employer violated section 8(a)(3) by requiring payment of union-security dues to the individual, and thereby discouraging mem-

²⁵ See p 163, above

²⁶ *Schultz v NLRB (Grand Union Co)*, 284 F 2d 254

bership in a labor organization wishing to displace such individual as employee representative

3. The Collective-Bargaining Obligations of Employers and Labor Organizations—Section 8(a)(5) and 8(b)(3)

The parallel provisions of section 8(a)(5) and 8(b)(3) of the act require good-faith bargaining between an employer and a union which is the statutory representative of his employees

Two cases put at issue the statutory obligations imposed on an individual employer by a multiemployer contract. Several cases arose under section 8(a)(5) which involved charges that the respective employers had failed to live up to their statutory bargaining obligations in one instance by making "unilateral" changes in existing employment conditions during the pendency of contract negotiations with the employees' representative, and in the others by refusing to supply the employees' representative with information relevant to collective bargaining. Three other cases presented the question whether a particular proposal insisted upon by either an employer or a union, as a condition of entering into an otherwise acceptable contract, was within the field of so-called "mandatory bargaining" as defined by the Supreme Court's decision in *Borg-Warner*²⁷

a Duty To Bargain—Multiemployer Situations

In one case,²⁸ the Ninth Circuit agreed with the Board that the respondent employer, which had designated the employer association as its representative in collective-bargaining negotiations, violated section 8(a)(5) and (1) by refusing to execute the contract negotiated by the association. The court approved, as supported by substantial evidence, the Board's finding that the respondent employer had not unequivocally withdrawn from the association before the agreement was reached. In the *Marcus Trucking* case,²⁹ the Second Circuit agreed with the Board that the employer violated section 8(a)(1), (2), and (5) by entering into a collective-bargaining agreement with a union which represented a substantial majority of his own employees, where the respondent employer had previously bound himself to a current multiemployer contract between another union and an employer association. The court noted the Board's position that an employer is obligated to bargain with an incumbent minority union when the hold-

²⁷ *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958)

²⁸ *NLRB v. Jeffries Banknote Co.*, 281 F.2d 893

²⁹ *NLRB v. Marcus Trucking Co., Inc.*, 286 F.2d 583

ing of a new election is precluded by the Board's "contract-bar" rule⁸⁰ "falls within the rationale" of *Brooks v NLRB*, 348 U.S. 96⁸¹

b. Unilateral Action by Employer During Collective-Bargaining Negotiations

As the Board construes section 8(a)(5), its affirmative command to bargain collectively with respect to rates of pay and other conditions of employment necessarily means that the employer must not act "unilaterally" by changing the status quo with respect to such matters. Viewing such unilateral action as the equivalent of a categorical "refusal" to bargain about the particular subject matter involved, the Board considers it immaterial that the employer may not have been unwilling to negotiate a general agreement with the employees' representative or otherwise may not have been demonstrably acting in bad faith. However, the Second Circuit, the chief judge dissenting, rejected this rule in upsetting the Board's finding of a section 8(a)(5) violation in the *Katz* case⁸². During the course of long-drawn-out contract negotiations with a recently certified union, the employer here made certain changes in the employees' existing wages and working conditions, without giving the union advance notice or an opportunity to bargain about the matter. While stating that these unilateral actions, if "tested within the framework of the entire bargaining situation," might have justified an inference that the employer was "no longer bargaining in good faith," the court noted that the Board had expressly declined to draw this inference, and held that an unlawful refusal to bargain was not made out in the absence of such a "definite determination of the mental attitude of the employer"⁸³.

c. Employer's Refusal To Furnish Information

(1) Costs of Noncontributory Group Insurance Program

In preparation for, and during the course of, negotiating a new contract, the union in the *Sylvania* case⁸⁴ requested the employer to furnish it with an itemized statement of the costs incurred by the

⁸⁰ See pp 39-52, above

⁸¹ However, the court conditioned enforcement of the Board's order requiring the employer to bargain with the incumbent union, upon the Board's holding an election to determine which union the employees now actually preferred. Similar modification of bargaining orders issued by the Board were adopted by the Seventh Circuit in *Perry Coal Co v NLRB*, 284 F 2d 910, certiorari denied 366 U.S. 949, and by the Second Circuit in *NLRB v Superior Fireproof Door & Sash Co, Inc*, 289 F 2d 713, and *NLRB v Adhesive Products Corp*, 281 F 2d 89.

⁸² *NLRB v Bennis Katz et al d/b/a Williamsburg Steel Products Co*, 289 F 2d 700.

⁸³ The majority of the court acknowledged that its decision in this case is in conflict with the rulings of several other circuits. The Board has petitioned for Supreme Court review to resolve the conflict. Certiorari was granted on Oct 9, 1961.

⁸⁴ *Sylvania Electric Products, Inc v NLRB*, 291 F 2d 128.

employer, in years past, in maintaining a program of "noncontributory" group insurance for the benefit of the employees in the bargaining unit. The parties' contracts had customarily specified the dollar amounts of benefits payable to employees or their beneficiaries under this program, which embraced life, disability, and hospital-surgical-medical insurance. And the company conceded that the cost of carrying such insurance was a factor it took into account in formulating its bargaining position with respect to the level of benefits it was willing to guarantee. It refused, however, to divulge the amount of the premiums it had been paying, on the ground that the union was not "legally entitled" to such information. The Board held that this position was violative of section 8(a)(5), reasoning that insurance benefits of the type involved here were an inseparable aspect of "wages," and that the premium costs incurred by the employer must therefore be available to both parties for the purposes of collective bargaining.

The First Circuit disagreed with this decision. "In the court's view, the benefits payable to employees under a group insurance plan are bargainable matters since they come within the category of "wages." Hence, as to such benefits, the employer has a duty to "make available to the employees' representative whatever facts and data may be relevant and necessary to informed and realistic bargaining." However, the court held, where the insurance plan is noncontributory, the employer is not under a duty to disclose its costs. "While no doubt employer costs affect wages," the court stated, "a direct relationship between them is at the best speculative, and not in accord with current business economy or business thinking." At the same time, the court indicated that the employer would have been required to divulge the requested cost information if the insurance plan had been contributory, with a share of the premiums coming out of the employees' wages as a direct deduction, or if the union here had demanded increased or broader insurance coverage for the employees and the company had rejected the demand "on the ground of cost."⁸⁵

(2) Seniority List of Employees

In another case involving an employer's duty to supply information,⁸⁶ the Fifth Circuit required the employer to furnish a seniority list of employees in order to enable the union to enforce and administer the current bargaining agreement adequately, even though the union, during the preagreement bargaining negotiations, had allegedly

⁸⁵ Believing that this decision is erroneous in principle, and in conflict with at least one other circuit court decision, *NLRB v John S. Swift Co.*, 277 F.2d 641 (CA 7, 1960), the Board filed a petition for Supreme Court review. However, certiorari was denied on Dec 4, 1961.

⁸⁶ *NLRB v Gulf Atlantic Warehouse Co.*, 291 F.2d 475

abandoned, in return for a wage increase, its insistence on a clause giving it the right to obtain the list. The court observed that "the language of the contract as finally agreed upon must be construed without reference to give and take of the bargaining sessions which produced the final terminology."

d Application of *Borg-Warner* Rule

(1) Waiver of Union Fines

The employer in the *Allen Bradley*³⁷ case, reviewed by the Seventh Circuit, refused to enter into an otherwise acceptable contract with the complaining union unless the latter would agree to a clause providing, in effect, that it would not impose fines or similar penalties upon its members for refusing to respect the picket line in any strike the union might call against the employer. The Board, invoking the rule of the *Borg-Warner*³⁸ case, held that the employer's insistence upon this clause violated section 8(a)(5) because the type of intraunion disciplinary action involved was not related, in the Board's view, to wages, hours, or any other working condition within the field of mandatory bargaining. The court disagreed with this reasoning, however, and declined to enforce the Board's order on the ground that the employer's proposal was equivalent, in purpose and legal effect, to a no-strike clause. Under *Borg-Warner* itself, the court noted, such clauses prohibiting strikes are within the field of mandatory bargaining since they regulate employer-employee relations, as distinguished from union-member relations, and any employer has a "vital interest" in utilizing the unimpaired services of employees who may choose to work during the course of a strike.

(2) Other Bargaining Subjects

In another case,³⁹ the Seventh Circuit held that the Board had properly applied the *Borg-Warner* rule in finding that a union violated section 8(b)(3) by refusing to sign a contract with the employer unless the latter would agree to a clause purporting to assign it "jurisdiction" over work being performed by employees outside the bargaining unit, who were on the payroll of another employer. The District of Columbia Circuit, one judge dissenting, likewise sustained the Board's ruling that the union in one case had unlawfully conditioned bargaining upon a matter outside the field of "wages, hours, and other terms and conditions of employment" when it

³⁷ *Allen Bradley Co v NLRB*, 286 F 2d 442

³⁸ *NLRB v Wooster Division of Borg-Warner Corp*, 356 U S 842 (1958). See Twenty-third Annual Report (1958), pp 104-106

³⁹ *NLRB v Local 19, International Brotherhood of Longshoremen (Chicago Stevedoring Co)*, 286 F 2d 661

refused to sign a contract unless the employer would agree to post a performance bond payable to the union in the event the employer should commit any substantial breach of the contract⁴⁰

4. Union Unfair Labor Practices

a Union Responsibility for Acts of Its Agents

Several cases decided during the year presented the question of union responsibility for proscribed conduct. In the *Delaware Valley Beer* case,⁴¹ the Third Circuit agreed with the Board that the union was answerable for the conduct of its stewards in directing employees of neutral employers not to handle goods destined for the primary employer. Although the union's constitution and bylaws were not in the record, according to the court, the evidence that different stewards at different places of business gave the same kind of orders and indulged in the same kind of conduct was "good evidence to show how stewards were acting" and "good circumstantial evidence to show this action was within the scope of their authority." Moreover, the court said, "an expert body like the Board knows what some labor terms mean without having their meanings spelled out in each individual case."

In the *Kaufmann* case,⁴² the District of Columbia Circuit, one judge dissenting, agreed with the Board that a district council was answerable for a foreman's unlawful refusal to hire an applicant for employment because he could not obtain a work permit. The foreman was a member of a local union affiliated with the council and had never been advised that the council had suspended the provisions of its written constitution and working rules which required work permits as a condition of employment.

Thereafter, the same circuit approved⁴³ the Board's finding that a union, whose rules required foremen not to work with nonunion men or permit their subordinates to do so, was answerable for a work stoppage induced by a union foreman⁴⁴ because nonunion men were on the job, even though the striking employees were covered by a contract with their employer which permitted them to refuse to work on a job where nonunion men were working. However, the court

⁴⁰ *Local 104, Local 1287, and Local 1010, Brotherhood of Painters, Decorators & Paperhangers of America v NLRB (Cheatham)*, 293 F 2d 133

⁴¹ *NLRB v Brewery and Beer Distributor Drivers, Helpers & Platform Men, Local 830, International Brotherhood of Teamsters, etc*, 281 F 2d 319

⁴² *Carpenters District Council of Detroit, etc, United Brotherhood of Carpenters & Joiners of America, AFL-CIO v NLRB*, 285 F 2d 289

⁴³ *United Brotherhood of Carpenters & Joiners of America, AFL-CIO v NLRB (Endicott Church)*, 286 F 2d 538

⁴⁴ Compare with conduct of another foreman in this case discussed below, p 175

held that the union was not answerable for the conduct of the general contractor's superintendent, a union member who was bound by the same union rules, in allegedly inducing a work stoppage because nonunion men were on the job, on the ground that he was acting on behalf of his own employer who likewise objected to their presence

In the *Mengel* case,⁴⁵ the Ninth Circuit agreed with the Board that where a district council passed, and its parent international approved, a trade rule which prohibited the use of products which did not have the union label, and the district council transmitted to a member local a ruling from the international which approved continuation of the policy, both the council and the international were answerable for the local's conduct in inducing an unlawful concerted refusal to install such products. However, the court exonerated the State council with which the local was affiliated on the ground that the council had withheld any recommendation or direction as to a course of action to be taken with respect to the use of products without the union label.

In a case where an international union's constitution required its locals to enforce contractual provisions prohibiting installation of goods not manufactured by employers under contract with the international or its affiliates,⁴⁶ the District of Columbia Circuit agreed with the Board that the international was answerable for the conduct of two of its member locals in inducing a concerted refusal to install goods manufactured by employees who were represented by another international union.

b Restraint or Coercion Against Employers—Section 8(b)(1)(B)

In one case involving the scope of section 8(b)(1)(B),⁴⁷ the Second Circuit agreed with the Board that the union violated this section by threatening and engaging in a strike to compel negotiation of a collective-bargaining agreement, while at the same time refusing to meet with a particular individual chosen by the employer as its bargaining representative. The fact that the union, which had been the bargaining agent for the expired contract and with whom the employer desired to bargain concerning a new contract, was not the employees' "officially" designated bargaining representative was held no defense to an 8(b)(1)(B) charge.

⁴⁵ *NLRB v Local Union No 751, United Brotherhood of Carpenters & Joiners of America, AFL-CIO*, 285 F 2d 633

⁴⁶ *Sheet Metal Workers' International Assn, AFL-CIO v NLRB (Burt)*, 293 F 2d 141

⁴⁷ *NLRB v Local 294, International Brotherhood of Teamsters, etc (K-O Refrigeration)*, 284 F 2d 893

c Strikes and Boycotts Prohibited by Section 8(b)(4)

In one group of cases under section 8(b)(4), the issue was whether a union's conduct amounted to an attempt to "induce or encourage" work stoppages. Several cases decided during the year presented the question whether an employer against which a union was directing a strike or picket line occupied the position of a "neutral" in the underlying labor dispute so as to be entitled to protection under section 8(b)(4) (A) and (B) of the 1947 act. Other cases concerned the legality of picketing in "common situs" situations. And one case involved an alleged violation of section 8(b)(4) (C).

(1) Inducement or Encouragement of Work Stoppages

Section 8(b)(4), both before and after the 1959 amendments, forbids unions to "induce or encourage" work stoppages for certain objects. In *Korber Hats*,⁴⁸ the Fourth Circuit agreed with the Board that the union engaged in proscribed inducement and encouragement by picketing in front of the establishment of an employer which sold at wholesale the products of a manufacturer with which the union had a dispute. Rejecting the union's contention that the picketing constituted an appeal to the wholesaler's customers not to buy the products of the struck manufacturer, the court held that a refusal by deliverymen to handle the wholesaler's goods "would be a natural and reasonable result of the inducement and encouragement offered," and the fact that they did not refuse was not proof of the absence of the invitation.

However, in another case,⁴⁹ the District of Columbia Circuit disapproved the Board's finding that a union "induced" a work stoppage, within the meaning of section 8(b)(4), when a foreman,⁵⁰ who was a member of the union, advised other union members on a construction job that the employees of one of the other contractors on the job were nonunion. While the foreman's conduct may have been a reminder to the other members of their duty under union rules not to work with nonunion men, the court stated, it did not show that he tried to induce a strike in light of the fact that he sought and followed the advice of the union business agent, who told him to continue work.

(2) Secondary Boycotts

(a) What constitutes a "neutral" employer

Section 8(b)(4) (A) of the 1947 act, as section 8(b)(4) (B) of the present act, proscribed the inducement of work stoppages only where

⁴⁸ *NLRB v United Hatters, Cap & Millinery Workers Union, AFL-CIO*, 286 F 2d 950

⁴⁹ *United Brotherhood of Carpenters & Joiners of America, AFL-CIO v NLRB (Bndt-cott Church)*, 286 F 2d 553

⁵⁰ Compare with conduct of another foreman in this case discussed above, p 173

the employees induced were employed by neutral employers. Thus, in one case,⁵¹ the Seventh Circuit held that a local union had not violated this section by picketing a plant operated by a wholly owned subsidiary of another corporation against which a sister local was conducting a primary strike. The court agreed that the Board was justified in considering the two corporations to be, in effect, one employer.

However, in *Enterprise Association*,⁵² the Second Circuit agreed that a union, whose bargaining agreement with a piping contractor prohibited, in effect, the subcontracting of pipe fabrication, violated section 8(b)(4)(A) of the 1947 act by inducing the contractor's employees on a construction project for an electrical company to refuse to install pipe fabricated by another pipe company, where the electrical company withdrew the fabricating work from the contractor, under the terms of their piping contract, and transferred it to the other company. The court rejected the union's contention that the electrical company and the other pipe company were "allies" of the piping contractor since the electric company had given this fabricating work to the other pipe company without the piping contractor's advice or knowledge.

The District of Columbia Circuit approved, as a "reasonable accommodation" of interests, the Board's finding in another case that the union, which represented the production and maintenance employees at a manufacturing plant, violated section 8(b)(4)(A) of the 1947 act by picketing the construction site of a new addition to the plant—whose construction the manufacturer had subcontracted to other employers—in support of the union's demand that the construction work be performed by the manufacturer's own employees.⁵³ The court rejected the union's contention that it could lawfully picket the construction site because the contractors were doing the very work which was the subject of the primary dispute and the picketing sought to preserve. The court observed that this was not "struck work," that the contractors were independent contractors and not "allies" of the manufacturer, and that the contractors could not resolve the dispute. The court held that the interest of the manufacturer's employees in maintaining their debatable but bona fide claim to work under their bargaining agreement with the manufacturer did not justify the union's efforts at work stoppages directed solely against the contractors.

⁵¹ *Milwaukee Plywood Co v NLRB*, 285 F 2d 825

⁵² *NLRB v Enterprise Assn of Steam, Hot Water, Hydraulic, Sprinkler, Pneumatic Tube, Ice Machine & General Pipefitters of New York and Vicinity, Local Union No 638*, 285 F 2d 642

⁵³ *United Steelworkers of America, AFL-CIO v NLRB (Tennessee Coal & Iron Co)*, 294 F 2d 256

(b) Picketing at a common situs

Several cases decided during the year involved the scope of the picketing prohibitions contained in section 8(b)(4) (A) and (B) of the 1947 act in common-situs situations, where the situs of the primary dispute harbors employees of the primary employer and employees of secondary employers. In *Macatee*,⁵⁴ the Fifth Circuit approved the Board's finding that the union violated section 8(b)(4)(A) of the 1947 act by picketing at construction projects where both the primary employer's employees and the employees of neutral employers were working, on the ground, *inter alia*, that the primary employer had a permanent place of business where all of its employees regularly reported, and where the union could and did solicit their support. In another common-situs case,⁵⁵ the Second Circuit agreed with the Board that the union violated this provision by picketing near the primary employer's trucks when they were making pickups or deliveries at the premises of secondary employers. However, the court stated that the mere fact that the primary employer had a separate place of business where the primary employer could be picketed effectively "shows only that the secondary picketing had an objective other than persuading the primary employees, not that the picketing necessarily had the particular objective which § 8(b)(4)(A) forbids." The existence of this proscribed objective was shown by union conduct, apart from the picketing, which the court said warranted the inference that secondary employers were faced with a strike threat if they continued to do business with the primary employer.

One common-situs case decided during the year⁵⁶ involved violations of section 8(b)(4) (1) and (11)(B) of the act as amended in 1959. The Eighth Circuit agreed with the Board that the union violated these provisions by picketing in front of a construction site with an object of forcing the general contractor to cease doing business with the only subcontractor who employed nonunion men on the project, and forcing that subcontractor to recognize the union. The court noted that the tests set forth in *Moore Dry Dock*⁵⁷ for determining the legality of picketing at a common situs are only "evidentiary in nature," to be employed in the absence of more direct evidence of a union's intent and purposes. It then held that the Board's unfair

⁵⁴ *NLRB v Dallas General Drivers, Local Union No 745*, 281 F 2d 593, certiorari denied 365 US 826

⁵⁵ *NLRB v Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (K O Refrigeration)*, 284 F 2d 887

⁵⁶ *NLRB v International Hod Carriers, Building & Common Laborers' Union of America, Local No 1140 (Gilmore Construction Co)*, 285 F 2d 397, certiorari denied 366 US 903

⁵⁷ *Sailors' Union of the Pacific (Moore Dry Dock Co)*, 92 NLRB 547, 549. See Sixteenth Annual Report, pp 226-227 (1951)

labor practice findings in this case were supported by "ample, direct, and uncontradicted evidence" of the union's unlawful intent

The courts also decided two cases which involved a union's right to picket in front of a gate to a plant of the primary employer which is reserved for the use of neutral employers' employees. Thus, in *Phelps Dodge*,⁵⁸ the Second Circuit agreed with the Board that the union could not lawfully picket in front of a gate which the primary employer had built expressly and solely for the use of employees of independent contractors who were engaged in construction work on the premises. The court stated that to render such picketing unlawful "there must be a separate gate, marked and set apart from other gates, the work done by the men who use the gate must be unrelated to the normal operations of the employer, and the work must be of a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations." According to the court, the 1959 amendments did not legalize the picketing in question.

Similarly, in *Virginia-Carolina Chemical*,⁵⁹ the District of Columbia Circuit enforced a Board order based on a finding that the union violated section 8(b)(4)(A) by picketing in front of a plant gate which the primary employer had expressly reserved for the use of employees of independent contractors who were performing engineering work preliminary to a plant expansion, and were installing a fume removal and scrubber system on plant premises.

In *Virginia-Carolina*, the court relied on its own previous decision in the *General Electric* case.⁶⁰ After the issuance of the Supreme Court's opinion in *General Electric*,⁶¹ the court, in another case,⁶² set aside the Board's finding that a union violated section 8(b)(4)(A) of the 1947 act by picketing in front of a primary employer's only entrance, used by both the primary employees and the employees of a contractor performing construction work for the employer. As the contractor's employees could be identified by the pickets because of their uniforms and working hours which differed from those of the primary employees, the Board took the position that there should be no difference in effect between (1) separate gates and (2) distinct uniforms and different working hours. The court, however, ruled that

⁵⁸ *United Steelworkers of America, AFL-CIO v NLRB*, 289 F 2d 591

⁵⁹ *Local 36, International Chemical Workers Union, AFL-CIO v NLRB*, 47 LRRM 2498, certiorari denied 368 US 949, enforcing *per curiam* 126 NLRB 905. The Board's opinion is discussed in the Twenty-fifth Annual Report, p 109 (1960)

⁶⁰ *Local 761, International Union of Electrical, Radio & Machine Workers v NLRB*, 278 F 2d 282, discussed in the Twenty-fifth Annual Report, p 140 (1960)

⁶¹ 368 US 667. See p 157, above

⁶² *Teamsters, Chauffeurs, Warehousemen and Helpers of America v NLRB (Gonzalez)* 293 F 2d 881 (C A D C)

under the Supreme Court decision in *General Electric* a separate gate, which was lacking here, was a controlling consideration

(3) Strikes To Force Recognition Where Other Union Is Certified—
Section 8(b)(4)(C)

In the *Simmons* case,⁶³ the First Circuit disapproved the Board's action in dismissing a complaint which alleged that an employee committee had violated the act by striking with the object—proscribed by clause (C) of section 8(b)(4)—of compelling the employer to recognize and bargain with it instead of with the union which was the certified bargaining representative. The court rejected, as unsupported by the evidence and without passing on its legal materiality, the contention that the committee was merely seeking recognition as “a joint bargaining arm of a certified labor organization.”

d Organization and Recognition Picketing—Section 8(b)(7)

One case decided during the year involved the scope of section 8(b)(7)(C) of the act, which was added by the 1959 amendments.⁶⁴ In this case,⁶⁵ the Second Circuit approved the Board's finding that the union violated these provisions by continuing recognition and organization picketing, which caused a substantial cessation of deliveries, for at least 13 days after the effective date of the amendments. The court held without merit the union's contention that it did not have recognition or organization as an “object” and that, in any event, the picketing did not have an object of “forcing or requiring” recognition or organization. The court found that the union's conduct independently proved, apart from the exercise of any presumption, that its picketing continued to have a recognition-organization object after section 8(b)(7) became effective. The court also rejected the union's defense that its object was not to “force or require” recognition or organization on the ground that such language contemplates physical violence or threats thereof. The statutory language “force or require,” the court stated, “refers to the intended effect of the picketing, not the manner in which the picketing is carried on, to the ‘object,’ not the method, and it is clear that the union's object was swiftly to compel

⁶³ *Simmons, Inc v NLRB*, 287 F 2d 628

⁶⁴ Sec 8(b)(7)(C) provides, in part

“It shall be an unfair labor practice for a labor organization to picket any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing. *Provided*, That when such petition has been filed the Board shall forthwith direct an election.”

⁶⁵ *NLRB v Local 239, International Brotherhood of Teamsters, etc (Stan Jay)*, 289 F 2d 41

organization or recognition, not merely to create a climate in the shop favorable to the union "

The union further contended that its activity was not covered by section 8(b) (7) (C) because it was not afforded a "reasonable time" to picket without petitioning for an election under section 9(c). According to the union, a "reasonable period of time not to exceed 30 days" must be read to mean "thirty days" The court answered by stating that 30 days is the outer limit and that the Board has the authority to fix shorter periods as "reasonable" ones according to the particular fact situation The court agreed with the Board that the union had a reasonable time—a period of 2 weeks—in which to file a representation petition

The court also rejected the union's claim, based on the Board's Rules and Regulations⁶⁶ requiring filing of a charge as a prerequisite to the expedited procedure in 8(b) (7) (C), that as a result of the practices here (the complaint was issued a short period of time after the charge was filed) the time in which it could invoke the expedited procedure was considerably reduced The court pointed out that in every 8(b) (7) (C) case a petition must be filed under section 9(c) in order to validate the continuation of organization picketing Whether the Board will invoke the expedited procedure is another matter, the court stated, and the union had no "right" to the expedited procedure when it failed to file a petition

Nor did the "publicity" proviso to section 8(b) (7) (C)⁶⁷ render the picketing lawful, the court held, because there was substantial evidence to show that the picketing caused a stoppage of deliveries, thereby bringing the picketing within the delivery-stoppage exception to the publicity proviso

e Effect of Section 8(f) on Section 8(b) Proscriptions

Section 8(f) of the act, added by the 1959 amendments, provides in part that it shall not be an unfair labor practice for employers and unions in the building and construction industry to enter into any agreement before the union's majority status has been established under section 9, or to enter into certain kinds of hiring-hall agreements In the *Gilmore Construction* case,⁶⁸ the Eighth Circuit rejected the union's contention that section 8(f) protected its picketing at a construction site, which the Board had held violative of section 8(b) (4)

⁶⁶ Secs 102 73-102 82

⁶⁷ The proviso exempts from the operation of sec 8(b) (7) (C) "picketing or other publicity" for certain purposes "unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services "

⁶⁸ *NLRB v International Hod Carriers, Building & Common Laborers' Union of America, Local No 1140*, 285 F 2d 397, certiorari denied 366 U S 903

(1) and (11) Although section 8(f) validates certain hiring-hall agreements where they are voluntarily entered into, said the court, "we find no congressional approval of the use of strikes or picketing to compel execution of a hire agreement. Indeed, the legislative history indicates the contrary to be true."

5. Representation Matters

Bargaining orders, issued by the Board in several cases arising under section 8(a)(5), were contested on the ground that the Board exceeded its discretion either in ruling on issues pertaining to an election conducted in an antecedent representation case, or in holding that the unit of employees represented by the complaining union was appropriate. One case involved a Board determination that certain employees were entitled to a self-determination election and could not lawfully be treated as an accretion to an existing unit.

a Elections

In the *Cross* case,⁶⁹ involving a refusal to bargain by an employer, the Sixth Circuit held that the Board "acted unreasonably, and, therefore, arbitrarily" in certifying an incumbent union which, on the morning of the decertification election, distributed handbills to the employees overstating the size of a layoff before the advent of the union, the number of laid-off employees who were not recalled, and the improvements which the union had obtained in supplemental unemployment benefits. The court disagreed with the Board's findings that the union's misrepresentations were fair and constituted mere propaganda, half-truths, and legitimate campaign representations. The court vacated the union's certification and remanded the case to the Board for further consideration.

b Unit Determinations

Two cases put in issue the propriety of the Board's exclusion of certain employees from a certified unit. In one of these cases,⁷⁰ the Fifth Circuit held that, although the Board might properly have included tugboat captains in a unit of tugboat employees since they did about the same work as the employees but were in charge of the tugboats, the broad discretion vested in the Board precluded the court from interfering with the Board's determination to exclude them. However, in the other case,⁷¹ the Ninth Circuit rejected, as

⁶⁹ *The Cross Co v NLRB*, 286 F.2d 799, rehearing denied 288 F.2d 188.

⁷⁰ *NLRB v Belcher Towing Co*, 284 F.2d 118.

⁷¹ *NLRB v Convair Pomona—A Division of Convair, a Division of General Dynamics*, 286 F.2d 691.

“arbitrary and capricious,” a Board determination that a unit limited to the tool manufacturing department in an aircraft plant was appropriate for collective-bargaining purposes. The court stated that the Board improperly excluded employees in another department who manufactured the same tools with the same kinds of machines and materials, frequently interchanged with employees in the certified unit, and worked the same hours for the same pay.

In a case against an employer and a union, which were parties to a collective-bargaining agreement covering the employer's department store,⁷² the Second Circuit approved the Board's finding that the employer and the union violated section 8(a) (1), (2), and (3) and 8(b) (1) (A) and (2), respectively, by applying this agreement, which contained a union-security clause, to a branch store during the hiring process and before the branch store had opened. The court stated, “The Board's action in thus permitting a new group of employees at a new store to choose freely a bargaining representative is fully in accord with the policy of § 7 of the Act and is a valid exercise of the Board's wide discretion in determining the appropriate bargaining unit.”

But in *Industrial Rayon*,⁷³ the Fourth Circuit set aside the Board's bargaining order based on the certification of a union which did not meet the “traditional union” test of the Board's *American Potash* rule.⁷⁴ The court held that the Board did not “furnish an adequate explanation of [its] change of policy or meet the charge that it is inconsistent and arbitrary to apply the *American Potash* rule to a craft unit when it is first severed from the main body of the employees but to ignore the rule altogether when a change in the bargaining representative is afterward proposed.”⁷⁵

⁷² *N L R B v Masters Lake Success, Inc., et al.*, 287 F 2d 35

⁷³ *N L R B v Industrial Rayon Corp.*, 291 F 2d 809

⁷⁴ *American Potash & Chemical Corp.*, 107 NLRB 1418 (1954), discussed above, pp 56-57

⁷⁵ Compare with *N L R B v Pittsburgh Plate Glass Co.*, 270 F 2d 167 (C A 4, 1959), certiorari denied 361 U S 943, Twenty-fifth Annual Report (1960), pp 143-144

VII

Injunction Litigation

Sections 10 (j) and (l) authorize application to the U S district courts, on petition on behalf of the Board, for injunctive relief pending hearing and adjudication of unfair labor practice charges by the Board ¹

Section 10(j) provides that, after issuance of an unfair labor practice complaint against an employer or labor organization, the Board, in its discretion, may petition "for appropriate temporary relief or restraining order" in aid of the unfair labor practice proceeding before it. The court in which the petition is filed has jurisdiction to grant "such temporary relief or restraining order as it deems just and proper." In fiscal 1961, the Board filed only one petition for temporary relief under the discretionary provisions of section 10(j). In that case, involving a union's strike to modify contract terms in violation of section 8(b)(3) and 8(d), an injunction was issued ²

Section 10(l) imposes a mandatory duty on the Board to petition for "appropriate injunctive relief" against a labor organization or its agent with respect to certain charged violations of the act whenever the General Counsel's investigation reveals "reasonable cause to believe that such charge is true and a complaint should issue." As set forth in the report for fiscal 1960,³ the provisions of section 10(l) were extended by the 1959 amendments to the act ⁴ to apply not only to violations of section 8(b)(4) (A), (B), and (C), which were incorporated in the act in the amendments of 1947,⁵ but also to cover

¹ Table 20 in appendix A lists injunctions litigated during fiscal 1961, table 18 contains a statistical summary of results

² *MoLeod v Compressed Air, Foundation, Tunnel, etc, Workers (Catapano-Grow)*, 194 F Supp 479 (D C E N Y), affd 292 F 2d 358 (C A 2)

³ Twenty-fifth Annual Report of the National Labor Relations Board, pp 145-146

⁴ Title VII of the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat 541)

⁵ Labor Management Relations Act, 1947 (61 Stat 149) These sections, prior to the 1959 amendments, prohibited 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. In the 1959 amendments, these sections were enlarged 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 purposes, 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)

violations of the new section 8(b) (7) and 8(e) which were added by the 1959 amendments⁶ In section 8(b) (7) cases, however, application "for any restraining order" is prohibited if a charge under section 8(a) (2) of the act has been filed alleging that the employer has dominated or interfered with the formation or administration of a labor organization and, after investigation, there is "reasonable cause to believe such charge is true" Section 10(1) also provides that its provisions shall be applicable, "where such relief is appropriate," to violations of section 8(b) (4) (D) of the act, which section prohibits strikes and other coercion in support of jurisdictional disputes In addition, section 10(1) provides for issuance of a temporary restraining order without notice to the respondent upon a petition alleging that "substantial and irreparable injury to the charging party will be unavoidable" unless immediate injunctive relief is granted Such *ex parte* relief, however, may not extend beyond 5 days

In fiscal 1961, the Board filed 255 petitions for injunctions under section 10(1) This was an increase of 36 over the petitions filed in fiscal 1960, or an increase of over 16 percent As in past years, most of the petitions were based on charges alleging violations of the secondary-boycott and sympathy-strike provisions now contained in section 8(b) (4) (1) (11) (B) of the act Forty-nine petitions involved charges alleging strikes or other proscribed pressure in furtherance of jurisdictional disputes in violation of section 8(b) (4) (D), 3 petitions concerned charges alleging prohibited conduct to compel an employer or self-employed person to join a labor organization in violation of section 8(b) (4) (A), and 2 petitions were based on charges alleging strikes against Board certifications of representatives in violation of section 8(b) (4) (C) Nineteen cases were predicated on charges alleging unlawful "hot cargo" agreements under section 8(e) of the act, which section prohibits agreements between employers and labor organizations whereby the employer agrees not to do business with another employer, and 12 cases involved charges alleging strikes or other coercion to obtain such agreements, which conduct is proscribed by section 8(b) (4) (A) of the act Thirty-nine petitions were predicated on charges alleging violations of the recognition and organization picketing prohibitions of subparagraphs (A), (B), or (C) of section 8(b) (7) Of these, 4 cases involved alleged violations of subparagraph (A) by recognition picketing when the employer was lawfully recognizing another union with which he had a contract that barred an election, 12 were based on charges alleging violations

⁶ See 73 Stat 543, 544 Sec 8(b) (7) makes organization and recognition picketing under certain circumstances an unfair labor practice sec 8(e) makes "hot cargo" agreements unlawful, with certain exceptions for the construction and garment industries

of subparagraph (B) by recognition or organization picketing within 12 months of the conduct of a valid election at the employer's establishment, and 23 alleged violations of subparagraph (C) by recognition or organization picketing for more than a reasonable period without a petition for an election being filed.⁷

A. Injunction Litigation Under Section 10(j)

As reported above, only one petition for injunctive relief under the discretionary provisions of section 10(j) was filed in fiscal 1960.⁸ This involved a union's alleged refusal to bargain under section 8(b)(3) of the act in accordance with the requirements of section 8(d) of the act.⁹ As found by the court, the union had a contract with the employer fixing the terms and conditions of employment on a city sewer construction job; the contract specified that it was to continue in effect for the duration of the job. After negotiations for certain changes in working conditions, which it asserted were to be applicable to the city sewer job, the union struck the sewer job "for lack of a contract" without prior notice to the Federal and State mediation services. The union contended that it struck to obtain a contract for future jobs, not the sewer job. The court rejected this contention and found that the strike, being in support of a demand for new contract terms on the sewer job, violated section 8(b)(3) and 8(d) in that it was called without the required 30-day notices to the conciliation services and was for the purpose of terminating the existing contract on the sewer job. On appeal, the Second Circuit affirmed the district court's findings and injunction order.¹⁰

B. Injunction Litigation Under Section 10(l)

In fiscal 1961, 83 petitions under section 10(l) went to final order, the courts granting injunctions in 70 cases and denying injunctions in 13 cases.¹¹ Injunctions were issued in 29 cases restricted to alleged secondary action proscribed by section 8(b)(4)(B). Injunctions were issued in four additional section 8(b)(4)(B) cases which also enjoined coercive conduct proscribed by section 8(b)(4)(A) to obtain "hot cargo" agreements contrary to the provisions of section 8(e). Three injunctions were issued enjoining the maintenance of "hot cargo"

⁷ All of these cases and the actions therein are reflected in table 18, appendix A.

⁸ Shortly after the close of the fiscal year, two other sec 10(j) proceedings were instituted each involving the alleged refusal of the charged employer to discharge its bargaining obligation under sec 8(a)(5) of the act. See *Madden v Alberto Culver Co*, No 61 C1754 (D C N Ill), *Kennedy v Telecomputing Corp*, 1341-61-Y (D C S Calif).

⁹ *McLeod v Compressed Air, Foundation, Tunnel, etc, Workers (Catapano Grow)*, 194 F Supp 479 (D C E N Y).

¹⁰ See 292 F 2d 358 (C A 2).

¹¹ See tables 18 and 20 in appendix A.

agreements prohibited by section 8(e), two of which also enjoined violations of section 8(b)(4) (A) and (B). Two injunctions were issued enjoining proscribed conduct to compel an employer or a self-employed person to join a labor organization in violation of section 8(b)(4) (A), one of which also enjoined violations of section 8(b)(4) (B). Injunctions were granted in 18 cases involving jurisdictional disputes in violation of section 8(b)(4)(D), 7 of these cases also involved proscribed activities under section 8(b)(4) (A) or (B). Injunctions were issued in 14 cases involving recognition or organization picketing in violation of section 8(b)(7). Of these, one involved picketing where another labor organization had been recognized, in violation of subparagraph (A); six concerned picketing where a valid election had been conducted within the preceding 12 months, in violation of subparagraph (B), and seven involved picketing which had been conducted beyond a reasonable period of time without a petition for an election having been filed as required by subparagraph (C). The injunctions in two of the latter cases also enjoined violations of section 8(b)(4) (A) or (B).

Of the 13 injunctions denied, 2 involved alleged secondary boycott situations under section 8(b)(4) (B), 4 involved alleged jurisdictional disputes under section 8(b)(4) (d), 1 involved an alleged attempt to compel a self-employed person to join a labor organization in violation of section 8(b)(4) (A), 1 involved an alleged "hot cargo" agreement in violation of section 8(e), and 5 involved alleged recognition or organization picketing in violation of section 8(b)(7)—2 under subparagraph (B) and 3 under subparagraph (C).

During the fiscal year there were two cases involving procedural questions applicable to all 10(1) proceedings. In one case,¹² the district court dismissed a 10(1) petition upon the General Counsel's refusal to produce agency files to test the regional director's assertion of reasonable cause to believe the charge proceeded upon had merit.¹³ An appeal was taken but before the appeal could be heard the charge before the Board was withdrawn. Although the appeal thereby was made moot, the Third Circuit nonetheless granted the Board's motion to vacate the lower court's judgment.¹⁴ In another case,¹⁵ the respondent union sought review of a section 10(1) injunction notwithstanding that the Board's order in the meantime had

¹² *Schauffler v Highway Truck Drivers & Helpers (Emery Transportation Co)*, 47 LRRM 2400 (D C E Pa.)

¹³ *Contra*, see *Madden v International Hod Carriers, Building & Common Laborers' Union (Calumet Contractors Assn)*, 277 F 2d 688 (C A 7), *Schauffler v Highway Truck Drivers & Helpers, etc (E A Gallagher)*, 182 F Supp 164 (D C E Pa.)

¹⁴ *Schauffler v Highway Truck Drivers & Helpers (Emery Transportation Co)*, Feb 7, 1961 (No 13,488, C A 3)

¹⁵ *Carpenters' District Council of Miami, etc v Boire (George Construction Co)*, 288 F 2d 454 (C A 5)

issued in the unfair labor practice proceeding before it. The Fifth Circuit, taking cognizance of the provision in section 10(1) for injunctive relief "pending final adjudication of the Board," held that upon entry of the Board's order "the court injunction had fulfilled its function" and dismissed the appeal as "moot."

1. Secondary Boycott Situations

a Handbilling and Other Publicity

As amended in 1959, section 8(b)(4)(B) prohibits strikes and work stoppages, and threats or other coercion and restraint addressed to employers to compel employers to cease handling the products of or doing business with other persons. A proviso to the section specifies, however, that "publicity, other than picketing" is not prohibited to advise the public "truthfully" that "a product or products" produced by an employer with whom the union has a "primary dispute" are distributed by another employer, as long as such publicity does not cause a secondary work stoppage. In several cases during fiscal 1961, the district courts were called upon to construe this proviso in respect to handbilling and related conduct.

In the *Piggly Wiggly* case,¹⁶ the union, among other things, distributed handbills in front of the Piggly Wiggly stores in the area urging the public not to patronize the stores because Piggly Wiggly had contracted the installation of refrigeration equipment at a new store to a nonunion contractor. The court, rejecting the defense that the handbilling was protected by the proviso, found that it unlawfully coerced and restrained Piggly Wiggly and issued an injunction restraining the handbilling.¹⁷

In *Industrial Electric Service*¹⁸ the district court reached the same result in respect to handbilling of a retail store at which a nonunion subcontractor engaged by another subcontractor installed the refrigeration equipment, the handbills appealing to consumers not to patronize the store because "refrigeration work was done by persons other than members" of the union. The handbilling was enjoined.

In *Middle South Broadcasting*¹⁹ the union, in furtherance of a dispute with a radio station, circulated lists of advertisers of the station containing an appeal to the public not to patronize the advertisers. Some of the lists were circulated to other business houses with the notation "We would rather not add you to list." The court,

¹⁶ *Potter v Plumbers and Pipefitters, Local 142*, 192 F Supp 641 (DC W Tex).

¹⁷ After the close of the fiscal year, the Board issued its decision finding that the handbilling was protected by the proviso. *William Matcra*, 133 NLRB No 33.

¹⁸ *Shore v Local 712, International Brotherhood of Electrical Workers (Industrial Electric Service)*, 48 LRRM 2231 (DC W Pa).

¹⁹ *Phillips v Local No 662, Radio & Television Engineers (Middle South Broadcasting Co)*, 192 F Supp 643 (DC E Tenn).

noting that Congress in the 1959 amendments attempted to "provide that the union movement would retain its freedom to protect and advance itself, but not to encroach past the boundary of the freedom of neutral persons to operate business without undue pressure," and finding reasonable cause to believe "the wording of the notice containing the list of advertisers, and the distribution thereof, goes further than persuasion," enjoined distribution of the list of advertisers²⁰

In *Great Western Broadcasting*,²¹ two unions having disputes with a television station conducted a campaign to induce advertisers to discontinue advertising over the station. They organized a telephone campaign wherein advertisers were told in telephone conversations that the unions would instigate a consumer boycott against them unless they ceased doing business with the station, advertisers were visited and told that, unless they ceased, the fact that they were advertising over the station would be publicized, and some were shown handbills which the unions proposed to distribute urging consumers not to patronize the advertisers; handbills were distributed throughout the city appealing to customers not to patronize listed advertisers who refused to withdraw their business from the station, and the return of credit cards of a gasoline company that advertised over the station was induced. The court recognized that the unions "may legally appeal to the sympathy of advertisers on KXTV in order to persuade them, voluntarily, to boycott the station," but concluded that in the instant matter the unions had used "coercive pressure" on the advertisers to accomplish their objective and enjoined the customer appeals not to do business with the advertisers.

In *Houston Armored Car*,²² the court viewed the ban on restraint and coercion differently without reaching a different result. In that case the union had a dispute with an armored car company which picked up and delivered cash and other valuables from and to retail stores, banks, insurance companies, and other employees. In connection with the dispute, the union distributed handbills at the premises of retail stores which did business with the armored car company requesting the public not to patronize the stores. The handbills were distributed not only to customers of the stores but also to their employees. Because of the handbilling, some of the retail stores ceased using the services of the armored car company. The court,

²⁰ Subsequent to the close of the fiscal year, the Board issued its decision holding that the respondent's conduct was protected by the proviso. *Middle South Broadcasting Co.*, 133 NLRB No 165.

²¹ *Brown v American Federation of Television & Radio Artists (Great Western Broadcasting Corp)*, 191 F Supp 676 (DC N Calif) *Contra* 134 NLRB No 141.

²² *Potter v United Plant Guard Workers of America (Houston Armored Car Co)*, 192 F Supp 918 (DC S Tex) *Contra* 136 NLRB No 9.

concluding that Congress intended that the same interpretation be given the words "coerce or restrain" in section 8(b)(4) as in other sections of the act,²³ held that these words were "indicative of stronger conduct or activities than 'induce' or 'encourage'" or "influence and persuasion" and refused to find that the handbilling coerced or restrained the retail stores within the meaning of the section. On the other hand, the court, relying on the *Piggly Wiggly* and *Middle South Broadcasting* court decisions, above, found that the handbilling was not protected by the publicity proviso and held that it violated the secondary boycott section because it had "an effect of inducing" secondary employees "to refuse to perform services at the secondary site, even though no actual refusal by secondary employees in fact occurred." The court, therefore, enjoined the handbilling.

In another case the conclusion was also reached that handbilling which did not cause an actual work stoppage nonetheless constituted prohibited inducement and encouragement of such, but for another reason. In that case,²⁴ the district court had enjoined, *inter alia*, the distribution of handbills to employees at a brewery which advertised in the newspaper published by the company with which the union had its dispute. On appeal, the union contended that the handbills were privileged publication of its strike and not inducement of a secondary work stoppage. The First Circuit,²⁵ however, found "ample evidence" in the statement in the handbill directed at the employees of the brewery "We are asking you to insist with Corona [the brewery] so *that it doesn't advertise in El Imparcial* [the newspaper]," which it characterized as at best "only thinly veiled encouragement of strike action by Corona's employees," to support the injunction against the handbilling.

b Refusal To Refer Workers

Under the terms of the ban on secondary boycotts contained in the act prior to its amendment in 1959 it had been held by the Board and accepted by the courts²⁶ that a refusal to furnish workers to a secondary employer to compel the latter to cease using the products of or doing business with another person was not prohibited. This conclusion was predicated on the language in the act which prohibited only the inducement of "employees" to engage in a "concerted refusal in the course of their employment." In the view of the Board and

²³Referring to sec 8(a)(1) and 8(b)(1)(A). See *NLRB v Drivers, Chauffeurs, and Helpers, Local 639 (Curtis Brothers)*, 362 U S 274.

²⁴*Compton v Local 901, International Brotherhood of Teamsters (Editorial El Imparcial, Inc)*, Oct 10, 1960 (No 249-80, D C F R).

²⁵*Local 901, International Brotherhood of Teamsters v Compton (Editorial El Imparcial, Inc)*, 291 F 2d 798 (C A 1).

²⁶See *Jobet Contractors' Assn*, 90 NLRB 542, *aff'd Jobet Contractors' Assn v NLRB*, 202 F 2d 606 (C A 7).

the courts, the act contemplated the disruption of an established employment relationship and since the employment status had not been established, a refusal to furnish workers could not violate the act. At the adoption of the 1959 amendments, it was indicated that this kind of pressure was being prohibited by the inclusion of the new ban against coercion and restraint of secondary employees.²⁷

This question arose in two cases in fiscal 1961. In the *Martin Company* case,²⁸ Martin subcontracted the installation of certain cable to an employer who had a contract with the union requiring it to furnish necessary workers on demand. Because the cable had been fabricated by Martin with employees represented by another labor organization, the union, among other things, refused to furnish workers to the subcontractor for the performance of its contract with Martin. Without discussing the impact of the aforesaid amendment, the court found that the union's refusal to furnish workers, as well as its other conduct, violated the amended act and expressly enjoined the union from continuing to withhold requested workers from the subcontractor.²⁹

In *Harbor Commissioners*³⁰ it was contended that there was no violation when longshoremen refused to accept employment to unload a ship. Without discussing the new prohibition against restraint and coercion of secondary employers, the court found that the longshoremen's refusal to work was in the "course of their employment." In reaching this conclusion and granting the injunctive relief sought, the district court noted that the "implication" of the union's contract with the secondary employer "obligated" longshoremen to unload the ship and that the latter "customarily" did so. Relying on other cases,³¹ the court distinguished the *Johet Contractors'* case, above, and found "reasonable cause to believe that a sufficient employment relationship existed at the time when the longshoremen refused to discharge the Pipiriki's cargo to bring the conduct of respondents under the ban of Section 8(b)(4)(B)." An injunction was issued enjoining the refusal to work.

c Common Situs Picketing

In *Middle South Broadcasting*³² the court found probable cause to

²⁷ See Leg Hist of the Labor-Management Reporting and Disclosure Act of 1959, vol II, pp 1194(1) and 1581(1-2)

²⁸ *Boire v Local 756, International Brotherhood of Electrical Workers (The Martin Co)* 47 LRRM 2351 (D C S Fla)

²⁹ Subsequently the Board found that the union's refusal to refer workers violated sec 8(b)(4)(ii)(B) of the act. *The Martin Company*, 131 NLRB No 120

³⁰ *Samoff v International Longshoremen's Assn (Board of Harbor Commissioners)*, 188 F Supp 308

³¹ *United Marine Division, Local 333, ILA (New York Shipping Assn)*, 107 NLRB 686, *American Federation of Radio & Television Artists v Getreu (L B Wilson, Inc)*, 258 F 2d 698 (C A 6)

³² *Phillips v Local No 668, Radio & Television Engineers (Middle South Broadcasting Co)*, 192 F Supp 643 (D C E Tenn)

believe that a union engaged in conduct proscribed by the secondary boycott provisions when it picketed in front of neutral retail establishments because a mobile unit of a struck radio station was parked in front of the establishments. The court, in issuing the injunction, pointed out that the "mobile unit would not be a substitute for the studio and office headquarters of the station" and that by picketing the latter, which were located in the center of town, the union "well informed people of the area of [its] claim"³³ In another case³⁴ an injunction was also issued where the union picketed at a construction site but did not picket at the primary employer's regular place of business 7 blocks away where its employees checked in and out each day. In *Lance Roofing*,³⁵ however, an injunction against picketing at a construction site was denied when it was established that the only other place of business of the primary employer in the area was a building "used only as a meeting place" for the nine employees of the primary employer working at the construction site but for no other business activities of the primary employer. The court, in denying the injunction, stated that "To hold otherwise on these facts is merely to encourage employers to rent 'decoy' offices located away from operations which have resulted in labor disputes." In another case, *Cleveland Construction*, the court first denied injunctive relief against common situs picketing because the primary employer's premises, where his employees reported before going to work at the construction site, were located in a town other than that in which the construction site was situated although within the geographical jurisdiction of the union,³⁶ but granted relief against the construction site picketing when the primary employer opened a temporary office in the same town as the construction site and required his workers to report daily to the new location.³⁷

In the *Leonard Shaffer* case,³⁸ the union had a dispute with a dining club which was having a new clubhouse built for it by independent contractors. During the construction work, the club continued to operate at its old location, which the union was picketing, and none of its employees worked at the new site. Shortly before completion, the union picketed the new clubhouse and shut down construction

³³ Subsequent to the close of the fiscal year the Board decision issued finding no violation in this picketing. See *Middle South Broadcasting Co.*, 133 NLRB No 165

³⁴ *Schauffler v Local 670, United Association of Journeymen, etc (Allentown Supply Corp)*, 48 LRRM 2094 (D C E Pa)

³⁵ *Schauffler v Local 30, United State, Tile & Composition Roofers, etc (Lance Roofing Co)*, 191 F Supp 237 (D C Del)

³⁶ *LeBus v International Brotherhood of Electrical Workers, Local 861 (Cleveland Construction Co)*, 192 F Supp 485 (D C La)

³⁷ *LeBus v International Brotherhood of Electrical Workers, Local 861 (Elco Electric, Inc)*, May 4, 1961 (No 8266, D C La)

³⁸ *Schauffler v Hotel, Motel & Club Employees Union (Leonard Shaffer Co, Inc)*, 47 LRRM 2947 (D C E Pa)

work The court, under these circumstances, concluded that the picketing at the new clubhouse was secondary and enjoined it³⁹

d. Primary Picketing Proviso

In the 1959 amendments, Congress incorporated a proviso to the secondary boycott provisions stating that "nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing" In *Baltimore Contractors*⁴⁰ the union contended that this proviso permitted it to picket a general contractor at a construction site to compel it to terminate a subcontract with a nonunion employer and abide by its agreement to "subcontract work only to firms hiring union labor" Finding that such picketing continued to be unlawful under the act (see below for discussion of cases involving contracts of this nature in the construction industry), the court, citing the House Conference Report on the 1959 amendments,⁴¹ held that the proviso did not "change anything" in respect to the "ban on secondary boycotts" As the Supreme Court held in *Local 761, International Union of Electrical, Radio & Machine Workers v NLRB (General Electric Co)*, 366 U S 667, 681, the proviso merely—

was directed against the fear that the removal of "concerted" from the statute might be interpreted so that "the picketing at the factory violates section 8(b) (4) (A) because the pickets induce the truck driver employed by the trucker not to perform their usual services where an object is to compel the trucking firm not to do business with the manufacturer during the strike"

e. "Ally" Defense

In several cases it was unsuccessfully argued that a secondary employer was an ally of the primary employer In *El Imparcial*⁴² the union was engaged in a labor dispute with a newspaper publishing company and had continuously picketed the primary employer's plant Another newspaper company, occupying leased space at the primary employer's premises, had a contract with the primary employer whereby the latter printed its newspaper The union agreed to permit

³⁹ Later the Supreme Court issued its decision in *Local 761, International Union of Electrical, Radio & Machine Workers v NLRB (General Electric Co)*, 366 U S 667, affirming the Board's conclusion that picketing of a manufacturing plant gate set apart for the exclusive use of independent contractors during a dispute with the manufacturer violated the secondary boycott provisions of the act

⁴⁰ *LeBus v International Union of Operating Engineers, etc (Baltimore Contractors, Inc)*, 188 F Supp 392 (D C E La) Subsequently the union consented to a Board order permanently enjoining its conduct *Baltimore Contractors, Inc*, Case No 15-CC-124

⁴¹ H R No 1147, 86th Cong, 1st Sess, p 38, Leg Hist of the Labor Management Reporting and Disclosure Act of 1959, vol I, p 942

⁴² *Compton v Local 901, International Brotherhood of Teamsters, etc (Editorial El Imparcial, Inc)*, October 10, 1960 (No 249-60, D C P R)

the secondary employer's employees to cross the picket line only if the secondary employer agreed to cease having its newspaper printed by the primary employer. The district court found reasonable cause to believe that the union's conduct violated the secondary boycott provisions of the act and issued an injunction predicated on this and other findings of unlawful secondary activities. On appeal it was contended that the affairs of the primary and secondary employers were "so intertwined" that the secondary employer was not a "neutral" to the dispute with the primary employer, but on the contrary the two were "co-employers," or at least "allies," and the secondary employer therefore was deprived of the protection of the secondary boycott section. The First Circuit⁴³ rejected the contention and sustained the injunction, finding from the "undisputed facts" that the two employers were "separate and distinct corporations without any common ownership or control," that their "only relationship was under the contract" providing for the primary employer's printing of the secondary employer's newspaper, that the secondary employer "was not performing 'struck work'" for the primary employer, and that their businesses were not "so integrated or intertwined operationally" as to deprive the secondary employer of the act's protection. The court also rejected the argument that "the fact that [the secondary] employees participated in the work of bundling [the secondary employer's] papers after they were delivered by [the primary employees] to [the primary employer's] mailing room" altered the situation, noting that the "plain intent" of section 8(b) (4) (B) "is to prohibit conduct aimed at terminating the very sort of business relationship which existed here."

In another case,⁴⁴ the union had a dispute with a manufacturing company. The manufacturer leased one entire warehouse and part of another, both located off the manufacturer's premises, where the manufacturer stored supplies and finished products. The warehouses were operated by other companies which, pursuant to contract, performed required services for the manufacturer at the warehouses. The union, contending that the warehouse operators were "allies" of the manufacturer, extended its picketing to the warehouses. The court, however, found that the warehouses were in the "actual control" of the warehouse operators who had "no interest" in the manufacturer, the warehouse employees were "hired, fired, paid and controlled in the details of their performance" by the warehouse operators, "no employees of [the manufacturer were] on the premises of either ware-

⁴³ *Local 901, International Brotherhood of Teamsters v Compton (Editorial El Imparcial, Inc)*, 291 F. 2d 793 (C.A. 1)

⁴⁴ *Vincent v Local 516, United Plant Guard Workers (Hewitt Robins, Inc)*, 47 LRRM 2895 (D.C. W.N.Y.)

house, except on infrequent occasions when a representative of [the manufacturer] may visit a warehouse to inspect merchandise or for some similar reason not connected with the management or control of the warehouses", the manufacturer had "no right of entry into either" warehouse; and the warehouse operators were paid "at fixed contract rates for services performed" which rates were not shown to be "any less than would be appropriate to result in a reasonable profit to each warehouse company" From these findings, the court concluded that "neither warehouse company is an ally" of the manufacturer and that there was reasonable cause to believe the picketing at the warehouses violated the secondary boycott section Accordingly, it enjoined the warehouse picketing

In *Publishers' Assn of New York City*⁴⁵ the union had a dispute with the company which printed certain Sunday supplements for the New York Herald Tribune, the New York Mirror, and the New York Journal American After the union called a strike at the printing company, it instructed its members employed at the newspaper plants not to perform their duties of inserting the Sunday supplements from the printing company in the Sunday newspapers published by their employers In defense, the union claimed that the supplements were "struck work" which it lawfully could order its members at the newspaper plants not to handle The court rejected the contention and found that the union action was the "type of conduct which Congress intended to eliminate" as a secondary boycott under the act The refusal to work on the supplements at the newspaper plants was enjoined⁴⁶

2. "Hot Cargo" Clause Situations and Strikes To Obtain "Hot Cargo" Clauses

Section 8(e) of the act, added in 1959, makes it an unfair labor practice for a labor organization and an employer to enter into a contract or agreement, either express or implied, whereby the employer ceases or agrees to cease handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer or to cease doing business with any other person, and declares that any contract containing such provisions shall be void The section exempts, however, certain such agreements in the construction and clothing industries Section 8(b)(4)(A) of the act was amended at the same time to make it an unfair labor practice to strike or

⁴⁵ *Kaynard v New York Mailers' Union No 6, etc (The Publishers' Assn of New York City)*, 191 F Supp 880 (D C S N Y) Accord 136 NLRB No 19

⁴⁶ See *N L R B v Business Machine & Office Appliance Mechanics Conference Board, etc (Royal Typewriter Co)*, 288 F 2d 553 (C A 2), *Doude v Metropolitan Federation of Architects, etc (Project Engineering Co)*, 75 F Supp 672 (D C N Y), for discussion of the kind of "struck" or "farmed out" work a union may lawfully refuse to handle

exert other pressure on an employer to compel him to enter into an agreement in violation of section 8(e). In fiscal 1961, the district courts were called upon in a number of cases to construe these provisions.

In *Greater St. Louis Automotive Trimmers & Upholsterers Assn.*⁴⁷ the union and certain automobile dealers had, prior to the 1959 amendments, entered into contracts which provided that whenever a dealer found it "feasible to send work out" preference will be given to such shops or subcontractors having contracts with the Union. In the summer of 1960, the union demanded that the automobile dealers comply with their contractual agreement to give preference to union shops in respect to certain work being contracted out. As a result, some of the dealers ceased contracting out work to firms which did not have contracts with the union. The court, finding reasonable cause to believe that section 8(e) prohibited this type of agreement, and that the union would continue to insist that it be complied with, granted an injunction restraining the union from seeking adherence to the agreement or any other similar agreement violative of section 8(e).

In *Drive-Thru*⁴⁸ the union demanded that a milk processor, whose drivers the union represented, cease selling milk for resale to a customer at the processor's plant, and require such customer to purchase milk on a basis of delivery at the customer's place of business by the processor's drivers. To enforce its demand, the union induced its members not to load the customer's trucks at the processor's dock. As a result, the processor ceased doing business with the customer except under the conditions demanded by the union. The court, finding reasonable cause to believe that the processor had entered into an "implied" agreement with the union and that the agreement violated section 8(e), enjoined the union from enforcing the "implied" agreement or from engaging in coercive conduct to obtain any other similar agreement violative of section 8(e).

In *Edna Coal*⁴⁹ the court found reasonable cause to believe that the union, by picketing a coal mine to compel it to agree to cease using the services of a nonunion trucker, was employing proscribed conduct under section 8(b)(4)(A) to compel the mine to enter into an agreement prohibited by section 8(e) and enjoined the picketing of the mine.⁵⁰

⁴⁷ *Cosentino v. Automotive, Petroleum & Allied Industries Employees Union (Greater St. Louis Automotive Assn.)*, 47 LRRM 2492 (D.C.E. Mo.) Accord 184 NLRB Nos. 138 and 139.

⁴⁸ *Carlson v. Milk Wagon Drivers & Dairy Employees' Union (Drive-Thru Dairy, Inc.)*, 48 LRRM 2316 (D.C.E. Mo.)

⁴⁹ *Waters v. District 15, United Mine Workers, etc. (Edna Coal Co.)*, 47 LRRM 2417 (D.C. Colo.)

⁵⁰ Subsequent to the close of the fiscal year, the Board dismissed the complaint herein for insufficient evidence of union responsibility for the picketing *Edna Coal Company*, 132 NLRB No. 42.

In a number of cases injunctions were sought to restrain picketing to obtain or to enforce an agreement concerning on-the-site subcontracting in the construction industry.⁵¹ In *Sherwood Construction*⁵² and *Ford, Bacon and Davis*⁵³ the union picketed general contractors in the building and construction industry for agreements which would require the general contractors to subcontract only to employers who agreed to abide by the terms of the master agreement. Finding reasonable cause to believe that picketing for such an object violated both subsections (A) and (B) of section 8(b)(4), the courts in these cases enjoined the picketing under both sections.⁵⁴

In several other case, however, the district courts, while finding that a strike to obtain or enforce a clause restricting subcontracting of on-the-job-site work violated section 8(b)(4)(B), refused to find that a strike or picketing to obtain such a clause violated section 8(b)(4)(A). In *Colson & Stevens*⁵⁵ the court, rejecting the argument that section 8(e) "merely sanctioned voluntary agreements into a 'Hot Cargo' agreement in the construction industry, but did not lift the ban on coercive measures designed to force such a stipulation from an employer," held that "Congress, when enacting [section 8(b)(4)](A) intended to proscribe only those agreements which were prohibited by subsection (e)" and that the latter subsection "expressly excepts from the scope of its prohibitions those building and construction contracts" of the foregoing nature. Noting, however, that the 1959 amendments "did not intend to change the rule" regarding secondary boycotts, and that since picketing to obtain such an agreement prior to the amendments violated the secondary boycott section, it continued after the amendments to violate the section. Taking note of cases holding that a union cannot strike to enforce observance of the terms of such a contract,⁵⁶ the court further held that "Since picketing to enforce the provisions of such an agreement is prohibited by the Act, it naturally follows that picketing to obtain

⁵¹ A proviso to sec 8(e) specifies "That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction."

⁵² *Sperry v Local 101, International Union of Operating Engineers (Sherwood Construction Co)*, 47 LRRM 2481 (D C Kans)

⁵³ *LeBus v Building & Construction Trades Council (Ford, Bacon & Davis)*, 186 F Supp 109 (D C W La)

⁵⁴ Subsequently the Board's case was closed upon the union's compliance with the trial examiner's intermediate report finding a violation of the act. *Ford, Bacon & Davis*, Case No 15-CC-121

⁵⁵ *Kennedy v Construction, Production & Maintenance Laborers' Union, etc (Colson & Stevens Construction Co)*, 48 LRRM 2791 (D C Ariz)

⁵⁶ *Local 1976, United Brotherhood of Carpenters, etc v N L R B (Sand Door & Plywood Co)*, 357 U S 93. *N L R B v Bangor Building Trades Council (Dawson Construction Co)*, 278 F 2d 287 (CA 1)

such an agreement would likewise be prohibited" For similar reasoning see *Baltimore Contractors*⁵⁷ and *Binnings Construction*⁵⁸

3. Forcing an Employer or Self-Employed Person To Join a Labor Organization

In *McCourt Construction Co*⁵⁹ the union demanded that the self-employed trucker become a member of the union When he refused, the union visited two building contractors who were utilizing the services of the trucker and threatened to cause trouble and to picket them if they continued to do business with the trucker As a consequence, the two contractors canceled their trucking agreements with the trucker The court issued an injunction against these threats finding them a violation of section 8(b) (4) (ii) (A) which proscribes threats, coercion, and restraint to force a self-employed person to join a labor organization or an employer association⁶⁰ In *Johns Bargain Stores*⁶¹ the court granted an injunction where the union attempted to compel a self-employed person providing floor-cleaning and waxing services for a chain of variety stores to join the union⁶² In *John Reich*⁶³ the court denied an injunction because it concluded that the individual the union was insisting remain a member of the union was an employee and not a partner in his father's business

4. Jurisdictional Dispute Situations

Injunctions were granted in 18 cases involving jurisdictional disputes—11 relating to conflicting claims to the assignment of work in the building and construction industry,⁶⁴ 3 relating to work dis-

⁵⁷ *LeBus v International Union of Operating Engineers (Baltimore Contractors, Inc)* 188 F Supp 392 (D C E La) Subsequently the union consented to a Board order permanently enjoining its conduct *Baltimore Contractors, Inc*, Case No 15-CC-124

⁵⁸ *LeBus v Local 60, United Association of Journeyman, etc (Binnings Construction Co)*, 193 F Supp 392 (D C E La)

⁵⁹ *Fusco v Local 348, International Brotherhood of Teamsters, etc (McCourt Construction Co)*, 47 LRRM 2096 (D C N Ohio)

⁶⁰ Subsequent to the close of the fiscal year, the Board issued its decision holding that the union's conduct violated the act *McCourt Construction Co*, 132 NLRB No 99

⁶¹ *Kaynard v Building Service Maintenance & Miscellaneous Employees (Johns Bargain Stores Corp)*, May 2, 1961 (No 61 C 279, D C E N Y)

⁶² Subsequently the Board proceeding was settled by consent Board order providing for a court decree

⁶³ *Fraker v Brotherhood of Painters, Decorators & Paperhangers (John Reich Painting & Decorating Co)*, October 20, 1960 (No 2519, D C S Ohio) *Contra* 136 NLRB No 11

⁶⁴ *Shore v Local 66, International Union of Operating Engineers (Frank Badolato & Son)*, 47 LRRM 2685 (D C W Pa), *Waers v Carpenters District Council (Brown-Schrepferman & Co)*, May 19, 1961 (No 7146, D C E Colo), *Roumell v Port Huron Building & Construction Trades Council (Port Huron Sulphite & Paper Co)*, June 2, 1961 (No 21273, D C E Mich), *Kaynard v Metallic Lathers and Reinforced Concrete Steel Workers Union (Prefabricated Concrete)*, 186 F Supp 326 (D C E N Y), *Boire v Local No 272, International Association of Bridge, Structural and Ornamental Iron Workers (Erectors of Florida, Inc)*, August 19, 1960 (No 10180-M, D C S Fla), *McLeod v Local No 46,*

putes in the maritime industry,⁶⁵ 2 relating to conflicting work claims in the newspaper publishing industry,⁶⁶ and 1 each relating to disputed work in the theatrical⁶⁷ and trucking industries⁶⁸

In the *Northern Metal* case, above, the company loaded vehicles of various kinds aboard vessels for shipment overseas. By agreement, the company had assigned the movement of the vehicles to the crane at shipside to 7 of its own employees, who belonged to one union, and had assigned the remainder of the loading work to 15 members of respondent union, a stevedoring local. After working a number of years under this arrangement, the stevedoring union demanded the movement of the vehicles to shipside. This would have required the employment of a 22-man stevedoring gang instead of the 15-man being used. When respondent's demand was not acquiesced in, respondent, relying on a provision in its contract which provided that the loading of general cargo required a gang of 22 men, refused to furnish gangs of 15 men as it had previously for the loading of the vehicles. The district court found reasonable cause to believe that respondent's insistence on the employment of 22-man gangs rather than 15-man gangs was in furtherance of its demand for the shoreside work assigned to the members of the other union and that a jurisdictional dispute within the meaning of section 8(b)(4)(D) existed. Finding injunctive relief appropriate, the court enjoined respondent. On appeal, respondent contended that it was entitled pursuant to its contract and a grievance procedure thereunder to insist on the employment of 22-man gangs. The Third Circuit⁶⁹ sustained the injunction, holding that respondent's insistence on the employment of 22-man gangs under the circumstances clearly established reasonable cause to believe that respondent union was demanding the work assigned to the other union

Wood, Wire and Metal Lathers International Union (Precrete, Inc), June 12, 1961 (No 61 C 400, DC ENY), *Cosentino v Local 553, United Association of Journeymen, etc (Illinois Power Co)*, 46 LRRM 2992 (DCS Ill), *Hendrix v Local 101, International Union of Operating Engineers (Ets-Hokin & Galvan, Inc)*, 47 LRRM 2132 (DC Kans), *Cunco v Local No 825, International Union of Operating Engineers (Mechanical Contractors Assn of New Jersey)* August 11, 1960 (No 653-60 DC N I), *Cunco v Local 825 International Union of Operating Engineers (Nichols Electric Co)*, June 15, 1961 (No 435-61, DC N I) *Penello v Local 5, United Association of Journeymen, etc (Arthur Venners Co)*, 46 LRRM 2740 (DC DC)

⁶⁵ *Schauffler v Local 1291, International Longshoremen's Assn (Northern Metal Co)*, 188 F Supp 203 (DC Pa); and 292 F 2d 182 (CA 3) *Kennedy v Maritime Trades Department, Southern California Ports Council (Todd Shipyards Corp)*, June 7, 1961 (No 596-61-K, DCS Calif), *Graham v International Longshoremen's & Warehousemen's Union Local No 19 (J Duane Vance)*, November 16, 1960 (No 5156, DC W Wash)

⁶⁶ *McLeod v Newspaper & Mail Deliverers Union, etc (New York Times Co)*, November 4, 1960 (No 60 Civil 4027, DCS NY), *Kennedy v International Typographical Union (Hillbro Newspaper Printing Co)*, October 4, 1960 (No 1095-60-T, DCS Calif)

⁶⁷ *Cosentino v International Alliance of Theatrical, Stage Employees & Motion Picture Machine Operators (Globe-Democrat Publishing Co)*, 48 LRRM 2221 (DC Mo)

⁶⁸ *Kaynard v Highway & Local Motor Freight Drivers, Dockmen & Helpers (Arbogast & Bastian, Inc)* October 28, 1960 (No 60 Civil 3941, DCS NY)

⁶⁹ *Schauffler v Local 1291, International Longshoremen's Assn (Northern Metal Co)*, 292 F 2d 182

and that the contention it was entitled under its contract and the grievance procedure to insist upon the work was a question for determination by the Board in its proceedings rather than by the court in the section 10(1) proceeding

In *Marshall Maintenance*,⁷⁰ the Second Circuit affirmed the injunction of the district court against picketing and handbilling to force an employer to assign certain welding work to members of the union rather than to the employer's own employees who were not members of any union. In doing so, the court of appeals expressly held that section 8(b) (4) (D) is not limited to disputes between two unions over the assignment of work but rather is broad enough to cover coercive activity by a union to obtain an assignment of work to its members, to the exclusion of other workers, regardless of whether the employees sought to be replaced are union members or nonunion employees.

In *Veneri*, above, the respondent union, among other things, refused to refer or furnish workers to a subcontractor, pursuant to its agreement, to force the general contractor to contract out certain work to a subcontractor that employed members of respondent rather than to perform the work with members of another union to whom it had been assigned. The court, finding reasonable cause to believe that both the conduct and the object violated section 8(b) (4) (D), issued an injunction enjoining, *inter alia*, the refusal to refer workers.

Similarly, in *Illinois Power*, above, an injunction was issued when a utility company using its own employees to lay pipes for a gasline was picketed by a union desiring the work for its own members. The union sought the assignment of the work through a demand that it be subcontracted, rather than through a demand that the utility company assign the work direct to its members.

In *Prefabricated Concrete*, above, the respondent union demanded that the work of cutting, bending, and inserting metal bars used in making prestressed concrete products be assigned to its members. Subsequently, another union was certified by the Board as the representative of the employees doing this work. The respondent union thereafter picketed the employer's plant with signs addressed to the public stating that the company's employees were engaged in "work normally performed" by the respondent union at wages below prevailing rates. The picketing stopped deliveries to the plant. An injunction was granted, the court finding from the foregoing reasonable cause to believe that the objective of the union's picketing after the election was to force the assignment of the work in question to respondent union's members. The court enjoined all picketing for the object

⁷⁰ *Vincent v Steamfitters Local Union 395 etc (Marshall Maintenance)*, 288 F 2d 276 (CA 2)

declared unlawful in section 8(b)(4)(D), including picketing when employees were not working at the plant, holding that the proviso which permits certain kinds of primary picketing⁷¹ does not apply in a section 8(b)(4)(D) case⁷²

In the *DuPont* case,⁷³ the company's construction department was engaged in construction work at one of its plants. The company had, in the past, both subcontracted out sheet metal work to subcontractors who employed respondent union's members and performed it with employees it hired direct who were not members of respondent union. The union picketed the construction project to force the company to subcontract sheet metal work on the instant job to a subcontractor who had a contract with it. The court, finding that the company had refused to subcontract the work because of the union's travel pay demands, held that section 8(b)(4)(D) was inapplicable. In reaching this conclusion, the court construed the Supreme Court's decision in the *CBS* case⁷⁴ to hold that sections 8(b)(4)(D) and 10(k) related solely to situations in which an employer is caught in the middle between conflicting jurisdiction demands of two groups. Finding only a dispute between the company and the respondent union, the court denied injunctive relief on the ground that the controversy was not covered by 8(b)(4)(D).

5 Recognition and Organization Picketing

Section 8(b)(7), added to the act by the 1959 amendments, declares certain recognition or organization picketing by a union which is not currently certified as the representative of the employees involved to be an unfair labor practice. Subparagraph (A) of the section states that such picketing is prohibited when another union has been lawfully recognized by the employer as the representative of the employees involved and the Board is prohibited from conducting an election because of its contract-bar rule. Subparagraph (B) provides that such picketing is unlawful within 12 months following a valid election, during which period the Board is prohibited by virtue of section 9(c)(3) from holding a further election. Subparagraph (C)—which applies to those situations in which the Board is free at the time to conduct an election—states that such picketing is prohibited after a reasonable period of time, not to exceed 30 days, unless a petition has been filed with the Board for a resolution of the repre-

⁷¹ See above, p 192

⁷² See also *McLeod v Local No 46, Wood, Wire & Metal Lathers etc (Precrete, Inc)*, 48 LRRM 2689 (D C ENY) a similar case where an injunction was granted.

⁷³ *Penello v Local Union No 59, Sheet Metal Workers (E I DuPont de Nemours & Co)*, 48 LRRM 2495 (D C Del).

⁷⁴ *NLRB v Radio & Television Broadcast Engineers Union Local 1212 (Columbia Broadcasting System)*, 364 US 573

sentation question by the holding of a Board-conducted election. A proviso, however, exempts from the proscription of this subparagraph picketing "for the purpose of truthfully advising the public" that the employer does not employ members of or have a contract with the union, unless an effect of such picketing is to cause employees of other employers to refuse to make pickups or deliveries or perform other services. Also, a proviso to section 10(1) prohibits the Board from seeking injunctive relief in a section 8(b)(7) case if a meritorious charge has been filed alleging that the employer has dominated or interfered with a labor organization in violation of section 8(a)(2) of the act.

a Constitutionality of the Section

In the *Irvins* case,⁷⁵ the union attacked the restrictions set forth in the section as an unconstitutional infringement of the right of free speech guaranteed in the first amendment. The court, relying on Supreme Court decisions upholding the constitutional authority of Congress to regulate picketing which is for the purpose of defeating a "valid public policy," rejected the union's contention, stating that "Congress can constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy." The decision was affirmed on appeal to the Fourth Circuit.⁷⁶ Likewise, the court in the *Islander* case⁷⁷ held that it "cannot be questioned that the Congress could curtail lawfully certain types, or all picketing under certain circumstances," citing Supreme Court decisions.

b An Object of Recognition or Organization

Section 8(b)(7) restricts picketing which has "an object of recognition or organization." In a number of cases the unions have contended that their picketing is for some purpose other than organization or recognition. In those cases where the court found, however, that "an" object of the picketing also was recognition or organization, it enjoined the picketing. In *Baronet*⁷⁸ the First Circuit sustained the injunction of the district court finding that "an object" of the picketing was recognition, even though another object was to protest certain layoffs. As the First Circuit stated, "The statute does not require that the sole object" be recognition or organization.⁷⁹

⁷⁵ *Picello v Retail Store Employees Local Union No. 692 (Irvins, Inc)*, 188 F Supp 102 (D.C. Md.)

⁷⁶ 287 F.2d 509 (C.A. 4)

⁷⁷ *Kennedy v Los Angeles Joint Executive Board of Hotel & Restaurant Employees (The Islander)*, 102 F Supp 339 (D.C. S. Calif.)

⁷⁸ *Local 346 International Leather Goods Union v Compton (Baronet of Puerto Rico)*, 202 F.2d 313 (C.A. 1)

⁷⁹ Subsequent to the close of the fiscal year the Board issued its decision finding that an object was recognition. *Baronet of Puerto Rico, Inc*, 133 NLRB No. 160

c. Effect of Alleged Unfair Labor Practice by Employer

In *Charlie's Car Wash*⁸⁰ the respondent union argued that injunctive relief should not be granted because the employer had committed an unfair labor practice under section 8(a)(1) by threatening to lay off an employee. Noting that the only restriction in section 10(1) against application for an injunction in a section 8(b)(7) situation is the filing of a meritorious charge alleging that the employer had dominated or supported a labor organization in violation of section 8(a)(2) of the act, the court rejected the assertion, stating, "One of the major purposes of the section allowing injunctive relief, protection of the public interest requiring unobstructed flow of interstate commerce, would be nullified by an interpretation which would allow as a defense to injunction any charge against the employer, particularly an unfiled charge, which comes within the Board's jurisdiction."

d. Picketing Where Another Union Is the Contractual Representative

In fiscal 1961, only one case reached the district courts under the ban of section 8(b)(7)(A) against organization or recognition picketing where another union, which had been lawfully recognized, had a contract with the employer that barred an election. In that case, *Associated General Contractors*,⁸¹ the employer association, on behalf of its employer-members, had recognized a district council of the laborers' union for many years. Collective-bargaining contracts in effect between the employers and the laborers' union covered all employees performing laborers' work, including "tunnel construction employees." Without challenging the validity of the recognition of the laborers' union or the existence of the contract with that union which covered the employees involved and barred the holding of an election, the respondent union threatened to, and did, picket the employers' projects to secure recognition as the representative of the employers' tunnel workers. The court, entering preliminary findings that there was reasonable cause to believe that respondent union's picketing violated section 8(b)(7)(A), issued a temporary restraining order enjoining the picketing. Subsequently, the temporary restraining order was continued upon consent of respondent union.

e. Picketing Within 12 Months of Election

Subparagraph (B) of section 8(b)(7) bans recognition or organization picketing within 12 months following a validly conducted

⁸⁰ *Osentino v Local 618, Automotive, Petroleum & Allied Industries Employees Union (Charlie's Car Wash)*, 47 LRRM 2309 (D C E Mo)

⁸¹ *Hoffman v Tunnel & Rock Workers (Associated General Contractors)*, May 23, 1961 (No 8299, D C N Calif)

Board election In most cases under this subsection, the union contended that its postelection picketing was for a reason other than recognition or organization For example, in *Irvins*,⁸² after losing a Board election under the expedited procedures of subsection (C) (see below, p 205), the union wrote the employer that it was no longer picketing for recognition and "will not accept recognition until the majority of the employees indicate their desire to be represented by our Union," but that it intended to continue picketing to publicize the employer's unfair labor practices—which had been settled with the approval of the union prior to the election—and the fact that its employees were not represented by respondent Thereafter the union changed its picket signs to appeal to the public to withhold patronage from the employees because "This is a Non Union Store Irvins Opposes Unions for its Employees" No reference was made to any alleged unfair labor practices The union's business agent admitted that in order to secure removal of the pickets the employer would have to afford the union an opportunity to "address the employees" The court, "from the totality of its conduct" before and after the election, rejected the contention that the union picketing after the election was in protest of the employer's unfair labor practices and concluded that it continued to have a recognition or organization objective and enjoined it as violative of section 8(b)(7)(B) On appeal the Fourth Circuit⁸³ sustained the injunction and the district court's findings regarding object In doing so, the court of appeals especially noted that the picket signs made no reference to unfair labor practices by the employer, "It only told readers that the Union had not been recognized, which is the purpose the court found the picketing to serve"

In *Bachman Furniture*,⁸⁴ in a similar factual situation, the court issued an injunction where the union picketed after the election with signs stating that "Bachman's Admit Unfair Labor Practices" and "Unfair Labor Practices Violate Federal Law," although the employer's alleged unfair labor practices had been settled with the union's approval Reciting the evidence indicating the union's active interest in recognition up to the time of the picketing and its failure to picket in protest of the alleged unfair labor practices when they occurred 2 months before, the court stated, "If parties are to be judged merely by their professions independently of the totality of their actions, the goal of the Congress that there be a period of freedom from organizational picketing after a valid election will never be achieved"

⁸² *Penello v Retail Store Employees Local Union No 692 (Irvins Inc)*, 188 F Supp 192 (D C Md) Accord 134 NLRB No 51

⁸³ 287 F 2d 509

⁸⁴ *Cavers v Teamsters "General" Local No 200 etc (Bachman Furniture)*, 188 F Supp 184 (D C E Wis) Contra 134 NLRB No 54

In the *Islander* case,⁸⁵ the union, after losing an election, continued to picket with a new sign addressed to the public and stating that the employer "Does Not Have a Contract With" the union, claiming that the "type of picketing had changed from organizational and recognition to informational." Stating that the "proviso contained in Subdivision 7(C) but confirms the fact that the Congress must have thought that what is called 'informational picketing' is forbidden," because "if it was not the exception was not necessary," and noting that it was "doubtful that to anyone the new sign would carry any different meaning than the sign carried in the pre-election picketing," and taking into account the union's persistent quest for recognition up to the change in the picket sign, the court found reasonable cause to believe that the postelection picketing violated section 8(b) (7) (B) and issued an injunction.

In *Woodward Motors*⁸⁶ the court reached a similar result and issued an injunction in respect to so-called proviso picketing (see below, p 206) that followed close on the heels of an organizational drive and a lost election, stating that it "would be naive to conclude that [the union's] sole object was to inform the public under the circumstances shown here." See also *Blinstrub*,⁸⁷ where the court also found reasonable cause to believe that picketing after a lost election violated the act and enjoined it.

In *Hested*,⁸⁸ however, the court refused to enjoin picketing with a proviso sign which began a month and a half after an election in which the union had filed a disclaimer of interest. The court, holding that the existence of an organizational or recognition objective before the election does not preclude a union from engaging in lawful activity at a future time, concluded that the evidence of the union's conduct since its disclaimer was "insufficient to show a reasonably immediate object of *forcing* or *requiring* recognition or organization." Even though "the case is not entirely free from doubt," the court concluded that the evidence was insufficient "to justify the issuance of an injunction."

f Other Organization and Recognition Picketing

Subparagraph (C) of section 8(b) (7) prohibits other recognition or organization picketing for more than a reasonable period of time,

⁸⁵ *Kennedy v Los Angeles Joint Executive Board of Hotel & Restaurant Employees (The Islander)*, 192 F Supp 339 (DC S Calif)

⁸⁶ *Vincent v Local 182, International Brotherhood of Teamsters (Woodward Motors)*, March 1, 1961 (No 8481, DC N Y) Accord 135 NLRB No 90

⁸⁷ *Greene v Local Joint Executive Board of Boston, Hotel & Restaurant Employees' Union (Blinstrub's Village & Grille, Inc)*, 47 LRRM (DC Mass)

⁸⁸ *Graham v Retail Clerks International Association, Local No 57 (Hested Stores Co)*, 188 F Supp 847 (DC Mont)

not to exceed 30 days, without the filing of a petition for a Board election. This subparagraph is intended to regulate such picketing where there is no lawfully recognized union holding a contract which would bar an election, or where there has been no election within the preceding 12 months, in either of these two situations such picketing is not permitted for any period. Where a timely petition is filed, subparagraph (C) provides for an expedited election.⁸⁹ A proviso specifies, however, that under this subparagraph picketing "for the purpose" of advising the public that the employer "does not employ members of, or have a contract with," the union is not prohibited unless it stops deliveries or causes a secondary work stoppage.⁹⁰

(1) Reasonable Period of Time Which Picketing May Continue Without Filing of Election Petition

The subparagraph specifies that the petition for an election to qualify as a bar to an unfair labor practice proceeding must be "filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing." In *Baronet*⁹¹ the First Circuit affirmed the district court's injunction where application for the relief was made prior to the expiration of the 30 days. In reaching this result, the court of appeals pointed out that "the picketing was accompanied by disorder, confusion and violence, and that on occasion an effect of the picketing was to prevent deliveries," and that, in any event, the injunction was not issued until more than 30 days after commencement of the picketing.⁹² In *Colson & Stevens*⁹³ two unions picketed construction projects of the employer at different times, each time for less than 30 days. Concluding that there was "reasonable cause to believe that the [two unions] were acting jointly and in concert with and in support of each other's demands," the court found that the picketing had "exceeded the thirty days allowed" under the subsection and enjoined both unions from further picketing of the projects for an object proscribed by the section.

⁸⁹ The election provisions were considered in *Graham v Retail Clerks International Association, Local No 57 (Heated Stores Co)*, above.

⁹⁰ The proviso in full states

"Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person, in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services."

⁹¹ *Local 346, International Leather Goods Union v Compton (Baronet of Puerto Rico)*, 292 F 2d 813 (C A 1)

⁹² Subsequent to the close of the fiscal year the Board issued its decision finding that an object was recognition. *Baronet of Puerto Rico, Inc*, 133 NLRB No 102

⁹³ *Kennedy v Construction, Production & Maintenance Laborers' Union (Colson & Stevens Construction Co)*, June 6, 1961 (No 3563-Phx, D C Ariz)

(2) Necessity for Filing of Election Petition

In *Goldleaf*⁹⁴ the union contended that it was picketing to compel recognition for a single employee of the employer and that, since it is established Board policy not to conduct an election in a one-man unit, it would have been futile to file a petition for an election. This being so, the union argued, it was relieved of the necessity of filing a petition under subsection (C). Finding no exception in the subsection for the omission to file an election petition in such circumstances, the court enjoined the picketing which had continued for more than 30 days.⁹⁵

(3) Accretion to the Bargaining Unit as a Defense to Picketing

In *Best Markets*⁹⁶ the union, which had picketed for more than 30 days without filing an election petition, claimed that it was picketing to compel the employer to blanket the employees of stores acquired from another chain into its bargaining unit under the terms of its contract with the employer and, therefore, that its picketing was not for an object prohibited by the section. The court, however, found that the new stores, where another union was recognized as bargaining agent, continued after their acquisition to be operated as a separate division under their former name, with no interchange of employees with the stores within respondent's bargaining unit, and that under Board cases they might be a separate appropriate unit for bargaining purposes. Concluding that the unit issue raised "interesting legal questions" which "should be disposed of by the Board, rather than by the court," and that under Board procedures neither respondent's contract nor the contract of the union at the acquired stores foreclosed the filing of an election petition, the court found reasonable cause to believe that the union's picketing was for recognition as bargaining representative at the acquired stores, citing cases,⁹⁷ and enjoined the picketing.

(4) Publicity Proviso

In some of the injunction cases during the fiscal year unions have claimed that their picketing was exempted from the proscription of section 8(b)(7)(C) by the second proviso (above, p 205), which permits picketing for the purpose of advising the public that the

⁹⁴ *McLeod v Local 456, Teamsters & Chauffeurs Union, IBT (Goldleaf Sales Corp)*, 47 LRRM 2692 (D C S N Y)

⁹⁵ Subsequently the Board proceeding was terminated by entry of an order by the Board upon the union's failure to file exception to the trial examiner's intermediate report finding a violation of the act. *Goldleaf Sales Corp*, Case No 2-CP-61

⁹⁶ *Schauffler v Local 1357, Retail Clerks International Assn (Best Markets, Inc)*, 48 LRRM 2610 (D C E Pa)

⁹⁷ D G, *McLeod v National Maritime Union (Moore-McCormack Lines, Inc)* 157 F Supp 691 (D C S N Y)

employer does not employ members of or have a contract with the union as long as the picketing does not cause a secondary stoppage

During fiscal 1960, the district court in *Stork Club*⁹⁸ found that when the unions, after a section 8(b)(7)(C) charge had been filed, wrote the employer withdrawing their requests for recognition and changed their picket signs to assert that the employer "Does Not Have a Contract With" the unions and the employees "Do Not Enjoy Union Wages, Hours and Working Conditions," they nonetheless continued to have a recognition objective and that the picketing, therefore, violated section 8(b)(7)(C). On appeal during fiscal 1961, the Second Circuit reversed the district court's conclusion that the disclaimer letter was insufficient to clear the way for proviso picketing but, because the picketing with the changed signs continued to stop deliveries, remanded the case to the district court for the entry of an order restraining the picketing only insofar as it affected deliveries.⁹⁹ On a subsequent appeal, the court modified the district court's order on remand so as to restrict the prohibition against picketing to those hours when it had been found that deliveries normally were made, but retained jurisdiction in the district court to modify the order "from time to time as may be required in the interests of justice."¹

In *Charlie's Car Wash*² the court rejected the contention that the picketing was merely "informational" and found it was for "an object, not merely an ultimate object either to force or require acceptance by Charlie's of the union as a bargaining representative, or to force or require organization of the employees," in view of prior demands for a contract, evidence of current organizational activities, and the "attempt made to discourage pickups and deliveries by methods beyond reliance on sympathy with the union." The picketing was therefore enjoined.

In several other cases,³ where the union's proviso picketing resulted in the stoppages of pickups and deliveries by suppliers and trucking companies at the employer's premises, the courts issued injunctions finding that the picketing, by reason of this, was not exempt from the prohibition of section 8(b)(7)(C). In *Barker Brothers*,⁴ however, where the union had publicized that the picketing

⁹⁸ *McLeod v Chefs, Cooks, Pastry Cooks & Assistants (Stork Club Restaurant)*, 181 F Supp 742 (DC S NY)

⁹⁹ *McLeod v Chefs, Cooks, Pastry Cooks & Assistants*, 280 F 2d 760 (CA 2)

¹ *McLeod v Chefs, Cooks, Pastry Cooks & Assistants*, 286 F 2d 727 (CA 2) See also 130 NLRB 543 and 135 NLRB No 122

² *Cosenimo v Local 618, Automotive, Petroleum & Allied Industries Employees Union (Charlie's Car Wash)*, 47 LRRM 2309 (DC E Mo)

³ See *Sperry v Local 101, International Union of Operating Engineers (Sherwood Construction Co)*, 47 LRRM 2481 (DC Kans), *McLeod v Local 456, Teamsters & Chauffeurs Union, IBT (Goldleaf Sales Corp)*, 47 LRRM 2692. Subsequently the Board proceeding was terminated by entry of an order by the Board upon the union's failure to file exception to the trial examiner's intermediate report finding a violation of the act *Goldleaf Sales Corp*, Case No 2-CP-61

⁴ *Kennedy v Retail Clerks Union Local 324 (Barker Bros Corp and Gold's, Inc)*, 48 LRRM 2158 (DC S Calif)

was not intended to disrupt deliveries, and there was no evidence which contradicted this "expressed intention," the court refused to find that temporary interruptions to deliveries until the driver "checked with his union that deliveries were not to be interfered with," or other refusals which had no "causal connection" with the picketing, were sufficient to remove the picketing from the protection of the proviso and denied the injunction.

VIII

Contempt Litigation

Petitions for adjudication in civil or criminal contempt of parties for noncompliance with decrees enforcing Board orders were filed in eight cases during fiscal 1961. In three of these cases, the petitions were granted,¹ in three, the petitions were withdrawn following compliance by respondents during the course of the proceedings,² and two remained open.³

During this year, opinions of some interest were rendered in two cases instituted the previous year, *Tempest Shirt Manufacturing Co., Inc.*,⁴ and *Olson Rug Co.*⁵ In *Tempest*, the Fifth Circuit adjudged a successor corporation, which had not participated in the original proceedings, in civil contempt for refusing to remedy the unfair labor practices of its predecessor. And in *Olson*, the Seventh Circuit approved a Special Master's limited discovery order against the Board in connection with the reference before him.

In *Tempest*, the enforcing decree had required Tempest, its officers, agents, successors, and assigns to reinstate three of its former employees because of discrimination against them. Prior to the issuance of the underlying Board order, Tempest's plant, equipment, and work force were taken over by Pascal Corporation as the result of the division of business interests between Robert Pascal and others who shared the proprietary interests in Tempest. Pascal contended that because the transfer of Tempest's business interests to Pascal Corporation was a bona fide business transaction and was not designed to continue Tempest in disguise for the purpose of evading the decree, Pascal Corporation was not a successor within its purview. But the court, noting that Pascal's proprietary interest in the plant never substantially changed, that he continuously exerted managerial

¹ *NLRB v Royal, Inc.*, adjudged Feb 23, 1961 (CA 1, No 5053), *NLRB v Gustavo Stanzone*, adjudged Feb 20, 1961 (CA 2), *NLRB v F M Reeves & Sons, Inc.*, adjudged Jan 19, 1961, reported at 47 LRRM 2480, certiorari denied 366 U.S. 914 (CA 10, No 6125).

² *NLRB v Habib Marcus* (CA 2), *NLRB v Pioneer Wagon Works, Inc.* (CA 6, No 13755), *NLRB v Detroit Plastics Products Co.* (CA 6, No 13819).

³ *NLRB v Editorial "El Imparcial" Inc.* (CA 1, No 5568), *NLRB v Local 901, IIA (Huron Stevedoring Co.)* (CA 2).

⁴ *NLRB v Tempest Shirt Manufacturing Co., Inc.*, 285 F.2d 1 (CA 5).

⁵ *NLRB v Olson Rug Co.*, 291 F.2d 655 (CA 7).

authority, and that the industry remained essentially the same after the transfer of ownership, imposed liability on Pascal Corporation and Robert Pascal, under the decree, notwithstanding that the transfer of the business was carried out at "arms length"

In the course of the contempt hearing in *Olson*, the Special Master directed the Board to turn over to him the Region's investigative files in the case, so that he might extract and turn over to the company documentary evidence, if any, relevant to the company's defense that it withdrew recognition from the union in good faith. On interlocutory appeal, the Seventh Circuit held that the Special Master's restricted "Jencks-type" discovery order was a reasonable exercise of his power, in representing the court, to assure a fair determination of the company's contempt. The court found that the Master's proposed procedure "properly struck a balance between the needs of Olson for relevant objective evidence of its good faith and the policy of confidentiality of government files." In so doing, the court cautioned that "its holding in this review is expressly limited in its application to contempt proceedings of the character now before us."

IX

Miscellaneous Litigation

Litigation for the purpose of aiding or protecting the Board's processes during fiscal 1961 was concerned primarily with the defense of suits by parties seeking review or nullification of orders in representation proceedings. Two cases involved the Board's assertion or nonassertion of jurisdiction: one, the Board's assertion of jurisdiction¹ over an employer located on an Indian reservation; and the other, the Board's refusal to assert jurisdiction over a proprietary hospital. And two other cases involved the Board's refusal to recognize a contract as a bar² to a representation election: one, because the contract contained a "hot cargo" clause; and the other, because it contained an unlawful union-security clause which the parties sought to amend and cure by a supplemental agreement.

1. The Board's Jurisdiction

a. Employer on Indian Reservation

In *The Navajo Tribe*,³ the Court of Appeals for the District of Columbia Circuit was faced with the somewhat novel question of whether an Indian tribe could enjoin the Board from holding a representation election among the employees of the Texas-Zinc Minerals Corporation, a company located on its reservation. In its complaint, the Navajo Tribe alleged that the Board lacked jurisdiction to conduct the election because (1) the Treaty of 1868 between the Navajo Tribe and the United States, providing the Tribe with certain powers of self-government, vested the Tribe with exclusive authority to regulate labor relations on the Indian reservation; (2) the National Labor Relations Act was not intended to apply to commerce with an Indian tribe or to interstate commerce resulting from business activities located on an Indian reservation in the absence of express provision to that effect in the Act, and (3) Congress had not exercised its constitutional power in the National Labor Relations Act to regulate commerce "with the Indian Tribes."

¹ For a full discussion of the Board's jurisdiction see above, pp 22-31

² For a discussion of the Board's contract bar rules, see above, pp 39-52

³ *The Navajo Tribe v N L R B*, 288 F 2d 162 (C A D C), certiorari denied 366 U S 928

The court of appeals, in affirming the district court's dismissal of the complaint,⁴ rejected these contentions. According to the court, Congress' adoption of a national labor policy was intended to supersede all local policies, State or tribal, where the employer's operations affect interstate commerce. Therefore, in determining that the Act "clearly applie[d] to the [employer] because it is engaged in the production of goods for interstate commerce," the court concluded that the circumstance that its plant was located on the Navajo reservation could not remove it or its employees from the coverage of the Act.⁵ Thus, as the court determined, "[t]he Board regulates labor disputes affecting interstate commerce, and the Act authorizes it to do so without stating any exception which would preclude its acting with respect to a plant located within an Indian reservation, or one employing Indians."⁶

b Proprietary Hospital

In *Fitch Sanitarium*,⁷ plaintiff, a proprietary hospital, contended that the Board's refusal to entertain a representation petition filed by it under section 9(c)(1)(B) of the act⁸ constituted a violation of the proviso to section 14(c)(1) of the act which states that ". . . the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959." In support of this contention, plaintiff pointed to several cases antedating August 1, 1959, in which the Board had assumed jurisdiction over proceedings involving proprietary hospitals. Without deciding whether those cases were distinguishable, the court of appeals held that the proviso to section 14 contemplated "a standard more definitely formulated than one said to arise by the assumption of jurisdiction in a few cases."⁹ Therefore, having determined that the Board had no jurisdictional standard prior to August 1, 1959, pursuant to which it would have asserted jurisdiction over proprietary hospitals like Fitch, the court concluded that section 14(c)(1) authorized, rather than prohibited, the declination of juris-

⁴ *The Navajo Tribe v NLRB*, 46 LRRM 2130 (D C D C)

⁵ 288 F 2d at 164

⁶ *Id* at 165

⁷ *Leedom v Fitch Sanitarium*, 294 F 2d 251 (C A D C)

⁸ In refusing to entertain this petition, the Board adhered to its decision in *Flatbush General Hospital*, 126 NLRB 144, where it had established a policy of not asserting jurisdiction over proceedings involving proprietary hospitals as a class. This policy was based upon the authority conferred by sec 14(c)(1) of the act, a provision added by the 1959 amendments which empowers the Board to "decline to assert jurisdiction over any labor dispute involving any class or category of employers where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction," provided that the Board may not decline "to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959."

⁹ 294 F 2d at 254

diction which plaintiff sought to challenge. Accordingly, the court of appeals reversed the district court's order¹⁰ requiring the Board to assert jurisdiction over proceedings involving plaintiff Fitch and directed the lower court to dismiss the complaint.

2. The Board's Contract-Bar Rules

a. Effect of "Hot Cargo" Clause

In *Local 1545, United Brotherhood of Carpenters v Vincent*,¹¹ plaintiff union, party to a collective-bargaining contract, sought to enjoin the holding of a representation election on the ground that the Board's refusal to accord contract-bar status to the agreement because it contained a "hot cargo" clause¹² violated constitutional protections, since the clause was not unlawful at the time the contract was executed. In addition to challenging the Board's retroactive application of this new contract-bar rule, whereby contracts containing such clause would not constitute a bar to an election, plaintiff alleged that the rule itself contravened section 8(e) of the act¹² by attaching to "hot cargo" clauses a heavier sanction than Congress intended.

The court of appeals, in affirming the district court's dismissal of the complaint,¹³ held that the Board's decision not to accord contract-bar protection to agreements, existing as well as future, which contained "hot cargo" clauses raised no constitutional issue because the grant of such protection lay wholly in the discretionary authority of the Board and not upon constitutional compulsion. Moreover, upon an analysis of section 8(e), the court rejected plaintiff's further contention that the Board's determination constituted a violation of section 8(e), which, under the Supreme Court's decision in *Leedom v Kyne*,¹⁴ could be redressed by a suit in a Federal district court. Thus, as the court of appeals held, "*Leedom v Kyne* would be precisely applicable only if [section 8(e)] had said that the Board should not deprive existing agreements, or existing and future agreements, of contract-bar protection solely because of hot-cargo clauses, this it did not do."¹⁵

In these circumstances, the court concluded that plaintiff could prevail only if *Leedom v Kyne* were not limited to the case of a Board representation determination "flouting a clear statutory command," but instead recognized district court jurisdiction "to enjoin represen-

¹⁰ *Fitch Sanitarium v Leedom*, 47 LRRM 2095 (D C D C)

¹¹ 286 F 2d 127 (CA 2)

¹² But see *Food Haulers, Inc.*, 136 NLRB No 36, where the Board reversed its former contract bar rule as to "hot cargo" agreements.

¹³ This provision was added by the 1959 amendments and, in part, makes so-called "hot cargo" clauses "unenforceable and void."

¹⁴ *Local 1545, United Brotherhood of Carpenters v Vincent*, 187 F Supp 921 (D C N Y)

¹⁵ 358 US 184 (1958)

¹⁶ 286 F 2d at 132

tation orders whenever there is colorable allegation that the Board has misread the declared will of Congress and the remedy afforded by § 9(d) is likely to prove inadequate ”¹⁶ Such an interpretation of *Leedom v Kyne*, feared by Mr Justice Brennan in his dissent, was found by the court not to have been borne out in view of the unanimous rejection of attempts to review Board representation determinations in suits since that decision, nor to be warranted in light of the Supreme Court’s intention to do no more than carve out a “narrow exception to a rule [of limited judicial review] that is founded on important considerations of history and policy ”

b Amendment of Illegal Union-Security Clause

The Board’s refusal to accord contract-bar protection to a collective-bargaining agreement also served as the basis of an incumbent union’s suit to enjoin the holding of a representation election in *McLeod v Local 476, United Brotherhood of Industrial Workers*¹⁷ There the Board, in applying its *Keystone* rule,¹⁸ held that a supplemental agreement, by which the parties sought to amend and cure an illegal union-security clause contained in a contract as originally executed, could not make the initial contract a bar to a representation election In its suit, plaintiff claimed that the Board’s determination transgressed constitutional requirements of due process

The district court, while declining to interfere with the holding of the election, in which the employees chose to be represented by a union other than plaintiff, subsequently ordered the election to be set aside¹⁹ The court of appeals, however, reversed the district court, holding that it should have dismissed the complaint for lack of jurisdiction over the subject matter In the court’s view, Congress granted “the Board much freedom of action in its handling of representation matters, including questions of contracts as bars to elections ”²⁰

¹⁶ *Ibid*

¹⁷ 288 F 2d 198 (CA 2)

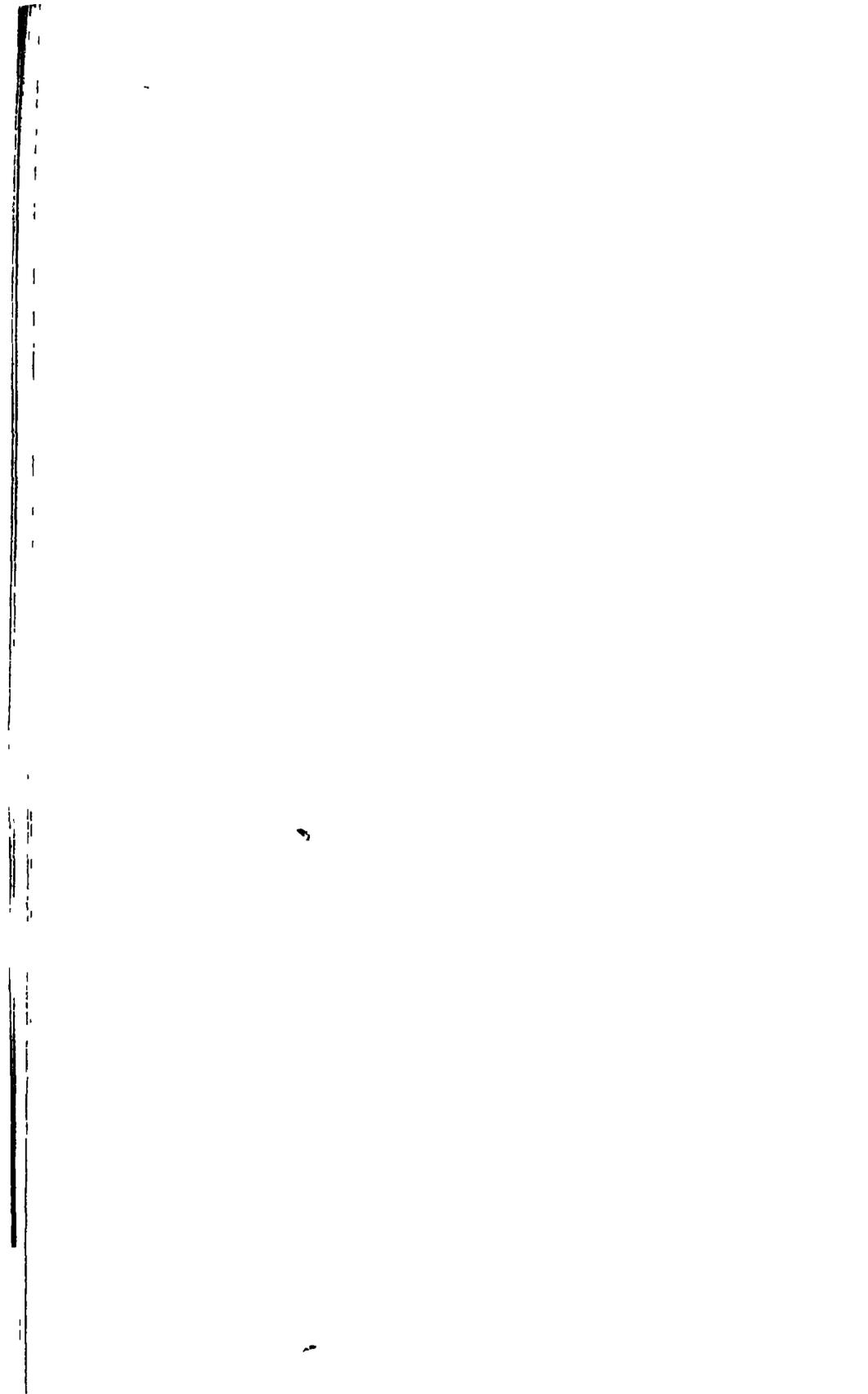
¹⁸ *Keystone Coat, Apron & Towel Supply Co*, 121 NLRB 880 (1958) In *Keystone*, the Board, in an effort to simplify certain of its contract bar rules, decided that, for contract-bar purposes, the validity of union-security clauses would be determined solely upon the face of the provision as originally executed The Board further determined that curative amendments to illegal union-security clauses would be insufficient to make contracts containing such clauses effective bars to an election But see *Paragon Products Corp*, 134 NLRB No 86, decided after the close of the fiscal year, which revised these rules

¹⁹ *Local 476, United Brotherhood of Industrial Workers v McLeod*, 46 LRRM 2454 (DC ENY), see also, 46 LRRM 3189 (DC ENY)

²⁰ *Id* at 201

Though construing the complaint most favorably to the plaintiff, the court concluded that it did not establish constitutional impairment, which was the primary basis of the suit and the prerequisite to the jurisdiction of the district court. For, as the court stated, "If the Board has, in the instant case, exercised its discretion unwisely, even unreasonably, that raises no constitutional issue."²¹

²¹ *Ibid*



APPENDIX A

Statistical Tables for Fiscal Year 1961

Table 1.—Total Cases Received, Closed, and Pending (Complainant or Petitioner Identified), Fiscal Year 1961

	Number of cases				
	Total	Identification of complainant or petitioner			
		AFL-CIO affiliates	Unaffiliated unions	Individuals	Employers
All cases¹					
Pending July 1, 1960.....	7,007	2,556	1,268	2,277	896
Received fiscal 1961.....	22,691	8,908	4,998	6,321	2,464
On docket fiscal 1961.....	29,698	11,484	6,276	8,598	3,360
Closed fiscal 1961.....	22,405	8,711	4,908	6,353	2,433
Pending June 30, 1961.....	7,293	2,738	1,368	2,245	927
Unfair labor practice cases					
Pending July 1, 1960.....	4,858	1,383	531	2,165	779
Received fiscal 1961.....	12,132	3,298	1,445	5,664	1,725
On docket fiscal 1961.....	16,990	4,681	1,976	7,829	2,504
Closed fiscal 1961.....	12,116	3,238	1,374	5,732	1,772
Pending June 30, 1961.....	4,874	1,443	602	2,097	732
Representation cases					
Pending July 1, 1960.....	2,142	1,173	747	105	117
Received fiscal 1961.....	10,508	5,010	3,553	606	739
On docket fiscal 1961.....	12,650	6,783	4,300	711	856
Closed fiscal 1961.....	10,242	5,473	3,534	574	661
Pending June 30, 1961.....	2,408	1,310	766	137	195
Union shop deauthorization cases					
Pending July 1, 1960.....	7	-----	-----	7	-----
Received fiscal 1961.....	51	-----	-----	51	-----
On docket fiscal 1961.....	58	-----	-----	58	-----
Closed fiscal 1961.....	47	-----	-----	47	-----
Pending June 30, 1961.....	11	-----	-----	11	-----

¹ Definitions of types of cases used in tables.—The following designations, used by the Board in numbering cases, are used in the tables in this appendix to designate the various types of cases

- CA A charge of unfair labor practices against an employer under sec 8(a)
- CB A charge of unfair labor practices against a labor organization under sec 8(b) (1), (2), (3), (5), (6)
- CC A charge of unfair labor practices against a labor organization under sec 8(b)(4)(A), (B), (C)
- CD A charge of unfair labor practices against a labor organization under sec 8(b)(4)(D)
- CE A charge of unfair labor practices against a labor organization and employer under sec 8(e)
- CP A charge of unfair labor practices against a labor organization under sec 8(b)(7) (A), (B), (C)
- RC A petition by a labor organization or employees for certification of a representative for purposes of collective bargaining under sec 9(c)(1)(A)(i)
- RM A petition by employer for certification of a representative for purposes of collective bargaining under sec. 9(c)(1)(B)
- RD A petition by employees under sec 9(c)(1)(A)(ii) asserting that the union previously certified or currently recognized by their employer as the bargaining representative, no longer represents a majority of the employees in the appropriate unit
- UD A petition by employees under sec 9(e)(1) asking for a referendum to rescind a bargaining agent's authority to make a union-shop contract under sec 8(a)(3)

Table 1A.—Unfair Labor Practice and Representation Cases Received, Closed, and Pending (Complainant or Petitioner Identified), Fiscal Year 1961

	Number of unfair labor practice cases					Number of representation cases				
	Total	Identification of complainant				Total	Identification of petitioner			
		AFL-CIO affiliates	Unaffiliated unions	Individuals	Employers		AFL-CIO affiliates	Unaffiliated unions	Individuals	Employers
	CA cases ¹					RC cases ¹				
Pending July 1, 1960.....	3,197	1,340	500	1,355	2	1,921	1,173	747	1	0
Received fiscal 1961.....	8,136	3,184	1,382	3,566	4	9,177	5,608	3,550	18	1
On docket fiscal 1961.....	11,333	4,524	1,882	4,921	6	11,098	6,781	4,297	19	1
Closed fiscal 1961.....	8,117	3,131	1,307	3,676	3	9,022	5,472	3,632	17	1
Pending June 30, 1961.....	3,216	1,393	575	1,245	3	2,076	1,309	765	2	0
	CB cases ¹					RM cases ¹				
Pending July 1, 1960.....	1,108	32	24	797	255	117	0			117
Received fiscal 1961.....	2,520	80	41	2,028	371	738	1			737
On docket fiscal 1961.....	3,628	112	65	2,825	626	855	1			854
Closed fiscal 1961.....	2,556	78	41	1,990	447	659	0			659
Pending June 30, 1961.....	1,072	34	24	835	179	196	1			195
	CC cases ¹					RD cases ¹				
Pending July 1, 1960.....	388	7	6	8	367	104	0	0	104	0
Received fiscal 1961.....	815	8	12	51	744	593	1	3	588	1
On docket fiscal 1961.....	1,203	15	18	59	1,111	697	1	3	692	1
Closed fiscal 1961.....	897	6	17	51	813	561	1	2	557	1
Pending June 30, 1961.....	316	9	1	8	298	136	0	1	135	0

CD cases ¹						
Pending July 1, 1960.....	65	4	0	2	59	
Received fiscal 1961.....	288	15	4	12	257	
On docket fiscal 1961.....	353	19	4	14	316	
Closed fiscal 1961.....	239	16	3	11	209	
Pending June 30, 1961.....	114	3	1	3	107	
CE cases ¹						
Pending July 1, 1960.....	11	0	1	0	10	
Received fiscal 1961.....	57	4	2	4	47	
On docket fiscal 1961.....	68	4	3	4	57	
Closed fiscal 1961.....	34	1	3	1	29	
Pending June 30, 1961.....	34	3	0	3	28	
CP cases ¹						
Pending July 1, 1960.....	89	0	0	3	86	
Received fiscal 1961.....	316	7	4	3	302	
On docket fiscal 1961.....	405	7	4	6	388	
Closed fiscal 1961.....	283	6	3	3	271	
Pending June 30, 1961.....	122	1	1	3	117	

¹ See table 1, footnote 1, for definitions of types of cases

Table 2.—Types of Unfair Labor Practices Alleged, Fiscal Year 1961

A CHARGES FILED AGAINST EMPLOYERS UNDER SEC 8(a)

	Number of cases showing specific allegations	Percent of total cases		Number of cases showing specific allegations	Percent of total cases
Total cases	1 8,136	1 100 0	8(a)(3)	6,240	76 7
8(a)(1)	8,136	100 0	8(a)(4)	238	2 9
8(a)(2)	653	8 0	8(a)(5)	1,676	20 6

B CHARGES FILED AGAINST UNIONS UNDER SEC 8(b)

	Number of cases showing specific allegations	Percent of total cases		Number of cases showing specific allegations	Percent of total cases
Total cases	1 3,939	1 100 0	8(b)(3)	217	5 5
8(b)(1)	2 181	55 4	8(b)(4)	1,103	28 0
8(b)(2)	1,958	49 7	8(b)(5)	13	3
			8(b)(6)	17	4
			8(b)(7)	316	8 0

C ANALYSIS OF 8(b)(4) AND 8(b)(7)

	Number of cases showing specific allegations	Percent of total cases		Number of cases showing specific allegations	Percent of total cases
Total cases 8(b)(4)	1 1,103	1 100 0	Total cases 8(b)(7)	1 316	1 100 0
8(b)(4)(A)	183	16 6	8(b)(7)(A)	58	18 4
8(b)(4)(B)	745	67 5	8(b)(7)(B)	22	7 0
8(b)(4)(C)	19	1 7	8(b)(7)(C)	248	78 5
8(b)(4)(D)	288	26 1			

D CHARGES FILED AGAINST UNIONS AND EMPLOYERS UNDER SEC 8(e)

Total cases 8(e)	57	100 0			
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¹ A single case may include allegations of violations of more than one section of the act. Therefore, the total of the various allegations is more than the figures for total cases.

² An 8(a)(1) is a general provision forbidding any type of employer interference with the rights of the employees guaranteed by the act, and therefore is included in all charges of employer unfair labor practices.

Table 3.—Formal Action Taken, by Number of Cases, Fiscal Year 1961

Formal action taken	All cases	Unfair labor practice cases			Representation cases
		All O cases ¹	CA cases ¹	Other O cases ¹	
Complaints issued	1,621	1,621	1,104	457	
Notices of hearing issued	5,687	76		76	5,612
Cases heard	3,983	1,047	746	301	2,936
Intermediate reports issued	1,056	1,056	772	284	
Decisions issued, total	3,798	1,106	766	340	2,092
Decisions and orders	885	885	645	240	
Decisions and consent orders	221	221	121	100	
Elections directed by Board	2,166				2,166
Elections directed by regional directors	52				52
Rulings on objections and/or challenges in stipulated election cases	204				204
Dismissals on record	270				270

¹ See table 1, footnote 1, for definitions of types of cases

² Includes 102 cases decided by adoption of intermediate report in absence of exceptions

³ Includes 17 cases decided by adoption of intermediate report in absence of exceptions

Table 4.—Remedial Action Taken in Unfair Labor Practice Cases Closed, Fiscal Year 1961

A BY EMPLOYERS¹

	Total	By agree- ment of all parties	By Board or court order
Cases			
Notice posted.....	1,775	1,299	476
Recognition or other assistance withheld from employer-assisted union.....	189	152	37
Employer-dominated union disestablished ..	20	17	3
Workers placed on preferential hiring list ..	92	81	11
Collective bargaining begun ..	319	232	87
Workers			
Workers offered reinstatement to job ..	2,507	1,774	733
Workers receiving backpay.....	3,448	2,145	1,303
Backpay awards ..	\$1,401,240	\$616,780	\$884,460

B BY UNIONS⁴

	Cases		
Notice posted.....	934	778	156
Union to cease requiring employer to give it assistance.....	188	160	28
Notice of no objection to reinstatement of discharged employees ..	90	69	21
Collective bargaining begun ..	43	39	4
Workers			
Workers receiving backpay ..	251	140	111
Backpay awards.....	\$107,660	\$52,120	\$55,540

¹ In addition to the remedial action shown, other forms of remedy were taken in 185 cases

² Includes 78 workers who received backpay from both employer and union

³ Includes 73 workers who received backpay from both employer and union

⁴ In addition to the remedial action shown, other forms of remedy were taken in 199 cases

Table 5.—Industrial Distribution of Unfair Labor Practice and Representation Cases Received, Fiscal Year 1961

Industrial group ¹	Unfair labor practice cases								Representation cases			
	All cases	All C cases	CA :	CB :	CC :	CD :	CE :	CP :	All R cases	RC :	RM :	RD :
Total.....	22,640	12,132	8,136	2,520	815	288	57	316	10,508	9,177	738	593
Manufacturing.....	11,469	5,676	4,342	889	242	90	19	94	5,793	5,091	340	362
Ordnance and accessories.....	20	9	5	4	0	0	0	0	11	9	1	1
Food and kindred products.....	1,824	860	651	117	54	13	8	17	964	858	63	43
Tobacco manufacturers.....	24	18	12	4	1	1	0	0	6	5	0	1
Textile mill products.....	264	145	116	23	1	0	0	5	119	100	8	11
Apparel and other finished products made from fabric and similar materials.....	423	298	199	57	18	3	2	19	125	100	14	11
Lumber and wood products (except furniture).....	480	179	149	19	5	0	0	6	301	247	37	17
Furniture and fixtures.....	460	248	214	29	3	0	0	2	212	186	14	12
Paper and allied products.....	402	155	118	27	7	2	0	1	247	233	4	10
Printing, publishing, and allied industries.....	669	296	211	44	19	11	4	7	373	334	17	22
Chemicals and allied products.....	658	267	205	36	13	7	0	6	391	348	21	22
Products of petroleum and coal.....	174	81	60	14	7	0	0	0	93	70	6	17
Rubber products.....	403	188	160	23	4	0	0	1	215	189	7	19
Leather and leather products.....	182	107	89	14	1	0	0	3	75	68	4	3
Stone, clay and glass products.....	621	297	227	44	14	8	0	4	324	298	15	11
Primary metal industries.....	670	328	258	58	6	5	0	1	342	308	15	19
Fabricated metal products (except machinery and transportation equipment).....	1,167	576	476	70	10	13	1	6	591	522	33	36
Machinery (except electrical).....	862	380	315	50	14	1	0	0	482	413	28	41
Electrical machinery, equipment, and supplies.....	844	451	337	87	19	3	1	4	393	330	24	39
Aircraft and parts.....	220	152	107	30	14	0	1	0	68	51	10	7
Ship and boat building and repairing.....	154	107	68	30	5	2	0	2	47	45	1	1
Automotive and other transportation equipment.....	388	223	159	33	14	12	0	5	165	147	8	10
Professional, scientific, and controlling instruments.....	129	64	49	7	4	4	0	0	65	63	2	0
Miscellaneous manufacturing.....	431	247	157	69	9	5	2	5	184	167	8	9
Agriculture, forestry, and fisheries.....	15	5	5	0	0	0	0	0	10	10	0	0
Mining.....	226	140	99	27	5	5	1	3	86	76	6	4
Metal mining.....	52	19	16	3	0	0	0	0	33	32	0	1
Coal mining.....	93	75	46	20	3	3	0	3	18	14	4	0
Crude petroleum and natural gas production.....	13	6	1	2	1	2	0	0	7	6	1	0
Nonmetallic mining and quarrying.....	68	40	36	2	1	0	1	0	28	24	1	3

Construction.....	2,493	2,145	799	831	317	136	10	52	348	297	48	3
Wholesale trade.....	1,549	553	422	57	40	3	1	30	996	855	83	58
Retail trade.....	2,724	1,146	877	122	60	3	7	77	1,578	1,377	128	73
Finance, insurance, and real estate.....	91	50	38	5	5	1	0	1	41	39	2	0
Transportation, communication, and other public utilities.....	2,676	1,634	1,024	407	117	40	12	34	1,042	885	87	70
Local passenger transportation.....	148	92	73	19	0	0	0	0	56	44	4	8
Motor freight, warehousing, and transportation services.....	1,688	1,031	665	223	83	20	11	29	657	557	66	34
Water transportation.....	390	299	137	129	17	13	1	2	91	81	3	7
Other transportation.....	57	32	27	1	3	0	0	1	25	23	2	0
Communications.....	218	98	70	17	7	2	0	2	120	92	10	18
Heat, light, power, water, and sanitary services.....	175	82	52	18	7	5	0	0	93	88	2	8
Services.....	1,397	783	530	182	29	10	7	25	614	547	44	23

¹ Source Standard Industrial Classification, Division of Statistical Standards, U S Bureau of the Budget, Washington 1957

² See table 1, footnote 1, for definitions of types of cases

Table 6.—Geographic Distribution of Unfair Labor Practice and Representation Cases Received, Fiscal Year 1961

Division and State	All cases	Unfair labor practice cases							Representation cases			
		All C cases	CA :	OB :	CC :	CD :	CE :	OP :	All R cases	RC :	RM :	RD :
Total.....	22,640	12,132	8,136	2,520	815	288	57	316	10,508	9,177	738	593
New England.....	992	472	356	63	30	3	1	19	520	458	28	84
Maine.....	71	31	23	5	1	0	0	2	40	33	4	3
New Hampshire.....	50	16	15	0	1	0	0	0	34	31	3	0
Vermont.....	24	12	10	1	1	0	0	0	12	10	0	2
Massachusetts.....	554	258	194	41	15	0	1	7	296	266	13	17
Rhode Island.....	92	50	24	9	9	1	0	7	42	37	3	2
Connecticut.....	201	105	90	7	3	2	0	3	96	81	5	10
Middle Atlantic.....	4,846	2,829	1,626	761	231	90	11	110	2,017	1,768	136	113
New York.....	2,369	1,412	838	366	93	43	6	66	957	834	68	55
New Jersey.....	1,076	592	320	154	68	22	3	25	484	430	33	21
Pennsylvania.....	1,401	825	468	241	70	25	2	19	576	504	35	37
East North Central.....	4,929	2,643	1,904	514	124	48	12	41	2,286	1,989	151	146
Ohio.....	1,376	681	483	140	35	9	5	9	695	609	44	42
Indiana.....	635	357	262	68	14	1	2	10	278	257	9	12
Illinois.....	1,366	790	561	173	26	18	3	9	576	522	37	17
Michigan.....	1,245	696	513	113	42	18	1	9	549	444	45	60
Wisconsin.....	307	119	85	20	7	2	1	4	188	157	16	15
West North Central.....	1,494	631	471	90	42	12	6	10	863	770	47	37
Iowa.....	182	46	37	5	2	0	0	2	136	124	8	4
Minnesota.....	245	70	46	10	11	0	1	2	175	153	9	13
Missouri.....	642	332	242	60	13	8	5	4	310	283	14	13
North Dakota.....	37	9	9	0	0	0	0	0	28	25	2	1
South Dakota.....	53	16	16	0	0	0	0	0	37	35	0	2
Nebraska.....	136	64	50	4	9	1	0	0	72	67	5	0
Kansas.....	199	94	71	11	7	3	0	2	105	92	9	4

	3, 022	1, 870	1, 295	382	185	40	4	28	1, 153	1, 043	61	49
South Atlantic.....												
Delaware.....	89	63	23	18	3	7	0	2	26	34	0	2
Maryland.....	325	144	58	17	18	16	1	4	181	168	0	4
District of Columbia.....	147	108	32	17	11	4	0	4	79	70	0	3
Virginia.....	249	113	96	8	6	0	0	3	188	139	4	8
West Virginia.....	186	98	46	25	14	0	0	5	67	83	6	6
North Carolina.....	236	129	115	11	11	0	0	1	107	86	7	6
South Carolina.....	115	61	49	9	2	0	0	0	64	45	7	2
Georgia.....	376	210	148	38	11	0	2	7	166	146	9	8
Florida.....	1 291	994	688	219	66	15	0	6	297	289	14	14
East South Central.....	1, 088	583	442	99	18	15	1	8	475	421	39	15
Kentucky.....	267	119	84	20	6	6	0	4	148	135	6	7
Tennessee.....	452	287	227	44	7	6	1	2	168	167	22	6
Alabama.....	231	136	99	28	4	3	0	2	95	87	7	1
Mississippi.....	78	41	32	7	1	1	0	0	37	32	4	1
West South Central.....	1, 483	784	568	183	57	18	0	13	699	590	68	41
Arkansas.....	180	91	71	13	6	1	0	0	89	81	6	2
Louisiana.....	316	198	117	42	19	4	0	6	128	107	15	6
Oklahoma.....	134	37	37	1	2	0	0	2	92	74	9	6
Texas.....	853	453	343	77	30	8	0	5	390	328	38	24
Mountain.....	1 052	598	409	70	43	19	2	14	464	427	38	19
Montana.....	91	50	32	9	2	4	0	3	41	30	11	0
Idaho.....	102	45	4	4	0	0	1	0	57	49	3	6
Wyoming.....	76	60	47	1	2	0	0	0	28	18	6	3
Colorado.....	403	247	184	23	27	10	0	3	195	150	3	3
New Mexico.....	89	52	33	14	2	3	0	0	37	37	0	0
Arizona.....	164	71	32	17	12	2	1	7	93	75	11	7
Utah.....	94	50	24	5	1	0	0	0	64	51	3	0
Nevada.....	43	23	17	3	2	0	0	1	20	17	2	1
Pacific.....	3, 001	1, 439	838	368	118	41	20	64	1, 562	1, 281	189	122
Washington.....	429	201	151	63	19	11	6	11	168	125	27	16
Oregon.....	253	91	72	12	1	0	0	6	142	107	19	16
California.....	2, 389	1, 087	615	283	98	30	14	47	1, 252	1, 049	113	90
Outlying areas.....	762	313	227	64	12	1	0	9	449	421	11	17
Alaska.....	81	51	25	20	2	1	0	3	80	24	3	3
Hawaii.....	225	96	40	8	2	0	0	0	109	104	1	4
Puerto Rico.....	449	206	156	36	8	0	0	6	243	227	6	10
Virgin Islands.....	7	0	0	0	0	0	0	0	7	6	1	0

1 The States are grouped according to the method used by the Bureau of the Census, U S Department of Commerce
 2 See table 1, footnote 1, for definitions of types of cases

After Board decision, before court decree.....	458	3 8	358	4 4	79	3 1	17	1 9	0	0	0	0	4	1 4
Compliance.....	294	2 4	234	2 9	46	1 8	14	1 6	0	0	0	0	0	0
Withdrawn.....	2	(¹)	0	0	2	1	0	0	0	0	0	0	0	0
Dismissed.....	157	1 3	120	1 5	30	1 2	3	3	0	0	0	0	4	1 4
Otherwise.....	5	1	4	(¹)	1	(¹)	0	0	0	0	0	0	0	0
After circuit court decree, before Supreme Court action.....	214	1 7	137	1 7	34	1 3	40	4 5	3	1 3	0	0	0	0
Compliance.....	162	1 3	103	1 3	30	1 1	26	2 9	3	1 3	0	0	0	0
Withdrawn.....	4	(¹)	2	(¹)	2	1	0	0	0	0	0	0	0	0
Dismissed.....	48	4	32	4	2	1	14	1 6	0	0	0	0	0	0
After Supreme Court action.....	35	3	27	3	5	2	3	3	0	0	0	0	0	0
Compliance.....	31	3	24	3	4	2	3	3	0	0	0	0	0	0
Dismissed.....	4	(¹)	3	(¹)	1	(¹)	0	0	0	0	0	0	0	0

¹ See table 1, footnote 1, for definitions of types of cases

² Includes 49 cases adjusted before 10(k) notice, 5 cases adjusted after 10(k) notice, 1 adjusted after 10(k) hearing, and 3 cases adjusted after 10(k) Board decision

³ Includes 99 cases withdrawn before 10(k) notice, 15 cases withdrawn after 10(k) notice, 8 withdrawn after 10(k) hearing, and 1 case withdrawn after 10(k) Board decision

⁴ Includes 39 cases dismissed before 10(k) notice, and 12 cases dismissed by 10(k) Board decision

⁵ Less than one-tenth of 1 percent

Table 8.—Disposition of Unfair Labor Practice Cases Closed, Fiscal Year 1961

Stage of disposition	All C cases		CA cases ¹		CB cases ¹		CC cases ¹		CD cases ¹		CE cases ¹		OP cases ¹	
	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed
Total number of cases closed	12,116	100 0	8,117	100 0	2,558	100 0	887	100 0	239	100 0	34	100 0	283	100 0
Before issuance of complaint.....	10,082	83 2	6,790	83 7	2,116	82 8	648	73 1	232	97 1	33	97 1	263	92 9
After issuance of complaint, before opening of hearing ²	955	7 9	825	6 5	258	10 1	155	17 5	2	8	0	0	15	5 3
After hearing opened, before issuance of intermediate report ³	147	1 2	100	1 2	35	1 4	10	1 1	2	8	0	0	0	0
After intermediate report, before issuance of Board decision.....	132	1 1	103	1 3	15	6	13	1 5	0	0	0	0	1	4
After Board order adopting intermediate report in absence of exceptions.....	93	8	77	9	14	5	1	1	0	0	1	2 9	0	0
After Board decision before court decree.....	458	3 8	358	4 4	79	3 1	17	1 9	0	0	0	0	4	1 4
After circuit court decree, before Supreme Court action.	214	1 7	137	1 7	34	1 3	40	4 5	3	1 3	0	0	0	0
After Supreme Court action ⁴	35	3	27	3	5	2	3	3	0	0	0	0	0	0

¹ See table 1, footnote 1, for definitions of types of cases

² Includes cases in which the parties entered into a stipulation providing for Board order and consent decree in the circuit court

³ Includes 45 cases in which a notice of hearing issued pursuant to sec (10)(k) of the act Of these 45 cases, 29 were closed after notice, and 16 were closed after Board decision

⁴ Includes either denial of writ of certiorari or granting of writ and issuance of opinion

Table 9.—Disposition of Representation Cases Closed, Fiscal Year 1961

Stage of disposition	All R cases		RC cases ¹		RM cases ¹		RD cases ¹	
	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed	Number of cases	Percent of cases closed
Total number of cases closed.....	10,242	100 0	9,022	100 0	659	100 0	561	100 0
Before issuance of notice of hearing.....	4,778	46 7	4,083	45 3	384	58 3	311	55 4
After issuance of notice of hearing, before opening of hearing.....	2,675	26 1	2,419	26 8	148	22 4	108	19 3
After hearing opened before issuance of Board decision.....	460	4 5	402	4 4	27	4 1	31	5 5
After issuance of Board decision.....	2,329	22 7	2,118	23 5	100	15 2	111	19 8

¹ See table 1, footnote 1, for definitions of types of cases

Table 10.—Analysis of Methods of Disposition of Representation Cases Closed, Fiscal Year 1961

Method and stage of disposition	All R cases		RC cases ¹		RM cases ¹		RD cases ¹	
	Number of cases	Percent of cases ² 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..	10,242	100 0	9,022	100 0	659	100 0	561	100 0
Consent election.....	3,124	30 5	2,849	31 6	176	26 7	99	17 7
Before notice of hearing ..	1,948	19 0	1,768	19 6	129	19 0	51	9 1
After notice of hearing, before hearing opened.....	1,012	9 9	939	10 4	38	5 8	35	6 2
After hearing opened, before Board decision	164	1 6	142	1 6	9	1 3	13	2 4
Stipulated election	1,744	17 0	1,615	17 9	80	12 1	49	8 7
Before notice of hearing ..	776	7 6	714	7 9	46	7 0	16	2 9
After notice of hearing, before hearing opened	686	6 7	648	7 2	20	3 0	18	3 2
After hearing opened, before Board decision	93	9	84	9	2	3	7	1 2
After postelection decision	189	1 8	160	1 9	12	1 8	8	1 4
Regional director-directed election ..	27	3	12	1	15	2 3		
Before notice of hearing	24	2	9	1	15	2 3		
After notice of hearing, before hearing opened	3	1	3	(³)				
Withdrawn	2,660	26 0	2,234	24 8	225	34 1	201	35 8
Before notice of hearing ..	1,467	14 3	1,178	13 1	134	20 3	155	27 6
After notice of hearing, before hearing opened	811	7 9	696	7 7	75	11 4	40	7 1
After hearing opened, before Board decision	160	1 6	144	1 6	12	1 8	4	7
After Board decision and direction of election	222	2 2	216	2 4	4	6	2	4
Dismissed.....	881	8 6	674	7 5	88	13 4	119	21 2
Before notice of hearing ..	490	4 8	348	3 9	55	8 3	87	15 5
After notice of hearing, before hearing opened	77	8	54	6	11	1 7	12	2 1
After hearing opened, before Board decision	27	2	22	2	1	2	4	7
By Board decision	² 287	2 8	250	2 8	21	3 2	16	2 9
Board-ordered election	1,806	17 6	1,638	18 1	75	11 4	93	16 6

¹ See table 1, footnote 1, for definitions of types of cases

² Includes 6 RC, 4 RM, and 6 RD cases dismissed by Board order after a direction of election issued but before an election was held

³ Less than one-tenth of 1 percent

Table 11.—Types of Elections Conducted, Fiscal Year 1961

Type of case	Total elections	Type of election				
		Consent ¹	Stipulated ²	Board ordered ³	Regional director directed ⁴	Expedited elections under 8(b)(7)
All elections, total	6,810	3,077	1,713	1,786	8	26
Eligible voters, total	471,260	142,428	171,520	155,988	173	1,150
Valid votes, total	421,428	127,815	155,161	137,853	182	947
RC cases, ⁵ total	6,042	2,810	1,507	1,623		12
Eligible voters	436,181	129,142	158,122	148,059		858
Valid votes	390,461	115,711	143,064	130,983		703
RM cases, ⁵ total	312	162	67	70		13
Eligible voters	14,749	5,448	5,329	3,683		289
Valid votes	12,849	4,702	4,685	3,136		236
RD cases, ⁵ total	241	99	49	92		1
Eligible voters	18,364	6,052	8,069	4,234		9
Valid votes	16,604	5,457	7,412	3,727		8
UD cas.s, ⁵ total	15	6	0	1	8	0
Eligible voters	1,960	1,780	0	7	173	0
Valid votes	1,514	1,355	0	7	182	0

¹ Consent elections are held by an agreement of all parties concerned. Postelection ruling and certification are made by the regional director.

² Stipulated elections are held by an agreement of all parties concerned, but the agreement provides for the Board to determine any objections and/or challenges.

³ Board-ordered elections are held pursuant to a decision and direction of election by the Board. Postelection rulings on objections and/or challenges are made by the Board.

⁴ These elections are held pursuant to direction by the regional director. Postelection rulings on objections and/or challenges are made by the Board.

⁵ See table 1, footnote 1, for definitions of types of cases.

Table 12.—Results of Union-Shop Deauthorization Polls, Fiscal Year 1961

Affiliation of union holding union-shop contract	Number of polls				Employees involved (number eligible to vote)				Valid votes cast					
	Total	Resulting in deauthorization		Resulting in continued authorization		Total eligible	Resulting in deauthorization		Resulting in continued authorization		Total	Percent of total eligible	Cast for deauthorization	
		Number	Percent of total	Number	Percent of total		Number	Percent of total	Number	Percent of total			Number	Percent of total eligible ¹
Total.....	15	9	60 0	6	40 0	1,966	2 02	10 3	1,764	89 7	1,514	77 0	180	9 2
AFL-CIO.....	13	8	61 5	5	38 5	481	195	40 5	286	69 5	416	86 5	173	36 0
Unaffiliated.....	2	1	50 0	1	50 0	1,485	7	5	1,478	99 5	1,098	73 9	7	5

¹ Sec 8(a)(3) of the act requires that, to revoke a union shop provision, a majority of the employees eligible to vote must vote in favor of deauthorization.

Table 13.—Collective-Bargaining Elections¹ by Affiliation of Participating Unions, Fiscal Year 1961

Union affiliation	Elections participated in			Employees involved (number eligible to vote)			Valid votes cast			
	Total	Won	Percent won	Total eligible	Employees in units selecting bargaining agent		Total	Percent of total eligible	Cast for the union	
					Number	Percent of total eligible			Number	Percent of total cast
Total.....	6,354	3,563	56 1	1450,970	229,283	60 8	1403,310	89 4	239,693	59 4
AFL-CIO.....	4,287	2,170	50 8	364,856	156,564	42 9	328,907	90 1	158,046	48 1
Unaffiliated.....	2,714	1,393	51 3	196,670	72,719	37 0	172,617	87 8	81,647	47 3

¹ The term "collective-bargaining election" is used to cover representation elections requested by a union or other candidate for employee representation or by the employer. This term is used to distinguish this type of election from a certification election, which is one requested by employees seeking to revoke the representation rights of a union which is already certified or which is recognized by the employer without a Board certification.

² Elections involving 2 unions of different affiliations are counted under each affiliation, but only once in the total. Therefore, the total is less than the sum of the figures of the 2 groupings by affiliation.

Table 13A.—Outcome of Collective-Bargaining Elections¹ by Affiliation of Participating Unions, and Number of Employees in Units, Fiscal Year 1961

Affiliation of participating union	Number of elections				Number of employees involved (number eligible to vote)				
	Total	In which representation rights were won by—		In which no representative was chosen	Total	In units in which representation rights were won by—		In units where no representative was chosen	Total valid votes cast
		AFL-CIO affiliates	Unaffiliated unions			AFL-CIO affiliates	Unaffiliated unions		
Total.....	6,354	2,170	1,393	2,791	450,930	156,564	72,719	221,647	403,310
1 union elections									
AFL-CIO.....	3,423	1,725		1,698	219,627	71,034		147,503	199,112
Unaffiliated.....	1,960		1,035	925	76,664		28,103	48,561	66,179
2-union elections									
AFL-CIO v AFL-CIO.....	205	127		78	34,049	18,769		15,280	30,106
AFL-CIO v Unaffiliated.....	587	278	245	68	97,470	61,969	28,577	6,924	86,562
Unaffiliated v Unaffiliated.....	106		92	14	9,373		8,497	876	8,191
3-union elections									
AFL-CIO v AFL-CIO v AFL-CIO.....	12	8		4	1,584	979		605	1,475
AFL-CIO v AFL-CIO v Unaffiliated.....	36	22	7	7	5,519	2,151	2,179	1,189	5,032
AFL-CIO v Unaffiliated v Unaffiliated.....	18	6	11	1	6,629	1,163	4,926	640	5,735
Unaffiliated v Unaffiliated v Unaffiliated.....	1		1	0	37		37	0	33
4-union elections									
AFL-CIO v AFL-CIO v AFL-CIO v Unaffiliated.....	3	2	1	0	450	50	400	0	287
AFL-CIO v AFL-CIO v Unaffiliated v Unaffiliated.....	3	2	0	1	528	449	0	79	498

¹For definition of this term, see table 13 footnote 1

Table 14.—Decertification Elections by Affiliation of Participating Unions, Fiscal Year 1961

Union affiliation	Elections participated in				Employees involved in elections (number eligible to vote)					Valid votes cast				
	Total	Resulting in certification		Resulting in decertification		Total eligible	Resulting in certification		Resulting in decertification		Total	Percent of total eligible	Cast for the union	
		Number	Percent of total	Number	Percent of total		Number	Percent of total eligible	Number	Percent of total eligible			Number	Percent of total cast
Total.....	241	80	33 2	161	66 8	18,364	7,757	42 2	10,607	57 8	16,604	90 4	9,034	54 4
AFL-CIO.....	162	59	36 4	103	63 6	14,898	5,247	35 2	9,651	64 8	13,527	90 8	6,871	50 8
Unaffiliated.....	79	21	26 6	58	73 4	3,466	2,510	72 4	956	27 6	3,077	88 8	2,163	70 4

Table 14A.—Voting in Decertification Elections, Fiscal Year 1961

Union affiliation	Elections in which a representative was redesignated					Elections resulting in decertification				
	Employees eligible to vote	Total valid votes cast	Percent casting valid votes	Votes cast for winning union	Votes cast for no union	Employees eligible to vote	Total valid votes cast	Percent casting valid votes	Votes cast for losing union	Votes cast for no union
Total.....	7,757	6,962	89 8	5,271	1,691	10,607	9,642	90 9	3,763	5,879
AFL-CIO.....	5,247	4,776	91 0	3,319	1,457	9,651	8,751	90 7	3,552	5,199
Unaffiliated.....	2,510	2,186	87 1	1,952	234	956	891	93 2	211	680

Table 15.—Geographic Distribution of Collective-Bargaining Elections, Fiscal Year 1961

Division and State 1	Total	Number of elections in which representation rights were won by—		Number of elections in which no representative was chosen	Number of employees eligible to vote	Total valid votes cast	Valid votes cast for—			Employees in units choosing representation
		AFL-CIO affiliates	Unaffiliated unions				AFL-CIO affiliates	Unaffiliated unions	No union	
Total.....	6,354	2,170	1,393	2,791	450,930	403,310	158,046	81,647	103,617	229,233
New England.....	354	123	65	166	28,742	26,154	10,314	4,617	11,223	13,656
Maine.....	20	6	3	11	5,806	5,068	2,211	1,471	1,386	3,750
New Hampshire.....	29	10	3	16	1,520	1,364	521	69	774	491
Vermont.....	8	3	3	2	572	525	262	31	232	530
Massachusetts.....	197	65	39	93	15,168	13,968	5,057	2,560	6,351	6,320
Rhode Island.....	31	15	5	11	973	901	458	113	330	743
Connecticut.....	69	24	12	33	4,703	4,328	1,805	373	2,150	1,822
Middle Atlantic.....	1,205	380	290	526	124,340	106,685	41,972	28,986	35,727	70,672
New York.....	540	163	143	234	77,593	65,358	26,261	19,312	19,783	47,843
New Jersey.....	265	95	64	106	16,454	15,020	5,763	4,518	4,739	10,124
Pennsylvania.....	400	122	92	186	30,293	26,309	9,948	5,156	11,205	12,705
East North Central.....	1,463	498	335	630	87,283	79,856	31,008	16,334	32,514	44,034
Ohio.....	452	152	91	209	29,581	26,835	10,702	5,671	10,462	14,953
Indiana.....	193	64	47	82	10,172	9,300	3,778	1,825	3,697	5,626
Illinois.....	363	138	79	146	27,654	25,409	9,962	4,499	10,048	12,459
Michigan.....	325	105	82	138	14,366	13,175	4,812	2,907	5,456	7,863
Wisconsin.....	130	39	36	55	5,510	5,137	1,754	1,432	1,951	3,133
West North Central.....	582	196	141	245	25,309	22,925	9,085	4,416	9,424	13,631
Iowa.....	99	36	26	37	3,718	3,407	1,238	655	1,514	1,581
Minnesota.....	111	38	24	49	5,076	4,594	1,631	636	2,127	2,542
Missouri.....	203	87	42	74	11,700	10,498	4,634	2,206	3,658	6,948
North Dakota.....	17	2	8	7	362	326	70	113	143	247
South Dakota.....	21	3	4	14	380	356	87	78	191	126
Nebraska.....	61	11	16	34	1,530	1,387	285	369	733	618
Kansas.....	70	19	21	30	2,628	2,357	940	359	1,058	1,569

South Atlantic.....	695	218	143	334	62,131	56,609	19,882	8,161	28,566	23,140
Delaware.....	22	16	2	4	942	832	475	24	333	563
Maryland.....	104	28	22	54	11,737	10,742	3,837	1,542	5,364	4,145
District of Columbia.....	57	18	14	25	4,888	4,133	1,675	375	2,083	1,251
Virginia.....	92	23	29	40	9,310	8,392	3,519	1,583	3,290	4,953
West Virginia.....	67	19	18	30	6,129	5,873	1,712	695	3,486	1,701
North Carolina.....	59	19	7	33	7,644	7,029	2,424	530	4,075	2,145
South Carolina.....	15	7	3	5	1,409	1,325	654	108	563	1,067
Georgia.....	100	31	16	53	8,186	7,624	2,616	945	3,963	2,454
Florida.....	179	57	32	90	11,886	10,759	2,970	2,359	5,430	4,861
East South Central.....	318	99	72	147	24,680	22,537	9,163	2,247	11,127	10,215
Kentucky.....	73	23	20	30	3,750	3,397	1,350	578	1,469	1,922
Tennessee.....	132	35	30	67	9,690	8,678	3,801	952	4,125	4,426
Alabama.....	80	24	18	38	6,744	6,262	2,451	455	3,356	2,142
Mississippi.....	33	17	4	12	4,496	4,200	1,761	262	2,177	1,725
West South Central.....	401	145	68	188	33,246	30,723	10,680	6,223	13,820	15,339
Arkansas.....	59	34	6	19	3,218	2,939	1,244	263	1,432	1,308
Louisiana.....	80	21	18	41	8,026	7,398	1,665	2,342	3,391	3,630
Oklahoma.....	54	17	9	28	4,135	3,783	1,241	246	2,296	1,094
Texas.....	208	73	35	100	17,867	16,603	6,530	3,372	6,701	9,307
Mountain.....	290	119	57	114	14,475	13,090	5,842	2,278	4,070	7,982
Montana.....	26	14	5	7	877	756	439	62	255	526
Idaho.....	41	19	5	17	2,328	2,050	1,089	305	656	1,529
Wyoming.....	19	8	4	7	400	373	120	102	151	201
Colorado.....	100	30	24	46	4,726	4,444	1,795	691	1,958	1,920
New Mexico.....	26	15	3	8	2,246	1,995	1,183	242	570	1,523
Arizona.....	37	15	9	14	2,097	1,911	815	237	859	1,078
Utah.....	31	12	5	14	832	734	226	84	424	373
Nevada.....	10	6	2	2	969	827	175	555	97	832
Pacific.....	807	290	150	367	37,890	33,696	14,362	6,101	13,233	20,669
Washington.....	88	42	20	26	2,562	2,348	1,130	748	470	2,157
Oregon.....	73	30	10	33	2,124	2,000	1,073	138	789	1,150
California.....	646	218	120	308	33,194	29,348	12,159	5,215	11,974	17,362
Outlying areas.....	239	102	63	74	12,764	11,035	5,738	2,284	3,013	9,945
Alaska.....	14	8	2	4	657	549	316	50	183	517
Hawaii.....	105	28	46	31	3,383	3,090	966	1,078	1,055	2,616
Puerto Rico.....	117	63	15	39	8,510	7,239	4,340	1,156	1,743	6,608
Virgin Islands.....	3	3	0	0	204	148	116	0	32	204

¹ The States are grouped according to the method used by the Bureau of the Census, U S Department of Commerce

Table 16.—Industrial Distribution of Collective-Bargaining Elections, Fiscal Year 1961

Industrial group ¹	Number of elections				Eligible voters	Valid votes cast
	Total	In which representation rights were won by—		In which no representative was chosen		
		AFL-CIO affiliates	Unaffiliated unions			
Total	6,364	2,170	1,393	2,791	450,930	403,810
Manufacturing	3,739	1,434	697	1,608	305,276	277,613
Ordnance and accessories.....	5	3	1	1	607	535
Food and kindred products.....	655	202	182	271	38,052	34,107
Tobacco manufacturers.....	2	0	0	2	1,546	1,474
Textile mill products.....	62	28	8	26	10,329	9,564
Apparel and other finished products made from fabrics and similar materials.....	64	22	7	35	5,909	5,380
Lumber and wood products (except furniture).....	177	76	27	74	11,366	10,172
Furniture and fixtures.....	136	57	15	64	9,919	8,954
Paper and allied products.....	175	77	37	61	19,497	17,916
Printing, publishing, and allied industries.....	216	89	61	66	6,926	5,448
Chemicals and allied products.....	279	100	56	123	21,663	20,041
Products of petroleum and coal.....	59	29	13	17	7,615	7,148
Rubber products.....	120	43	20	57	8,050	7,457
Leather and leather products.....	47	19	2	26	11,877	10,801
Stone, clay, and glass products.....	208	77	40	91	12,754	11,760
Primary metal industries.....	225	92	42	91	19,233	15,843
Fabricated metal products (except machinery and transportation equipment).....	395	166	52	177	24,131	22,452
Machinery (except electrical).....	324	120	34	170	30,211	28,230
Electrical machinery, equipment, and supplies.....	251	93	45	113	39,008	35,211
Transportation equipment.....	171	71	32	68	14,895	13,373
Professional, scientific, and controlling instruments.....	56	27	5	24	4,609	4,150
Miscellaneous manufacturing.....	112	43	18	51	8,179	7,497
Agriculture, forestry, and fisheries	2	2	0	0	30	25
Mining	71	14	25	32	7,361	6,666
Metal mining.....	20	6	6	8	4,802	4,286
Coal mining.....	25	0	11	14	921	859
Crude petroleum and natural gas production.....	3	1	1	1	62	56
Nonmetallic mining and quarrying.....	23	7	7	9	1,576	1,465
Construction	153	63	34	56	4,748	3,770
Wholesale trade.....	626	128	221	277	15,996	14,595
Retail trade.....	818	271	129	418	32,825	27,810
Finance, insurance, and real estate.....	21	7	5	9	1,083	997
Transportation, communication, and other public utilities	624	140	226	258	65,510	59,015
Local passenger transportation.....	85	8	10	67	19,563	15,403
Motor freight, warehousing, and transportation services.....	349	35	191	123	7,190	6,574
Water transportation.....	31	18	6	7	4,258	3,529
Other transportation.....	19	6	4	9	1,315	1,166
Communication.....	79	42	3	34	27,017	23,634
Heat, light, power, water, and sanitary services.....	61	31	12	18	6,167	5,409
Services	300	111	56	133	18,101	15,919

¹ Source Standard Industrial Classification, Division of Statistical Standards, U.S. Bureau of the Budget, Washington 1957

Table 17.—Size of Units in Collective-Bargaining and Decertification Elections, Fiscal Year 1961

Size of unit (number of employees)		A COLLECTIVE-BARGAINING ELECTIONS										Elections in which no representative was chosen	
		Number of eligible to vote		Number of elections	Percent of total	Elections in which representation rights were won by—				Elections in which no representative was chosen			
		Number of eligible to vote				AFI-CIO affiliates		Unaffiliated unions		Number	Percent		
Total	450,930	6,354	100 0	2,170	100 0	1,363	100 0	2,791	100 0	2,791	100 0	100 0	
1-9	8,714	1,535	24 3	494	23 8	497	35 7	544	19 5	544	19 5	100 0	
10-19	18,715	1,355	21 3	488	22 5	321	23 0	646	19 6	646	19 6	100 0	
20-29	17,878	1,747	11 8	253	11 7	150	10 8	344	12 3	344	12 3	100 0	
30-39	18,411	540	8 5	175	8 1	86	6 9	269	9 6	269	9 6	100 0	
40-49	16,046	363	5 7	144	6 6	54	3 9	165	5 9	165	5 9	100 0	
50-59	12,495	231	3 6	81	3 7	41	3 0	109	3 4	109	3 4	100 0	
60-69	13,336	207	3 2	50	3 7	33	2 4	94	3 0	94	3 0	100 0	
70-79	12,572	169	2 0	48	2 2	25	1 8	85	2 2	85	2 2	100 0	
80-89	10,534	125	1 5	35	1 6	16	1 2	61	1 6	61	1 6	100 0	
90-99	8,987	95	1 1	35	1 6	16	1 2	44	1 6	44	1 6	100 0	
100-149	40,305	334	5 3	117	5 4	48	3 4	169	5 3	169	5 3	100 0	
150-199	33,717	197	3 1	68	3 1	34	2 4	95	3 4	95	3 4	100 0	
200-299	46,255	166	3 6	57	2 6	29	1 4	119	4 3	119	4 3	100 0	
300-399	39,563	94	1 8	25	1 1	17	1 2	52	1 9	52	1 9	100 0	
400-499	21,782	49	1 1	11	1 1	7	1 1	31	1 1	31	1 1	100 0	
500-599	15,482	29	0 4	7	0 4	2	0 5	20	0 7	20	0 7	100 0	
600-699	21,527	42	0 5	12	0 6	2	0 3	17	0 6	17	0 6	100 0	
700-799	18,617	19	0 3	7	0 3	4	0 3	10	0 4	10	0 4	100 0	
800-899	24,403	25	0 3	7	0 3	7	0 3	11	0 4	11	0 4	100 0	
900-999	20,111	8	0 1	2	0 0	2	0 0	4	0 1	4	0 1	100 0	
1,000-1,999	6,450	2	0 0	0	0 0	0	0 0	0	0 0	0	0 0	100 0	
2,000-2,999	6,450	0	0 0	0	0 0	0	0 0	0	0 0	0	0 0	100 0	
3,000-3,999	6,450	0	0 0	0	0 0	0	0 0	0	0 0	0	0 0	100 0	
4,000-4,999	6,450	0	0 0	0	0 0	0	0 0	0	0 0	0	0 0	100 0	
5,000-9,999	6,000	0	0 0	0	0 0	0	0 0	0	0 0	0	0 0	100 0	
10,000 and over	18,000	1	0 0	1	0 0	0	0 0	0	0 0	0	0 0	100 0	

Size of unit (number of employees)		B DECERTIFICATION ELECTIONS									
		Total	Elections in which representation rights were won by—		Elections in which no representative was chosen						
			Number	Percent	Number	Percent	Number	Percent			
Total	18,364	241	100 0	59	100 0	21	100 0	161	100 0	100 0	
1-9	331	62	21 6	10 2	10 2	2	9 5	44	27 3	27 3	
10-19	670	48	19 9	4 4	6 8	2	9 5	42	26 1	26 1	
20-29	742	31	12 9	5 5	8 5	4	19 0	22	13 7	13 7	
30-39	692	18	7 5	6 6	10 2	3	23 8	7	4 4	4 4	
40-49	748	17	6 6	5 0	7 0	3	14 3	11	6 8	6 8	
50-59	853	16	6 6	11 9	13 9	1	4	8	6 0	6 0	
60-69	443	7	2 9	3 4	7 7	0	0	5	3 1	3 1	
70-79	590	8	3 3	5 0	8 4	0	0	5	3 1	3 1	
80-89	833	10	4 2	1 6	1 9	0	0	5	3 1	3 1	
90-99	100	2	0 2	1 6	1 6	0	0	1	4	4	
100-149	1,082	6	3 7	6 2	5 7	1	4 8	5	2 5	2 5	
150-199	1,803	10	4 2	10 2	5 7	2	9 5	2	1 2	1 2	
200-299	2,158	9	3 8	8 5	3 9	0	0	4	2 5	2 5	
300-399	2,657	2	0 8	3 4	1 3	0	0	0	0 0	0 0	
400 and over	6,630	2	0 8	0 0	0 0	1	4 8	1	6	6	

1 Less than one tenth of 1 percent

Table 18.—Injunction Litigation Under Sec. 10(j) and (l), Fiscal Year 1961

Proceedings	Number of cases instituted	Number of applications granted	Number of applications denied	Cases settled, withdrawn, dismissed, inactive, pending, etc
Under sec 10(j)				
(a) Against unions.....	1	1	0	
(b) Against employers.....	0	0	0	
Under sec 10(l).....	255	70	13	71 settled * 3 withdrawn 2 dismissed 91 alleged illegal activity suspended 14 pending
Total.....	256	71	13	181

* Six injunctions were granted in fiscal 1961 on petitions instituted in the prior fiscal year

* Two injunctions were denied in fiscal 1961 on petitions filed in the prior fiscal year

* One petition pending at the end of the prior fiscal year was settled in fiscal 1961

Table 19.—Litigation for Enforcement or Review of Board Orders, July 1, 1960–June 30, 1961, and July 5, 1935–June 30, 1961

	July 1, 1960– June 30, 1961		July 5, 1935– June 30, 1961	
	Number	Percent	Number	Percent
Cases decided by U S courts of appeals.....	148	100 0	2,129	100 0
Board orders enforced in full.....	65	43 9	1,228	57 7
Board orders enforced with modification.....	35	23 7	436	20 5
Remanded to Board.....	13	8 8	73	3 4
Board orders partially enforced and partially remanded.....	4	2 7	19	9
Board orders set aside.....	31	20 9	373	17 5
Cases decided by U S Supreme Court.....	10	100 0	134	100 0
Board orders enforced in full.....	2	20 0	82	61 2
Board orders enforced with modification.....	1	10 0	13	9 7
Board orders set aside.....	4	40 0	24	17 9
Remanded to Board.....	1	10 0	3	2 2
Remanded to court of appeals.....	2	20 0	9	6 7
Board's request for remand or modification of enforcement order denied.....	0	0	1	8
Contempt case remanded to court of appeals.....	0	0	1	8
Contempt case enforced.....	0	0	1	7

Table 20.—Record of 10(l) and 10(j) Injunctions Litigated During Fiscal Year 1961

Case No	Name of complainant	Name of union	Disposition of injunctions		
			Granted	Denied	Pending
	8(b)(4)(A)				
2-CC-629	Elegante Bridals, Inc & Gift, Inc	Ladies Garment Workers, Local 148			X
8-CC-113	Jesse Holland	Teamsters, Local 348*	X		
9-CC-276	John Reich Painting & Decorating	Painters, Local 249		X	
	8(b)(4)(B)				
4-CC-167	Allentown Supply Corp	Plumbers, Local 670	X		
16-CC-98	Anderson Company	I B E W, Local 59	X		
12-CC-60	Babcock Company	Plumbers, Local 519	X		
4-CC-144	Board of Harbor Commissioners et al	Longshoremen's & Its Local 1694	X		
2-CC-581	Carleton Bros, Peter A Neuffer	Operating Engineers	X		
9-CC-273	Carolina Lumber Co	Teamsters, Local 805*		X	
10-CC-465	Carter Electric Co	I B E W, Local 513		X	X
15-CC-129	Cleveland Construction Corp & Elco Electric, Inc	I B E W, Local 861 & Lafayette Building & Construction Trades Council		X	
13-CC-253	Consumers Aid, Inc et al	I B E W, Local 134			X
2-CC-573	Digaugl Electrical Services	I B E W, Local 3 et al	X		
28-CC-78	Drake & Harris Trucking Co	Teamsters, Local 83*	X		
15-CC-134	Eloc Electric, Inc	I B E W, Local 861	X		
24-CC-67	EI Imparcial, Inc	Teamsters, Local 901*	X		
18-CC-82-84-85	General Development Co et al	Painters, Local 1324	X		
23-CC-97	General Steel Erection Co	Ironworkers, Local 84			X
20-CC-234	Great Western Broadcasting Corp	Television & Radio Artists, Amer Fed of	X		
2-CC-626	H K Electric Co	I B E W, Local 3			X
2-CC-616	Handcraft Knitwear Co, Inc	Ladies Garment Workers, Local 156	X		
21-CC-423	Walter Holm & Company	Teamsters, Local 630*			X
23-CC-82	Houston Armored Car Co, Inc	Plant Guard Workers U of America*	X		
6-CC-241	Industrial Electric Service et al	I B E W, Local 712 et al	X		
21-CC-353	Keith Riggs Plumbing & Heating	Plumbers, Local 741 & Painters, Local 596	X		
6-CC-238	S M Kisser & Sons	Sheetmetal Workers, Local 299	X		
17-CC-127	Layne Western Co	Operating Engineers, Local 871	X		
12-CC-123	Martin Company	I B E W, Local 756	X		
10-CC-452	Middle South Broadcasting Co	I B E W, Local 662	X		
23-CC-91	E Frank Munnany	Painters, Local 1778			X
12-CC-115-117-118	Otis Steel Erection, Inc	Ironworkers, Local 272 et al	X		
12-CC-162	W E Owen	Painters, Local 385	X		
2-CC-614	Publishers Assn of New York City	New York Mailers' Union No 6 ITU	X		
4-CC-163	Leonard Shaffer Co, Inc et al	Hotel & Restaurant Employees, Local 509	X		
23-CC-72-73	Shop-Rite Stores, Inc, Pig Wiggly	Plumbers, Local 142	X		
17-CC-122	Stiebler Heating & Airconditioning Inc	Sheetmetal Workers, Local 3			X
16-CC-101	Stephen Company	Teamsters, Local 886*	X		
4-CC-151	Sterling Wire Products Co	Teamsters Local 107*	X		
10-CC-463	Joseph R Walker Company	Painters, Local 33	X		
12-CC-112	Tampa Sand & Material Co	I B E W, Local 2017 et al	X		
3-CC-130	Watson Warehouse, Inc	Plant Guard Workers U of A, Local 516*	X		

See footnote at end of table

Table 20.—Record of 10(l) and 10(j) Injunctions Litigated During Fiscal Year 1961—Continued

Case No	Name of complainant	Name of union	Disposition of injunctions			
			Granted	Denied	Pending	
	<i>8(b)(4)(D)</i>					
2-CD-185	Arbogast & Bastian, Inc	Teamsters Local 707*	X			
6-CD-122	Frank P Badolato & Son	Operating Engineers, Local 66	X			
27-CD-25	Brown-Schrepperman & Co.	Carpenters, Local 55	X			
7-CD-38	Dowd Chair Rental & Sales, Inc	Teamsters, Local 243*		X		
5-CD-66	E I Dupont De Nemours & Co, Inc	Sheetmetal Workers, Local 59		X		
14-CD-112	Globe Democrat Publishing Co	Stago Employees, Local 774	X			
14-CD-103	Illinois Power Company	Plumbers, Local 553	X			
2-CD-196	New York Times Co.	New York Mailers, Local 6 ITU	X			
4-CD-51	Northern Metal Company	Longshoremen, Local 1291	X			
7-CD-48	Port Huron Sulphite & Paper Co	Carpenters, et al	X			
2-CD-216	Precrete, Inc.	Lathers, Local 46	X			
2-CD-189	Prefabricated Concrete, Inc.	Lathers, Local 46	X			
22-CD-54	Schwerman Co of Pa, Inc	Operating Engineers, Local 825			X	
21-CD-100	Todd Shipyards, Corp.	Marine Engineers' Beneficial Assn et al	X			
	<i>8(b)(4)(A)(B)</i>					
15-CC-124	Baltimore Contractors, Inc.	Operating Engineers, Local 406	X			
15-CC-121	Ford, Bacon & Davis Construction Co	Building & Trades Council of Monroe	X			
27-CC-65	Edna Coal Co et al	Mine Workers, Dist 50*	X			
21-CC-414	Interstate Employers Inc.	Hod Carriers, Local 1184 et al	X			
2-CC-623	Johns Bargain Stores Corp.	Building Service Employees, Local 400	X			
18-CC-93	Weis Builders, Inc	Carpenters, Local 1392 et al			X	
	<i>8(b)(4)(A)(D)</i>					
15-CC-133	Binnings Construction Co, Inc	Plumbers, Local 60		X		
	<i>8(b)(3)(B)(D)</i>					
12-CC-119, 12-CD-21	Erectors of Florida, Inc.	Ironworkers, Local 272	X			
17-CC-125, 17-CD-39	Ets-Hokin & Galvan, Inc.	Operating Engineers, Local 101	X			
4-CC-164, 4-CD-62	Lance Roofing Co.	Roofers, Local 30		X		
22-CC-90, 22-CD-38	Mechanical Contractors Ass'n of N J	Operating Engineers, Local 825	X			
22-CC-126, 22-CD-51	Nichols Electric Co.	Operating Engineers, Local 825	X			
19-CC-148, 19-CD-53	J Duane Vance	Longshoremen & Warehousemen's Local 19*	X			
5-CC-124, 5-CD-42	Arthur Vennerl Co.	Plumbers, Local 5	X			
	<i>8(b)(4)(A)(B)(D)</i>					
21-CC-386, 21-CD-84	Hillsbro Newspaper Printing Co et al	Typographical Union, Local 9	X			
	<i>8(b)(7)(A)</i>					
20-CP-32	Associated General Contractors	Tunnel & Rock Workers N Calif Chapter et al*	X			

See footnote at end of table

Table 20.—Record of 10(i) and 10(j) Injunctions Litigated During Fiscal Year 1961—Continued

Case No	Name of complainant	Name of union	Disposition of injunctions		
			Granted	Denied	Pending
<i>§(b)(7)(B)</i>					
13-CP-15	Bachman Furniture Co.....	Teamsters, Local 200*.....	X		
1-CP-22	Blinstrubs Village & Grill Inc	Hotel & Restaurant Employees et al	X		
5-CP-10	Irvin, Inc	Retail Clerks, Local 692.....	X		
21-CP-36	Islander Restaurant.....	Hotel & Restaurant Employees	X		
23-CP-4	Joiners, Inc.....	Painters, Local 130			X
14-CP-14	National Food Stores.....	Retail Clerks, Local 219.....	X		
19-CP-10	Sears Roebuck & Co.....	Retail Clerks, Local 1207.....		X	
3-CP-16	Woodward Motors, Inc.....	Teamsters, Local 182*.....	X		
19-CP-11	Hested Stores Co.....	Retail Clerks, Local Union #57		X	
<i>§(b)(7)(C)</i>					
4-CP-20	Atlantic Maintenance Co....	Phila Window Cleaners & Maintenance Workers Union, Local 125 *		X	
21-CP-44	Barker Bros Corp & Golds, Inc	Retail Clerks, Locals 770 & 324		X	
2-CP-82	Bernard Crystal dba Albert Mfg Co	Ladies Garment Workers		X	
4-CP-29	Best Markets, Inc.....	Retail Clerks, Local 1357.....	X		
14-CP-10	Charlie's Car Wash & Service	Teamsters, Local 618*.....	X		
2-CP-89	Charles & Roberts of Rego Park	Barbers & Haudressors, Local 1045			X
23-CP-2	Claude Everett Construction Co	Building & Construction Trades Council			X
2-CP-48	Faneli Ford Sales, Inc	Automobile Workers, Local 295	X		
2-CP-61	Goldleaf Sales Corp.....	Teamsters, Local 456*.....	X		
21-CP-7	Koith Riggs Plumbing & Heating Contractors	Plumbers, Local 741.....	X		
<i>§(b)(4)(A) & (7)(C)</i>					
17-CC-123	Sherwood Construction Co, Inc	Operating Engineers, Local 101	X		
<i>§(b)(4)(A)(B) & (7)(C)</i>					
28-CC-80	Colson & Stevens Construction Co	Hod Carriers, Local 383 et al.	X		
<i>§(b)(4)(A)(B) & §(e)</i>					
9-CC-288, 9-CE-6	Cardinal Industries, Inc	Carpenters, Ohio Valley Dist Council	X		
14-CC-172, 14-CE-7	Drive Thru Dairy, Inc.....	Teamsters, Local 603*.....	X		
20-CC-247, 20-CE-5	Sunrise Transportation Co..	Teamsters, Local 484*.....		X	
<i>§(e)</i>					
14-CE-1	Greater St Louis Automotive Trimmers Assn	Teamsters, Local 618* & Machinists Dist #9	X		
<i>§(b)(4)(B) & §(e)</i>					
13-CC-254, 13-CE-6	Milwaukee Cheese Co.....	Teamsters, Local 200*.....			X
<i>10(j)</i>					
<i>§(b)(8)</i>					
2-OB-3117	Andrew Catapano Co, Inc et al	Hod Carriers, Local 147.....	X		

*All unions are affiliated with AFL-CIO except those indicated by an asterisk

